NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Eisan*, 2015 NSCA 65

Date: 20150626
Docket: CAC 434637
Registry: Halifax

Between:

Thomas Anthony Eisan

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: 486 Criminal Code

Judges:	Fichaud, Beveridge and Bryson, JJ.A.
Appeal Heard:	June 12, 2015 in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Beveridge, J.A.; Fichaud and Bryson, JJ.A. concurring
Counsel:	Thomas Eisan appellant in person James Gumpert, Q.C. 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 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 stepdaughter), 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).

Reasons for judgment:

INTRODUCTION

[1] The Honourable Judge D. Timothy Gabriel sentenced the appellant to fourteen months' incarceration on November 28, 2014 for the offence of sexual interference contrary to s. 151 of the *Criminal Code*, followed by two years of probation with a number of optional conditions.

[2] The appellant has two complaints about the sentence imposed: it is unduly harsh; and the condition in the probation order that prohibits him from consuming or possessing alcohol is unwarranted—even counterproductive to his pending reintegration back into society.

[3] Despite the appellant's impassioned advocacy, made as a self-represented litigant, I would grant leave to appeal, but ultimately dismiss his appeal from sentence. The following reasons explain.

BACKGROUND

[4] An information sworn November 25, 2013 charged the appellant with six offences. There were two complainants. The offences charged were sexual assault (s. 271(1)(a)) and sexual interference (s. 151) alleged to have occurred between December 31, 2008 and July 2, 2012. Arraignment soon followed.

[5] The Crown proceeded by indictment. The appellant elected trial in Provincial Court and pled not guilty. Trial was set for three days, October 8, 10 and 14, 2014. The appellant was remanded from time to time. The appellant had other criminal charges.

[6] The exact history of the proceedings for the other criminal charges is not entirely clear, but some of the details were discussed before Judge Gabriel.

[7] The appellant had been charged with possessing child pornography, and careless storage of a semi-automatic assault rifle, between March 9, 2013 and June 20, 2013. In addition, the appellant, while working as a counsellor at a youth camp, was charged with two counts of sexual assault against fellow counsellors for incidents on July 3 and 10, 2013. There were also two charges of breach of terms of release (s. 145(3)) between July 15 and September 7, 2013.

[8] Apparently, the appellant pled guilty to the charge of possessing child pornography and the firearms offence, and was sentenced to a term of imprisonment. He was convicted of the two charges of sexual assault from July 2013, and also sentenced to jail. The appellant was therefore serving a sentence for some period of time prior to his guilty plea to the charge underlying these appeal proceedings, and prior to being sentenced.

[9] On October 8, 2014, the day for the start of his trial on the six count information before Judge Gabriel, all of the Crown witnesses were in attendance. Some from out of province. With the assistance of counsel, the appellant pled guilty to one count of sexual interference. The Crown offered no evidence on the other counts, and they were dismissed. Attempts to have all of his sexual offences dealt with at the same time fell through. Eventually his sentence hearing was held before Judge Gabriel on November 28, 2014.

[10] There was no dispute about the facts of the offence. There were two incidents. One in the summer of 2009 at a family cottage. The second at a New Year's Eve party December 31, 2009. The victim was 14 in the summer of 2009, and 15 years old at the party. The facts are summarized in the factum of the Respondent:

> 20. One assault occurred at the […] family cabin in Guysborough County. The victim was under 16 years of age. Because of a leaking roof in a bedroom the victim slept on the floor in the living room. The Appellant was sleeping on the couch above the victim. The Appellant tried to get the victim to go out to the outhouse to have sex with him. The victim refused. The Appellant then took her hand and put it on his bare, erect penis. He moved her hand up and down his penis until he ejaculated. (A.B., Tab 8, pp. 10 and 11)
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> 21. The other assault occurred at a New Year's Eve party in Halifax Regional Municipality. Both the Appellant who was 21 years old at the time and the victim who was under 16 years of age had attended the party. The Appellant had been drinking. The Appellant took the victim to a room in the upstairs of the house, hugged her and told her he wanted to have sex with her. She refused. At that point a family member walked into the room. Later on the Appellant continued to be "touchy" with the victim, including grabbing her breasts over her clothing and grabbing her and trying to "grind" with her. (A.B., Tab 8, p. 10)

[11] The victim submitted a victim impact statement. She attended court and read it. She spoke of the impact the appellant's actions had caused. She described how she had known the appellant her whole life, and viewed him as her uncle.

