

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Carson*, 2021 NSPC 1

Date: 20210105

Docket: 8271278

Registry: Bridgewater

Between:

R.

v.

Glen Carson

Restriction on Publication: s. 486.4 *Criminal Code*

SENTENCING DECISION – SEXUAL ASSAULT

Judge:	The Honourable Judge Ronda van der Hoek,
Heard:	April 18, 2019, May 13, 2019, July 4, 2019, November 13, 2019, November 29, 2019 and October 14 and 29, 2020 in Bridgewater, Nova Scotia
Decision	January 5, 2021
Charge:	s. 271 <i>Criminal Code</i>
Counsel:	Roland Levesque, for the Crown Michael Powers, Q.C., for the Defendant

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273,

279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

- **(ii)** any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
- **(b)** two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

By the Court:

Overview:

[1] Mr. Carson is before the Court for sentencing following a finding of guilt to one count of sexual assault contrary to section 271 of the *Criminal Code of Canada*. The Crown elected to proceed summarily. The parties recommend jointly a conditional sentence order followed by a period of probation and various ancillary orders.

Facts:

[2] Following four days of trial, I found Mr. Carson guilty of sexual assault. In summary, the victim was a female waitress working at Mr. Carson's Bridgewater restaurant for a few short weeks before the assault. While she was drying the silver, Mr. Carson came up behind her purporting to reach above her for a glass and grabbed her buttock. She was shocked and yelled out. He asked her, "What are you going to do, call the Labour Board?" She replied, "It is not the Labour Board you need to worry about, it's my husband".

[3] She quit the job the next day and reported the incident to the police.

Personal Circumstances of Mr. Carson:

[4] A Pre-sentence Report (PSR) was prepared by the Ministry of the Solicitor General (Ontario). It sets out a rather positive summary of continuous employment, family support and general resilience.

[5] Mr. Carson comes before the Court with a criminal record arising from the sentence imposed earlier today by His Honour Judge Scovil, who also convicted Mr. Carson of a somewhat similar offence involving the same restaurant and a different female employee.

[6] The PSR advises that Mr. Carson “sees himself as the victim of false allegations and spent quite a bit of time and energy attempting to convince the writer of his innocence as well as his efforts to discredit the victim,... [h]e is adamant in his denial of any wrongdoing”. (Page 6 PSR)

[7] Mr. Carson is 58 years old and gainfully employed. He is not addicted to any substance and maintains relatively good physical health, despite complications arising from the matter before the Court. He relocated following the closure of the restaurant, and no doubt the closure was a result of the offence and perhaps its notoriety in the community. As such, the Court infers some degree of financial impact resulted for Mr. Carson.

[8] Along with typical conditions, the PSR writer also recommended a donation of \$1,200.00 to be split evenly among three sexual assault centres in Nova Scotia. Such a condition is not, to my knowledge, typically imposed in this province, however the Court will consider same in future sentencing decisions as it makes good sense in the context of the purposes and principles of sentencing offenders found guilty of committing sexual assault. That said, I will not consider it in this case as it did not form part of the joint recommendation.

[9] I am aware that the Court must give proper weight in sentencing to the offender's underlying attitudes because they are highly relevant to assessing his moral blameworthiness and applying the sentencing objective of denunciation. Since Mr. Carson does not acknowledge committing the offence, the Court cannot assess his attitude toward women and the offence. That said, it is surely now beyond dispute that sexual assault is clearly recognized as gender violence. (see: *Putting Trials on Trial: Sexual Assault and Failure of the Legal Profession*, Montreal: McGill-Queen's University Press, 2018 and *Capacity to Consent to Sexual Risk* (2014), 17 New Crim. L. Rev. 103, both by Professor Elaine Craig)

Victim Impact Statement:

[10] The victim filed a statement that both lawyers agree properly conformed to the rules set out for such documents. (See: *R. v. B.P.*, 2015 NSPC 34)

[11] Her statement sets out the various impacts the offence has had: she and her husband had to file bankruptcy after she left her employment; she is in therapy and nervous in public fearing she may see Mr. Carson; she suffers extreme anxiety, has nightmares and suffers depression; and she does not feel like she is the same person she was before the offence.

