Her Majesty the Queen v. Alicandro
[Indexed as: R. v. Alicandro]

95 O.R. (3d) 173
Court of Appeal for Ontario,
Doherty, Rosenberg and Cronk JJ.A.
February 12, 2009

Criminal law -- Child luring -- Elements of offence -- Accused communicating with police officer posing as 13-year- old girl in Internet chat room -- Accused transmitting video of himself masturbating to "girl" -- Accused properly convicted under s. 172.1(1)(c) of Criminal Code of communicating with person believed to be under 14 for purpose of facilitating commission of indecent act under s. 173(2) -- Accused's belief that he was communicating with person under 14 sufficient to fix him with liability under s. 172.1(1)(c) despite fact that offence under s. 173(2) requires exposure of genitals to person who is actually under 14 -- No defence to child luring charge that was impossible to complete offence of exposing genitals to child -- Section 173(2) not requiring that accused and victim be in same place -- Section 173(2) applying to images sent over Internet -- Criminal Code, ss. 172.1(1)(c), 173(2).

Criminal law -- Sentence -- Child luring -- Accused communicating with police officer posing as 13-year-old girl in Internet chat room, engaging in sexually explicit conversation and transmitting video of himself masturbating -- Accused having no criminal record -- Custodial sentence of 90 days intermittent followed by two years' probation affirmed on appeal -- Deterrence and denunciation being primary sentencing considerations for child luring offences.

Criminal law -- Indecent act -- Exposure -- Offence of exposing genitals to child not requiring that accused and victim be in same place and applying to images sent over Internet -- Criminal Code, R.S.C. 1985, c. C-46, s. 173(2).

The accused struck up a conversation with a police officer posing as a 13-year-old girl in an Internet chat room, quickly moved the conversation in a sexual direction and transmitted a video of himself masturbating to ejaculation to the "girl". The accused was convicted of communicating with a person he believed to be under the age of 14 for the purpose of facilitating the commission of the offence of exposing his genitals to a child contrary to s. 172.1(1)(c) of the Criminal Code. He was sentenced to 90 days in jail, to be served intermittently, followed by two years' probation. He appealed the conviction and the sentence.

Held, the appeal should be dismissed.

The accused was properly convicted of Internet child luring, communicating over a computer system for the purpose of facilitating the commission of an offence under s. 173(2) of the Code despite the fact that an offence under s. 173(2) requires exposure of one's genitals to a person who is actually under the age of 14. Section 172.1 creates an inchoate offence. Liability for inchoate offences turns on what the accused believed the material facts to be and not what those facts actually were. If the Crown proves that the culpable mens rea existed with the prohibited conduct, the offence under s. 172.1(1)(c) is made out regardless of whether the designated crime is ever committed, attempted or is even factually possible.

Section 173(2) of the Code applies to images sent over the Internet. The phrase "in any place" in s. 173(2) speaks to the location where the perpetrator exposes himself. There is no requirement that the accused and the victim must be in the same place when the offence is committed.

The accused had no criminal record and did not actually expose himself to a young person. Nevertheless, a short custodial sentence was appropriate. Deterrence and denunciation are the primary considerations when sentencing for an offence like the one committed here.

APPEAL from the conviction entered by J.E. Allen J. of the Ontario Court of Justice dated December 12, 2007 for child luring and from the sentence imposed on December 20, 2007.

