

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. J.P.*, 2017 NSPC 54

Date: 2017-09-15
Docket: 2957572-3
Registry: Halifax

Between:

Her Majesty the Queen

v.

J, P.

Restriction on Publication: S. 486.4 CC
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DECISION

Editorial Notice: Identifying information has been removed from this electronic version of the judgment

Judge: The Honourable Judge Marc C. Chisholm, J.P.C.

Place: Halifax, Nova Scotia

Decision: September 15, 2017

Charges: Section 271 of the Criminal Code

Counsel: Brian Cox, Crown Attorney
Luke Merrimen, Defence Attorney

By the Court:

[1] The issue for the Court is the determination of a fit and proper sentence for Mr. P. for two offences of sexual assault. The Crown, having proceeded summarily, the maximum punishment for each offence is imprisonment for 18 months.

[2] The Court has considered the facts of the offences, as admitted by Mr. P., the facts as found by the Court, the Presentence Report, the character references for the accused, the submission of counsel and the caselaw provided by counsel.

[3] Decisions in other cases assist in identifying an appropriate range of sentence. Persons with similar personal circumstances who commit similar offences ought receive similar sentences. This is known as the parity principle of sentencing. The principle is founded in equity, fairness. No two cases are exactly alike. Sentencing is an individualized process. The issue to address is what is the appropriate sentence for this offender in the circumstances of this case.

[4] The Court is guided by the provisions of the **Criminal Code of Canada**, Section 718, which sets out the fundamental purpose of sentencing, principles of sentencing, sentence objectives and factors.

[5] Section 718.1 provides:

“A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[6] In this case, the positions of the parties are far apart. The Crown urged the Court to place greatest emphasis on the objectives of denunciation and deterrence and to impose a total sentence of 12 months’ imprisonment followed by probation.

[7] The Defence urged the Court to place greatest emphasis on rehabilitation, restraint, and grant a Conditional Discharge, in part because a conviction will have significant adverse immigration consequences.

[8] In the alternative, if the Court is not persuaded that a Conditional Discharge ought to be granted, the Defence sought a non-custodial sentence, and in the further alternative, if a custodial sentence is to be imposed, that it be of less than six months’ duration for each offence and preferably a Conditional Sentence Order as the accused is employed.

Circumstances of the Offences

[9] The accused pled guilty to two offences of sexual assault against H.R. between December 22 and December 28, 2015.

[10] By letter dated June 22, 2017, the accused made admissions of fact. He admitted that on December 23, 2015, at the [...] in Halifax, he was seated in a chair. He pulled H.R. towards him. He briefly put his hand under her skirt and stated that he wanted to see if she was wearing underwear. The event was captured on video. It depicts the accused helping H.R. put on a necklace. Then, when he's seated, he grabs her by the torso and attempts to pull her onto his lap. His hand goes under her skirt.

[11] In testimony, H.R. stated that the accused slid his hand up to the band of her tight and tried to pull them down. This was denied by the accused. The Court accepted the evidence of H.R., rejected the accused's evidence, and found the accused did attempt to pull down her tights.

[12] The accused admitted that on December 27, 2015 he asked H.R. for a hug. She agreed. He hugged her and kissed her cheek and as he was releasing her he slid his right hand across her chest and fondled her breasts. This non-consensual sexual contact lasted a few seconds.

[13] Those were the direct circumstances of the two offences of December 2015. In an earlier ruling during this sentence hearing, the Court held that certain evidence of events outside the timeframe of the two offences was relevant and admissible to assist the Court, *inter alia*, in determining the nature of the work relationship between the accused and H.R., particularly regarding whether the accused was in a position of trust or authority in relation to H.R. and, if so, whether the accused abused that trust/authority; the degree of moral responsibility of the accused; the vulnerability of the victim; the impact of the accused's actions on the victim; and the accused's awareness of the victim's vulnerability and the impact of his actions on her.

[14] In relation to incidents prior to December 22-28, 2015, the accused admitted to:

“On multiple occasions commenting on her physical appearance, including remarks about her breasts and backside and saying that he would like to bend her over the desk.”

[15] During testimony, there was a dispute as to how often the accused made comments about H.R.'s breasts or backside. The Court found that it happened regularly throughout the period of H.R.'s employment.