[12] At the sentence hearing, the Crown outlined the statutory directions in the *Criminal Code*, and case law, that where crimes are committed against a young person the primary considerations in imposing sentence are denunciation and deterrence (s. 718.01 and 718. 2(a)(ii.1)).

[13] Temporally, the appellant had one prior conviction. As a young person (sixteen days short of his 18th birthday), he was charged with, and pled guilty to, aggravated assault. His sentence was 90 days. All of the other offences happened after the dates of the incidents underlying the s. 151 charge.

[14] The Crown argued the subsequent offences were relevant to demonstrating the character of the appellant, the prospects for rehabilitation, and the need to emphasize not just general, but specific deterrence. The Crown also noted at the time the appellant entered his plea of guilt on October 8, 2014, he was asked if he would consent to a sexual offender assessment. The appellant declined.

[15] The Crown recommended a sentence of 18 months' incarceration, plus three years' probation.

[16] Counsel for the appellant did not dispute any of the facts about the s. 151 offence, or the details surrounding the appellant's other offences. She agreed that the primary focus in terms of the principles of sentence was denunciation and deterrence, but that rehabilitation should not be discarded. The appellant was but a young man, and his relative youth and his guilty plea were mitigating factors.

[17] Although the charge was serious, the facts were not the most egregious, as it involved touching without any penetration, and the appellant was not actually in a position of trust *vis a vis* the victim. His counsel urged the judge to impose the least period of incarceration that would meet the principles of sentence:

> …the least amount of incarceration that would be appropriate to sufficiently meet the principles of sentencing should be imposed in this case. I would suggest that there's quite a broad range of appropriate sentences for this offence. Given the facts, I would suggest that it's not quite as high – it's not quite as high as the range suggested by my friend. I would suggest that it's quite a bit lower than my friend has recommended, given the nature of offences that could occur with respect to a 151 order.

[18] Both parties agreed that the legislation in place at the time of the offence mandated a minimum period of 45 days' incarceration under s. 151.

SENTENCING DECISION

[19] The trial judge observed that although the victim and the appellant were not blood relatives, the relationship was such that he was a person she had reason to believe "had her back"—someone she could trust. The judge acknowledged that denunciation and deterrence are given priority in cases involving sexual offences committed by an adult on a young victim. He cautioned himself that he was not taking into account the later offences the appellant had been convicted of:

> When I look at the quotes to which I've been referred, it's a case that calls for strong denunciation with an emphasis on deterrence. I don't factor into my analysis the other sentences for which you've been sentenced, sir, because you didn't have the benefit of them at the time that you committed these acts.
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> On the other hand, the other two sentences are bad enough, but at least they weren't children upon whom the acts were perpetrated. In this case this was a child. A child is a very delicate thing. A child is something that all of our society is geared to protect, and you behaved like a predator, sir. You behaved in a fashion that was not only selfish, that was not only improper, but it was also predatory, opportunistic, and it was a betrayal, a betrayal of the trust that you knew that this person had in you. We can come up with weasel words to say, well, you weren't blood related and you weren't this, you weren't that, but you knew that she trusted you. You knew that she trusted you and you betrayed her anyway. Quite apart from this offence, that doesn't speak very well for you as a person.

[20] Judge Gabriel did not find that the appellant had abused a position of authority or trust. He noted the mitigating factors that the appellant had pled guilty and was still a young man, in his early twenties. He also appeared to reflect on the impact of totality, although he did not use that label. The reasons for selecting a sentence of 14 months were:

> I don't know what your prospects of re-offending are. I don't have that report in front of me. I do, however, on the basis of the submissions of your counsel and the Crown, have sufficient information upon which to address what I consider to be a fit sentence for this crime. The Crown has made submissions on sentence, the defence has made submissions on sentence. I'm not bound by either. I have to go through the analysis and impose a sentence that is fit under all of the circumstances. Fitness takes into account a whole lot of things, proportionality, denunciation, deterrence, rehabilitation, the fact of your relatively young age, but also I'm satisfied from the authorities I have to place special emphasis on denunciation and deterrence in these circumstances.

