NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. G.P.*, 2004 NSCA 154

Date: 20041221
Docket: CAC 204237
Registry: Halifax

Between:

G.P.

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Publication Ban pursuant to s. 486(3) of the **Criminal Code**

Judges: Bateman, Hamilton and Fichaud, JJ.A.

Appeal Heard: November 18, 2004, in Halifax, Nova Scotia

Held: Leave to appeal granted and appeal allowed per reasons for judgment of Bateman, J.A.; Hamilton and Fichaud, JJ.A. concurring.

Counsel: Sandra Sarto and Darren MacLeod, for the appellant
Peter Rosinski, for the respondent

<u>Publishers of this case please take note</u> that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

(3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with

> (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
>
> (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
>
> ©) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,

the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Reasons for judgment:

[1] G.P. applies for leave and, if granted, appeals the sentence imposed by Judge D. William MacDonald of the Provincial Court of Nova Scotia.

[2] Mr. P. was charged with forty-seven offences arising from the following Informations:

> Sexual Exploitation of his daughter K. C. (dob June [*editorial note- date removed to protect identity*] 1986) - s.153 between January 1, 2002 and April 25, 2002 - instructing her how to perform fellatio in order to prostitute her;
>
> Possessing, making and distributing child pornography - possession of 100 pictures of child pornography as well as photographs contained on his computer of a similar nature **and** between May 2, 2001 and April 25, 2002 Mr. [P.] took still photographs and videotape which he live-streamed onto the internet of his daughter and other young females under the age of 18 engaging in sexual activities for payment by clients;
>
> That he operated an elaborate prostitution business as well as a website involving the same females under the age of 18 years (whose dates of birth range between March 31, 1984 and June 28, 1986) over the period of time from May 1, 2001 to April 25, 2002.

[3] Mr. P. entered guilty pleas to fourteen counts including keeping a common bawdy house (s. 210(1)); procuring (s. 212(1)(d) and (h) and s. 170); householder permitting sexual activity (s. 171); possessing, making and distributing child pornography (s. 163.1(2) and (3) and (4)); and sexual exploitation (s. 153(1)(a) and (b)). There were multiple counts of some of these crimes.

[4] The Crown and defence jointly recommended a global sentence of six years less two for one credit for fourteen months spent on remand, bringing the effective recommendation down to three years and eight months.

[5] The judge did not accept the joint recommendation, imposing a sentence of 30 months custody on the prostitution related charges, 12 months consecutive on the child pornography offences and four years consecutive on the sexual exploitation charges involving Mr. P.’s 15 year old daughter, for a total of 90

months or 7 ½ years, after allowing double credit for the time on remand. The effective sentence was, therefore, nine years and ten months.

[6] Mr. P. appeals, alleging that the judge erred in not giving effect to the joint recommendation.

[7] The sentencing proceeded on agreed facts. The offences arise out of Mr. P.'s sex trade operation. This was an organized and sophisticated sex for sale operation offering an assortment of "products" including live sex on and off site; video sex; child pornography and pictures of individuals performing sex acts with animals. Mr. P. "employed" a number of females, including several who were under the age of 18. He actively recruited these underage females, including his 15 year old daughter. The operation offered sexual services performed for hire, both on his premises and elsewhere. Mr. P. also ran an internet pornography web site. Clients could pay to watch the performance of requested sex acts over a web cam or by video. Additionally he possessed volumes of child pornography and pictures of other depraved sex acts.

[8] In oral submissions to the sentencing judge, neither attorney addressed the range of sentence for these offences but advised the judge that they had concluded that a global sentence of six years (less double credit for time served on remand) was appropriate, considering the totality principle. The Crown attorney, when questioned by the judge as to the adequacy of the sentence, advised that both Crown and defence had researched the case law on the range of sentence and had held numerous conferences. The Crown attorney indicated that in reaching the recommendation he had consulted with a number of individuals in the Crown's office on the question of range. Counsel stated that they had been working on this matter for more than a year and had reached what they considered to be a "just and appropriate sentence given the nature of the criminal activity....". Defence counsel described the proposed sentence as " . . . a true joint recommendation in all respects" ... involving "serious negotiations regarding pleas right from the beginning [of Mr. P. arrest and remand the year before] . . . ". No details were provided by counsel on what, if any, difficulties the Crown would face in prosecuting these charges should they proceed to trial.

[9] The judge was particularly concerned about the two charges involving Mr. P.'s 15 year old daughter. According to the agreed facts, not only had Mr. P. recruited her to work for him in the sex trade, he had "prepared" her for her job by

having her perform oral sex on him. He did not wear a condom. It is agreed, as well, that on other occasions Mr. P. offered his daughter money to fellate him and when she refused, would increase the amount of money offered. It is unclear whether she acquiesced on those additional occasions.

