

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Burton*, 2017 NSSC 181

Date: 2017 07 24

Docket: CRH No. 443267

Registry: Halifax

Between:

Her Majesty the Queen

v.

Robert Shawn Burton

Restriction on Publication: S. 486.4 and 539

Judge: The Honourable Justice Joshua Arnold

Heard: June 28, 2017, in Halifax, Nova Scotia

Oral Decision: June 28, 2017

Counsel: Robert Kennedy, for the Crown
Peter Planetta, for the Defence

By the Court:

[1] On February 2, 2014, following a Super Bowl party, Robert Burton sexually assaulted R.P. while she was asleep and under the influence of sleeping pills.

[2] On March 3, 2017, following a five day trial in the Nova Scotia Supreme Court, Burton was found guilty of sexual assault, contrary to s. 271 of the *Criminal Code*. The decision relating to that conviction, and the facts that form its foundation, is found at *R. v. Burton*, 2017 NSSC 57.

[3] Some facts relevant to the sentencing include that Burton and R.P. had known each other for a year or so and had dated casually, very briefly, with a couple of sleepovers. As a result of spending several nights together, along with the knowledge that R.P. suffers from insomnia, Burton was aware that R.P. took sleeping pills and that once she took them, as Burton himself noted, she “slept like the dead”. After dating briefly, R.P. clearly advised Burton that she did not want a romantic relationship.

[4] On February 2, 2014, Burton started a text message conversation with R.P. that revealed that he was desperate for her to attend at the Super Bowl party that night, even if it was just as friends:

Then you are with me... I want you with me for the game... I will always remember this game... it will be even be better if you were with me and my team wins!!!; Then I should pick you up some and we watch the game together at your place; I will come get you and bring you to Sackville.; Kidnap you or something.; Let me know if you hear from mom and dad; What would you like to drink.; First I should ask... would you like to come hang out with me?; It would be nice to see you... I will take friendship over not seeing you.; I respect the honesty you bring... let's hang out as friends.; But here is the kicker... I would like to hang out more often than three weeks... LOL; What would you like... people around or just us.; Then people it will be... did you hear from mom dad... what do you feel like drinking?; We can do whatever.; I have to go to liquor store... what would you like? Around four would be good... pre drinks.; Heading to liquor store in about 10 mins.; Hey I was just at store home in two mins I got things for us; Com back (sic); I was just at grocery store and liquor store.; I bought you two one litre bottles of Smirnoff.; LOL going to crack one soon; You coming soon.

[5] R.P. attended the Super Bowl party at Burton's home. She watched the game with a group of Burton's friends, and along with Burton drank alcohol, smoked marijuana and snorted MDMA. After the game ended she quite sensibly did not

want to drive home. R.P. felt she could trust Burton so she stayed overnight at his house. She took her sleeping pills and went to sleep.

[6] R.P. awoke to find that Burton had removed her clothes, had propped her up and was having unprotected, vaginal intercourse with her. R.P. stopped the intercourse, asked Burton what he was doing, and left the bed, but was so groggy from her sleeping pills that she did not feel as though she could leave Burton's home. She was also scared to confront him as she did not know what else Burton might do to her. In her confused and vulnerable state R.P. therefore returned to the bed and pretended to be asleep. Burton then masturbated twice and on each occasion rubbed his ejaculate into R.P.'s hand while she appeared to be asleep.

[7] Burton was persistent. R.P. had told him she only wanted to be friends. There was no suggestion from her during or after the party that she felt otherwise. Burton knew that R.P. was under the influence of sleeping pills, or that she slept often under the influence of sleeping pills, and that she was asleep when he removed her clothes and had unprotected intercourse with her.