[16] During her testimony, H.R. alleged that the accused's statement about wanting to bend her over the desk included "and fuck her hard or well". The accused denied saying those words. The Court accepted the evidence of H.R. and rejected the accused's evidence. The Court found that, even without those words, the only reasonable interpretation of the accused's words was that he was referring to having sex with her.

[17] The accused also admitted to nudging H.R. on multiple occasions. In his evidence, he said nudging meant a hip check on shoulder bump. The complainant testified that there was more involved but the Court was not persuaded beyond a reasonable doubt.

[18] The accused admitted that on multiple occasions, he was "smacking and kicking H.R.'s backside". Further, the accused admitted "coming up behind her on two different occasions on one day and tickling her until she dropped to the ground and sat on her backside".

[19] The evidence of the accused and H.R. differed as to the frequency of the accused smacking her buttocks or kicking her in the buttocks. The Court found that such conduct occurred on a regular basis.

[20] The Court rejected the accused's testimony regarding the two incidents which he described as tickling. The Court accepted the evidence of H.R. that the accused groped her on both occasions.

[21] In addition to the accused's admissions, the Court accepted H.R.'s testimony that, on one occasion, she went with the accused, at his request, to a motel room on the pretext of checking damage done by guests. In the room, he sat on the bed, pulled her onto his lap and attempted to grope her. She fled.

[22] On at least one occasion, he opened her blouse and looked down at her breasts.

[23] The Court found that on every occasion, H.R. told the accused no or stop. She expressed her objection to his conduct.

[24] Pursuant to Section 725(1)(c), the Court heard evidence relating to sexual misconduct of the accused, outside the timeframe of the offences, in relation to another employee of the [...]. These incidents occurred during the time period when H.R. worked at the [...].

[25] The accused admitted that in relation to the second woman, A.V., a woman in her early 20's who worked part-time at the front counter while attending

university, that “a couple of times” he lifted A.V. up over his shoulder and smacked her backside. He also admitted that “he pinched at the back clasp of her bra strap”.

[26] A.V. testified on the sentencing hearing. Her evidence was credible and was accepted by the Court. Where in conflict with her evidence, the accused’s evidence was rejected. A.V. indicated that when the accused hoisted her up onto his shoulder she was wearing a skirt. He slid his hand up her leg under her skirt. She yelled for him to stop, struggled and kicked.

[27] On one occasion, she allowed him to massage her shoulders. He went beyond that to which she had consented and he slid his hand down inside her shirt and touched her breast.

[28] She would try to avoid him. She would try to leave when she saw him coming. On many such occasions, he would grab her bra strap from behind as she attempted to leave.

[29] Both A.V. and H.R. made a complaint to the [...] manager. Their complaints fell on deaf ears.

[30] Both A.V. and H.R., in an effort to stop the accused from touching them inappropriately, made reference to the presence of video cameras. He told each of them that he controlled the video recordings.

[31] Pursuant to Section 725(2)(b), I note that I have considered the evidence of the sexual acts the accused committed against A.V. in determining the sentence for the accused for the two offences charged. As previously stated, this evidence was considered in relation to the power imbalance between H.R. and the accused, the vulnerability of H.R., the impact of the accused's actions on H.R., et cetera.

Context

[32] The accused, aged 49 in December 2015, was the [...] supervisor at the [...] for all the time H.R. worked there. There were a small number of supervisors. They were a close-knit group. They took turns acting as supervisor-in-charge on weekends, each doing so about once per month. As supervisor-in-charge on a weekend, the individual supervisor would address problems which needed to be addressed immediately, mostly regarding guests, and in relation to other issues which arise, they would do a report to the supervisor of the relevant department for them to follow up.

[33] H.R. began working at the [...], on a part-time basis, in November 2011 while attending university when she was 21 years old. She first worked in housekeeping. After a couple months, she transferred to front desk staff. It was there that she began having contact with and concern regarding the behaviour of Mr. P.. The vast majority of contact was on weekends when Mr. P. was supervisor-in-charge.