[10] The judge was aware that he should not lightly depart from a joint submission. He said:

> I have been asked to consider a joint submission by counsel and, of course, I give great weight to joint submissions. Indeed, if I may be myself inclined to impose a somewhat different sentence, I do not think I should stray from a joint submission as long as it is within an appropriate range for the offences.

[11] He expressed his concern, however, that the proposed sentence did not adequately take into account the gravity of the offences. He said:

> But what troubles me here is that the offences involve the participation of under-age people. The age which is significant for this purpose in the Criminal Code is age 18. Mr. [P.]'s operation provided the wherewithal, the encouragement, and the training, if I can use that word, for these teenage girls to participate as prostitutes. And that has to affect the self-image and self-respect of the girls who have been doing that.

[12] The judge did not clearly advise counsel that he would depart from the joint submission nor did he cite the authority which caused him to conclude that the proposed global sentence was outside the range. He did indicate, however, that in the brief time available to him he had looked at some authorities to assist him in determining the appropriate range of sentence for these crimes. He rejected the jointly recommended sentence.

[13] This Court recently considered the sentencing judge's obligation when assessing a joint sentence submission. In **R. v. MacIvor** (2003), 215 N.S.R. (2d) 344; N.S.J. No. 188 (Q.L.), Cromwell, J.A., writing for the Court, said:

> **[31]** I am also of the view that, with respect, the judge erred in "jumping" the joint submission. It is not doubted that a joint submission resulting from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission: see, e.g., **R. v. Thomas (O)** (2000), 153 Man. R. (2d) 98; 238 W.A.C. 98 (C.A.) at

para. 6. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it: see, for example, **R. v. MacDonald, L.W. et al.**, supra **R. v. Tkachuk (E.A.)** (2001), 293 A.R. 171; 257 W.A.C. 171;159 C.C.C. (3d) 434 (C.A.) at para. 32; **R. v. G.W.C.** (2000), 277 A.R. 20; 242 W.A.C. 20; 150 C.C.C. (3d) 513 at paras. 17-18; **R. v. Bezdan**, [2001] B.C.J. No. 808; 154 B.C.A.C. 122; 252 W.A.C. 122 (C.A.), at paras. 14-15; **R. v. Thomas**, supra, at paras. 5-6; **R. v. B.(B.)**, 2002 Carswell NWT 17(C.A.) at para. 3; **R. v. Webster (D.)** (2001), 207 Sask. R. 257; 247 W.A.C. 257 (C.A.) at para. 7.

[32] Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.

[33] The tendency in most courts of appeal in recent years has been to emphasize the weight that should generally be given to joint recommendations following a plea agreement. Some courts have gone so far as to adopt the principle that a joint submission should only be rejected if accepting it would be contrary to the public interest and otherwise bring the administration of justice into disrepute: **R. v. Dewald (T.O.)** (2001), 144 O.A.C. 352; 156 C.C.C. (3d) 405 (C.A.); **R. v. Cerasuolo (J.C.)** (2001), 140 O.A.C. 114; 151 C.C.C. (3d) 445 (C.A.); **R. v. Dorsey (C.)** (1999), 123 O.A.C. 342 (C.A.); **R. v. Nome (T.M.)** (2002), 172 B.C.A.C. 183; 282 W.A.C. 183 (C.A.); **R. v. Hatt (R.E.)** (2002), 209 Nfld. & P.E.I.R. 170; 626 A.P.R. 170;163 C.C.C. (3d) 552 (P.E.I.S.C.A.) at paras. 15 & 18. Many of the relevant authorities were reviewed by Fish, J.A., writing for the Court, in **R. v. Verdi-Douglas** (2002), 162 C.C.C. (3d) 37 (Que. C.A.):

> [42] Canadian appellate courts have expressed in different ways the standard for determining when trial judges may properly reject joint submissions on sentence accompanied by negotiated admissions of guilt.
>
> [43] Whatever the language used, the standard is meant to be an exacting one. Appellate courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless they are ‘unreasonable’, ‘contrary to the public interest’, ‘unfit’, or ‘would bring the administration of justice into disrepute’.
>
> . . .

> [51] In my view, a reasonable joint submission cannot be said to 'bring the administration of justice into disrepute'. An unreasonable joint submission, on the other hand, is surely "contrary to the public interest". Accordingly, though it is purposively framed in striking and evocative terms, I do not believe that the Ontario standard [i.e. that the jointly recommended sentence is contrary to the public interest and would bring the administration of justice into disrepute] departs substantially from the test of reasonableness articulated by other courts, including our own. [The] shared conceptual foundation [of these various formulations of the principle] is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty -- provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted. (Emphasis added)

[34] I respectfully agree with and would adopt the last sentence of this quoted passage.