Aggravating Factors

- This was a major sexual assault that included unprotected vaginal intercourse;
- Multiple sexual acts – in addition to having unprotected, vaginal intercourse with R.P., while again believing her to be asleep, he twice masturbated next to her and rubbed his ejaculate into her hand;
- R.P. was asleep or unconscious when Burton sexually assaulted her, and was completely vulnerable. Burton knew she had an unnaturally deep sleep when under the influence of her sleeping pills;
- R.P. was friends with Burton and trusted him. Burton knew that R.P. did not want to be anything more than friends with him; and
- R.P. has suffered severe mental health repercussions as a result of Burton's actions and is no longer employed.

Mitigating Factors

- Mr. Burton has now acknowledged his guilt and has expressed some remorse; and
- The pre-sentence report is very positive.

Pre-Sentence Report

[8] The pre-sentence report states variously:

... He added his parents were very involved in the religion and did not consume drugs or alcohol. Mr. Burton explained it was a very strict household but also very loving.

...

Mr. Burton advised he was in three relationships in an 18-month period, and they all ended amiably, without any dependents.

The subject disclosed in March 2015, he was attending Narcotics Anonymous meetings and met Ms. Sherry McIntyre, age 42. He revealed Ms. McIntyre has a daughter, ... and the couple have 17-month old twins, ... who were born in December 2015. According to the subject, he and Ms. McIntyre separated in August 2016. He revealed due to Ms. McIntyre's drug issues, Child Protective Services became involved in August 2016. Mr. Burton explained the children are living with him on a full-time basis, and their mother has supervised visits three times per week.

...

Ms. Maria McIntyre, step-daughter of the subject, was contacted for the purpose of this report. ... She stated she is aware of the subject's current charge before the Court, stating she was very surprised upon hearing of it, stating it is "hard to believe", adding it is out-of-character for him. Ms. McIntyre revealed when the subject was talking to her about the current charge, he appeared to feel badly and was very ashamed.

Ms. McIntyre described the subject as an amazing father, who is generous and caring, as well as responsible.

...

Ms. Maryanne Burton, mother of the subject, was contacted for the purpose of this report. ... Ms. Burton commented the subject grew up in a loving and strict environment, noting he did not have any issues while growing up. ... She described the subject as a strong worker and a good father, as well as being soft-hearted. ... Ms. Burton stated she believes the subject is very sorry about how the situation

turned out, explaining he was under the influence of drugs and alcohol at the time of the incident.

...

Mr. Burton advised he last attended Horton High School, where he obtained his Grade 11 education.

...

Mr. Burton would like the Court to know he was never suspended or disciplined while attending school...

...

Mr. Burton reported he has owned his own business for the past three years, a construction company named Build Tec.

...

The subject added he has always been employed and was never fired from a job.

...

Mr. Burton reported he is physically healthy and currently not prescribed any medication. The subject advised he has never required the services of a mental health professional.

...

In reference to illicit drug use, the subject advised he began experimenting with marijuana at age 41 and then progressed to ecstasy, cocaine and eventually crack at age 42. Mr. Burton explained his drug use became progressively worse during that time frame. The subject indicated he stopped using drugs on his own, and he has been clean since February 4, 2014, after his arrest for the current offence. Mr. Burton reported he attended Narcotics Anonymous meetings, explaining his home group is on Windmill Road. ... Mr. Burton advised he undergoes urinalysis testing through the Department of Community Services, with his most recent occurring two weeks ago. The subject revealed if the drug test shows he has been using any kind of drugs, his children will be removed from his care.

...

Ms. Anne Simmons, Social Worker with the Department of Community Services, Child Welfare, was contacted for the purpose of this report. ... Ms. Simmons disclosed the children are with him, under the supervision of the agency, adding the children appear to be doing very well in his care. Ms. Simmons concluded by reporting the subject does take urinalysis testing, and all tests have been negative, showing no drug use, explaining all the urinalysis tests are randomly completed.

...

The subject admits guilt in the current offence before the Court, disclosing he feels bad about the incident.

...

