IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***R. v. Sims,***,
2006 BCSC 651

Date: 20060426
Docket: X064685
Registry: New Westminster

Between:

Regina

And

Kevin Robert Sims

Before: The Honourable Mr. Justice Brine

Reasons for Judgment

Counsel for the Crown:	W. van Tongeren Harvey
Counsel for the accused:	H.G. Stevenson
Date and Place of Trial/Hearing:	March 20-24, 27, 28, 2006 New Westminster, B.C.

Introduction

[1] The accused has been charged with four offences arising out of a series of encounters between him and the complainant, J.M., between September 1999 and November 2000. The offences are: sexual assault, sexual interference, sexual invitation to touch, and sexual exploitation of J.M. The first three counts are alleged to have occurred while J.M. was under the age of fourteen years. Count four is alleged to have occurred when J.M. was fourteen years of age.

Evidence

[2] The Crown called six witnesses including the complainant, her mother, T.M., two police officers, Dr. Lohrasbe and the former co-accused, Tasha Langley ("Langley"). In addition, the complainant's original statement to the R.C.M.P. was filed pursuant to s. 715.1 of the ***Criminal Code***, R.S.C. 1985, c. 46. As well, a report from Dr. Lohrasbe dated 13 December 2005 was filed. The pertinent portions of that evidence are mentioned hereafter.

[3] The accused elected to call no evidence.

1. Statement of the Complainant

[4] The evidence of the complainant, J.M., was first received by way of a video taped statement taken on November 19, 2000. The Crown's application to admit the statement pursuant to s. 715.1 of the ***Criminal Code*** was not opposed by the defence.

[5] In the video taped statement, J.M. is seen sitting on a couch wearing a parka. Her hair is tied up on top of her head. She states that her birth date is July 14, 1986. She was fourteen years old at the time of the statement. While the video is not of the best quality, she appears to be her stated age.

[6] J.M. stated that she first met the accused and his girlfriend at the time, Tasha Langley, at the house of her friend, B.M., in late August 1999. During that initial meeting, she explained that the drug ecstasy was being consumed by the accused, Langley, B.M.'s mother, P.M., and two teenaged boys. While there, the boys began to make fun of J.M. The accused interceded and told the boys to wait until she got older when she would be so pretty. J.M. said that this made her feel good both about herself and about the accused.

[7] A couple of days following the first meeting, the accused called P.M. to ask whether J.M. could baby-sit for him. J.M. was driven with P.M. to the accused's house in Surrey, B.C. On the drive to the house, J.M. was told that they did not need a baby-sitter but that she could hang out with the others there. While those present at the accused's house smoked crack, J.M. drank alcoholic coolers. She did not smoke crack as she was afraid of it. She became quite ill from the alcohol and was taken to a bedroom upstairs where she slept for the night.

[8] Thereafter, J.M. said that she attended the accused's house on another ten or eleven occasions. Usually it was J.M., Langley and the accused at the house. Occasionally others were present and J.M. was told by the accused to say that she was sixteen years old. She said that they mostly sat up in the accused's bedroom, doing drugs and making videos.

[9] She recounted an incident where she had mentioned to B.M. that she had been doing drugs at the accused's house. She had not mentioned any other activities. J.M.'s mother, T.M., became aware of this. T.M. told J.M. to tell Langley that she had told others about taking drugs. J.M. did not do so as she was afraid of what the accused might do. Later, T.M. called the house and spoke with Langley and asked her if J.M. had told her yet and went on to say that J.M. had told others about their activities. The accused had been listening on the other line and, as J.M. described it, "freaked out." He became verbally abusive, yelling at J.M. causing her to cry. He told her to go into his shower where he put the hot water on and scalded her.

[10] J.M. described that the accused and Langley asked her if she liked "to dyke out … with other girls." She said she was scared and wouldn't do it. She and Langley would dress up in Langley's clothes while the accused took Polaroid pictures of them. She eventually got to the

point where she and Langley made porno movies with dildos while the accused filmed and photographed them.

[11] J.M. said that all of this activity stopped about one-and-a-half to two months before the date of the statement when her mother stopped her from going over to the accused's house. She had returned home from the accused's house by bus having had a bad drug trip from speed. She fought with her parents. She told her mother that she was on drugs but did not tell her that she got them from the accused as she knew that she would get into trouble for saying that.

[12] She said that if she ever did anything wrong with the accused he would yell at her and call her names but said that he had never hit her. However, she was aware from Langley that the accused had hit her.

[13] J.M. described how the sexual activities started. She started using crack with them and started to like it and although she didn't like sex, she started to get "more into it." All of the sexual activity was between J.M. and Langley. When he wanted to join them, J.M. would not participate as she did not want to do those sorts of things. If she and Langley would not pose for pictures or videos and "stay active" he wouldn't give them any drugs and he would be upset with them. She felt that she had to do the video tapes to get the drugs. She said that she made the video tapes every time she went there. She said that she had "lost [her] virginity to a dildo 'cause of him."

[14] A close review of the video tape testimony shows the complainant in November 2000 as being a young girl who clearly appears to be her stated age of fourteen years. Her vocabulary, expressions, actions and appearance all plainly show her to be a girl of about her actual age.

2. Testimony of the Complainant

[15] J.M. testified at the trial as well. She said that while she was not under the influence of drugs when she gave her November 19, 2000 statement, she considered herself addicted to crystal meth in November 2000. She also said that while she is "off drugs here and there now" she is still addicted. She also said that she had not used such drugs before she met the accused.

[16] J.M. lived in Abbotsford when she first met the accused and Langley. She started eighth grade in September 1999. She did not complete her year in June 2000 and has since been unable to complete eighth grade although she has tried to do so on two more occasions. She said that she had been able to complete kindergarten and grades one to seven without problem.

[17] She said that she had met the accused when she had gone to the home of her friend, B.M. She had known B.M. about a year and she lived a short distance away from her. The two were also in the same grade and class at school. She said that she and B.M. appeared to be about the same age. She testified that she had told B.M. her age. She said that she and B.M. would commonly do typical activities for girls their age such as going to school, going to movies and hanging out at the mall. B.M. called the accused "Uncle Kevin" and J.M. believed that he was B.M.'s uncle.

[18] When she first met the accused at B.M.'s house, B.M.'s mother, P.M. was also present. She was about 36 years of age. As well, B.M.'s older brother, Joey and a friend, Mikey, were present. Mikey and P.M. were apparently having a relationship. On that occasion, the accused, Langley, P.M., Joey and Mikey were using ecstasy. It was during that get-together that J.M.

and Mikey began to pick on J.M. The accused defended her which, she said, made her feel good about herself.

[19] When she first went to the home of the accused and Langley, she and P.M. were picked up from P.M.'s house by the accused and Langley in his vehicle, a black Lincoln with tinted windows and a nice stereo system. While en route to the accused's house, P.M. told J.M. not to say anything to B.M. as she, P.M., did "bad things there." J.M. shared in a marijuana joint laced with cocaine which was handed around by the accused.

[20] According to J.M., the accused's house was impressive. She said it was big with nice furniture, a big kitchen and a pool table. While there she said that she drank alcoholic coolers and smoked some pot. The others smoked crack-cocaine. During the evening, J.M. got sick and Langley looked after her, bathed her and put her to bed. She does not recall how she got home. Nothing of a sexual nature occurred on that occasion.

[21] Some time later, the accused and Langley called J.M. at home in the morning and asked if she wanted to skip school and go to their house. The accused said he would pay for a taxi to drive her. J.M. said nothing to her mother and walked to a nearby store and called a cab and went to the accused's house in Surrey.

[22] While there, Langley brought up the subject of dressing up in her clothes and posing for pictures taken by the accused. The accused and Langley were smoking crack and asked J.M. if she'd like some. J.M. asked what would happen if she did. The accused replied that he'd "never give [her] something to hurt [her]." She joined them smoking some crack. She found that it made her feel good. It made her feel she could trust him. At first she was shy and embarrassed about posing with little or no clothing and she was generally uncomfortable with the activity. However, J.M. said that taking crack allowed her to become more comfortable in having her picture taken in more revealing clothing or even with no clothing on at all.

[23] There were subsequent visits to the accused's house with drug use and similar but more sexually active poses and sexual touching taking place. J.M. said that while in eighth grade she missed quite a bit of school while going to the accused's house where she would do drugs that helped her become free from her inhibitions. She found that the drugs made her feel good and she wanted more. They also allowed her to take off her clothes and to have pictures and videos taken of her and Langley.

