NOVA SCOTIA COURT OF APPEAL
Citation: R. v. A.S. G., 2004 NSCA 7

Date: 20040115
Docket: CAC 194329
Registry: Halifax

Between:

A. S. G.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Publication Ban:	Pursuant to s. 486(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, as am.
Judges:	Roscoe, Cromwell and Oland, JJ.A.
Appeal Heard:	November 14, 2003, in Halifax, Nova Scotia
Held:	**Leave to appeal is granted but the appeal is dismissed per reasons for judgment of Cromwell, J.A.; Roscoe and Oland, JJ.A. concurring.**
Counsel:	Jill Lacey, for the appellant Peter Rosinski, for the respondent

<u>Publishers of this case please take note</u> that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
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> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Reasons for judgment:

I. Introduction:

[1] The appellant pleaded guilty to several sexual offences against young children, namely; sexual assault, five counts of sexual touching and one count each of making and possessing child pornography. Buchan, P.C.J. sentenced him to eight years in prison, less one year for time served in custody prior to sentencing, designated him a long term offender and delayed his parole eligibility until one-half of his prison sentence has been served. The appellant asks for leave to appeal, arguing that the sentence is excessive and that the order respecting delay of parole eligibility should not have been made. The Crown responds that the sentence is fit and should be upheld.

[2] In my respectful view, the judge did not err in principle and the sentence she imposed is demonstrably fit. These were crimes of unfathomable depravity committed by the appellant while in a position of trust in relation to very young children and, in part, while he was on parole from a previous federal sentence. The expert evidence at the sentencing hearing highlighted the risk he poses to the community and the need for a lengthy period in custody if there is to be any chance of rehabilitation. The sentence rightly emphasized both deterrence and protection of the public from this offender and crimes like his and also gave due weight to the appellant's prospects for rehabilitation. While I would grant leave to appeal, I would dismiss the appeal.

II. Facts:

(i) The offences:

[3] Mrs. J.B. had an ongoing, if sporadic relationship with the appellant, A. S. G.. On the evening of February 1, 2002, she had been socializing with Mr. G. and others and the group had returned to Mr. G.'s apartment. He fell asleep on the couch in the living room and Mrs. J.B. went into his bedroom to sleep. Under the pillow on the bed she found a number of Polaroid photographs of little girls, approximately 5 - 8 years old, with their clothes removed and lying in various positions. Mrs. J.B. recognized three of these children, including her own daughter, C.B. She appeared in photos in which the accused's penis also was

present, apparently photographed by him as he stood over her while she slept with her nightgown pulled up. In some of the photos, Mr. G. was shown to be touching her vagina. Most of the photos showed the little girls, apparently asleep, lying on the couch or bed and often with their legs spread wide open. One depicted a little girl of about 5 who was naked and photographed in various poses. Mr. G. admitted that he had touched and photographed the three girls whom Mrs. J.B recognized in the photos while they slept, that he had touched C.B.'s vagina with his hand, placed his own penis in her hand and exposed C.B. and another little girl's vagina in order to photograph them while they slept. He admitted making these photos for a sexual purpose.

[4] And that was not all. In the ensuing investigation, Mr. G. confessed to touching three more neighbourhood children, R.S., J.R.S. and N.C. for a sexual purpose. He had placed J.R.'s penis in his mouth while J.R. slept, placed his own penis near R.S.'s mouth and had R.S. "hold" his penis while R.S. slept. He placed his penis on the outside of N.C.'s vagina and her buttocks while she slept. One child, D.M., was photographed while awake.

[5] Mr. G. disclosed to police that these images could be found on his computer. Police investigators retrieved approximately 1500 images from Mr. G.'s computer, the vast majority of which the judge found to fall within the definition of child pornography in s. 163.1 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. The judge had the unpleasant duty of viewing many of these images. She noted that Mr. G.'s face was clearly visible in many of them, often with a "gloating, self satisfied look." As she put it:

> ... The comparison of the children's faces flushed and sweet and profoundly innocent as only children can look when in deep sleep with that of Mr. G. hovering over them and around them, naked, his penis engorged, his hands and mouth poking and prodding the most intimate parts of their little bodies as he photographed his activities was disturbingly grotesque.

