NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Pitts*, 2016 NSCA 78

Date: 20161103
Docket: CAC 439939
Registry: Halifax

Between:

Jason Troy Pitts

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 468.4 of *Criminal Code* relating to charges under s. 163.1

Judges:	Bryson, Oland and Bourgeois, JJ.A.
Appeal Heard:	September 22, 2016, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Bryson and Oland, JJ.A. concurring
Counsel:	Jason Troy Pitts, on his own behalf, James A. 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

[1] The Appellant, Jason Troy Pitts, is a pedophile. He acknowledges it. On October 27, 2014, Mr. Pitts, represented by legal counsel, pled guilty to one charge of possessing child pornography; one charge of accessing child pornography; one charge of making child pornography; and eight charges of conspiring to commit the indictable offence of sexual assault on a child.

[2] On February 4, 2015, Associate Chief Judge Alan Tufts, after receiving submissions from the Crown and Mr. Pitts' counsel, rendered a global sentence of seven years in relation to the 11 charges. These were broken down as follows:

a) Five years concurrent on the eight conspiracy charges;

b) Two years concurrent on the making of child pornography charge;

c) Two years concurrent on the accessing child pornography charge; and

d) Two years consecutive on the possession of child pornography charge.

[3] Mr. Pitts has filed an appeal challenging the appropriateness of his sentence. In his submissions, he makes clear that it is solely the sentence relating to the conspiracy charges which he questions.

Background

[4] The factual circumstances giving rise to the offences were described by the sentencing judge as follows:

> [8] In this case, Mr. Pitts was found to have collected child pornography. He has been found to have accessed child pornography, and he has been found to have made child pornography. I will just briefly describe and summarize what Mr. Pitts was doing.
>
> [9] Mr. Pitts, as Mr. Singleton indicated, is a pedophile. He has been accessing child pornography for many years and finds sexual gratification in the images or sexualized images of young children, pre-pubescent children. In this instance, the police were investigating him as a result of a wider investigation of internet child pornography, and when they investigated his computer devices, they found that he was involved in an online chat streaming or web streaming organization, I will put it that way, wherein he was communicating with individuals, in this case, in the Philippines.

[10] He has made contact with a number of individuals and his preference for young children became known, and, in fact, in some instances, he was approached by those at the other end of the internet stream to participate in these types of activities. What he was doing was having these children perform certain sexual acts between the children and other adults, females, or between the young children themselves.

[11] He developed a "relationship," and I put that in quotation marks, with one particular woman – I'll refer to her as JS – and she had an eight to 11-year-old perhaps, a young pre-pubescent child, who she referred to her as her daughter. Whether, in fact, it was her daughter, I don't think a lot turns on that. But Mr. Pitts viewed her in that regard, although I think he acknowledged to the police and to Dr. Connors, at least, that he may have been being duped in that regard. But be that as it may, he spoke to this young girl, through the internet, on that basis.

[12] He opined about bringing JS and the young girl back to Canada. He referred to himself as "Daddy" at some times. He spoke to JS and to the child about sleeping with this girl and performing sexual acts short of sexual intercourse. He, in fact, paid JS to have her perform certain sexual acts with this girl, including variations of oral sex and exposure of her genitalia to Mr. Pitts, who, obviously, was viewing this for his own sexual gratification.

[13] There were a number of these "live shows," if I can use that expression. The Crown indicated five or six, and in two of these incidents, Mr. Pitts recorded these somehow on his computer and had them available for further viewing. That, of course, is the basis of the making of the child pornography charge which he has pled guilty to.

[14] The conversations in which Mr. Pitts was discussing various sexual performances are the subject of the conspiracy charges, wherein Mr. Pitts was agreeing with the adult females on the other end of the line to have these children available to perform various sexual acts wherein these children were abused sexually. These are the conspiracy charges which Mr. Pitts has pled guilty to.

[15] Mr. Pitts had a collection of child pornography separate and apart from these live shows – a couple of hundred of those, and there were a number of videos, as well. He was accessing the internet for those and he was possessing those, and that is the basis of the charge of possession of child pornography and of accessing child pornography.

