PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. X. J*, 2022 NSPC 27

Date: 20220725
Docket: 8381148
Registry: Truro

Between:

Her Majesty the Queen

v.

X.J.

Restriction on Publication:
No one shall publish the name of a young person if it would identify the young person as a young person dealt with under this Act—s. 110 Youth Criminal Justice Act

Judge:	The Honourable Judge Bégin,
Heard:	April 6, 2021 in Truro, Nova Scotia September 21, 2021 in Truro, Nova Scotia
Decision	July 25, 2022
Charge:	s.151 Criminal Code
Counsel:	Thomas Kayter, for the Crown Attorney Nic Hoehne, for the Defendent

Ban on Publication:

A Ban on Publication of the content of this file has been placed subject to the following conditions:

Section 486.4 & 486.5: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way.

By the Court:

[1] This is the sentencing of X.J., now almost 20 years of age, but he was between 15-16 ½ years of age at the time of the offenses between September 2017 and June 2019. His repeated victim, K.R., would have been between 5 ½ and 7 ½ years of age.

[2] X.J. is being sentenced for one count of touching K.R. for a sexual purpose, contrary to section 151 of the Criminal Code. There is a stay for the s. 271 offense as the same facts ground both offenses. The Crown proceeded by Indictment.

[3] It is important to point out that the sexual contact covers a broad spectrum of illegal behaviour that is sexual in nature that took place over an extended period of time. The illegal sexual activity included various and repeated forms of sexual touching, and also sexual activity at the highest end of the spectrum, sexual intercourse. This was a very violent offense, that took place over an extended period of time.

[4] The facts were summarized in my decision after trial. There was grooming, and an escalation of repeated sexual activity over time, from watching pornography, kissing, sexual touching, oral sex, X.J. counselling K.R. to use objects to practice penetrating herself vaginally, and eventually vaginal penetration by X.J. on K.R.

[5] The Crown is seeking the maximum punishment permissible of 16 months in custody followed by 8 months of community supervision.

[6] Defence counsel is recommending a period of Probation for 24 months.

<u>Youth Sentences</u>

[7] S. 3 of the YCJA is as follows:

> 3 (1) The following principles apply in this Act:
>
> (a) the youth criminal justice system is intended to protect the public by

(i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person,
(ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and
(iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour;

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,
(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,
(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,
(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and
(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

(c) within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should

(i) reinforce respect for societal values,
(ii) encourage the repair of harm done to victims and the community,
(iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and
(iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements; and

> (d) special considerations apply in respect of proceedings against young persons and, in particular,
>
> (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms,
> (ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system,
> (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and
> (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

[8] Sections 38 and 39 of the YCJA lay out the principles of sentencing for young persons:

> 38 (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.
>
> Sentencing principles
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> (2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in subsection 3 and the following principles:
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> (a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances;
> (b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;
(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
(e) subject to paragraph (c), the sentence must
(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community;
(e.1) if this Act provides that a youth justice court may impose conditions as part of the sentence, a condition may be imposed only if
(i) the imposition of the condition is necessary to achieve the purpose set out in subsection 38(1),
(ii) the young person will reasonably be able to comply with the condition, and
(iii) the condition is not used as a substitute for appropriate child protection, mental health or other social measures; and
(f) subject to paragraph (c), the sentence may have the following objectives:
(i) to denounce unlawful conduct, and
(ii) to deter the young person from committing offences.

Factors to be considered

(3) In determining a youth sentence, the youth justice court shall take into account
(a) the degree of participation by the young person in the commission of the offence;
(b) the harm done to victims and whether it was intentional or reasonably foreseeable;
(c) any reparation made by the young person to the victim or the community;
(d) the time spent in detention by the young person as a result of the offence;

(e) the previous findings of guilt of the young person; and
(f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

Committal to custody

39 (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless
(a) the young person has committed a violent offence;
(b) the young person has previously been found guilty of an offence under section 137 in relation to more than one sentence and, if the court is imposing a sentence for an offence under subsections 145(2) to (5) of the Criminal Code or section 137, the young person caused harm, or a risk of harm, to the safety of the public in committing that offence;
(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985; or
(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

Alternatives to custody

(2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

Factors to be considered

> (3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to
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> (a) the alternatives to custody that are available;
>
> (b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and
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> (c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.
>
> Imposition of same sentence
>
> (4) The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.

