

**PROVINCE OF PRINCE EDWARD ISLAND
PRINCE EDWARD ISLAND COURT OF APPEAL**

Citation: R. v. Anderson 2009 PECA 04

Date: 20090227
Docket: S1-AD-1143
Registry: Charlottetown

Publication Ban under s. 486.4(2) of the *Criminal Code of Canada* in place.

BETWEEN:

JILLIAN MAUREEN ANDERSON

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

Before: Chief Justice D.H. Jenkins
Justice J.A. McQuaid
Justice M.M. Murphy

Appearances:

Peter C. Ghiz, counsel for the Appellant

Gerald K. Quinn, Q.C., counsel for the Respondent

Place and Date of Hearing

Charlottetown, Prince Edward Island
November 25 and 26, 2008

Place and Date of Judgment

Charlottetown, Prince Edward Island
February 18, 2009

DATE OF ADDENDUM

February 27, 2009

Reasons for judgment:

BY THE COURT:

[1] For clarification, the court issues the following addendum.

[2] Reference to a “journal” in paras. 33, 34, 103 and 105 of the reasons filed February 18, 2009 (2009 PECA 04) is a reference to Exhibit C-28 (ID).

Chief Justice D.H. Jenkins

Mr. Justice J.A. McQuaid

Justice M.M. Murphy

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Written Reasons by:
Justice J.A. McQuaid

Concurred in by:
Chief Justice D.H. Jenkins
Justice M.M. Murphy

CRIMINAL LAW - SEXUAL OFFENCES PUBLIC MORALS AND DISORDERLY CONDUCT - Sexual offences, particular offences - Sexual exploitation of a young person

APPEALS - INDICTABLE OFFENCES - Appeal to court of appeal - General

The appellant was convicted by a Provincial Court judge of two offences contrary to s. 153(1)(a) and (b) of the **Criminal Code**. The Court of Appeal allowed the appeal, set aside the convictions and ordered the entry of acquittals. The Court of Appeal found the convictions, on the whole of the evidence, were not convictions that a properly instructed trier of fact, acting judicially could reasonably have reached. The Court of Appeal also found the trial judge made errors of law in entering the convictions.

Authorities Cited:

CASES CONSIDERED: *R. v. Yebes*, [1987] 2 S.C.R. 168 (SCC); *R. v. S.(P.L.)*, [1991] 1 S.C.R. 909 (S.C.C.); *R. v. Biniaris*, [2000] 1 S.C.R. 474 (S.C.C.); *R. v. W.(R.)*, [1992] 2 S.C.R. 122 (S.C.C.); *R. v. Dunn* 2006 PESCAD 19; (2006), 211 C.C.C. (3d) 307 (PESCAD); *R. v. Galbraith* (1994), 30 C.R. (4th) 230; (1994), 90 C.C.C. (3d) 76 (Ont. C.A.); [1994] O.J. No. 808 (Ont.CA); *R. v. Audet*, [1996] 2 S.C.R. 171 (SCC); *R. v. Poncelet* 2008 BCSC 202; 2008 CarswellBC 333; *R. v. S. (P.)*, [1993] O.J. No. 704 (Ont. Ct. of Justice); *R. v. Sharma*, [1994] O.J. No. 3775(Ont. C.A.); See: *R. v. W.(D.)*, [1991] 1 S.C.R.742 (SCC); *R. v. G.H.B.* (1999), 182 Nfld. & P.E.I.R. 296; [1999] P.E.I.J. No. 101 (P.E.I.S.C.A..D.), followed in *R. v. Murphy* 2004 PESCTD 31; (2004), 237 Nfld. & P.E.I.R. 312; [2004] P.E.I.J. No. 34

STATUTES CONSIDERED: *Criminal Code of Canada*, R.S.C. 1985, C-46, s-s. 150.1(1); s.151, 152, s-ss.153(1), (1)(a) and (b), (2), (1.1), (1.1)(a), (1.2); s-ss.686(1)(a) and (b), (1)(a)(i); s.715.1

ARTICLES CONSIDERED:

Furguele, Andrew: "*The Self-Limiting Appellate Courts and Section 686*" (2007), 52 *The Criminal Law Quarterly*

Reasons for judgment:

McQUAID J.A.:

[1] The appellant is a female university student who, at all material times, was between 22 and 23 years of age. She was charged that while she was in an exploitative relationship with another female, who was 15 years of age at the time,

she touched that person for a sexual purpose and invited, **counselled** or incited that person to touch her for a sexual purpose contrary to ss.153(1)(a) and (b) as well as s.153(1.1)(a) of the **Criminal Code**. After a trial, the appellant was convicted on both counts by Douglas C.P.C.J. and sentenced to serve a term of five months imprisonment, concurrently, on each count. The appellant was also placed on probation for a period of 24 months following her release from prison.

[2] The appellant filed a notice of appeal from both the conviction and the sentence. The Crown filed a notice of cross-appeal from the sentence. The appellant was granted judicial interim release from custody pending the disposition of the appeal and the cross appeal.

The Background and the Evidence

[3] The trial comprised eight sitting days. The appellant testified in her own defence.

[4] I will provide an overview of the evidence at the outset of these reasons. Details of other evidence and comments on the evidence, which is considered relevant to the applicable ground of appeal, will be addressed in the analysis.

[5] For a six-month period between May 2005 and October 2005, the appellant served as an assistant coach of the complainant's Under 14 soccer team. She was an assistant to two male coaches, and it was recommended by the local association that she be involved as an assistant coach of this team. She had experience coaching in the local association and at the junior high school level. The appellant's younger sister, who was a close friend of the complainant at the time, was also a member of the team. As the result of her friendship with the appellant's sister, the complainant had known the appellant quite well for approximately two years prior to October 2005.

[6] The period of time encompassed by the charges against the appellant (between October 2006 and February 2007) is one year to sixteen months after the appellant served as the assistant soccer coach. As I will explain later, the period of time served by the appellant as an assistant coach of the complainant's team is one factor which is relevant to a consideration as to whether the complainant was in an exploitative relationship with the appellant; however, it is important to note that the charges do not relate to any criminal misconduct on the part of the appellant while she was an assistant coach.

[7] As set out in Appendix A to the Information filed in Provincial Court the charges were as follows:

Appendix "A"

... did, between the 19th of Oct. 2006 and the 17th day of Feb. A.D. 2007 at or near Charlottetown in Queens County, Province of Prince Edward Island, while being in a relationship with T.C.D., a young person, that was exploitive of T.C.D., for a sexual purpose, touch directly the body of T.C.D., with parts of her body to wit her hands and mouth, contrary to s. 153(1)(a) and 153 (1.1)(a) of the Criminal Code of Canada;

AND FURTHER between October 19, 2006 and February 17, 2007 at or near Charlottetown (South) in Queens County, Province of Prince Edward Island, while being in a relationship with T.C.D., a young person, that was exploitive of T.C.D., did for a sexual purpose invite, counsel or incite T.C.D., a young person, to touch directly with parts of her body to wit her hands and mouth the body of Jillian Anderson, contrary to ss.153(1)(b) and 153(1.1)(a) of the Criminal Code of Canada.

[8] Subsequent to the conclusion of the soccer season in October 2005, the appellant and the complainant continued to have contact with one another. The appellant has characterized the relationship as a friendship which grew during the time the appellant was the assistant soccer coach. The two talked frequently in person, by e-mail and by way of the electronic social networking tool known as "Facebook." The complainant has characterized the relationship as more than a friendship, explaining to her friends that she and the appellant "were going together." The appellant denied the friendship evolved to a romantic level.

[9] The appellant testified that in the summer or fall of 2005 the complainant confided in the appellant that she was being abused at home. The complainant denied she told the appellant of any abuse at home and furthermore, the complainant denied she was ever abused. The appellant, not knowing what to do with this information, informed her mother who counselled her to keep the information to herself as it may not be true and because the allegation was serious, the dissemination of an untruthful allegation could result in harm to the complainant's parents. There was some evidence from the complainant's friends that she had also complained to them of abuse at home.