Cases referred to United States of America v. Dynar (1997), 1997 CanLII 359 (SCC), 33 O.R. (3d) 478, [1997] 2 S.C.R. 462, [1997] S.C.J. No. 64, 147 D.L.R. (4th) 399, 213 N.R. 321, J.E. 97-1400, 101 O.A.C. 321, 115 C.C.C. (3d) 481, 8 C.R. (5th) 79, 44 C.R.R. (2d) 189, apld Other cases referred to R. v. Ancio, 1984 CanLII 69 (SCC), [1984] 1 S.C.R. 225, [1984] S.C.J. No. 12, 6 D.L.R. (4th) 577, 52 N.R. 161, 2 O.A.C. 124, 10 C.C.C. (3d) 385, 39 C.R. (3d) 1, 11 W.C.B. 457; R. v. Clark, [2005] 1 S.C.R. 6, [2005] S.C.J. No. 4, 2005 SCC 2 (CanLII), 249 D.L.R. (4th) 257, 329 N.R. 10, J.E. 2005-259, 208 B.C.A.C. 6, 193 C.C.C. (3d) 289, 25 C.R. (6th) 197, 8 M.P.L.R. (4th) 289, 63 W.C.B. (2d) 218; R. v. Folino (2005), 2005 CanLII 40543 (ON CA), 77 O.R. (3d) 641, [2005] O.J. No. 4737, 203 O.A.C. 258, 202 C.C.C. (3d) 353, 67 W.C.B. (2d) 454 (C.A.); R. v. Jarvis, 2006 CanLII 27300 (ON CA), [2006] O.J. No. 3241, 214 O.A.C. 189, 211 C.C.C. (3d) 20, 41 C.R. (6th) 190 (C.A.); R. v. Jones, [2007] 2 Cr. App. R. 21, [2007] E.W.C.A. Crim. 1118, [2007] 4 All E.R. 112 (C.A.); R. v. Legare, [2008] A.J. No. 373, 2008 ABCA 138 (CanLII), 429 A.R. 271, 89 Alta. L.R. (4th) 1, [2008] 10 W.W.R. 90, 236 C.C.C. (3d) 380, 58 C.R. (6th) 155, 79 W.C.B. (2d) 887 [Leave to appeal to S.C.C. granted [2008] S.C.C.A. No. 406]; R. v. Shivpuri, [1987] 1 A.C. 1, [1986] 2 All E.R. 334, [1986] 2 W.L.R. 988, 150 J.P. 353, [1986] Crim L.R. 536 (H.L.) Statutes referred to Canadian Charter of Rights and Freedoms, s. 11(b) Criminal Code, R.S.C. 1985, c. C-46, ss. 150, 172.1 [as am.], (1), (c), (3), (4), 173 [as am.], 1(a) [as am.], (b) [as am.], (2) [as am.], 281, 349 [as am.] Sex Offender Information Registration Act, S.C. 2004, c. 10Authorities referred to Ashworth, Andrew, Principles of Criminal Law, 5th ed. (London: Oxford University Press, 2006) Fitch, Gregory J., Q.C., "Child Luring" (Paper presented to the National Criminal Law Program: Substantive Criminal Law, Advocacy and the Adminstration of Justice, Edmonton, Alberta, 10 July 2007) Federation of Law Societies of Canada, 2007 Gold, Alan D., "To Dream the Impossible Dream: A Problem in Criminal Attempts (and Conspiracy) Revisited" (1979), 21 Crim. L.Q. 218 House of Commons Debates, No. 054 (May 3, 2001) Stuart, Don, Canadian Criminal Law: A Treatise, 5th ed. (Toronto: Carswell, 2007)

Alan D. Gold and Joanne Park, for appellant.

Lisa Joyal and Allison Dellandrea, for respondent.

The judgment of the court was delivered by

DOHERTY J.A.: -- I. Overview

[1] The appellant was charged that he

> . . . did by means of a computer system within the meaning of subsection 342.1(2) of the Criminal Code of Canada, communicate with a person he believed to be under the age of 14 years for the purpose of facilitating the commission of an offence under subsection 173(2) . . . contrary to the Criminal Code of Canada section 172.1(1)(c).

[2] He was convicted after a trial in the Ontario Court of Justice and sentenced to a term of imprisonment of 90 days to be served intermittently and to be followed by two years of probation. He was also ordered to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10.

[3] The appellant appeals from his conviction and sentence. I would dismiss the appeal.

[4] Counsel for the appellant advanced five grounds of appeal. The court required submissions from the Crown on two of those grounds, both relating to the interpretation of the applicable Criminal Code, R.S.C. 1985, c. C-46 provisions. The other arguments advanced by the appellant concerned the trial judge's ruling that the appellant's right to a trial within a reasonable time was not breached and his reasons for conviction. We agree with the s. 11(b) [of the Canadian Charter of Right and Freedoms]) ruling and see no error in the

trial judge's analysis of the evidence or his application of the relevant legal principles to that evidence. The remainder of these reasons will address the two issues on which the court required submissions from the Crown.

II. Factual Background

[5] It is unnecessary to review the evidence in any detail. The two arguments addressed in these reasons assume the facts as found by the trial judge. Counsel argues that on those facts, the appellant did not commit the offence created by s. 172.1(1)(c).

