PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. MacLean* , 2015 NSPC 70

Date: 2015-10-15
Docket: 2825618
Registry: Pictou

Between:

Her Majesty the Queen

v.

Nathan Fred Grant MacLean

SENTENCING DECISION

Restriction on Publication: Section 486.4 *Criminal Code*

Judge:	The Honourable Judge Del W. Atwood
Heard:	October 15, 2015 in Pictou, Nova Scotia
Charge:	Section 151 of the Criminal Code of Canada
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service H. Edward Patterson for Nathan Fred Grant MacLean

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

By the Court:

[1] The court has for sentencing Nathan Fred Grant MacLean. Mr. MacLean elected to have his charge dealt with in this court, and entered a guilty plea at a reasonably early opportunity in relation to a single indictable count under s. 151 of the *Criminal Code* which provides that:

> Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> > *(a)* is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year.[1]

[2] The female victim in this case was 14 years of age at the time of the offence. The offender was twenty-two years of age at the time. The facts are that the offender and the victim shared a bed at the home of a friend. The offender had sexual intercourse with the victim that lasted ten to fifteen minutes. The facts submitted to the court in accordance with ss. 723 and 724 of the *Code* characterized this offence as "entirely an act of consensual intercourse."

[3] Regardless of this characterization, the criminality of the offender's conduct is clear and unambiguous. This is because s. 150.1 of the *Code* states:

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[1] S.C. 2012, c. 1, s. 11 in force 9 August 2012 in virtue of SI/2012-48.

> 150.1 (1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

[4] The fact that Mr. MacLean might not have forced the victim to have intercourse is not a mitigating factor. I stated in *R. v. Fitzgerald*[2] that our Court of Appeal is unambiguous on this point; as Saunders J.A. held in *R. v. Oliver*:

> Very little can be said by way of mitigation. Mr. Oliver's timely guilty plea did save the complainant from painful court appearances. The appellant's intellectual deficits may, arguably, have prompted him to think that the incidents of sexual intercourse were "consensual" (when of course there was never "consent" here, as a matter of law, on account of her age). These features were obviously considered by the trial judge in deciding an appropriate sentence. The appellant has no prior criminal record, but sexual offenders often present in court with an otherwise good character. The appellant says there was no overt violence; however, I question how it could ever be said that multiple rapes of a 12 year old ought not to be characterized as "overtly violent."[3]

[5] Mr. MacLean was in a position to know better. The 14-year old victim was not.

[6] There is a joint-recommendation before the court for a two-year term of imprisonment. The Court of Appeal of this province stated in *R. v. MacIvor* that sentencing courts ought to depart from joint-recommendations only if the court

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[2] 2014 NSPC 1.
[3] 2007 NSCA 15 at para. 32.

were to be satisfied that the imposition of the joint submission would bring the administration of justice into disrepute.[4]

[7] The sentence that is being recommended to the court is certainly at the low end of the range. As I described in *Fitzgerald*, sentences have been imposed in this province for terms of three years and greater, even for single occurrences or single incidents of sexual assault upon minors when the sexual assault has consisted of actual intercourse. The reasons for the imposition of significant penitentiary terms in cases such as this one are well known. The first is the inevitable level of victim impact. While the victim decided not to file a victim-impact statement, this does not mean, contrary to what was suggested to me today, that there is no evidence of victim impact before the court. As I stated in *R. v. Stewart*:

> None of the young people victimized by Mr. Stewart sought to file victim-impact statements. Defence counsel suggests I infer from this a lack of victim impact. In fact, I draw the contrary inference. Sentencing courts may–indeed, in some cases, must–draw reasonable inferences regarding the impact of proven crimes upon victims. I conclude that the impact of Mr. Stewart's predatory acts inflicted upon these young people is or will be profound. It is well within the common experience of the court that victims of sexually exploitative crimes will often experience overwhelming feelings of shame and regret which will account fully for their reticence in the sentencing process. Applying the principles set out in *R. v. R.D.S.*, I am satisfied that this is the sort of thing that, as a judge, I am well entitled to "know". It might take years before the full weight of the abuse

[4] 2003 NSCA 60 at paras. 31-33.

> inflicted on these young people might be felt; but of the high level of victim impact, I have absolutely no doubt.[5]

[8] The victim had to go to the hospital, she was subjected to SANE-kit testing, she had to be interviewed by police, and was faced with the prospect of having to come to court to testify; furthermore, that there will be the inevitable consequences of shame and regret as inflicted on victims of sexual assault.