[10] During the time the appellant served as the assistant soccer coach, the complainant's parents became concerned about the unusual amount of contact their daughter was having with the appellant. The appellant would spend time with the complainant and other members of the soccer team. There was no indication at this time there were any concerns expressed as to possible sexual activity. The complainant's parents spoke to the head coaches of the team as well as the manager and asked that they monitor the contact. On two occasions one of the coaches and

the manager had to remind the appellant that she was the coach and not to develop close friendships with any of the players, particularly, the complainant.

[11] In October 2005, the complainant's mother discovered a number of e-mails that had been exchanged between the appellant and the complainant between July 2005 and October 2005. She was concerned about the content of the e-mail messages particularly in light of the earlier concerns she and her husband were having with the amount of time the appellant and the complainant were spending together. The e-mail messages were brought to the attention of the complainant's father when he returned from a trip the same day. They were printed and the complainant was confronted with them. These e-mail messages were all entered as exhibits at trial by the Crown. See: Exhibits C-1 to C-25.

[12] On the basis of the content of the e-mails, the complainant's father immediately contacted the police department of the City of Charlottetown, the president of the local soccer association as well as the president of the provincial soccer association asking all of them to commence investigations into the conduct of the appellant in relation to the complainant. The complainant's parents also asked the Recreation Department of the City of Charlottetown to investigate the actions of the appellant as she had a part-time job working in the canteen of a local arena. The appellant was immediately suspended from her position; however, she was very shortly reinstated after that department concluded there was no wrongdoing. The police department similarly concluded that criminal charges were not warranted. Both the local soccer association and the provincial soccer association asked their national governing body, the Canadian Soccer Association, to undertake an investigation.

[13] An investigation was undertaken and a report made on behalf of the Canadian Soccer Association. It found that the appellant's conduct did not contravene the harassment policies of the Association. The complainant's father was unhappy with the report, and he again approached the president of the provincial soccer governing body and asked him to request the national body to conduct a further investigation. They agreed to do so. A second investigation was conducted and a report made on June 19, 2006. This report was introduced into evidence at trial by the appellant.

[14] The investigator, Mr. Ray Malone, the Harassment Prevention Officer for Prince Edward Island, was specifically tasked with determining whether the conduct of the appellant constituted harassment as defined by the "Canadian Soccer Association Harassment Policy." The investigator concluded it did not, while finding that one e-mail (September 27, 2005 Exhibit C-14) did cross the line of inappropriate conduct. He did not explain why it crossed that line.

[15] The e-mail cautions the complainant to read it in private. It is very personal as

to the appellant's friendship with another female friend. It does not have any sexual overtones nor does it suggest that the relationship of which she writes has a romantic component. It is the very private thoughts of the appellant, and no doubt thoughts which the investigator felt should not be shared by a coach, as part of her personal life, with a player. In his evidence on cross-examination, Mr. Malone stated that he did not consider the e-mail to have sexual overtones nor did he consider the e-mail as an invitation to engage in sexual relations. Generally, his view of all the emails were that they amounted to nothing more than "adolescent chatter."

[16] In the meantime, the appellant had made it known to the complainant that she did not wish to continue contact or communication. Despite the repeated requests of the appellant in this respect, the complainant persisted in her attempts to keep in contact with the appellant. In February 2006 and while the above investigations were being undertaken, the appellant and/or her father retained a lawyer, and they instructed him to advise the complainant to stay away from the appellant. The lawyer did so by providing the complainant with a letter advising her to stay away from the appellant.

[17] A number of additional e-mail messages were introduced into evidence (Exhibit D-10), and these illustrated that, despite the steps the appellant was taking to sever all contact, the complainant was continually asking the appellant to contact her. The appellant did not respond. The appellant changed her cell phone number and when confronted by the complainant, the appellant personally made it known to the complainant that she did not want to communicate.

[18] Subsequent to the events in October 2005 and the above investigations, the evidence, although conflicting, indicates there may have been some minimal contact between the appellant and the complainant by way of messages on Facebook. The evidence is uncontradicted that between March 2006 and September 2006 there was no contact. It resumed in September 2006 when the complainant called the appellant on her cell phone. It is not clear how she obtained the new number. They had a conversation about the past including the various investigations that had taken place.

[19] One week later, in September 2006, the complainant again called the appellant from a party she was attending. She wanted to talk and she asked the appellant to meet her. The appellant agreed to pick her up at the party. They went to a nearby park where according to the evidence of the appellant, the complainant again confided in the appellant that she was gay and afraid. The appellant advised the complainant to talk to her family and seek their advice. After receiving a phone call from a friend of the complainant, the appellant drove the complainant back to the party. There was no sexual conduct.

[20] The friendship resumed but unknown to the parents of both the complainant and the appellant. The appellant continued to be involved in soccer as a referee but the two did not have any contact in this capacity. When the complainant's soccer team was again returning to a national tournament in October 2006, she was chosen as one of the referees. The complainant's parents complained to the soccer association about the appellant's presence as a referee at this tournament despite the fact the appellant did not officiate any of the complainant's games.

[21] The complainant testified there were sexual relations between her and the appellant in October and November 2006. The complainant stated the sexual touching occurred at the appellant's apartment, at the home of a family where the complainant was babysitting as well as in the complainant's own home. According to the complainant, there were a number of different encounters all of which she said were consensual. The appellant denies sexual relations or sexual conduct of any kind with the complainant.

[22] Also, throughout this period of time the appellant and the complainant took great care to conceal from their parents the fact that they were in communication. The efforts to conceal the friendship was discussed openly with the complainant's friends who were present on many of the occasions that the appellant was in the company of complainant and who were aware that the communication between the two of them was not approved of by their respective parents.

[23] In February 2007 it came to the knowledge of the complainant's family that she and the appellant were again in contact. On February 15th the complainant's sister was informed the appellant had delivered flowers to the complainant at school the previous day, Valentine's Day. She was also informed the appellant had given the complainant a cell phone. The complainant's sister advised their mother of these developments and the mother in turn called the father. They located the complainant at the home of a friend. They took her home and confronted her with whether she was again having contact with the appellant. The complainant's mother was physical with her, pushing her on the head and ordering her to go to her room. The complainant spent the night at home and left for school the next morning, February 16th, with a friend. She did not return home from school that day.

[24] The evidence as to whether the appellant actually gave flowers to the complainant is conflicting. Another friend of the complainant, L.H., testified that she had a carnation delivered to the appellant at school on the same day, February 14th. L.H. was not attending school that day; however, after discovering she required some material from the school to complete a project, L.H. called the appellant asking her if she would drive her to the school. The appellant picked up L.H. and took her to the

school. When L.H. was in the school, she met the complainant who inquired as to how she was traveling and upon learning it was with the appellant, the complainant asked if they would give her a ride home.

[25] They went to the home of L.H. and subsequently the complainant was driven to her home by L.H.'s boyfriend. L.H. did not notice if the complainant was carrying the flower she had given her nor did she observe if the complainant was carrying other flowers. The complainant's father testified that he saw her return home on the 14th, and she told him that the flowers she was carrying had been given to her by a male friend.

[26] The appellant denies sending the complainant flowers and denies telling the police officer that she did. The officer was relatively sure, although not certain, in his evidence that she did admit to sending the flowers.

[27] In any event, the complainant did not return home on February 16th. She spent part of the night in the company of the appellant and another part of the night with her friend L.H. and the appellant. The next day on the urging of the appellant and after the appellant called the complainant's mother, the complainant returned home.

[28] The complainant's mother testified that at this time, February 17, 2007, the complainant disclosed to her that sexual activity had occurred between the complainant and the appellant at the home where she was babysitting, in her own home and at the appellant's apartment. The police were again called by the parents, and a series of video recorded statements were given by the complainant.

