PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Layes, 2012 NSPC 54

Date: 20120621
Docket: 2252026, 2252027
Registry: Pictou

Between:

Her Majesty the Queen

v.

Elwin Layes

SENTENCING DECISION

Restriction on publication: Any information the could identify the complainant L.W.P. shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W. Atwood
Heard:	19 March 2012, 3 April 2012, 26 April 2012, 30 May 2012
Written decision:	21 June 2012
Charge:	Sub-section 149(1) and section 157, *Criminal Code of Canada*, R.S.C. 1970, c. c-34
Counsel:	William Gorman, for the Nova Scotia Public Prosecution Service. Douglas Lloy, Nova Scotia Legal Aid, for Elwin Layes.

By the Court:

Introduction and procedural history

[1] The Court is sentencing Elwin Layes for indecently assaulting L.W.P., a female person, a violation of sub-s. 149(1) of the *Criminal Code of Canada*, R.S.C. 1970, c. C-34, and for committing acts of gross indecency with Edward Dean, contrary to s. 157 of the same revision of the *Code*. There remains in force a publication ban regarding the identity of L.W.P.; however, the ban against publicizing the identity of Mr. Dean was vacated by the Court on 19 March 2012 on Mr. Dean's informed and voluntary application.

[2] Having elected trial in this Court, Mr. Layes pleaded guilty to these indictable counts at the start of what was to have been a two-day trial for charges of intercourse with a female under fourteen years of age, assault with intent to commit buggery, and two counts of indecent assault of a male. With the consent of defence, the Crown amended the first two counts, and it was to these amended counts that Mr. Layes pleaded guilty. The remaining charges were dismissed.

Facts supporting the convictions

[3] Elwin Layes is now a sixty-five-year-old male who suffers from a number of chronic health issues. When he was thirty-three years old, he molested sexually then-thirteen-year-old L.W.P. who was at Mr. Layes' home to have Mr. Layes' wife fit her for a dress. To describe Mr. Layes' conduct as a sexual violation of L.W.P. does not capture fully the enormity of his crime. Mr. Layes took down L.W.P's pants and underpants and forced his erect penis into her vagina. In recalling that event over three decades later, L.W.P. told police that she felt that Mr. Layes' penis would rip her apart. In L.W.P's estimation, Mr. Layes forced himself upon her for about twenty minutes. L.W.P. told police that she experienced vaginal bleeding for a couple of days afterwards, and had to borrow a sibling's sanitary pad in order to staunch it. The Court was not presented with a victim-impact statement from L.W.P.; nevertheless, I am satisfied that the Court may reasonably infer from these facts, which were not contested by Mr. Layes, that the impact upon L.W.P. would have been profound and long lasting. Sentencing courts may–indeed, in some cases, must–draw reasonable inferences regarding the impact of proven crimes upon victims.[1]

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[1]See, *e.g., R. v. Cromwell* 2005 NSCA 137 at para. 44; *R. v. Whalen* 2011 ONCA 74 at para. 9; *R. v. D. (K.)* 2011 ONCJ 81 at para. 22; *R. v. Mattis,* [1996] O.J. No. 5127 at para. 7 (O.H.C.J.).

[4] While I am unable to conclude beyond a reasonable doubt–and that is the standard of proof required by para. 724(3)(e) of the *Code*–that Mr. Layes stood in a position of trust or authority toward L.W.P., in that there is no evidence that Mr. Layes knew that L.W.P. would be coming to his home or that Mr. Layes was actually placed in charge of her care, the fact is that Mr. Layes was the householder, and L.W.P. was a child who was a guest in his home. Mr. Layes' duty to keep L.W.P. safe from harm approached very closely to constituting a position of trust. In other words, while Mr. Layes' status in relation to L.W.P. –householder and child guest–might not be decisive of the existence of a position of trust,[2] it does afford strong and compelling evidence of a near-trust relationship which would require the Court to recognize that this was not a case of an assault by a stranger.

[5] Mr. Layes also committed multiple acts of sexual violation of Edward Dean when Mr. Dean was between fifteen to nineteen years of age. Although the gravamen of gross indecency does not require strictly that there be a 'victim' and an 'assailant'–given that the offence of gross indecency admits of all parties to the

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[2]See *R. v. Audet,* [1996] S.C.J. No. 61at para. 39

act as being accomplices–the undisputed facts heard by the Court prove that Mr. Dean was an authentic and actual victim. The following summary of the facts will establish why this is so.