[24] As well, the accused would give suggestions as to various poses and positions, much as a movie director might. She said that they would do these activities and do drugs. She said that she wanted to "hang out" with them and do drugs.

[25] In terms of sexual activities, J.M. described that she and Langley would touch each other in different ways, usually with sex toys such as dildos and vibrators – neither of which she was familiar with before. The accused would direct them, saying, "Don't take it out!" He would instruct them on how to use the sex toys. On occasion, the accused would give her a crack "hoot" while Langley was performing oral sex on her.

[26] The accused took pictures with a Polaroid camera or video camera while she and Langley had sex together. The video camera was on a tripod. The accused sometimes wore regular clothes and sometimes would remove his clothes and be naked. He would sometimes touch himself and smoke crack while she and Langley "made out." He would also touch her during this process by showing her how to use the sex toys and how to position herself.

[27] J.M. described a particular incident involving the use of a dildo by the accused. She said the three of them were in his bedroom together. The accused was using the dildo on her. J.M. was getting a hoot of crack when he suddenly shoved the dildo deep inside her vagina.

This hurt her a great deal and caused her to cry. The accused's reaction was to tell J.M. that "the next time she was with a guy with a big dick she'd love it and would never forget it."

[28] J.M. described that although she had used the dildo before that time, it would only be used as a vibrator and not inserted very far into her vagina, if at all. It was used mainly for clitoral stimulation. On this occasion J.M. was laying on the bed with Langley to her side using the vibrator on her clitoris. She said the accused had the dildo and shoved it really hard inside of her. She said that she had agreed to certain of the activities such as Langley's use of the vibrator. However, she did not consent to the accused using the dildo inside of her as he did.

[29] The incident was filmed on a video camera by the accused who had told them how to position themselves. She assumed he did so in order to make it more interesting and better for him. They later watched the video of this event. She said that the video showed her smoking crack and having an orgasm. It showed that she was fine until he shoved the dildo inside of her at which point she jumped up in pain and went into the bathroom.

[30] J.M. said that she thought that she had had her fourteenth birthday at that point. She also said that she thought that she was living in Chilliwack at the time. However, she also said that the incident had taken place before Langley had left the accused's home with her grandfather.

[31] On this point J.M. testified that when Langley moved out of the accused's house, Langley and the accused had been arguing. J.M. was sleeping on the couch. Langley's grandfather knocked on the door and Langley came downstairs and said she was leaving. She then left with her grandfather. J.M. said she thought that Langley was gone for about a month. J.M. did say that she believed that she had been at the accused's house about six times before Langley left with her grandfather. J.M. also said that at the time Langley left, J.M. was still residing in Abbotsford and that she was living in Chilliwack when Langley returned. She believed that she had gone over to the accused's house three or four times after Langley had returned.

[32] J.M. stated that she had moved to Chilliwack at the end of her eighth grade year in June 2000. Once she had moved to Chilliwack, she thought that she had been at the accused's house on only two occasions. The last was when she had had her "bad trip" on crystal meth and arrived home still spaced out.

[33] J.M. testified that there were, however, a number of occasions when she met with the accused while Langley was away. On one occasion, J.M., B.M. and another boy had gone with the accused to a rave party on Chilliwack Mountain. It was meant to be overnight but they left because the accused wanted to leave early. Nothing of a sexual nature occurred on that occasion. J.M. was living in Chilliwack at the time.

[34] On another occasion, the accused took J.M. to a motel in Abbotsford where they sat and smoked crack. They then drove to his house and smoked more crack. Again, nothing of a sexual nature took place. J.M. was living in Chilliwack at the time.

[35] On another occasion, the accused took J.M. in his camper to a parking lot in Abbotsford where they smoked crack. On this occasion, the accused kissed her and touched her breasts. J.M. said she was living in Abbotsford at the time.

[36] On another occasion, later in the summer of 2000, while living in Chilliwack, J.M. had a telephone conversation with the accused. She had called him as she wanted to go to his house. At the time J.M. had a friend visiting her who was the same age as J.M. While on the telephone, the accused asked J.M. to touch her friend's breasts and to remove her clothes. J.M. did not do so as she was not comfortable with the idea.

[37] She also testified that near the time of her fourteenth birthday, the accused and B.M. came to J.M.'s house with a birthday card for her. On that occasion, J.M.'s parents met the accused.

[38] J.M. said that when she went to the accused's house she would usually ask her mother for permission when it was on a weekend. Her mother would call the accused's house on occasion as well. J.M. did not ask permission whenever she skipped school and believed that her mother was not aware she did so, at least at first.

[39] In terms of drug use, J.M. said that she was not a drug user before she met the accused but had smoked some pot. The first drug she used at his house was crack, which was smoked. It was only ever ingested by smoking. Later she took crystal meth. She said that this started after Langley had returned from her grandfather's home.

[40] In terms of how she viewed the accused, most of her information was derived from conversations with Langley and observations of her interactions with the accused. She saw him to be possessive and mean and believed him to be violent. He was a very large imposing man, 6' 6" tall, weighing some 280 pounds. She described "mean" in terms of not giving her drugs if she did not have sex with Langley. She described him as being "the boss of everything." If she was asked to do something, she would, provided she was comfortable with it. She recalled one occasion when he told her to stay upstairs with headphones on for a period of time. When she came downstairs there had been a delivery of a jeep, motorcycle and a hot tub to the accused's house.

[41] While at the accused's house, drug consumption occurred only when the accused was present. J.M. said she never got drugs on her own. Rather they would be given to her by the accused when she asked for them or simply handed to her by the accused. She said that she and Langley would have to pose for pictures and entertain the accused to get him to get more drugs. She said that when she and Langley wanted another hoot of crack, he would not give them any until they "did stuff together."

[42] She described that she felt good when she took the drugs. They seemed to give her more energy and made her feel good about herself. She said that she did drugs almost every time she was at the accused's house unless someone else, such as B.M. or her brother, happened to be present.

[43] As to J.M.'s age, she said that she was sure that the accused knew how old she was but could not recall directly telling him her age. She said that the accused told her not to say what her real age was when other people were around. He told her to say that she was a different age, an older age of sixteen or seventeen, and she went along with it by telling people at the house that she was sixteen when she was really thirteen or fourteen. She said that he knew that she was the same age as B.M. and that B.M. was thirteen when J.M. first met the accused. She also pointed out that he had given her a birthday card for her fourteenth birthday.

[44] During cross-examination, she acknowledged that it is possible for kids of her age to have friends of different ages. She said that she had not tried to pass herself off as older than she was before meeting the accused. She also said that others seemed to accept it when she told them that she was seventeen.

[45] She said that the visits to the accused's house occurred over a six or seven month period. She also said that her current recollection seemed to all blend together from one visit to the next and that this was due to the passage of time – some six years.

[46] She also agreed with the suggestion that videos were taken on only two or three occasions and that she only saw one of the videos. She agreed that the accused was never

directly violent with her and that he became very angry at her when it became apparent that she had told others, particularly B.M., about her drug consumption with the accused.

[47] She agreed that nothing sexual happened unless drugs were used first. She also agreed that drugs often made her hallucinate and she would see flashes and other things that were not there. She agreed that when Langley used sex toys on her that it was pleasurable and felt good. She further agreed that she and Langley had an understanding that if she (J.M.) did not want to do something she did not have to. She said that if she wanted to get drugs that it would be a good idea to participate in sex acts and that she did so because she wanted to get drugs. She agreed that she was never asked to pay any money for any of the drugs she consumed.

[48] J.M. agreed with the suggestion that there was sexual activity on only four or five occasions. She also agreed that on at least two occasions the accused was not in the room and that it was just J.M. and Langley together.

[49] When asked about the incident where she had described the accused shoving the dildo inside her, J.M. said that before that happened, Langley had inserted a sex toy part way inside her vagina but not very far. She had never had a sex toy inserted so far as to rupture her hymen. She described Langley as using the vibrator on her clitoris. The accused was first using the video camera and then went on to use the dildo, partially inserting it, while Langley was using the vibrator. She agreed with the suggestion that until the accused pushed the dildo in further than it had ever been, she was agreeable with what had been going on.

