PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Fitzgerald*, 2014 NSPC 1

Date: 20140107
Docket: 2533085
Registry: Pictou

Between:

Her Majesty the Queen

v.

Terry Leonard George Fitzgerald

SENTENCING DECISION

Restriction on publication: Any information that could identify the complainant A.B., shall not be published in any document or broadcast or transmitted in any way.

Judge: The Honourable Judge Del W. Atwood

Heard: 20 December 2013; 7 January 2014

Charge: Section 151 of the *Criminal Code of Canada*

Counsel: Patrick Young and Andrew O'Blenis, for the Nova Scotia Public Prosecution Service.
Rob Sutherland for Terry Leonard George Fitzgerald

By the Court:

Facts supporting the charge

[1] I wish to note at the outset of this sentencing decision that there is an order in effect under s. 486.4 of the *Code* prohibiting the publication of any information that might identify the complainant in this case.

Facts

[2] Terry Leonard George Fitzgerald is before the court for sentencing in relation to a charge under section 151 of the *Criminal Code*. The following facts supporting the charge were read into the record by the prosecution in accordance with ss. 723 and 724 of the *Code*, and were admitted by defence counsel.[1] Mr. Fitzgerald had sexual intercourse on one occasion with A.B., a fourteen-year-old female acquaintance. A.B. and her younger sister had run away from her aunt's home and went to see Mr. Fitzgerald looking for a place to stay; Mr. Fitzgerald took them in. He then convinced A.B. to have sexual intercourse with him. At some point, while A.B. and Mr. Fitzgerald were still in bed together, the aunt arrived and sized up the situation. A.B. was taken to hospital in order to have a

[1]There was one disputed fact which the prosecution did not seek to prove under the provisions of sub-s. 724(3). That disputed fact is excluded entirely from my summary of the evidence, and it is not relied upon in any way in this decision.

SANE-kit examination done; while there, A.B. admitted having sexual intercourse with Mr. Fitzgerald. A.B. said that she had not been forced into it, and that it was the first time she and the offender had ever had intercourse. Mr. Fitzgerald denied initially having any sexual relations with A.B.; yes, they had gone to bed together, but he had improvised a "divider" between them. However, the offender ultimately cooperated with police and owned up to what he had done.

Chronology of sentencing-related proceedings

[3] The prosecution proceeded by indictment; the offender elected to have the charge dealt with in this court, and pleaded guilty. Defence counsel brought on a *Charter* application to have the indictable election quashed and have the matter proceed summarily. I heard that application on 8 November 2013 and dismissed it. The court heard sentencing submissions on 20 December 2013; the prosecution sought a federal term of imprisonment of two to two-and-one-half years. Defence counsel sought a term of twelve to twenty-four months. I reserved my decision until today.

Child victims

[4] Sub-para. 718.2(a)(iii) of the *Code* makes it statutorily aggravating for an offender to abuse a position of trust. I am unable to conclude beyond a reasonable doubt–and that is the standard of proof required by para. 724(3)(e) of the *Code*–that Mr. Fitzgerald stood in a position of trust or authority toward A.B.: he exercised no lawful authority over her. Yes, A.B. and her sister were invited by the offender into his home, and, yes, there is an age differential of about twenty-two years; however, it was they who went to Mr. Fitzgerald looking for a place to spend the night, and the offender had intercourse with A.B. on that one occasion only. While the offender and A.B. were acquainted with each other, there was no evidence before the court describing how or when this had arisen. Applying the principles in *R. v. Audet*[2] , it is clear to me that being in a position of trust toward a young person means more than being a casual, one-night host. I recognize that there are varying degrees of trust, from slight to substantial; however, it is simply the case that I find the burden of proving a trust relationship not to have been discharged.

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

[5] This does not end the analysis of statutorily aggravating factors, as the *Code* recognizes one more that is a central sentencing value in this case:

> 718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
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> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> . . .
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
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> . . .
> shall be deemed to be [an aggravating circumstance] . . . .

[6] These provisions codify what courts in this country have followed for generations. As was stated by my colleague Campbell J.P.C. in *R. v. E.M.W.*, a sentencing decision upheld by our Court of Appeal:

> Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment

> of a child in this way is an attempt to deny her basic human dignity. In the eyes of the adult the child is reduced to being a nameless "thing". She is robbed of her childhood and her innocence. She has no choice in the matter. She is simply used. She has becomes a means to an end.[3]

[7] In *R. v. S.C.C.,* my colleague Tufts J.P.C. listed a number of correlative factors I find useful in assessing the level of seriousness of cases involving child sexual abuse:

> (1) the degree of invasiveness or the nature of the assaults and the variety of the acts;
> (2) the presence of other form of physical violence beyond the abuse itself;
> (3) the presence of threats or other psychological forms of manipulation;
> (4) the age of the victim;
> (5) other forms of vulnerability of the victim besides the parent/child relationship;
> (6) the number of incidents and the period of time over which the abuse occurred;
> (7) the impact on the victim;
> (8) the risk to re-offend.[4]

[8] Applying these factors to Mr. Mr. Fitzgerald's crime, I observe that this offence involved sexual intercourse with a fourteen-year-old female runaway.

