EISUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Prosper*, 2017 NSSC 173

Date: 2017-06-16
Docket: CRS No. 452992
Registry: Sydney

Between:

Her Majesty the Queen

v.

Davis Joseph Prosper

Restriction on Publication: s. 486 C.C.

Judge: The Honourable Justice James L. Chipman

Heard: June 16, 2017, in Sydney, Nova Scotia

Counsel: John W. MacDonald, for the Crown
M. Blair Kasouf, for Mr. Prosper

Orally by the Court:

Introduction

[1] By Indictment dated August 3, 2016, Davis Joseph Prosper was charged with sexual assault on K.J., contrary to s. 271 of the *Criminal Code of Canada*. The charge dates back to August 6, 2015, with respect to an incident which took place in Eskasoni.

[2] A judge and jury trial was scheduled for February 27 – March 1, 2017 in Sydney. A notice of re-election to a judge alone trial was subsequently filed. The trial was then re-scheduled to begin on February 28. On the opening day of trial, Mr. Prosper changed his plea to guilty and today's sentencing hearing was scheduled.

[3] In advance of today's sentencing, the Court received the following:

1. Given Mr. Prosper's aboriginal status, a *Gladue* report prepared by Armand Paul of the Mi'kmaw Legal Support Network;
2. A Pre-Sentence Report (PSR) prepared by probation officer David Snow;
3. The Defence's sentencing brief with six attachments, as follows: *R. v. Gladue*, [1999] 1 S.C.R. 688, *R. v. S.J.P.*, 2016 NSPC 50, *R. v. R.H.*, [1997] N.J. No. 104 Nfld S.C., *R. v. C.M.*, [2000] B.C.J. No. 2230, and *R. v. William*, [2014] B.C.J. No. 2328 (BCSC), s. 718.2(e) of the *Criminal Code*; and
4. The Crown's sentencing brief with four attachments, as follows: *Gladue*, *R. v. Ipeelee*, [2012] 1 SCR 433, *R. v. J.J.W.*, 2012 NSCA 96, and *R. v. C.B.K.*, 2015 NSSC 62.

[4] Today the Court received and read a victim impact statement prepared by K.J. which confirms the fact that what took place can hardly be regarded as a victimless crime. True damage was done and we can only all hope that the continuing passage of time will provide some relief and closure for K.J.

[5] In addition to the above materials, the Court has had the benefit of today's oral submissions by counsel.

Background Facts

[6] The facts as put forward by the Crown and accepted by the accused were previously put forward by way of a s. 606 inquiry. On the 6th day of August, 2015, K.J. was at her home. She indicated that she was upstairs with her family and Davis Prosper and then went to her bedroom by herself and Mr. Prosper followed. She indicated that Davis Prosper sat on her bed and she was lying on her bed texting her boyfriend. She indicated that Mr. Prosper began touching her buttocks and subsequent to that attempted to take off her shorts. She pulled up her shorts and Mr. Prosper then moved the crotch area of the shorts aside and put his fingers on and in her vagina. He also tried to lick her vagina. K.J. then got away from Davis Prosper and her boyfriend, whom she had texted, told (either by a telephone conversation or text) Mr. Prosper to leave the house.

Issue

[7] The issue for the Court is to determine a fit and proper sentence for Davis Joseph Prosper, having regard to the circumstances of the crime and his personal situation, including his status as an aboriginal person.

Positions of the Parties

Crown

[8] The Crown takes the position that the sexual assault in question should be characterized as a major or serious sexual assault as defined by the case law. On the last page of Mr. MacDonald's brief, he argues the sentence should be as follows:

> … the Crown submits a sentence of 2 years is appropriate being the minimum set out for serious sexual assaults. This sentence would meet the requirements of deterrence and denunciation and would while being the appropriate sentence be a sentence that would closely that given for nonoffenders [sic].
>
> The Crown submits that this should be followed by a one-year period of probation with conditions that would require Mr. Prosper to have no contact with K.J. and not to be within 100 meters of her residence except for travel on a public highway. The probation should also contain terms that would require Mr. Prosper to report to a probation officer at times and places as directed; notify the probation officer of any change of name, address or occupation; keep the peace and be of good behavior; and take any assessments and counselling that his probation

> officer recommends to him. There should also be a term that Mr. Prosper execute such consents as are necessary to monitor his attendance at such counselling.
>
> In terms of ancillary orders, 271 being a designated primary offence, Mr. Prosper should be required to provide a sample of his DNA. Mr. Prosper should also be subject to a mandatory prohibition order pursuant to Section 109(1)(a) for a period of 10 years for firearms other than prohibited firearms and restricted firearms, etc. and life as set out in 109(3) for prohibited weapons, restricted firearms, prohibited devices and prohibited ammunition.
>
> In addition, Mr. Prosper should be subject to a SOIRA Registration Order for a period of 20 years pursuant to section 490.013(2)(b).

