SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Decoste*, 2024 NSSC 38

Date: 20240216
Docket: CRPH No. 522994
Registry: Port Hawkesbury

Between:

His Majesty the King

Appellant

v.

Gary Joseph Decoste

Respondent

Restriction on Publication of any information that could identify the victim or witnesses: Sections 486.4 486.5 *Criminal Code*

LIBRARY HEADING

Judge:	The Honourable Justice Mona Lynch
Heard:	December 13, 2023, in Port Hawkesbury, Nova Scotia
Final written submissions:	January 10 (Crown) and January 15 (Defence, 2024
Written decision:	February 16, 2024
Counsel:	Constance MacIsaac, for the Appellant Adam Rodgers, for the Respondent

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Subject: Sentencing; touching for a sexual purpose s. 151

Summary: The Respondent was convicted of touching for a sexual purpose and sexual assault in relation to his partner's daughter. The sexual assault charge was stayed. The offence included oral sex and penile penetration. The sentencing judge sentenced the Respondent to ten months imprisonment on the touching for a sexual purpose charge. The Crown appealed the sentence.

Issues: (1) Was there and error in principle that impacted the sentence or was the sentence demonstrably unfit?

(2) Did the trial judge err by failing to consider an earlier conviction of the Respondent in relation to the same complainant?

Result: Judge did not err in relation to the consideration of the earlier conviction. The sentencing judge did make an error in principle

that impacted the sentence by failing to consider that the Respondent stood in a place of trust or authority in relation to the complainant. Appeal from sentence allowed; a period of incarceration of 20 months imposed.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

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By the Court:

Introduction:

[1] This is an appeal by the Crown from the sentence imposed on the Respondent on March 21, 2023, for the offence of touching for a sexual purpose a person under the age of sixteen years contrary to s. 151 of the *Criminal Code* on August 30, 2018. The Respondent was found guilty of sexual assault contrary to s. 271 of the *Criminal Code* in relation to the same set of facts, but that charge was stayed, and sentencing proceeded on the s. 151 charge. The Crown proceeded summarily on both offences.

[2] The Respondent's appeal of conviction on both charges was dismissed on December 13, 2023.

[3] The Respondent was sentenced to imprisonment of ten months to run consecutive to the sentence he was serving, three years of probation, and other ancillary orders.

[4] For the reasons that follow I will allow the Crown's appeal and substitute a sentence of imprisonment for 20 months, with the remainder of the sentence imposed by the trial judge remaining the same. I will stay the sentence as the Respondent is soon to be released from custody.

Background:

[5] The Respondent was in a relationship with the complainant's mother which began when the complainant was about seven years old. The Appellant lived with the complainant and her mother. The offence in question occurred when the complainant was 15 years old. It occurred after an evening of the complainant and the Respondent drinking alcohol when the complainant's mother was out. The complainant and the Respondent began what the complainant described as "making out" behind the house where they were living. The complainant was feeling the effects of the alcohol and left the residence when her mother returned home. The Respondent followed the complainant behind a building where the Respondent placed his mouth on the complainant's vagina and then he put his penis in her vagina. The trial judge found the complainant's account of the events compelling and convincing. The Respondent's testimony was not accepted or believed by the trial judge, and it did not raise a reasonable doubt. The Respondent was found guilty of

both sexual assault (s.271) and touching for a sexual purpose a person under the age of 16 years (s. 151).

Issues:

1. Did the trial judge make an error in principle that impacted the sentence or err by imposing a demonstrably unfit sentence?
2. Did the trial judge err by failing to consider the prior conviction of the Respondent for s. 151 in relation to the same complainant?

Standard of Review:

[6] Sentencing decisions are accorded a high degree of deference. Appellate intervention is warranted if (1) the sentencing judge has committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor." If a consequential error in principle has been made, or the sentence is demonstrably unfit, then the appellate court performs its own sentencing analysis to determine a fit sentence (*R. v. Dawson; R. v. Ross*, 2021 NSCA 29, paras 24-25). In doing so, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle (*R. v. Friesen*, 2020 SCC 9, para. 28).

