PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Baxter*, 2019 NSPC 8

Date: 20190404
Docket: 8205457
Registry: Kentville

Between:

Her Majesty the Queen

v.

Bradley Baxter

Restriction on Publication: Section 486.4 *Criminal Code*

Judge:	The Honourable Judge Ronda van der Hoek
Heard:	March 13, 2019 in Kentville, Nova Scotia
Decision	April 4, 2019
Charge:	Section 286.1(1) of the *Criminal Code of Canada*
Counsel:	James Fyfe, for the crown Bernard Conway, for the defence

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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] On a date between October 1 and October 31, 2017, Mr. Bradley Baxter attended a local park where he met with two female residents of a provincial group home. Those females, who were fifteen and eighteen years old, had met him there on a previous occasion when he gave them cigarettes. On this second occasion, Mr. Baxter spoke to the fifteen-year-old who in turn told the suggestible eighteen-year-old to have sex with Mr. Baxter in exchange for cigarettes. The eighteen-year-old, who is described as both vulnerable and suggestible, did so partly for the cigarettes and partly because she did not want to anger the fifteen-year-old.

[2] Those are the accepted facts upon which Mr. Bradley Baxter pled guilty to communicating with [fifteen-year-old] to obtain for consideration the sexual service of [eighteen-year-old], contrary to s. 286.1(1) of the *Criminal Code*.

[3] The only issue in this case is determining a fit and proper sentence for Mr. Baxter in the absence of appellate court benchmarks and reported decisions.

[4] Section 286.1(1) CC represents Parliament's response to *R. v. Bedford*, 2013 SCC 1101, which struck down a number of prostitution related offences. The newly drafted offences set up a regime to address obtaining sexual services for consideration or communicating for that purpose. They establish mandatory minimum sentences dependant on the Crown's election. In this case the Crown

proceeded by indictment rendering a $2,000.00 mandatory minimum fine an available sentence option.

[5] Section 286.1, located in the **Criminal Code** at Part VIII *Offences Against the Person and Reputation*, reads as follows:

> 286.1(1) Everyone who, in any place, obtains for consideration, or communicates with anyone for the purpose of obtaining for consideration, the sexual services of a person is guilty of
>
> (*a*) an indictable offence and liable to imprisonment for a term of not more than five years and a minimum punishment of,
>
> (i) in the case where the offence is committed in a public place, or in any place open to public view, that is or is next to a park or the grounds of a school or religious institution or that is or is next to any other place where persons under the age of 18 can reasonably be expected to be present,
>
> (A) for a first offence, a fine of $2,000,

Position of the Parties:

[6] The maximum sentence available is five years, and the Crown is seeking 6 months incarceration to be served consecutive to time currently being served, and twelve months' probation with various conditions: keep the peace and be of good behaviour, report to probation, attend for assessment regarding sexual offending, have no contact with the two females and [the group home]. He also seeks ancillary Orders: DNA and SOIRA (lifetime).

[7] The defence is seeking the mandatory minimum $2,000.00 fine and a one-year period of probation. He says if I am inclined to impose a carceral sentence, two months followed by probation is sufficient.

[8] It is acknowledged by both counsel that any period of incarceration be served consecutive to the current sentence in accordance with s. 718.3 (4) CC.

The Principles of Sentencing:

[9] The relevant sentencing provisions are found at ss. 718, 718.1 and 718.2 of the *Criminal Code*. They provide the general principles and factors I must consider in fashioning a sentence that serves to protect the public and contribute to respect for the law and the maintenance of a safe society.

[10] Section 718 instructs the court to impose a just sanction that has, as its goal, one or more of the following: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

[11] Section 718.1 establishes a fundamental principle of sentencing that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. In *R. v. Nasogaluak*, 2010 SCC 6 (CanLII), [2010] 1

S.C.R. 206, at paragraph 49, the Supreme Court said a "proportionate sentence is one that expresses, to some extent, society's legitimate shared values and concerns".

[12] Section 718.2 requires the court to consider the aggravating and mitigating factors relating to the offence and to the offender including evidence that the offence had a significant impact on the victim, considering her age and other personal circumstances (s. 718.2(a) (iii.1).

[13] The section also directs application of the principles of parity and proportionality, noting an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.

[14] Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[15] All available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders.

[16] It is well established that sentencing has an overarching goal of promoting the long-term protection of the public. I must keep that at the fore when balancing

the principles and purposes of sentencing to arrive at a fit and proper sentence for Mr. Baxter.

Denunciation and Deterrence:

[17] Both the Crown and the defence acknowledge that subsection 286.1(1) has generated very few reported decisions, and as result there is little direction with respect to the primary principles applicable in such a case. However, it does not appear to be subject to dispute that denunciation and deterrence should be the primary considerations when sentencing those who commit this offence.

[18] In *R. v. Rouse,* 2018 NSSC 240, Warner J., faced with the same issue, reached a sensible conclusion. At paragraph 32 he said as follows:

> There is little guidance for sentencing those who obtain sex for consideration. This relatively new offence appears to be aimed at "johns". The maximum sentence is five years; the minimum is a fine. The factual matrix of the offence can vary greatly. Where the matrix is greater than the normal single event "john" situation, as in this case, denunciation and specific and general deterrence become more relevant.

