SUPREME COURT OF NOVA SCOTIA
Citation: *R v. S.O.*, 2024 NSSC 140

Date: 20240425
Docket: 515611
Registry: Sydney

Between:

Her Majesty the Queen

v.

S.O.

Defendant

Restriction on Publication: 486.4

Judge:	The Honourable Justice Patrick J. Murray
Heard:	April 15, 2024
Oral Sentencing Decision:	April 25, 2024
Counsel:	Bronte Fudge-Lucas for the Crown Tony Mozvik, K.C. for S.O.

Section 486.4 - 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court (Orally):

Introduction

[1] This is my sentencing decision with respect to the Defendant, S.O. Mr. O. currently resides in […], where he was born and raised. He was predeceased by his father in […]. He currently resides with […], and has one sibling, a […] who resides in […].

[2] The Defendant has been convicted following a trial on October 17, 2023 of two offences involving a young person, sexual exploitation and sexual assault, contrary to s. 271 of the *Criminal Code*. The victim was […] with whom he had a close relationship. The offences occurred between July 1, 2013 and August 31, 2013.

[3] Under the Criminal Code the maximum penalties for these offences are: 1) for sexual exploitation is 14 years imprisonment; and 2) for sexual assault a maximum penalty of 14 years. Each offence has a minimum punishment of one year.

[4] The penalties for these offences in the year 2013 were 10 years for each offence with no minimum punishment.

[5] In the present case, the Crown's position is that the principles in ***R. v. Keinapple***, 15 C.C.C. (2d) 524, which is that a person should not be convicted twice for the same criminal conduct. The Crown, therefore, proposes that the sexual assault conviction be stayed conditionally, and that Mr. O. be sentenced on the count of sexual interference.

[6] Sentencing is an individual process, both with respect to the circumstances of the offence, and the circumstances of the offender.

[7] The Court must consider the sentencing principles contained in the *Code,* as interpreted by the caselaw to guide it in reaching a fit and proper sentence in each case.

[8] Sections 718 to 718.2 contain the general purpose, objectives and principles of sentencing.

[9] The fundamental purpose of sentencing is to protect the public and contribute to respect for the law and the maintenance of a just and safe society. This purpose is accomplished by imposing just sanctions that are aimed at one or more of the statutory objectives (s. 718).

[10] The fundamental principle of sentencing contained in s. 718.1 which state that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

Circumstances of the Offence

[11] […] and the Defendant knew each other when she was a younger child, from being together at […].

[12] The facts support a certain amount of grooming, the comments about hookers, suggestive to […] about her appearance.

[13] It was not long she said after she began to […] when the contact started. It progressed to him performing oral sex upon her, and having intercourse on several occasions. She said it let like an "out of body experience" and she was not sure what to do after these occasions. Eventually, shame came over her. She felt ostracized and moved away.

[14] The facts are contained in my decision at trial reported as, 2023 NSSC 400.

Victim Impact Statement – […]

[15] In her victim impact statement […] described the trauma she has experienced from this offence, stating her innocence was taken away. She had good grades in school but her attendance was "horrible". She lost confidence and the ability to concentrate.

[16] She suffered from depression, anxiety and PTSD. She was not able to work to her full potential. She stressed that she felt manipulated and taken advantage of by someone who claimed to show empathy toward her.

[17] She is looking forward to some closure and continuing to heal from the emotional and physiological damage that had a significant impact on her physical being.

Circumstances of the Offender

[18] Mr. O. is presently […] years of age. He grew up in […] and graduated from […] and then attended 1 year at […].

[19] According to the pre-sentence report, Mr. O. had some difficulty in school, not discipline, but in regard to learning. The report states he was diagnosed with Dysgraphia, which is an inability to write coherently, and is associated with having a learning disability.

[20] Mr. O. has an older […] who is […] years old with whom he shares a close relationship. He shares a good relationship with […] who is supportive of him and upset with these circumstances.

[21] The Defendant stated his family provided him with the basic needs, but it was a modest lifestyle. His […] said there was no form of abuse or behaviour issues when he was younger. She did say that past relationships have caused Mr. O. to experience mental stress and that he struggles with his mental health. She maintains that Mr. O. did nothing wrong, as he claims also.

[22] Mr. O. had held various jobs over the years, and at the time of this offence was employed at the […] in […] where he did shift work. He owned the home where the offences occurred in […].