Impact of Offences on the Victim

[34] The actions of the accused had a significant, long-term, negative impact on the victim's psychological and emotional well-being. During her testimony, it was obvious H.R. was experiencing emotional distress when stating what the accused did to her. Her evidence of her thoughts when escaping the hotel room where the accused sat her on his lap and attempted to fondle her were entirely understandable. She stated that she was confused, in disbelief, fearful, uncertain what to do. The accused was a much older man, a supervisor at her workplace, who abuse his position of authority. The number of incidents and the nature of the incidents contributed to the harm caused and made H.R. very, very uncomfortable

at work. She voiced her objection to the accused. She told the accused no, to stop. He repeatedly ignored her objections.

[35] The accused intentionally re-enforced his power imbalance over her by telling her he controlled the video recording – intimating she couldn't count on such evidence to corroborate any claim of misconduct. This enhanced her feeling of futility and helplessness.

[36] H.R.'s victim impact statement clearly captured the psychological harm suffered by her due to the actions of the accused. She felt alone, isolated and vulnerable. She continues to experience psychological difficulties. Coming forward was very difficult for her. She continues to be in counselling. She has experienced nightmares, she has fears and insecurities. She alleged that she suffers from post-traumatic stress disorder. PTSD is a medical condition. This can be an aggravating fact on sentencing. Therefore, the burden is on the Crown to prove this fact. A diagnosis of PTSD has not been proven.

Circumstances of the Offender

[37] The accused is 51 years of age and has no criminal record. He is a [...] citizen and a permanent resident of Canada. The Presentence Report is very

positive. Mr. P. was fired from the [...] as a result of these charges. He has been re-employed for four months and is up for a promotion. His present employer is a friend who speaks very highly of the accused's work. This employment is available if the accused is not in custody

[38] The accused has a common-law partner of 19 years and they have four children. The Court has been provided with ten letters of reference for the accused which are extremely positive. They speak to the accused's conduct as a parent, spouse, friend, community volunteer, and his work ethic. He is described as honest and trustworthy. This evidence indicated, and I accept that, in other aspects of his life, the accused's behaviour has been very positive. On the sentencing hearing, the accused apologized for his behaviour and expressed remorse.

Sentencing Factors

Character Reference

[39] The Crown submitted that the character references ought to be given little weight. Each of the reference letter writers indicated an awareness of the accused's plea of guilty to two charges of sexual assault. That knowledge didn't alter their opinion of the accused. What information did they have of the facts of

the offences? Any information regarding the circumstances of the offences was provided to the writers by the accused. At the sentencing hearing, the Court rejected the accused's testimony regarding the extent of his sexual misconduct. Therefore, the Court ought not be satisfied that their opinions were fully informed.

[40] Four of the reference writers were in Court on the previous day of the sentencing hearing and heard the circumstances surrounding the offences. Through Defence counsel they indicated their opinion of the accused was unchanged.

[41] I accept these character references as evidence of the accused's positive behaviour in the community, as a parent, husband, friend, neighbor and community volunteer. Knowledge of the accused's criminal conduct at his former workplace does not change his positive deeds in the community. Incomplete or inaccurate information regarding his misconduct at work lessens the weight the Court attributes to an opinion re his character. Nevertheless, this evidence is entitled to be given some weight. This is a factor which I've considered, ie, that in other aspects of his life, the accused has conducted himself in a very positive manner.

The Accused's Guilty Plea

[42] A guilty plea is generally treated as a mitigating factor because it saves the need for a trial and for the victim to testify, it is an acceptance of responsibility, and indicates remorse. In this case, while he pled guilty, I found that the accused's admissions greatly understated the frequency of his misconduct and minimized his actions. His position on the facts alleged by the Crown led to the victim being called to testify.

[43] H.R. was called to testify about the accused's conduct in relation to the offences of December 2015 and the surrounding circumstances. She was subjected to a lengthy, difficult cross-examination in which she became emotionally distraught several times.

[44] The accused's guilty plea and admission of some facts did not eliminate the victim being required to testify. The sentencing hearing was much like a trial.

[45] Evidence of the offences of December 2015 were depicted on hotel video – strong evidence for the Crown. There was a substantial likelihood the accused would have been found guilty at trial. The guilty pleas are a mitigating factor to be considered on sentence but the weight of this factor is reduced because of these considerations.