[6] Two specific findings, which are not challenged, should be noted. First, the judge found as a fact that Mr. G. had not merely put his penis beside or on N.C.'s vagina or buttocks, but that he had pushed it slightly into the outer vagina and between her buttocks to simulate a sexual act. Second, the judge also found that Mr. G. was in a position of trust in relation to the parents and the children whom

he abused: he sexually assaulted, touched and made pornographic images of the children while they were in his care.

[7] The judge accepted Mr. G.'s guilty pleas and entered convictions on the following offences alleged to have occurred between August of 2000 and February of 2002:

- one count of sexual assault against C.J.
- five counts of touching a person under 14 for a sexual purpose against J.R.S., R.S., N.C., C.B. and D.N.
- one count of possession of child pornography
- one count of making child pornography.

(ii) The offender:

[8] The judge had the advantage of extensive information at the sentencing hearing. In addition to thorough written and oral submissions from defence and Crown counsel, the judge had before her a pre-sentence report, a Comprehensive Sexual Offender Assessment and victim impact statements.

[9] At the time of sentencing, Mr. G. was a single, 31 year old who was employed as a mobile pressure washer operator. He has a criminal record dating back to 1991. It contains no prior convictions for sexual offences, but it does include offences of violence, namely, assault and robbery. It shows as well that Mr. G. had received escalating sentences ranging from fines and probation to four years incarceration in a federal penitentiary. The latter sentence was imposed in May of 1997 and it follows from this that Mr. G. had been on parole with respect to that sentence during a significant portion of the period during which he committed the offences now before the Court.

[10] The Sexual Offender Assessment Report is a chilling read. As the judge noted, the assessment's author, Dr. Starzomski, who also testified at the sentencing hearing, found that Mr. G. displays sexual deviancy and robust anti-social traits, the two factors most closely associated with sexual recidivism; that he poses a moderate to high risk to offend violently; that he is dishonest, manipulative, skilled in deception and takes pride in this ability. The judge concluded her summary of this report and Dr. Starzomski's evidence as follows:

> Due to the array of anti-social features present and the magnitude of sexually deviant interests present in this case, the doctor is of the opinion that substantial treatment progress is not considered likely. As a result, a larger onus for risk management recommendations is placed on external controls.
>
> In summary, the doctor states the following:
>
> > In light of my analysis of the index offences in relation to his prior criminal, social and correctional history, risk of sexual recidivism, my conclusions support consideration of designating Mr. G. a long-term offender.
> >
> > I am not of the opinion that he would be a good candidate for a parole even after a sex offender program unless he has shown ongoing compliance with maintenance programming for a period of several years thereafter.
>
> This report was largely focused on Mr. G.'s risk for sexual recidivism. Awareness should also be made of the fact that he poses a risk for violent offending, especially to regain perceived loss of control or of feeling mistreated, drug offences, and for impulsive and destructive behaviours while intoxicated. He poses substantial risk for supervision failure.

(iii) The judge's reasons for sentence:

[11] The judge carefully reviewed the evidence before her, the victim impact statements and the written and oral submissions of counsel. She noted the mitigating circumstances of Mr. G.'s cooperation with the police, his guilty pleas and his professed remorse and willingness to accept treatment. She noted that he had been in custody approximately 11 months pending sentencing. The judge also took account of several aggravating factors: Mr. G.'s serious criminal record, that he had been on parole for some of the period during which these offences were committed, that he breached the trust of his young victims and their parents and that there were multiple victims over a period of a year and a half. She found on the basis of the record before her that:

> ... Mr. G. can only be specifically deterred ... if he follows the plan as outlined in Dr. Starzomski's report. A simple sentence of a few years of incarceration is not

> sufficient here to specifically deter Mr. G. from re-offending in a like manner. Even his ability to rehabilitate is guarded and questionable."

[12] The judge imposed the following sentences:

- for the sexual assault on CJ - 1 year

- for the 5 counts of sexual touching - 1 year each, consecutive

- for the possession of child pornography - 2 years concurrent

- for the making of child pornography - 2 years consecutive

for a total of 8 years from which she deducted 1 year as credit for time spent on remand prior to sentencing.

