IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Randall, 2006 NSPC 19

Date: 2006/04/28
Docket: 1538177
Registry: Halifax

Between:

Her Majesty the Queen

v.

Kevin Scott Randall

DECISION

Judge:	The Honourable Judge Castor H. Williams
Heard:	February 6th, 2006 (Trial date)
Written decision:	April 28th, 2006
Charge:	Section 172.1(1) of the Criminal Code
Counsel:	Craig Botterill for Her Majesty the Queen (Crown) Stan MacDonald for Kevin Scott Randall (Defence)

By the Court:

Introduction

[1] The accused, Kevin Scott Randall, used his computer in an internet chat room, to communicate with someone whom he believed to be less than fourteen years old. He, in fact, was communicating with an undercover police officer. In any event, a plain reading of the transcript of this transmission disclosed that the accused was inviting the other party to meet with him for possible sexual intercourse or other sexual acts. As well, he went to the arranged rendevous where he was identified by the police who subsequently charged him with,

> unlawfully used a computer to communicate with a person believed to be under 14 years of age for the purpose of facilitating the offence of sexual interference Section 151 of the Criminal Code, and contrary to Section 172.1(1)(c) of the Criminal Code.

[2] At trial, he declared that the intentions of his communication were altruistic and benign. Furthermore, and in the alternative, on an interpretation of the statute, as he had not committed the offence of sexual interference his communication, by itself was not proof of the offence of internet luring. Therefore, this case raises the issue of whether the mere communicating for the purpose of facilitating the commission of one or more of the designated secondary offences is sufficient proof of the offence of internet luring or, that in order to be convicted of the offence of internet luring, the communication must result with the actual commission of a designated secondary offence.

Summary of Evidence

(a) For the Crown

[3] An undercover police officer utilizing the profile of a thirteen-year-old female, which was not his true identity, parked in an adult internet chat room. Someone, self-identified as "Maritimemale," now the accused, initiated a text messaging dialogue and the officer opened a text log and captured the screen images as they appeared on the computer. Exhibit 1, which is not attached to this decision, is a transcript of that dialogue.

[4] In his dialogue with the female respondent the accused, in his profile, submitted that he was thirty-one years old and gave other personal particulars such as his address, height and weight that were accurate. Also, he gave a description of himself such as his eyes and hair colouring that was accurate. Additionally, he asked her whether she had ever had sex as they would probably will not have much to do otherwise, if they got together. The respondent suggested that they could go shopping but the accused proposed that unless they had sex or engage in some other specified sexual activities it was not worth his time as those were the activities that he currently wanted to do with her despite their age differences.

[5] He wanted to meet her and made arrangements for a meeting at the Tim Hortons located on Dutch Village Road in the Halifax Regional Municipality. When making the arrangements to meet with his female respondent, the accused transmitted his actual name the car that he would be driving and his clothing apparel, all of which proved to be accurate. Likewise, he described himself to the female respondent and a person, the accused, matching that description, arrived for the prearranged rendevous. However, after looking around and not seeing anyone matching his female respondent's profile, the accused got into his vehicle and left the area. The police, who were on surveillance at the scene, followed, stopped and arrested him. On a search incidental to arrest the police discovered that the accused had in his possession packs of condoms.

(b) For the accused

[6] The accused presented himself as a person with a postgraduate degree but currently unemployed. He has served as an Army Reservist and in the past has worked with a local Addiction Services Centre where he had daily contacts with clients. On May 5, 2005, he arrived in Halifax for a job interview and afterwards he went to have supper with his girlfriend of four and one-half year's relationship but who appeared to be unsympathetic with spending "quality time" with him. After supper, he dropped of his girlfriend for her to go to work, and he went to

Dalhousie University, at about 1800 hours, to pass the time until after she had finished working when they would meet again.

[7] When at Dalhousie, he logged onto the computer to check his e-mail and other job opportunities. He also, as he was accustomed to doing, logged into an internet chat room using his usual profile “maritime male.” This was a particular multipurpose chat room for “East coast lovers and friends,” where it was possible to seek romantic encounters. While he was looking at profiles and what was being communicated he, by chance, detected on line, a correspondent self-identifying herself as a thirteen-year-old girl. He became concerned that a thirteen-year-old girl was in what was essentially an adult chat room. And, because of this concern for her safety he decided to initiate a dialogue to discover why she would be there.