[19] Accepting Justice Warner's comments, I too conclude that denunciation and deterrence, both specific and general, are the predominant sentencing principles.

Rehabilitation:

[20] Defence counsel also reminds the court that even in cases that require emphasis on denunciation and deterrence, rehabilitation remains a relevant sentencing objective. Such was confirmed by the Supreme Court of Canada in *Lacasse*, [2015] 3 SCR 1089, in a sentence appeal for the offence of dangerous driving causing death.

> One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate. (at para. 4)

[21] Defence counsel argues that Mr. Baxter is a young, employable father who has prospects for rehabilitation available through programming under a probationary order, while at the same time acknowledging that Mr. Baxter was a past participant in a Forensic Sexual Behaviour program.

Proportionality:

[22] The principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender requires me to consider the gravity of the offence and the degree of Mr. Baxter's responsibility.

[23] Mr. Baxter decided to engage a fifteen-year-old girl to help him obtain sex from the vulnerable young adult. The offence is rendered graver still by this

decision to employ such a person, herself resident in a group home, for this unseemly purpose. As a result, two young females were exploited in this enterprise.

[24] It cannot be overemphasized that the eighteen-year-old victim's status as a group home resident clearly suggests her vulnerable status in our community. Such was confirmed by the group home staff assessment that she is suggestible, supporting the inference of her vulnerability.

[25] People in these situations are particularly vulnerable to adult predation as they are without the protection of families of their own. Mr. Baxter is a father of young children and should be aware that young people need protection from adults not exploitation.

[26] One might query why an adult man would keep social company in a park with these two people, having previously been sentenced for two counts of luring a child under the age of sixteen years. This also renders Mr. Baxter's degree of responsibility heightened in the circumstances because the park accomplice was also under the age of sixteen.

[27] That said, there is certainly no suggestion he sought to lure the young woman into prostitution as a pimp. However, these things must start somewhere, and his actions afforded a vulnerable young woman opportunity to be sexually

exploited likely placing her at increased risk in her future social interactions. This I can only assume without a Victim Impact Statement.

[28] Without such a statement, the Court is not in a position to conclude much more about the impact of this offence upon the victim. As such, anything other than the aforesaid observations are constrained in the context of s. 718.1(a) (iii.1) which requires evidence of harm.

Aggravating and Mitigating Factors:

[29] Section 718.2 requires the court to consider the aggravating and mitigating factors relating to the offence and the offender. I have concluded the following:

Aggravating Factors

- Vulnerability of the victim who is resident in a provincial group home. Staff describe her a suggestible;
- A fifteen-year-old group home resident accomplice used to arrange the commission of the offence;
- The location of the offence in a public park;
- That a fifteen-year-old, *albeit* an accomplice, was present in the park at the time of the offence;
- A prior criminal record, for a sex-related offence;
- Benefit of attending a 2014 Forensic Sexual Behavior Program that, in his 2018 PSR, he described as helpful (program formed part of sentence for s. 172.1(1)(b) lure child under 16 years x 2 involving offence committed in May 2013)

Mitigating factors

- Mr. Baxter pled guilty;
- He has two young children and a supportive partner;
- He is a relatively young man;
- His extended family is supportive;
- He reports an ADHD diagnosis at a young age that sees him functioning five years behind his biological age, a "psychological deficit";
- His mother confirmed the ADHD diagnosis calling it "extreme" noting he was on medication. She says he is immature for his age and still identifies as a teenager despite his age, at times not thinking before he acts;
- He is a hard worker who has employment prospects upon release from custody;
- He has no drug or alcohol dependency; and
- There was an absence of physical coercion involving the victim.

Parity / Range of Sentences:

[30] Section 718.2 requires the court to consider the principle of parity by examining the range of sentences imposed for such an offence. This is the crux of the issue, despite a thorough investigation, neither counsel nor the court located cases involving remotely similar situations. Saying so, it is difficult to imagine that this is the first group home situation involving this type of exploitation. I note that ss. 286.1(2) CC has received somewhat more attention in the case law, however that subsection relates to the offence when committed against children, so is of limited value.

[31] It is useful to review cases involving the relevant section, although factual dissimilar. *R. v. Mercer*, 2017 NSPC 20, a decision of Judge Brian Williston, involved an elderly man convicted under s. 286.1(1) CC for communicating with an undercover officer involved in *Operation John be Gone* aimed at halting street prostitution running amuck in Sydney, Nova Scotia. After an unsuccessful challenge to the mandatory minimum $500.00 fine, applicable in a summary proceeding, he was fined that minimum.

[32] Judge Williston conducted an extensive review of the changes to the law following the Supreme Court of Canada's decision in *R. v. Bedford*, *supra*. In concluding "the mandatory minimum sentence is a forceful statement of Parliament", he addressed "the circumstances of the significant problems identified with unlawful solicitation in downtown Sydney… , the exploitation of persons who I hold were, for the most part, not there by free choice but by social economic conditions, addictions, and abuse as well as the potential for violence to them" and imposed the mandatory minimum fine.