[6] Mr. Dean's family ran a small business in Coalburn, Pictou County, selling dew worms to recreational fishers. The Deans knew Mr. Layes, and Mr. Layes allowed them to harvest worms on his property in Trenton. In the spring of 1979, Mr. Layes picked up Mr. Dean, who was then fifteen years old, to bring him to Trenton. Mr. Layes stopped off at a house in the town; he enticed Mr. Dean into the house on the pretext of "checking on things". Once inside, Mr. Layes dominated Mr. Dean and told him to drop his pants and bend over. Mr. Dean did as he had been told; Mr. Layes then forced his penis between Mr. Dean's legs from behind. Mr. Dean was unable to recall whether Mr. Layes had penetrated him anally, but he did recall Mr. Layes rubbing his penis between his legs. Mr. Layes ejaculated, and then told Mr. Dean to "go".

[7] In the summer of 1979, Mr. Layes had Mr. Dean return to the same house to do some digging in the basement. Mr. Layes took advantage of that opportunity to rub and touch Mr. Dean over top of his clothing.

[8] Sometime during the summer of 1979 or 1980, Mr. Dean spent one night at Mr. Layes' home, planning on harvesting dew worms the next morning. Between 12 midnight and 1:00 a.m., Mr. Layes approached Mr. Dean as he slept, awoke him, and then told him to lie over top of a coffee table and pull down his pants. Mr. Dean did as he was told. Mr. Layes applied petroleum jelly to Mr. Dean's anus and attempted to penetrate him anally with his penis. Mr. Dean told Mr. Layes to stop as it hurt. Mr. Layes stopped and then masturbated.

[9] In the summer of 1981, Mr. Layes picked up Mr. Dean in Coalburn, ostensibly to take him to have his bicycle fixed. Instead, Mr. Layes drove to his home in Trenton; he directed Mr. Dean to remove all his clothing, and Mr. Dean complied. Mr. Layes then proceeded to sexually abuse Mr. Dean, leading up to Mr. Dean being ordered to masturbate Mr. Layes to the point of ejaculation.

[10] In the summer of 1981, Mr. Layes performed fellatio on Mr. Dean.

[11] Finally, in the fall of 1983, Mr. Layes picked up Mr. Dean as he hitchhiked to town from Coalburn. Mr. Layes fondled Mr. Dean over his clothing. Mr. Layes

took down his own pants, and told Mr. Dean to “hump” him, and “give it to me, give it to me hard”. Mr. Dean did not want to do this, and refused. Mr. Layes then masturbated and ejaculated onto the ground.

[12] Mr. Dean was affected profoundly by the abuse he was forced to endure, as he described poignantly in his victim-impact statement:

> I have carried the baggage of abuse and violation for 30 years. No one is aware of the impact that this abuse has had on my life. I have been obedient in keeping your secret so no one else knew, Elwin, but it is time for me to speak and to let others know that it is alright to speak out about childhood sexual abuse so that others may have the opportunity that I am now taking to get on with the healing journey. Childhood sexual abuse was wrong thirty years ago, and it is wrong today.

[13] As in the case of L.W.P., I am unable to conclude beyond a reasonable doubt that Mr. Layes exercised a position of trust or authority over Mr. Dean. I base this on Mr. Dean’s age, on the absence of evidence that Mr. Dean’s parents had ever placed their son in Mr. Layes’ care, and on my overall impression that Mr. Layes sought to groom Mr. Dean through casual contact.

[14] The Crown submits to the Court that all of Mr. Layes' acts were calculated and premeditated. While the facts submitted to the Court by the Crown in accordance with ss. 723 and 724 of the *Code*–and not contested in any way by defence counsel–do disclose a level of calculation and manipulation in the abuse of Mr. Dean, there is, in the Court's view, no identifiable level of premeditation in the case of Mr. Layes' sexual abuse of L.W.P. However, this does not afford Mr. Layes much in the way of mitigation. This is because there is no appreciable difference in the risk presented to the protection and safety of the public between, on the one hand, a sexual predator who stalks and plans his attacks, and, on the other, the predator who seizes the moment and victimizes a child sexually when the opportunity presents itself.