[8] He decided to scare her by talking about sex. When he was neither blocked nor ignored as

he expected would happen, and, although he had no sexual purpose in mind, he used more sexually explicit language in order to elicit a rebuff. As he had no malevolent intentions toward her he gave her an accurate description of himself and suggested that they should meet. His purpose of inviting her to meet with him was first to test whether she would do so and second, if she did meet, to admonish her on the dangers she could expose herself to when on the internet. To assure her of her safety with him he suggested that the meeting should be in a public place. Even though he thought that the person could be a police officer, he went to the Tim Hortons, as

arranged, to see if she would come, as agreed. She did not. Concerning the condoms in his pockets, although he and his girlfriend rarely used them, he did not have them for the meeting.

Relevant Legislation

[9] **172.1(1)** Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with

.....

> (c) a person who is, or who the accused believes is, under the age of fourteen years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 281 with respect to that person.
>
> .....
>
> **(2)** Every person who commits an offence under subsection (1) is guilty of
> (a) an indictable offence and liable to imprisonment for a term of not more than five years; or
> (b) an offence punishable on summary conviction
>
> **(3)** Evidence that the person referred to in paragraph (1)(a), (b) or (c) was represented to the accused as being under the age of eighteen years, sixteen years or fourteen years, as the case may be, is, in the absence of evidence to the contrary, proof that the accused believed that the person was under that age.
>
> **(4)** It is not a defence to a charge under paragraph (1)(a), (b) or (c) that the accused believed that the person referred to in that paragraph was at least eighteen years of age, sixteen years or fourteen years of age, as the case may be, unless the accused took reasonable steps to ascertain the

age of the person.

Statutory Interpretation

(a) Submissions of the Parties

[10] Basically, the accused submitted that the words “for the purpose of facilitating the commission of an offence under section 151”, mean that the prosecution must prove that not only did he, the accused, communicate with but that his communication also was “to assist with” or “to set up” his actual commission of the secondary offence. In short, he must commit the secondary offence. Or, put another way, without the actual commission of the secondary offence there is no crime.

[11] Additionally, he submitted that as there was no ambiguity in the wording of the section there was no need for me to consider “the common law, legislative history, related Criminal Code provisions, margin notes and public policy.” Moreover, referring to the principles of statutory interpretation as set out in ***R. v. McIntosh***, [1995] S.C.J. No.16, he submitted that, as it was a penal provision that affects his liberty, any ambiguity must be resolved in his favour.

[12] On the other hand, the essential submission of the Crown was that the offence of internet luring,

> requires that the communication have as its content words that directly relate to the commission of the secondary offence regardless of the accused behaviour or intent respecting the secondary offence.

He referred to the legislative history and the policy context of the provision and the Parliamentary resolve to address the global phenomenon of the use of the internet to target and exploit the vulnerability of children.

[13] Furthermore, he submitted that "the protection offered to children should be construed broadly." To support this point, he submitted that Section.172.1 was a new provision enacted to address a specific conduct and is precise in its wording in that it uses the word "facilitating" in order to capture any conduct by the prohibited means that would make it easier to commit one of the secondary offences. In short, it captures "the precursor action to the substantive offence." Put another way, the substantive offence need not be committed. Such an approach to statutory interpretation is contrasted where the legislature used the words "for the purpose of committing" an offence when it links a first action to a second to complete the offence. On this premise, the "actor must have the present intent to commit the second action when he does the first."

(b) Analytical Approach

[14] First, I think that as a guiding principle, I am mindful that, as stated in ***Mewett, The Criminal Law 1867-1967,*** (1967) 45 Can. Bar Rev. 726 at 736,

> The substantive criminal law cannot be divorced from its social context, and criminal legislation is at least as much a matter of analyzing the social problem, discussing alternatives, thinking of the investigative problems, deciding upon the sanctions and weighing the consequences [as] it is of proper drafting.