[9] Clearly, the YCJA intends that custody be the last resort after all other options are considered, but custody is one of the sentencing options for youth who are convicted of a violent offense, and that the imposition of a sentence other than custody would be inconsistent with s. 38 of the YCJA.

[10] There are 18 possible sentences under s. 42(2) of the *Youth Criminal Justice Act.* The range is from a judicial reprimand to an Intensive Rehabilitative Custody and Supervision Order.

[11] In ***R. v. B.W.P.*** **1 SCR 941 (2006)** the Supreme Court of Canada held that "specific deterrence" and "general deterrence" were **not** sentencing principles under the YCJA.

[12] And in ***R. v. C.T.*** **2006 MBCA 15 (Man. C.A.)** the Manitoba Court of Appeal stated that denunciation was **not** a sentencing principle applicable to youth.

[13] "Rehabilitation", "meaningful consequences" and "accountability" appear to be the guiding principles in youth sentences, along with proportionality. These principles do not exclude custody as sometimes custody is required for the youth to be rehabilitated, or to fully understand accountability and meaningful consequences.

[14] Proportionality is a fundamental principle of sentencing. It takes into account the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect the seriousness

of the criminal conduct. A disproportionate sanction can never be a just sanction. Aggravating and mitigating factors, and the principles of parity, totality and restraint are also important principles that must be engaged in the sentencing process.

[15] An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[16] With regard to the overall sentencing process, I note the words of Chief Justice Lamer in ***R. v. C.A.M.*** [1996] SCJ No 28 at paras 91 & 92:

> 91. …The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offense, while at all times taking into account the needs and current conditions of and in the community. The discretion of the sentencing judge should thus not be interfered with lightly.
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> 92. …It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime…Sentencing is an inherently individualized process and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offense should be expected to vary to some degree across various communities and regions of this country as the 'just and appropriate' mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred."

[17] In a rational system of sentencing the respective importance of "rehabilitation", "meaningful consequences" and "accountability" will vary according to the nature of the crime and the circumstances of the offender. There is no easy test that a judge can apply in weighing these factors. Much will depend on the judgment and wisdom of sentencing judges whom Parliament has vested with considerable discretion in making these determinations.

[18] The Supreme Court of Canada in ***R. v. Lloyd*** 2016 SCC 13 confirmed that a judge's determination of the appropriate sentence is entitled to deference. The Supreme Court also stated in ***Lloyd*** that appellate courts cannot alter a trial judge's sentence unless it is demonstrably unfit, and that an appellate court may not

intervene simply because it would have weighed the relevant factors considered by the sentencing judge differently.

[19] As noted in ***R. v. Suter*** 2018 SCC 34, trial judges have a "broad discretion to impose the sentence they consider appropriate within the limits established by law."

[20] In ***R. v. Lacasse*** 2015 SCC 64, the Supreme Court of Canada commented on the deference that is to be given to a trial judge's discretion in determining the appropriate sentence by noting at paragraph 48:

> First, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. Second, the sentencing judge is usually familiar with the circumstances in the district where he or she sits and therefore with the particular needs of the community in which the crime was committed.

[21] In ***R. v. Fifield*** [1978] NSJ 42 the NS Court of Appeal stated at para 11 that "We must constantly remind ourselves that sentencing to be an effective societal instrument must be flexible and imaginative. We must guard against using…the cookie cutter approach."

[22] I have reviewed the cases provided by counsel for my consideration. As frequently noted by counsel and the Courts, it is almost impossible to find cases that are similar to the case before the Court that can act as a strong precedent. It is even more difficult to attempt to find cases with regional parity.

[23] I am, obviously, well aware of prior sentencings by myself, and I am also aware of which cases would in fact have parity. My case of ***R. v. J.K.*** (unreported) is not relevant as that involved an initially consensual sexual relationship that ended up with the accused ignoring the ground rules previously agreed upon. Equally, the ***R. v. M.M.*** case is not relevant as that also involved a single occasion of sexual assault, this time with a sleeping victim.

