SUPREME COURT OF NOVA SCOTIA
Citation: *R v C.P.*, 2019 NSSC 157

Date: 20190501
Docket: CRS 458562
Registry: Sydney

Between:

Her Majesty the Queen

v.

C.P.

Accused

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Heard:	April 15, 2019 in Sydney, Nova Scotia
Oral Decision:	May 1, 2019
Written Decision:	May 13, 2019
Subject:	Criminal law – s. 271 of the *Criminal Code of Canada*; Sentencing – Aboriginal Offender
Summary:	Accused age 33 entered a plea of guilty to charge of sexual assault. Accused 18 years at time of offence. Victim was age 6 – 7 years.
Issues:	(1) What is an appropriate sentence? (2) Whether a conditional sentence should be imposed?
Result:	A conditional sentence was available to the Accused by virtue of the provisions in the *Criminal Code* in 2004 – 2005 and Section 11 of the *Charter*. A Gladue report had been prepared with positive features. Accused had no record at time of offence and suffering from mental issues. Court found, in these circumstances that a conditional sentence order would satisfy the principles of sentencing taking into account the

factors mentioned in s. 742.1 of the *Criminal Code*. Accused on a more positive path during last several years without offences.

Cases cited: ***R v. D.R.***, [2003] O.J. No. 561; ***R v. Esmonde***, [2002] O.J. No. 2544; ***R v. W.(L.F.)***, 1997 CarswellNfld 173; ***R v. W.(J.)***, 1997 CarswellOnt 969 (Ont. C.A.); ***R v. C.(S.)***, 1999 NSCA 49; ***R v. Proulx***, [2001] 1 S.C.R. 61 (SCC); ***R v. Wismayer***, 33 O.R. (3d) 225 (1997); ***R v. C.(S.C.)***, 2008 NSSC 115; ***R v. J.(D.J.)***, 1998 CarswellSask 830 (Sack. CA); ***R v. Wells***, 2000 SCC 10; ***Ipeelee***, 2012 SCC 13; ***R v. Christmas***, 2017 N.S.P.C. 28 (N.S.P.C.); ***R v W. (M.A.)***, 1999 NSCA 49.

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Restriction on Publication: 486.4

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Counsel:	Glenn Gouthro for the Crown Doug MacKinlay for Mr. P.

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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):

Introduction

[1] This is the sentencing hearing for C.P. Mr. P. is […] years of age and is aboriginal. He resides in […], with his father.

[2] Mr. P. has entered a guilty plea to a charge of sexual assault pursuant to s. 271 of the *Criminal Code*. When he was 18 years old, he touched his half-sister inappropriately. She was 6 or 7 years old. He also had her touch him.

Background

[3] Mr. P. has expressed sorrow for his actions, and regrets what he did. He wishes to obtain help for issues he has. He has been diagnosed with depressive issues, ADHD and bipolar disorder. He also wishes to receive treatment for alcohol and drug addition.

[4] A Gladue report has been prepared and it has identified a number of factors that have impacted Mr. P. in his lifetime. A significant one is the death of his younger brother, […], who at age 7 was struck by a car and fatally injured. Mr. P. had many difficulties in school. He may have completed grade 7. While his formal education is limited, he has taken and successfully completed construction and labour related courses. He enjoys work and if he is to "pull himself up", so to speak, it seems it will be through that and re-visiting his traditional Mi'Kmaq heritage.

[5] Sexual assault is a very serious criminal offence. In this case the victim was a young child. Because he was an adult at age 18, the Accused is considered to be in a position of trust, a position he breached.

[6] Our courts have repeatedly said this type of criminal behaviour must be met with sanctions that emphasize the principles of denunciation and deterrence, sentences that both denounce the crime in society and deter other like-minded individuals from engaging in criminal behavior.

[7] The Crown brings to the Court's attention that the victim, who is identified by her initials [...], has been negatively impacted by these events, which took place over the course of a year back in 2004 – 2005.

[8] The Defence says Mr. P. is remorseful. As evidenced by his guilty plea he has accepted responsibility for his actions. He is ashamed, and he let his father, […] down, he says. He has the support of his wife of 10 years, […], and also has his father's support. Unfortunately, Mr. P. currently has no relationship with his mother.

[9] Mr. P. is currently being prescribed medication for his depressive illness. He has little memory of his childhood. He suffers from memory lapses. By all accounts he has had a very difficult and traumatic childhood. His parents separated shortly after the tragic death of their other son.

[10] The offence here involved several incidents where the Accused touched the victim's vagina and an occasion where he held her hand to touch his penis. There were other incidents of flashing. Once he pinned her down on the bed but let go when she screamed and cried. There was no penetration.