[29] On February 20, 2007, the complainant gave a statement to a police officer and a social worker. This statement was video recorded and admitted into evidence pursuant to the provisions of s.715.1 of the **Criminal Code**. In her statement, the complainant said there had been consensual activity between her and the appellant but she was unable to describe the nature of such activity. She did imply it was sexual in nature but she refused to provide details. She also related the evolution of their friendship beginning with her friendship with the appellant's sister.

[30] On March 16, 2007, the complainant made another video recorded statement conducted in the presence of two police officers. The corporal who conducted the interview testified there were technical difficulties with the recording which he says only became apparent after the interview was complete. This resulted in no recording being made. Arrangements were made with the complainant and her father, to provide another statement the following day.

[31] The corporal who conducted the interview testified that before he met the complainant to conduct the interview on March 17, 2007, the complainant's father delivered to him a journal kept by the complainant and which contained the details of the sexual relations between her and the appellant, including the dates on which such activity took place. The complainant testified that the corporal had the journal at the interview the day before; however, this is contrary to the corporal's evidence that he received the journal from the complainant's father just before the interview on March 17th.

[32] The journal was used extensively by the corporal to conduct the interview as were some of his notes from the first interview which notes were never disclosed to the appellant's counsel. The complainant's journal was entered as an exhibit at trial but only for identification, and thus it is not available for review by this court. The complainant was cross-examined by appellant's counsel on the contents of the journal, and from this cross-examination, it is possible to discern some of the information contained within it.

[33] The police officer who conducted the two interviews testified initially in his evidence that the complainant was nervous on the 16th and reluctant in describing the details of what took place. On the other hand, he also stated that on the 16th the complainant was more forthcoming than she was on the 17th.

[34] Regardless, there is no question that the first occasion upon which the complainant described the details of the sexual activity was in the interview of March 17th. The complainant also related in this statement the nature of the relationship with the appellant and the manner in which the appellant exerted control and influence over her. She stated that she had to call her every day. The appellant wanted to know where she was every minute of every day, and the appellant would be upset if the complainant was with a male friend. The complainant also stated that if she didn't the appellant would be mad and upset at her. She also stated in this statement that the appellant gave her a pink cell phone on Valentine's Day, February 2007.

[35] This video recorded statement was also introduced and accepted into evidence by the trial judge pursuant to the provisions of s. 715.1 of the **Criminal Code**. Shortly after this statement was taken by the police, charges under the **Criminal Code** were filed against the appellant.

Grounds of Appeal

[36] There are fourteen grounds of appeal set forth in the appellant's "Amended Supplementary Notice of Appeal." The appeal can be decided on two of these

grounds of appeal: first, whether the trial judge delivered a verdict which was unreasonable or unsupported by the evidence; second, whether the trial judge made errors on questions of law when entering the conviction.

Disposition

[37] I would allow the appeal, quash the convictions and direct that an acquittal be entered.

Analysis

(i) Standard of review

[38] Pursuant to s.686(1)(a)(i) of the ***Criminal Code*** on an appeal from a conviction, the court of appeal may set aside a conviction on the ground that it is unreasonable or cannot be supported by the evidence. Furthermore, where the conviction is entered on the basis of an error on a question of law, the court of appeal may also set it aside. Sections 686(1)(a) and (b) of the ***Criminal Code*** provide as follows:

686.(1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice;
- (b) may dismiss the appeal where
 - (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
 - (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph

(a),

- (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
- (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

[39] Generally, the test to be applied by the Court of Appeal in considering an appeal from a conviction, pursuant to the provisions of s. 686(1)(a)(i) of the **Code** is to determine whether, on the whole of the evidence, the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have reached. The function of this court goes beyond merely finding that there is evidence to support the conviction. While the court of appeal is not to substitute its view for that of the trier of fact, in order to properly apply the test the court must re-examine and to some extent re-weigh and consider the effect of the evidence. See: **R. v. Yebes**, [1987] 2 S.C.R. 168.

[40] In **R. v. S.(P.L.)**, [1991] 1 S.C.R. 909 (S.C.C.), Sopinka J. summarized the test and the role of the court in considering an appeal brought pursuant to s.686(1)(a)(i) of the **Criminal Code**. He stated at para. 7:

- [7] In an appeal founded on s. 686(1)(a)(i) the court is engaged in a review of the facts. The role of the Court of Appeal is to determine whether on the facts that were before the trier of fact a jury properly instructed and acting reasonably could convict. The court reviews the evidence that was before the trier of fact and after re-examining and, to some extent, reweighing the evidence, determines whether it meets the test. See: **R. v. Yebes**, [1987] 2 S.C.R. 168 ...

[41] Where the appeal is from a conviction entered by the trial judge sitting without a jury, the court of appeal should identify the defects in the trial judge's analysis that led to the unreasonable conclusion. It is not sufficient to interfere or find the verdict unreasonable on the basis of a lurking or lingering doubt without providing the basis for the doubt. The court must articulate the basis for finding the verdict unreasonable. See: **R. v. Biniaris**, [2000] 1 S.C.R. 474 (S.C.C.).

[42] The rule as to the scope of the court's power of review provided for in s.

686(1)(a)(i) enunciated in **R. v. Yebes** and confirmed in **R. v. Biniaris** applies to verdicts based on findings of credibility except that the court should show a significant degree of deference to the trial judge's findings of credibility. However, after considering and reviewing all the evidence with due regard to the trial judge's unique position to see and hear the witnesses, the court of appeal may interfere with the assessment on credibility, if it concludes the verdict is unreasonable. See: **R. v. W.(R.)**, [1992] 2 S.C.R. 122 (S.C.C.) at para. 20.

[43] In **R. v. Dunn** 2006 PESCAD 19; (2006), 211 C.C.C. (3d) 307 at para. 37, Mitchell C.J.P.E.I. summarized the scope of an appeal court's review powers under s. 686 of the **Code** in the following manner:

It is trite law that an appellate court should not readily interfere with a trial judge's assessment of the evidence. A mere difference of opinion with the trial judge is certainly not grounds for appellate intervention. Unless it finds the verdict unreasonable an appeal court cannot interfere however much it disagrees with the conclusion reached by the trial judge. See: **R. v. Gagnon**, 2006 SCC 17 (CanLII), [2006] S.C.J. No. 17; 2006 SCC 17. It is only where the appeal court has considered all of the evidence and determined that a conviction cannot reasonably be supported that it can intervene to set aside the verdict. See: **R. v. Burke**, 1996 CanLII 229 (S.C.C.), [1996] 1 S.C.R. 474 at para four. **While this power given to the court of appeal pursuant to s. 686(1)(a)(i) of the Criminal Code should be exercised sparingly an appellate court should not shrink from using it where after carrying out its statutory duty it concludes the conviction rests on shaky ground and that it would not be safe to maintain it.** See: **Burke** at para six. (My emphasis).

[44] In summary, a court of appeal in accordance with the powers conferred upon it by s. 686(1)(a)(i), has the jurisdiction to consider the effect of the evidence but not the jurisdiction to substitute its findings of fact over those of the trial judge. If the court of appeal finds that the effect of the evidence, considered cumulatively and in its totality, produces a verdict which is ". . . illogical, or speculative or inconsistent with the main body of evidence . . .", the court of appeal may intervene. On the other hand if there is ". . . a plausible link between the evidence and the finding of guilt . . .," the court of appeal does not have the jurisdiction to intervene. See: Furguele, Andrew: "**The Self-Limiting Appellate Courts and Section 686**" (2007), 52 The Criminal Law Quarterly, p. 237 at p. 240.

[45] It is also important to note here that the appellant's notice of appeal is not grounded on the insufficiency of the trial judge's reasons thereby resulting in an error of law. The appeal is grounded instead on the appellant's position that the reasons of the trial judge demonstrate an error in the manner in which he weighed the evidence in relation to the elements of the offence. This, the appellant argues resulted in other

errors of law as well as an unreasonable verdict or one which was not supported by the evidence.