Defence

[9] The Defence takes a markedly different view of what is a fit and proper sentence for Mr. Prosper. On the second last page of his submission, Mr. Kasouf makes these points in favor of his client:

> The case before this Honourable Court does not involve a position of trust or a child victim. Mr. Prosper is approximately four years older than K.J. and for better or worse, was a friend …. It appears to have been an impulsive, immature act. There were no threats, striking, choking, or sexual intercourse. His affidavit in the Section 276 application appears to be relatively candid as to his physical acts on that day. He did waive his Preliminary on the day of the hearing and changed his plea to guilty just before the trial commenced. While it is acknowledged that this was not an early resolution, K.J. did not have to testify at either hearing and he has accepted responsibility.
>
> Mr. Prosper has a list of *Gladue* factors as well as many strong points and considerable potential. This will be canvassed in more detail during the sentencing hearing.

[10] The Defence goes on to recommend a term of 90 days imprisonment served intermittently in conjunction with probation, perhaps with restricted house arrest style curfews during the first portion.

Factors and Law for Consideration on Sentencing

[11] It is an aggravating factor that at the time of the offence, K.J. was over 16 years of age, but under 18. In this regard, s. 718.2(ii.1) indicates that it is aggravating that an offender, in committing the offence, abused a person under the age of 18. As well, at the time of the matters in issue, Mr. Prosper was under charge for other matters dating back to 2014. These offences were dealt with on

November 8, 2016, when Mr. Prosper then had a record regarding two charges, unrelated to the sexual assault offence in question.

[12] In terms of the mitigating circumstances, at the time of the offence Mr. Prosper did not have a criminal record. Further, the preliminary inquiry was waived by Mr. Prosper; albeit, at the last moment. Mr. Prosper also pled guilty to the charge, but once again, this took place late in the process as a *voir dire* had taken place and the trial was about to commence.

[13] Having reviewed the PSR and in listening to counsel today, I am satisfied that Mr. Prosper takes responsibility for his actions and expresses remorse.

[14] In sentencing Mr. Prosper, I am mindful of s. 718 of the *Criminal Code* and, given his aboriginal status, I am especially cognizant of s. 718(2)(e) and the cases of *Gladue* and *Ipeelee*. I note the *Gladue* decision was extensively canvassed by Justice Rosinski in *R. v. Denny*, 2016 NSSC 76, and his comments at paras. 62-70 are helpful in providing relevant background:

> [62] The court has available to it, and is grateful for, a *Gladue* Report prepared through the auspices of the Mi'kmaq Legal Services Network, and signed by Ms. Elizabeth Marshall. That report is particularly helpful in assessing how section 718.2(e) of the *Criminal Code* should be applied in this case.
>
> [63] Until July 22, 2015, that subsection read:
>
> > All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.
>
> [64] Since July 23, 2015, the subsection reads:
>
> > 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.
>
> [65] In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court of Canada set out the principles that should guide courts in relation to the application of the then extant s. 718.2(e). More recently, in *R. v. Ipeelee*, 2012 SCC 13 (at paras. 56 – 87), the Supreme Court revisited and reformulated those principles, particularly as applicable in the context of aboriginal offenders who were subject to long-term offender supervision orders.

[66] The majority opinion made the following observations:

> … s. 718.2(e) of the *Code* is a remedial provision designed to ameliorate the serious problem of overrepresentation of aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing… [It] directs sentencing judges to pay particular attention to the circumstances of aboriginal offenders because those circumstances are unique and different from those of non-aboriginal offenders… When sentencing an aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection... Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people generally, but additional case specific information will have to come from counsel and from the presentence report….
>
> … to be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, high rates of substance abuse and suicide, and of course higher levels of incarceration for aboriginal peoples. These matters, on their own, and do not necessarily justify a different sentence for aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case specific information presented by counsel.… In current practice, it appears the case specific information is often brought before the court by way of a *Gladue* Report, which is a form of presentence report tailored to the specific circumstances of aboriginal offenders. Bringing such information to the attention of the judge in a comprehensive and timely manner is helpful to all parties at the sentencing hearing for an aboriginal offender, as it is indispensable to a judge in fulfilling his duties under s. 718.2(e) of the *Criminal Code*." – Paras. 59 – 60.
>
> …
>
> Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.
>
> …
>
> First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness… The second set of circumstances – the types of

> sanctions which may be appropriate – bears not on the degree of culpability of the offender, but on the effectiveness of the sentence itself.… s. 718.2(e) does not create a race-based discount on sentencing. – Paras. 72-75.
>
> [emphasis added]

[67] Furthermore, the court reiterated that it would be extremely difficult for an aboriginal offender to ever establish a direct causal link between his circumstances and his offending. Section 718.2(e) does not logically require such a connection:

> Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. That is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence. (para. 83)

[68] *Gladue* reports are, "a form of presentence report tailored to the specific circumstances of Aboriginal offenders" – *Ipeelee*, para. 60. For this reason, it may be helpful for such report writers to follow more closely the model adopted for presentence reports, with necessary modifications.

