PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. T.M.K.*, 2013 NSPC 134

Date: 20131211
Docket: 2576289, 2563428
Registry: Sydney

Between:

The Queen

v.

T. M. K.

DECISION ON SENTENCE

Judge: The Honourable Judge Jean M. Whalen, JPC

Heard: December 13, 2013, in Sydney, Nova Scotia

Decision: December 13, 2013

Charges Section 271, 145(3) ***Criminal Code***

Counsel: Kathy Pentz, Q.C., for the Crown
Tony Mozvik, for the Defendant

By the Court:

Facts – as recited by the Crown

[1.] The defendant pled guilty to Section 271 which occurred between August 26th to September 26th, 2011. The victim was 13 years old, and the defendant 19 years of age. The defendant was very good friends with the victim's older brother, and in fact was very close to the victim's family.

[2.] The defendant also pled guilty to a Section 145 (January 30, 2013) – breaching a court order.

[3.] The first incident that occurred between the two was on a day when they were having a party at the victim's household in celebration of an achievement of the victim's father. Mr. K. was across the street at his grandmother's house. The victim indicated he was across the street sitting in his car ready to go out. She and a friend went over to speak to him. She had her head in the driver's door and her friend had her head through the passenger's door. They were just talking to him and then her friend left. She was talking with the defendant a few more minutes and when she was leaving he kissed her. She indicated that he kissed her on the

mouth, a fairly short kiss but she was rather taken aback. He subsequently texted her and told her not to tell anyone about the kiss. Texts between the two continued and T. was asking her to hang out with him. He asked the question was anything going to happen between them, to which she responded "I don't know."

[4.] Towards the end of the summer or early September Mr. K. was going to be moving away and he made arrangements to meet the victim. He indicated that he wanted to see her one more time before he went away. She was staying overnight at a friend's house and the defendant picked her up. They were supposedly going for an ice cream, but they drove down a road where the defendant stopped. She indicated he started to kiss her and then felt up underneath her shirt. She said he then began underdoing her belt and started to take her shorts off and asked her if she was okay with it. Her response was that she wasn't sure and he said okay well you can trust me and that it would just stay between the two of them. So then she said okay. He pulled off her pants and she said he put his fingers in her. She said that it took about five minutes and then after a few minutes she said he asked her if she would do something for him. She said she told him she wasn't sure and then he told her again that she could trust him. He took his pants off and had her feel his penis.

[5.] She said that took place for a couple of minutes and then it ended when she basically told him she was done. The incident stopped, the defendant put his pants back on and then drove the victim back to her friend's house.

[6.] She did confide briefly in some of her friends. One of her friends she told in more detail. There were indications from that witness that she was very upset as she relayed what had happened. The friend told her mother about the incident, who then told the victim's mother.

[7.] The victim's mother called the defendant to ask him about it. He denied the incident and said the victim was like a sister to him and said nothing happened.

[8.] Mr. K. was charged and released on an Undertaking and part of that Undertaking was to have no contact with the victim, her family and her brother who was his friend.

[9.] Mr. K. has pled guilty to breaching that Undertaking in Halifax. The victim's brother was walking home from the Liquor Dome and ran into Mr. K. on Argyle Street. The defendant began to engage in derogatory comments; pointing at the victim's brother, making comments like "look at this fucking faggot" and saying "nice leather jacket you fucking faggot".

[10.] The victim did not want to file a victim impact statement. The Crown stated that she gets upset and could not complete a statement. She did tell the Crown she felt "pushed into sex before she was ready" and that she looked up to the defendant and had "a bit of a crush on him."

[11.] The defendant has no previous criminal record.

[12.] A Presentence Report was prepared for the benefit of the court. Mr. K. is 21 years of age and resides in […]. His parents separated when he was young. He has attended St. Mary's University and Nova Scotia Community College – […] Campus. He has plans to begin the […] Diploma.

[13.] He is currently in a relationship with a 24 year old woman. She reported they get along well and he "displays no problem behaviours." She was shocked to learn of the offence. "This was a bad mistake He truly regrets it. It bothers him."

