IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Trimm*, 2023 NLCA 13
Date: May 2, 2023
Docket Number: 202201H0050

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BETWEEN:

STEPHEN TRIMM — APPLICANT/APPELLANT

AND:

HIS MAJESTY THE KING — RESPONDENT

Coram: L. R. Hoegg, F. J. Knickle and K. J. O'Brien JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador, St. John's 0121A00283, 0121A01000 and 0122PA00471

Appeal Heard: March 6, 2023
Judgment Rendered: May 2, 2023

Reasons for Judgment by: K. J. O'Brien J.A.
Concurred in by: L. R. Hoegg and F. J. Knickle JJ.A.

Counsel for the Applicant/Appellant: Iain R. W. Hollett
Counsel for the Respondent: Kathleen M. O'Reilly

Authorities Cited:

CASES CITED: *R. v. Bertrand Marchand*, 2021 QCCA 1285, leave to appeal to SCC granted, 39935 (26 May 2022); *R. v. H.V.*, 2022 QCCA 16, leave to appeal to SCC granted, 40039 (18 August 2022); *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157; *R. v. Gruenke*, [1991] 3 S.C.R. 263; *R. v. Karasek*, 2011 ABCA 161; *Regina v. R.S.* (1985), 19 C.C.C. 3d 115 (ONCA), leave to appeal to SCC refused, 19293 (26 June 1985); *R. v. K.P.*, 2019 NLCA 37, 4 C.A.N.L.R. 493; *R. v. Allale*, 2019 ABCA 154; *R. v. W.(D.)*, [1991] 1 S.C.R. 742; *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639; *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621; *R. v. G.F.*, 2021 SCC 20; *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3; *Kienapple v. R.*, [1975] 1 S.C.R. 729; *R. v. B. (G.)*, [1990] 2 S.C.R. 30; *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551; *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3; *R. v. Alicandro*, 2009 ONCA 133, leave to appeal to SCC refused, 33343 (22 July 2010); *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424; *R. v. Provo*, [1989] 2 S.C.R. 3.

STATUTES CONSIDERED: *Criminal Code*, sections 163.1, 172.1(1)(b), 172.1(1)(a), 271, 151, 172.1(2)(a), 601, 160(3), 272, 273, 280, 152, 173(2); *Canadian Charter of Rights and Freedoms*, section 12; *Children, Youth and Families Act*, SNL 2018, c. C-12.3, section 11.

TEXTS CONSIDERED: *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961).

K. J. O'Brien J.A.:

OVERVIEW

[1] Stephen Trimm was convicted of distribution of child pornography (*Criminal Code*, at s. 163.1(3)) and child luring (*Code*, at s. 172.1(1)(b)) following trial (*R. v. Trimm* (23 February 2022), St. John's 0121A01000 (NLPC)). A second charge of child luring (*Code*, at s. 172.1(1)(a)) was judicially stayed. The complainant for all offences, E, was 15 years old.

[2] The trial judge sentenced Mr. Trimm to 12 months of incarceration for distribution of child pornography and 22 months of incarceration, consecutive, for child luring. She also imposed various ancillary orders (*R. v. Trimm* (18 July 2022), St. John's 0121A01000; 0122PA00471 (NLPC)).

[3] The trial judge did not rule on Mr. Trimm's constitutional challenge to the mandatory minimum sentences for both offences pursuant to section 12 of the *Canadian Charter of Rights and Freedoms* because she found that the appropriate sentence for each offence was not below the mandatory minimum prescribed by the *Code*.

[4] Mr. Trimm appeals his conviction and sentence.

[5] This decision is about his conviction appeal only. At Mr. Trimm's request, the Court has postponed the hearing of his sentence appeal pending its assessment of the relevance of two cases currently under reserve at the Supreme Court of Canada (*R. v. Bertrand Marchand*, 2021 QCCA 1285, leave to appeal to SCC granted, 39935 (26 May 2022); and *R. v. H.V.*, 2022 QCCA 16, leave to appeal to SCC granted, 40093 (18 August 2022)). Mr. Trimm will appear before the Court on his sentencing appeal on May 10, 2023.

Evidence of Distribution of Child Pornography

[6] The trial judge found that Mr. Trimm received a picture of E's genitals from E and then sent the picture to a third party. To support her finding, the trial judge relied on statements that Mr. Trimm made to his counsellor describing what he had done. The trial judge ruled Mr. Trimm's statements admissible following a *voir dire* (*R. v. Trimm* (22 November 2021), St. John's 0121A00283; 0121A01000 (NLPC)). In the *voir dire* decision, the trial judge found that the counsellor's conversation with Mr. Trimm was not privileged.

Evidence of Child Luring

[7] Mr. Trimm conceded that he was aware of E's age and that they communicated together using electronic means. At issue was whether Mr. Trimm communicated with E for the purpose of facilitating one or more of the secondary offences designated by sections 172.1(1)(a) or (b) of the *Code*, an essential element of child luring.

