PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Fitzgerald*, 2013 NSPC 128

Date: 20131107
Docket: 2532947, 2533085, 2548178
Registry: Pictou

Between:

Her Majesty the Queen

v.

Terry Leonard George Fitzgerald

DECISION ON DEFENCE APPLICATION TO QUASH ELECTION BY PROSECUTION TO PROCEED BY INDICTMENT

Restriction on publication: Any information that could identify the complainant A.B., shall not be published in any document or broadcast or transmitted in any way.

Judge: The Honourable Judge Del W. Atwood

Heard: 7 November 2013

Charge: Sections 145, 151, 271 of the *Criminal Code of Canada*

Counsel: Patrick Young, for the Nova Scotia Public Prosecution Service.
Rob Sutherland for Terry Leonard George Fitzgerald

<u>The Court reconvenes following a brief recess</u>:

[1] I wish to note at the outset of this decision that there is an order in effect under s. 486.4 of the *Code* prohibiting the publication of any information that might identify the victim, A.B.

[2] Terry Leonard George Fitzgerald is charged with offences under sub-ss. 151(1) and 271(1) of the *Criminal Code*; there is, as well, a breach charge under sub-s. 145(5) of the *Code*. The prosecution chose to proceed indictably on all matters. Mr. Fitzgerald elected to have his charges dealt with in this court, and pleaded guilty to the sub-ss. 151(1) and 145(5) counts. No plea has been taken yet on the sub-s. 271(1) charge.

[3] The application before the court today, brought by counsel for Mr. Fitzgerald, alleges an abuse of process by the prosecution. Defence counsel argues that the election of the prosecution to proceed indictably is unsupportable on the evidence and constitutes an abuse of process as comprehended in s. 7 of the *Charter*. The remedy being sought by defence counsel–this, under sub-s. 24(1) of the *Charter*–is that the court strike out the indictable elections made by the prosecution and superimpose summary elections. As guilty pleas were entered

before me, this court is a court of competent jurisdiction for the purposes of granting *Charter* relief.

[4] This is not a case of the prosecution having elected an indictable process in a matter of lesser criminality, seeking to skirt the six-month time limit for starting up a summary proceeding as prescribed in sub-s. 786(2) of the *Code*. That was the situation in *R. v. Parkin*[1] and in *R. v. Boutilier*.[2] In both of those cases, it was found abusive for the prosecution to have elected to proceed by indictment in situations when it clearly had considered the seriousness of the offences and decided against proceeding by indictment in the first place, but then re-electing to indict merely out of expedience to get around the six-month limit. Even in such instances, the law has developed to the point that it recognizes a significant deference owed to the exercise of core-function discretion by the prosecution. For instance, in *R. v. Dudley*, the Supreme Court of Canada said the following:

> 40 There is a large and divided body of case law considering the Crown's right to "re-elect" on the original information to proceed by indictment after first electing to proceed summarily. *See, e.g.*, *Abarca and the Queen*; *R. v. Jans* (1990), 59 C.C.C. (3d) 398 (Alta. C.A.); *R. v. Burke* (1992), 78 C.C.C. (3d) 163 (Nfld. C.A.); *R. v. Kalkhorany*

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[1] [1986] O.J. No. 203 (C.A.) leave to appeal to S.C.C. refused, 28 C.C.C. (3d) 252*n*.

[2] [1995] N.S.J. 540 (C.A.).

(1994), 89 C.C.C. (3d) 184 (Ont. C.A.); *R. v. Boutilier* (1995), 104 C.C.C. (3d) 327 (N.S.C.A.).

41 In my respectful view, these cases do not ask the right question.

42 As mentioned earlier, the failure of the accused to consent to the prosecution of a hybrid offence by way of summary conviction beyond the limitation period is fatal to the validity of the Crown's election and to the proceedings that ensue.

43 It is for precisely this reason that the Crown is free to proceed by indictment on the original information, if valid on its face, where the accused refuses to consent. Although the information remains valid, the initial election and all subsequent proceedings are a nullity. They can therefore have no effect on the Crown's ability to proceed by indictment.