[9] The second factor is that this was a case of child abuse, aggravating statutorily under s. 718.01 and sub-para. 718.2(a)(ii.1) of the Code. These provisions codify what courts in this country have followed for generations. As was stated by Campbell J.P.C. (as he then was) in *R. v. E.M.W.*:

> Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment of a child in this way is an attempt to deny her basic human dignity. In the eyes of the adult the child is reduced to being a nameless "thing". She is robbed of her childhood and her innocence. She has no choice in the matter. She is simply used. She has becomes a means to an end.[6]

[10] Having said that, the joint-recommendation takes into account the fact that Mr. MacLean has no prior record and would appear to have some degree of insight into the nature of the serious criminality of his acts. It is in line with the sentence

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[5] 2013 NSPC 64 at para. 17.
[6] 2009 NSPC 65 at para. 7; *aff'd*. 2011 NSCA 87.

imposed in *Oliver* and comports with sentence parity. I intend to impose what has been recommended to the court.

[11] I will point out that Mr. MacLean is not to be penalized for anything that might have been said by a family member in the course of the sentencing process. There was a suggestion made the by prosecution this morning that a statement made by Mr. MacLean's mother to the author of the pre-sentence report, seemingly minimizing the seriousness of the offence, ought to enhance the already substantial need for deterrence. The court certainly appreciates that when family members, parents, close friends and close relatives of an offender are confronted with the knowledge that a child or sibling has committed a serious criminal offence, the tendency is to come to the defence of that person. However, Mr. MacLean is to be sentenced for his conduct, not someone else's, and he is not to be penalized or treated more severely because of anything that might have been said by a family member.

[12] Therefore, Mr. MacLean, the court is going to impose sentences as follows:

- First of all, there will be a $300.00 victim surcharge amount, and you will have 48 months to pay that victim surcharge amount.

- This is a mandatory Section 109 offence; therefore, the court orders and directs that you be prohibited from possessing any firearm, other than a prohibited firearm or restricted weapon, and any cross-bow, restricted weapon, ammunition or explosive substance, commencing today's date and ending 10 years after your release from your two-year sentence of imprisonment. The court will also order and direct that you be prohibited from possessing any firearm, restricted firearm, prohibited weapon, prohibited device, prohibited ammunition for life.

- There will also be a primary-designated-offence DNA collection order.

- There will be a 20-year SOIRA order under the provisions of para. 490.013(2)(b) of the *Criminal Code*.

- Pursuant to s. 743.21 of the *Criminal Code*, the two-year warrant of committal will be endorsed: while in custody, Mr. MacLean is to have no contact or communication, either directly or indirectly, with the named complainant, and the complainant's full name will be set out in the endorsement.

- Section 161 requires the court to consider the imposition of a prohibition order, even if not applied for. Given the circumstances of this

offence, the court will order and direct that there be a ten-year Section 161 order that will, pursuant to para. 161(2)(b) of the *Criminal Code*, start upon Mr. MacLean's release from imprisonment. That order will direct that Mr. MacLean be prohibited from attending a public park or public swimming area where persons under the age of 16 are present, or can reasonably be expected to be present, or a daycare centre, school ground, play ground or community centre. You are also prohibited from being within two (2) kilometres of any dwelling house where the victim ordinarily resides. Furthermore, you are prohibited for that period of time from seeking, obtaining or continuing any employment, whether or not the employment is remunerated or being a volunteer in a capacity that involves being in a position of trust or authority toward a person under the age of 16 years. You are prohibited for that period of time from having any contact, including communicating by any means, with a person who is under the age of 16 years unless you does so under the supervision of a person whom the court has found appropriate. And, finally, you are prohibited for that period of time from using the internet or other digital network with the approval of the court.

- Finally, Mr. MacLean, the court sentences you to a term of imprisonment of two (2) years' incarceration in a federal institution which is a bare-minimum federal sentence.

[13] Were there any other submissions that counsel wish to make?

[14] **Mr. Young**: No, Your Honour.

[15] **Mr. Patterson**: No, Your Honour.

[16] **The court**: Thank you, and Mr. MacLean, I'll have you go with the sheriffs, if you could, please, sir. Thank you very much.

JPC