

IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

R. v. Y., 2015 NSPC 19

Date: April 16, 2015

Docket: 2675200

2675201

2675202

Registry: Halifax

BETWEEN:

HER MAJESTY THE QUEEN

v.

“Y”

**DECISION ON CROWN REQUEST FOR A PSYCHO-SEXUAL
ASSESSMENT**

BEFORE THE HONOURABLE JUDGE ANNE S. DERRICK

HEARD: April 16, 2015

DECISION: April 16, 2015

CHARGES: sections 346 (1.1); 163.1(4); 163.1(3)(a), *Criminal Code*

COUNSEL: Mark Heerema and Jamie Van Wart, for the Crown

Peter Planetta, for “Y”

By the Court:

Introduction

[1] On April 2, 2015 I convicted “Y” of three offences –extortion, possession of child pornography and possession of child pornography for the purpose of distribution. (*R. v. “Y”, [2015] N.S.J. No. 137*)

[2] “Y” was 16 years old when he committed the offences. The images that qualified as child pornography under the *Criminal Code* were “selfies” taken by “A”, a 16 year old girl, depicting her breasts, a “bra-on” image and a “no-bra” image. (*R. v. “Y”, paragraphs 4 and 6*)

[3] The images were stored on “Y”’s computer, buried within an obscure file path that, as “Y” admitted at trial, contained other pornographic images. (*R. v. “Y”, paragraph 18*)

[4] “Y”’s sentencing is the next stage in these proceedings. The Crown has applied to have a section 34 psychological assessment prepared and wants the assessment to include a psycho-sexual assessment. The other pornographic images from “Y”’s computer have played a role in animating the Crown’s request for a psycho-sexual assessment. The Defence opposes the request. These are my reasons for declining to order a psycho-sexual assessment.

The Crown Application for a Psycho-Sexual Assessment

[5] The Crown’s reasons for seeking a psycho-sexual assessment relate to the other pornographic images on “Y”’s computer. Mr. Heerema submits that the trial produced no clear explanation for “Y”’s relentless engagement with “A” despite her statements that she was suicidal and her hospitalization for a suicide attempt. I understand Mr. Heerema to be saying that the pornographic material discovered in the same file path on “Y”’s computer as the two images of “A” suggest there may have been a sinister motivation. In the Crown’s submission a psycho-sexual

assessment is required to explore the possible underpinnings of “Y”’s offences – what motivated him, and do the other pornographic images indicate, as the Crown submits, that “Y” has sexual interests that could put him at risk to re-offend in the future. Mr. Heerema says a psycho-sexual assessment would ferret out whether there is anything of concern that merits closer examination.

The Defence Position

[6] Mr. Planetta in opposing the Crown’s request submits that the circumstances of this case do not warrant a psycho-sexual assessment. He submits that it is not appropriate or constructive to subject “Y”, a young adult with social anxiety, to such intrusive testing. In his submission a psycho-sexual assessment is more typically done where an actual sexual assault has been committed by an older offender against a much younger victim. Mr. Planetta says there is no evidence before me to show what use or assistance a psycho-sexual assessment may be in determining “Y”’s sentence.

[7] Mr. Planetta has also said there is nothing illegal about the other pornographic images on “Y”’s computer which I take him to mean that the images and the possession of them is not illegal. He notes that “Y” has no prior record and that the offences in this case were perpetrated when he was 16 years old, the same age as his victim.

Information about the Nature and Scope of a Psycho-Sexual Assessment

[8] Following Mr. Heerema’s submissions on April 2 that a psycho-sexual assessment should be ordered, it was agreed that he would obtain more information about the nature and scope of such an assessment. By email dated April 13, Mr. Heerema informed Mr. Planetta and myself what he had learned from Dr. Angela Connors of the Forensic Sexual Behaviour Program at the Nova Scotia Hospital:

- The Program takes clients who are currently 18 years and older regardless of when the offence occurred;
- A psycho-sexual assessment can be done on an out-patient basis;

- The interview process remains the same although the risk instruments utilized change depending on when in the individual's teen years the offence occurred;
- In all assessments the two main goals are to identify the likelihood an individual "will violate sexual boundaries in the future, and to identify intervention into factors contributing to that risk to help the [individual] manage that risk effectively";
- The assessment always has three components, unless there is a clinical decision made at the time of assessment to modify it: (1) clinical interview to review biopsychosocial factors in background and current life; (2) psych testing to evaluate personality, symptom patterns, potential areas for intervention, etc.; and (3) PPG [phallometric assessment] to investigate sexual preference profiling.

