

SUPREME COURT OF NOVA SCOTIA

Citation: *R v. C.R.A.*, 2017 NSSC 348

Date: 20170621

Docket: Syd No. 452878

Registry: Sydney

Between:

Her Majesty the Queen

v.

C.R.A.

Restriction on Publication: Section 486.4

Judge: The Honourable Justice Patrick J. Murray

Heard: June 21, 2017 in Sydney, Nova Scotia

Subject: Criminal Law

Summary: Accused charged with sexual assault contrary to section 156 and gross indecency contrary to s. 157 of the *Criminal Code*. Accused pleading guilty to both charges.

Issues: Sentencing

Result: Joint recommendation of a one (1) year and two (2) year federal prison terms accepted by the Court.

Accused's guilty plea, no prior record and positive Pre-Sentence Report, taken into account.

Court concluded acceptance of sentence imposed would not bring administration of justice into disrepute, nor would accepting the joint recommendation be contrary to the public interest.

Principles of sentencing discussed including those set out by the Supreme Court of Canada decision in *R v. Anthony-Cook*.

Caselaw:

R v. Anthony-Cook, 2016 SCC 43; *R v. D.(D.)*, 2002 CanLII 44915; *R.R.D.G.*, 2014 NSSC 223; *R. EMW*, 2011 NSCA 87; *R. v. Whalen*, 657 A.P.R. 358; *R v. S.*, 178 N.S.R. (2d) 176; *R v. Gardiner*, [1995] B.C.W.L.S. 2997.

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Sentencing Decision: June 21, 2017 in Sydney, Nova Scotia

Counsel: Gerald MacDonald, for Her Majesty the Queen
Gregory McNeil, for the Defendant, C.R.A.

Section 486.4 - Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court (Orally):

[1] The Accused, C.R.A., is before me for sentence having pled guilty to two offences of indecent assault on a male person contrary to s. 156 of the *Criminal Code* and having pled guilty to the offence of gross indecency contrary to s. 157 of the *Criminal Code*.

[2] These offences occurred many years ago. They are serious and involved indecent acts with young children. Both victims are related to the Accused. One was [...] who was at the time between 6 and 10 years of age. The other was [...] who at the time was between the ages of 10 and 13.

[3] The Courts have stated that society's condemnation for these types of offences must be expressed in clear terms to ensure that a strong message is sent that sexual abuse of young people will not be tolerated. For this reason the principles of denunciation and deterrence are primary factors to be considered in imposing a fit and proper sentence.

[4] A proper sentence must reflect the degree of moral blameworthiness associated with these crimes, which by their nature are violent crimes. Given the tender ages of the victims the moral culpability of the offender here is high.

[5] These are not the only factors however, the Court is required to weigh all of the relevant facts and circumstances in arriving at an appropriate sentence, having regard to the circumstances of the offence and those of the offender.

[6] There are both aggravating and mitigating factors that should be considered. For this reason sentencing is considered a very individual exercise. Caselaw serves as a guide to what would be a fit and just sentence in each circumstances, in each individual case.

Facts

[7] The facts including the details of the sexual activity are contained in the Crown's brief and they have been read into the record. These facts have been agreed to by the Defence for sentencing purposes. I will not repeat those facts verbatim but will touch on them as follows.

[8] In respect of Counts 2 and 3 involving [...], the assault and indecent acts included oral sex, exposure and repeated incidents of the Accused masturbating in the presence of the victim.

[9] In respect of Count 1 involving [...], the indecent act involved touching and demonstrating how to masturbate on at least one occasion.

Principles of Sentencing

[10] Sentencing principles mention as one objective the need to provide reparation for harm to victims, and to impose sentences that will contribute to respect for the law and deter others from committing similar offences. In addition, the Court should attempt to impose a sentence that is similar to those imposed for similar offences in similar circumstances.

[11] In this case, I have been presented with a joint recommendation from counsel with respect to the sentence that I should impose. Crown and Defence believe the joint recommendation of two years incarceration, coupled with a period of probation for one year is appropriate and reflects those principles I have referred to, including the principles of sentencing under the *Criminal Code* in section 718 - 718.2.

[12] The principle of totality in sentencing is relevant here as is the fact that the Accused occupied a position of trust in relation to the victims.

[13] In Nova Scotia our Court of Appeal has not adopted a starting point approach. Rather, the appeal court has chosen to remain focused on the principles of sentencing as set out in the *Criminal Code* with the Supreme Court of Canada's guidance.

[14] In the recent Supreme Court of Canada case of *R v. Anthony-Cook*, 2016 SCC 43, the court held that the proper test to be applied here is the public interest test. That is the test in determining whether to accept a joint recommendation. The court held it is a stringent test that best reflects the many benefits that joint submissions bring to the criminal justice system.

[15] Applying this test, I should only depart from a joint submission on sentence if what is being proposed would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

Purpose of Sentencing s. 718

[16] Under Section 718 of the *Criminal Code* the fundamental purpose of sentencing is 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 objectives including:

- (a) to denounce 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 and to the community.

Fundamental Principle s. 718.1

[17] Under Section 718.1 a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Pre-Sentence Report

[18] The pre-sentence report of Mr. A is generally positive. He is 72 years of age and currently retired. He had been employed in [...] for 30 years. He had his own company and also worked as an employee. The reference given by [...] his former employer described him as an important employee, with a wealth of knowledge and a lot of energy. There were no issues with him and he always put in a full day's work.