[8] The trial judge relied on E's evidence, text messages between E and Mr. Trimm, evidence from E's aunt, and text messages between Mr. Trimm and E's aunt to conclude that Mr. Trimm communicated with E with the specific intent

of facilitating an offence with a sexual purpose. She also found that Mr. Trimm wanted an intimate relationship with E.

Issues on Conviction Appeal

[9] Mr. Trimm raises three grounds of appeal in relation to his conviction:

a. The trial judge erred in law by admitting the conversation between him and his counsellor;

b. The trial judge erred in law by failing to consider his statement to police, which was tendered by the Crown; and

c. The trial judge erred in law in her interpretation of the elements of the offence of child luring.

Decision on Conviction Appeal

[10] For the reasons that follow, I would conclude:

a. The trial judge did not err in admitting Mr. Trimm's statement to his counsellor. Because the counsellor told Mr. Trimm in advance that she would break confidentiality if there was a risk of harm to a child, the trial judge did not err in finding that Mr. Trimm's statement did not originate in confidence.

b. The trial judge's reasons demonstrate that she considered Mr. Trimm's exculpatory statement and that it did not leave her with reasonable doubt. Her reasons are sufficient to allow this Court to meaningfully review her decision and they explain why she found Mr. Trimm guilty of distributing child pornography.

c. The trial judge did not err in her interpretation or application of the elements of the offence of child luring. Although she did not specifically identify any of the secondary offences listed in s. 172.1(1)(b) of the *Code*, she described conduct consistent with the secondary offences of sexual assault (s. 271) and sexual interference (s. 151) sufficiently to ensure her reasons explain why she convicted Mr. Trimm.

[11] As a result, I would dismiss Mr. Trimm's appeal against conviction.

ISSUE 1: MR. TRIMM'S STATEMENTS TO HIS COUNSELLOR

[12] Mr. Trimm submits that his statements to his counsellor should not have been admitted as evidence because they were privileged. Mr. Trimm acknowledges that there is no recognized class privilege between a counsellor and a client, but submits that case-by-case (or non-class) privilege applies. Although Mr. Trimm concedes that the trial judge identified the correct legal test for case-by-case privilege, he submits that she erred in applying it.

The Counsellor's Evidence

[13] The counsellor was the only witness at the *voir dire*. Mr. Trimm was her client while she was a doctoral student in psychology doing her residency at Eastern Health. A registered psychologist and a registered sexologist supervised her during her residency.

[14] The counsellor testified:

a. At her first meeting with Mr. Trimm she outlined the situations when she was obliged to break confidentiality, including when there was harm, or risk of harm, to any child under the age of 18. She also told him that harm could be physical, emotional or sexual (Trial Transcript Volume 1, at 18, lines 13–22, at 19, lines 1-17).

b. At their fifth session, Mr. Trimm told her that a 15-year-old youth named E had sent a picture of his genitals to Mr. Trimm. Mr. Trimm told her that he had sent the picture to a friend, whom he named (Trial Transcript Volume 1, at 15, lines 9–22, at 16, lines 1-21).

c. As result of this disclosure, she consulted with her supervisor about her duty to report and then she reported the information to the Department of Children, Seniors and Social Development (CSSD) and the police (Trial Transcript Volume 1, at 16, line 22, at 17, lines 1-3).

d. At her next session with Mr. Trimm, she told him that she had disclosed the information to the police. During this session, Mr. Trimm told her that he sent the picture to his friend using Snapchat, that he (Mr. Trimm) had deleted the picture, and that he did not receive any notification that his friend had saved the picture

(suggesting the friend had not saved it) (Trial Transcript Volume 1, at 20, lines 1–8).

e. On cross-examination, the counsellor was asked if it was true that at the session in which he talked about Snapchat, Mr. Trimm also said that it was a picture of his own genitals that he had sent via Snapchat. In response, she recalled "different information being reported to [her] at a later date", but said her report to police was based on the information that she was provided before making the report (Trial Transcript Volume 1, at 27, lines 20-22, at 28, lines 1–3).

The Trial Judge's Ruling on Mr. Trimm's Statement

[15] The trial judge referenced and quoted from *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, for the four requirements for case-by-case privilege (*voir dire* decision, at para. 14):

> First, the communication must originate in a confidence. Second, the confidence must be essential to the relationship in which the communication arises. Third, the relationship must be one which should be "sedulously fostered" in the public good. Finally, if all these requirements are met, the court must consider whether the interests served by protecting the communications from disclosure outweigh the interest in getting at the truth and disposing correctly of the litigation.