> On factoring in that, although what I am sentencing you for may perhaps at face value call for a higher sentence, I also have to factor in the fact that you've essentially been behind bars serving another sentence for over a year now. I have to factor that into the analysis. I can't just necessarily impose a sentence that I would otherwise have given you and remain blind to that effect, to that particular aspect of it and the fact that you've already been incarcerated now since last November.
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> Putting it all together, and having regard to the range of sentences that have been applied and have been noted by our Court of Appeal, and in other lower court decisions that have applied the range, I am satisfied that a sentence of 14 months of incarceration is appropriate. From that I will give you credit with respect to the time that you've spent in lockup from November 7th to today's date. I'm satisfied that that amounts to 20 days, for which I credit you at one and a half times. So you'll receive 30 days against the sentence that I've imposed. On a go-forward basis, you will serve 13 months incarceration.

ANALYSIS

[21] Initially the appellant advanced four grounds of appeal. These were narrowed by the appellant to two: the sentence was too harsh in comparison to that imposed by judges on other offenders; and the prohibition on possession or consuming alcohol is unwarranted.

[22] There are two cases that the appellant relies on: *R. v. Fraser*, 2010 NSSC 194, and an unreported case involving one Ryan Patrick Nolan.

[23] In the case of *Fraser*, a teacher was convicted of sexual exploitation, contrary to s. 153(1)(a) of the *Criminal Code*, over a 15 month period. The accused had breached his position of trust and authority. The fact the young victim consented to the sexual activity was no defence, nor a mitigating factor. The trial judge canvassed the authorities, and concluded that the range of sentence for the offence was between six months and four years. Mr. Fraser had no prior record, an extremely positive pre-sentence report and character references. After considering over 20 cases, many with similar features, and the relevant principles of sentence, the trial judge imposed a sentence of nine months' incarceration.

[24] There are scant details available regarding the case of Mr. Nolan. Apparently he was a teacher that tutored two boys under the age of sixteen. He sexually assaulted them. Mr. Nolan pled guilty. A joint recommendation was made by the defence and the Crown for a twelve month conditional sentence.

[25] An appeal court cannot simply substitute a different sentence for the one imposed by the trial judge absent an error in law or principle, or where the sentence imposed is not fit, either by being manifestly excessive or lenient. In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, Lamer C.J., for the full Court, summarized this important concept as follows:

> [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

(See also *R. v. McDonnell*, [1997] 1 S.C.R. 948 at para. 30; and *R. v. L.M.*, [2008] 2 S.C.R. 163 at para. 14.)

[26] These principles were more recently restated in *R.* v. *Nasogaluak*, 2010 SCC 6 as follows:

> [46] Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.),* Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17*; R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained *in R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:
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> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[27] The appellant complains of no legal error by the trial judge, just that the sentence is too harsh. Trial judges have a difficult task to take into account the diverse, and sometimes competing principles of sentence, and arrive at what he or

she concludes is a fit sentence. As noted above, it is in essence an exercise of discretion that is accorded considerable deference by appeal courts, provided there is no error in law or principle.

[28] Merely pointing to other cases where a trial judge imposed a lesser sentence does not make the one at bar unfit on the basis that it is manifestly excessive. The appropriate range of sentence for any given offender for the offence that he or she has committed is not governed by one or even two other cases.

[29] The appellant urges that he should have been sentenced to nine months' incarceration (a conditional sentence not being available due to the statutory minimum sentence of 45 days). Here the trial judge took into account the impact of the offence on the victim, denunciation and deterrence, both general and specific, the totality of the time the appellant had already been incarcerated, the guilty plea, and the appellant's relative youth. The sentence of 14 months' incarceration for two incidents of sexual interference involving non-penetrative or invasive conduct in these circumstances may be higher than I might have considered necessary to fulfill the goals and principles of sentence, but it is not manifestly excessive.

[30] The appellant admits that during the incident at the New Year's Eve party, he was intoxicated. There is nothing unreasonable in the condition in the probation order for the appellant not to possess, take or consume alcohol or other intoxicating substances. The appellant complains that the condition banning possession may detract from his potential employment as a bartender or server. His complaint is entirely speculative since there is no evidence that he has any training in those fields, or any realistic prospects of related employment. If such came to pass, it would always be open to him, with or without the support of his probation officer, to apply for an amendment to this condition.

[31] Accordingly, although I would grant leave to appeal, I would dismiss the appeal.

Beveridge, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A.