[11] The facts as set out in the Crown's brief has been agreed to by the Defence on the record. The Defence emphasises certain of these facts, while the Crown points to others.

[12] These incidents occurred when Mr. P. was babysitting his sister at home. It seems from the Gladue repot that the home life was far from structured. No victim impact statement has been filed. The Defence says, he was barely an adult. The Crown says, he took advantage.

Issues

[13] What is an appropriate sentence for Mr. P.?

Position of the Crown

[14] The Crown's position is that a fit and proper sentence for Mr. P. is 1 year in custody, coupled with a two year probationary period. This is the only way, says the Crown, that the principles of denunciation and deterrence can be best served in this case.

[15] Rarely says the Crown, should the principle of rehabilitation be given prominence over those of denunciation and deterrence in offences of a sexual nature involving young children and, in a situation involving breach of trust. These principles have been codified by Parliament to illustrate their importance.

Position of the Defence

[16] The Defence also seeks a one-year custodial term, however, to be served in the community plus a two year period of probation for Mr. P. The Defence argues that Mr. P. is not a danger to his community and the Gladue report bears that out.

[17] Mr. P.'s actions, says the Defence, were on the "low end" of the spectrum of sexual assault offences, and he has accepted responsibility for those actions.

Analysis

[18] It bears repeating that sentencing principles call for this type of behaviour to be dealt with in strong terms, so as to illustrate society's repudiation of such conduct, and to ensure protection of the public, especially children who are among the most vulnerable members of society.

[19] In its brief, the Crown has correctly stated that denunciation and deterrence are primary considerations in imposing sentence on those who abuse children. Further, I agree that children need protection and the effect of childhood abuse can be quite harmful and can impact a person for a long time in a negative manner.

[20] The Crown argues that for these reasons, courts have stated what when an adult in a position of trust sexually abuses a child, a conditional sentence should rarely be imposed. (***R v. D.R.***, [2003] O.J. No. 561)

[21] These provisions have been specifically codified in the *Criminal Code*. In particular, s.718.01 states that in cases involving the abuse of a person under 18 years, the court shall give primary consideration to these objectives.

[22] Similarly, s. 718.2 further incorporates these principles and states that abuse of a person under 18, abuse of a position of trust in relation to a victim, are to be considered, among other principles, in increasing or reducing the sentence to account for aggravating and mitigating factors.

[23] The Crown points to the age of the victim and the fact that Mr. P. held a position of trust, among other things such as the extended period over which they occurred and emotional harm to the victim.

[24] At the same time the Crown recognizes that sentencing is an individual, case specific process requiring an assessment of many factors in order to determine the

most appropriate sentence, in all of the circumstances. (***R v. Esmonde***, [2002] O.J. No. 2544)

[25] Sentencing therefore requires a delicate balance in reaching a just sentence, taking into account the circumstances of the offence and the offender. In terms of mitigating factors, Mr. P. was 18 years old when the offence took place and he has pled guilty, thus sparing the victim the ordeal and aggravation of a trial.

[26] At the time of this offence he had no criminal record. Having considered the positions of Crown and Defence, both agree that a one-year custodial sentence should be imposed. Further, both agree it should be followed by two years of probation.

[27] The Crown has acknowledged that given the time of this offence, a conditional sentence order is an available option for the Court to consider. Legislative changes since that time now restrict judicial discretion by imposing minimum periods of custody for s. 271 charges when the victim is under the age of 16 years.

[28] S. 11 of the *Charter of Rights and Freedoms* clearly states that if the punishment for an offence has been varied between the time of commission and the time of sentence, the person charged is entitled to the benefit of the lesser punishment.

[29] However, simply because a conditional sentence order is available, does not mean it will be imposed. Consideration of a conditional sentence arises because a Court has decided to impose a sentence of imprisonment of less than two years. This means the Court has already rejected all of the alternatives to imprisonment such as probation, or a suspended sentence, for example.

[30] The second part of the two-stage process in s. 742.1 requires the Court to be satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing in s. 718 – 718.2.

[31] The primary consideration in determining whether a conditional sentence should be imposed is whether the Accused is a danger to the community. The Crown's position on this important aspect is summarized in paragraphs 25 and 26 of the Crown's brief. Primarily, the Crown points to the criminal record of Mr. P. since these incidents of 2004- 2005, stating that he has 28 convictions since 2008.

[32] The caselaw suggests that a rigid approach not be taken in determining whether an Accused is a danger to the community. Rather, the trial judge must consider all relevant principles, objectives and factors in determining whether to impose a conditional sentence. Included in this is the need to assess whether the imposition of a conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

[33] The fundamental purpose is that of proportionality. Above all else a sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender. I shall later address this second requirement of stage two of the test for a conditional sentence requirement.