[50] J.M. was asked whether she had tried to impress the accused and Langley with statements of previous sexual experiences. She denied having done so but did acknowledge that she had had one earlier sexual experience with a boy but that there had been no intercourse. She may have related that incident to the accused.

[51] J.M. agreed that after she stopped attending at the accused's house, she continued using drugs and experimenting with other drugs she had not used with the accused. She testified that drugs remain a problem in her life.

3. Testimony of the Complainant's Mother, T.M.

[52] T.M. confirmed the birth date of J.M. as July 14, 1986. She also confirmed that the time that J.M. had returned home while high on drugs was September 2000. She contacted the accused on that occasion and told him that J.M. would not be allowed back to his house. In November of that year, the accused called for J.M. On that occasion, J.M. told T.M. all that had happened while she was at the accused's house and the police were called.

[53] T.M. could not be sure of the date when J.M. first met the accused. She was aware that it was through J.M.'s friend, B.M., and that he was B.M.'s uncle. She also recalled that it was when J.M. had started eighth grade in Abbotsford. She did say that she was aware that J.M. had gone to the accused's house as J.M. had phoned to ask permission. She said that it was a rule of the house for her to do so. At the time, she had no reason not to give permission.

[54] She said that she was aware of giving J.M. permission to attend at the accused's house on about ten occasions. The only time that she recalled anything unusual was when the accused had picked J.M. up at her house and she had returned to Chilliwack by bus and was high on drugs at the time.

[55] T.M. said that J.M. often went to the accused's house on weekends. She said that it was every couple of weekends but that she was not exactly sure.

[56] T.M. said that the family, including J.M., had moved from Abbotsford to Chilliwack some time around May 2000. She recalled that J.M. went to the accused's house a few times in the summer of 2000. She also recalled meeting the accused once when he came to pick her up when they lived in Chilliwack and having a look at his truck with which J.M. was impressed.

[57] When asked whether she had had a conversation with the accused about J.M.'s age she replied that he knew her age as his niece, B.M., was the same age and in the same grade.

[58] T.M. also confirmed that J.M. had completed school from kindergarten to grade seven without any problems and that her difficulties with school started while she was in grade eight. She saw definite behaviour changes in J.M. in 2000. She stopped going to school and was "lying all the time."

[59] During cross examination, T.M. acknowledged that in an earlier statement to police, in response to a question about the number of times J.M. had gone to the accused's house she had replied "Maybe ten times. I'm not sure."

4. Testimony of Dr. Lohrasbe, Psychiatrist

[60] Dr. Lohrasbe was qualified as an expert on the effect of drugs and inappropriate sexual experiences upon adolescent girls.

[61] He stated that the brain of adolescents is not fully developed, particularly with respect to the executive functions of the frontal lobe of the brain. The effect of sexual experiences, other than age-appropriate experiences, is to traumatise normal psycho-social development.

[62] The impact of drugs, including cocaine and crystal meth, has a greater impact on neurological development, which affects cognitive abilities.

[63] The impact of both together is to enhance the impact of one another.

[64] Dr. Lohrasbe was careful to point out that he could not opine as to the path that J.M.'s life might have taken absent the events at issue in this trial but that if her statements about drugs and sex were accepted he would expect to see her life go sideways independent of other life experiences.

[65] He stated that young persons of the age of thirteen or fourteen do not have the experiential ability to control the use and effects of cocaine and crystal meth. One aspect of those drugs, which are highly addictive particularly when ingested by smoking, is a compulsion to want more and a willingness to do anything to get it.

[66] It was Dr. Lohrasbe's opinion that with J.M.'s drug use she would have quickly become addicted. It would have provided her with an intense sense of confidence, well-being and euphoria. The use of drugs in conjunction with the sexual experiences she was having would have made the sexual experience itself quite addictive. She would have a lessened ability to keep track of what was happening around her but would be more focussed on the immediate source of what she perceived to be pleasure.

[67] In Dr. Lohrasbe's view, the "package" of circumstances: the accused's apparent success; his reassurances to her; his demands of her; his supply of drugs, food and transportation; the age difference; and, his introduction as a friend's uncle, compelled the complainant to comply with his instructions. It was, he said, "a part of the package." Her ability to resist would have been virtually non-existent.

5. Report of Dr. Lohrasbe, Psychiatrist

[68] The essence of Dr. Lohrasbe's opinion, based primarily upon the information imparted to him by J.M. during an interview with her, was outlined as follows:

> [J.M.] was incapable of turning to others for help. Her emotional and cognitive capacities had been thoroughly undermined. By the time she turned 14 it is highly likely that the collective impact of addiction, fearfulness, domination, and loss of confidence/self-efficacy made it difficult if not impossible for [J.M.] to exercise the capacities that she may have otherwise done at 14, including age-appropriate insight, judgment, and the ability to make voluntary choices based on a realistic appraisal of her situation and her needs.

6. Testimony of Tasha Langley

[69] Langley was, until September 2005, a co-accused and remained such through the preliminary hearing in March 2003. Due to serious health problems, the Crown entered a stay of proceedings with respect to the charges against her. She provided a K.G.B. statement to the Crown in December 2005.

[70] She is currently 29 years of age. On her behalf, the Crown sought an order permitting her to testify outside of the courtroom. The defence did not oppose this and her testimony was conducted with the use of video equipment. Counsel remained in the courtroom during her testimony. Langley was accompanied only by a female sheriff's officer while giving her evidence.

[71] In September 1999, Langley was in a common law relationship with the accused. His birthday was September 7, 1960. She first met J.M. at the end of the summer in 1999. She and the accused had gone to P.M.'s house in Abbotsford. P.M. and the accused were cousins. While there, P.M. told the accused that she knew a girl who liked to party, presumably in reference to the complainant. J.M. and P.M. were subsequently driven to the house by the accused and Langley in the Lincoln. J.M. became drunk and passed out. Langley helped clean her up and put her to bed.

[72] J.M. was next invited to the accused's house on the pretext of needing her to baby-sit. When asked what was on her mind at this time, Langley replied, "Nothing but trouble." She said she and the accused planned to get J.M. to come over to "party" with them.

[73] Langley confirmed that posing for pictures began with wearing Langley's clothes which progressed to fewer clothes and, eventually to wearing none at all. They began doing things with each other using dildos and vibrators. Langley said that the accused asked them to do "things" which he would video tape and photograph and that if she refused, he would get really angry, hit her and "freak out." She said it was scary.

[74] Langley said that the sexual activities were the accused's idea. He would talk to Langley before J.M. arrived and tell her what to do. While video taping the encounters, the accused would tell Langley and J.M. to do things in a particular way and gave directions for the sorts of sex acts he wanted them to perform. He would take Langley's hand and say "do it like this" and would tell them that they looked "too uptight" and to be more "relaxed" and "natural." Langley said that there were probably four or five of these instances.

[75] Langley described the incident when the accused had pushed the dildo into J.M.'s vagina. She said that the accused had wanted Langley to take the dildo and put it inside J.M. Langley did not want to as she knew that J.M. was still a virgin and had not had prior sexual relations. She said that J.M. whispered to her, "Please don't do it." She said that she "kind of pretended to do it" and that the accused got angry. Langley said that he then came and took

the dildo and put it inside of J.M.'s vagina. Langley said J.M. was hurt and it caused her to cry and become very upset.

[76] Langley described the drug use as being constant. The accused would obtain the drugs. He had introduced her to drugs some time prior. Langley said that she and J.M. were hooked and dependent on it. Generally, she said he would put a pipe of crack to their mouths and light it for them. She said that J.M. got to the point where she would do anything to get her next hit and that drugs took control of her.

[77] As to J.M.'s age, Langley said that she did not know her age. She thought that she was a friend of P.M. rather than B.M. She said that J.M. did not look her age and thought that she might have been sixteen years old. During one of J.M.'s earlier visits to the accused's house, J.M. told Langley that she was fifteen years old. Langley advised the accused of this at some point.

[78] Langley said that the accused pursued a relationship with J.M. so that she and Langley would do sexual acts for him and he could video tape them. He wanted Langley to "come on to" J.M. and to "do things" with her. She said that the video taping started in 1999 and that there were four or five instances of this. She said that he did touch J.M. during some of these occasions. He would touch and squeeze her breasts, touch her vagina and would take Langley's hand and rub it on J.M. and do the same with J.M.'s hand on Langley.

[79] She said that she and the accused would watch the videos when J.M. was not there and that he would masturbate while doing so. She recalled one occasion that a video was played back while J.M. was present.