Ms. Deanne McCullen (sic), friend and neighbour of the subject, was contacted for the purpose of this report. ... She stated she is aware of the subject's current charge before the Court, stating she was very shocked upon hearing of the offence. She commented Mr. Burton was very honest, and visibly upset and emotional, when he explained the situation to her. Ms. McCullen described the subject as compassionate and hard-working individual, who is a good father and is very focused on taking care of his children.

[9] Character reference letters from those who know Mr. Burton state:

Carl Weatherhead

Robert has rented a flat from me... for the past 3 years... During the 3 years that I have known Robert he has been very reliable, and an excellent caregiver for the twins.

Deanne MacLennan

Within minutes my new neighbor having twin babies at the time was right there to help me with my move. ... While a full time working single dad of twins he continues to amaze me every day with his extreme amount of structure, patience, positivity and love he constantly gives to his babies and his family. ... After building a trust with me as his friend and neighbor, Robert explained in full detail to me the circumstances of the Charge that lied before him. He also explained his past before the babies were born. A very shocking conversation for me to hear of bad decisions mixed with drug addiction as this is not the man that I have come to know and respect.

Nicole Sardinha

I met Robert two years ago in the Narcotics Anonymous program. ... I observed that Robert was always at work, and when he was home, he was very involved in the care and raising of his twins. Then unfortunately, things did not work out and Sherry was removed from the house. Robert then stoically had to adjust to being a working single dad, and all the challenges of taking on that role. It is during this time, that I offered to look after the kids while he attended his home group meeting every Wednesday evening. During this time, I was able to get to know him on a more personal level. I was aware of his charges, he was very upfront with me, and the circumstances.

Christina Spencer

... I am a personal friend of Rob's. We met in elementary school parted ways in high school and reunited about three years ago. ... I have never witnessed inappropriate words or behavior towards me or any other person. He has always treated people with respect and kindness.

Lisa Arthur and Tara Jamieson

We have known Robert for 2.5 years now and met him through Narcotics Anonymous (NA). The Robert we met was the clean and true Robert he is today. He made a decision on his own to change his life, get clean from drugs and alcohol, and allow himself to be the amazing, kind, generous person that he truly is. In the past couple years, we have become very close to Robert. ... Robert is a very compassionate, sensitive, generous, and loving person who would give anyone the shirt off his own back to help them out. He has selflessly helped other recovering addicts in NA by volunteering on service committees and by being a sponsor to male members in need. ... With one of us having been a victim of sexual assault, Robert is not a person whom we would consider a "sex offender". There is no way we would be friends with someone who could do that to a woman. But we know who Robert really is and that this was all an unfortunate circumstance...

[10] We also heard today, as R.P. read her Victim Impact Statement, the heartbreaking impact of Burton's selfish and criminal actions and what effect they have had on her. She provided a poignant account of the devastation to her life. Hopefully, she can find some internal peace, starting a new and more hopeful chapter sometime soon. Obviously, that is easier said than done.

[11] This sentencing decision follows Burton to prison. I think it is important to clarify some loose language that occurred during an exchange I had with Mr. Planetta a few minutes ago during his submissions.

[12] I note that Burton testified at trial and said that R.P. was a conscious and willing participant in sexual activity that evening. That was not true. Having been found guilty, according to the author of the pre-sentence report and others in the character reference letters, Burton now admits his wrongdoing. According to the various character reference letters submitted on his behalf, Burton apparently has admitted his guilt to others. Every person charged with an offence is presumed innocent and has the right to a fair trial. That does not equate to the right to lie in court.

[13] That said, proceeding to trial is not an aggravating factor. Entering a guilty plea in advance of trial can be a mitigating factor. That did not happen here. Showing true remorse can be a mitigating factor. Burton has expressed remorse to the author of the pre-sentence report, to some of his friends and has now addressed the court and offered an apology to his victim and her family.