[6] The appellant, while on his computer in his home in Woodbridge, Ontario, entered a chat room under the screen name "slickman69a". He struck up a conversation with a person using the screen name "two_tongues13". Unbeknownst to the appellant, this person was Detective Constable Gary Rubie of the Peel Regional Police Internet Child Exploitation Unit. Constable Rubie was posing as a young girl.

[7] The appellant quickly moved the conversation in a sexual direction. He offered to "cum and make u feel better". He asked two_tongues13 if she had a picture of herself and how old she was. When two_tongues13 asked the appellant how old he was, he responded "69" and then added "I like 69 do u".

[8] Constable Rubie left the chat for about 20 minutes in order to set up the software needed to fully record the remainder of the interaction between the appellant and two_ tongues13. During this break, the appellant repeatedly tried to renew his dialogue with two_tongues13.

[9] When Constable Rubie returned to the chat, the appellant asked two_tongues13 if she would "like to see my cam". The appellant added that he was nude and asked two_tongues13 if she would "like to see". Two_tongues13 expressed concern about her mother being around and about getting into trouble. The appellant repeated his offer. Two_tongues13 then said "but im only 13".

[10] The appellant made one apparent failed effort to send an image of himself in the nude to two_tongues13. Then, he set up his webcam so that it was focused on his genitals and transmitted a video to two_tongues13 of himself masturbating to ejaculation.

[11] The appellant testified in his own defence. He initially indicated that he was not sure that he was the person chatting with two_tongues13 and masturbating to ejaculation. The appellant eventually acknowledged that it was him, but insisted that he believed that two_tongues13 was at least 18 years of age. He testified that he had reviewed the electronic profile of two_tongues13 in which she was described as 18 years of age. He also understood that persons could not enter this particular chat room if they were under 18.

[12] The appellant was asked what he thought when two_ tongues13 said "but im only 13". The appellant replied that everybody, including him, lies about their age in chat rooms. The appellant also said that he did not think the speaker was referring to her age when she said "but im only 13".

[13] Not surprisingly, the trial judge rejected the appellant's evidence in its entirety. He concluded:

> I do not think there is anything remotely resembling a reasonable effort to determine the true age of the person he was dealing with here indeed. He could have nothing in his mind other than he was sending images of himself over the Internet masturbating to a 13 year old.

[14] The language used by the trial judge reflects the content of s. 172.1(3) and (4). In the context of a charge under s. 172.1(1)(c), s. 172.1(3) provides that where the person with whom an accused is communicating is represented to be under 14 years of age, that representation is proof, in the absence of evidence to the contrary, that the accused believed the person to be under 14. Section 172.1(4) declares that

an accused's belief that a person is over 14 is not a defence "unless the accused took reasonable steps to ascertain the age of the person".

[15] Given the applicable legislation and the evidence, the trial judge's findings of fact are fully justified. The legal issues raised by counsel must be considered on the basis that the appellant, believing he was communicating via his computer with a 13-year-old girl, masturbated to ejaculation and transmitted a video of that act to the person he believed to be 13 years of age.

III. Analysis

[16] The relevant parts of the Criminal Code provisions at issue on appeal, as they read at the time of trial, are set out below:

Luring a child

> 172.1(1) Every person commits an offence who, by means of a computer system within the meaning of subsection 342.1(2), communicates with
> (a) a person who is, or who the accused believes is, under the age of eighteen years, for the purpose of facilitating the commission of an offence under subsection 153(1), section 155 or 163.1, subsection 212(1) or (4) or section 271, 272, or 273 with respect to that person;
> (b) a person who is, or who the accused believes is, under the age of sixteen years, for the purpose of facilitating the commission of an offence under section 280 with respect to that person; or
> (c) a person who is, or who the accused believes is, under the age of fourteen years, for the purpose of facilitating the commission of an offence under section 151 or 152, subsection 160(3) or 173(2) or section 281 with respect to that person. [See Note 1 below]

Indecent acts . . . . .