[13] The judge also found Mr. G. to be a long term offender and that he would be subject to supervision in the community for a period of 10 years following expiration of his sentence. In addition, she determined that "... in furtherance of the protection of the public, and in particular here where the public involves very young children..." Mr. G. would not be eligible for parole until at least one-half the term of sentence had been served in an institution.

III. The Grounds of Appeal:

[14] The appellant advances several grounds of appeal which raise three main issues: whether the total length of the sentences imposed was excessive; whether adequate credit was given for time spent in custody before sentencing; and, whether it was appropriate to delay parole eligibility. I will address these issues in turn after saying a brief word about the applicable standard of appellate review.

IV. Analysis:

(i) Standard of Review:

[15] The standard of review to be applied by this Court on a sentence appeal is as described by Oland, J.A. in **R. v. Longaphy** (2000), 189 N.S.R. (2d) 102; N.S.J. No 376 (Q.L.)(N.S.C.A.):

> **[20]** A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. 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 if the sentence is "demonstrably unfit": **R. v. M.(C.A.)** (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in **R. v. Proulx** (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at [paragraph] 123-126

(ii) Length of sentence:

[16] The appellant says that the sentences imposed are unfit because they are outside an acceptable range of sentence and that taken together, they offend the principle of totality.

[17] In my opinion, only the second of these points is fairly arguable. The one and two year sentences imposed for the various offences fall within the range of sentences for such offences as advanced by the appellant. I do not think much is to be gained in a case such as this of multiple offences by considering whether the sentence for the making of child pornography charge should have been concurrent or, as the judge decided, consecutive. The appellant's real point is that the combined sentences are excessive and this submission engages what is known as the principle of totality in sentencing.

[18] The purpose of the totality principle, said the Court in **R v. Dujmovic**, [1990] N.S.J. No 144 (Q.L.)(C.A.) is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate just and appropriate. (See also **R. v. ARC Amusements Ltd.** (1989), 93 N.S.R. (2d) 86; N.S.J. No. 331 (Q.L.)(C.A.). The issue raised by the appellant is that the totality of the sentences is excessive and therefore unjust and inappropriate.

[19] I am not persuaded that the totality of the sentences is excessive. There were multiple offences and victims, several serious aggravating circumstances and

expert evidence that protection of the public both by way of prevention and rehabilitation of the offender required a lengthy sentence. A previous 4 year sentence did not deter, and parole supervision did not prevent, Mr. G. from further crime. In short, these were serious offences against helpless children committed by a dangerous man. The circumstances of the offences and of the offender called for, and justly received, a strong response by the sentencing judge directed to the specific deterrence and rehabilitation of the offender and the protection of the public. The totality of the sentences was not excessive in all of these circumstances.

(iii) Credit for time served:

[20] The appellant submits that the sentence of imprisonment imposed by the judge is unfit because it does not give full ("double time") credit for time spent in pre-sentencing custody. The appellant spent 346 days in custody prior to his sentencing. The judge credited him with one year for this period, stating that she was not prepared to give "... the usual credit for remand time two for one..." as he had benefited from some programming and counselling while on remand.

[21] The **Criminal Code** provides that a sentencing court may take into account any time spent in custody as a result of the offence for which the person is to be sentenced: s. 719(3). The manner in which this section should be applied was set out by the Supreme Court of Canada in **R. v . Wust**, [2000] 1 S.C.R. 455; S.C.J. No. 19 (Q.L.) at paras. 44 and 45:

> 44 I see no advantage in detracting from the well-entrenched judicial discretion provided in s. 719(3) by endorsing a mechanical formula for crediting pre-sentencing custody. As we have re-affirmed in this decision, the goal of sentencing is to impose a just and fit sentence, responsive to the facts of the individual offender and the particular circumstances of the commission of the offence. I adopt the reasoning of Laskin J.A., *supra*, in *Rezaie, supra*, at p. 105, where he noted that:
>
> > ... provincial appellate courts have rejected a mathematical formula for crediting pre-trial custody, instead insisting that the amount of time to be credited should be determined on a case by case basis... . Although a fixed multiplier may be unwise, absent justification,

> sentencing judges should give some credit for time spent in custody before trial (and before sentencing). [Citations omitted.]
>
> 45 In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the *Corrections and Conditional Release Act* apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

[22] While the 2 for 1 ratio is frequently applied, there is no rigid formula and, as the Supreme Court of Canada pointed out in **Wust**, the matter is best left to the sentencing judge. Here, the judge took the issue of pre-sentence incarceration into account and decided to depart from the frequently applied double time credit for reasons that were supported by the record before her. The judge did not err in principle by doing so. Nor did the effect of her treatment of credit for custody before sentencing result in a sentence that was unfit.