[12] Hearing her testify at trial, I expect that she will heal from this situation and this confident, well-spoken, woman will go on with her life not blaming herself in any manner for this offence perpetrated against her.

The Law:

Sentencing Principles:

[13] Sentencing takes place in a legal framework. As such, this statutory court looks to the *Criminal Code* for the relevant sentencing provisions found at sections 718, 718.1 and 718.2. Those sections provide the general principles and factors that must be considered in fashioning a sentence that serves to protect the public and contribute to respect for the law and the maintenance of a safe society.

[14] 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.

[15] Section 718.1 says it is a fundamental principle of sentencing that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[16] Section 718.2 requires a sentencing judge to consider the aggravating and mitigating factors relating to the offence or to the offender, and to increase or decrease a sentence accordingly; the principles of parity and proportionality; that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and that 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.

[17] Section 718.2(iii) sets out the aggravating factor- evidence that the offender, in committing the offence, abused a position of authority in relation to the victim.

[18] Sentencing has an overarching goal of promoting the long-term protection of the public. As a result, I must balance the principles and purposes of sentencing and apply them to the facts, arriving at a fit sentence. Fortunately, case law also provides guidance as to how the Court should interpret and balance these principles and how they should be applied to different categories of offences. However, the best means of addressing the principles and attaining the ultimate objective will always depend on the unique circumstances of the case and the offender before the Court. Because of that, it has been consistently recognized that sentencing is a delicate and inherently individualized process (*R. v. Lacasse*, 2015 SCC 64 (CanLII) at para. 1 and *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500 at para. 91-92).

Denunciation and Deterrence:

[19] Over the years, the Supreme Court of Canada has repeatedly stated that denunciation and deterrence must be the primary considerations when sentencing offenders who commit sexually based offences. Doing so recognizes the serious impact this offence has on victims and the abhorrence with which society has come to view it.

Rehabilitation:

[20] Despite the focus on denunciation and deterrence for sexually based crimes, rehabilitation does continue to be a relevant sentencing objective. Such was confirmed by the Supreme Court of Canada in *R. v. Lacasse, supra*, where, in the context of a sentence appeal for the offence of dangerous driving causing death, Wagner, J., writing for a majority, said:

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] The Supreme Court of Canada also provides that the prospect for rehabilitation really turns on “whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse” *R. v. Proulx*, 2000 SCC 5, at para. 113.

[22] In the context of a finding of guilt as opposed to a guilty plea, recognizing there is no need for the offender to acknowledge guilt, I must nonetheless consider whether rehabilitation has a role to play in this sentence. As stated in the PSR, Mr. Carson does not acknowledge committing the offence and has not availed himself

of counselling directly related to obtaining insight into his offending behaviour. Not unlike other cases where an offender does not acknowledge commission of an offence, he has not demonstrated good prospects for rehabilitation (*R. v. Solorzano Sanclemente*, 2019 ONSC 695). Therefore, I cannot say whether he has good prospects for rehabilitation should I consider ordering him to participate in sexual offender focused services offered through probation services. However, there is a very good chance such a program would provide insight and aid his understanding of sexual offences.

Proportionality:

[23] The principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender requires the Court to consider the gravity of the offence. Binding authority confirms that this proportionality principle is the dominant principle driving the determination of sentence, (see *R. v. Malmo-Levine*, [2000] S.C.C.A. No. 361; *R. v. Proulx*, *supra*; and *R. v. Nasogaluak*, [2010] 1 S.C.R. 206).

[24] “Gravity of the offence” is a concept directed to what the offender did wrong. It includes two considerations: (1) the harm or likely harm to the victim; and (2) the harm or likely harm to society and its values. Sexual assault committed

in a workplace by an employer on an employee is a serious offence. That the sexually assaultive behaviour occurred while she was actually working coupled with the minimizing comments made to her afterwards, renders it fairly grave. Employees are in a position of weakness as it relates to an employer and the actions of Mr. Carson took advantage of his position of authority. We do not live in a television comedy world such as “Alice” where slapping a waitress on the buttocks was seen as a joke rather than the demeaning sexual assault that it is.