[33] *R. v. Rouse* (September 25, 2018) a NSSC unreported decision of Smith J., sitting as a trial judge, involved imposition of a two-month period of incarceration for a single count s. 286.1(1) CC, on two occasions involving a single Dilaudid pill. Mr. Rouse was not charged with trafficking under the CDSA, but the

constellation of factors in the case led Smith J. to conclude that a considered six months incarceration be reduced to two months. Justice Smith considered totality as well as his recently imposed five-year sentence for somewhat similar matters and imposed two months consecutive to time being served.

Reasonable Alternatives to Custody:

[34] The *Code* requires me to consider reasonable alternatives to custody. An offender should not be deprived of liberty, if there are less restrictive sanctions that are appropriate in the circumstances and that are available other than imprisonment. They must be reasonable in the circumstances and consistent with the harm done.

[35] The defence says the sentencing principles can be met with a non-custodial sentence or, alternatively, a period of two months incarceration.

[36] I asked counsel during submissions whether a period of incarceration sends a message to people who would engage in such an offence that a new day has dawned for adults engaging in such a venture. The new day dawns on jail instead of the relatively modest fines that might have been imposed in the past. The new mandatory minimums certainly send the message that fines are to be steep, with no regard to ability to pay.

[37] In considering the request for probation I must say I cannot support such a sentence. In this case rehabilitation in the form of attendance at the Forensic Sexual Behavior Program has been tried in the past but seems to have been less than effective.

[38] This offence brought a fifteen-year-old into the crime as an accomplice. She now has a youth record.

[39] The sentence must reflect deterrence and denunciation and the way to achieve both is by imposition of a carceral sentence.

[40] Mr. Baxter is currently incarcerated serving a 174-day period of custody for an offence under s. 172 CC involving a young person. It has not been argued that he should receive a CSO. In any event, given the related record for which he has served time and his current carceral status, I am ruling that option not legally supported in the circumstances, these being factors clearly relevant to the exercise of my discretion to impose jail time.

Criminal Record:

[41] Mr. Baxter's prior record consists of the aforementioned May 2013 offence under s. 172(1)(b) x two (luring a child under sixteen years), for which he received

90 days intermittent followed by two years' probation- mandatory minimum sentence.

[42] Following commission of the offence before this court, on January 14, 2019, Mr. Baxter pled guilty to a single count s. 172 CC, for which I sentenced him to the mandatory minimum 6 months period of incarceration, reduced to 174 days incarceration after consideration of the few days spent on remand. He also received a lifetime SOIRA order, a s. 161 Order and probation for two years including attendance at a Forensic Sexual Behavior assessment. This conviction, it is acknowledged, post dated the one before me now. It is not relevant for my purposes except insomuch as it sets out the probationary conditions he will be subject to upon his release from custody.

[43] Available primary dispositions include a fine alone, imprisonment alone, a combination of a fine and probation, a combination of imprisonment and probation, or a combination of fine and imprisonment. A suspended sentence or a discharge are not legal sentences for this offence, due to the prescribed minimum punishments.

[44] Balancing the guilty plea, ADHD which renders him challenged in his behaviour coupled with the need to denounce and deter his actions, I conclude that a sentence of two months incarceration is fit and proper in the circumstances. It

will be served consecutive to time being served. This sentence acknowledges that the victim is an adult, not a child, while are the same time recognizing that the fifteen-year-old accomplice is also a victim in this exploitation.

[45] After considering the above noted factors, I find this short period of incarceration is a fit and proper sentence in the circumstances. Six months is much too long, and two months is more in line with the amount of time that will send a strong message of deterrence to anyone who would consider soliciting a vulnerable adult by means of a vulnerable girl accomplice. It takes into account that young people in group homes must be protected from exploitation. It considers a somewhat related record resulting in incarceration that did not act as deterrent for Mr. Baxter, while at the same time acknowledging his frailties regarding the ADHD diagnosis and his mother's explanation as to how it impacts his choices and actions.

[46] In my determination, because it is important to the protect the victims from future contact with Mr. Baxter and to keep him away from the […] group home, I am also imposing a probation order with conditions sought by the Crown.

[47] The one-year period of probation will commence on your release from custody and include the following conditions:

> Keep the peace and be of good behaviour.

> Report to and be under the supervision of a Probation Officer and report to the Probation Office at 136 Exhibition Street, Kentville within 2 days of being released from custody.
>
> Abstain, refrain from having contact or communication, directly or indirectly with [fifteen-year-old] and [eighteen-year old].
>
> Remain/stay away from the provincial group home, […]
>
> Take any assessment, counselling, treatment for sexual offending as may be recommended / directed by your probation officer.

Ancillary Orders:

[48] For the purpose of making a forensic DNA data bank order under s. 487.051, the offence is a secondary designated one. I grant that order.

[49] Pursuant to s. 490.012, where an offender is convicted of this offence, the court may make an order requiring the offender to comply with the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 on application of the crown prosecutor. I grant that order for life.

The Honourable Judge Ronda van der Hoek