Crown's submissions on sentencing

[15] The Crown referred in its submissions to the principles of sentencing set out in s. 718.01 and sub-paras. 718.2(a)(ii.1) and (iii) of the *Code*, which state:

> 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.

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
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> . . .
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
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> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> . . .
> shall be deemed to be aggravating circumstances . . . .

[16] Earlier in my judgment, I found that the existence of a position of trust or authority had not been proven. I will limit my analysis of s. 718.2 to take this into account.

[17] Although these provisions of the *Code* came into effect well after Mr. Layes committed his crimes, I am satisfied that they should be given retrospective effect, as they do not create any new offences, do not deprive the offender of any defences

available to him, and do not create liability for any increased penalties. Even if I were to be wrong on this point, these provisions merely codify sentencing principles which have been applied by courts for decades, as observed in *R. v. W. (E.M.).*[3]

[18] The Crown has argued that the need for denunciation and deterrence is so profound in this case, as it involves the sexual degradation of two young people, that the sentencing range would be a penitentiary term of two to three years; the Crown expresses the view that a sentence toward the lower end of that range would be appropriate. In addition, the Crown seeks a DNA-collection order, a lifetime SOIRA order, and a lifetime s. 161 order of prohibition.

Defence submissions on sentencing

[19] Defence counsel have applied for a conditional sentence. It is not lost on the Court that, by amending the two counts to which Mr. Layes pleaded guilty, the

[3]2011 NSCA 87 at paras. 14 and 23.

Crown have moved the upper limit of sentencing downward so that the Court is no longer dealing with a “serious personal injury offence” as defined in section 752 of the *Code*. This is because the maximum sentence for each of the charges before the Court is one of five-years’ imprisonment. Thus, Mr. Layes is no longer facing charges that are statutorily excluded from conditional sentencing under s. 742.1 of the *Code*.

[20] However, it is important to distinguish between a range of penalty prescribed in a statute from the range of penalty appropriate in a specific case. A statute will fix an upper limit for a penalty–and now, more often, a lower limit as well. But the actual range of penalty to be considered by a court conducting a sentencing hearing will be governed by a constellation of factors, appositely described by Bateman J.A. in *R. v. Cromwell*:

> Counsel for Ms. Cromwell says this joint submission is within the range. He broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("... sentences imposed upon similar offenders for similar

> offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in R. v. Mafi (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.[4]

Sentencing factors

[21] For the reasons that follow, I am not satisfied that the imposition of a conditional sentence is appropriate in this case. First of all this is a case that requires a punishment far in excess of a discharge, suspended sentence or a fine. The offences committed by Mr. Layes were glaringly serious and revolting; his degree of responsibility was substantial–indeed, Mr. Layes was solely responsible for his crimes; the need for denunciation and deterrence is great, given that these are crimes involving the sexual degradation of young people. Accordingly, the need to enforce respect for the law here is so substantial, anything less than the imposition of a significant penitentiary term would be manifestly inadequate. In reaching this conclusion, I have taken into account Mr. Layes' guilty plea, and his declaration of remorse– expressed in his comments to the author of the presentence report and in his section 726 allocutions which he presented to the court,

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[4] 2005 NSCA 13 at para. 26; see also *W. (E.M.), supra*, note 2 at para. 29, and *R. v. N. (A.)*, 2011 NSCA 21 at para. 34.

impromptu, on two occasions, the first on 19 March 2012, and, later, on 30 May 2012. Although I granted the Crown's application to reopen its case on sentencing and heard evidence from the accused's daughter that appeared to place into doubt the authenticity of Mr. Layes' expressions of remorse and regret, I find that Mr. Layes is genuinely remorseful for the physical and emotional pain he inflicted on Mr. Dean and L.W.P.; while I find that he did, in fact, make the comments attributed to him by his daughter–indeed, Mr. Layes admitted uttering those words when he testified at the resumed sentencing hearing on 30 May 2012–my experience informs me that this was simply the case of a disgraced man trying to save face with his family, which should not detract in any way from the mitigating effect of Mr. Layes' remorse.