[16] The trial judge found that the first requirement was not met because the statement did not originate in confidence (*voir dire* decision):

> [15] … Counseling relationships, of course, are to be fostered in order to ensure that persons are able to disclose and receive assistance. Confidentiality is an expectation in most such counseling relationships. However, [the counsellor] noted limits on the confidentiality at the start of her professional relationship with Mr. Trimm.
>
> [16] Those limits were explained by [the counsellor] and she was clear that it included potential harm to a person under the age of 18 years old. It was her evidence that Mr. Trimm appeared to understand the caution. Defence counsel suggested in her cross examination that individuals could have a different understanding of "harm" than [the counsellor]. However, there was no evidence presented to indicate that Mr. Trimm's understanding of the term differed in any way.
>
> [17] In addition, [the counsellor] had a legal obligation to disclose the comments made by Mr. Trimm pursuant to provincial legislation as the information related to a child. The *Children, Youth and Families Act* provides in section 11 that a person who has

> information that a child is or may be in need of protective intervention must immediately disclose that information to a manager, social worker or peace officer.
>
> [18] Consequently, while the comments arose in the context of a confidential relationship, it should have been clear to Mr. Trimm that any disclosures which fell into the exceptional categories described by [the counsellor] could not be held in confidence. This particular communication that Crown counsel seeks to introduce did not, therefore, originate in the confidence that it would not be disclosed.

[17] Having found that defence counsel failed to establish the requirements for case-by-case privilege, and there being no other bar to admissibility, the trial judge ruled the statements admissible (*voir dire* decision, at para. 20).

Analysis of the Trial Judge's Ruling on the Statements

[18] Mr. Trimm submits that the trial judge wrongly focused on the *possibility* that his statements to the counsellor might be disclosed to decide that the statements did not arise in confidence. He argues that no communication would be privileged on this assessment because no privilege is absolute and so there is always a possibility of subsequent disclosure. He submits that the trial judge's considerations would be relevant to the final balancing step of the test articulated in *M. (A.)*, but that they were not conclusive of the first requirement of that test.

[19] Privilege is an exception to the fundamental proposition that everyone owes a general duty to give evidence relevant to matters before the court, so that the court may find the truth. For the exception to apply, the privilege must be necessary for a public good that is more important than the usual principle of using all rational means to find the truth (*M. (A.)*, at para. 19). Traditionally, only certain categories of privilege were recognized, but it is now accepted that the common law permits privilege in new situations on a case-by-case basis (*M. (A.)*, at paras. 20-23).

[20] The requirements for case-by-case privilege, cited by the trial judge from *M. (A.)*, derive from *Wigmore on Evidence*, vol. 8 (McNaugthon rev. 1961), and are often referred to as the Wigmore criteria. The onus is on the person asserting privilege to establish each of the Wigmore criteria on a balance of probabilities (*R. v. Gruenke*, [1991] 3 S.C.R. 263, at 293; and *R. v. Karasek*, 2011 ABCA 161, at para. 16).

[21] The trial judge found that Mr. Trimm did not establish the first Wigmore criteria – that the communications at issue originated in a confidence that they would not be disclosed. I see no error in her finding and will explain why.

[22] I disagree with Mr. Trimm's suggestion that the trial judge based her finding largely on the possibility that his statements to the counsellor might be disclosed in the future. As is evident from the passages of the *voir dire* decision quoted above, the trial judge focused primarily on the fact that the counsellor told Mr. Trimm in advance that information that revealed potential harm to a person under the age of 18 would not be confidential.

[23] There was no evidence before the trial judge that Mr. Trimm did not hear or understand the counsellor's warning. Mr. Trimm's statements to the counsellor about receiving and transmitting a photograph of a 15-year-old's genitals fell within the exception to confidentiality that she told him about. In such circumstances, it was open to the trial judge to find that the first Wigmore criteria was not met.

[24] Although the trial judge also referenced the counsellor's legal obligation to disclose Mr. Trimm's comments pursuant to section 11 of the *Children, Youth and Families Act,* SNL 2018, c. C-12.3 [*CYF Act*], I would consider the counsellor's reason for making and communicating the confidentiality exception to be of minor relevance to the analysis. For example, whether the counsellor had a statutory obligation; a professional duty; or simply held a personal moral conviction to disclose is not determinative. The important part is that she told Mr. Trimm in advance that such a communication would not be confidential. She did not reference the *CYF Act*, or any other source of her obligation, when she warned him.

[25] As a result, I do not need to assess whether section 11 of the *CYF Act* obliged the counsellor to make a report in this case. A judicial interpretation of section 11 would not affect what the counsellor told Mr. Trimm about confidentiality.