44 I agree with the Court of Appeal that it is not unfair to the accused to permit the Crown to proceed by indictment unless "the evidence discloses an abuse of process arising from improper Crown motive, or resulting prejudice to the accused sufficient to violate the community's sense of fair play and decency" (para. 1). On the record as we have it, nothing of the sort may be said to have occurred here. [3]

[5] The proposition being advanced by the applicant in this case is that the sentencing principle of proportionality and the need for denunciation and deterrence in this case are so diminished by the facts which form the basis of the sexual interference charge as not to justify the indictable process chosen by the prosecution. This is expressly the argument in Mr. Fitzgerald's affidavit. This

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[3] 2009 SCC 58 at paras. 41-44.

line of reasoning is advanced further in the next paragraph of that same affidavit, which I shall read in its entirety:

> Second, while there was penile penetration, the victim states that the sex was not forced, was otherwise consensual, and asked the defendant if he wanted to be friends with benefits. There was strong evidence that she had done it before with other older men. The degree of victimization would not justify an immediate indictment election.

[6] The submission of the defence seems to be that, as the fourteen-year-old victim was sexually active, she is somehow less worthy of the protection of the law that criminalises sexual intercourse between 36-year-old men and minors. That position is unsupportable. It is, in its essence, the bonnet-and-crinoline polemic that is based on inappropriate myths and stereotypes, and was criticised properly by the Supreme Court of Canada in *R. v. Ewanchuck*; as was noted by McLachlin J., as she then was, in her opinion in that case concurring in the majority:

> 103 I agree with the reasons of Justice Major. I also agree with Justice L'Heureux-Dubé that stereotypical assumptions lie at the heart of what went wrong in this case. The specious defence of implied consent (consent implied by law), as applied in this case, rests on the assumption that unless a woman protests or resists, she should be "deemed" to consent (see L'Heureux-Dubé J.). On appeal, the idea also surfaced that if a woman is not modestly dressed, she is deemed to consent. Such stereotypical assumptions find their roots in many

> cultures, including our own. They no longer, however, find a place in Canadian law.
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> 104 I join my colleagues in rejecting them. [4]

[7] It is well within the scope of the court's knowledge that young persons may become active sexually for an array of reasons that expose their vulnerability: parental absence or indifference, drug abuse, peer pressure and bullying, grooming by wily adults bent on exploitation, the abuse of relationships of trust, and the like. The risks are grave: violence, addiction, sexually-transmitted infection, human trafficking. A young person caught in such a situation–as would appear to be the case here–deserves the highest level of protection afforded by the criminal law. Furthermore, the *Criminal Code* makes clear in s. 150.1 that the consent of a young person under the age of sixteen does not have exculpatory legal effect. The significance of this was underscored most insightfully by Saunders J.A. in *R. v. Oliver*:

> Very little can be said by way of mitigation. Mr. Oliver's timely guilty plea did save the complainant from painful court appearances. The appellant's intellectual deficits may, arguably, have prompted him to think that the incidents of sexual intercourse were "consensual" (when of course there was never "consent" here, as a matter of law, on account of her age). These features were obviously considered by the trial judge in deciding an appropriate sentence. The appellant has no prior criminal record, but sexual offenders often present in court

[4] [1999] S.C.J. No. 10, at paras. 93-95, and 103-104.

> with an otherwise good character. The appellant says there was no overt violence; however, I question how it could ever be said that multiple rapes of a 12 year old ought not to be characterized as "overtly violent."[5]

[8] The statement of fact put before the court by defence counsel includes a transcript of the interview with the victim, in which she states the following in response to questions asked of her by the police investigator:

Q: Who initiated the sex?

A: Him.

Q: How did Terry initiate the sex?

A: Kept rubbing my back and kissing my forehead.

Q: What happened next?

A: He undressed me himself and then we had sex.

Q: Were you forced to have sex?

A: No.

Q: Where did this happen?

A: Upstairs.

Q: What if anything did Terry say when it was all over?

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[5] 2007 NSCA 15 at para. 32.

A: He said not to tell anybody and was asking what I thought would happen to him if anybody found out. I said he'd get in trouble. He just really wanted me not to tell anybody. He was saying it like it was the most important thing in his life. I asked him if he wanted to be friends with benefits. He said yeah.