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[3]2009 NSPC 65 *aff'd.* 2011 NSCA 87.

[4]2004 NSPC 41 at para. 16.

While the offender did not use violence or threats of violence to convince A.B. to have intercourse with him, and while there was only one proven act of intercourse, the fact is that A.B. was a minor, incapable of giving a valid consent–as set out in s. 150.1 of the *Code*–and was in need of shelter, thus vulnerable to sexual depredation. I recognize that Mr. Fitzgerald's actions were opportunistic, rather than planned and calculated, and there is no evidence that A.B. was groomed over a period of time. However, as I stated in *R. v. Layes*, there is no appreciable difference in the risk presented to the protection and safety of the public between, on the one hand, a sexual predator who stalks and plans his attacks, and, on the other, the predator who seizes the moment and victimizes a child sexually when the opportunity presents itself.[5]

[9] A.B. did not seek to file a victim-impact statement. Sentencing courts may–indeed, in some cases, must–draw reasonable inferences regarding the impact of proven crimes upon victims.[6] I conclude that the impact of Mr. Fitzgerald's predatory acts inflicted upon A.B. is or will be profound. It is well within the common experience of the court that victims of sexually exploitative crimes will

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[5]2012 NSPC 54 at para. 14.

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

often experience overwhelming feelings of shame and regret which will account fully for their reticence in the sentencing process. Applying the principles set out in *R. v. R.D.S.*, I am satisfied that this is the sort of thing that, as a judge, I am well entitled to "know".[7] It might take years before the full weight of the abuse inflicted on A.B.might be felt; but of the high level of victim impact, I have absolutely no doubt.

Range of sentence

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

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

[7][1997] 3 S .C .R. 484.

> offences committed in similar circumstances ..." per MacEachern, C.J.B.C. in *R. v. Mafi* (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.[8]

[11] Section 151 of the *Code* –as it stood at the time of the commission of this offence– provides as follows:

> 151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) . . . .
>
> R.S., 1985, c. C-46, s. 151; R.S., 1985, c. 19 (3rd Supp.), s. 1; 2005, c. 32, s. 3; 2008, c. 6, s. 54; 2012, c. 1, s. 11.

[12] As the statute prescribes a minimum penalty of imprisonment, Mr. Fitzgerald is not eligible for a conditional sentence.

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[8] 2005 NSCA 13 at para. 26; see also *W. (E.M.), supra,* note 2 at para. 29, and *R. v. N. (A.)*, 2011 NSCA 21 at para. 34.

[13] The submissions of counsel describe a range of 12-months' imprisonment to a two-and-one-half-year penitentiary term. My own review of reported cases–necessary to assess sentence parity in accordance with para. 718.2(b) of the *Code*– reveals a very wide spectrum:

- Six years global for sexual offences, including digital penetration and attempted but unsuccessful intercourse with the offender's stepdaughter, committed over time while the victim was 10 to 14 years old;[9]

- Five years for various sexual assaults including digital penetration, but not intercourse, over a period of years on the offender's stepdaughter;[10]

- Two federal terms of three years each for indecent assault and gross indecency without intercourse against a child with whom the offender stood *in loco parentis*;[11]

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[9] *R. v. J.B.C.*, 2010 NSSC 28 at para. 24.

[10] *R. v. D.B.S.*, [2000] N.S.J. No. 172.

[11] *R. v. R.H.*, 2005 NSSC 134.

- A three-year penitentiary term for one incident of sexual assault without intercourse upon the offender's four-year-old daughter;[12]

- Another three-year term for multiple occurrences of indecent assault without intercourse upon the offender's daughter over the period of time when she was 8 to 11 years of age; the offender had no criminal record and was described unlikely to reoffend.;[13]

- Two, two-and-one-half year concurrent sentences for two counts of sexual assault and sexual touching, including attempted but unsuccessful intercourse; the victim was the offender's stepdaughter, and the abuse occurred while she was between 15 and 18 years of age.[14]

[14] These are significant sentences imposed even when no intercourse with the victim took place. Admittedly, they all involve high levels of trust; yet, they all

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[12] *R. v. E.E.C.*, 2005 NSSC 3.

[13] *R. v. I. (Part 2)*, [1996] N.S.J. No. 153 (S.C.).