[26] Nor do I need to decide whether the existence of a statutory obligation to disclose alone (without any discussion about potential disclosure with the accused) would be sufficient to defeat the first Wigmore criteria. That determination is best left for another case. In this case, the counsellor told Mr. Trimm about the confidentiality exception to their sessions in advance and that is why he could not establish that his statements originated in confidence. In this regard, Mr. Trimm's situation is similar to other cases in which the first

Wigmore criteria was not met (see e.g. *Gruenke*, at 283, 291-293; and *Karasek*, at paras. 17-18) and different from cases where it was met (see e.g. *M. (A.)*, at para. 24; and *Regina v. R. S.* (1985) 19 C.C.C. (3d) 115 (ONCA), leave to appeal to SCC refused, 19293 (26 June 1985), at 130-131).

ISSUE 2: MR. TRIMM'S STATEMENT TO POLICE

[27] Mr. Trimm gave a statement to police in which he said that the counsellor had misunderstood him. He said he had clarified with her that he had sent his friend a picture of his own genitals. Mr. Trimm did not testify at trial but his statement to police was admitted as evidence. Mr. Trimm alleges that the trial judge failed to consider the statement in her analysis.

Mr. Trimm's Statements about the Picture

[28] Mr. Trimm's statements to police about the picture were as follows:

> Constable Catherine Dawe:
> Okay. And you, you had said ah, or rather, yah—so we spoke on the phone and, and you're aware that ahm, [the counsellor] told me that you had said you sent this Snap Chat ahm, to your friend [J], who is [J]?
>
> Stephen Trimm:
> Ah, an old friend of mine. Ahm, I had clarified that with her because I actually when I had spoken with her because I sent [J] a picture of my own genitals and that was what happened there. So, there was a misunderstanding between her and I.
>
> Constable Catherine Dawe:
> Okay. So, you're saying that you sent [J] your own genitals rather than [E's] genitals?
>
> Stephen Trimm:
> Correct. Mm, hm.
>
> Constable Catherine Dawe:
> And can you explain how that was confused in your conversation with her?
>
> Stephen Trimm:
> I think we were just talking really fast and I said how—it's difficult for me explain it—I said, [J] asked and I sent him one of mine—and that was how I worded it and that was what I meant? I sent him one of my own pictures of myself.

Trial Judge's Consideration of Mr. Trimm's Statements about the Picture

[29] The trial judge referenced Mr. Trimm's statements in her review of the evidence as follows (conviction decision, at para. 44):

> On January 4, 2021, Mr. Trimm came to meet Cst. Dawe at her request and at that time, he was arrested and given his rights and caution. Mr. Trimm exercised his right to counsel and chose not to give a statement. However, he did provide answers to some follow up questions asked by the police and this was recorded and entered into evidence.

[30] The trial judge did not reference his statement to police further. However, she referenced Mr. Trimm's explanation to the counsellor in her consideration of the counsellor's evidence (conviction decision, at para. 62):

> [the counsellor]'s evidence regarding the statement made by Mr. Trimm was consistent and clear. When asked directly if Mr. Trimm could have said that he had sent a picture of his own genitals to a third party, she was adamant in her response that she was certain about what she had heard. It was her evidence that Mr. Trimm advised he had received a picture from a 15 year old of that person's genitals and sent it to a friend. E was 15 years old at that time. As a result of that statement by Mr. Trimm, she made her report to the authorities.

Analysis of the Trial Judge's Consideration of the Evidence Relating to Distribution of Child Pornography

[31] The trial judge had to decide, on the whole of the evidence, if she was left with a reasonable doubt as to whether Mr. Trimm sent a picture of E's genitals to his friend. The whole of the evidence included Mr. Trimm's out-of-court, exculpatory police statement (see *R. v. K.P.*, 2019 NLCA 37, 4 C.A.N.L.R. 493, at paras. 16, 54-72; and *R. v. Allale*, 2019 ABCA 154, at para. 32).

[32] This means that the trial judge had to consider whether Mr. Trimm's exculpatory police statement raised a reasonable doubt as to his guilt. She did not have to believe what Mr. Trimm said in order for it to do so. Even if his statement did not raise any reasonable doubt, she still had to consider all of the evidence, and any absence of evidence, to decide if she was convinced beyond a reasonable doubt that he was guilty of distributing child pornography. This is the law as set out by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and subsequent cases such as *R. v. J.H.S.*, 2008 SCC 30, [2008] 2 S.C.R. 152, *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, and *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639.

[33] The trial judge also had to give reasons for her decision that justify and explain the result to the parties and to the public. Her reasons have to be sufficient to allow meaningful appellate review and show that she dealt with the substance of the critical issues of the case. In reviewing her reasons, I must take a functional, substantive approach and consider them as a whole, in the context

of the evidence, the arguments at trial, and with an appreciation of the purpose for which they were delivered. The trial judge is not required to discuss all of the evidence or recite all of the law. Her reasons need not be perfect but they must be intelligible and show a logical connection between the verdict and the basis for the verdict. This is the law as set out by the Supreme Court of Canada in *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, and subsequent cases such as *Dinardo, Vuradin*, *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, and *R. v. G.F.*, 2021 SCC 20.

