S.C.C. No. 02762

NOVA SCOTIA COURT OF APPEAL

Clarke, C.J.N.S, Matthews and Pugsley, JJ.A.

Cite as: R. v. P.R.P., 1993 NSCA 96

BETWEEN:

HER MAJESTY THE QUEEN		Kenneth W.F. Fiske, Q.C. for the Appellant
	Appellant	
- and -		Frank E. DeMont for the Respondent
P.R.P.	Respondent	Appeal Heard: March 16, 1993
		Judgment Delivered: March 19, 1993

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal allowed and sentence varied per reasons for judgment of Matthews, J.A.; Clarke, C.J.N.S., and Pugsley, J.A., concurring.

MATTHEWS, J.A.:

The respondent pled guilty to a charge in an information sworn April 9, 1992, that he:

> "Between the 1st day of January, 1964 and the 31st day of December, 1965, at or near [...] in the County of Pictou, Province of Nova Scotia, did unlawfully have sexual intercourse with J.G.H., a female person, who was not his wife without her consent and did thereby commit rape, contrary to Section 135(a) of the **Criminal Code, 1964**."

He was arraigned on the charge and elected trial by judge and jury. On June 11, 1992, he re-elected trial before a Provincial Court judge and pled guilty. Sentencing was adjourned until August 2, 1992, at which time the sentencing judge suspended the passing of sentence, with no time stipulated, and directed the respondent to pay a fine in the amount of $10,000.00.

It is from that sentence that the Crown now seeks leave to appeal, and if that be granted, appeals.

The respondent is the complainant's uncle. At the time of the offence he was 28 or 29 years old and the complainant, 14 or 15. The complainant and her female cousin were babysitting the children of the respondent and his wife in New Glasgow. After the respondent and his wife returned home, the two girls left to walk to their home. A short time later the respondent and his brother, in a vehicle operated by the brother, offered the girls a drive. They went to [...] where the respondent removed the complainant's clothes and had sexual intercourse with her, without her consent.

At sentencing, the respondent was 56 years old and has been free of crime since the rape event. He has grade 10 education and has been employed with the same firm for the past 23 years. He was married for the third time five years ago. Other than comments respecting the offence before us, the presentence report is favourable, the respondent admitted committing the crime in a statement to the police and expressed remorse.

The complainant now lives in another province. According to the presentence report, her statement and the confirming medical reports, the rape by her uncle some 28 years ago has severely traumatized the complainant. She has been under the care of a doctor since

1989, has been hospitalized on several occasions, suffered bouts of depression and is suicidal.

The sentencing judge commented:

> "In my view after such a long passage of time and since he now finds himself in a stable situation it would be a rather severe hardship to him and his family after all this time and from his different station in life to impose a custodial sentence. It seems to be that the P.R.P. that is before the Court today although within the same body shell if you will of the person who committed the offence in 1968, he is quite a different person. He has grown and changed and matured and I think that is a factor I must consider. To incarcerate a fifty-six year old man for an act that a twenty-eight year old man did would be an extreme hardship to a fifty-six year old man."

He then imposed the sentence to which I have previously referred.

There is no question. The sentence imposed is not in accord with the law. With that, both counsel agree. Thus, we grant leave to appeal.

Sections 718(2), 737(1)(a) and (b) and 737(3) of the **Code** are relevant:

> "718.(2) An accused who is convicted of an indictable offence punishable with imprisonment for more than five years may be fined in addition to, but not in lieu of, any other punishment that is authorized.
>
> 737(1) Where an accused is convicted of an offence, the court may, having regard to the age and character of the accused, the nature of the offence and the circumstances surrounding its commission,
>
> > (a) in the case of an offence other than one for which a minimum punishment is prescribed by law, suspend the passing of sentence and direct that the accused be released on the conditions prescribed in a probation order;
> >
> > (b) in addition to fining the accused or sentencing him to imprisonment, whether in default of payment of a fine or otherwise, for a term not exceeding two years, direct that the accused comply with the conditions prescribed

> in a probation order; or...
>
> (3) A probation order may be in Form 46, and the court that makes the probation order shall specify therein the period for which it is to remain in force."

By s. 738(2)(b) no probation order can remain in force longer than three years.

If the sentencing judge desired to suspend the passing of sentence, then he should have ordered that the passing of sentence be suspended for a specified period of time and required that the respondent comply with the provisions set out in the probation order for the same duration. No other punishment may be added because the sentence is suspended. However, if the sentencing judge desired to sentence and impose a fine, then s. 718(2) governs and because this is "an indictable offence punishable with imprisonment for more than five years", he should have ordered "other punishment" in addition to the imposition of the fine.

We must determine a fit sentence to impose in the particular and somewhat unique circumstances of this case. The sentencing judge correctly observed that the passage of time has demonstrated that there is no need for specific deterrence of the respondent. The difficulty, recognized by both counsel and the sentencing judge, is that the offence is some 28 years old.

Although the respondent gave an inculpatory statement to the police and expressed remorse, it is noted that he did nothing respecting this serious offence until the complaint was made. Being the uncle of the complainant he was in a position of trust; at the time of the offence some 14 years separated the ages of the uncle and niece, she being only 14 at that time. The sentencing judge remarked:

> "The sexual act it appears was not a particularly violent one, there was no threats that I heard about, there was no beating or bruising or anything of that nature, it was an unlawful sexual act because there was no consent."

Rape is a particularly violent act. With deference, the fact that there was no

beating or bruising, fails to take into consideration the disastrous effect this offence has, in most instances, upon the victim. The sentencing judge failed to give adequate consideration to this factor. It is unfortunate that the documents concerning the impact of this offence upon the victim were not placed before the sentencing judge but were only commented upon in part. The reports in full should have been before the sentencing judge.

In this case the psychiatrist speaks of the complainant's attendance at the rape crisis centre; depression; anger; suicidal tendencies; impairment of her self-esteem, trust and ability to cope; insomnia; recurring dreams of her uncle "insulting her"; her prognosis being poor and

> "She has worked very hard at trying to get well and only recently has felt strong enough to try and cope with the laying of charges. Despite that, she has had significant difficulty since she has laid them and fears the divisions within her family that have occurred over this issue."

Although, arguably, this offence may not be the sole cause of all of her problems, the psychiatrist said:

> "Although depression is certainly a complex illness and in this day and age there are many stresses and factors that can worsen it, it is my professional opinion that this alleged rape would have played an extremely significant and crucial role in the development of her problems."

This court, on many occasions, has said that with crimes of violence general deterrence is the dominant factor in determining a fit sentence requiring, other than in exceptional circumstances, incarceration.

Here, while imprisonment would not be required for specific deterrence given the significant delay and the absence of a criminal record since this offence, it is essential for general deterrence.

Taking both the mitigating and aggravating circumstances into account, it is our opinion that the appeal is allowed and the sentence imposed be varied to nine months

incarceration.

J.A.

Concurred in: Clarke, C.J.N.S.

Pugsley, J.A.