Remorse

[46] A guilty plea may be viewed as an indicator of remorse. The accused has expressed remorse. The author of the Presentence Report reported the accused expressed remorse and appeared genuine. The accused expressed remorse in Court, and apologized. He indicated that he never intended to hurt anyone. The accused portrayed his conduct as joking around which, on occasions, went too far. He said he is not a bad person.

[47] In my view the accused does not appreciate the seriousness of his conduct. This is not a case of the accused assuming, wrongly, that H.R. consented to his conduct or at least didn't object to it. She verbally, repeatedly, objected. He knew she objected and he ignored her objection. He repeatedly violated her sexual integrity for his personal gratification.

[48] When the Court considers all the evidence: the accused being 49 years of age, the victim being in her early 20's; that he was a supervisor at her place of work; the number of occasions of sexual touching; the nature of the contacts; the sexual comments; the use of false pretences, a hug, to touch her breasts on December 27th; asking her to come with him to assess damage to a room to get her alone to fondle her; fondling her on the pretext of tickling her; and telling her he

could alter the videos, I do not accept that the accused was joking around and just went too far. His behaviour was a pattern of abuse which he knew she objected to and he continued unabated. The accused showed no concern for how his actions affected her.

[49] The accused's apology is a factor which I've considered in the context of all factors on this hearing.

Immigration Consequences

[50] Defence counsel submitted a legal opinion regarding the potential immigration consequences for the accused depending on the sentence imposed. I accept the opinion. If a conviction is entered, a deportation order for the accused's removal from Canada will be issued. That order is subject to appeal, unless there is a sentence of imprisonment of six months or longer for either offence. I have considered the potential affect of sentencing on the accused's immigration status.

[51] These consequences of the sentencing are a factor for the Court to consider, to balance with other factors. This factor does not justify the Court imposing a sentence which is unfit. The sentence must reflect the purpose, principles and objectives of sentencing and aggravating and mitigating factors of this case.

[52] To summarize the mitigating factors:

- The accused has no prior record.
- He has pled guilty.
- The offences involved touching only.
- He has a positive Presentence Report.
- He has strong family support.
- He has strong community support.
- He has an excellent work history;
- He is working full-time.
- He has expressed an openness to counselling.
- There is a likelihood of rehabilitation.

Some reference letters indicate the accused has modified his behaviour as a result of these criminal charges/proceedings, i.e. that he is more careful in his words and actions.

[53] An additional consideration is that a criminal record will have an adverse affect on his status as a permanent resident in Canada and a custodial sentence may

negatively affect his employment and consequently his ability to support his family.

[54] The aggravating factors are:

- These are two offences of sexual assault;
- The accused was 46-49 years of age, the victim in her early 20's.
- The accused was a supervisor at her place of employment and in a position of authority vis-à-vis the victim.
- The accused's abuse of the power imbalance in the workplace.
- The abuse of interpersonal trust, e.g., a hug would lead to fondling of breasts.
- The accused knowingly isolated the victim, further enhancing the victim's sense of vulnerability in the workplace and deterring a complaint by telling her he controlled the video recording.
- The accused's conduct stopped only because of the charges. He did not stop of his own accord.
- The number of incidents and course of conduct of sexual abuse.

- Significant emotional harm caused to the victim which is ongoing.

Case Law

Defence Cases:

[55] There have been discharges (conditional) granted in relation to sexual assaults. In the case of *R. v. Mamadieo*, (Judge Sherar), September 2, 2015 there was a one-time assault by a taxi driver on a customer. This offence was out of character. Defence counsel provided jurisprudence where a conditional discharge was granted for a sexual assault even involving a breach of trust. In each of these cases cited by Defence, the offence involved a single incident of sexual assault.

R. v. B.L., 2001, B.C.P.C. 254; *R. v. B.R.E.*, 2012, N.S.S.C. 253; *R. v. J.W.*, 2010, N.S.P.C. 40; *R. v. T.J.H.*, 2012, B.C.P.C. 0115; *R. v. Burton*, 2012 O.J. No. 5187; *R. v. Jayswell*, 2011, On. C.J. 33; *R. v. Ingrey*, 2003, S.J. No. 509; *R. v. Gilmour*, 2005, A.J. No. 555; *R. v. Stout*, 2003, B.C.J. No. 862; *R. v. Chartrand*, 1986, M.J. No. 469

Cases of Suspended Sentence

[56] Defence counsel referred the Court to cases wherein a Suspended sentence was imposed. In *R. v. L.P.*, 2009, B.C.J. No. 1743, the accused drove the victim home. He groped her and forced her to touch him. This happened one time. The accused was convicted after trial.