[80] In 2002, Langley became aware that a warrant had been issued for her arrest. She spoke to the accused the day before she turned herself in. The accused told her to tell the police that he was not present when any of the alleged acts occurred. He told Langley to say that it was only she and J.M. "fooling around" and that if she did so, nothing would happen to her.

[81] As to the timing of these various events, Langley said that at the end of April 2000, her grandfather had come from Courtenay to take her to live with him. She was able to recall the date by reference to a job application form she had completed on May 24, 2000 for a job as a waitress in Courtenay. She said that J.M. and the accused were at the house when her grandfather arrived. She had planned to stay away for good but in fact was only able to stay away for three or four months. She believed she had returned by the end of August 2000.

[82] During cross-examination, Langley agreed that J.M. was not forced to do anything and that she, Langley, did nothing to stop any of the activities. She said that there were about four or five sexual incidents over a six or seven month period. She felt that J.M. wanted to play with big people and that she was always acted older than she was, wanted to party and to have a good time.

[83] In cross-examination Langley was asked whether she had said, "If J.M. had ever said that she did not want to do something or wanted any of it to stop, then none of what had happened would have happened." Langley responded that there were times that she didn't want to do things but: "We had to. What could we do?" Langley did, however, acknowledge that in her K.G.B. statement of December 2005 she had made a similar statement to the one put to her above.

Legal Principles

1. Principal or Party to an Offence

[84] The Crown alleges that the accused was a party to the offences, either as a principal party or as party who aided, abetted or counselled Tasha Langley in her actions upon J.M.

[85] Section 21(1) of the ***Criminal Code*** states:

> (1) Every one is a party to an offence who
>
> > (a) actually commits it;
> >
> > (b) does or omits to do anything for the purpose of aiding any person to commit it; or
> >
> > (c) abets any person in committing it.

[86] Section 22 states:

> (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.
>
> (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.
>
> (3) For the purposes of this Act, “counsel” includes procure, solicit or incite.

2. The Offences

[87] The elements of each offence with which the accused is charged are different and I will briefly set them out below. The analysis pertaining to the age of the complainant and the absence of consent, are common to all offences and will be discussed in more detail later in these reasons.

(a) Count One: Sexual Assault

[88] The Crown alleges that the accused sexually assaulted J.M. by aiding and counselling Langley to facilitate the repeated sexual assaults on J.M. and by directly sexually assaulting J.M. himself. The allegation is that the accused, either as a principal or a party to the offence, engaged in sexual activity with the complainant when she was thirteen years of age from September 1, 1999 to November 19, 2000, without her consent, or without taking reasonable steps to ascertain her age.

[89] The crime of sexual assault is only indirectly defined as it is comprised of an assault within any one of the definitions in s. 265(1) of the ***Criminal Code***, in circumstances of a sexual nature such that the sexual integrity of the victim is violated: ***R. v. S.(P.L.)***, [1991] 1 S.C.R. 909 at 926, 64 C.C.C. (3d) 193; ***R. v. Ewanchuk***, [1999] 1 S.C.R. 330, 131 C.C.C. (3d) 97 at ¶24.

[90] Assault is defined in s.265(1) as follows:

> (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose.

[91] Subsection 271(1)(a) of the ***Criminal Code*** provides that:

Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years.

[92] The *actus reus* of sexual assault is established by proof of three elements: (1) touching, (2) the sexual nature of the contact, and (3) the absence of consent: ***Ewanchuk***, *supra* at ¶25.

[93] As a crime of general intent, the *mens rea* for sexual assault is the intent to touch the complainant and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched: ***Ewanchuk***, *supra* at ¶41-42. There is no requirement for any *mens rea* with respect to the sexual nature of the accused's behaviour: ***Ewanchuk***, *supra* at ¶25.

[94] If the complainant is under the age of fourteen years at the time of the offence, consent is vitiated where the accused does not take reasonable steps to ascertain the age of the complainant: (1997), 113 C.C.C. (3d) 42 at ¶1-2, 86 B.C.A.C. 20 (B.C.C.A.).

(b) Count Two: Sexual Interference

[95] The Crown alleges that the accused, either as a principal or a party, did for a sexual purpose, touch directly or indirectly, with a part of his body or with an object; the body of J.M., a person under the age of fourteen. The allegation is that the accused touched J.M. directly with his own body and with a sex toy object; and indirectly, by Tasha Langley touching J.M. with her body and with sex toy objects. The Crown alleges that the accused either knew the age of the complainant or, did not take reasonable steps to ascertain the age of the complainant.

[96] Subsection 151(a) of the ***Criminal Code*** states:

Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of fourteen years

(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.

(c) Count Three: Sexual Invitation to Touch

[97] The Crown alleges that the accused, either as a principal or a party, invited, counselled or incited J.M. to touch her own body and the body of Tasha Langley for a sexual purpose.

[98] Subsection 152(a) of the ***Criminal Code*** states:

Every person who, for a sexual purpose, invites, counsels or incites a person under the age of fourteen years 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 person under the age of fourteen years

(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.

(d) Count Four: Sexual Exploitation

[99] The Crown alleges that between July 14, 2000 and November 19, 2000, after J.M. turned fourteen years of age; the accused, being a person in a position of trust or authority towards J.M., or a person with whom J.M. was in a relationship of dependency; did for a sexual purpose, touch directly or indirectly, with a part of his body or with an object, the body of J.M.

[100] Section 153 of the ***Criminal Code*** states in part:

> (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.
>
> […]
>
> (1.2) 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.
>
> (2) In this section, "young person" means a person fourteen years of age or more but under the age of eighteen years.

[101] In essence, the offence involves committing acts amounting to sexual interference in s.151 or invitation to sexual touching in s.152, *while* the accused either occupies a position of trust or authority or while the complainant is in a relationship of dependency with the accused.

3. The Age of the Complainant

(a) Element of the Offences

[102] For counts two and three, the Crown is required to prove the actual age of the complainant and that the accused either knew the complainant was under fourteen or did not take all reasonable steps to ascertain her age. As well, for count one, the age of the

complainant is relevant in determining the absence of consent – if the accused did not take all reasonable steps to ascertain her age, the absence of consent is proven.

[103] The *mens rea* with respect to the age of the complainant is reckless indifference as to whether the complainant was under the age of fourteen. An accused who fails to take all reasonable steps to ascertain the age of the complainant is recklessly indifferent: ***R. v. P.(L.T.)***, *supra* at ¶17.

(b) Mistake as to Age Defence

[104] The ***Criminal Code***, in s.150.1(4) and the common law, both recognize a defence of mistake of fact pertaining to the age of the complainant.

[105] The defence was addressed by our Court of Appeal in ***R. v. P.(L.T.)*** in which Finch J.A. (as he then was) had this to say at ¶13-14:

> The defence afforded by s. 150.1(4) has been considered by a number of courts since the section was enacted in January, 1988. In ***R. v. Hayes and Morris*** (4 March, 1991), Red Deer 90100226C2 (Alta Q.B.), summarized at 12 W.C.B. (2d) 457, MacKenzie, J. held at p.7 that the general common law rule applied to the defence under s. 150.1(4), and that the Crown had the onus of proving beyond a reasonable doubt that the accused had failed to take all reasonable steps to ascertain the complainant's age. He said, at p.10:
>
> > The steps to be taken to ascertain the age are "all reasonable steps." That says to me that they are the steps a reasonable person would take in the particular circumstances. In some circumstances the only step a reasonable person would be expected to take to ascertain the age of another person would be simply to look at that person. As circumstances vary, a reasonable person would be expected to take more searching steps. It strikes me that the requirements of section 150.1(4) are removed from the "reasonable grounds" defence more by semantics than in practical application. […]
> >
> > As I say, "steps" can, depending on the circumstances, be limited to simple observations by the accused of the circumstances or they can extend to the requirement that a person contact the parents of the child to ascertain the age. The word "reasonable" governs.
>
> He also observed, at p.11, that because the section required an objective standard to be applied, the trier of fact might conclude that the Crown had succeeded in negativing the defence even though the accused honestly believed that he had taken all reasonable steps to ascertain the complainant's age. In other words, evidence as to the accused's subjective state of mind, even if believed by the Court, is not conclusive.