[34] The principle factor, as stated, should be whether permitting the offender to serve his sentence in the community under a conditional sentence order would endanger the safety of the community because of the risk the offender will re-offend.

[35] S. 742.1 and related provisions are designed to give effect to the important principle of restraint in the use of incarceration. It is not a sentence to be reserved solely for first offenders of whom it might be said pose less risk to reoffend. That said, in cases such as ***R v. W.(L.F.)***, 1997 CarswellNfld 173, and ***R v. W.(J.)***, 1997 CarswellOnt 969 (Ont. C.A.), neither accused had a criminal record in instances where a conditional sentence was imposed. As noted, Mr. P. had no record at the time of this offence but did at the time he was charged for this offence.

[36] In the case of ***R v. C.(S.)***, 1999 NSCA 49, the Nova Scotia Court of Appeal upheld a conditional sentence for an accused who was 18 years of age at the time of the assaults on his 7-year-old nephew on four occasions over a period of 6 months.

[37] Referring to the case of ***W.(L.F.)***, the court dismissed as "untenable" that the objectives of the deterrence and denunciation can be achieved only through incarceration and jail, noting in s. 718.2(d) that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate. I note the word "may" because it is impossible to say whether a particular offender will re-offend. On the other hand, the Court must always be concerned with the protection of society and with doing its best to ensure that if an accused is to serve a sentence in a community, that it would not pose a danger to the community.

[38] Whether Mr. P. poses a danger to the community requires an assessment of the relevant factors of which his criminal record is one, albeit a significant one. The Gladue report indicates that Mr. P. is being treated for his diagnosis of Attention Deficit Hyperactive Disorder (ADHD) and more recently his bi-polar diagnosis.

[39] I note in reviewing his record that Mr. P. had been encountering difficulty with the law, it seems regularly, since this incident. His record includes numerous offences involving breaches of probation, failing to appear and mischief. His last offence was 4 years ago where he was charged summarily with assault. Prior to that in 2010 there was a conviction for sexual assault, I do not have the details of that, but he received probation and that conviction is 9 years old at this time.

[40] The Crown notes Mr. P. was previously the subject of two conditional sentence orders, one of which he complied with and one that he did not.

[41] None of this is to minimize the importance of his record as an aggravating factor, nor the harm done to the victim, but to consider Mr. P.'s record in the proper context in so far as determining whether he poses a danger to the community.

[42] On the whole of the evidence, I find that he does not.

[43] Mr. P. has had no offences for the past 4 years when prior to that he had a steady string of offences almost every year. It is during this time that he has been employed more often. Working seems to be the key for him. It gives him purpose and his father agrees. His employers describe him as a good worker.

[44] The Crown has also argued that there is nothing in the Gladue report to suggest that Mr. P.'s actions are directly related to indigenous offenders or his community. Gladue obligates the sentencing judge to consider whether there are factors within the aboriginal community that have played a role in the Accused's life and in the appearance before the Court. (***R v. Proulx***, [2001] 1 S.C.R. 61 (SCC))

[45] The Crown submits there is a lack of a clear nexus between the offending conduct of Mr. P. and the factors mentioned in the Gladue report. But Gladue and section 718.2(e) provide the Court with a certain flexibility, thus allowing and compelling the sentencing judge to take specific factors into account.

[46] I am aware that 718.2(e) does not mandate necessarily a different result for aboriginal offenders and does not alter the fundamental duty of the sentencing judge to impose a sentence that is fit for the offence and the offender. Accordingly, it is open to me to give primary consideration to the principles of denunciation and deterrence on the basis that the offence involved was a serious one. The Crown in its submissions emphasized the gravity of the offence and the high degree of moral culpability on the part of Mr. P.

Decision

[47] Having carefully considered the circumstances of the offence and the offender, it might be that either one of the proposed sentences, in my view, by Crown and Defence could be consistent with the fundamental principles of sentencing, in that a jail sentence would clearly satisfy the objectives of denunciation and deterrence, which is called for in these types of offences. Yet, there are many cases, the prominent ones being ***R v. Proulx*** and ***R v. Wismayer***, 33 O.R. (3d) 225 (1997), and others that say that a conditional sentence order with punitive conditions, can serve those same objectives, but with an element of rehabilitation, in the right circumstances.

[48] As pointed out by the Defence in reference to the decision of the Honourable Judge Alan Tufts in ***R v. C.(S.C.)***, 2008 NSSC 115, these are often cases involving historical situations and those where the level of invasiveness is on the lesser end of the spectrum in terms of the assault. But let's be clear, all of these assaults are an affront on the personal integrity of the victim and are abhorrent to society, in addition to being harmful to the victim.

