

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Finck*, 2017 NSPC 73

Date: 20171129

Docket: 8074143/8074144

Registry: Amherst

Between:

Her Majesty the Queen

v.

Matthew Finck

Restriction on Publication: Pursuant to s. 486.4 of the *Criminal Code*

DECISION ON SENTENCE

Judge: The Honourable Judge Alain Bégin

Heard: 29 November 2017, in Amherst, Nova Scotia

Decision: 29 November 2017 (oral)
4 May 2018 (written)

Charges Sections 271 and 266 Criminal Code

Counsel: Ms. Mary Ellen Nurse, for the Crown
Mr. Robert Rideout, for the Defence

By the Court:

[1] This is the sentencing of Matthew James Finck, who was found guilty of committing a sexual assault on A.C., contrary to section 271, and committing an assault on A.C., contrary to section 266. The incidents occurred between February 1, 2016 and February 28, 2016.

[2] The trial was held on August 31, 2017 and my decision was rendered on September 19, 2017.

[3] The facts are as they were described in my decision of September 19, 2017 and I do not intend on repeating them today.

[4] The crown is recommending a sentence of 18 months consecutive on each count.

[5] Counsel for Mr. Finck is recommending a reduced sentence.

[6] Section 718 of the *Criminal Code* explains the purposes and principles of sentencing:

Purpose

718 *The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by*

imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

(b) to deter the offender and other persons from committing offences;

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[7] Section 718.1 states that “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[8] In *R. v. Hamilton* (2004) 186 CCC (3d) (ONCA) the court stated that proportionality is a fundamental principle of sentencing. It takes into account the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction. Aggravating and mitigating factors, and the principles of parity, totality and restraint are also important principles that must be engaged in the sentencing process.

[9] The *Criminal Code* views imprisonment as a sentence of last resort. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[10] Section 718.2 states the other principles that the sentencing court is mandated to take into consideration, which for the purpose of this case are:

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing:

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[11] In a rational system of sentencing the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. There is no easy test that a judge can apply in weighing these factors. Much will depend on the judgment and wisdom of sentencing judges whom Parliament has vested with considerable discretion in making these determinations pursuant to section 718.3.

[12] With regard to the overall sentencing process, I note the words of Chief Justice Lamer in *R. v. C.A.M.* [1996] SCJ No. 28 at paragraphs 91 and 92:

91. ...The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offense, while at all times taking into account the needs and current conditions of and in the community. The discretion of the sentencing judge should thus not be interfered with lightly.

92. ...It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime...Sentencing is an inherently individualized process and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offense should be expected to vary to some degree across various communities and regions of this country as the 'just and appropriate' mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred."

[13] Denunciation is the communication of society's condemnation of the offender's conduct. A sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantial criminal law. Society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the court can show this is by the sentences that they pass.

[14] A court must exercise caution in placing too much weight on deterrence when choosing a sentence, especially incarceration. This caution arises from empirical research which suggests that the deterrent effect of incarceration is uncertain.

[15] I am mindful of the principles of sentencing as outlined in *R. v. Grady* (1973) 5 NSR (2d) 264 (NSCA) where the court confirmed that the primary focus was on the protection of the public and how best to achieve that, whether through deterrence

or rehabilitation, or both. Protection of the public includes both protection of society from the particular offender as well as protection of society from this particular type of offence.

[16] The same court in *R. v. Fifield* [1978] NSJ 42 stated at paragraph 11, “We must constantly remind ourselves that sentencing to be an effective society instrument must be flexible and imaginative. We must guard against using...the cookie cutter approach.”

[17] I have read the victim impact statement of A.C. and I am well aware of the impact that Mr. Finck’s actions had on A.C., as I heard her testify in court at the trial. I also note her comments contained in the pre-sentence report.

[18] I have reviewed the pre-sentence report prepared on October 18, 2017.

[19] I have already noted I am striking the last sentence in the corrections history on page six, were Constable Galloway recommends a certain sentence. This is not an appropriate entry for a pre-sentence report.

[20] I note the underlying tone of the pre-sentence report that Mr. Finck has an unwillingness to accept responsibility for his actions. I also note a lack of remorse

by Mr. Finck. I do understand that Mr. Finck maintains that nothing occurred between him and A.C.

[21] Mr. Finck's sister describes Mr. Finck as being vengeful and as having unresolved mental health issues.

[22] Mr. Finck's father notes how Mr. Finck always sees himself as right, and others as wrong when they disagree with him. I reject his father's description of Mr. Finck as "kind with a big heart, loyal to those he lets into his life". This clearly was not the case with A.C., who suffered terribly at the hands of Mr. Finck.

[23] There are clear substance abuse issues for Mr. Finck.

[24] Mr. Finck abused a domestic partner. He has shown no remorse and has refused to take responsibility for his actions. These are clearly aggravating factors. Mr. Finck has a criminal record. This is also aggravating, although it was a discharge. I note that. As is the effect that Mr. Finck's actions had on A.C.

[25] There are few, if any, mitigating factors to assist Mr. Finck.

[26] The sexual assault occurred as a result of A.C. advising Mr. Finck that she wanted out of the relationship.

[27] Stand up, Mr. Finck. The sentence for the sexual assault will be 18 months. The sentence for the assault will be five months in jail, consecutive to the 18 months for the sexual assault, for a total sentence of 23 months, or 690 days. You have been on remand for 221 days, so you're going to get credit at one and a half time ratio. That's 330 days credit. So you have 360 days remaining to serve, which will be consecutive to any other sentences you may be serving.

[28] There will be a DNA order. This is a primary designated offence. There is a ten year section 110 weapons prohibition, as this was effected on a domestic partner, pursuant to section 110(2.1). There will be a ten year SOIRA order, as per section 490.013. There will be a section 734.21 non-communication order with A.C. while you are in jail. I'm waiving the victim fine surcharge. You'll be in jail for some period of time.

[29] Your prison time will be followed by two years probation. Keep the peace and be of good behaviour. Appear before the court when required to do so. Report to your probation officer at 26-28 Prince Arthur Street within 72 hours of release from jail. Reside within the province of Nova Scotia unless written permission to reside elsewhere is obtained from the court or your probation officer. Notify promptly your probation officer of any change in name, address or telephone

number. Notify your probation officer of any change of employment or occupation. Not to own, possess or carry any weapon, firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substances as those items are defined in the *Criminal Code*. Attend for mental health counseling, substance abuse counseling, anger management, violence intervention and pay the costs or portion of the costs as directed by your probation officer, if you are able. No contact with A.C. Not to be within 100 metres of A.C.'s home. Make reasonable efforts to find employment. Non-association with anyone with a criminal record, CDSA record. No alcohol and no drugs.

Alain Bégin, JPC.