[34] I am satisfied that the trial judge's reasons demonstrate that she considered Mr. Trimm's exculpatory statement and that it did not leave her with reasonable doubt. I am satisfied that her reasons are sufficient to allow this Court to meaningfully review them and that they show and explain why she found Mr. Trimm guilty of distributing child pornography. I will explain why.

[35] First, the reasons show that the trial judge was aware of her duty to consider all of the evidence, including any absences in the evidence, in deciding whether the Crown had proved its case beyond a reasonable doubt. She was also aware that the evidence in relation to distribution of child pornography was largely circumstantial and that no picture had been admitted to evidence (conviction decision, at para. 50). She reviewed the law related to these issues at some length (conviction decision, at paras. 51-56).

[36] Second, the trial judge was alive to Mr. Trimm's statement to police because she referenced it in her decision (conviction decision, at para. 44).

[37] Third, she identified and considered the central issue raised by Mr. Trimm's statement. The counsellor said that Mr. Trimm told her that he had sent a picture of E's genitals to a friend. Mr. Trimm asserted that the counsellor was mistaken and had misheard or misunderstood what he said. He asserted that he had sent a picture of his own genitals to the friend and that he had clarified this with the counsellor. The counsellor had been cross-examined about this and the trial judge referred to that cross-examination in her reasons (conviction decision, at para. 62).

[38] Although the trial judge did not specifically address Mr. Trimm's statement to the police at this point, there was no relevant information in the police statement additional to what came out on cross-examination of the counsellor. The reasons thus show that the trial judge considered the substance of Mr. Trimm's exculpatory statement.

[39] Fourth, the reasons show that the trial judge believed the counsellor's evidence about what Mr. Trimm had told her and rejected Mr. Trimm's evidence that he had sent a picture of his own genitals. She described the counsellor's evidence as "consistent and clear" and the counsellor as "adamant" and "certain" about what she had heard (conviction decision, at para. 62). *R.E.M.* is instructive on this point:

> [66] Finally, the trial judge's failure to explain why he rejected the accused's plausible denial of the charges provides no ground for finding the reasons deficient. The trial judge's reasons made it clear that in general, where the complainant's evidence and the accused's evidence conflicted, he accepted the evidence of the complainant. This explains why he rejected the accused's denial. He gave reasons for accepting the complainant's evidence, finding her generally truthful and "a very credible witness", and concluding that her testimony on specific events was "not seriously challenged" (para. 68). It followed of necessity that he rejected the accused's evidence where it conflicted with evidence of the complainant that he accepted. No further explanation for rejecting the accused's evidence was required. In this context, the convictions themselves raise a reasonable inference that the accused's denial of the charges failed to raise a reasonable doubt.

[40] Finally, the trial judge considered the counsellor's evidence with other evidence related to the picture. She considered E's credibility and his evidence that he had sent pictures of his genitals to Mr. Trimm (conviction decision, at paras. 58-61). She also considered the lack of any picture and concluded that it was not necessary for her to see the picture alleged to have been sent, for her to be satisfied that the picture was sent (conviction decision, at para. 63). Ultimately, she was satisfied on all of the evidence that there was no other reasonable inference to be drawn but that Mr. Trimm sent a picture of E's genitals to his friend (conviction decision, at paras. 63-64).

ISSUE 3: THE ELEMENTS OF CHILD LURING

[41] Child luring has three elements: (1) an intentional communication by means of telecommunications; (2) with a person who is, or who the accused believes is, under the requisite age; and (3) for the purpose of facilitating the commission of a designated secondary offence with respect to that person (*R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 43).

[42] Mr. Trimm submits that the trial judge erred in her application of the third element. Specifically, he submits that she failed to identify the secondary offence at issue and wrongly concluded that the requisite intention was communication for the purpose of facilitating an offence with a sexual purpose

in general, rather than one of the listed offences. He also submits that the trial judge improperly considered two factual issues – the discussion of a "hot pic" and the discussion of getting a hotel room – in her assessment of the third element.

There Were Two Counts of Child Luring, Each With Different Secondary Offences

[43] Count two of the Information alleged that Mr. Trimm communicated with E, a person under (or believed to be under) 18 years old, by means of a computer system for the purpose of facilitating the commission of a secondary offence contrary to sections 172.1(1)(a) and (2)(a) of the *Code*. Eleven possible secondary offences were listed in the Information. These eleven offences are all of the secondary offences included in section 172.1(1)(a).

[44] Count three of the Information alleged that Mr. Trimm communicated with E, a person under (or believed to be under) 16 years old, by means of a computer system for the purpose of facilitating the commission of an offence contrary to sections 172.1(1)(b) and (2)(a) of the *Code*. Eight possible secondary offences were listed in the Information. These eight offences are all of the secondary offences included in section 172.1(1)(b) and are different from the secondary offences listed in section 172.1(1)(a).