[69] I agree with the comments of the court in *R. v. Lawson*, 2012 BCCA 508, at paras. 26-28:

> … Their purpose is to provide the court with individualized information about how intergenerational and systemic effects of colonialism, displacement, residential schools, poverty, unemployment and substance abuse have affected the aboriginal offender. They should also include information about realistic restorative or rehabilitative programs suitable to the particular aboriginal offender.
>
> …
>
> Finally, as a form of presentence report, *Gladue* reports should be subject to the same general requirements of balance and objectivity as conventional presentence reports. Thus, the writer should attempt to remain detached rather than advancing personal opinions.

[70] Courts have also been consistent in confirming that it is the contents of a *Gladue* report that are critical, not its format, and that such content can come

> before the court outside of any formal *Gladue* report, or even if none is formally submitted – by way of counsel's representations, agreed statement of facts, or in presentence reports, etc.

[15] I have carefully reviewed the *Gladue* report prepared by Mr. Paul and have borne in mind the 13 factors set forth in the *Gladue* decision at para. 93:

> 93 Let us see if a general summary can be made of what has been discussed in these reasons.
>
> 1. Part XXIII of the *Criminal Code* codifies the fundamental purpose and principles of sentencing and the factors that should be considered by a judge in striving to determine a sentence that is fit for the offender and the offence.
>
> 2. Section 718.2(*e*) mandatorily requires sentencing judges to consider all available sanctions other than imprisonment and to pay particular attention to the circumstances of aboriginal offenders.
>
> 3. Section 718.2(*e*) is not simply a codification of existing jurisprudence. It is remedial in nature. Its purpose is to ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing. There is a judicial duty to give the provision's remedial purpose real force.
>
> 4. Section 718.2(*e*) must be read and considered in the context of the rest of the factors referred to in that section and in light of all of Part XXIII. All principles and factors set out in Part XXIII must be taken into consideration in determining the fit sentence. Attention should be paid to the fact that Part XXIII, through ss. 718 , 718.2 (*e*), and 742.1, among other provisions, has placed a new emphasis upon decreasing the use of incarceration.
>
> 5. Sentencing is an individual process and in each case the consideration must continue to be what is a fit sentence for this accused for this offence in this community. However, the effect of s. 718.2(*e*) is to alter the method of analysis which sentencing judges must use in determining a fit sentence for aboriginal offenders.
>
> 6. Section 718.2(*e*) directs sentencing judges to undertake the sentencing of aboriginal offenders individually, but also differently, because the circumstances of aboriginal people are unique. In sentencing an aboriginal offender, the judge must consider:

(A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and

(B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.

7. In order to undertake these considerations the trial judge will require information pertaining to the accused. Judges may take judicial notice of the broad systemic and background factors affecting aboriginal people, and of the priority given in aboriginal cultures to a restorative approach to sentencing. In the usual course of events, additional case-specific information will come from counsel and from a pre-sentence report which takes into account the factors set out in #6, which in turn may come from representations of the relevant aboriginal community which will usually be that of the offender. The offender may waive the gathering of that information.

8. If there is no alternative to incarceration the length of the term must be carefully considered.

9. Section 718.2(*e*) is not to be taken as a means of automatically reducing the prison sentence of aboriginal offenders; nor should it be assumed that an offender is receiving a more lenient sentence simply because incarceration is not imposed.

10. The absence of alternative sentencing programs specific to an aboriginal community does not eliminate the ability of a sentencing judge to impose a sanction that takes into account principles of restorative justice and the needs of the parties involved.

11. Section 718.2(*e*) applies to all aboriginal persons wherever they reside, whether on- or off-reserve, in a large city or a rural area. In defining the relevant aboriginal community for the purpose of achieving an effective sentence, the term "community" must be defined broadly so as to include any network of support and interaction that might be available, including in an urban centre. At the same time, the residence of the aboriginal offender in an urban centre that lacks any network of support does not relieve the sentencing judge of the obligation to try to find an alternative to imprisonment.

12. Based on the foregoing, the jail term for an aboriginal offender may in some circumstances be less than the term imposed on a non-aboriginal offender for the same offence.