[15] Second, as stated in the **Interpretation Act**, R.S. C. 1985, c. I-21, s. 12:

> Every enactment shall be deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[16] Third, I am also guided by the following relevant authorities in the application of the established principles of statutory interpretation:

1. ***R.v. McIntosh***, [1995] 1 S.C.R. 686, 95 C.C.C. (3d) 481, 36 C.R. (4th) 171 as submitted by the accused, where the legislature used in the provision clear and unequivocal language capable of one meaning I am compelled to give force to its terms regardless to however "reprehensible the result may appear."

2. ***R.v. Egger,*** [1993] 2 S.C.R. 451, 21 C.R. (4th) 186, 82 C.C.C. (3d) 193 at para.35, " . . . where [if] the plain and ordinary meaning of a portion of the statutory language would defeat the legislative purpose . . . , an interpretation consistent with the legislative intent which goes against the literal meaning of the statute must be adopted."

3 ***R.v. Pare***, [1987] 2 S.C.R. 618, 60 C.R. (3d) 346, 38 C.C.C. 3(d) 97 states the proposition that even in penal statutes an interpretation "that runs contrary to common sense is not to be adopted if a reasonable alternative is available"(para. 29) that conforms with the legislative scheme and purpose.

4. ***R.v. Paul***, [1982] 1 S.C.R. 621, 67 C.C.C. (2d) 97, 138 D.L.R.(3d) 455 citing with approval Baron Alderson in ***Attorney-General v. Lockwood*** (1842), 9 M. & W. 377, 152 E.R. 160 and ***Maxwell on Interpretation of Statutes***, 12th ed., by P. St. J. Langan, 1969, at p. 228, states the proposition that ordinarily courts must look to discover Parliament's purpose in enacting the law and give the words their ordinary meaning and grammatical construction "unless that construction leads to a plain and clear contradiction of the apparent purpose of the act, or to some palpable and evident absurdity."

5. ***R.v. Goldman***, [1980] 1 S.C.R. 976, where McIntyre J formulated the principle that "It is elementary to say that the courts must discern and apply the legislative intent when construing the statutes. The intent must be found upon an examination of the words employed in the enactment for it is the intent which the legislature expressed which must have effect. It is for this reason that the meaning of statutory language must be examined and on occasions fine distinctions must be made."

6. ***Black's Law Dictionary,*** ® Seventh Edition, (West Group, St. Paul, Minn., 1999) defines **"**facilitate" as "to make the commission of a crime easier."

[17] Here, however, in my view, there is no statutory interpretation conundrum. What presents itself is a rational and reasonable determination of which of the submitted briefs on statutory interpretation correspond to Parliament's historical expectation concerning the protection of children. As was put by Randal N. Graham in, ***Statutory Interpretation: Theory and Practice*** (Toronto; Emond Montgomery Publications Ltd., 2001) at p.141:

> Obviously, the legislature has turned its collective mind to a particular problem and proposed a specific solution, despite the drafter's inability to express the proposed solution with precision. As the elected branch of government has exercised its constitutional mandate and expressed its will in the form of legislation, it is the task of the judiciary to apply the law in accordance with the legislator's expectations. Any departure from originalist construction in these cases runs the risk of clothing the courts with unwarranted legislative power. A failure to give effect to an originalist construction in such cases would also run afoul of Canada's various interpretation acts, which command the courts to adopt interpretations that are based on the legislature's historical objectives.

Thus, in the end, there is no need for me to invent a view of the legislative intention. See also: Randal N. Graham, ***"Good Intentions,"*** (2000) 12 Supreme Court Law Review, 147.

[18] The accused has submitted that as a principle his communication should not be treated as criminal only because it has the natural tendency to induce or deliberately stimulate, influence or bring about the occurrence of a subjectively held desired event. As the desire is not realized there is not any *actus reus* for the listed secondary offence and without the commission of this secondary

offence there is no criminal infraction. Although there may be an argument for the proposition that merely communicating, however gross or inviting the language, by itself and without any further overt activity, is insufficient for a conviction, ***R.v.Legare***, [2006] A. J. No. 371, 2006 ABQB 248, I am, however, of the opinion that such a proposition, must also consider that Parliament's fundamental intention, as may be deducted from its legislative action, was to protect children from persons who use the internet to target them and where the potential for their victimization could become a reality.