[14.] The offender's mother, Mrs. P. M., reported her son is not a source of concern in her home and he adjusted well after she and his father separated.

[15.] Mrs. M. was shocked to learn about the offence. She stated it was out of character and he had never displayed sexually in appropriate behaviour.

[16.] Mr. K. has a history of gainful employment. He is currently employed full time at a business in Sydney. There are no issues with alcohol or drugs.

[17.] The defendant accepted responsibility for his actions and expressed remorse stating: "I definitely regret it. If I could change it I would."

[18.] **Aggravating Factors**

(1.) The victim is 13 years old. It is a situation of breach of trust in that the defendant was a friend of the victim's older brother, and he took advantage of that relationship when he stated during the offence "You can trust me."

(2.) There were two separate incidents; the second of which was planned.

(3.) The defendant knew it was wrong. He told the victim not to tell anyone. When confronted by the victim's mother he denied it.

(4.) The offences include digital penetration and touching of the defendant's penis.

(5.) The defendant's comments to the victim's brother were homophobic slurs meant to be hurtful and not consistent with remorse.

[19.] **Mitigating Factors**

(1.) The defendant changed his plea to guilty prior to trial eliminating the need for the complainant to testify under what would no doubt be a stressful situation.

(2.) The defendant is a youthful offender. He was 19 years of age at the time of the offence. He is now 21.

(3.) Mr. K. has no criminal record.

[20.] The Crown is seeking a conditional sentence of two months, followed by probation for two years with a condition that the defendant be ordered to attend for a sexual offender assessment, and a DNA order. They are not requesting a SOIRA Order, although as of April 15, 2011 it is mandatory.

[21.] Defence counsel seeks a conditional sentence order of two months, probation for 12 months with no condition for an assessment stating "this is an isolated incident" . Counsel states this is a joint recommendation.

[22.] Following their original submissions, the court disagreed that it was a joint recommendation but if so, disagreed with the sentence. The matter was adjourned to allow counsel to make further submissions.

Issue:

[23.] What is a fit and proper sentence for the defendant?

The Law:

[24.] In ***R. v. S.C.C.*** N.S.P.C. 204 41, Tufts, J., reviews the law relative to sentencing beginning at paragraph 11:

> 11. I will now briefly review the law relative to sentencing. The general principles related to sentencing are included in Section 718 to 718.2 of the Criminal Code. The fundamental purpose of sentencing is to contribute to respect for the law and to the maintenance of a just, peaceful and safe society. This is achieved by the imposition of sanctions which have the following objectives: (a) denunciation; (b) specific and general deterrence; (c) separation of offenders from society where necessary; (d) rehabilitation; (e) reparations to victims; and finally, (f) promotion in offenders of a sense of responsibility and acknowledgement of harm to victims.
>
> 12. Sentencing objectives are achieved by employing three principles of sentencing, namely: Proportionality - Sections 718.1 and 718.2(a), Parity - Section 718.2(b), and Restraint - Section 718.2 (c),(d), and (e).
>
> 13. Proportionality means that the sentence must be proportionate to the gravity of the offence and the moral blameworthiness of the

> offender. This principle must also take into account the presence of any aggravating or mitigating circumstances including those listed in Section 718.2(a).
>
> 14. Parity means that the sentence must be similar to those sentences imposed for similar offences on similarly situated offenders. This necessarily requires a review of the sentences approved or imposed by other Trial Courts in this Province, our Appeal Court, and the Appeal Court of other Provinces.

[25.] Then at paras. 17 and 18:

> 17. Mitigating features include a guilty plea at an early stage, remorse and acknowledgement of harm to the victim, a lack of a criminal record, disabilities or character of the offender or other characteristics which reduce the moral blame worthiness of the offender and prospects of treatment.
>
> 18. I will now review the law relative to parity. To properly apply the principle of parity it is necessary to examine the sentences of other similar offences to determine the range of sentences imposed by other trial courts and those approved by the Court of Appeal of this and other Provinces. This will allow the Court to place the facts surrounding this case and the distinguishing characteristics of this offender in some context and on a continuum of sentences. In my opinion, it is particularly important to focus on cases which have occurred since 1996 when the **Criminal Code** was substantially amended with regard to sentencing, and to which I referred to in part above.