Analysis:

[7] The Crown proceeded summarily on the offences against the Respondent and therefore the maximum sentence available was two years of imprisonment. At sentencing, the Crown asked for a sentence in the range of 20 plus months of incarceration and the Respondent asked for a sentence of ten to 12 months of incarceration.

[8] The Crown appeals the sentence imposed based on the principles set out in *Friesen*. While the court in *Friesen* directed that mid-single digit penitentiary terms for sexual offences against children are normal (para. 114), such a sentence was not available to the sentencing judge for a summary conviction offence.

[9] The Respondent submits that the sentence imposed by the sentencing judge was not demonstrably unfit, contains no error in principle, and asks that the appeal be dismissed.

1. Did the trial judge make an error in principle that impacted the sentence or err by imposing a demonstrably unfit sentence?

[10] The sentencing judge was not provided with cases which would assist him in determining an appropriate range of sentence for a summary conviction offence after *Friesen.* The only caselaw referred to at the sentencing hearing was *Friesen* and *R. v. Murray*, 2023 NSSC 62.

[11] The Crown concedes that the sentencing judge referred to the purpose and principles of sentencing set out in the *Criminal Code* and mentioned *Friesen but* submits that the sentencing judge erred in not considering all the factors set out in *Friesen*. The Crown's primary concern is that the sentencing judge did not mention the fact that the Respondent stood in a position of trust or authority to the complainant.

[12] The sentencing judge mentioned *Friesen.* The sentencing judge found that the sentencing objectives were denunciation and deterrence, both specific and general. He spoke of sending a strong message to the community that this type of behaviour and activity is to be denounced. He noted the impact of these type of offences on young people. He considered the purpose and principles of sentencing. He said that the Appellant was the adult and had the responsibility. He found that the complainant was not capable of consenting. He said that decisions prior to *Friesen* should not be relied upon. The sentencing judge distinguished the *Murray* case because he found that there was no gratuitous violence in this case. He found that the circumstances in *Murray* were more aggravating than the offence for which he was sentencing the Respondent. He said that sexual assault in itself is a violent offence.

[13] The sentencing judge noted that the Respondent had been convicted of an offence for earlier incidents in relation to the complainant when she was much younger. This he said would make the victim more vulnerable and the offence more aggravating. He noted that the Respondent would have to live with the stigma of being convicted of this type of offence. The sentencing judge said that the prior offence was for sexual touching on a number of occasions over a period of five years and the sentence received was 16 months. He found that the circumstances were different in the earlier offence.

[14] Notably absent from the sentencing judge's decision was the fact that the Respondent was in a position of trust or authority in relation to the complainant. The weighing or balancing of factors can form an error in principle if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably. Not every error in principle is material and an appellate court can only intervene if it is apparent from the judge's reasons that the error had an impact on the sentence (*Friesen*, para. 26).

[15] *Friesen* set out significant factors to determine a fit sentence for sexual offences against children. Those are: (a) Likelihood to Reoffend; (b) Abuse of a Position of Trust or Authority; (c) Duration and Frequency; (d) Age of the Victim; (e) Degree of Physical Interference; (f) Victim Participation (paras 122-154). While the sentencing judge considered many of these factors, the sentencing judge did not mention in his sentencing decision that the Respondent stood in a position of trust or authority to the complainant.

[16] I find that the sentencing judge erred in the weighing or balancing of factors by not giving enough, if any, weight to the Respondent being in a position of trust or authority to the complainant; that error had an impact on the sentence.

[17] I will therefore determine the proper sentence for the Respondent giving proper weight to him being in a position of trust or authority.

[18] The Respondent was in a relationship with the complainant's mother and had been for seven years or more at the time of the offence. The Respondent acknowledged watching the complainant grow up from the age of approximately seven years old. He had a good relationship with her and tried to get her to stay in school. *Friesen* notes that a position of trust is an aggravating factor because it increases the offender's degree of responsibility as the person in a position of trust owes a duty to protect the child and a breach of that duty enhances moral blameworthiness (para. 129). All things being equal, a person who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than a stranger to the child (para. 130).