Exposure

> 173(2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction. [See Note 2 below]

> > (1) Whether s. 172.1(1)(c) can apply to communications with a person who is not, in fact, under the age of 14 years

[17] The appellant was charged under s. 172.1(1)(c) of the Code with communicating over a computer system for the purpose of facilitating the commission of an offence under s. 173(2). Since the communication under s. 172.1(1)(c) must be for the purpose of facilitating the designated offence "with respect to that person", and an offence under s. 173(2) requires exposure of one's genitals to a person who is actually under the age of 14 years, the appellant submits that he could not be found guilty of the offence charged because the person the appellant was communicating with, Constable Rubie, was not, in fact, under the age of 14 years. On this interpretation of s. 172.1(1)(c), the appellant's belief that he was exposing himself to a 13-year-old child would not be enough to fix him with liability. Rather, the offence is made out only where the person with whom an accused is communicating for the purpose of facilitating an offence under s. 173(2) is in fact under 14 years of age.

[18] This argument turns on the interpretation of s. 172.1(1) (c). The process of statutory interpretation requires that a provision in a statute be read contextually, in a manner that reflects the grammatical and ordinary meaning of the words used that accords with the scheme and object of the statute, and that reflects the intention of the legislature: R. v. Clark, 2005 SCC 2 (CanLII), [2005] 1 S.C.R. 6, [2005] S.C.J. No. 4, at

para. 43. The aim of the interpretative exercise is to discern the meaning of the statutory provision, not to define the individual words or phrases used in the provision.

(a) The nature of the offences created by s. 172.1

[19] Before examining the specific language of s. 172.1(1) (c), it is helpful to consider s. 172.1 on a more general level. The crimes created by that section target a specific kind of conduct, the communication by means of a computer with a person who is, or is believed to be, below a certain age. That conduct is not in and of itself criminal, illegal or necessarily inappropriate. The section criminalizes that conduct only if it is accompanied by the intention to facilitate the commission of one of the crimes designated in s. 172.1. All those designated crimes are crimes against young persons and all potentially involve the sexual exploitation of young people.

[20] By criminalizing conduct that is preparatory to the commission of the designated offences, Parliament has sought to protect the potential child victims of those designated crimes by allowing the criminal law to intervene before the actual harm caused by the commission, or even the attempted commission, of one of the designated offences occurs. Section 172.1 creates what Professor Ashworth refers to as essentially inchoate crimes, described in substantive offence terms: Andrew Ashworth, Principles of Criminal Law, 5th ed. (Oxford: Oxford University Press, 2006), at pp. 468-70. [See Note 3 below]

[21] The offences created by s. 172.1, like the inchoate crimes of conspiracy, attempt and counselling, are prophylactic in that they seek to prevent the commission of the designated crimes by criminalizing conduct that occurs on the way toward the commission of the designated crimes. Also like the inchoate offences, justification for criminalizing the conduct described in s. 172.1 is found in the required mens rea. It is the intention to facilitate the commission of one or more of the designated offences that makes the accused's otherwise lawful conduct sufficiently harmful and potentially dangerous to warrant the imposition of criminal sanction. The words of McIntyre J. in R. v. Ancio, 1984 CanLII 69 (SCC), [1984] 1 S.C.R. 225, [1984] S.C.J. No. 12, at pp. 247-48 S.C.R., although addressing the crime of attempt, apply to the crimes created by s. 172.1:

> [T]he intent to commit the desired offence is a basic element of the offence of attempt. Indeed, because the crime of attempt may be complete without the actual commission of any other offence and even without the performance of any act unlawful in itself, it is abundantly clear that the criminal element of the offence of attempt may lie solely in the intent. (Emphasis added)

[22] Recognizing that s. 172.1 creates what are in essence inchoate crimes assists in placing the appellant's submission within the context of the broader criminal law principles that address the scope of criminal liability. The appellant's submission, although anchored in the closing phrase of s. 172.1(1)(c), is in reality a contention that the defence of impossibility is available to a charge under that section. It is contended that because the appellant did everything he intended to do, that is exposed himself to two_tongues13, and yet did not commit an offence under s. 173(2), because two_ tongues 13 was in fact an adult male, he could not be convicted of communicating for the purpose of facilitating that offence.