[19] A second difficulty, in my view, is that the accused submission devalues the mischief that the legislature sought to remedy and it could lead to arbitrary and contradictory distinctions. If, by way of example only, in the present case the accused had committed the offence of sexual interference, his guilt would be beyond dispute. Even so, the approach, advanced by the accused, would have me conclude that the time he spent contemplating and acting on his move to seduce the child, through the medium of a computer, in order to commit the listed proscribed offence of sexual interference, is legally permissible and is therefore not a crime. That would be indeed a strange result. Parliament has made it a crime to communicate for the listed prohibited purpose by a prohibited means and, in my view, the purposeful communication is no less serious than committing the actual listed proscribed offence. Both offences involve some element of deliberation, are prohibited and punishable in their own right. They are committed in distinct modes and the effect of one does not reduce nor render nugatory the commission of the other. In other words, as was adjudged by Agrios J., in ***Legare***, at para. 22:

> The Crown need not prove the accused actually intended to carry out the enumerated secondary offence, but the Crown does need to prove the accused intended to lure the child for that purpose.

Therefore, in my view, the legislative scheme and its principle objective, in the protection of children, are to allow for the more effective prosecution of internet predators.

[20] Additionally, such an approach, as advocated, could lead an accused, on reflection, after the fact and when in jeopardy, to give a smooth-tongued explanation of his stated intentions and, depending on the explanation, could introduce great uncertainty into the administration of the criminal law dealing with the community's resolve to protect children against the dangers that lurk on the internet. Thus, on reflection and analysis, I think that this view ought to be rejected. The present law, in my opinion, is intentionally not only proactive and inchoate with respect to the listed secondary offences, but, it also acts as an effective prophylactic against a baneful predacious syndrome that is apparently prevalent on the internet.

[21] On a careful reading of section 172.1 (c), I think that it is more reasonable and rational to hold, as it is compatible with the tenets of statutory interpretation, that the statute addresses communication with a prohibited class of persons for a proscribed purpose. Furthermore, as our criminal laws help to define our societal values and beliefs, I think that an accused person can be convicted of the offence of communicating for the "purpose of facilitating" a listed secondary offence if there is proof that he intentionally communicated by means of a computer, as defined in s.342.1(2), with someone whom he believes to be or is in the prohibited class of persons to urge that

person to participate in one of the listed prohibited acts, in language that indicates objectively that he wishes that person to take his intentions seriously.

[22] Furthermore, in my opinion, the actual consummation of the listed secondary offence need not be realized. However, even though I think that the listed secondary offence need not be committed, if, in addition to his communications, an accused person further conducts himself in a manner that reasonably and objectively demonstrates an intention to complete or to fulfill the desired listed prohibited act as expressed in his communications that was the precursor of his observed conduct, then such activities merely add credence that his communication was to lay the foundation, or to make it easier for him to commit a listed prohibited offence in relation to the child.

[23] The "purpose" is expressed by the words used and the intention is the deliberate and conscious expressions. Thus, the *mens rea* is the intentional communication by the proscribed means knowingly and consciously expressing the desire to commit the proscribed act. The *actus reus* is partly the communication via the prohibited medium, the computer, completed when he does any overt physical activity that signifies objectively an intention to carry out, if circumstances permitted, the proscribed act. His overt activity, *actus reus*, is the connection between his declared desire, *mens rea*, and it is also the linkage between him and the child, a potential victim. Therefore, I think that it is any such sexually pernicious and predacious communications directed to a child by means of a computer, accompanied by any directly related behaviour, regardless of the commission of a listed secondary offence, is what Parliament has prohibited.

Findings of Facts and Analysis

[24] The accused has admitted that he was on the computer in the chat room and was communicating with someone whom he believed to be thirteen years old. I so find. Additionally, he has admitted, and I find, that he was the person who showed up at the Tim Hortons as the person who was communicating on the computer and made the arrangement to meet.