[46] The trial judge's verdict is not one which a properly instructed trier of fact, acting judicially, could reasonably have reached. Furthermore, it is a verdict reached on the basis of a wrong decision on a question of law. What follows are my reasons for so concluding.

(ii) Applicable law

[47] Section 153(1), (1.1) & (1.2) of the *Criminal Code* provides as follows:

153.(1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who

- (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
- (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

(1.1) Every person who commits an offence under subsection (1)

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; or
- (b) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

(1.2) A judge may infer that a person is in a relationship with a young person that is exploitative of the young person from the nature and circumstances of the relationship, including

- (a) the age of the young person;
- (b) the age difference between the person and the young person;

- (c) the evolution of the relationship; and
- (d) the degree of control or influence by the person over the young person.

[48] At the time of charges against the appellant, “young person” was defined in s.153(2) of the **Code** as a person age 14 or more, but under the age of 18. Section 153 of the **Criminal Code** is one of three sections which created offences respecting sexual relations with children, separate and apart from an offence of sexual assault. Sections 151 (“sexual interference”) and 152 (“invitation to sexual touching”) addressed sexual conduct with children under the age of fourteen years, while s. 153 addressed similar sexual conduct with young persons between the ages of 14 and 17. In 2008 the **Criminal Code** was amended to provide that the applicable age in sections 151 and 152 was 16 and the applicable ages in s. 153 was now between 16 and 17. Accordingly, a “young person” is presently defined in s. 153(2) as a person 16 years of age or more, but under the age of 18.

[49] As will be noted from the wording of the Information set forth in para.7 of these reasons, the appellant was charged that she was in a relationship with the complainant “. . . that was exploitative . . . ” of the complainant, a “young person” within the meaning of the section and while in that relationship the appellant is alleged to have touched the complainant for a sexual purpose and to have, incited, counselled or invited the complainant to touch her for a sexual purpose. While the complainant testified she had consented to the sexual touching, the appellant was unable to avail herself of this consent as a defence to the charges. Section 150.1(1) of the **Criminal Code** provides that when an accused is charged with an offence under s. 153(1), it is not a defence to the charge that the “young person” may have consented to the sexual touching or to the other sexual activity described.

[50] The Crown had the burden of proving the offences beyond a reasonable doubt. There are three elements to the offence under s. 153(1) and (1.1) of the **Criminal Code**. They are: (1) that the accused was in a relationship with the young person which was exploitative of the young person; (2) that, for a sexual purpose, the accused touched the young person or invited, counselled or incited touching for the same purpose; and (3) that the complainant was a “young person” within the definition provided in the section.

[51] There is no issue on this appeal, nor was it an issue at trial, that the complainant was a “young person” as defined by s. 153(2) of the **Code** as it read at the time of the alleged offences and before it was amended in 2008. The complainant was more than fourteen years of age and less than eighteen years of age at the time of

the alleged offences. Therefore, the elements of the offence which were in issue at trial and are therefore under review on this appeal were: (i) whether the relationship was exploitative of the complainant, and (ii) whether there was sexual activity as described in s. 153(1)(a) and (b).

[52] At the times alleged in the Information, a 22 to 23-year-old female did not commit a criminal offence by engaging in consensual sexual conduct with a 15-year-old female unless the sexual conduct took place within one of the relationships set forth in s. 153(1) of the **Criminal Code**. As previously stated, if the sexual conduct described in s.153(1)(a) and (b) took place within one of the relationships set forth in s. 153(1), the conduct is criminal, regardless of whether the younger female provided her consent. See: s. 150.1(1) of the **Criminal Code**.

[53] The prohibited relationships provided for in s. 153(1) are those where the accused is in a position of trust or authority vis-a-vis the young person, a relationship where the young person is in a position of dependency vis-a-vis the accused and finally, where the relationship between the two is found to be exploitative of the young person. The existence of these relationships have been termed conditions which disentitle any person to sexual contact with a young person of the kind described in s.153(1)(a) and (b) of the **Code**. The disentitling conditions must be proven, independent of the sexual conduct. See: **R. v. Galbraith** (1994), 30 C.R. (4th) 230; (1994), 90 C.C.C. (3d) 76 (Ont. C.A.); [1994] O.J. No. 808 at paras. 13 and 14.

[54] Because the allegation in this case is that the appellant was in a relationship with the complainant which was exploitative of the complainant, the Crown had the burden of proving beyond a reasonable doubt that such a relationship existed. Furthermore, independent of proving that element of the offence the Crown also had the burden of proving beyond a reasonable doubt there was sexual activity between the two as alleged in the Information.

[55] The type of relationship termed “exploitative of the young person” was added to s. 153(1) of the **Criminal Code** by an amendment in 2005. Bill C-2 “**An Act To Amend The Criminal Code**” was enacted June 9, 2005. Prior to that date the types of relationships referred to in s.153(1) were those where the accused was in a position of trust or authority and where the young person was in a position of dependency vis-a-vis the accused. The terms, “trust,” authority,” “dependency” and “exploitative” are not defined in the **Criminal Code**.

[56] A “relationship of dependency” was considered in **R. v. Galbraith, supra**. At the time of that decision, the relationship of dependency had recently been added to s. 153(1). The Ontario Court of Appeal concluded that a relationship of dependency was one where there was *de facto* reliance by the young person on the accused who

had assumed a position in relation to the young person which created a power imbalance in favour of the accused.

[57] In **R. v. Galbraith** the accused was a 27-year-old male and the complainant was a fourteen-year-old female who had run away from home and taken up residence with the accused, a residence he was sharing with other individuals. The complainant made it clear in her evidence that if she had not been living with the accused, she would not have returned home because she did not get along with her mother and her stepfather. The accused provided the complainant with food and also gave her money and a ring. The two had consensual sexual relations on a daily basis over a two-month period of time. The complainant testified that she did not feel pressured into the sexual relationship. The court of appeal found there was no relationship of dependency.

[58] Finlayson J.A., writing for the court, concluded that the intention of Parliament in adding the relationship of dependency to s. 153(1) was to extend the classes of relationship to those where there was dependency by the young person on the accused, even though the latter may not have been in a position of trust or authority vis a vis the former. At the same time Finlayson J.A. concluded that the scope of the relationship of dependency was *ejusdem generis* the types of relationship which were in the section at that time, that is those relationships where the accused was in a position of trust or authority vis-a-vis the young person. Based on the statutory interpretation principle of *ejusdem generis*, Finlayson J.A. was of the view that the scope of a relationship of dependency was set by the legal definition of trust and authority. In other words, the dependency of the young person must be such that the accused had assumed a position of power or authority over the young person. At para. 18 Finlayson J.A. stated as follows:

In my view, "relationship of dependency," the third prohibited relationship in s. 153 of the Code, must be looked at with reference to the other two prohibited relationships, namely positions of trust or authority. My first thought was that "dependency" was the inverse of the other two relationships and described the position of the person subject to feelings of trust or the object of the authority. On reflection, however, it seems to me that Parliament, by using the word "dependency," must have added a category which is *ejusdem generis* to the first two. That is to say, something that was an extension of the first two categories which have become somewhat circumscribed by traditional legal definition. In my view, what is contemplated by a relationship of dependency is a relationship in which there is a de facto reliance by a young person on a figure who has assumed a position of power, such as trust or authority, over the young person along non-traditional lines. Sexual relations are prohibited in relationships of trust, authority and dependency because the nature of the relationship makes the young person particularly vulnerable to the influence of the other person. Under these circumstances it has been determined that any sexual activity,

even where it is consensual, involves taking advantage of a person in need of protection and merits society's condemnation. Because a relationship of dependency is a de facto one which can only be determined after due consideration of all the circumstances, I believe that the jurisprudence will have to develop on a case-by-case basis to retain the flexibility that the phrase "relationship of dependency" was intended to provide.