> 13. It is unreasonable to assume that aboriginal peoples do not believe in the importance of traditional sentencing goals such as deterrence, denunciation, and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

[16] From Mr. Paul's report, I am particularly drawn to paras. 10, 12, 24, 30, 32 and 33 being relevant considerations in sentencing Mr. Prosper. I also make reference to the second last page of the report, which reads as follows:

> According to the Gladue decision, two types of information are particularly relevant in the process of sentencing Aboriginal persons: (1) information on their background and (2) information on alternatives to incarceration.
>
> - Mr. Davis PROSPER is of Aboriginal ancestry.
> - That he has experienced the adverse effects of the toxic social environment and poor socio-economic conditions that continue to impact the lives of Aboriginal people since the time of colonization, including:
> - Substance abuse; personally, immediate family, extended family and within the general community
> - Poverty: personally, family and community
> - Family (divorce, born out of wedlock) or community break down
> - Abuse: emotional, verbal, mental, emotional, physical and spiritual; Domestic violence
> - Unemployed, low income, lack of employment opportunity
> - Lack of educational opportunities
> - Direct Involvement with Family and Children's services
> - Family involvement with Criminal activities
> - Mental Health issues: Suicide & Depression

[17] In terms of Mr. Prosper's current status, the PSR indicates he is presently unemployed and living with his Uncle Keith Joe in Membertou. Mr. Prosper has

maintained a low profile and has not been a problem to the police over the last number of months.

[18] In addition to *Gladue*, counsel have provided a number of cases which I previously listed. In the Crown's brief at p.5, two relatively recent Nova Scotia cases are highlighted as follows:

> In the case of *R. v. J.J.W.*, 2012 NSCA 96, the Court was dealing with a sentence appeal for a serious sexual assault. The court in that case did not disturb the sentence imposed by the trial judge having regard to the passage of time and the fact that the accused had served out the entire 5 months of the incarceratory sentence, but the Court did remark that a sentence of 2.5 years in custody would have been an appropriate sentence in the circumstances. In that case the Court was dealing with one incident of forced anal intercourse on an estranged spouse. The Court in that case remarked that it could find no jurisprudence where a sentence of less than 2 years less a day was given for a serious sexual assault and the Crown submits that 2 years less a day should thus be considered as a starting point.
>
> In R. v. C.B.K., 2015 NSSC 62, the Honourable Justice Robin Gogan imposes sentencing in relation to a number of counts including one count of sexual assault. While the circumstances in that case are not an analogous at paragraph 28, Justice Gogan refers to the jurisprudence from the Court of Appeal and stated "in that case, '*R. v. J.J.W.*'" the jurisprudence indicated that a major sexual assault involving intercourse, particularly in the spousal context, mandates a term of imprisonment of at least 2 years less a day and frequently a term of between 3 and 5 years. The starting point approach to sentencing was rejected. In that case the Court was dealing with a 26 year old with a troubled past. The Court imposed a sentence of 3 years for the sexual assault and various concurrent and consecutive sentences for other offences.

[19] In my view, the above cases concern much more serious sexual assaults than what transpired with Mr. Prosper and K.J. In any event, there are a wide range of sentences depending on the circumstances of each case. As the Supreme Court of Canada has stated on numerous occasions, sentencing is very much an individualized process. Recently in *R. v. S.J.P.*, at paras. 58-106, Judge Ross thoroughly canvassed a host of sexual assault sentencing cases, some of which involved aboriginal offenders. Judge Ross' excellent review demonstrates a wide range and the diversity of options available in sentencing.

Analysis and Disposition

[20] The case before me does not involve a position of trust or a child victim, albeit K.J. was only 16. Mr. Prosper is approximately four years older than the victim. At the time, he was a friend … to the teen. On the facts in context, I accept that Mr. Prospect's actions were impulsive. He acted for his own sexual gratification at great expense to the victim. Having said this, he made no threats and there was no striking, choking or sexual intercourse.

[21] Given the circumstances of the crime, along with Mr. Prosper's status as outlined in the PSR and *Gladue* report, I am of the view that despite a difficult upbringing and poor socio-economic status, Mr. Prosper exhibits great potential. In these difficult circumstances, I have decided that a fit and proper sentence should not involve a lengthy period of incarceration as sought by the Crown. Having regard to all of the circumstances of the crime, all of the circumstances unique to Mr. Prosper and the authorities, I am satisfied that the following sentence is just:

1. A four month custodial sentence.
2. The four month period of custody shall be followed by 18 months of probation, with regular reporting and conditions as recommended by the Crown.
3. Ancillary orders with respect to DNA (s. 271) and a 10 year firearms prohibition (ss. 109(1)(a) and 109(2)), with an exception for Mr. Prosper to hunt for sustenance, as expressed by his counsel today and agreed to by the Crown. In this regard, he is clearly an aboriginal person. He has financial hardship and, no question, he hunts and fishes to bring food home to his family.
4. Mr. Prosper shall be subject to a SOIRA Registration Order for a period of 20 years, pursuant to s. 490.013(2)(b).
5. There shall be a $200 victim fine surcharge, payable within one year of today's date.

Chipman, J.