[23] Mr. O. had been previously married and has a […] with his wife, […] who was interviewed for the report. They were married for […] years. She indicated they were together for about […] years, but she stated she has known him for approximately […] years.

[24] […] stated the divorce was difficult and that Mr. O. had difficulty accepting responsibility and was not a reliable point.

[25] She said he informed her of the current charges, and she was shocked to learn of the nature of the charges.

[26] Mr. O. also has a […] who is […] years of age from a relationship that he was in at the time of the events. In the pre-sentence report he reported he has not seen since […]. Mr. O. speaks to his […] daily. Mr. O. is in a current relationship since […] with a partner who has known him for […] years.

[27] His partner of the last year and a half, states in the pre-sentence report that they share a positive relationship. She provided a letter to the Court indicating she

has known the Defendant for […] years, stating he has always been respectful of her. She also points to his extensive volunteer work in the community.

[28] Financially, the Defendants resources are limited. He declared bankruptcy in […]. He is currently collecting Employment Insurance. He has been diagnosed with a general anxiety disorder, and major depressive disorder and residing […].

Analysis

[29] The Crown has filed an extensive brief with caselaw in support of its recommendations that Mr. O. serve a substantial term of imprisonment.

[30] The Crown has referred to a number of the aggravating factors that exist, stating with those that are deemed to be aggravated under the *Code*. These include abuse of a person under the age of 18 years (s. 718.01); abuse of a position of trust and authority (s. 718.02(a)(iii)); evidence that the offender abused a […] (s. 718.2(a)(ii), and circumstances that involve the abuse of a vulnerable person.

[31] In these instances the *Code* mandates that a Court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[32] In addition, there is the duration and frequency of the events, the age of the victim, the degree of physical interference to be taken into account.

[33] The Crown emphasizes in its submission that in assessing the gravity of the offence, focus must be placed on the harm done to the victim as opposed to the particular nature of the offence referring to the comments in ***R. v. Freisen***, 2020 SCC 9, applicable to the sentencing of Mr. O.

[34] Section 722 of the *Code* mandates that when determining the sentence to be imposed on an offender the Court shall consider any statement prepared by a victim describing any emotional and physical harm suffered by the victim and the impact of the offences on the victim.

[35] The impact statement provided by the victim, […], demonstrates that these events have had a very significant impact on her emotionally and physically. I will later discuss the victim impact statement in more detail.

[36] In terms of mitigating factors the Crown recognizes that Mr. O. has no prior criminal record. The Crown acknowledges that Mr. O. maintains his

innocence as is his right. This is therefore, not an aggravating factor and provides an explanation for a lack of expression of remorse.

[37] The Court has noted that Mr. O. is a relatively young man at […], and suffers from anxiety and depressive disorder for which he is prescribed medication. The pre-sentence report states he has had suicidal idealization and periods of crisis most recently in […].

[38] According to the caselaw the likelihood or risk to re-offend, often stems from a lack of insight by an Accused into the gravity of the offence. The need to separate some offenders from society can be closely related to the objectives of denunciation and deterrence for sexual offences against children.

[39] The Crown's sentencing recommendation in this case is that the Defendant serve a period of imprisonment of 5 years.

The Defence Submission

[40] Having reviewed the Crown submission the Defence states it is in agreement with the majority of the Crown's submission. The Defence agrees that the Crown's outline of the aggravating and mitigating factors is "appropriate and clear". This includes the Crown's application of the law to Mr. O., stating it is "also persuasive".

[41] The Defence submits however, that on the facts the circumstances of Mr. O. in relation to this offence are most similar to those in the case of ***R v. DD***, [2020] O.J. No. 1277.

[42] In ***DD***, the 15 year old victim was a cousin of the 39 year old Defendant. They had known each other for approximately 9 years and were in regular contact (every second day). On the date of the offence, the victim was home from school and feeling down. The Defendant offered to take her for a ride in his van, suggesting he would "get her drunk". The Accused purchased a bottle of vodka and after driving the rural roads, the victim became "highly intoxicated". The victim had gotten sick and they pulled over. She got back in the van and fell asleep. It was then that the Accused had vaginal and anal sex with her. She tried to resist but was overpowered. The offender was an aboriginal offender with an extensive criminal record over a period of 20 years.

[43] The court found as a fact that the assault, including both the vaginal and anal penetration, lasted about 15 minutes.

[44] In the Defence brief, counsel for Mr. O. referred to the range of sentence, quoted by the learned sentencing judge in ***DD***:

> Justice Fregeau reviewed the caselaw and determined at paragraph 63 the range of sentence for such events is three (3) to five (5) years imprisonment.