[106] The onus on the accused to raise the defence is an evidentiary onus. It requires that the accused adduce evidence or identify Crown evidence, or both, which if true, would entitle the accused to an acquittal. For the accused to succeed, such evidence need not be believed; it is only necessary that it create a reasonable doubt in the mind of the trier of fact: ***P.(L.T.)***, *supra* at ¶16; ***R. v. Osborne*** (1993), 17 C.R. (4th) 350, 323 A.P.R. 194, at pp.360.

[107] Parliament's intention and further expansion on the defence was provided by Goodridge C.J.N. in ***Osborne*** at p. 363, he said, by way of conclusion:

> Parliament has decided that a person engaging another who is more than two years younger and under 14 in a sexual encounter is guilty of a crime, notwithstanding that the encounter may be consensual. The only defence is a belief that the younger is 14 years of age or more. Parliament requires more than an honest belief; it requires a belief resulting from the taking of "all reasonable steps to ascertain the age of the complainant". Parliament made the act a crime and expects of citizens engaging in sexual activity with young people to make a reasonable effort to ascertain the age of prospective partners. It is more than a casual requirement. There must be an earnest inquiry or some other compelling factor that obviates the need for an inquiry. An accused person can only discharge the requirement by showing what steps he took and that these steps were all that could be reasonably required of him in the circumstances. It is not sufficient, for example, to state that further inquiries were not made because they would open the accused to ridicule, embarrassment or rejection.

[108] The age difference between the complainant and the accused is relevant in determining what constitutes “reasonable steps.” The greater the age disparity, the greater the level of inquiry on the part of the accused: ***P.(L.T.)***, *supra* at ¶18.

[109] Finch J.A. in ***P.(L.T.)*** at ¶20, provided that reliance on a visual observation may be reasonable in some cases, but the reasonableness of taking further steps will depend upon the apparent indicia of the complainant's age, and the accused's knowledge of same, including:

- the accused's knowledge of the complainant's physical appearance and behaviour;
- the ages and appearance of others in whose company the complainant is found;
- the activities engaged in either by the complainant individually, or as part of a group; and
- the times, places, and other circumstances in which the complainant and her conduct are observed by the accused.

[110] He went on to say:

> The Court should ask whether, looking at those indicia, a reasonable person would believe that the complainant was fourteen years of age or more without further inquiry, and if not, what further steps a reasonable person would take in the circumstances to ascertain her age. Evidence as to the accused's subjective state of mind is relevant but not conclusive because, as pointed out in ***R. v. Hayes*** at p. 11, " [a]n accused may believe that he or she has taken all reasonable steps only to find that the trial judge or jury may find differently."

[111] The trier of fact is therefore obliged to ask whether the appearance of the complainant and all the other relevant circumstances are such as to create a reasonable doubt as to whether it would have been reasonable for the accused to have engaged in further inquiry. This includes a consideration of whether it was reasonable for the accused *not* to put his mind to the age of the complainant in the circumstances: ***R. v. P.(L.T.)***, *supra* at ¶27.

(c) Proof of consent no defence

[112] If it is proven that the accused did not take all reasonable steps to ascertain the age of the complainant under the age of fourteen, proof of consent is not a further defence. Section 150.1 of the ***Criminal Code*** states in part:

> (1) Where an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of fourteen years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.
>
> [...]
>
> (4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was fourteen years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

[113] Thus, if the accused is able to raise a reasonable doubt as to whether all reasonable steps were taken to ascertain the age of the complainant, he cannot be convicted of those offences in which the age of the complainant is an essential element - in this case, counts two and three. However, for the purpose of count one, the age of the complainant is only a factor which may vitiate consent if the accused did not take all reasonable steps. If he is able to raise the defence of mistake as to age, a further analysis regarding the absence of consent will still be required.

4. Consent

(a) Definition of Consent

[114] The absence of consent is an essential element of count one, sexual assault.

[115] Subsection 273.1(1) of the ***Criminal Code*** states:

> (1) Subject to subsection (2) and subsection 265(3), “consent” means, for the purposes of sections 271, 272 and 273, the voluntary agreement of the complainant to engage in the sexual activity in question.

[116] The absence of consent is subjective, determined by reference to the complainant’s subjective internal state of mind towards the touching at the time it occurred: ***Ewanchuk***, *supra* at ¶26.

[117] As a result, credibility is often a primary issue in sexual assault cases. The Supreme Court of Canada discussed the approach to credibility in ***Ewanchuk*** at ¶29-30:

> While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
>
> The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the complainant's conduct is consistent with her claim of non-consent. The accused's perception of the complainant's state of mind is not relevant. That perception only

arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

(b) Honest but Mistaken Belief of Consent

[118] The common law recognizes a defence of mistake of fact, which removes culpability for those who honestly but mistakenly believed that they had consent to touch the complainant: ***Ewanchuk***, *supra* at ¶42.

[119] The accused may therefore challenge the Crown's evidence by asserting an honest but mistaken belief in consent. The nature of this defence was analysed by the Supreme Court of Canada in ***Ewanchuk***, in which Major J. quoted at ¶43, the decision in ***Pappajohn v. The Queen***, [1980] 2 S.C.R. 120, 52 C.C.C. (2d) 481, at p.148, as follows:

> Mistake is a defence . . . where it prevents an accused from having the *mens rea* which the law requires for the very crime with which he is charged. Mistake of fact is more accurately seen as a negation of guilty intention than as the affirmation of a positive defence. It avails an accused who acts innocently, pursuant to a flawed perception of the facts, and nonetheless commits the *actus reus* of an offence. Mistake is a defence though, in the sense that it is raised as an issue by an accused. The Crown is rarely possessed of knowledge of the subjective factors which may have caused an accused to entertain a belief in a fallacious set of facts.

[120] Major J. expanded upon the evidentiary burden at ¶44:

> The defence of mistake is simply a denial of *mens rea*. It does not impose any burden of proof upon the accused (see ***R. v. Robertson***, [1987] 1 S.C.R. 918 at p. 936), and it is not necessary for the accused to testify in order to raise the issue. Support for the defence may stem from any of the evidence before the court, including the Crown's case-in-chief and the testimony of the complainant. However, as a practical matter, this defence will usually arise in the evidence called by the accused.

(c) Limitations

[121] The defence of honest but mistaken belief of consent is limited by both the common law and the ***Criminal Code***: see ***Ewanchuk***, *supra* at ¶50.

[122] The relevant provisions of the ***Criminal Code*** are contained in ss. 273.1, 273.2 and 265. These provisions, for the most part, codify the common law.

(i) Criminal Code Provisions

[123] Section 273.1 states in part:

> (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (a) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (b) the complainant is incapable of consenting to the activity;

(c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;

(d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

(e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[124] Section 273.2 states:

It is not a defence to a charge under 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

(a) the accused's belief arose from the accused's

(i) self-induced intoxication, or

(ii) recklessness or wilful blindness; or

(b) the accused did not take reasonable steps in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[125] Subsection 265(3) states:

(3) For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of

(a) the application of force to the complainant or to a person other than the complainant;

(b) threats or fear of the application of force to the complainant or to a person other than the complainant;

(c) fraud; or

(d) the exercise of authority.

(ii) Implied Consent

[126] The accused may not allege that the complainant impliedly consented to the sexual contact. Major J. made the following comments regarding this limitation in ***Ewanchuk*** at ¶51-52:

[A] belief that silence, passivity or ambiguous conduct constitutes consent is a mistake of law, and provides no defence: see ***R. v. M. (M.L.)***, [1994] 2 S.C.R. 3. Similarly, an accused cannot rely upon his purported belief that the complainant's expressed lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. An accused cannot say that he thought "no meant yes." […]

Common sense should dictate that, once the complainant has expressed her unwillingness to engage in sexual contact, the accused should make certain that she has truly changed her mind before proceeding with further intimacies. The accused cannot rely on the mere lapse of time or the complainant's silence or

> equivocal conduct to indicate that there has been a change of heart and that consent now exists, nor can he engage in further sexual touching to "test the waters."

[127] It is clear from the foregoing that an accused may not rely on a belief that the complainant's lack of agreement to sexual touching in fact constituted an invitation to more persistent or aggressive contact. Once a woman says "no" to sexual activity, the accused must obtain a clear and unequivocal "yes" (by her words or actions) before he touches her again in a sexual manner. Continuing sexual contact after someone has said "no" is at least reckless conduct which is not excusable: ***Ewanchuk***, *supra* at ¶52.