Position of the Parties

[14] The Crown suggests a prison term of three years in a penitentiary is appropriate and has provided a number of cases to support this position including *R. v. Kasokeo*, 2009 SKCA 48; *R. v. Arcand*, 2010 ABCA 363; *R. v. G.(T.V.)*, (1994) 133 N.S.R. (2d) 299; *R. v. McCraw*, [1991] 3 S.C.R. 72; *R. v. Branton*, 2013 NLCA 61; *R. v. Sandercock*, 1985 ABCA 218; *R. v. Iron*, 2005 SKCA 84; *R. v. W.(J.J.)*, 2012 NSCA 96; *R. v. W.H.A.*, 2011 NSSC 246; *R. v. G.A.L.*, 2001 NSCA 29; *R. v. Marshall*, 2008 NSSC 132; *R. v. M.(J.R.)*, 2011 NSSC 499, 2012 NSSC 108; *R. v. McNamara*, 1998 NSCA 149; *R. v. Simpson*, 2017 NSPC 25; *R. v. Sayine*, 2003 NWTSC 53; *R. v. M.(E.H.)*, 2004 ABPC 76; and *R. v. Bisram*, 2015 ONCJ 809.

[15] The defence suggests a prison term of two years in a penitentiary is appropriate and has provided a number of cases to support their position including *R. v. J.J.W.*, [2012] N.S.J. No. 522; *R. v. Whiting*, [2013] S.J. No. 579; *R. v. B.S.B.*, [2010] B.C.J. No. 300; *R. v. Rosenthal*, [2015] Y.J. No. 1; *R. v. Shalley*, [2005] M.J. No. 466; *R. v. W.H.A.*, [2011] N.S.J. No. 460; and *R. v. Garrett*, [2014] O.J. No. 5031.

[16] In *R. v. W.(J.J.)*, 2012 NSCA 96, following a detailed review of many cases on sentencing for sexual assault, Oland J.A. stated:

21 Nova Scotia has not adopted a starting point approach. Rather, this Court has chosen to remain focussed on the principles of sentencing as set out in the *Criminal Code* and the Supreme Court of Canada's affirmations that the approach on review on sentencing appeals is one of deference to the decisions of the sentencing judge.

22 Since sentencing is such an individualized process and done in the context of the particular circumstances of each case, it is notoriously difficult to find cases that are factually similar. ...

Principles of Sentencing

[17] Section 718-718.2 of the *Criminal Code* state in part:

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.

...

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

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,
 - (i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,
 - (ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
 - (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,
 - (iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
 - (v) evidence that the offence was a terrorism offence, or
 - (vi) evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the Corrections and Conditional Release Act

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;

...

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

[18] In particular the Crown references s. 718.2(a)(iii). I can say that certainly R.P. trusted Burton and put herself in a very vulnerable position as a result of that trust. I am not sure that the Crown was suggesting that it falls necessarily into the breach of trust category. I think that they were trying to find a way to explain the relationship between Burton and R.P.

[19] With respect to s. 718.2(a)(iii.1), clearly in this case there was a profound effect on R.P.

[20] In relation to s. 718(b), the range as acknowledged by both Crown and defence is in the two to three years in a penitentiary.

[21] Deterrence and denunciation are of paramount consideration in sentencing Burton. Reformation and rehabilitation have a lesser, but still important, role, considering his personal circumstances.

Prospects for Rehabilitation

[22] At pp. 6-7 of the pre-sentence report, under the heading “Assessment of Community Alternatives/Resources”, the author states:

Mr. Robert Burton is a 50-year-old individual, who does not possess a prior adult criminal record. The subject vocalized during the Pre-Sentence Report interview that he admits guilt and feels badly about the incident. Mr. Burton reported he does not have any contact with his ex-girlfriend at the present time. He admits to struggling with substance dependency and is currently attending Narcotics Anonymous meetings. The subject has random urinalysis testing through the Department of Community Services, which has shown no drug use since he first received custody of his 18-month-old twins.

