Date: 2012 08 30
File: T-1-CR-2011-001225

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

D., (R.D.G.)

Respondent

Application for committal to stand trial

Heard at Yellowknife, NT on June 7, 2012

Reasons filed: August 30, 2012

REASONS FOR JUDGMENT
of the
HONOURABLE CHIEF JUDGE ROBERT D. GORIN

Counsel for the Applicant: Daniel Rideout

Counsel for the Respondent: Gary Wool

Date: 2012 08 30
File: T-1-CR-2011-001225

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

D. (R.D.G.)

Respondent

REASONS FOR JUDGMENT

[1] The Accused is charged with two counts contrary to sections 271 and 151 of the *Criminal Code* as a result of a number of incidents which the Crown alleges occurred on or between February 21st, 2005 and May 31st, 2005. The Accused's preliminary inquiry commenced on June 7th of this year during which time I heard all of the Crown's evidence. As is typically the case, the Accused elected not to call evidence.

[2] The question I must determine is whether or not the Crown has presented sufficient evidence on which the Accused may be committed to stand trial on one or more of the charges currently before me. In particular, the question is whether or not sufficient evidence has been adduced on the essential element of identity.

[3] The matter was adjourned to allow counsel to provide written submissions on the issue and to allow me further time to consider them. I thank both counsel, in particular, Mr. Wool, for their submissions which have been of considerable assistance to me in determining the issue I must decide. However, notwithstanding

defence counsel's valiant efforts, after considering the matter at length, I think that the Crown has passed the required evidentiary threshold on all of the elements of both offences including identity. That being the case, I must commit the Accused to stand trial on both counts before the court.

My reasons are set out in the paragraphs that follow.

A. EVIDENCE OF IDENTITY

[4] The complainant, who is now 12 years old, testified that in 2005 when she was 7, the Accused touched her in a sexual manner in the home where she was living. She testified that at the time, she was residing with her father, her brother who was 20 years old, and the Accused. She further testified that the Accused, had a full beard, moustache and side-burns. Although she provided some description of her brother's appearance, she provided no evidence as to whether or not he or her father had facial hair.

[5] She testified that at some time, during the dates alleged, the Accused touched her "privates" when she was sleeping in her bedroom. She said that this happened a "few nights".

[6] When describing the first time such an incident happened, she testified that she was unable to see whether or not the Accused was wearing clothes. When asked how she knew it was the Accused who was touching her, she testified: "I think I saw his beard."

[7] She testified that after the incident was over, she went to her father to try to wake him. The Accused told her to leave him alone and she went back to her room. She told the Accused she needed to use the washroom and when she got out of the washroom, the Accused was in the kitchen and she then went to see her father.

[8] She testified that the next time a similar incident occurred was days later. On this occasion he touched her in the same places as in the previous incident. She testified that she thinks her father was out of the home with her brother at the time

and that nobody else was home except herself and the Accused. She provided no evidence on how she knew it was the Accused on this occasion. She also testified on when and how she first disclosed these incidents to others, including the police.

[9] Her father was the only other witness to be called by the Crown. He testified that he, his daughter (the complainant), his 20 year old son, and the Accused were living in the same apartment on the dates in question. He described the Accused as having longer hair, a moustache and a bit of a goatee. He provided no description of his son's appearance or whether or not he or his son had facial hair at the time.

B. THE THRESHOLD FOR COMMITTAL

[10] At a preliminary inquiry the judge is to assess all of the evidence presented and determine whether that evidence, if believed, could lead a reasonable trier of fact, properly instructed, to infer guilt. As pointed out by Charbonneau J. in *R.* v. *Raddi*, 2012 NWTSC 63 (para. 37), a case decided after counsel provided their oral and written submissions:

> It flows from this that where there is direct evidence on each element of the offence charged, the preliminary hearing judge has no jurisdiction to weigh the evidence or draw inferences from it. However, where the Crown's case depends in whole or in part on circumstantial evidence, the preliminary hearing judge must engage in limited weighing of this evidence. Such weighing is unavoidable because circumstantial evidence, by its very nature, requires inferential reasoning. Hence, the preliminary hearing judge's task is to decide whether the inferences that the Crown seeks to rely upon can reasonably be drawn from the evidence assuming that evidence is believed. *R.* v. *Arcuri,* 2011 SCC 54 at paras 23 and 30.