[23] This submission echoes the submission advanced and rejected in United States of America v. Dynar (1997), 1997 CanLII 359 (SCC), 33 O.R. (3d) 478, [1997] 2 S.C.R. 462, [1997] S.C.J. No. 64. In Dynar, it was alleged that the accused had attempted to launder money and conspired to launder money. The accused believed that the money to be laundered was from the proceeds of illegal drug trafficking. In reality, the accused was the target of a police sting operation and the money had come from the public coffer. It was argued that because the money the accused attempted to launder was not in fact the proceeds of crime, he could not be convicted of attempting to launder the proceeds of crime, even though he believed that the money was the proceeds of crime. The same argument was made with respect to the conspiracy allegation.

[24] The majority in the Supreme Court of Canada acknowledged the long-standing academic debate over whether the impossibility of committing the completed crime could ever provide a defence to a charge of attempting to commit that crime or conspiracy to commit that crime. [See Note 4 below] The majority concluded that impossibility of completion should not provide a defence to attempt or conspiracy. It determined that on a charge of attempt or conspiracy, the accused's mens rea had to be determined based on the material circumstances as the accused believed them to be. Consequently, in Dynar, what mattered for the purposes of the attempt and conspiracy charges was whether the accused believed the money to be the proceeds of crime and not whether the money was in fact the proceeds of crime. The majority justified this holding as consistent with both the preventative rationale underlying inchoate liability and the generally accepted subjective nature of mens rea in criminal matters.

[25] The majority squarely addressed the appropriateness of criminalizing inchoate offences where the full crime could not be committed in addressing the conspiracy charge, at para. 91:

> Does it make any difference to the potential liability of the conspirators that they could not have committed the substantive offence even if they had done everything they set out to do? Put another way, should conspirators escape liability because, owing to matters entirely outside their control, they are mistaken with regard to an attendant circumstance that must exist for their plan to be successful? Such a result would defy logic and could not be justified. (Emphasis added)

[26] After Dynar, it can safely be said that liability for inchoate offences turns on what the accused believed the material facts to be and not what those facts actually were. [See Note 5 below] Indeed, in response to a question from my colleague, Rosenberg J.A., counsel for the appellant acknowledged that the appellant could have been convicted of attempting to expose himself contrary to s. 173(2) had he been so charged.

[27] Given the nature of the offences created by s. 172.1 and the principles set down in Dynar, the accused's inability to complete the offence he sought to facilitate should provide no defence to the charge. It is, of course, always open to Parliament to provide a defence that would not be available under generally applicable criminal law principles. I turn now to the language of s. 172.1(1)(c) to determine whether Parliament has done so in respect of this offence.

(b) Interpretation of the language of s. 172.1(1)(c)

[28] The offence described in s. 172.1(1)(c) has three elements:
(i) The accused must communicate by means of a computer system; (ii) the communication must be with a person under 14 years of age, or with a person who the accused believes is under 14 years of age; and (iii) the accused's purpose in making the communication must be to facilitate the commission of one of the designated offences with the person with whom the communication is made.

[29] The first of these elements, communication by means of a computer system, describes part of the prohibited conduct, or actus reus of the crime. In keeping with general criminal law principles, that conduct must be voluntary to attract criminal liability: Don Stuart, Canadian Criminal Law: A Treatise, 5th ed. (Toronto: Carswell, 2007), at pp. 107-115.

[30] The second element of the offence, the age of the person to whom the communication is made, or the accused's belief as to the age of that person, is also part of the conduct prohibited by the offence. If the person to whom the communication is made is under 14 years of age, his or her age is a condition or circumstance that must be proven by the Crown to complete the actus reus. If the person with whom the communication is made is over 14, but the accused believes he or she is under 14, the accused's belief is the circumstance or condition that the Crown must prove to establish the prohibited act. The language of the section draws no distinction between communicating with a child who is under 14 and communicating with a child who the accused believes is under 14.

[31] The third element describes the fault component, or mens rea, of the offence created by s. 172.1(1)(c). The accused must engage in the prohibited communication with the specific intent of facilitating the commission of one of the designated offences "with respect to that person". In this case, the Crown had to prove that when the accused communicated with two_ tongues13 in the chat room, his purpose or intent was to facilitate the exposure of his genital organs to two_tongues13, a person he believed to be under 14 years of age.