[24] This was a very violent offense. This position is supported by the Manitoba Court of Appeal in ***R. v. B.S.*** **[2017] M.J. No. 290, 2017 MBCA 102 (Man. C.A.)** where the Manitoba Court of Appeal found that the trial judge had erred in finding there was no 'serious bodily harm' in the absence of expert evidence and in imposing a deferred custody and supervision order. The offense was a major sexual assault, forced sexual intercourse, while the victim was sleeping. The sentence

appeal was allowed, and the sentence was varied to a five-month custody and supervision order.

[25] This is also confirmed by the Nova Scotia Court of Appeal in ***R. v. M.M.*** **2022 NSCA 46**.

[26] Further, the recent ***Friesen*** case from our Supreme Court has emphasized the serious, long-lasting, and pervasive damage inflicted on young people who are sexual assaulted. ***Friesen*** was a case dealing with an adult offender, but the Court focused on the long-term harm inflicted on victims who are children. K.R. would have been 5 ½ to 7 ½ years of age at the time of the sexual attacks on her by X.J. All courts have been directed by the Supreme Court of Canada to deal with these types of cases very seriously. This reference to ***Friesen*** is not intended to be a reference to a greater sentence, but simply as a reminder of the long-term harm of sexual abuse on young children.

[27] This was a sexual interference/assault that was at the high end of the sexual assault spectrum, that occurred repeatedly over an extended period of time, and it was a sexual assault against a very young person.

Victim Impact Statements

[28] K.R. filed a Victim Impact Statement. It is very brief. K.R. is only 10 years old today. Reference to the ***Friesen*** case helps to guide this Court on the long-term impacts that X.J.'s actions will have on her and on her family.

Pre-Sentence Report

[29] The Pre-Sentence Report was dated March 1, 2022. It describes a 19-year-old who is considering a career in the trades once these legal matters are concluded.

[30] X.J. had an unremarkable childhood, and he did not suffer abuse inside or outside of the home. No traumatic events impacted his life. He notes no mental health concerns.

[31] X.J. does not accept responsibility. He maintains his innocence, as is his right.

I.W.K. Forensic Assessment Report dated February 28, 2022

[32] The report indicates that X.J. likes to follow the law, but his conviction for serious sexual violence on a very young victim over a period of almost 2 years would discredit this statement by X.J.

[33] There is a note in the report that X.J. was suspended from school in November 2016 for "sexual harassment."

[34] There are several notes in the report as to how X.J.'s mother provided clearly inaccurate information in the hopes of shielding X.J. in this assessment. His mother also tells the assessors that she would not push X.J. in getting the treatment targeting inappropriate sexual behaviour that he needed. **This is troubling to the Court, and it clearly affects any hope that one would have for meaningful rehabilitation for X.J. in the community.**

[35] The report indicates that X.J. would benefit from receiving information on healthy relationships and sexuality, along with setting boundaries.

[36] Of concern to the Court is the note at page 22 that the risk estimation relating to X.J. by the assessor may not be completely reliable, and then at page 29 the assessor goes on to state that the future risk is low. On what basis can this risk assessment be reliable?

[37] This Court is deeply troubled by the assessor stating at page 26 that the offenses by X.J. "did not appear to involve excessive aggression." Perhaps X.J. was not 'aggressive' towards K.R., but he certainly committed a violent sexual offense that involve grooming over a lengthy period of time. The sexual act does not have to be aggressive to have long-term consequences on the victim.

[38] The report notes that X.J. does not take responsibility for the offenses, and that he showed limited remorse and guilt for his offending behaviour. The lack of remorse by X.J. brings into question the hope of meaningful rehabilitation for X.J.

[39] The report concludes by stating that seeing as how the future risk by X.J. is low that he could be effectively managed in the community. This is by the same assessor who previously states that the risk assessment is not reliable.

[40] Overall, the Forensic Assessment Report is found by this Court to be unreliable considering the contradictions and inconsistencies in the report.

I.W.K. Report dated March 2, 2022

[41] The I.W.K. report does not note any mental health disorders, and it notes a very low risk for recidivism.

Submissions by Defence Counsel

[42] Defence counsel points out that X.J. is a first-time offender. Defence also points out that if custody is not granted that X.J. would be able to keep working.