[26.] Later at para. 52, Tufts, J., discusses the principle of restraint:

> Finally, I want to discuss specifically, the principles of restraint. Our Appeal Court, in ***R. v. G.O.H.*** [1996] N.S.J. No. 51**,** has acknowledged that it is almost impossible to speak of crimes such as this without referring to pejorative adjectives to described the

> gravity of these offences. It is certainly understandable, given the nature of the crime and the degree to which these crimes offend the standards and values of our society. However, the Court must be careful not to let those pejorative adjectives detract from the requirement that Parliament has legislated that any sentence must be the least restrictive sanction which meets the fundamental purposes and principles of sentencing.

[27.] In ***R. v. MacIvor***, [2003] N.S.J. No. 188, Cromwell, J., writing for the Court of Appeal, stated at paras. 31 to 33:

> 31 I am also of the view that, with respect, the judge erred in "jumping" the joint submission. It is not doubted that a joint submission resulting from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission: see, e.g., ***R. v. Thomas*** (2000), 153 Man. R. (2d) 98 (C.A.) at para. 6. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it: see, for example, ***R. v. MacDonald*** (2001), 191 N.S.R. (2d) 399; N.S.J. 51 (Q.L.)(N.S.C.A.); ***R. v. Tkachuk*** (2001), 159 C.C.C. (3d) 434 (Alta. C.A.) at para. 32; ***R. v. C.(G.W.)*** (2000), 150 C.C.C. (3d) 513 at paras. 17-18; ***R. v. Bezdan***, [2001] B.C.J. No. 808 (C.A.) at paras. 14-15; ***R. v. Thomas,*** *supra*, at paras. 5-6; ***R. v. B.(B.)***, 2002 Carswell NWT 17 (N.T.C.A.) at para. 3; ***R. v. Webster*** (2001), 207 Sask. R. 257 (C.A.) at para. 7.
>
> 32 Even where the proposed sentence may appear to the judge to be outside an acceptable range, the judge ought to give it serious consideration, bearing in mind that even with all appropriate disclosure to the Court, there are practical constraints on disclosure of important and legitimate factors which may have influenced the joint recommendation.

33 The tendency in most courts of appeal in recent years has been to emphasize the weight that should generally be given to joint recommendations following a plea agreement. Some courts have gone so far as to adopt the principle that a joint submission should only be rejected if accepting it would be contrary to the public interest and otherwise bring the administration of justice into disrepute: ***R. v. Dewald*** (2001), 156 C.C.C. (3d) 405 (Ont. C.A.); ***R. v. Cerasuolo*** (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); ***R. v. Dorsey*** (1999), 123 O.A.C. 342 (C.A.); ***R. v. T.M.N.*** (2002), 172 B.C.A.C. 183 (C.A.); ***R. v. Hatt*** (2002), 163 C.C.C. (3d) 552 (P.E.I.S.C.A.D.) at paras. 15 & 18. Many of the relevant authorities were reviewed by Fish, J.A., writing for the Court, in ***R. v. Verdi-Douglas*** (2002), 162 C.C.C.(3d) 37 (Que. C.A.):

> [42] Canadian appellate courts have expressed in different ways the standard for determining when trial judges may properly reject joint submissions on sentence accompanied by negotiated admissions of guilt.
> [43] Whatever the language used, the standard is meant to be an exacting one. Appellate courts, increasingly in recent years, have stated time and again that trial judges should not reject jointly proposed sentences unless they are "unreasonable", "contrary to the public interest", "unfit", or "would bring the administration of justice into disrepute".
> . . .
>
> [51] In my view, a reasonable joint submission cannot be said to "bring the administration of justice into disrepute". An unreasonable joint submission, on the other hand, is surely "contrary to the public interest". Accordingly, though it is purposively framed in striking and evocative terms, I do not believe that the Ontario standard [i.e. that the jointly recommended sentence is contrary to the public interest and would bring the administration of justice into disrepute]