[32] A plain reading of the words of the section offers no support for the appellant's contention that the offence is only committed if the intended exposure is to a person who is actually under 14. This submission confuses the elements of the completed offence created by s. 173(2) and the mens rea that the Crown must prove to establish the inchoate offence described in s. 172.1(1)(c). The former looks to what happened, the latter to what the accused believed could happen. If the Crown proves that the culpable mens rea existed with the prohibited conduct, the offence under s. 172.1(1)(c) is made out regardless of whether the designated crime is ever committed, attempted or is even factually possible.

[33] While I agree that on the wording of the section, the criminal purpose must be in respect of the person with whom the accused is communicating, there is no language supporting the contention that the criminal purpose is culpable only if the accused is actually able to bring that purpose to fruition and commit the designated offence with the person to whom the communication is made. This element of the offence created by s. 172.1(1)(c) focuses on the accused's purpose in making the communication. Purpose is a state of mind. The appellant believed he was communicating with a child under 14 years of age. It is that belief, not the actual age of the person with whom he was communicating, that is relevant to the accused's purpose in engaging in the communication.

[34] In considering the appellant's interpretation of s. 172.1(1)(c), I must, of course, examine the entire provision. I agree with the Crown's submission that the appellant's interpretation renders a significant part of s. 172.1(1)(c) meaningless. The section specifically targets for protection either a person who is under 14 years of age or a person who the accused "believes is under the age of fourteen years". If the appellant's submission is correct, communication with a person who is not under 14 but who the accused believes to be under 14 years of age could never result in the commission of the offence created by s. 172.1(1)(c). The appellant's interpretation reads the phrase "the accused believes is under the age of fourteen years" out of the section and would defeat Parliament's clear intention to capture communications with that class of persons.

[35] The section read as a whole and the specific language of s. 172.1(1)(c) lead me to reject the appellant's contention that the section is applicable only where the person with whom the accused communicates is in fact under 14 years of age. A consideration of the language in the context of the clear object of the provision fortifies this conclusion.

(c) The purpose of s. 172.1

[36] The language of s. 172.1 leaves no doubt that it was enacted to protect children against the very specific danger posed by certain kinds of communications via computer systems. [See Note 6 below] The Internet is a medium in which adults can engage in anonymous, low visibility and repeated contact with potentially vulnerable children. The Internet can be a fertile breeding ground for the grooming and preparation associated with the sexual exploitation of children by adults. One author has described the danger in these terms:

> For those inclined to use computers as a tool for the achievement of criminal ends, the Internet provides a vast, rapid and inexpensive way to commit, attempt to commit, counsel or facilitate the commission of unlawful acts. The Internet's one-too-many broadcast capability allows offenders to cast their nets widely. It also allows these nets to be cast anonymously or through misrepresentation as to the communicator's true identity. Too often, these nets ensnare, as they're designed to, the most vulnerable members of our community -- children and youth. . . . . .

> Cyberspace also provides abuse-intent adults with unprecedented opportunities for interacting with children that would almost certainly be blocked in the physical world. The rapid development and convergence of new technologies will only serve to compound the problem. Children are the front-runners in the use of new technologies and in the exploration of social life within virtual settings. [See Note 7 below]

[37] The appellant, by his conduct, made it crystal clear that he is prepared to use Internet communication with a child to facilitate his sexual exploitation of a child. It would undermine entirely the purpose of the provision if the appellant could escape liability where, despite his best efforts to expose himself to a child, he could not succeed because, unbeknownst to him, he was actually communicating with a police officer.

[38] The appellant's interpretation of s. 172.1(1)(c) would significantly undermine the object of that statutory provision in a second way. If the appellant's interpretation is accepted, communications between an accused and a police officer who an accused believes to be a young person could not result in a conviction under s. 172.1(1)(c). A review of the case law demonstrates that police officers posing as young persons is almost the exclusive manner in which this provision is enforced. This is hardly surprising. Children cannot be expected to police the Internet. The state is charged with the responsibility of protecting its children. That responsibility requires not only that the appropriate laws be passed, but that those laws be enforced. The appellant's interpretation would render the section close to a dead letter.

(2) Whether s. 173(2) applies to images sent over the Internet

[39] For convenience, I have set out s. 173 in its entirety:

Indecent acts

> 173(1) Every one who wilfully does an indecent act
> (a) in a public place in the presence of one or more persons, or
> (b) in any place, with intent thereby to insult or offend any person, is guilty of an offence punishable on summary conviction.