[43] Defence also submits that the Court should focus on rehabilitation of X.J. and that the assessment reports would be helpful for X.J. when he seeks counselling. Custody would delay any counselling for X.J.

[44] There was no mention of any counselling steps being taken by X.J. to date.

Case Law

[45] The Crown is seeking the maximum punishment permissible of 16 months in custody followed by 8 months of community supervision.

[46] The following cases have been referred to by counsel, and reviewed by the Court:

***R. v. B.R.S.* 2020 ABCA 29**

***R. v. J.D.* 2021 PESC 8**

***R. v. Z.L.* 2021 NWTTC 17**

***R. v. J.J.* ONCJ 112**

***R. v. M.A.* 2020 SKPC 13**

***R v. S.C.Y.* ABPC 53**

[47] The Court has also considered the case of ***R. v. M.M.* 2022 NSCA 46** which I understand is being appealed to the Supreme Court of Canada.

Decision

[48] X.J., please stand.

[49] There will be a 2-year s. 109 firearms prohibition order from the date you were found guilty which was November 15, 2021.

[50] There will be a DNA Order.

[51] What you did to K.R. was a "major sexual assault." Your actions will no doubt have long term consequences for K.R. She will continue to suffer long after you have completed serving whatever sentence I impose.

[52] There is a range of available sentences for you under the Youth Criminal Justice Act, and when imposing a sentence for a youth:

(a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances.
    a. An adult would receive a sentence far greater than what is available to you as a youth for this offence.
(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances.
    a. There is little in terms of case law for such a prolonged sexual abuse of a young child by a youth but I do consider the cases of **R. v BRS 2020 ABCA 29** and ***R. v. JD* 2021 PESC 8**, to be somewhat similar.
(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.
    a. Your degree of responsibility is high as the repeated sexual contact took place over a prolonged period and involved grooming and escalation. This was a violent offense.

[53] Further, the sentence must be one that is the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

(a) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society,
    a. you do not have a reliable support network that would ensure that you took the necessary counselling in the community.

(b)promote a sense of responsibility in the young person,
    a. you are not accepting responsibility, and you are showing no remorse for your actions

(c)an acknowledgement of the harm done to victims and the community;

a. K.R. will be suffering from your sexual abuse of her long after you have completed your sentence

[54] The sentence that is imposed may have the following objectives:

(i) to denounce unlawful conduct, and
(ii) (ii) to deter the young person from committing offences.

[55] Your sentence must also take into account:

(a) the degree of participation by the young person in the commission of the offence;
    a. your degree of participation was high. You planned and initiated all of the sexual contact.
(b) the harm done to victims and whether it was intentional or reasonably foreseeable;
    a. the harm to K.R. was high and it will be long-lasting, and the harm to K.R. was foreseeable
(c) any reparation made by the young person to the victim or the community;
    a. no reparations have been made by you. You continue to maintain your innocence.
(d) the time spent in detention by the young person as a result of the offence;
    a. not applicable
(e) the previous findings of guilt of the young person;
    a. not applicable
(f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.
    a. It is aggravating that there were repeated, and escalating, sexual assaults of K.R. By her age K.R. was extremely vulnerable.
    b. It is mitigating that you do not have a prior *YCJA* record.

[56] This court has no confidence that a period of probation, instead of custody, would be beneficial as you have no support network that would ensure your attendance at counselling, you deny responsibility, and you have taken no steps to date.

[57] In consideration of the factors just listed, and to ensure ‘meaningful consequences’ for your repeated, and escalating, violent sexual acts, that included

vaginal penetration, which caused ‘serious bodily harm’ to K.R., the imposition of a sentence other than custody would be inconsistent with s. 38 of the YCJA.

[58] I am sentencing you to 16 months Custody followed by 8 months Community Supervision. You are ordered to serve 16 months in custody, to be followed by 8 to be served under supervision in the community subject to conditions which will be explained to you.

[59] If you breach any of the conditions while you are under supervision in the community, you may be brought back into custody and required to serve the rest of the second period in custody as well.

[60] You should also be aware that, under other provisions of the *Youth Criminal Justice Act*, a court could require you to serve the second period in custody as well.

[61] The periods in custody and under supervision in the community may be changed if you are or become subject to another sentence.

Judge Alain Bégin,
JPC