[49] Are these circumstances, in terms of the gravity of the offence and the degree of responsibility of the offender, so pressing, that the custodial sentence should be served in an institution and not in the community? If the Court were only concerned with the offender then, the conditional sentence order is likely the more just sanction. If the Court was only concerned with the offence, then a jail sentence is probably the more just sanction. But the Court is concerned with both. That is where the sentencing objectives must be balanced and as has already been said, it is a delicate balance to achieve. While denunciation and deterrence are primary objectives, they are not the only ones.

[50] In ***Wismayer***, which bears some relation to this offence on the facts, the Ontario Court of Appeal noted that undue emphasis should not be placed on aggravating factors and their mere presence does not disentitle an accused to a

conditional sentence. The issue in that case was the same as here, whether the accused should serve a 12 month sentence in prison or a conditional sentence of imprisonment.

[51] Rehabilitation for someone who was 18 years of age at the time of the offences and dealing with mental issues cannot and should not be ignored, even if the accused has a criminal record, as Mr. P. does since the incident in question.

[52] Here I find the case of ***R v. J.(D.J.)***, 1998 CarswellSask 830 (Sack. CA), to be instructive as well as paragraph 17 of the Defence brief which reads as follows:

> 17. Mr. . had just entered legal adulthood when he committed the assaults against […], he has admitted his guilt without a Trial, he is remorseful, his Gladue report is fairly positive about his current situation, and although he is not of "diminished mental capacity", he does suffer from significant mental health issues.

[53] I am not satisfied these circumstances are so pressing that the only way to express society's repudiation is through incarceration in an institution.

[54] As far as the connection between the offence and the factors relevant to Mr. P.'s ancestry, there are a number of things that have been identified, and we do not know what exact effect they might have had, but I would suggest the culmination of these factors, could well have placed Mr. P. in an environment that led to his involvement with the law, in some fashion. It might not have been inevitable, but it is not a total surprise. Difficulties in learning, family break ups, impulsive behaviour, exposure to death, depressive issues from an early age, combined with medication that did not always have the desired effect. At 33, Mr. P. has no relationship with his mother. He is attempting to establish himself at work and support his own family.

[55] From my reading of the Gladue report there are several factors which may not have contributed directly, but certainly did not help Mr. P. in terms of his upbringing. The family separation occurred shortly after the death of his brother, Even if Mr. P. was not abused himself, his environment was far from stable. The report confirms that he had depressive disorders and from a young age, has been impulsive in his decision making due to ADHD. It further indicates that bi-polar disorder is a serious mental illness that can lead to unpredictable behaviour.

[56] In the two Nova Scotia Court of Appeal cases that upheld conditional sentence orders in similar and to some extent more serious circumstances, the court pointed out that punitive sentences were necessary as part of the conditional

sentence order. The conditions proposed here include the following among the statutory provisions in the *Criminal Code*, for a total of 16 conditions. (***R v. C.(S.)***; ***R v W. (M.A.)***, 1999 NSCA 49)

> Remain in your residence at all times, 24 hours per day, for a one year period, with some exceptions: directly to and from a) employment; b) medical appointments for himself or for immediate family members; c) legal appointments; and d) counselling programs or treatment programs; notification to his supervisor is require in advance for all such exceptions.

[57] In my respectful view, I cannot agree with the Crown that service of Mr. P.'s sentence in an institution is the only way that the principles of denunciation and deterrence can be adequately expressed in these circumstances.

Conclusion

[58] In conclusion, an appropriate sentence can rarely be determined by the application of rigid rules. In the result, and taking into account all relevant factors, I concur with the Defence that these factors point to a conditional sentence order being more appropriate than a jail sentence for Mr. P. Mr. P. wishes to return to his traditional culture, practice and heritage and wishes to receive treatment and counselling for his mental difficulties.

[59] As was stated in ***R v. Wells***, 2000 SCC 10, referring to ***Ipeelee***, 2012 SCC 13, the application of the Gladue factors does not necessarily result in a lesser sentence. Neglecting that duty however, to pay particular attention to the circumstances of Mr. P. would not be faithful to this core requirement of the sentencing process.

[60] What I have done is attempt to pay particular attention to the circumstances of Mr. P., an aboriginal offender, in an attempt to achieve a truly fit and proper sentence in this particular case. (***R v. Christmas***, 2017 N.S.P.C. 28 (N.S.P.C.))

[61] This concludes my sentencing decision. I wish to thank counsel for their very helpful briefs and submissions in regard to this matter.

Murray, J.