Exposure

> (2) Every person who, in any place, for a sexual purpose, exposes his or her genital organs to a person who is under the age of fourteen years is guilty of an offence punishable on summary conviction.

[40] The appellant submits that the phrase "in any place" in s. 173(2) means that the accused person who exposes him or herself must be in the same physical location as the victim of the exposure. I quote from counsel's factum:

> [T]he section is referring to a physical location encompassing the "victim" as well as the accused. It is therefore respectfully submitted that sending moving or still images over the Internet does not constitute exposing oneself in a "place" as required by s. 173(2).

[41] According to the appellant, it would follow that an offence under s. 172.1(1)(c) of communicating for the purpose of facilitating the commission of an offence under s. 173(2) could not be established unless the communication evidenced some form of intended direct contact.

(a) Interpretation of the language of s. 173(2)

[42] Nothing in the language of s. 173(2) suggests that the perpetrator and the victim must be in the same place for the offence to be committed. The phrase "in any place" speaks to the location where the perpetrator exposes himself. It has no grammatical or syntactical connection to the phrase "a person who is under the age of fourteen years", the phrase describing the victim of the offence. Section 173(2) does not

speak to the location of the victim when the crime occurs, much less require that the victim be in the same place as the perpetrator.

(b) The history of s. 173(2)

[43] There is no need to go beyond the language of s. 173(2) to properly interpret the phrase "in any place". The history of s. 173 does, however, explain why that phrase appears in s. 173(2). Section 173(1) creates two crimes, both of which require the doing of an indecent act. The offence described in s. 173(1)(a) requires that the act be done "in a public place". The offence described in s. 173(1)(b) refers to the indecent act as being committed "in any place". The phrase "public place" is a defined term under s. 150 of the Code and has a much more limited meaning than the phrase "in any place": see R. v. Clark.

[44] The Criminal Code has contained the two offences set out in s. 173(1) and distinguished between them using phrases like "public place" and "any place" since the first Criminal Code was enacted in 1892 (S.C. 1892, c. 29, s. 177). Section 173(2) came along much later (R.S.C. 1985, c. 19 (3rd Supp.), s. 7(2)). The phrase "in any place" in s. 173(2) was intended to make it clear that s. 173(2), like s. 173(1)(b), and unlike s. 173(1)(a), was not limited to acts done in a public place or in any particular place.

(c) The purpose of s. 173(2)

[45] Section 173(2), like s. 172.1, was enacted to protect children against sexually exploitive conduct. That object is not advanced by an interpretation which requires that the victim be in the same physical place as the perpetrator. The harm caused by the prohibited conduct and the danger it poses to young persons flows from the conduct and the sexual purpose with which the conduct is done. Neither the harm nor the danger depends upon the victim being in close proximity to the perpetrator. Indeed, it could well be argued that the modern day "flasher" surfing the Internet for vulnerable children poses a more significant risk to children than did his old- fashioned raincoat-clad counterpart standing on some street corner.

[46] Not only does the appellant's reading of s. 173(2) undermine the object of that provision, it would also significantly impair the protection intended to be afforded children by s. 172.1(1)(c). On the appellant's interpretation, s. 172.1(1)(c) would be helpless to protect children against adults who sexually exploit them entirely over the Internet and thereby avoid ever being in the same place as their victims. Instead, the section would reach only those adults whose sexually exploitive conduct included some form of intended direct contact. An interpretation which requires direct contact seems entirely inconsistent with a provision expressly designed to address sexual exploitation via computer communication.

[47] I do not think that s. 173(2) poses any interpretative difficulty on the facts as found by the trial judge. The appellant was in his home when he exposed his genitals via the webcam broadcast to two_tongues13. Consequently, his actions fall squarely within the opening language of s. 173(2). He was a person "who, in any place, for a sexual purpose, exposes his or her genital organs". The location of the appellant's audience, two_tongues13, was irrelevant to his liability under s. 173(2). It is common ground, of course, that the appellant could not be convicted of the full offence under s. 173(2) since, despite his best efforts, he did not expose himself to a person under 14 years of age.