[16] In terms of the gravity of the offence, which is one of the important aspects of this process which I am required to consider, I can only describe this as being horrendous in its impact. There is really no limit to the negative superlatives that can be used to describe what one can only conclude is depravity. And I am very aware of the risk of attaching too many sensational words to this, for the reasons that Mr. Singleton had correctly pointed out. One cannot be over-sensational in describing how horrendous and negative these images are. Quite

> frankly, the live shows that Mr. Pitts was participating in, and directing, are, quite frankly, at the high end of the scale of child pornography. He is not viewing images that were created by somebody else; he is directly responsible for the abuse of these children, because he was conspiring and agreeing to have these children abused.

[5] Mr. Pitts has not taken issue with the above description.

Issues

[6] In his Amended Notice of Appeal, Mr. Pitts sets out the following grounds:

1. Sentence based on Safer Community Act (*sic*; *Safe Streets and Communities Act*, S.C. 2012, c. 1) which came into law after the offender was charged.
2. Hard and Excessive.
3. Outside the range of sentence for similar offenders in similar circumstances.
4. Crown did not provide any case law for the conspiracy to commit an indictable offence (sexual assault) in relation to the 5 years that the crown was asking for.
5. Cases that the crown provided to the trial judge show that the offender had direct power and control over the victim(s) as well as physical contact. In my case there was a third party who had direct power and control over the victim(s). My case also shows that I have no physical contact with the victim(s).

[7] In his written submissions, Mr. Pitts raised an additional allegation of error. He submits that he could not have been convicted of conspiracy because all of the children involved in the "live shows" were under the age of 12, and as such, could not be criminally responsible under the *Criminal Code*. Flowing from this, he argues there cannot be a conspiracy if the co-conspirator, a child under 12, is immune from criminal responsibility.

[8] This argument can be dealt with summarily. Firstly, Mr. Pitts has not appealed his conviction, which was notably entered by virtue of a guilty plea given with the benefit of counsel. A challenge to his conviction is not, in my view, properly before this Court. Further, even if this Court were inclined to consider a late in the day challenge to conviction, there is no merit to the position advanced by Mr. Pitts. On the face of the undisputed factual record, it was the adults on the

other end of the video link with whom Mr. Pitts conspired. The children were clearly the victims of the conspiracy, not participants in it.

[9] Before this Court, Mr. Pitts conceded that the *Safe Streets and Communities Act* had no relevance to the issues on appeal, and that the sentencing judge did not incorrectly apply that legislation. His remaining arguments relate to the alleged harshness of the five year sentence. In my view, the sole issue on this appeal is whether the sentencing judge erred in the imposition of that sentence.

Standard of Review

[10] The standard of review in relation to sentencing decisions is well-established and was recently described by this Court in *R. v. Landry*, 2016 NSCA 53. Justice Beveridge explained:

> [35] Before turning to the appellant's complaints of error, it is appropriate to recognize that an appellate court is not at liberty to reassess the issues that faced a trial judge and substitute its own view as to the appropriate outcome. Sometimes an appellate court may well conclude that it would not have arrived at a particular result, but must defer to the trial court. The level of deference is conveniently referred to as the standard of review.
>
> [36] The standard of review is different for the two putative errors advanced by the appellant. A judge must correctly identify and apply the relevant legal principles in arriving at sentence. An appellate court is free to substitute its view of the correct legal principles. Furthermore, if a trial judge errs in law or principle, deference dissipates in relation to the discretionary decision as to sentence. The appellate court is free to arrive at the appropriate sentence (see *R. v. Hawkins*, 2011 NSCA 7 at para. 43; *R. v. Bernard*, 2011 NSCA 53; *R. v. Brunet*, 2010 ONCA 781; *R. v. MacDonald*, 2009 MBCA 36; *R. v. Provost*, 2006 NLCA 30; *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.); and *R. v. Willis*, 2013 NSCA 78).
>
> [37] But, as the Supreme Court of Canada recently emphasized in *R. v. Lacasse*, 2015 SCC 64, the legal error must have been one that impacted sentence.
>
> [38] Absent legal error that had an impact on the quantum or type of sentence imposed, an appellate court must defer to the sentence imposed at trial. It can only intervene if it concludes that the sentence is unfit as being manifestly excessive or inadequate (see *R. v. Eisan*, 2015 NSCA 65 at paras. 25-26).

[11] To successfully challenge the sentence imposed, it must be shown that the sentencing judge made a legal error which impacted on the sentence; or that the term is manifestly excessive.