[35] In my view, in light of the circumstances of both the offence and the offender which I have set out earlier, the jointly recommended sentence was manifestly fit. There were no compelling reasons for departing from it. In my respectful view, the judge erred by doing so.
(Emphasis added)

[14] I would infer, although it was not stated by the judge, that he thought the proposed sentence was not fit. Absent from the decision is any expression of what benchmarks were used by the sentencing judge to determine the substitute sentence. Counsel, apparently assuming that their joint recommendation would be accepted, did not submit on range.

[15] In **R. v. Sinclair** (2004), 185 C.C.C. (3d) 569; M.J. No. 144 (Q.L.) (Man. C.A.) the Court outlined a recommended procedure for a judge when considering departing from a joint submission arising out of a plea bargain. Steel, J.A., writing for the Court said:

> [17] Thus, the law with respect to joint submissions may be summarized as follows:
>
> > (1) While the discretion ultimately lies with the court, the proposed sentence should be given very serious consideration.

> (2) The sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons may include, among others, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.
>
> (3) In determining whether cogent reasons exist (*i.e.*, in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
>
> (4) The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.
>
> (5) The sentencing judge must then provide clear and cogent reasons for departing from the joint submission. Reasons for departing from the proposed sentence must be more than an opinion on the part of the sentencing judge that the sentence would not be enough. The fact that the crime committed could reasonably attract a greater sentence is not alone reason for departing from the proposed sentence. The proposed sentence must meet the standard described in para. 2, considering all of the principles of sentencing, such as deterrence, denunciation, aggravating and mitigating factors, and the like.

(Emphasis added)

[16] With appropriate candour, the Crown here concedes that the procedure followed by the judge was in error. In particular, the Crown says that counsel should have been alerted to the judge's concern about the fitness of the sentence and permitted an opportunity to address that issue in detail. (See, for example, **R. v. Bezdan** (2001), 154 B.C.A.C. 122; B.C.J. No. 808 (Q.L.)(C.A.))

[17] It is appropriate to distinguish between the treatment of sentence recommendations that have resulted from a true plea bargain, and those that are made after a finding of guilt or the voluntary entry of a guilty plea, not prompted

by discussions of sentence. **R. v. McKay** (2004), 186 C.C.C. (3d) 328; M.J. No. 205 (Q.L.)(C.A.)) The joint recommendation here arose from a genuine plea bargain.

[18] Maintaining the position taken at the sentencing hearing, Crown counsel does not assert on this appeal that the jointly recommended sentence is outside the range. In reviewing the extensive case law provided by Crown counsel on this appeal, we are persuaded, and counsel appear to accept, that the jointly recommended sentence, on the record before the trial judge, appeared to be, if not below an acceptable range, at the very low end of the range. Much would turn upon the application of the totality principle.

[19] In either event, before rejecting the joint recommendation the judge should have advised counsel that he was considering departing from the agreed sentence and afforded them an opportunity to make submissions justifying their proposal (**R. v. Sinclair**, **supra**). There being acknowledged error, it falls to this Court under s. 687 of the **Criminal Code**, to consider the fitness of the sentence appealed against and either vary the sentence or dismiss the appeal.

[20] At the hearing of this appeal we provided counsel with an opportunity to advise us of those factors which would support the joint submission. Neither appellate counsel had appeared at the sentencing, but each consulted with his/her colleague who had appeared in the court below. They advise that there are important and legitimate considerations which influenced this joint recommendation (**R. v. McIvor**, **supra**, at para. 32). These include, Mr. P.'s early indication of an intent to enter a guilty plea to spare the witnesses the stress of testifying, thus the avoidance of a preliminary inquiry as well as the trial; the length and complexity of any trial given the computer and technical aspects of the evidence; and, most importantly, the reluctance to testify on the part of a number of Crown witnesses. It is regrettable that this important information was not volunteered by counsel to the sentencing judge. Counsel presenting a joint submission should come to the hearing prepared to address all relevant issues supporting the sentence.

[21] In the light of this additional material background, particularly the potential for problems of proof at trial, I am not persuaded that the sentence as proposed is contrary to the public interest or would bring the administration of justice into disrepute.

[22] I would grant leave to appeal, allow the appeal, set aside the sentence imposed by the trial judge and order that the offender be incarcerated for three years and eight months, consistent with the joint recommendation of counsel. For clarity, it is our intention that this sentence be effective as of the date of the original sentencing.

Bateman, J.A.

Concurred in:

Hamilton, J.A.

Fichaud, J.A.