[9] Dr. Connors advised in her communications with Mr. Heerema that:

Unless clinically indicated the PPG assessment is not an optional component because at age 18 or older information revealed by this process is one of the most robust predictors of recidivism in the untreated. Treatment that does not take into account the findings of a PPG process has the very real potential to miss intervention in a critical risk factor, effectively neutralizing the impact of treatment to reduce recidivism...

[10] Dr. Connors went on to indicate that:

...There are many pathways to sexual offense, and not everyone has followed a pathway that was motivated by non-normative sexual preferences; however, if non-normative sexual preferences were a significant motivator, the management of these preferences across a

lifetime is a great deal to expect without providing the client with help in how to do so.

[11] Mr. Heerema inquired with the IWK program that conducts youth psycho-sexual assessments and was advised that as “Y” is now 19 they would prefer he was assessed by Dr. Connors and her staff at the Forensic Sexual Behaviour Program. This is the program for adult offenders.

[12] Dr. Connors provided Mr. Heerema with the information sheet/consent form given to individuals being assessed at the Forensic Sexual Behaviour Program. It indicates the purpose of the assessment is to address the following areas: risk to re-offend in a sexual manner; treatment needs; and responsivity to treatment. The testing, including the PPG (phallometric) evaluation, is described to the individual being assessed as follows:

During the phallometric evaluation, your sexual interests/preferences will be assessed by measuring your sexual arousal to various slides and audio clips. The slides depict nude males and/or females of various ages, and the audio taped passages describe sexual and nonsexual situations. Some of the material used is disturbing to many people; however, phallometry is a very important aspect of this specialized assessment. For the PPG evaluation, you will be seated in a private room, and will be asked to wear a measuring device on your penis, which you will place yourself. The PPG technician will give you instructions on how to do this.

Ordering a Section 34 “Medical, Psychological or Psychiatric” Assessment

[13] Section 34 of the *Youth Criminal Justice Act (YCJA)* provides that “at any stage of the proceedings against a young person”, a youth justice court may order a “medical, psychological or psychiatric” assessment of the young person. The assessment must be done by “a qualified person”.

[14] Section 34 assessments can be ordered to assist the youth justice court in determining the appropriate sentence for a young person. (*section 34(2)(c)*) In a

case such as “Y”’s where the young person to be sentenced is not consenting to the Crown’s application, and there is no prior record and no allegation that “a serious violent offence” has been committed, the court must be satisfied the assessment is “necessary” for the sentencing and that there are “reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability.” (*section 34(1)(b)(i)*) A pattern of repeated findings of guilt or an allegation that the young person has committed a serious violent offence can each also ground the ordering of a section 34 assessment but neither of those criterion apply here. (*section 34(1)(b)(ii) and (iii)*)

Ordering a section 34 Psychological/Psychiatric Assessment in this Case

[15] Given my findings at trial about the circumstances in which “Y”’s offending occurred and the nature of that offending, I am satisfied that section 34 psychological and psychiatric assessments will be helpful to me in sentencing. And, I find there are reasonable grounds to believe that “Y” may be suffering from “a mental illness or disorder, a psychological disorder or an emotional disturbance” justifying an order for the assessments.

[16] I base my “reasonable grounds” determination on “Y”’s trial evidence. “Y” is now 19 years old. He testified that his last full grade was Grade 8 and that he stopped going to school a few weeks into Grade 9 because he was having “a lot of mental problems.” He went on to say that he has seen doctors and psychologists about “mental health problems”, has been prescribed medications, and diagnosed with social anxiety. The trial evidence indicated to me that “Y”’s social anxiety directly contributed to his involvement in the offences for which he has been convicted. (*see, for example, R. v. “Y”, paragraph 66*)

My Decision Not to Order a Psycho-Sexual Assessment

[17] The more controversial question is whether there are reasonable grounds to order a psycho-sexual assessment as part of the section 34 psychological/psychiatric assessment. Section 34 does not oblige me to order a psycho-sexual assessment: the legislation provides that a youth justice court “may, at any stage of the proceedings against a young person...” order a section 34 assessment.