[19] Mr. A stated he has made many positive changes since these incidents 35 – 37 years ago. He states there is no excuse for what he did and that he has great respect for the police and the law.

[20] The [...] Church has been an important aspect of the life of Mr. A and his family. He and his wife had [...] children, [...] who are all adults well into their 30 and 40's. There was a breakdown in his marriage that led to a divorce in 1999. Mr. A former wife, [...] is present today.

[21] Mr. A is currently undergoing treatment for a cancer diagnosis, which has led him to show some improvement with the illness. It is expected that this will continue if a custodial sentence is imposed. This has been verified through the appropriate channels by Mr. A's counsel, Mr. McNeil.

Caselaw Summary

[22] The Crown provided caselaw to offer some assistance to the Court in determining an appropriate sentence in the case before me.

[23] I have reviewed those cases and accept them as a guide.

[24] The Court must seek to impose a sentence that is just and reasonable in all of the circumstances.

Decision

[25] It must be noted that Mr. A has entered a guilty plea, thereby taking responsibility for his actions. In doing so he has also spared the victims the need to testify at trial, and thus they were not required to recount these events in open court.

[26] The Crown has noted this is a mitigating factor as well as the fact that the Accused has no prior record meaning this is his first appearance "before the law", as it were, and he is 72 years of age at this time.

[27] The overall message in the case of *R v. D.(D.)*, 2002 CanLII 44915, at paragraphs 34, 35 and 37, is that children are our most valued assets and at the same time our most vulnerable assets.

[28] In *D.D.* the court referred to the long term affects of sexual abuse on the victims. It is reasonable to assume that a child may have suffered some form of emotional trauma which may be long lasting.

[29] In the present case, the knowledge that another person was abused, deeply affected the victim, [...]. On the facts, the level of invasiveness and the number of acts continued for a period of several years for the victim [...].

[30] According to his victim impact statement, these events have impacted him and he still feels rage. He felt betrayed by the person responsible to protect him.

He referred to the memories, the shame and embarrassment and the pain which remains a part of his life forever.

[31] This is recognized in the *Criminal Code* in section 718.2 where it states that abusing a position of trust or authority is deemed to be an aggravating factor in sentence.

[32] In terms of further aggravating factors, as noted, the offences continued over a period of several years with multiple incidents.

[33] I have reviewed and considered the decision of Rosinski, J. in ***R.R.D.G.***, 2014 NSSC 223, where he referred extensively to Justice Fichaud's decision in ***R. EMW***, 2011 NSCA 87.

[34] In paragraph 30 the court mentions two sentences of 3 years each (counts 1 and 5) for indecent assault and gross indecency without intercourse involving a child with whom the offender had a parental relationship.

[35] I have considered the remaining cases provided ***R. v. Whalen***, 657 A.P.R. 358, ***R v. S.***, 178 N.S.R. (2d) 176, and ***R v. Gardiner***, [1995] B.C.W.L.S. 2997. All of these have different facts but what they have in common is repeated and continued acts of indecent assault and gross indecency by parents or relatives of the victims who were young. In ***Gardiner*** the victims were as young as five (5). In that case there were a total of 5 victims, 4 nieces and 1 nephew. The sentence was 4 years total, 1.5 years for indecent assault and 2.5 years for gross indecency.

[36] It is important to note that in that case the offender maintained his innocence and expressed no remorse.

[37] In the present case, Mr. A has expressed remorse, and has accepted responsibility for his actions. It is significant that he did so even before the charges were laid against him, through legal counsel.

[38] This I think is something which sets this case apart from other cases. It is an important and mitigating factor, even if it does not lessen the seriousness of the behaviour.

[39] The Defence has reviewed the caselaw and statutory provisions cited in the crown brief and has acknowledged that these cases are a fair representation of the sentencing range applicable to this case.

[40] There is as well the age and health of the Offender. It appears he has been suffering from cancer, and that a special treatment program has provided positive results.

[41] It will be important that this treatment be able to continue in an institution if Mr. A is incarcerated.

[42] In summary, Mr. A had plead guilty to 2 counts of indecent assault involving 2 separate victims, and one count of gross indecency involving one of those victims.

[43] Applying the principles of sentencing as contained in the *Criminal Code* at s. 718 - 718.2 as discussed herein I conclude that a fit and proper sentence for Mr. A is a total sentence of 2 years in custody.

[44] On count 1 involving [...] Mr. A will receive a one year custodial sentence. On counts 2 and 3 involving [...] Mr. A will receive a two year custodial sentence. Both of those sentences to be served concurrently for a total of two years.

[45] In these circumstances, I am satisfied that this sentence does not bring the administration of justice into disrepute nor is it otherwise contrary to the public interest. I am therefore prepared to accept the joint submission.

[46] In addition to the custodial sentence of 2 years, as part of the recommendation, there will be a 1 year period of probation with conditions.

[47] In terms of the other orders that are sought, they are part of the joint submission including the SOIRA Order (lifetime); the DNA Order; a firearms prohibition pursuant to s. 109(2) for ten years; and an Order pursuant to s. 161 of the *Criminal Code* for ten years. I will impose these orders and sign them when they are presented to me.

[48] Before concluding I have heard that this is a close family (and had been a close family) and that this process has opened things up and allowed them to move ahead. I want to wish the family well in that regard.

[49] This concludes my sentencing decision.

Murray, J.