IV. Sentence Appeal

[48] The sentence appeal can be addressed very briefly. Counsel takes issue with one part of the sentence imposed by the trial judge. He submits that the trial judge erred in imposing a custodial sentence and that a conditional sentence should have been imposed. Counsel emphasizes that the appellant has no record, did not actually expose himself to a young person and has no history of any sexual interest in children.

[49] The mitigating factors are acknowledged. However, deterrence and denunciation are the primary considerations when sentencing for an offence like the one committed here. A short custodial sentence was appropriate in the circumstances: see R. v. Jarvis, 2006 CanLII 27300 (ON CA), [2006] O.J. No. 3241, 211

C.C.C. (3d) 20 (C.A.); R. v. Folino (2005), 2005 CanLII 40543 (ON CA), 77 O.R. (3d) 641, [2005] O.J. No. 4737 (C.A.). There is no basis upon which this court can interfere with the custodial term.

V. Disposition

[50] I would dismiss the appeal from conviction and the appeal from sentence.

Appeal dismissed.

Notes

Note 1: Section 172.1(1) was introduced into the Criminal Code by S.C. 2002, c. 13, s. 8. Section 172.1(1)(c) was recently amended by S.C. 2008, c. 6, s. 14 to eliminate reference to all offences except s. 281. That amendment was not in force at the time of the appellant's trial. Under the other amendments to s. 172.1, the allegations against the appellant would now fall under s. 172.1(1)(b).

Note 2: Section 173(2) was added to s. 173 by R.S.C. 1985, c. 19 (3rd Supp.), s. 7(2). The requisite age was changed from 14 to 16 by S.C. 2008, c. 6, s. 54. That amendment was made after the appellant's trial.

Note 3: There are numerous crimes in the Criminal Code that criminalize otherwise non-criminal conduct where it is done with the intention of, or for the purpose of committing a crime (e.g., s. 349, entering a dwelling house with intent to commit an indictable offence). Section 172.1(1)(c) differs from these offences in that it does not require that the act be done for the purpose of committing one of the designated offences, but instead requires that it be done for the purpose of facilitating the commission of one of the enumerated offences. This difference may broaden the reach of s. 172.1(1) compared to the reach of these other offences: See R. v. Legare, 2008 ABCA 138 (CanLII), [2008] A.J. No. 373, 429 A.R. 271 (C.A.), at paras. 58-66, leave to appeal to S.C.C. granted [2008] S.C.C.A. No. 406. I need not address that issue. The scope to be given to the phrase "for the purpose of facilitating" is not germane to the outcome of the case. There is no doubt that the appellant's purpose in communicating with two_tongues13 was to facilitate the exposure of his genitals to that person.

Note 4: Professor Stuart canvasses this controversy in Canadian Criminal Law: A Treatise, 5th ed. (Toronto: Carswell, 2007), at pp. 680-82. Counsel for the appellant joined that debate and advanced a powerful, but ultimately unsuccessful, argument in favour of recognizing a limited impossibility defence: see Alan D. Gold, "To Dream the Impossible Dream: A Problem in Criminal Attempts (and Conspiracy) Revisited" (1979), 21 Crim. L.Q. 218.

Note 5: After a rather long and winding judicial road, English criminal law has reached the same position: see R. v. Shivpuri, [1987] A.C. 1, [1986] 2 All E.R. 334 (H.L.). R. v. Jones, [2007] 2 Cr. App. R. 21, [2007] E.W.C.A. Crim. 1118 (C.A.), at p. 282 Cr. App. R. provides a recent example in which the Court of Appeal affirmed a conviction on a charge of attempting to incite a child to engage in sexual activity. The accused thought he was text messaging over his mobile phone with a child, but he was in fact texting a police officer posing as a child. The court held that this fact made no difference to the accused's liability on the charge of attempted incitement.

Note 6: The purpose of the section is evident from its language. The comments of the then Minister of Justice, The Honourable Anne McLellan, when the legislation was introduced confirmed the purpose of the legislation: see House of commons Debates, No. 054 (May 3, 2001), at 1620.

Note 7: Gregory J. Fitch, Q.C., "Child Luring" (Paper presented to the National Criminal Law Program: Substantive Criminal Law, Advocay and the Administration of Justice, Edmonton, Alberta, July 10, 2007), Federation of Law Societies of Canada, 2007, at s. 10.1, pp. 1 and 3.