[45] The Defendant submits that while the judge emphasized deterrence and denunciation, he also recognized there must be some room for rehabilitation. Taking into account the individual factors, including the Gladue report, the judge in ***DD*** imposed a four (4) year term of imprisonment for the sexual assault.

Caselaw

[46] The Crown has submitted a total of 23 cases for the Court's consideration. These have included leading decisions from the Nova Scotia Court of Appeal (***R v. E.M.W.***, 2011 NSCA 87; ***R v. Hood***, 2016 NSPC 78) on sentencing for sexual offences against children. Also included is ***R v. Friesen***, from the Supreme Court of Canada and others.

[47] In terms of the caselaw the Crown submitted those most comparable to the present case are the decisions in ***R v. LeMay***, 2020 ABCA 365; ***R v. Crane***, 2021 PESC 1 and ***R v. CB***, 2023 NSPC 29)

[48] In ***LeMay*** the defendant was a co-worker and a friend of the victim's father. He babysat the victim as a toddler and he began texting her daily. This progressed to sexual activity that included exchanging photos of their genitals. On five occasions there was activity that included him touching her breast, digitally penetrating her and the complainant performing oral sex on him. On one occasion intercourse was attempted. She was 15 years of age, he was 35 years old. A sentence of 30 months on the s.151 offence was increased on appeal to four (4) years.

[49] The duration of the activity in ***LeMay*** was two months in the year 2017. Notably the accused had no prior criminal record. The Crown in this case has noted that in ***LeMay*** the accused pleaded guilty. I note there were also Gladue factors present in ***LeMay***.

[50] In ***Crane***, the accused, a music teacher, plead guilty to sexual exploitation of his student when she was ages 14 and 15. He was 35 and 36 years of age. The defendant had been hired by the victim's parents, and the matter progressed with increasing intrusiveness. It escalated to vaginal intercourse. In ***Crane***, the defendant sought out opportunities to have unprotected vaginal sex with the victim. As in the ***LeMay*** case, the accused had no prior record, plead guilty and expressed remorse. In sentencing the accused received 6 years imprisonment, the Court noted the duration and frequency and lack of insight by the accused into his behavior.

[51] In ***CB***, a decision of the Provincial Court of Nova Scotia decided in 2023, the victim was 14 years of age and the defendant was described as essentially her "step-grandfather". He was 68 years of age. The sexual activity included repeated sexual touching that progressively came to include incidents of fellatio and two incidents of CB rubbing his penis on the victims vaginal area, and ejaculating on her. There had been video communication exposing each of them in various stages of undress and the event included incidents of masturbation.

[52] In ***CB*** there was no sexual intercourse. The offences however, occurred over a period of months in the summer of 2019 to mid March of 2020, approximately 7 months.

[53] It is similar to this case in that the victim had adolescent issues, including parental breakdown. She could not recall the exact number of incidents, but stated there was sexual activity of some form every time she visited CB's home. There were repeated incidents.

[54] Her Honour, Judge Buckle, confirmed the primary objectives were denunciation and deterrence. She found the offences had a significant physical and emotional effect on the victim. Further, she found there was a significant betrayal of trust, and a significant degree of physical interference. In particular, the learned judge noted that the Defendant "gained her trust and exploited her vulnerability". He then engaged in repeated sexual activity [paragraph 55].

[55] In ***CB***, the court concluded that a 5 year sentence was appropriate for the offence of sexual exploitation, recognizing there were also mitigating factors of age and ill health and the accused had no criminal record.

[56] The Crown submits that Mr. O. does not have the mitigation of a guilty plea as in ***LeMay*** and ***Crane***, where the sentences for sexual exploitation were 4 years and 6 years respectively.

[57] The Crown submits that Mr. O. does come before the Court with no criminal record.

[58] In ***R v E.F.*** 2021 ABOB 272, a 48 year old accused received a 4 year sentence for sexual interference involving a 15 year old victim. He engaged in unprotected sexual intercourse with a clearly vulnerable victim in two sessions. At paragraph 71 the Court reviewed the specific factors addressed in ***Friesen***.

[59] In ***R v. Scribner*** 2020 1685, the Court sentenced a 28 year old offender to four (4) years involving a 14 year old victim. The Court found the victim was a vulnerable person. There were two incidents of sexual intercourse.