Q: Define friends with benefits?

A: Friends who have sex.

Q: Is there anything you would like to add?

A: He said he was going to get C.D.–I would note here parenthetically that C.D. is the victim's younger sister who was staying at Mr. Fitzgerald's home, as well–meaning he was going to try to fuck her too.

Q: Anything else?

A: He was trying to get us to go to Antigonish with him to be his whores. Apparently, he is a pimp. I don't know if it's true. I heard it from my mom. He has to be. He always has money, dope, cigarettes. Obviously, he has a good way of making money.

Q: Is there anything else you would like to add?

A: No.

[9] These are the facts put before the court by defence counsel in support of the abuse-of-process application. I caution myself that these are not facts put before the court under ss. 723 and 724 of the *Code* in support of sentencing. However, they are the facts upon which the court is being invited to find that the election by the prosecution to proceed by indictment is somehow abusive.

[10] Upon these facts, I find that, had the prosecutor elected to proceed summarily, that prosecutor ought to have had his or her head examined. I apply the principles of sentencing–only notionally, at this stage–as set out by our Court of Appeal in *R. v. E.M.W.*[6] and in s. 718.01 and sub-paras. 718.2(a)(ii.1) and (iii) of the *Code*. I observe, for the purposes of this application, that there is some evidence to support the existence of a relationship of trust between Mr. Fitzgerald and the victim; I say so because this fourteen-year-old minor was a guest in Mr. Fitzgerald's home, entitling her to his protection and not his lust. A substantial penitentiary term is most certainly within the range of possible sentencing outcomes here.

[11] I find that there is no air of reality to the allegation that there was an improper motive behind the decision of the prosecution to proceed by indictment. Considerable deference is owed to that core-function exercise of prosecutorial discretion.[7] On that point, L'Heureux-Dube J. stated the following in *R. v. Power*:

> 40 Moreover, should judicial review of prosecutorial discretion be allowed, courts would also be asked to consider the validity of

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[6]2011 NSCA 87

[7]*See, e.g.*, *R. v. Lyons*, [1987] 2 S.C.R. 309 at p 348; *R. v. Beare*, [1988] 2 S.C.R. 387 at pp. 410-11; *R. v. Jones*, [1986] 2 S.C.R. 749; *R. v. Power* [1994] 1 S.C.R. 601 at pp. 626-7; *R v Kelly* (1998), 128 C.C.C. (3d) 206 at para. 63 (Ont.C.A.); *R. v. Laws* (1988), 128 C.C.C. (3d) 516 (B.C.C.A.)

various rationales advanced for each and every decision, involving the analysis of policies, practices and procedure of the Attorney General. The court would then have to "second-guess" the prosecutor's judgment in a variety of cases to determine whether the reasons advanced for the exercise of his or her judgment are a subterfuge. This method of judicial review is not only improper and technically impracticable, but, as Kozinski J. observed in *United States v. Redondo-Lemos*, 955 F.2d 1296 (9th Cir. 1992), at p. 1299:

> Such decisions *[to charge, to prosecute and to plea-bargain*] are normally made as a result of a careful professional judgment as to the strength of the evidence, the availability of resources, the visibility of the crime and the likely deterrent effect on the particular defendant and others similarly situated. Even were it able to collect, understand and balance all of these factors, a court would find it nearly impossible to lay down guidelines to be followed by prosecutors in future cases. We would be left with prosecutors not knowing when to prosecute and judges not having time to judge. [Emphasis added in original.]

Such a situation would be conducive to a very inefficient administration of justice. Furthermore, the Crown cannot function as a prosecutor before the court while also serving under its general supervision. The court, in turn, cannot both supervise the exercise of prosecutorial discretion and act as an impartial arbitrator of the case presented to it. Judicial review of prosecutorial discretion, which would enable courts to evaluate whether or not a prosecutor's discretion was correctly exercised, would destroy the very system of justice it was intended to protect (*United States v. Redondo-Lemos*, *supra*, at p. 1300).[8]

[12] I agree entirely. The application is dismissed.

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[8] Note 6, *supra*, at para. 40.

J.P.C.