[18] My decision not to order a psycho-sexual assessment emerges from the following analysis. I have first considered the role of the other pornographic images on “Y”’s computer in this trial. The images were discovered by S/Cst. Rod Smith, the Crown’s computer expert. He preserved them on a CD which was marked as Exhibit 7 during his testimony at “Y”’s trial.

[19] Exhibit 7 was never referenced at “Y”’s trial. Its substantive contents were not discussed. I did not examine Exhibit 7 during the trial or in my preparation of my decision. I have never seen the images on it and I declined to have Mr. Heerema describe them to me in his submissions on the Crown’s request for a psycho-sexual assessment.

[20] The specific content of Exhibit 7 was made irrelevant by “Y”’s admission that he created the file path and that it “generally” contained pornographic material “and not much else.” “Y”’s admission that the file path contained many pornographic images in folders was relevant on the issue of whether the two images of “A” constituted child pornography. I considered this in my decision, stating at paragraph 18:

...Another relevant piece of evidence is the location where “Y” stored these images. He testified that he had saved the two “selfies” to his computer, tucking them away in a file path with many folders. Some of the initial sub-folders in the chain were unnamed folders, which, according to S/Cst. Rod Smith, are very difficult to create. The photographs were stored in a folder entitled “A.” “Y” admitted that the many other named folders in this string of folders contained pornographic images. The “burying” of the “A” photographs along an obscure file path with other pornographic images is another indication the images had no innocent, non-sexual purpose.

[21] In my decision convicting “Y”, the fact that the two images of “A” were co-located with other pornographic material was relevant but the content of the specific images beyond their admitted classification as “pornography” was not. I do not see how those images, which did not figure into my determination of “Y”’s

guilt, can now be treated as relevant to “Y”’s sentencing. “Y”’s sentencing will not involve holding him to account for the other pornographic images. He is accountable for what happened in relation to the images of “A” and that is all.

[22] Mr. Planetta has stated there is nothing about other pornographic images that makes them illegal. Mr. Heerema has not said otherwise and in any event, “Y” has not been charged in relation to the other images. Even if he had been or is, this sentencing before me does not concern them.

[23] The principles of accountability and proportionality also underpin my decision not to order a psycho-sexual assessment. “Y”’s offences were committed when he was 16 in relation to a girl his own age. This is an important fact to be taken into account as is the fact that “Y” has no prior record.

[24] The Declaration of Principle under subsection 3(1)(b)(ii) of the *YCJA* requires "fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity." The purpose of sentencing under the *YCJA* is

...to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

[25] “Y”’s sentence must be proportionate to the seriousness of the offences and the degree of his responsibility for them, and, subject to the proportionality principle, his sentence must be the least restrictive sentence that is capable of achieving the overall purpose of sentencing. “Y”’s sentence must be the sentence most likely to rehabilitate him and reintegrate him into society, and it must promote a sense of responsibility in him, and an acknowledgement of the harm done to his victim and the community. (*Youth Criminal Justice Act, sections 38(2)(b); (c); (e)(i)(ii)(iii)*)

[26] I view the ordering of a psycho-sexual assessment in the circumstances of this case as incompatible with the principles of the *YCJA* and the legislation's emphasis on accountability and proportionality.

[27] The fact that a psycho-sexual assessment will necessarily include a phallometric assessment unless clinically indicated to be optional is relevant to the proportionality principle in the *YCJA*. It means that ordering the assessment would subject "Y", a vulnerable young man with serious anxiety issues, to an intrusive experience in violation of his privacy and dignity. The assessment would be done in the adult "system" even though "Y" is being sentenced as a young person. I cannot be confident it would not exacerbate his marginalization and social alienation, pathologize and stigmatize him, and risk further damage to his mental health. In the circumstances of this case, and given what "Y" is accountable for, I see the potential of jeopardizing "Y"'s rehabilitation.

[28] The Crown's application for an order for a psycho-sexual assessment is denied. I want to indicate my appreciation to Mr. Heerema for obtaining the information from Dr. Connors. I will order psychological and psychiatric assessments in accordance with section 34 of the *YCJA*. Mr. Planetta has acknowledged that section 34 psychological and psychiatric assessments may assist me in sentencing "Y".

[29] This is a troubling case and I believe I will be assisted by these assessments in determining the appropriate sentence for "Y". In my experience, such assessments are very comprehensive and produce detailed recommendations for rehabilitative measures. It is my expectation that the assessments will shed light on what motivated "Y" to engage in the merciless campaign against "A". We will set a date for sentencing.