[19] I am also mindful of what *Friesen* and *R. v. Marchand*, 2023 SCC 26 say about being particularly careful in imposing sentences where the victim is an adolescent, as historically disproportionately low sentences have been imposed in those cases (para. 136 *Friesen;* para. 85 *Marchand*). *Marchand* also noted that a wide gap in age between the offender and victim increases blameworthiness (para.

87). In this case the Respondent was almost 60 years old at the time of the offence and the complainant was 15 years old, a very wide age gap.

[20] While the Crown points to other things that they submit were errors by the sentencing judge, I am satisfied that the sentencing judge did consider the Respondent's likelihood to reoffend, the duration and frequency of the abuse, the degree of physical interference, and that the victim participation was not a relevant consideration.

[21] Both counsel have provided the Court with post *Friesen* caselaw for sexual offences against children where the Crown proceeded summarily. Counsel have provided:

(a) R. v. T.J., 2021 ONCA 392 where the sentence for sexual assault against a young child in a position of trust was increased from nine months to 24 months on appeal.

(b) R. v. R.D.Z., 2020 BCPC 175 where a 53-year-old abused his step-granddaughter when the child was 8 years old and received a sentence of 18 months on the s.151 offence and 15 months concurrent on the s. 271 offence.

(c) R. v. D.B.S., 2021 BCPC where the step-grandfather in his sixties touched the 11-year-old and received 18 months for a s. 151 offence.

(d) R. v. M-M, 2022 ABQB 197 an uncle who touched his 6-year-old niece's genitals had his sentence of 15 months for the s. 151 offence upheld on appeal.

(e) R. v. T.K.B., 2022 NSSC 150 where the offender was sentenced to 12 months of imprisonment for four incidents where the worst facts involved the offender licking the complainant's face and neck.

(f) R. v. R.A.-M., 2021 ONCJ 319 the offender touched the complainant several times for a sexual purpose while she was on a sleepover with the offender's daughter and he received an intermittent sentence of 90 days.

[22] I am mindful that s. 718.01 of the *Criminal Code* requires that primary consideration be given to the objectives of denunciation and deterrence of such conduct. In *Friesen* the Supreme Court of Canada sent a strong message to judges sentencing for sexual offences against children:

> [5] Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

[23] Here, the Respondent abused a position of trust and authority. He had been in a parental role to the complainant for seven years. The offence here was one occurrence on one evening. The victim was 15 years of age, a very vulnerable age. The offence involved oral sex and penile penetration, a high degree of physical interference.

[24] The sentence imposed does not reflect the high moral blameworthiness of the Respondent and the increase in sentence demanded by *Freisen*.

[25] I find that a fit and proper sentence in this case is 20 months incarceration.

[26] The next question is whether it is in the interests of justice for the sentence to be served by the Respondent or stayed. The Respondent is due to be released from prison in the next few weeks. As in *R v. J.J. W.*, 2012 NSCA 96, I find that requiring the Respondent to serve the increased sentence could have a negative impact on his rehabilitation and would not serve the interests of justice.

2. Did the trial judge err by failing to consider the prior conviction of the Respondent for s. 151 in relation to the same complainant?

[27] The Crown submitted that the sentencing judge did not consider the prior offence. The sentencing judge mentioned the prior offence involving the same complainant and took it into consideration, although not as a prior record. The Respondent had not been convicted or sentenced for the prior offence at the time of the commission of this offence.

Conclusion:

[28] The sentence imposed resulted from an error in principle which impacted the sentence. A fit and proper sentence in this case is 20 months of incarceration. I would

leave the probation order and the ancillary orders of the judge undisturbed. I do not find it in the interests of justice to order the Respondent to serve the additional period of incarceration. I will stay the sentence (*Livingstone; R. v. Lungal; R. v. Terris*, 2020 NSCA 5).

Lynch, J.