[128] In my view, this also applies to situations where, through words or conduct, limits or parameters to sexual touching have been established. Touching of a sexual nature beyond those boundaries, absent a clear and unequivocal assent, is also reckless and inexcusable conduct.

[129] "Implied consent" is therefore clearly not a defence in cases of sexual assault. This was expressly confirmed by Major J. when he said the following at ¶31:

> [T]he trier of fact may only come to one of two conclusions: the complainant either consented or not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of the *actus reus* of sexual assault is proven. The doctrine of implied consent has been recognized in our common law jurisprudence in a variety of contexts but sexual assault is not one of them. There is no defence of implied consent to sexual assault in Canadian law.

(iii) Circumstances Vitiating Consent

[130] Section 265(3) stipulates circumstances which vitiate consent, namely, consent given by reason of force, fear, threats, fraud or the exercise of authority. On this point, Major J. made the following comments at ¶38-39:

> In these instances the law is interested in a complainant's reasons for choosing to participate in, or ostensibly consent to, the touching in question. In practice, this translates into an examination of the choice the complainant believed she faced. The courts' concern is whether she <u>freely</u> made up her mind about the conduct in question. […]
>
> The question is not whether the complainant would have preferred not to engage in the sexual activity, but whether she believed herself to have only two choices: to comply or to be harmed. If a complainant agrees to sexual activity solely because she honestly believes that she will otherwise suffer physical violence, the law deems an absence of consent, and the third component of the *actus reus* of sexual assault is established. The trier of fact has to find that the complainant did not want to be touched sexually and made her decision to permit or participate in sexual activity as a result of an honestly held fear. The complainant's fear need not be reasonable, nor must it be communicated to the accused in order for consent to be vitiated. While the plausibility of the alleged fear, and any overt expressions of it, are obviously relevant to assessing the credibility of the complainant's claim that she consented out of fear, the approach is subjective.

(iv) Wilful Blindness or Recklessness

[131] Section 273.2 codifies the common law principle set forth in ***R. v. Sansregret***, [1985] 1 S.C.R. 570, 17 D.L.R. (4th) 577, that an accused's belief in consent cannot be wilfully blind or reckless. In that case, the court dealt with the concept of recklessness at pp. 581-582:

> The concept of recklessness as a basis for criminal liability has been the subject of much discussion. Negligence, the failure to take reasonable care, is a creature of the civil law and is not generally a concept having a place in determining criminal liability. Nevertheless, it is frequently confused with recklessness in the criminal sense and care should be taken to separate the two concepts. Negligence is tested by the objective standard of the reasonable man. A departure from his accustomed sober behaviour by an act or omission which reveals less than reasonable care will involve liability at civil law but forms no basis for the imposition of criminal penalties. In accordance with well-established principles for the determination of criminal liability, recklessness, to form a part of the criminal *mens rea*, must have an element of the subjective. It is found in the attitude of one who, aware that there is danger that his conduct could bring about the result prohibited by the criminal law, nevertheless persists, despite the risk. It is, in other words, the conduct of one who sees the risk and who takes the chance. It is in this sense that the term 'recklessness' is used in the criminal law and it is clearly distinct from the concept of civil negligence.

[132] The court then distinguished wilful blindness from recklessness at p.584:

> Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused's fault in deliberately failing to inquire when he knows there is reason for inquiry.

[133] Not all beliefs upon which an accused might rely will exculpate him. In order to support the defence, there must be more than an absence of resistance, there must be a belief not only that she was consenting but that he honestly believed that she had communicated her consent to him. On this issue, Major J. said the following at ¶64-65 of ***Ewanchuk***:

> [T]he accused's putting consent into issue is synonymous with an assertion of an honest belief in consent. If his belief is found to be mistaken, then honesty of that belief must be considered. As an initial step the trial judge must determine whether any evidence exists to lend an air of reality to the defence. If so, then the question which must be answered by the trier of fact is whether the accused honestly believed that the complainant had communicated consent. Any other belief, however honestly held, is not a defence.
>
> Moreover, to be honest the accused's belief cannot be reckless, willfully blind or tainted by an awareness of any of the factors enumerated in ss. 273.1(2) and 273.2. If at any point the complainant has expressed a lack of agreement to engage in sexual activity, then it is incumbent upon the accused to point to some evidence from which he could honestly believe consent to have been re-

established before he resumed his advances. If this evidence raises a reasonable doubt as to the accused's *mens rea*, the charge is not proven.

5. Position of Trust or Authority or Relationship of Dependency

[134] Both ss.273.1 and 265(3), in setting out the limitations on honest but mistaken belief in consent, deal with the accused occupying a position of trust or authority. In essence, these provisions deal with circumstances where the consent of the complainant is qualified and possibly negated by the power differential between the accused and a complainant. A discussion of this was provided by the Supreme Court of Canada in ***R. v. Audet***, [1996] 2 S.C.R. 171, 106 C.C.C. (3d) 481, in which Laforest J. said at ¶20:

> The relative positions of the parties have always been relevant to the validity of consent under Canadian criminal law. The common law has long recognized that exploitation by one person of another person's vulnerability towards him or her can have an impact on the validity of consent.

[135] Laforest J. went on to comment on ss.273.1 and 265(3) at ¶22:

> The ***Code*** thereby specifically provides that, for the purposes of ss. 271, 272 and 273, the exercise of authority (s. 265(3)(d)) and the abuse of a position of trust, power or authority (s. 273.1(2)(c)) will vitiate consent. While conscious of the minor differences in terminology in s. 153(1), s. 265(3)(d) and s. 273.1(2)(c), I note that in most if not all cases in which the evidence shows that an accused in a position or relationship referred to in s. 153(1) with respect to the complainant actually abused his or her position in relation to the complainant to obtain the alleged sexual favours, the accused will at least have committed a sexual assault – a more serious offence – against the young person, since ss. 265(3)(d) and 273.1(2)(c) provide that there is no consent in such a situation.

[136] If the accused occupies a position of trust or authority, the Crown does not have to establish that the accused actually abused his or her position towards or relationship with the young person, in order to prove the absence of consent: ***Audet***, *supra* at ¶34.

[137] In addition, whether the accused was in a position of trust or authority or whether the complainant was in a relationship of dependency with the accused, is a key element with respect to count four – sexual exploitation.

[138] Whether or not there was a position of trust (and, presumably, a relationship of dependency) is a question of fact: ***R. v. Edwards*** (2003), 172 C.C.C. (3d) 313, 2003 B.C.C.A. 47 at ¶15.

[139] In terms of defining what constitutes a position of trust or authority, Laforest J. made the following comments in ***Audet*** at ¶37-38:

> [T]he concept of a "position of trust" is difficult, perhaps even more than that of a "position of authority", to define in the abstract in the absence of a factual context. For this reason, it would be inappropriate for this Court to try to precisely delineate its limits in a factual vacuum, especially since very few judicial decisions have so far commented on this relatively recent provision of the ***Criminal Code***.
>
> […]

> It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused, whether the accused was in a position of trust or authority towards the young person or whether the young person was in a relationship of dependency with the accused at the time of the alleged offence. […] It would be inappropriate to try to set out an exhaustive list of the factors to be considered by the trier of fact. The age difference between the accused and the young person, the evolution of their relationship, and above all the status of the accused in relation to the young person will of course be relevant in many cases.

[140] As to what amounts to "dependency," the decision in ***R. v. Galbraith*** (1994), 90 C.C.C. (3d) 76, 18 O.R. (3d) 247, (Ont. C.A.), leave to appeal to S.C.C. refused 92 C.C.C. (3d) vi., is instructive. Finlayson J.A. had this to say at p. 82:

> 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. […] 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.

[141] Again, the above comments are helpful in determining whether the accused occupied a position of trust or authority or was in a relationship of dependency with the complainant for the purpose of analysing consent in count one, and the essential elements of count four.

Application

[142] I, of course, start from the basic and fundamental propositions that the accused is presumed to be innocent and the Crown must prove all elements of the offences beyond a reasonable doubt. The presumption of innocence remains with the accused throughout the trial. The burden of proof never shifts to the accused; it is only displaced if, after considering all of the evidence, the Court is satisfied beyond a reasonable doubt that all of the elements of the various offences have been proven.