[59] In **R. v. Audet**, [1996] 2 S.C.R. 171 (SCC) at paras 37 and 38, the Court considered when an accused might be in a relationship that is grounded on a position of trust or authority. In that case the accused was a teacher and the young person a student. The sexual activity took place in the summer and not while there was a formal teacher-student relationship; however, the student-teacher relationship would be resuming when the school year recommenced. Writing for the majority, La Forest J. made it clear that the position of the accused as the teacher did not automatically place him in a position of trust or authority. La Forest J. went on to decide that the factors to be taken into account in determining whether the accused was in a position of trust or authority were dependent on the circumstances of each case. He did note, however, that the age difference between the accused person and the young person, the evolution of the relationship and the status of the accused in relation to the young person would all be factors relevant to deciding whether a person was in a position of trust or authority.

[60] In **R. v. Poncelet** 2008 BCSC 202; 2008 CarswellBC 333, the Crown alleged the accused was in a position of trust **in relation to** the young person. Specifically, the issue was whether the accused, a 41-year-old male, was in position of trust **in** his relationship with a 15-year-old female with whom he had consensual sexual relations. The accused was a cowboy who trained the young person to rope and ride horses. He was described as her teacher and mentor. The relationship commenced when the complainant was taking riding and roping lessons from the spouse of the accused. After the instruction ended, the sexual activity continued. The young person worked part-time with the accused and she testified that she found the accused to be attractive, he was respectful of her and she enjoyed the sexual relations. Their friendship also continued for some time after the sexual activity between them had ended.

[61] In **R. v. Poncelet, supra** the trial judge approached the determination as to whether there was a trust relationship from the perspective of assessing whether there existed a power imbalance between the young person and the accused. He concluded that, subjectively, the young person did not feel a power imbalance. He also considered the relationship from an objective perspective. Considering that the age difference, alone, was not determinative of a finding of a power imbalance, the trial judge considered the relationship to have evolved mutually with no coercion or pressure by the accused to engage the young person in sexual relations. Finally, the

trial judge found there was no manipulation on the part of the accused. The parties had many opportunities to be alone on their own volition and all with the knowledge of the young person's parents and with her consent. See: paras. 56 - 61.

[62] In **R. v. S. (P.)**, [1993] O.J. No. 704 (Ont. Ct. of Justice) Blair J. considered a relationship where the accused was alleged to be in a position of trust vis-a-vis the young person. He noted that a "position of authority" invoked the notion of a power imbalance and the ability to control the person who is the object of the authority. He stated that a position of trust may, but need not, possess this characteristic because a position of trust is "... founded on notions of safety and confidence and reliability that the special nature of the relationship will not be breached." Specifically Blair J. stated at paras. 36 and 37 as follows:

[36] One needs to keep in mind that what is in question is not the specialized concept of the law of equity, called a "trust". What is in question is a broader social or societal relationship between two people, an adult and a young person. "Trust," according to the Concise Oxford Dictionary (8th ed.), is simply "a firm belief in the reliability or truth or strength of a person." Where the nature of the relationship between an adult and a young person is such that it creates an opportunity for all of the persuasive and influencing factors which adults hold over children and young persons to come into play, and the child or young person is particularly vulnerable to the sway of these factors, the adult is in a position where those concepts of reliability and truth and strength are put to the test. Taken together, all of these factors combine to create a "position of trust" towards the young person.

[37] I take a "position of trust" to be somewhat different than a "position of authority." The latter invokes notions of power and the ability to hold in one's hands the future or destiny of the person who is the object of the exercise of the authority: see, **R. v. Kyle** (1991), 68 C.C.C. (3d) 286 (Ont. C.A.). A position of trust may, but need not necessarily, incorporate those characteristics. It is founded on notions of safety and confidence and reliability that the special nature of the relationship will not be breached.

Affirmed on appeal see: **R. v. Sharma**, [1994] O.J. No. 3775 (Ont. C.A.).

[63] The court was not referred to any previous cases nor was the court able to find any judicial authority which considered an offence under s.153(1) where the accused was charged on the basis that there existed a relationship that was exploitative of a young person, separate and apart from any relationship based on trust, authority or dependency. The offence created by s. 153 has always been known, even before the amendment in 2005, as the offence of "sexual exploitation." This is so because, when the relationship and the prohibited sexual conduct are both proven

independent of each other, the accused person has exploited the young person for a sexual purpose.

[64] In the same way it is necessary for the Crown to prove the existence of a relationship of trust, authority or dependency independent of the proof of any sexual conduct, it is necessary for the Crown to prove a relationship which is exploitative of the young person independent of the proof of the sexual conduct. As I stated above, consent is not a defence to an offence of "exploitation" under s. 153(1) of the **Criminal Code**. Therefore, to conclude that proof of consensual sexual conduct between an accused and a person over 14 (now age 16) but under the age eighteen constitutes proof of a relationship which is exploitative of the young person, would be, in effect, to conclude that consensual sexual conduct as described s.153(1)(a) and (b) with a person under the age of 18, is an offence. If it was the intention of Parliament to raise the age of a minor's consent to age 18, it could have accomplished this in a more straightforward manner when it amended sections 151, 152 and 153 of the **Code** as recently as last year. Parliament could simply have amended sections 151 and 152 to read 18 years rather than 16 years and then repealed s. 153 as it would be redundant. It was clearly not the intention of Parliament to raise the age of consent to 18 years. Proof of consensual sexual relations between an accused and a young person is not by itself proof of a relationship that was exploitative of the young person.

[65] Based on the wording of the information, the Crown realized at the outset that the relationship between the appellant and the complainant could not be said to be one where the appellant was in a position of trust or authority nor was it a relationship in which the complainant was dependent on the appellant. The appellant had ceased coaching the complainant's soccer team some 16 months to 2 years before the time of the offences as alleged in the Information. Also, because the complainant was over the age of fourteen at the time there was no basis for a charge under either ss. 151 or 152 of the **Criminal Code**.

[66] Therefore the issue to be resolved is what is meant by a relationship that is "exploitative of the young person."

[67] The terms "authority", "trust", "dependency" or "exploitative" are not defined in the **Criminal Code**. Parliament has directed, however, by the provisions of s. 153(1.2) of the **Code** that a judge may infer an accused is in a position which is exploitative of the young person from the nature and circumstances of the relationship including: (i) the age of the young person; (ii) the age difference between the young person and the accused; (iii) the evolution of the relationship; and (iv) the degree of control or influence by the accused over the young person. In considering the nature and circumstances of the relationship, including the four circumstances

specifically mentioned, what is the judge or the court looking for? In the same way, for example, that Blair J. defined the meaning of a relationship of trust in **R. v. S. (P.)** a judge or the court must determine the meaning of an exploitative relationship before considering whether the nature and circumstances of a particular relationship is, in fact, one which is exploitative of the young person.

[68] Given that the term “exploitative” is not defined in the **Criminal Code** assistance in determining the meaning may be sought from the dictionary meaning. **Black’s Law Dictionary 8th ed.** defines “exploitation” as the act of taking unfair advantage of another for one’s own benefit. Based on this dictionary meaning an exploitative relationship is one where the accused takes unfair advantage of the young person for the accused’s own benefit.

[69] The dictionary meaning of “exploitative” may not be sufficient in itself to ascertain the type of relationship Parliament intended to include when it made the amendment to s. 153 in 2005. The section sets out certain relationships between an accused and a young person more than 14 years old and less than 18 years old (presently 16 and 18) which have been deemed by Parliament to be special such that sexual conduct with the young person within that relationship is absolutely prohibited. I agree with the reasoning in **R. v. Galbraith** that the scope of the meaning of an exploitative relationship should be determined to some extent by the scope of the other types of relationships set forth in the section.

[70] Additional principles of statutory interpretation direct, however, that by the addition of this type of relationship Parliament intended to include a relationship which was not previously included within those that came before. The rules of statutory interpretation also direct the court to assume that Parliament did not intend to repeat what was already in the section but only in different words. Furthermore, the court or a judge is entitled to assume that Parliament had some specific purpose in mind when it expanded the special types of relationships where sexual contact with the young person is prohibited.