[25] The Crown proceeded summarily and as a result the maximum available sentence is eighteen months’ incarceration.

[26] Considering all the facts and circumstances of the case, I find that Mr. Carson abused a position of authority and his degree of responsibility or moral blameworthiness for his actions is high. I cannot but conclude that his actions were designed to humiliate a person he perceived as a helpless female employee. The victim proved she was underestimated when she chose to report the offence.

Aggravating and Mitigating Factors:

[27] Section 718.2 CC requires the Court to consider aggravating and mitigating factors relating to the offence or to the offender. I find as follows:

Aggravating Factors:

- The victim was an employee of Mr. Carson’s restaurant,
- His comments after the assault were intimidating,
- He abused a position of power as owner and manager,
- There was real emotional and psychological impact on the victim, as set out in the VIS; and
- The offence was opportunistic in nature.

Mitigating Factors:

- He is without a criminal record and
- He benefits from supportive family and community.

[28] I recognize that Mr. Carson cannot be penalized for insisting on his right to a trial, but he does not receive the benefit of a reduced sentence because of a guilty plea. Instead this is rendered a neutral factor. A court cannot punish a person for maintaining their innocence. People must be permitted to assert their *Charter* protected right to make full answer and defence, “unencumbered by fear of future implications” at sentencing. (*R. v. Reeve*, 2020 ONCA 381 (CanLII))

The Principle of Parity/ Range of Sentence:

[29] Section 718.2 CC requires the Court to consider the principle of parity which involves examining the range of sentences imposed on others similarly situated who commit this offence. Sentencing ranges are equally important as they are intended to encourage greater consistency between sentences imposed and engender respect for the parity principle. Ranges are, however, “guidelines rather than hard and fast rules” (*R. v. Nasogaluak*, 2010 SCC 6 (CanLII) at para. 44). This was recognized in our province by Scanlan, J.A. in *Oickle*, 2015 NSCA 87, at para. 40 when he said, “it is not appropriate to set a bottom range or a top range for a particular offence without regard for the offender or other sentencing principles”.

[30] The Crown helpfully provided 16 cases to assist in setting a range - seven resulted in a suspended sentence and probation, three in CSOs, and six in incarceration. While I have read them all, I agree that the two that are relative comparators are *R. v. Giovanelli*, 2017 ONCJ 408 and *R. v. JP.*, 2017 NSPC 54.

[31] Mr. Giovanelli was sentenced to 9 months incarceration for sexual assault on a female employee at a work party where he isolated her, kissed her, touched her breast and inserted his finger in her vagina.

[32] That assault was more serious than the one before me, however the principles regarding abuse of a position of authority has resonance. In rejecting a suspended sentence, the Court said, “I must ensure however that a clear message is sent to employers who would be tempted to engage in unwanted sexual acts with employees”. Because Mr. Giovanelli worked very long hours and a CSO would have had little impact on him, the Court imposed a custodial sentence.

[33] *JP* involved a housekeeper and a motel supervisor. *JP* was found guilty of two incidents involving putting his hand under the employee’s skirt in an effort to pull down her tights, and kissing and fondling her breasts. In rejecting a request for a discharge Chisholm J. considered the position of authority, power imbalance, *JP*’s failure to fully appreciate the seriousness of his behaviour, that a woman’s sexual integrity must be respected, and finally concluded because “a noncustodial sentence would fail to adequately address the need for denunciation and deterrence...[t]he sentence must be imprisonment”. (Paras. 54, 65, 66 and 68)

[34] While Mr. Carson’s actions were not as grave as that of *JP*, he was the owner of the business and not merely a supervisor. Based on the review of the cases, I accept that a conditional sentence is within the range for an offence such as this in these circumstances.

Violence against Women:

[35] The Court must consider violence against women, confirmed in *R. v. Stone* [1999] 2 S.C.R. 290 (S.C.C.). At para. 239:

It is incumbent on the judiciary to bring the law into harmony with prevailing social values. This is also true with regard to sentencing. To this end, in *M. (C.A.)*, *supra*, Lamer C.J. stated, at para. 81:

The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. ... Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.
[emphasis in original.]