[11] The preliminary inquiry judge must weigh the evidence to determine whether or not it supports a legitimate inference or a conclusion that is not tantamount to pure speculation. Clearly it may at times be very difficult to determine whether the evidence crosses the line from allowing a merely speculative conclusion or a legitimate inference, however weak. Nonetheless, as stated I conclude that on the evidence before me that threshold has been passed.

C. ANALYSIS & CONCLUSION

[12] On the evidence adduced at the preliminary inquiry, there were only three individuals living in the complainant's residence other than the complainant herself. The complainant testified that other persons did not visit the apartment. One could easily infer that it was one of those individuals residing with the complainant who touched her. Clearly, there is some evidence eliminating the father as the perpetrator since according to the complainant, her assailant told her not to tell her father after he had touched her.

[13] As stated, when she asked how she knew it was the Accused who touched her on the first occasion, she said: "I think I saw a beard". When during the preliminary inquiry, the complainant was asked what the Accused looked like at the time, she responded without further prompting that he had a beard and longish hair. When she was asked to describe her brother she described him as having black hair and piercings. One might assume that if she recalled her brother having a beard, the complainant would have responded accordingly as she had in the case of the Accused.

[14] Further, it was when the complainant was asked, "How did you know it was (the accused) touching you?", that she responded "I think I saw a beard." In my opinion when the answer is placed in context, it is capable of supporting an inference that the Accused was the only person living in the house who had a beard. Arguably, her response would not otherwise make sense. Although the words "*I think*" could well be viewed as tentative and uncertain, a trier of fact might well interpret them differently.

[15] I also find that there is some evidence on identity in relation to the other incident or incidents of sexual touching described by the complainant. The complainant's evidence was that it was the Accused who touched her on the subsequent occasions. Since they lived in the same apartment, the Accused was a

person who was very well known to the complainant at the time. Although the complainant did not state how she knew it was the accused who touched her on the other occasions, one might infer from all of her evidence that she simply recognized him.

[16] I find that based on all of the evidence, one of the inferences open to a trier of fact would be that the Accused was the person, who touched the complainant on the occasions described by her in her testimony.

[17] As for the rule in *Hodge's Case*, the case law is very well established that it has no application at a preliminary inquiry. As stated in *Raddi* at para 38:

> If several inferences can reasonably be drawn from the evidence, the preliminary hearing judge is required to consider only those that are favourable to the Crown. It is not his or her task to choose one possible inference over another:
>
> > (…) a preliminary inquiry judge is not permitted to assess credibility or reliability, and (…) where more than once inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered. A preliminary inquiry judge who fails to respect these constraints acts in excess of his or her jurisdiction: *see Dubois* v. *The Queen*, [1986] 1 S.C.R. 366, at p. 380
>
> *R.* v. *Sazant*, 2004 SCC 77, at para. 18.

[18] While I may think the evidence I have before me on the issue of identity is less than complete and rather weak, that is not the issue. I find that there is some evidence on all of the elements of the offences alleged. I find that at trial, a reasonable trier of fact, properly instructed, could, based on the evidence I have before me, infer that it was the Accused who touched the complainant as alleged in counts 1 and 2. It would not be unreasonable for a trier of fact to conclude that the element of identity has been proved to the requisite standard of proof – proof beyond a reasonable doubt.

[19] The Crown is not asking that the Accused be committed on any further alleged offence other than those set out in the information. For the foregoing reasons, I commit the Accused to stand trial on both of the counts alleged in the information I have before me.

Robert D. Gorin
C.J.T.C.

Dated at Yellowknife, Northwest Territories, this
30th day of August, 2012

R. v. *R.D.*, 2012 NWTTC 12

Date: 2012 08 30
File: T-1-CR-2011-001225

IN THE TERRITORIAL COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

D. (R.D.G.)

REASONS FOR JUDGMENT of the HONOURABLE CHIEF JUDGE ROBERT D. GORIN