Factors of age and health

[22] I have taken into account the evidence contained in the presentence report and in the medical information presented to the court by defence counsel describing Mr. Layes' poor health. I keep in mind the clear direction to sentencing courts laid out by the Supreme Court of Canada in *R. v. M.(C.A.)*:

> [I]n the process of determining a just and appropriate fixed-term sentence of imprisonment, the sentencing judge should be mindful of the age of the offender in applying the relevant principles of sentencing. After a certain point, the utilitarian and normative goals of

> sentencing will eventually begin to exhaust themselves once a contemplated sentence starts to surpass any reasonable estimation of the offender's remaining natural life span. Accordingly, in exercising his or her specialized discretion under the Code, a sentencing judge should generally refrain from imposing a fixed-term sentence which so greatly exceeds an offender's expected remaining life span that the traditional goals of sentencing, even general deterrence and denunciation, have all but depleted their functional value. But with that consideration in mind, the governing principle remains the same: Canadian courts enjoy a broad discretion in imposing numerical sentences for single or multiple offences, subject only to the broad statutory parameters of the Code and the fundamental principle of our criminal law that global sentences be "just and appropriate".[5]

While I am satisfied that a lower-end penitentiary sentence might be stressful for Mr. Layes, there is no evidence before me that it would extend beyond his life expectancy. As well, I have every confidence that Mr. Layes, while imprisoned, will have access to all medical care that is appropriate.

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[5][1996] S.C.J. No. 28 at para. 74.

Sentence parity with similar cases

[23] In reviewing the sentencing authorities submitted to the Court, I have found particularly relevant the cases of *R. v. Strong*[6] and *R. v. C. (S.C.)*.[7] I recognize that there existed in the *Strong* case circumstances more serious than those present in Mr. Layes' indecent assault of L.W.P.–particularly the employment by the offender Strong of a weapon and threats; however, the common elements of forcing sexual intercourse on a child call for a significant degree of sentencing parity. In *R. v. C. (S.C.)*, the court sentenced an offender for sexually assaulting a young boy; the abuse occurred over a period of time that the victim had been in the care of the offender. Furthermore, the offender had a prior, similar record, but for a chronologically subsequent offence; it is clear from the judgment of the court that the presiding judge was fully alert to the effect of this chronology. I regard *R. v. C. (S.C.)* as substantially similar to Mr. Layes' abuse of Mr. Dean, and am of the view, again, that para. 718.2(b) of the *Code* would call for a considerable degree of sentencing parity.

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[6]2007 NSSC 258.

[7]2008 NSSC 115.

Restraint and totality

[24] In reaching a decision on sentence, I have applied the principles of restraint and totality set out in paras. 718.2(c)-(e) of the Code, and in accordance with the guidance of *R. v.Adams*.[8]

[25] In relation to the indecent assault of L.W.P., I would have imposed a sentence of three-years' imprisonment, had that matter stood alone, and in relation to the gross indecency count, a sentence of two-years' imprisonment, had that been a stand-alone charge. However, taking into account the principle of totality, I sentence Mr. Layes to a term of two-years' imprisonment in relation to the indecent assault of L.W.P. and a one-year term of imprisonment for the gross indecency count, to be served consecutively, for a total sentence of three-years' imprisonment in a federal institution. There will be a primary-designated-offence DNA collection order in relation to both counts, a lifetime s. 161 prohibition order, and a 10-year SOIRA order, which appears to me to be the applicable term under para. 490.013(2)(a) of the *Code*. The Crown sought a lifetime order, but I am unable to find anything in the statute authorizing and order for that term. The Court will order and direct that the warrant of committal contain a s. 743.21 order that Mr. Layes have no contact or communication, directly or indirectly with

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[8]2010 NSCA 42 at paras. 23-30

Edward Dean or L.W.P. Finally, given the sentence imposed here today, and given Mr. Layes' limited means, I find that the imposition of a victim-surcharge amount would work an undue hardship on Mr. Layes; no victim surcharges will be imposed. The presentence report and sentencing exhibit #2, which lists Mr. Layes' medical prescriptions, will be attached to the warrant of committal to ensure that the corrections authorities arrange proper care for Mr. Layes.

J.P.C.