[71] In the cases which I have noted, courts have considered the characteristics of the relationships of trust, authority and dependency which preceded that of “exploitative” in this special class of relationships. In defining or describing these other types of relationships, courts have been consistent in holding there must be a power imbalance in the relationship that places the young person in a vulnerable situation thereby rendering meaningless any consent he or she may give to sexual activity. Therefore, a relationship exploitative of the young person appears to have been included in this special class of relationships with the intention of adding to the section a relationship where there was a power imbalance in favour of an accused person but not a power imbalance that would arise from a relationship where the

accused was in a position of trust or authority or a relationship where the young person was in a position of dependency. Whether or not there was a power imbalance is to be determined from all the circumstances of the relationship and the trial judge may infer it from the particular circumstances set forth in s.152(1.2) of the **Code**.

[72] The first three of these circumstances were set forth by the Supreme Court of Canada in **R. v. Audet, supra** at para. 38 to assist in the determination as to whether an accused was in a position of trust or authority vis-a-vis the young person. Of note is the addition of the fourth factor, "the degree of control or influence by the accused over the young person." This is a circumstance consistent with the elements the courts have found in the past to have been necessary when the relationship is alleged to have been one based on trust or authority. The inclusion of this as a circumstance upon which to base an inference that the relationship may have been exploitative of the young person is further indication of the importance of the requirement there be demonstrated a power imbalance between the accused and the young person.

[73] Indeed in all the types of relationship referred to among that special class of relationship set forth in s. 153(1), the courts have found that the nature of the relationship is such that the young person is the subject to the influence of the accused. This influence may be exerted simply by reason of the accused's position of authority or trust and, as well, by placing the young person in one's dependency.

[74] I consider an exploitative relationship to exist where there is a power imbalance between the accused and the younger person in circumstances other than where the accused is in a position of trust or authority or circumstances where the young person has developed a reliance on the accused who has assumed a position of power over the young person. The evidence must demonstrate or, it must be possible for the court to draw the inference from all the circumstances of the relationship and in particular those factors listed in s. 153(1.2) that the young person is, as the result of this power imbalance, vulnerable to the actions and conduct of the accused who is taking advantage of the young person for his or her own benefit.

(iii) Application of the law to the evidence of exploitative relationship

[75] Proof that there existed a relationship that was exploitative of the complainant is a question of fact and an essential element of an offence contrary to s. 153(1)(a) of the **Criminal Code**. The trial judge was entitled to draw an inference from all the circumstances surrounding the relationship including the four factors set forth in s. 153(1.2). The role of this court is to assess all the evidence and determine if the trial judge's verdict was one which a properly instructed trier of fact, acting judicially, could reasonably have reached. This court does not have the jurisdiction to substitute

its view of the facts to those of the trial judge; however, the court cannot avoid the statutory duty it has to review and assess the evidence thereby ensuring the trial judge's verdict is safe to maintain.

[76] First, I will address the age of the complainant and the age difference between her and the appellant. The complainant was age 15 within the time frame of the offences set forth in the Information. The appellant was age 22 and she turned 23 within the same time frame. When the friendship between them commenced the appellant was 21 and the complainant was 14. The age difference between the two is slightly greater than seven years - seven years and two months to be precise.

[77] The trial judge addressed the age of the complainant as well as the age difference between her and the appellant; however, he reached no conclusion or gave any indication how their respective ages and the age difference of slightly more than seven years was evidence which would assist him in drawing the inference that the relationship was exploitative of the complainant.

[78] At the time, the complainant was of an age that she could consent to sexual relations with the appellant without the latter committing a criminal offence. Age difference alone is insufficient to draw the inference of an exploitive relationship. An age difference of seven years is not presumptive of, or the basis upon which, one can draw the inference that there existed a power imbalance which would render the complainant incapable of providing her consent. Similarly, I stress that because the complainant was of an age where a person could engage in consensual sexual relations with her without criminal sanction, it should not be assumed such a relationship, considering all the other circumstances, might not be exploitative. However, the smaller the age differential between an accused and a complainant less bright is the line between the apparent exploitation by an accused and the degree to which a complainant may be vulnerable to the conduct of the accused. The trial judge did not give any indication that the age of the complainant and the age difference of slightly more than seven years were factors which assisted him in the circumstances of this case in drawing the inference that the relationship between the two was exploitative of the complainant. In this case the evidence of the age difference alone would not support drawing an inference that the relationship was exploitative of the complainant.

[79] The next circumstantial factor is the evolution of the relationship. The trial judge considered the evolution of the relationship beginning with the appellant's time as the complainant's assistant soccer coach in the summer of 2005. Again, I note and emphasize the appellant is not charged with being in a relationship founded on her position as an assistant soccer coach and thus she is not charged as a person in a position of trust or authority. Her position as an assistant coach of the complainant's

team is, however, relevant to a consideration of the evolution of the relationship.

[80] There is no evidence that any inappropriate conduct and certainly no criminal conduct occurred during the time the player-coach relationship existed. Two independent investigations conducted on behalf of the Canadian Soccer Association, as well as a police investigation, found no wrong doing on the part of the appellant as a soccer coach. The second of the above investigations did find that one e-mail message sent by the appellant to the complainant was inappropriate. The trial judge did not place any weight on the outcome of these investigations or on the evidence of Mr. Malone, one of the investigators. Even though these investigations did not adjudicate on criminal wrongdoing they were relevant to the issue of the evolution of a relationship which is alleged to be contrary to the ***Criminal Code***.

[81] The trial judge noted in the first paragraph of his reasons that the player-coach relationship had ended more than a year before the time frame of the Information. He also noted that the player-coach relationship was to be considered in the context of the evolution of the entire relationship between the appellant and the complainant. However, the trial judge did not assess the evidence of the player-coach relationship from the perspective of whether it supported the inference that the appellant's continuing relationship with the complainant was exploitative of the complainant.

[82] Viewed objectively there was no evidence the appellant used this relationship as a launching pad to manipulate the complainant in the future thereby contributing to the evolution of a relationship that effectively brought the complainant under her control and made the complainant vulnerable to actions of the appellant. The second investigation conducted by Mr. Malone on behalf of the soccer association specifically found that the appellant did not use her position as coach to "groom" the complainant. Mr. Malone's investigation concluded there was no evidence the appellant attempted to gain the trust of the complainant for purposes of the appellant's sexual benefit at some time in the future. No such evidence was adduced at trial.

[83] The relationship between the appellant and the complainant began before the player-coach relationship. It arose from the complainant's friendship with the appellant's sister. The evidence is clear that the appellant, in her capacity as an assistant coach, developed a friendship with all the players on the team, exchanging e-mails with them on subjects other than soccer as well as providing them with transportation and running other errands for them. These relationships continued after she ceased being their soccer coach. The evidence demonstrates that the appellant also had contact with the complainant's friends who were also members of the team. The complainant frequently saw the appellant in the company of her friends when they were calling upon her to bring them food, drive them to various

events, hang out at her apartment and without the appellant's permission, drink the alcohol they found at the appellant's apartment.

[84] The trial judge inferred from the e-mails that the appellant was cultivating a manipulative relationship with the complainant when in fact they were as Mr. Malone described nothing more than adolescent chatter and all sent in response to the complainant's messages. The trial judge gave too much weight to the e-mail messages in drawing the inference from them that they were indicative of a relationship which was sexual in nature and exploitative of the complainant. He overlooked the evidence of Mr. Malone who found the messages did not constitute harassment and only crossed the line of "inappropriate conduct" on the part of a coach in her communication with a player. He also overlooked the evidence of e-mail messages or Facebook postings exchanged between the complainant, her friends and another soccer coach of the same age as the appellant, who coached essentially the same team, at another age level, in 2007. See: Exhibit D-1. These messages contain some of the same language as the messages exchanged between the complainant and the appellant, further lending credibility to Mr. Malone's assessment that the messages were nothing more than adolescent chatter.