[57] None of the cases referred to the Court, by Defence Counsel, wherein a non-custodial sentence was imposed, involved a prolonged course of conduct of sexual abuse.

Crown Cases

[58] *R. v. B.(O.)*, 2016, ONSE 6861, the accused on a number of occasions over five years, touched the victim's breasts. This was not one isolated incident. The accused was a father figure and abused his position of trust. He exploited his position. The victim was young and vulnerable. The offence had a profound and enduring affect on the victim's life. The accused was a first offender, employed, with family support, who abided by bail for several years. The accused was sentenced to two years less one day followed by one year probation, DNA order,

firearms order, victim fine surcharge, SOIRA order. The primary considerations were denunciation and deterrence.

[59] *R. v. Long*, 2013 ONCJ 617. This was an employer/employee situation. The accused was age 60 to and the victim was 29. There were three occasions of him touching her breast. The victim was learning disabled (speech and language). The offence involved a breach of trust of the employment relationship. This was also a violation of a vulnerable person's trust. There was no indication of the impact of the offence on the victim. The primary considerations in sentencing were denunciation and deterrence. In other areas of his life the accused demonstrated good behaviour, had no criminal record. He showed no empathy for the victim, no insight into his behaviour, and did not commence rehabilitation. A Conditional Sentence Order would not address denunciation and deterrence. The accused was sentenced to 90 days intermittent and probation.

[60] *R. v. Racco*. 2013 ONSC 1517. This case involved an employer – employee relationship. The accused was 49 years of age, the victim 29. On one occasion, the accused touched the victim's vaginal area through her clothing and inserted his tongue in her mouth while kissing her. The accused had no record and was of prior good character. The victim complained only when the accused refused generous

severance. The victim claimed PTSD in her victim impact statement which was not proven. There were no significant consequences to the victim proven. The judge ordered six months' custody and probation. On appeal a Conditional Sentence Order was imposed. What distinguishes this case from the case at bar is that it was one incident and there was no proven harm to the victim.

[61] *R. v. Salabeddin*, 2014, Q.C.C.Q. 3909. This was an employer-employee situation. The accused was the sole proprietor of a shop. He touched the breasts of the victim on one occasion while he was under the influence of alcohol. The accused showed no remorse and was found guilty after trial. There was significant emotional harm to the victim. Defence argued that if the accused went to jail he would lose his business. A sentence of 90 days intermittent and probation was ordered.

[62] *R. v. Tufts*, 2011, S.K.Q.B. The victim was asleep. The accused put his hand down her pajama bottoms. She awoke and he tried to kiss her. She objected and the accused stopped. The offence was characterized as an isolated event of short duration. The accused had no record, was working and supporting his family. He received a Suspended Sentence and probation for 18 months.

[63] *R. v. Abdullahi*, 2010 Y.K.T.C. 16. The accused was a taxi driver. He took the victim's hand and put it on his groin area. She pulled away. He exposed his penis and put her hand on his penis. The accused had no criminal record. A conviction would have a negative impact on his attempt to have his wife and child come to Canada. A Conditional Discharge was denied. The negative immigration impact did not override the public interest in a conviction for this offence. In this case there was no indication of significant impact on the victim. There was no attempt to deter a complaint. The accused was sentenced to three months Conditional Sentence and nine months' probation.

Defence Seeks Conditional Discharge

[64] For a discharge to be granted under Section 730, two requirements must be met: That a discharge is in the best interest of the accused and that it not be contrary to the public interest. There is evidence that a conviction would have significant adverse immigration consequences and that imprisonment would cause the accused to lose his employment. I accept this evidence. I am satisfied that a discharge would be in the best interest of the accused.