Analysis

[12] Principles of sentencing are set out in the *Criminal Code*, most notably s. 718, which are intended to guide courts in the framing of appropriate dispositions. This section, and the principles set out therein, were noted by the sentencing judge:

> [3] Any sentencing, of course, begins with a consideration of the purpose and principles of sentencing as set out in s. 718 and the related sections of the *Criminal Code*. The purpose of sentencing is the protection of the public, in this case, protection of children, which I will speak about more in a minute, and, of course, upholding the integrity of the law. And that is done through the imposition of what are called "just" sanctions – "just" meaning that there is a measure of proportionality and restraint to achieve certain objectives. Those objectives are set out in s.718 of the *Criminal Code*. In my opinion, the objectives that need to be emphasized here, and I think the case law supports this, is, first of all, denunciation; secondly, deterrence, and then separation, and rehabilitation. But, clearly, denunciation is the primary objective. Deterrence and separation and rehabilitation are also important, as well.
>
> [4] Those sanctions are imposed using certain principles, which, again, are set out in the subsections of those sections that I referred to. It is the principle of proportionality, which is the fundamental principle of sentencing. The principles of parity and restraint apply as well.
>
> [5] The principle of proportionality is measured by looking at the gravity of the offence and the moral culpability of the offender or the moral blameworthiness, which Mr. Singleton referred to earlier in his submissions, which I will come back to.
>
> [6] I would also say that the Supreme Court of Canada has indicated that sentencing is a vehicle through which we, as a society, make a statement on the values that are important and should be promoted in our Canadian society. And of course, that is important here because the value that needs to be emphasized and promoted, and the message sent to our community and society, generally, is that our children are valuable assets and they need to be protected, whether those children are in Canada or across the world. The victims in this offence, of course, are in another country. But that does not diminish the values that we should be upholding. I might also say that diminishing the respect and dignity of children abroad, of course, diminishes the dignity and respect of all children, in my opinion.

[13] In my view, there is no question the sentencing judge identified the appropriate sentencing principles. Mr. Pitts has not suggested otherwise. It is equally clear that denunciation was the factor most heavily weighed by the court. Given the ages of the victims, s. 718.01 was relevant. It provides:

> 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[14] The crux of Mr. Pitts' challenge to the sentence relates not to the principles applied by the sentencing judge, but rather, the lack of precedent in the case authorities. It was acknowledged by the court and counsel at the sentencing hearing that the application of a conspiracy charge to the factual circumstances in the present case appeared to be unique, at least in reported authorities.

[15] Before this Court, Mr. Pitts reviewed the case authorities relied upon by the Crown at the sentencing hearing and attempted to demonstrate how they were factually distinct from his circumstances. He submits that none of those authorities support a sentence of five years. He argues that the lack of a similar sentence for a similar offence makes the term of five years harsh and excessive. I disagree.

[16] Undoubtedly, case authorities are an important tool which assist a sentencing judge in the crafting of an appropriate disposition. Consideration of past dispositions help insure that a sentence is "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances" (see s. 718.2(b)). However, the lack of a reported case involving a similar offender committing a factually similar offence does not serve to render a sentence harsh or excessive. With or without precedential assistance, a sentencing judge must apply the principles of sentencing to the nature of the offender and offence before him or her to craft an appropriate disposition.

[17] The sentencing judge noted that Mr. Pitts' involvement in the live shows was at the "high end of the scale" in terms of gravity, and that the conduct was "horrendous in its impact". It was further noted that Mr. Pitts had a previous criminal conviction for sexual interference against a child. He had recently undergone a sexual offender assessment, which opined he was a "high risk to re-offend" against children.

[18] The conspiracy charges and the penalty in relation thereto are grounded in ss. 465(1)(c) and 271(a) of the *Code* respectively. The offences attract a maximum

sentence of 10 years. In light of the considerations noted above, and the deference afforded to the sentencing judge, it is difficult to see how a sentence of five years in these circumstances is harsh or excessive.

Disposition

[19] I am not satisfied that in formulating the sentence under appeal, the sentencing judge committed legal error. Nor am I satisfied that the sentence imposed was harsh or excessive. As such, I would dismiss the appeal.

Bourgeois, J.A.

Concurred in:

Bryson, J.A.

Oland, J.A.