[85] The relationship/friendship had grown to the point where not only was it a concern to the complainant and her parents but as well, to the appellant and her parents. The appellant attempted to cease all contact with the complainant, despite the complainant's best efforts to keep the relationship in tact. After a period of six months during which there was no contact, the friendship was resumed only after the complainant finally made contact with the appellant and confided in her that she had questions as to her sexual identity. The trial judge did not consider any of this evidence in assessing whether, from the evolution of the relationship, he could infer it was one which was exploitative of the complainant. It was relevant to a consideration of whether the relationship was exploitative of the complainant to have considered that on the insistence of the appellant it ceased and resumed only upon the strong insistence of the complainant.

[86] The fourth factor which the court is instructed to consider in determining whether the circumstances surrounding the relationship supports the inference of an exploitative relationship is "the degree of control or influence over the young person." By his own admission the trial judge did not refer to any evidence that the appellant exerted control or influence over the complainant. At p. 20 lines 12 - 23, of the transcript of proceedings at trial on October 15, 2007 the trial judge stated:

When I was discussing whether the relationship was exploitive (sic), one of the factors to consider is the degree of control that may be exercised. I didn't refer to a lot of this, although it's very relevant because the point I was trying to make was even if I accepted the version of Ms. Anderson

alone, I consider the relationship to be exploitive. The statements by Ms. Anderson testified to by the others of what she was risking for T., that aspect of the relationship certainly is indicative of an exploitive - is relevant on the issue of an exploitive relationship or not.

[87] The trial judge concedes he did not consider evidence of influence and control exerted by the appellant and, without referring to such evidence, he reached the conclusion that the relationship was exploitive, even if he were to accept the evidence of the appellant, which he had previously rejected. With respect, this is circular reasoning. The **Criminal Code** directs that evidence of influence and control, in the context of all the circumstances surrounding the relationship, is a fact upon which the court can infer the relationship was exploitive. It was an error in law for the trial judge to embark upon a reasoning process, the starting point of which was the premise that the relationship was exploitive, and then arrive at a conclusion that because the relationship was exploitive of the complainant, there must have been influence and control exerted by the appellant.

[88] When the complainant was away from home overnight in February 2007, she spent time with the appellant but she was also in the company of both another friend and the appellant. The appellant attempted to convince her to return home and indeed her return home was facilitated when the appellant telephoned the complainant's mother to say she was going to take the complainant home. This is not evidence of the actions and conduct of a person who was exerting control and influence over the complainant for her own benefit. Like other instances where the appellant counseled the complainant to speak to her family about the crisis which the complainant stated she was having with her sexual identity, the appellant appeared to be caring for the well being of the complainant as opposed to attempting to take advantage of her. This evidence was overlooked by the trial judge. Indeed, it was evidence the appellant was attempting to assist the complainant in addressing the problems confronting her at home and in her life.

[89] The trial judge found the complainant suffered "...very obvious emotional damage as a result of this relationship...". There was evidence from the complainant's parents that the complainant was emotionally upset at various times; however, there was no evidence that her emotional state was caused by the relationship she had with the appellant. To the contrary, there was evidence the complainant had seen at least five counsellors after the relationship ended. At the time of the trial she had continued consultations with only one of them. None of the counsellors were called to give evidence as to the effect of the relationship on the complainant. It is only speculation as to why the complainant was emotionally upset when she was confronted with certain information by her parents, when she gave statements to the police and when she appeared at the trial. There were the many investigations, there was disagreement with her parents and there was stress of the trial itself. In the

absence of evidence that the complainant was emotionally affected in a detrimental way by the relationship, the trial judge erred in finding that the relationship had a negative emotional impact on the complainant, and relying upon that finding to infer the relationship was exploitative of the complainant.

[90] A complete review and assessment of the evidence reveals there is no evidence of influence and control exerted by the appellant over the complainant. The complainant stated in her evidence, by way of the statement given to the police, that she had to call the appellant every day and that the appellant would be mad at her if she did not call and if she was with boys. This is contrary to all the evidence which indicates that the complainant initiated much of the contact whether it was by e-mail or telephone conversation a fact specifically found by the trial judge. Considered objectively the evidence does not support a conclusion that the appellant exerted control or influence over the complainant. To the contrary, the evidence discloses the appellant would very willingly respond to the requests of not only the complainant but, as well, all her friends who were former players on the soccer team. There is no question the complainant had a great need to confide in the appellant and to be around the appellant. It is not the role of the court to speculate why this might have been; however, it is the role of the court to determine if there is evidence that this need was generated by the manipulative action on the part of the appellant. If there was such evidence, then the court could draw the inference that the complainant's need to be around the appellant was exploitative of the complainant. On the other hand, the evidence discloses it was a friendship which, despite their age difference, both of them wanted while at the same time knowing it was not one that their parents approved of. It was not a friendship or a relationship fostered by the manipulative actions of the appellant for her own benefit but rather one which arose from the complainant's need to be with and confide in a young woman almost seven years her senior.

[91] The trial judge also made errors of law when considering whether the relationship between the appellant and the complainant was one that was exploitative of the complainant.

[92] The trial judge considered the conduct of the appellant in relation to why she maintained and resumed contact with the complainant. He noted the appellant's testimony that the complainant had confided in her that she was being abused at home and that she was having trouble dealing with her sexual identity. He further noted the appellant's explanation that she continued to communicate with the complainant to try to help her and talk her through these issues, at all times advising the complainant she should speak to her family or some other adult concerning the difficulty she was having with these issues. The trial judge did not accept the explanation; however, he went on to state that even if he did accept it, he had "...

great difficulty with the reasons she has given for her motivation to conduct herself this way.” In other words, the trial judge was stating that even if he believed the evidence of the appellant as to her explanation as to why she continued to respond to the complainant’s repeated requests to maintain communication, it was not enough to convince him that she was not acting in a manner which was exploitative of the complainant.

[93] The trial judge reversed the onus of proof. He shifted the burden to the appellant to prove that the relationship was not exploitative of the complainant. This was an error in law. The burden throughout was with the Crown and not the appellant, to prove each element of the offence beyond a reasonable doubt. The trial judge should have asked himself the question:

Even though I do not accept the appellant’s explanation and it does not leave me with a reasonable doubt as to whether there was a relationship which was exploitative of the complainant, on the basis of the evidence I do accept, am I convinced beyond a reasonable doubt there was such a relationship?

See: **R. v. W.(D.)**, [1991] 1 S.C.R.742 (SCC).

[94] The trial judge specifically noted it was not necessary for him to apply the evidence to the analysis in **R. v. W.(D.)**, *supra* when assessing whether the Crown had proven a relationship that was exploitative of the complainant. However, after he reviewed the evidence as to whether the Crown had proven the prohibited sexual conduct, he did indicate he would subject that evidence to such an analysis. This approach demonstrates another material error of law by the trial judge. He considered that proof of the sexual conduct beyond a reasonable doubt was proof that the relationship was exploitative and thus proof of the offence under s. 153(1). He did not approach his analysis from the perspective that each element of the offence, the relationship and the sexual conduct, had to be proven independent of each other.

[95] In conclusion, on this element of the offence the trial judge made errors of law but more importantly there is insufficient evidence upon which a properly instructed trier of fact, acting judicially could reasonably conclude there existed a relationship between the appellant and the complainant which was exploitative of the complainant. There is insufficient evidence upon which to reasonably conclude there was an obvious power imbalance in the relationship and that the relationship was one in which the appellant was taking unfair advantage of the complainant for her own benefit. Because the evidence is incapable of proving beyond a reasonable doubt this essential element of the offence, the appeal should be allowed and a verdict of acquittal entered without any further disposition. However, in the circumstances I will also address the trial judge’s finding of sexual conduct.