[65] The second requirement is that a discharge not be contrary to the public interest. In my view, the aggravating factors in this case, that is breach of

trust/authority/power imbalance; the age of the accused versus the youth of the victim; a vulnerable victim; the number of incidents; the length of time over which the sexually assaultive behaviour continued; the accused's attempt to deter a complaint by claiming to control the video; the significant impact on the victim of the offences cause me to conclude that it would be contrary to the public interest to grant a discharge. The negative consequences to the accused as a result of a conviction do not justify a sentence that is contrary to the public interest. A discharge would fail to give proper emphasis to denunciation and deterrence and would fail to address the seriousness of the offences and fail to address the accused's moral blameworthiness. The application for a discharge is denied.

[66] In sentencing the accused in this case, the primary factors to be considered are the denunciation of the accused's behaviour and deterrence, specific and general. Based upon comments made by the accused during his testimony, I do not believe he fully appreciates the seriousness of his sexual violation of the complainant nor its impact on the victim. Although saying he went way over the line on two occasions, he otherwise minimized the seriousness and frequency of his misconduct. Women's sexual integrity must be respected. Sentences for persons who sexually assault a woman must reflect this.

[67] In this case, the victim, inspite of an unsupportive business environment in terms of her sexual abuse complaint, came forward with her complaint. This was courageous. The Court is convinced she left her employment, in part, because of the sexual misconduct of the accused. The victim continues to experience significant negative emotional/psychological impact as a result of the accused's actions.

[68] A message of general deterrence must be sent to others who would violate a woman's sexual integrity (or a man's). I conclude that a non-custodial sentence would fail to adequately address the need for denunciation and deterrence, both specific and general. The sentence must be of imprisonment.

[69] While deterrence and denunciation are primary factors, the Court must consider all factors. In addition to the mitigating factors, I have considered that the sentence will include:

- A SOIRA order, registration for life.
- The accused will provide a DNA sample.
- A firearms prohibition order.
- A victim fine surcharge.

[70] Section 737(7) provides:

“A victim surcharge imposed under subsection (1) shall be applied for the purposes of providing such assistance to victims of offences as the lieutenant governor in council of the province in which the surcharge is imposed may direct from time to time.”

[71] It appears the victim, H.R., would benefit from further counselling which may be provided/funded by the Victim’s Services Division of the Department of Justice.

[72] Where no fine is imposed, the Court is required to impose a \$100 victim surcharge for a summary offence or pursuant to section 737(3):

“The court may order an offender to pay a victim surcharge in an amount exceeding that set out in subsection (2) if the court considers it appropriate in the circumstances and is satisfied that the offender is able to pay the higher amount.

[73] I find it appropriate in this case to do so. The accused caused significant emotional harm. He does not appreciate the harm caused by his actions. I have concluded that it is appropriate for the victim surcharge to be \$1,000 on each count. I am satisfied the accused has the ability to pay this amount. In this way he will contribute to the cost of addressing the harm done to the victim.

[74] A sentence must be no more harsh than necessary to address the purpose and principles and objectives of sentencing. Upon a review of the caselaw and the

aggravating and mitigating factors in this case, I conclude that a period of 12 months' imprisonment straight time would be unduly harsh. I have concluded that, if a period of straight time imprisonment were imposed, the appropriate duration would be of 4-6 months.

[75] The length of custodial sentence precludes the sentence being served on an intermittent basis. The Court must consider whether a Conditional Sentence Order is appropriate.

[76] To impose a Conditional Sentence, the Court must be satisfied that the accused would not pose a danger to the community and such a sentence would address the purpose and principles of sentencing.

[77] I find that if the accused were sentenced to a Conditional Sentence, he would not present a danger to the community. He has no prior record and he has abided by the conditions of his release order.

[78] The more difficult question is whether a Conditional Sentence would address the need to denounce the offences and deter the accused and others who may act as he did. While I have some hesitation in so concluding, I am persuaded that a Conditional Sentence Order for a period of eight months with sufficient restrictions on the accused's liberty can address the need for denunciation and

deterrence. In reaching this conclusion, I have considered how a sentence of straight time would negatively affect his wife and four children.

[79] The Court has determined that a fit sentence is four months' imprisonment on each offence, consecutive, for a total of eight months to be served on a Conditional Sentence Order. There will be a SOIRA order for life, a DNA order, a victim fine surcharge of \$1,000 on each count and a firearms prohibition order for 10 years.

[80] I will adjourn to hear submissions on conditions of the Conditional Sentence Order.