[143] With respect to the indictment, the issues of date, jurisdiction and identity are common to all four counts. Jurisdiction and identity are not contested and I am satisfied that those elements of each offence have been proven beyond a reasonable doubt. As to date, the evidence is uncontradicted that the events occurred between September 1999 and September 2000. However, a determination of which events took place before and after July 14, 2000, the complainant's fourteenth birthday, is necessary.

[144] I have considered the testimony of J.M. and find it to be credible and generally reliable. This is so despite the fact of the clear difficulties she had with recalling details of her activities with the accused and Langley and the time frames of same. Her testimony was internally consistent. It was consistent with her prior statement. It was generally consistent with such portions of her testimony from the preliminary inquiry as were put to her. It was also consistent with, and largely confirmed by, the testimony of T.M., particularly with respect to time lines. Further, her testimony was largely confirmed by Langley. I was impressed that J.M. has not been in contact with Langley since the time of the complaint in November 2000.

[145] I was also impressed by J.M.'s obvious lack of maturity and insight, as well as the naivety, which were apparent when she testified. She is currently nineteen years of age. These attributes can only have been even more readily apparent to the most casual observer six years ago. She is, and undoubtedly was, an impressionable and vulnerable young woman who was easily swayed by persuasion.

[146] As to the reliability of her evidence, it is evident that much of her recollection of events has merged together. This may be due to the passage of time, drug use or other factors. Nevertheless, I accept that the detail of the various activities, which she provided, was accurate but that the time context was less reliable.

[147] I accept the testimony of T.M. as to when J.M.'s contact with the accused began. I also accept that she was aware of ten or eleven times when J.M. was, to her knowledge and with her permission, at the accused's residence. I accept her testimony as an indication that the visits were fairly frequent. I further accept that there were additional occasions of which T.M. was unaware, when J.M. was at the accused's residence. These would, for the most part, be occasions when J.M. stayed away from school.

[148] As to the age of the complainant, I accept the evidence of J.M. and T.M. that she was thirteen years old in September 1999 and was so until her birthday on July 14, 2000 when she turned fourteen.

[149] As to the evidence of Tasha Langley, I am mindful that she was at one time a co-accused with respect to these charges. It is therefore necessary, to a degree, to consider her testimony with some caution. For instance, she may well have a desire to downplay her involvement in the various activities involving J.M. and, consequently, be inclined to shift responsibility for them to the accused.

[150] However, I do note that she provided her K.G.B. statement at a time when the charges against her had been stayed and she faced no advantage, in a criminal context, by agreeing to testify. She attended trial notwithstanding that she was suffering from serious medical problems, including renal failure. It would have been a relatively easy matter for her to decline to testify.

[151] I also consider her testimony to be reliable. Her testimony was essentially consistent with the testimony of J.M. and T.M. where it overlapped. As well, there were occasions during her testimony that it was obvious that she felt true remorse for what had happened to J.M. In all, I found her testimony to be reliable and credible.

[152] As a result, I accept Langley's evidence that she left the accused's house with her grandfather by the end of April 2000. It follows, therefore, that most of the various activities of a sexual nature involving J.M. occurred between September 1999 and May 2000. J.M. was thirteen years of age during this period of time.

[153] To the extent that it might be relevant, I find that there were more than ten or eleven visits in total that J.M. made to the accused's house. I find that there were at least that many

visits between September 1999 and May 2000. Thereafter there were at least another four visits by J.M. with the accused. These include the trip to Chilliwack Mountain, the trip to an Abbotsford motel, sitting in the back of the accused's camper in an Abbotsford parking lot and the last occasion when J.M. arrived home high on drugs.

[154] Turning first to the charge of sexual assault, I am satisfied beyond any reasonable doubt that there was touching of the accused by both Langley and the accused during the time between September 1999 and May 2000 and that the touching was sexual in nature. The activities as described by J.M. and Langley clearly include sexual touching, by both the accused and Langley. Indeed, the defence at trial did not seriously dispute this. The evidence of J.M. and Langley, which I accept, was that the sexual aspect of the activities had started by the second or third visit by J.M. to the accused's house. Further, I accept that during the activities described by J.M. and Langley there was touching of J.M. by parts of the bodies of the accused and Langley, by various objects described as dildos and vibrators and by J.M. herself. There was also indirect touching of J.M. by the accused through his counselling of Langley.

[155] I am therefore convinced beyond a reasonable doubt that the accused intended to, and did, touch J.M. for a sexual purpose.

[156] The remaining element of the offence pertains to the issue of consent. As it is clear that J.M. was thirteen years of age when the sexual activities commenced, the question arises as to whether, from the evidence, I am satisfied beyond a reasonable doubt that the accused did not take all reasonable steps to ascertain J.M.'s age. If he did not, consent is vitiated and the offence proven.

[157] The Crown submits that the accused either directly knew that the complainant was under the age of fourteen or alternatively, did not take all reasonable steps to ascertain her age.

[158] As to whether the accused had direct knowledge of the complainant's age, counsel for the accused points to J.M.'s testimony that she was unable to recall that she had ever told him directly what her age was. He also points to the testimony of Langley where she said that J.M. had told her that she was fifteen years old and that she had told this to the accused. Langley also said that she thought that she believed that J.M. was a friend of P.M. rather than B.M.

[159] The defence further submits that the factual circumstances in this case were such that the accused was not required to take any additional steps to ascertain J.M.'s age. Those facts include:

- J.M. told people that she was older than she actually was.
- J.M. wanted to party with older people.
- When the accused first met J.M. she was at the house with older boys, B.M.'s brother and Mikey, a fifteen year old who was having a relationship with P.M.
- J.M. tried to pass herself off as older.
- J.M. acknowledged that she had had previous sexual experience.
- J.M. participated in taking drugs voluntarily and thus passed herself off as older than she was.

[160] On the basis of the above, the defence submits there is a reasonable doubt that the accused believed that J.M. was fourteen years or older and that he had taken all reasonable steps to ascertain her age.

[161] Having viewed J.M., both on the stand at trial and during her video taped statement of November 19, 2000, it is apparent that a visual observation alone would not suffice in order to

ascertain J.M.'s age. I am reinforced in that view by the very significant age disparity between J.M. and the accused, of almost 26 years.

[162] As noted, the reasonable steps required are determined according to an objective standard, those that a reasonable man would take in the particular circumstances of this case. As I have indicated, the accused's observation of J.M. alone would not suffice.

[163] What, then, in the circumstances of this case, would constitute reasonable steps?

[164] Most obviously, the accused could have asked J.M. directly. Further, the accused had an apparently close relationship with P.M. and B.M., which would have allowed him to inquire of them as to J.M.'s age. As well, the accused knew that T.M. often called the house when J.M. was there. He could have raised the matter either directly with T.M. or have done so through Langley. It is likely that other reasonable steps might have been taken as well.

[165] There is no evidence, therefore, that the accused took any of these steps, or, indeed, any steps at all, to ascertain J.M.'s age.

[166] I also consider the following factors of importance in that they informed or demonstrated, the accused's direct knowledge of J.M.'s age:

- There was a substantial and apparent age difference between the accused and J.M.
- J.M.'s physical appearance during her video taped statement shows a young person of the age of fourteen.
- J.M.'s behaviour was that of a youthful, naïve and inexperienced person; in particular, I point to her use of language as well as her body language during her statement, the fact that she was clearly reluctant at first to participate in sexual activities, and that she was clearly inexperienced with alcohol.
- J.M. was a good friend of B.M. who obviously had a close connection to the accused, referring to him as "Uncle Kevin."
- J.M. was a physically small person.
- J.M. was in school.
- J.M. needed her mother's permission to go the accused's house.
- J.M.'s mother called often to the accused's house to check on J.M.
- The accused told boys, who were themselves only two or three years older than J.M., that she would be pretty when she was older.
- J.M. was clearly inexperienced in sexual activities as the accused had to "teach" or "direct" her.
- J.M. was inexperienced with the use of drugs.
- The accused saw her in various states of undress.
- The accused told J.M. to tell others that she was sixteen or seventeen years old.
- The accused brought J.M. a birthday card for her fourteenth birthday.

[167] On the basis of the above, I am not satisfied that the accused has met the evidentiary onus required of him by s. 150.1(4). Instead, I am satisfied that the factors referred to above, when considered together, are sufficient to satisfy me beyond a reasonable doubt that the accused did not have the requisite belief that J.M. was fourteen years or more, and that he did not take all reasonable steps to ascertain her age.