(iv) Application of the law to evidence of sexual conduct

[96] The trial judge found the Crown had proven beyond a reasonable doubt that sexual conduct prohibited by s. 153(1)(a) and (b) had occurred. I am of the view that this finding of the trial judge is unreasonable because the trial judge did not properly assess the evidence of the complainant. See: **R. v. G.H.B.** (1999), 182 Nfld. & P.E.I.R. 296; [1999] P.E.I.J. No. 101 (P.E.I.S.C.A..D.). followed in **R. v. Murphy** 2004 PESCTD 31; (2004), 237 Nfld. & P.E.I.R. 312; [2004] P.E.I.J. No. 34.

[97] The trial judge accepted the evidence of the complainant over that of the appellant. While he stated that on a consideration of all the evidence he was satisfied beyond a reasonable doubt that the sexual conduct took place, it is clear that he did not consider all the evidence nor did he test the reliability of the evidence he did accept.

[98] The evidence of sexual conduct was adduced through the evidence of the complainant. The appellant denied any sexual activity took place. There were no independent witnesses. The evidence of the complainant is unreliable and therefore incapable of being the basis upon which a trier of fact properly instructed could reasonably conclude the sexual conduct took place.

[99] The first indication of sexual touching was disclosed by the complainant to her mother after the complainant returned home in February 2007. The police were contacted for the second time by the complainant's parents and an interview was arranged at the Department of Social Services in the presence of a police officer and a social worker. This statement was introduced pursuant to s. 715.1 of the **Criminal Code**. In giving this statement the complainant did not describe the acts of sexual touching. When questioned as to what would happen between she and the appellant, her reply was "everything" and "a lot of stuff."

[100] When the complainant was next interviewed by the police on March 16, 2007 the video recorder malfunctioned and the statement had to be recorded again. The police officer who conducted the interview testified the complainant had difficulty describing the sexual conduct on this occasion as well.

[101] In the next statement given to the police on the following day, March 17, 2007, the police officer had in his hand for the first time, according to his evidence, the journal provided to the police officer by the complainant's father which the complainant testified she had prepared. Following the entries in the journal and asking leading questions, the police officer had the complainant describe the sexual conduct. This video recorded statement was also introduced into evidence pursuant

to s. 715.1 of the ***Criminal Code***.

[102] There is no issue surrounding the admission of the statement into evidence; however, as the trial judge noted in allowing the video statement into evidence, there were issues as to the weight to be given to the statement and he indicated these would be addressed when considering the verdict at the conclusion of the trial. There are a number of issues surrounding the weight which should have been given to this statement. They advised caution and they should have been addressed by the trial judge.

[103] First, the evidence as to the dates and description of sexual contact was only adduced on leading questions from the police officer conducting the interview. While the complainant adopted the statement in giving her evidence at trial, the essence of the evidence of sexual conduct came from the video recorded statement. The value of the complainant's evidence at trial was dependent on what she had related in the video recorded statement. Not only was the questioning of the complainant in the video recorded interview leading, it followed the detail in a journal that was only placed in the hands of the police after the complainant had given two interviews in which she did not describe the sexual conduct. If the journal was a contemporaneous account, or prepared from a contemporaneous account, of the complainant's sexual contact with the appellant, the obvious question arises as to why it was not produced and relied upon when the complainant gave her initial statements. These are all concerns that go to the weight to be given to these statements. In his reasons for finding the appellant guilty, the trial judge did not address the issue of the weight to be given to the statements admitted under s. 715.1 despite the fact that in admitting the statements he indicated the evidence within them would be weighed at the conclusion of the trial. This was in error particularly when there were legitimate reasons to question the weight of the evidence in those statements.

[104] Second, the trial judge focussed his attention on a tattoo which the appellant testified in her direct evidence was on her body at the time of the alleged sexual activity. It was not observed by the complainant. The appellant also had another tattoo which was observed by the complainant but which she did not properly describe. This tattoo was referred to throughout the trial as the tattoo of "Soccer Canada Logo."

[105] The Crown took the position at trial that the appellant obtained the second tattoo after the alleged sexual activity and the Crown called rebuttal evidence to further its position. The Crown called the tattoo artist who worked at the tattoo parlour where the appellant said she attended to obtain this second tattoo. At trial the artist was shown the tattoo by the appellant. He confirmed it was a type of tattoo

design that he had frequently applied to the bodies of many customers at the parlour where he had worked and where the appellant said she attended. The appellant testified, however, that she stood in an upright position while the artist applied the tattoo to her torso just under her right breast. The tattoo artist, on the other hand, testified that he would never have applied the tattoo in that location on the appellant's body while the appellant was in a standing position.

[106] The trial judge accepted the evidence of the tattoo artist. He then rejected the evidence of the appellant as to the point in time in which she had the tattoo applied to her body. The trial judge concluded that the second tattoo could not have been on the body of the appellant at the time of the alleged sexual conduct between her and the complainant. Again, rejecting the evidence of the appellant and accepting that of the complainant he accepted the offence had been proven without considering whether the rest of the evidence might leave him with a reasonable doubt. While the trial judge stated that he was considering all the evidence, it is clear he did not do so.

[107] For example, there was the evidence of other body markings on the appellant, including the so-called "first tattoo" of the Soccer Canada logo. The evidence is that many had knowledge of this tattoo as the appellant had shown it to not only her friends but to the complainant's friends as well. These markings were present on the appellant's body at the time of the alleged sexual conduct. The complainant did not identify these body markings (except the first tattoo which she incorrectly described) despite her evidence that she showered with the appellant twice and had sexual relations on at least three occasions when, according to the evidence of the complainant, the surroundings were such that the body markings would have been evident.

[108] Even if the trial judge did not believe the appellant on the existence of the second tattoo at the time of the offences, this other evidence should have been enough to raise a reasonable doubt as to whether sexual relations even took place between the appellant and the complainant. The evidence raises questions as to the reliability of the complainant's evidence and when considered in the context of all the evidence, raises a reasonable doubt as to the guilt of the appellant.

[109] The complainant also testified that she had sexual relations on four separate occasions at the appellant's apartment. She testified that she had a good view of the appellant's body. She also testified that when she had sexual relations with the appellant at the home where the complainant was babysitting, she had a good view of the appellant's body. On re-direct examination the complainant's was asked by the Crown attorney to picture the appellant naked and describe any body markings which she couldn't do. The only marking she could picture was the tattoo of Soccer Canada

logo which she described incorrectly despite all the occasions she stated that she saw the appellant without clothes.

[110] The distinguishing body marks as described by the appellant's family doctor are detailed in Exhibit D- 7. These body markings are all of natural origin and their presence on their appellant's body from birth was confirmed by the appellant's mother. They are of a size and in a location that they should have been evident to the complainant in all the circumstances in which the complainant said she observed the appellant naked. The trial judge did not give any consideration to this evidence.

[111] Third, another piece of evidence which should have raised the alarm bells of reliability was the complainant's evidence that sexual relations occurred at her home. This is inconsistent with all the evidence accepted by the trial judge that the appellant made conscious efforts not to have their relationship disclosed, going so far, according to the findings of the trial judge, to educate the complainant and her friends on how to concoct a back up story should the relationship be discovered. It is inconsistent with all of this evidence for the appellant to go to the home of the complainant to have sexual relations where all the occupants, except the complainant, openly expressed an unreserved hatred for the appellant.

Conclusion

[112] In conclusion, after a review and assessment of all the evidence and for the foregoing reasons, including the errors of law noted above, I am satisfied that the convictions entered by the trial judge are not convictions that a properly instructed trier of fact, acting judicially, could reasonably have entered. The appellant's conviction rests on shaky ground and it would not be safe to maintain it. I order that the convictions be set aside and direct that an acquittal be entered. Given this disposition of the appeal, it is not necessary to address the Crown's cross-appeal from sentence.

Justice J.A. McQuaid

I AGREE: _____
Chief Justice D.H. Jenkins

I AGREE: _____
Justice M.M. Murphy