[14] *R. v. N.J.B.*, 2003 NSSC 134.

underscore the high level of denunciation required in the imposition of sentences involving vulnerable child victims.

[15] In *R. v. Oliver*, our Court of Appeal dealt with a prisoner appeal from sentence in a case involving a 19-year-old male who had intercourse on three occasions with a 12-year-old female who was a family friend. The victim was impregnated as a result. The Court of Appeal upheld a 2-year federal sentence, followed by a term of probation. In rendering judgment for the unanimous three-member panel, Saunders J.A. made the following insightful comments in his opinion:

> Very little can be said by way of mitigation. Mr. Oliver's timely guilty plea did save the complainant from painful court appearances. The appellant's intellectual deficits may, arguably, have prompted him to think that the incidents of sexual intercourse were "consensual" (when of course there was never "consent" here, as a matter of law, on account of her age). These features were obviously considered by the trial judge in deciding an appropriate sentence. The appellant has no prior criminal record, but sexual offenders often present in court with an otherwise good character. The appellant says there was no overt violence; however, I question how it could ever be said that multiple rapes of a 12 year old ought not to be characterized as "overtly violent."[15]

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[15] 2007 NSCA 15 at para. 32.

Restraint and mitigation

[16] In reaching a decision on sentence, I shall apply the fundamental principle of proportionality set out in s. 718.1 of the *Code*; I apply also the principle of restraint set out in paras. 718.2(c)-(e) of the Code. The court accepts Mr. Fitzgerald's guilty plea as an authentic expression of remorse, and that is a strong mitigating factor. Mr. Fitzgerald acknowledged the seriousness of his actions when interviewed by the author of the pre-sentence report. Mr. Fitzgerald has sought appropriate public-heath services in advance of today's hearing. The court must not crush the prospect of rehabilitation. I must consider all available sanctions other than imprisonment reasonable in the circumstances. I am mindful that offenders ought not be deprived of their liberty should less restrictive sanctions be appropriate. In reviewing Mr. Fitzgerald's record in the pre-sentence report, I note entries for two counts of assault; while these are classified as offences against the person, in not having been presented with evidence regarding the surrounding circumstances, I am unable to accept the submission made by the prosecution that they are "related offences." The report refers to a youth record which ended in 1994; given the provisions of paras. 119(2)(g)-(j) and sub-s. 119(9) of the *Youth Criminal Justice Act*, that record is not properly before the court, and I do not consider it.

Nevertheless, given the seriousness of this offence, given Mr. Fitzgerald's high degree of responsibility, and given the need to denounce and deter particularly those offences that involve the sexual abuse of minors, I am satisfied that a bare federal sentence of two-years' imprisonment should be imposed. This will be followed by an 18-month term of probation–permissible under para. 731(1)(b) of the Code as the sentence does not exceed two years–with the following conditions:

- keep the peace and be of good behaviour;
- appear before the court when required to do so by the court or your probation officer;
- report to and be under the supervision of the Adult Corrections office, 115 MacLean Street, New Glasgow, Nova Scotia; you must report in person to that office within 48 hours of your release from your sentence of imprisonment, and you must report in person thereafter as directed by your probation officer;
- you must immediately notify your probation officer in person of your address upon your release, and you must immediately notify your probation officer in person of any change of address;
- you must attend in person for any sex offender counselling at the times and places directed by your probation officer;
- you must attend in person for any other counselling at the times and places directed by your probation officer;
- you must notify your probation officer immediately should you miss any counselling appointments;

- you must not be in the presence of any person under the age of 16 years unless a parent or guardian of that child is immediately present at all times; this does not apply to your own children;

- you may have contact with your own children upon complying with the terms and conditions set by the Department of Community Services;

- you must use your best efforts to locate and maintain employment.

- you must not possess or consume any controlled substance as defined in the Controlled Drugs and Substances Act, except according to a valid and current physician's prescription for you.

[13] Pursuant to s. 743.21 of the *Code*, I order and direct that the warrant of committal be endorsed as follows: while in custody, Terry Leonard George Fitzgerald is to have no contact or communication, direct or indirect, with A.B.–and the endorsement is to include the victim's name in full–or with any person under the age of 16 years, except for his own biological children.

[14] There will be a 20-year SOIRA order in accordance with sub-s. 490.013(2) of the *Code*, and a primary-designated-offence-DNA-collection order. The prosecution did not apply for an order under s. 161 of the *Code*. There will be a 12-year/lifetime order under s. 109 of the *Code*, which comes into effect

immediately. As this offence pre-dates the amendments to s. 737 of the Code, there will be a $100.00 victim-surcharge amount, with three years allowed for payment.

ORDERS ACCORDINGLY

J.P.C.