[25] Significantly, he is not asserting that he was misled concerning the age of the person with whom he communicated. Or, that he took all reasonable steps to ascertain the person's age. Rather, he has accepted and believed that the person was thirteen years old. In his defence, he merely presents a tale of selflessness and declares that his communications, by themselves, do not attract any criminal sanctions.

[26] However, recognizing the presumption of innocence and that an accused person has the right to remain silent I must, nonetheless, weigh and test any non-contemporaneous explanation along with the total evidence for its reliableness and trustworthiness. Even so, in assessing the efficacy of any in court explanation, I must guard against the correcting and at times distorting narrative that is influenced by hindsight and prevarication and apply the principle of reasonable doubt as put forward in ***R.v.W.(D),*** [1991] 1 S.C.R. 742.

[27] The critical issue, in my view, is whether on the whole evidence and on my above analysis, his total conduct constitutes a crime. Consequently, his credibility was of paramount concern. As I stated in ***R.v. Killen***, [2005] N.S.J. No. 41, 2005 NSPC 4, at paras.19 and 20:

> 19 ... in accepting the testimony of any witness, because credit is presumed, the truthfulness of the witness is also presumed. However, that presumption can be displaced and, in my view, can easily be refuted by evidence that raises a reasonable doubt about the witness's truthfulness particularly if that witness is never rehabilitated by belief or supportive evidence as explained in ***R. v. Vetrovec*** [1982] 1 S.C.R. 811, and ***R. v. W.(D.)*** [1991] 1 S.C.R. 742. If credit is displaced and it is not restored, the witness's testimony becomes unreliable and untrustworthy and, in my view, it would have little or no probative value in deciding the facts in issue. See also ***R..v. O.J.M.*** [1998] N.S.J. No. 362 at para. 35.
>
> 20. Second, there is always a common sense approach to the assessment of witnesses and the weighing of their testimonies with the total evidence as was underscored by O'Halloran J.A., in ***Faryna v. Chorny*** [1952] 2 D.L.R. 354 (B.C.C.A.), at p.357, and by Cory J., in ***W.(D.)*** at p.747. In short, even if a witness is not disbelieved but remains discredited, reasonably, I could still refuse not to rely upon his or her testimony especially if, in my view, "it is not in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the set of circumstances disclosed by the total evidence and material to the facts in issue.

[28] I do not doubt, that on the preponderance of the probabilities that existed in the set of circumstances as disclosed by the evidence, a practical and informed person could readily recognize and conclude that the accused had embarked upon a series of activities that were not only of self-interest but were also opportunistic. After all, he had seen his girlfriend and he was disappointed that they could not have spent "quality time" together. Therefore, to pass the time, until he would ostensibly meet her after her work, he logged into a familiar chat room frequented by persons seeking romantic liaisons.

[29] Among all the profiles that he saw, only the one that presented to be of a thirteen-year-old girl attracted his interest. He was in an adult chat room in which was parked a thirteen-year-old girl. Rather than ignore her presence, he decided to initiate a dialogue that was not only sexually explicit in its contents but which expressed, in no mistaken words, a present need and desire to engage in specific sexual activities with the child. He presses home the point that they should meet and to ensure that she would not miss him, should she arrive at the rendevous, he gave her an accurate description of himself and the vehicle that he would be driving.

[30] Now, he says all this was a ruse to frighten the child out of the chat room. His intentions were honourable and platonic. However, when I consider the manner in which his conversation expanded, I think that a reasonable person would readily ask: if he were so concerned about the young girl's safety, and being aware, as he said, of the dangers and the dangerous persons who may lurk in the darkness of cyberspace awaiting to prey on innocent and vulnerable victims like her, why did he not tell her so specifically and in language and terms that she would readily understand? Furthermore: why would he cloak himself in the guise of a sexual predator, the very kind of person he would warn against, without informing the person whom he believed to be in danger, what was his true intentions, instead of continuing a course of activities, that would, objectively, conceal and deny his now subjective altruistic declarations?