[60] In ***E.F.***, the accused had significant community and family support. Unlike the second case, the offenders in these cases met the victims on social media and the internet. In this case, Mr. O. was a trusted […]. In ***Scribner***, the Court discussed the significance of a federal term of imprisonment for a first offender (Paragraph 27)

[61] All of the cases submitted have been helpful including, ***R v. Profit*** [1993] SCC 637; ***R v. Hughes*** 2020 NSSC 376; and ***R v. McNutt*** 2020 NSSC 219.

Decision

[62] In ***Friesen*** the Supreme Court recognized that children are the future of our country and communities, stating they deserve a childhood free from sexual violence. When they are denied that society as a whole is diminished and degraded.

[63] The Court further held that sometimes Courts need to depart from prior precedent in order to impose a proportionate sentence, and should depart when Parliament increases the maximum sentence for an offence. Judges must feel free it said, to impose sentences above a past threshold and must give "the legislative intent, its full effect". (***See R v KNDW 2020 MBCA 52, at para. 2***)

[64] While I make no finding on the suitability of the sentence, it appears that the case submitted by the Defence in ***DD*** was decided before the written reasons in

Friesen were released. At the very least there is no mention of ***Friesen*** in the decision. ***CB*** was released after ***Friesen*** and was decided April 28, 2023.

[65] Justice Fichaud's clear and unequivocal statement in ***E.M.W.***, is that children are valued, and if they are treated as objects for sexual gratification the perpetrators will suffer serious consequences stating that "the denunciation of it must be in very strong terms".

[66] Similarly, the Newfoundland Court of Appeal in ***R v. Branton***, 2013 NLCA 61, stated "young persons are less able to defend themselves from such assaults and that the role of deterrence in sentencing, is that criminal abuse of young persons is that such conduct is to be treated seriously by the justice system".

[67] The Crown is seeking an ancillary order under s. 161 of the *Criminal Code* with conditions prohibiting contact with the victim, […], and persons under the age of 16 years, in certain circumstances.

[68] Turning to the submission of the Defendant, a three (3) to five (5) term of imprisonment for someone who has no criminal record and has never served time in custody, is a substantial period of incarceration. (***see Scribner at para.27***)

[69] That said, it is my view that a sentence of 3 years in custody is insufficient to adequately address what the Crown has referred to as these "remarkable disregard to sexual boundaries as demonstrated by Mr. O., as well as the consequential harm to the victim, […].

[70] This crime was grievous in nature, the level of physical intrusion and moral blameworthiness being at its highest as is the betrayal of trust by the Defendant in the relationship with […]. She was struggling at the time, youthful and vulnerable.

[71] While the Court is persuaded by the approach and reasoning taken in ***CB***, it must not lose sight of mitigating factors or that rehabilitation continues to be a relevant objective.

[72] Mr. O. has no criminal record. While there are cases that question the logic of assigning a mitigating credit in cases of serious sexual assaults, it was held in ***Friesen*** that the trial judge was right to recognize the accused as a youthful first offender. I consider Mr. O.'s lack of a criminal record to be a mitigating factor.

[73] The Pre-Sentence Report has indicated that Mr. O. has mental health concerns. This has been repeated by comments of Mr. O.'s […] and his own

reporting. Further the Pre-Sentence Report indicates that the Defendant lost gainful employment as a result of this matter. It also states that he retains skills for future employment. At […] years of age, he is still a young man.

[74] I have decided that a fit and proper sentence for Mr. O. is four (4) years. I have reviewed and considered the caselaw submitted and recognize that a five (5) year sentence recommended by the Crown can be justified.

[75] I do not believe that a lesser sentence, even though it is Mr. O.'s first offence, is adequate to address the gravity of the offence and his degree of responsibility nor the harm done to the victim and to society in general when offences such as these are committed.

[76] There are a multitude of aggravating factors that are clearly applicable.

[77] While denunciation and deterrence are factors that must be elevated, I am satisfied that a four (4) year sentence best reflects those principles, leaving some room for Mr. O.'s rehabilitation, which I do take from the letters provided.

[78] The ancillary orders sought by the Crown are granted. These include:

1) Firearms prohibition pursuant to section 109 for 10 years

2) The SOIRA Order for a period of 20 years

3) An Order for the Defendant to provide a DNA sample

4) Warrant of Committal containing provisions for no contact.

5) Section 161 Prohibition Order

[79] I find the appropriate sentence having regard to the principles of sentencing to be 4 years of incarceration to be served by the Defendant.

Murray, J.