[45] The trial judge found Mr. Trimm guilty of count three and judicially stayed count two on the basis of *Kienapple v. R.*, [1975] 1 S.C.R. 729. In *Kienapple*, the Supreme Court of Canada ruled that an offender cannot be convicted of two criminal offences on the same or substantially the same elements. To support her decision to stay count two, the trial judge wrote: "Count 2 which alleges the same offence [as count three] while E was under the age of 18 is duplicitous" (conviction decision, at para. 89).

[46] To the extent that the trial judge's statement suggests that the two charged offences were the same other than with respect to E's age, she was incorrect. The two offences are under different sections of the *Code* and require an intention to facilitate different secondary offences. However, her decision to stay count two has not been appealed by the Crown. Additionally, I do not need to assess her decision to stay count two in order to decide the issues that have been appealed.

The Trial Judge's Findings Related to Child Luring

[47] I must decide whether the trial judge erred in assessing whether Mr. Trimm communicated with E for the purpose of facilitating the commission of one or more of the secondary designated offences of count three.

[48] The trial judge did not explicitly state which secondary offence or offences she was relying upon to support the conviction. Nevertheless, she made the following relevant findings (conviction decision, at paras. 78-88):

a. There was a significant age difference and a distinct power imbalance between Mr. Trimm and E.

b. E was experiencing some mental health issues and "could be described to be in a vulnerable position, particularly as regards [to] Mr. Trimm".

c. The content and frequency of the text messages between Mr. Trimm and E indicated a significant relationship.

d. The text messages between Mr. Trimm and E's aunt, which include Mr. Trimm referencing E's physical attractiveness and admitting to having feelings akin to those of a "jealous boyfriend", contradict the idea that this was merely a friendship.

e. Mr. Trimm's request of at least one "hot pic" from E and forwarding it to another individual indicates a more sexual component to the relationship between Mr. Trimm and E.

f. Mr. Trimm's text to E about getting a hotel room some day is also more sexually charged. Although Mr. Trimm did not reference outright sexual contact, the suggestion that he wants to "cuddle" E and stroke his hair and back infers sexual contact, which is not consistent with contact between mere friends.

g. Referencing the contact happening in a hotel room implied the need for privacy.

h. When confronted by E's mother about the text involving the hotel room, Mr. Trimm was concerned about the police laying charges and asked for another chance to do the "right thing". This indicates

> Mr. Trimm's awareness that his intentions were not merely friendly.
>
> i. Mr. Trimm clearly wanted an intimate relationship with E.

[49] The trial judge concluded in the conviction decision:

> [88] In the context of all of the evidence, it is clear that Mr. Trimm did have the requisite intent to make out the charge of facilitating an offence with a sexual purpose. Mr. Trimm wanted a relationship that was an intimate relationship. While there was some evidence of sexual dysfunction on Mr. Trimm's behalf, there was no evidence that he was incapable of sexual desire or sexual activity.

[50] On this basis, she found Mr. Trimm guilty of count three.

Analysis of the Trial Judge's Application of the Third Element of Child Luring

[51] Listing all secondary offences included in sections 172.1(1)(a) and (b) of the *Code* in the Information, as was done in this case, is unhelpful. Additionally, it is confusing to the accused, the complainant, and anyone else reading the Information. The general proposition is that an information or indictment must provide an accused with enough information to enable him or her to defend the charge (*R. v. B. (G.)*, [1990] 2 S.C.R. 30, at 41). Adding surplus allegations that have no foundation in the evidence does not advance this goal. If the evidence ultimately discloses a secondary offence that has not been included, the Crown can seek to amend the information or indictment under section 601 of the *Code*.

[52] Of the eight secondary offences listed in count three, there was no evidence in this case to support secondary offences of section 160(3) (bestiality), section 272 (sexual assault with a weapon, threats, or bodily harm), section 273 (aggravated sexual assault), or section 280 (abduction of a child).

[53] Of the possible secondary offences remaining, it was not necessary for the trial judge to pick just one. This is because child luring is an inchoate offence, which means that it is a preparatory crime that captures otherwise legal conduct meant to culminate in the commission of a completed crime, which may never happen (*R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 25; and *Morrison*, at para. 40). The offender need not meet or intend to meet the victim with a view to committing any of the specified secondary offences (*Legare*, at para. 25). The communications do not need to describe any secondary offence or even be sexual in nature (*Legare*, at para. 29).

[54] The offence of child luring aims to prevent the secondary offences, or attempts to commit the secondary offences, from happening (*Legare*, at para. 25; and *R. v. Levigne*, 2010 SCC 25, [2010] 2 S.C.R. 3, at para. 27). A trial judge must be satisfied beyond a reasonable doubt that the accused engaged in the prohibited communication with the specific intent of facilitating one or more of the listed secondary offences, but he or she need not pinpoint just one. Sexual predators do not necessarily groom child victims for a particular sexual offence; they groom children to make it easier to use them for sexual activity.