In consultation with the Provincial Forensic Psychiatric Service, the following information is being provided in relation to the current practices in community-based sexual offender treatment in Nova Scotia. The relative likelihood of success in sexual offender treatment is based upon matching an offender’s level of risk for recidivism with the appropriate treatment intensity. A Comprehensive Sexual Offender Assessment is required to determine the match of offender to treatment. The provincial community-based sexual offender treatment groups in Nova Scotia are designed at low-to-moderate intensity and are not developed to accommodate the treatment needs of high-risk, entrenched sexual offenders. Moderate-to-high

intensity programs are appropriate for high-risk offenders and are available, primarily within federal institutions operated by the Correctional Service of Canada. Group treatment programs utilizing a cognitive behavioural relapse prevention perspective have the most reliable impact on the reduction of recidivism for sexual offenders. Individual therapy is typically contra-indicated, because group-based treatment has shown more success addressing issues such as minimization, rationalization and secrecy. Treatment aimed at issues other than sexual deviancy, although beneficial to the offender, are not expected to decrease recidivism. Treatment involves a minimum of six months of structured weekly group treatment sessions. Group treatment is then followed by bi-weekly involvement in a maintenance group for the remainder of the term of supervision, in order to facilitate the maintenance of change/treatment gains. Due to the volume of cases being processed, it is reasonable to expect assessment/treatment to take two-to-three years to complete.

Conclusion

[23] Vulnerable people need to be protected from sexual predators. R.P. could not have been more vulnerable than she was when Burton violated her.

[24] Mr. Burton comes before this court with no prior criminal record. He committed a major sexual assault on R.P. who has suffered severe psychological consequences as a result.

[25] Burton has community support from family and friends who say this is out of character for him. He has successfully battled his addiction issues, runs a successful business, has now admitted guilt and is remorseful, and is the sole caregiver for twin toddlers.

[26] Probation services advises that Burton could be eligible for community-based sexual offender treatment, however, such treatment takes two to three years to complete.

[27] If Burton is sentenced to three years in prison I cannot order community-based treatment through probation.

[28] If Burton is sentenced to two years in prison in a federal penitentiary, I can order up to three years probation, thereby giving the criminal justice system control over him for five years. Burton would be removed from society for two years, serving his time in a federal penitentiary, but would be allowed to contribute to society and look after his children for the following three years, while receiving proper treatment. I believe that in these circumstances a two-year federal penitentiary sentence would satisfy the need for general and specific deterrence, and

would satisfy the need for denunciation, while still allowing for reformation and rehabilitation.

[29] I therefore sentence Robert Burton to two years in a federal penitentiary.

[30] This two-year prison term will be followed by three years' probation with the following conditions:

- Keep the peace and be of good behaviour;
- Appear before the Court when required to do so by the Court;
- Notify the Court or the Probation Officer in advance of any changes of name, address, employment or occupation;
- Report to a Probation Officer on the date of expiration of your sentence of imprisonment and thereafter as directed by your Probation Officer;
- Not to take or consume alcohol or other intoxicating substances;
- Not to take or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription for you or a legal authorization;
- Participate in the Sex Offender Treatment Program as directed by your Probation Officer;
- Have no direct or indirect contact or communication with R.P.;
- Attend for mental health assessment and counselling as directed by your Probation Officer;
- Attend for substance abuse counselling as directed by your Probation Officer;
- Attend for assessment, counselling or a program as directed by your Probation Officer; and
- Participate and co-operate with any assessment, counselling or program as directed by your Probation Officer.

[31] There will be a Victim Fine Surcharge in the amount of \$200.00. Mr. Burton will have four years to pay that fine considering he will be entering prison for two years and then will be required to support his young children when he is released from prison.

[32] Mr. Burton will also be subject to the following ancillary orders agreed upon between Crown and defence:

- Firearms prohibition for 10 years (s. 109);
- DNA Order (s. 487.051);
- SOIRA Order for twenty years (s. 490.013(1)(b)); and
- Order prohibiting communication with R.P. while in custody (s. 743.21).

[33] Mr. Burton, once released from prison, I hope you can return to being the type of father and community member people say you have been for the past few years.

Arnold, J.