[31] In answer, I think that his intentions, as he expressed them were genuine and he intended that the child should take his words seriously. I say so when I consider the fact that he was not an adult chat room novice. He knew precisely what was normally discussed in these chat rooms and the

clientele that would frequent this genre of chat rooms. Moreover, it would appear that the thirteen-year-old presented as an anomalous opportunity which he wanted to exploit. He was eager to meet her and, in his confidence that he would meet, he accurately described himself and his mode of transportation so that, as a stranger, she would readily recognize him. Further, he was to meet his girlfriend, who appeared to have been unsympathetic with his "quality time" feelings, after her work which was about the same time that he arranged to meet with a total stranger. He thus appears to have placed more effort in meeting the stranger, hopefully for sex, than to meet with his unsympathetic girlfriend. More telling, in my opinion, as if in anticipation of some sexual activity with a stranger, as he desired, he had in his possession packets of condoms that he does not normally use in sexual relations with his girlfriend.

Conclusion

[32] On my above reasoning, I conclude that the ***Criminal*** Code, s.172.1(1)(c) is a natural and meaningful extension of the law in the area of child protection against internet predators. In my opinion, it does not create another substantive offence identical to the listed offences as it serves no useful purpose for Parliament to enact and repeat the same listed offences. When read in its entirety in the context of the scheme and purpose of the legislation it is clearly grammatically possible to interpret it a manner that is consistent with the legislature's historical objectives.

[33] In my opinion, the accused submissions were forceful but not decisive. His after the fact explanation, when in jeopardy, and in my view, was not only self-serving but also ingratiating. It was not only internally inconsistent but it also lacked an air of reality and, in my opinion, was a smooth-tongued rationalization of his exposed harmful intentions to a child. Likewise, in my opinion, it was mental imagery without any corresponding reality. The ideas that it embraced represented that which is known and is thus plausible. However, I find and conclude that it represented what could be real but, in its entirety, I was left with the impression that it was fictional and without any objectivity. In short, I find that it was untrustworthy and I did not believe him. ***R.v. W.(D).*** Consequently, I conclude and find that his thoughts, as expressed by means of the computer, in their inception and application, presented a rational self-evident reason for his final observed conduct.

[34] Furthermore, I conclude and find that he used a computer, within the meaning of s.342.1(2), to communicate with a person whom he believed was a thirteen-year-old female. In addition, I conclude and find that he was not misled concerning her age or, that if so or at all, that he took reasonable or any steps to ascertain her age. Also, I conclude and find that he was being opportunistic and expressed a genuine desire to have sexual contact with a thirteen-year-old child. Additionally, I conclude and find that not only did he communicate his sexual desire by means of a computer but also he followed up his communication by arranging a meeting with the child in order to consummate, if circumstances permitted, the expressed and explicit desired sexual contact.

[35] Moreover, he went to the arranged meeting place in possession of packets of condoms and looked about for the child. Thus, it is reasonable to infer, and I infer and find, as it is " in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the set of circumstances disclosed by the total evidence and material to the facts in issue," that he had in mind the commission of an offence under s.151. Consequently, I conclude and find that his presence at his arranged rendevous was not only the response to the stimuli of his own sexual desire but was also a synthesis of his related ideas such as the expressed explicit desire for sex with a thirteen- year-old child, his arranged assignation, and his anticipation of the fulfilment of an incomplete idea which was to be experienced and become a reality.

[36] Therefore, in my opinion and on my above analysis, I conclude and find that his state of mind

consisted of the knowledge that, after a sexually explicit computer dialogue, he had made an arrangement to meet with a thirteen-year-old female specifically to have sexual relations. Additionally, his desire was that as a result of his voluntary act of going to the rendevous there was a high probability that such sexual relations would certainly follow.

[37] Consequently, this is not a case of merely "talking dirty" as, in my opinion, his total behaviour denounces him and identifies him as an offender within the meaning of the legislation. As a result, I conclude and find that his sole intention, with respect to the child, was to lure her and to make it easier for him to commit an offence under s.151. Thus, I am satisfied, on the evidence

before me and that which I accept, and on the analysis that I have made, that the Crown has proved beyond a reasonable doubt that the accused has committed the offence as charged. I find him guilty of the offence contrary to the ***Criminal Code,*** s. 172.1(1)(c) and, accordingly, will enter a conviction on the record.

J.