[55] Another reason that a trial judge need not single out a particular sexual offence is that an interaction between an adult and a child may result in more than one of the secondary offences being committed. For example, an adult who forces a child to perform oral sex on him or her commits the offences of sexual assault (s. 271), invitation to sexual touching (s. 152) and indecent exposure (s. 173(2)). Therefore, an adult who communicates with a child for the purpose of making it more probable that the child can be made to perform oral sex, is communicating for the purpose of facilitating the commission of more than one secondary offence.

[56] In some cases, the communication may clearly indicate a specific secondary offence. For example, in *R. v. Alicandro*, 2009 ONCA 133, leave to appeal to SCC refused, 33343 (22 July 2010), the trial judge found that the accused communicated with a person, whom he believed to be a girl under 14 years old, for the purpose of sending her a video of him masturbating (paras. 13-15). The only possible secondary offence on those facts was indecent exposure (s. 173(2)). In other cases, such as the one at hand, more than one secondary offence may be applicable.

[57] Although it may be preferable that a trial judge specify which secondary offence or offences were facilitated, I would not hold that a failure to do so, on its own, is an error.

[58] As already discussed, a judge's reasons should justify and explain the result to the parties and the public and they should permit meaningful appellate review. The trial judge's reasons must demonstrate that she identified and properly applied the law of child luring to Mr. Trimm's case. Mr. Trimm should not be left in doubt about why he was convicted of child luring.

[59] The trial judge was required to decide whether the evidence as a whole established beyond a reasonable doubt that Mr. Trimm communicated with E by electronic means for the purpose of facilitating the commission of one or more

of the secondary offences listed in section 172.1(1)(b) (*Legare*, at paras. 31-32). I am satisfied that her reasons demonstrate that she did this.

[60] First, she correctly stated the elements of child luring and identified that the third element was at issue (conviction decision, at paras. 65-66, 75-76). She cited *Morrison* for an explanation of how the third element is interpreted (conviction decision, at para. 67):

> [181] The range of conduct that constitutes an offence under this section is extremely broad. As this Court stated in *Legare*, to be convicted of child luring, the accused need not commit the secondary offence on which the child luring charge is based or even intend to meet the victim. Rather, the accused need only communicate for the purpose of *facilitating* the secondary offence — helping to bring it about or making it easier or more likely to occur (paras. 25 and 28). The impugned communications need not be sexually explicit or objectively capable of facilitating the secondary offence (paras. 29 and 42). Furthermore, there is significant variation in the nature and gravity of the designated secondary offences (see Moldaver J.'s reasons, at para. 147).
>
> (Emphasis in original.)

[61] She properly considered the evidence as a whole. Given that much of the evidence about Mr. Trimm's relationship with E came from E, she considered E's credibility at length (conviction decision, at paras. 59-61, 69-74). She found him credible. She also considered the "independent evidence" of the text messages (conviction decision, at para. 70), and the evidence of other witnesses that supported E's evidence (conviction decision, at para. 74).

[62] The trial judge focused on Mr. Trimm's subjective intention (conviction decision):

> [86] … Although Mr. Trimm does not reference outright sexual contact, the suggestion that he wants to "cuddle" E and stroke his hair and his back infers sexual contact which is not consistent with contact between mere friends. …
>
> [87] … Mr. Trimm clearly wants an intimate relationship with E.
>
> [88] In the context of all of the evidence, it is clear that Mr. Trimm did have the requisite intent to make out the charge of facilitating an offence with a sexual purpose. Mr. Trimm wanted a relationship that was an intimate relationship. …

[63] Although she did not specifically identify any secondary offences, these passages describe an intention to facilitate the offences of sexual assault (s. 271) and sexual interference (s. 151), at the very least. E was a child and not legally

capable of consent so Mr. Trimm touching him anywhere on his body for a sexual purpose would have been a crime under both of these provisions. Both are listed as secondary offences in section 172.1(1)(b).

[64] Mr. Trimm may disagree with the trial judge's reasons, but they should not leave him in any doubt as to why she found him guilty of child luring pursuant to section 172.1(1)(b).

The Trial Judge's Consideration of the "Hot Pics"

[65] Mr. Trimm submits that the trial judge improperly considered E's evidence that Mr. Trimm had requested "hot pics" from him. Mr. Trimm's submission is more relevant with respect to the child luring charge under section 172.1(1)(a), which was judicially stayed. One of the secondary offences listed under section 172.1(1)(a) is child pornography (s. 163.1). However, the issue is also relevant to the child luring charge under section 172.1(1)(b) because the trial judge considered Mr. Trimm's request of at least one "hot pic" from E as evidence of "a more sexual component" to their relationship (conviction decision, at para. 86).