[168] Accordingly, the defence of honest but mistaken belief in the age of the complainant fails. As a result, the age of the complainant operates to establish the absence of consent, thus establishing the offence of sexual assault.

[169] In the event that I am mistaken as to the availability of the defence as to the age of the complainant, I will address whether there is an absence of consent in the remaining circumstances.

[170] The absence of consent is subjective and determined by reference to the complainant's state of mind as to the touching at the time it occurred. I accept that when J.M. was initially introduced to the idea of posing nude or in revealing clothing, she was not comfortable with it. She only participated once she was persuaded to take drugs, specifically crack cocaine. From there she was persuaded to participate in sexual activities, mainly with Langley, with the encouragement, instruction and direction of the accused. These activities then ultimately became ones in which J.M. freely participated and, perhaps, even initiated.

[171] The Crown suggests that J.M. submitted to the activities as she was overpowered by the accused and Langley who, as adults, seduced her and provided her with drugs. The Crown submits that in addition to drugs, J.M. was overwhelmed by the oppressive nature of the atmosphere created by the accused and Langley. It was noted that J.M. was intimidated by the accused – by his size, by his anger generally, as well as the anger that was directed toward her and displayed toward Langley in front of J.M. In addition, J.M. was told by Langley of incidents where the accused was physically violent with her.

[172] The defence replies that J.M. willingly consented to participate in the sexual activity. He says that she was not forced to do anything that she did not wish to do. There was no actual use of violence towards J.M. and neither was there a threat to use violence. Nor did J.M. ever see the accused apply violence to anyone. On some occasions, J.M. would call the accused's house wanting to come over to participate in sexual activity and take drugs. Defence counsel submits that these facts are the indicia of voluntary consent.

[173] The Court must be concerned with whether J.M. freely consented to the activity in question. This involves a consideration of the complainant's subjective internal state of mind toward the sexual touching when it occurred. As was said by Major J. in ***Ewanchuk*** at ¶38, "there is no consent as a matter of law where the complainant believed that she was choosing between permitting herself to be touched sexually or risking being subject to the application of force." In my view, the addition of the words "…or denial of drugs" at the conclusion of that quotation is appropriate in this case.

[174] Here we have a naïve, thirteen-year-old girl with poor self-esteem and self-confidence. There is a clear relationship between J.M.'s ingestion of drugs and the sexual touching – without the latter, she would not get the former. I am satisfied from Dr. Lohrasbe's evidence that J.M., very quickly after she was introduced to crack cocaine, became dependent on it to the extent that she was willing to participate in activities that she had formerly been uncomfortable with. This dependency was more psychological or emotional than physiological – at least initially.

[175] In any event, I am satisfied that J.M.'s reliance and/or dependence upon drugs in combination with the atmosphere of intimidation that was present deprived her of the ability to freely and voluntarily consent to the sexual touching. I am further satisfied that J.M. submitted to the sexual activities or did not resist them due to her fear of the potential of violence against her by the accused and by the fear that she would be denied drugs. In either event, such consent as may have been present by the words or actions of J.M. was not freely given but rather was given under fear or duress, as contemplated by s. 265(3) and the common law.

[176] As to the *mens rea* component of the charge, the law recognizes that an accused may have an honest but mistaken belief in consent. As Major J. said in ***Ewanchuk***, in order to rely on a lack of *mens rea*, the accused must point to evidence that tends to show that the complainant communicated, by words or conduct, her consent to agree to sexual activity with the accused.

[177] In this case there is no evidence from the accused either as to his belief or the reasonableness of it, although none is required. However, on the basis of the evidence led, there is evidence from the perspective of the accused that indirectly tends to show that J.M. seemed to be a willing participant in the sexual activities. For instance, there is no evidence that she objected to the activity and, if she did object to some part of it, she was not forced to proceed. On the other hand, there was no direct evidence of the accused's belief as to J.M.'s consent one way or the other.

[178] I am not satisfied that the circumstances referred to above, tend to show that the complainant communicated, by words or conduct, her consent to agree to sexual activity with the accused.

[179] I am further satisfied, beyond a reasonable doubt, that any mistaken belief cannot have been honestly held by the accused. The accused was clearly aware that J.M. was initially not a willing participant in the sexual activity proposed by him and Langley. He would also have been aware that she was very reticent about taking drugs. Her evidence was that she was afraid to do so on the first occasion she went to the accused's house. It was not until he was later able to reassure her that he would never do anything to harm her that she agreed to do so. He would, as well, be aware that once she had had her inhibitions lowered by the drugs, her participation in sexual activities began to occur. He would further be aware that his denial of drugs motivated J.M. to continue to participate in such activities. He would also be aware that by intimidating her, by yelling at or belittling her, she would also become more willing to participate.

[180] From the foregoing I find that, in its most favourable light, the accused was reckless or wilfully blind as to J.M.'s consent. It surely cannot be a principle of law that an accused is able to hide behind the cloak of consent when he is the vehicle that, through the provision of drugs such as crack cocaine and crystal meth, results in the obtaining of that consent.

[181] Again, if I am wrong about J.M.'s consent to the sexual activities generally, there is one particular incident that requires discussion in the context of the sexual assault charge. This is the incident where the accused forcefully inserted a dildo into J.M.'s vagina beyond any point where it had been inserted on any prior occasion.

[182] I accept from the evidence of J.M. that the limit of her willingness to have a dildo inserted into her vagina was, at best, a superficial penetration. She had not previously "lost her virginity" by which she meant that her hymen had not been ruptured as a result of sexual intercourse or by other means. This was known to Langley and, I am satisfied, was known to the accused as well.

[183] If, therefore, there was consent by J.M. to the touching by Langley and the accused, it did not extend to the full insertion of the dildo into her vagina by the accused. I am also satisfied beyond any reasonable doubt that the accused was aware of this fact.

[184] It was suggested on behalf of the accused that where there is consent generally to sexual activity, one cannot then isolate an act within that activity. With respect, I think that in certain circumstances one can do so. As I have earlier noted, it is not beyond contemplation that where there has been a limit placed, either expressly or impliedly, to the sexual activity, in order to carry the activity beyond that limit, clear consent must be sought and obtained. Here

the established limit was clitoral stimulation. J.M.'s participation to that activity might, subject to my earlier remarks (viz. that I do not agree that they were consensual, but in the event that I am wrong on that point), be said to be willing. However, that willingness was clearly limited by the conduct of J.M. and Langley during earlier sexual activities as well as earlier on the day in question. The accused did not seek or obtain any consent, either expressly or impliedly, from J.M. to do what he did, which was clearly beyond the limit of J.M.'s consent.

[185] On the basis of that single incident, I find that there was no consent to the act. Further I find that there was no belief on the part of the accused that he might have held such a belief.

[186] I therefore find the accused, Kevin Sims guilty of count one.

[187] Turning to count two, I am satisfied, for the reasons expressed above, that the Crown has proved the essential elements of the offence, that the accused touched J.M. directly with his own body and with a sex toy object; and indirectly, by Tasha Langley touching J.M. with her body and with sex toy objects, without the accused having taken reasonable steps to ascertain J.M.'s age which was under fourteen years of age. I therefore find the accused, Kevin Sims, guilty of count two.

[188] Turning to count three it is clear from the foregoing discussion that, on the evidence of J.M. and Langley, J.M. was counselled and invited by the accused to touch both her own body and the body of Langley during the incidents described above and the touching was for a sexual purpose. Further, J.M. was thirteen years of age at the time, and the accused did not take all reasonable steps to ascertain J.M.'s age. I therefore find the accused, Kevin Sims, guilty of count three.

[189] I turn now to count four. I am satisfied that at the time the alleged offence occurred, J.M. was fourteen years of age and that she was not over the age of eighteen. From the evidence, there were only a limited number of contacts between J.M. and the accused following the departure of Langley. Of those contacts, the only one which involved touching of a sexual nature was described as having occurred in the back of the accused's camper when J.M. still resided in Abbotsford and while she was, therefore, thirteen years old. I am unable to find that there was any touching of a sexual nature that occurred after J.M. turned fourteen. Any contact between the accused and J.M. that might have occurred after J.M. turned fourteen, although clearly involving the use of drugs, cannot clearly be shown to have involved sexual touching. I therefore, find the accused, Kevin Sims, not guilty of count four.

[190] That concludes these proceedings.

"D. Brine, J."
The Honourable Mr. Justice D. Brine