[23] I would add, however, that it would be better if sentencing judges signalled to counsel their inclination to depart from the 2 for 1 credit, particularly where, as here, that approach did not appear to be in issue as between the Crown and the defence. This would ensure that all relevant evidence and submissions in relation to this issue are placed before the court and would foreclose any claim of reliance on the often applied 2 for 1 approach.

(iv) Parole ineligibility:

[24] The appellant submits that the judge erred in delaying parole eligibility because there was no evidence that he would not be deterred or rehabilitated

within the normal period of parole eligibility. The Crown says in response that there was ample evidence to support the judge's order.

[25] The principles to be applied in considering whether to delay parole eligibility under section 743.6 of the **Criminal Code** were recently set out by the Supreme Court of Canada in **R. v. Zinck**, [2003] 1 S.C.R. 41; S.C.J. No. 5 (Q.L.). Speaking for the Court, LeBel, J. said:

> 33 As mentioned above, courts must perform a double weighing exercise. First, they must evaluate the facts of the case, in light of the factors set out in s. 718 of the *Code*, in order to impose an appropriate sentence. Then, they must review the same facts primarily in the perspective of the requirements of deterrence and denunciation, which are given priority at this stage, under s. 743.6(2). The decision to delay parole remains out of the ordinary, but may and should be taken if, after the proper weighing of all factors, it appears to be required in order to impose a form of punishment which is completely appropriate in the circumstances of the case. This decision may be made, for example, if, after due consideration of all the relevant facts, principles and factors at the first stage, it appears at the second stage that the length of the jail term would not satisfy the imperatives of denunciation and deterrence. This two-stage process, however, does not require a special and distinct hearing. It should be viewed as one sentencing process, where issues of procedural fairness will have to be carefully considered.

[26] The application of these principles in **Zinck** shows that the protection of the public is a proper consideration in relation to whether the objectives of deterrence and denunciation can be satisfied without delaying parole eligibility: see **Zinck** at para. 39. Parole violations and evidence that prior significant custodial sentences have had little impact have been identified as relevant factors to consider in this regard: **R. v. Goulet** (1995), 97 C.C.C. (3d) 61 (Ont. C.A.) at p. 67. Both factors are present in the case before the Court.

[27] Here, the judge had evidence that the previous 4 year sentence imposed on Mr. G. had not deterred him from crime and that he had begun abusing these children while still on parole. The judge also had the gloomy picture concerning Mr. G.'s poor prospects for rehabilitation and the likelihood of re-offending as found in Dr. Starzomski's report and testimony. In light of the compelling record

before her, the judge did not err in invoking her discretion to delay parole ineligibility in this case.

[28] The appellant points out, and the Crown accepts, that the delay of parole eligibility is not available with respect to the child pornography offences as those offences are not ones to which the section applies. However, there is nothing in the judge's order or the warrant of committal to the effect that the order was meant to apply to these offences and therefore nothing for this Court to correct on appeal. However, I would direct the Crown forthwith to send a copy of these reasons to the appropriate correctional and parole authorities with a covering letter drawing to their attention that the parole ineligibility order does not relate to the child pornography offences and to provide the Court and the appellant's counsel with a copy of that letter.

V. Disposition:

[29] For these reasons, while I would grant leave to appeal, I would dismiss the appeal. I would be remiss if I did not express my appreciation to counsel for their thorough and helpful submissions and particularly to Ms. Lacey who presented a difficult case with both skill and fairness.

Cromwell, J.A.

Concurred in:

Roscoe, J.A.

Oland, J.A.