[36] The Supreme Court of Canada clearly requires an evolving approach to the law reflecting changing social values regarding the status between men and women: see *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *R. v. Lavallee*, [1990] 1 S.C.R. 852; *R. v. Seaboyer*, [1991] 2 S.C.R. 577 and others.

[37] After considering the aggravating and mitigating features of this offence, the circumstances of Mr. Carson, and the betrayal and violation of the victim's bodily integrity, as well as the impact these offences have on society and workplaces, I am able to conclude that a CSO followed by probation meets the pressing need for

denunciation and deterrence in this case. A CSO properly considers the mitigating factors as well as Mr. Carson's personal circumstances, balances deterrence and denunciation, and meets the sentencing objectives. That he will serve the sentence outside this province should bring comfort to the victim.

How the Sentence will be Served:

[38] I was asked to impose a four month CSO to be served consecutively to the one imposed this morning by Judge Scovil. I find I have the authority to so order. There will also be a six month period of probation that will be served concurrent to the order of probation imposed by His Honour this morning.

[39] Mr. Carson, the Court sentences you to imprisonment for four months and is satisfied that your serving the sentence in the community will not endanger its safety. You shall serve the sentence in the community under the following conditions:

1. Keep the peace and be of good behaviour;
2. Appear before the Court when required to do so by the Court;

3. Report to a supervisor at 99 High Street, Bridgewater on or before September 7, 2021 and as required and in the manner directed by the supervisor or someone acting in his/her stead;
4. Remain within the Province of Nova Scotia unless written permission to go outside the Province is obtained from the Court or the supervisor; and
5. notify promptly the Court or the supervisor in advance of any change of name or address, and promptly notify the Court or the supervisor of any change of employment or occupation.

In addition, you shall:

1. Attend for assessment, counselling and treatment as directed by your supervisor.
2. Participate in and co-operate with any assessment, counselling or program directed by your supervisor.
3. Have no direct or indirect contact or communication with the victim except through a lawyer.
4. House Arrest: You are to abide by house arrest, meaning you will remain in your residence at all times. For the purpose of this Order,

“Residence” is defined as the dwelling house located at [address], and surrounding lands within 10 to 20 meters of the dwelling.

The only exceptions to the house arrest are as follows:

1. When at regularly scheduled employment, which your supervisor is aware of in advance, and travelling to and from that employment by a direct route;
2. When dealing with a medical emergency or medical appointment involving you or a member of your household, and travelling to and from by a direct route;
3. When attending a scheduled appointment with your lawyer or a supervisor or a probation officer, and travelling to and from by a direct route;
4. When attending a counselling appointment, a treatment program or a meeting of Alcoholics Anonymous or Narcotics Anonymous, at the direction of or with the permission of your supervisor, and travelling to and from by a direct route;
5. For a period of 4 consecutive hours per week, approved in advance by your supervisor, for the purpose of attending to personal needs.

6. Prove compliance with the house arrest condition by presenting yourself at the entrance of your residence or answering the telephone should your supervisor, a peace officer, or any other authorized personnel attend at your residence or call you on the telephone to check on your compliance.

[40] You will also serve a six month period of probation to run concurrently to the one imposed by Judge Scovil this morning, with the following conditions:

1. Report to a Probation Officer at 99 High Street, Bridgewater, Nova Scotia, (543-4721) within 2 days from the date of the expiration of your sentence of imprisonment and thereafter as directed by your Probation Officer.
2. Have no direct or indirect contact or communication with the victim, except through a lawyer.
3. Attend for assessment, counselling or a program as directed by your probation officer.
4. Participate in and co-operate with any assessment, counselling or program directed by your probation officer, and pay the cost or a portion of the cost as directed by your probation officer.

[41] Mr. Carson this sentence takes into account your previous unblemished record. Such a sentence will hopefully deter you and others from committing this offence.

[42] There will also be the requested ancillary orders: a SOIRA order for life and a DNA order (primary designated).

Judgment accordingly.

van der Hoek J.