[66] E considered Mr. Trimm's request for a "hot pic" to be a request for a picture of E's genitals and the trial judge accepted E's interpretation. Mr. Trimm does not challenge E's evidence or the trial judge's acceptance of it. He submits that she erred by failing to consider whether his intention in requesting a "hot pic" was an attempt to facilitate E sending him a picture that would meet the definition of child pornography in section 163.1(1) of the *Code*. His argument is that a "hot pic" request may have been intended as a request for a sexy or erotic picture that did not reveal E's genitals, and thus would not meet the *Code* definition of child pornography.

[67] Mr. Trimm's argument focuses too narrowly on the wording of the request, and fails to consider that the trial judge was required to determine whether the evidence *as a whole* established his intention to communicate for the purpose of facilitating a secondary offence.

[68] The offence of child luring is rarely established by a single action or communication. Predatory adults groom children. They build a relationship through repeated contact and move it along the spectrum of trust over time. Such grooming is a regular occurrence in child luring cases (see *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 125). The adult may test the waters of trust with the child by making more benign or ambiguous requests. The adult is trying

to reduce the child's inhibitions and normalize sexual activity between them. A trial judge must assess the whole of the evidence to determine the accused's specific intent. A single communication or phrase is unlikely to be determinative.

[69] The trial judge did not have to determine Mr. Trimm's intended meaning of "hot pic". She had to determine if the evidence as a whole proved beyond a reasonable doubt that Mr. Trimm communicated with E for the purpose of facilitating a secondary offence.

[70] For the secondary offence of child pornography (the only listed secondary offence possibly applicable to the stayed charge under section 172.1(1)(a)), there was other relevant evidence to consider. For example, E testified that Mr. Trimm made three to four requests for "hot pics", which E understood to be pictures of his genitals, and that he complied. E testified that one time Mr. Trimm sent him a picture of his own genitals in return. E testified that Mr. Trimm would comment that the "hot pics" were well taken and attractive. He thanked E for the pictures and gave him compliments (conviction decision, at paras. 14-16; and Trial Transcript Volume 1, at 99, lines 4-7, at 106, lines 1-10).

[71] Given that I would dismiss the conviction appeal for count three, these comments in relation to the secondary offence of child pornography are less relevant. A final dismissal of the conviction appeal on count three makes the conditional stay of count two permanent and the functional equivalent of a judgment or verdict of acquittal for appeal or special plea purposes (see *R. v. Provo*, [1989] 2 S.C.R. 3, at 16-17).

The Trial Judge's Consideration of the Hotel Night Evidence

[72] Mr. Trimm also submits that the trial judge improperly considered his conversation with E about getting a hotel room. Mr. Trimm focuses on a text he sent E in May of 2020 (Respondent's Supplementary Appeal Book, tab 3, at 103):

> When we have our hotel night some day, can I cuddle into you. I want to see if you can feel how much I care about you. I will play with your hair and rub your back for you too.

[73] He submits that the trial judge considered this text as a significant factor in assessing his intent. Even accepting that this message is sexual in nature, Mr. Trimm submits that it does not follow that it was for the purpose of facilitating a secondary offence. His argument focusses on the words "some day". On cross-

examination, E testified that he and Mr. Trimm had not settled on a timeframe for the hotel stay, but that he assumed it would be early next year and sometime in January, February, or March (Trial Transcript Volume 1, at 142, lines 14-21, at 143, lines l-3).

[74] The text message was sent a few weeks before E turned 16. So at the time E assumed the hotel meeting would take place, E would have been of age to consent. As a result, Mr. Trimm argues that the secondary offence would not be a crime and so the text negates the trial judge's inference that he specifically intended his communications to facilitate the offence of sexual interference.

[75] Again, Mr. Trimm's argument focusses too narrowly on the wording of a specific communication. The trial judge had to determine Mr. Trimm's intention from all of the evidence. I have already reviewed much of the evidence that the trial judge relied upon. She took a holistic view, as she was required to do.

[76] Mr. Trimm's argument also fails to recognize that a communication does not have to plan or describe a secondary offence. He ignores that it need only be proven that he communicated for the purpose of *facilitating* sexual assault or sexual interference — helping to bring it about or making it easier or more likely to occur.

[77] Considered in context, communications that merely float an idea or make suggestions about the future may be evidence of child luring. For example, as part of communications intended to normalize sexual activity between them, an adult may tell a child that he wants to have sex with her when she is old enough. In the totality of the circumstances, this may support a finding of child luring. In some circumstances, suggesting future legal activity may make it easier for illegal activity to occur.

[78] I find no error in the trial judge's consideration of the evidence about "hot pics" or the hotel night.

DISPOSITION

[79] For these reasons, I would dismiss Mr. Trimm's appeal against conviction. His sentence appeal remains before the Court.

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K. J. O'Brien J.A.

I concur:_____

L. R. Hoegg J.A.

I concur:_____

F. J. Knickle J.A.