> departs substantially from the test of reasonableness articulated by other courts, including our own. [The] shared conceptual foundation [of these various formulations of the principle] is that the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty -- provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted. (Emphasis added)

[28.] In ***R. v. Cromwell***, 2005 N.S.C.A. 137, Bateman, J., writing for the Court of Appeal, stated at paras: 18 to 21:

> **Resolution Agreements:**
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> 18. In ***R. v. MacIvor***, this Court approved with particular emphasis, the following comment by Fish, J.A. (as he then was), writing for the Court in ***R. v. Douglas*** (2002), 162 C.C.C. (3d) 37 (Que. C.A.):
>
> > [51] ....the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - - provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.
>
> 19. There are many situations in which it is in the public interest for Crown and defence counsel to enter into negotiations which result in a guilty plea and a joint sentence recommendation. There may be uncertainties in evidence which induce both counsel to prefer a compromise. Avoidance of a trial may save substantial public expense and spare prosecution witnesses the trauma of testifying. A negotiated resolution, which shortens the time between the charging of the offence and disposition, protects the public from those who would re-offend while on pre-trial release

> and spares victims of crime the long ordeal of awaiting trial of the perpetrators. Offenders sometimes provide the police with critical information leading to the solution of other crimes. This can serve as a *quid pro quo* for a sentence somewhat reduced from what would otherwise be appropriate. Heavy criminal caseloads resulting in court backlogs can also be alleviated through consensual resolution, in the proper circumstances. Such resolutions are more likely to be achieved where it is probable that the sentencing judge will accept the recommendation of counsel.
>
> 20. Joint sentence submissions arising from a negotiated guilty plea are generally respected by the sentencing judge. Ultimately, however, the judge is the guardian of the public interest and must preserve the reputation of the administration of justice. Where the agreed resolution is contrary to the public interest, would bring the administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject the joint submission ***(R. v. Cerasuolo*** (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); ***R. v. Dorsey*** (1999), 123 O.A.C. 342 (C.A.); ***R. v. C. (G.W.)*** (2000), 150 C.C.C.(3d) 513 (Alta. C.A.)).
>
> 21. A trial judge may decline to give effect to a joint recommendation, not simply because she would have imposed a more severe sanction, but where the sentence is clearly unreasonable and then, only if the judge is satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence.

[29.] Bateman, J., continues on the issue of the fitness at sentence in paras. 22 to 24:

> **FITNESS OF SENTENCE**
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> 22. In ***R. v. Shropshire*** [1995] 4 S.C.R. 227 an "unfit" sentence is described as one that is "clearly unreasonable" (at para. 46 *per*

Iacobucci, J., for a unanimous Court), in other words, "clearly excessive or inadequate" (see also ***R. v. Muise*** (1995), 94 C.C.C. (3d) 119 (N.S.C.A.)). An unreasonable sentence is one falling outside the range (***Shropshire*** at para. 50 and ***MacIvor***, *supra* at para. 31).

23. In evaluating a joint submission the judge must determine the acceptable range of sentence for the offence before the court. A fit sentence is one that falls within that range. Fixing the range requires a consideration of the general sentencing principles and, for purposes of this case, those of conditional sentencing.

24. Where there is a joint submission, the judge considers the record before him – the admitted facts of the offence; information about the offender; the victim impact statements and submissions of counsel. It is counsels' obligation to provide sufficient detail to justify the joint submission. (***R. v. G.P.***, **supra** at para. 20 and ***R. v. Douglas***, *supra* at para. 45). There are occasions when all relevant factors prompting the joint submission cannot be disclosed to the judge. The offender may have provided useful but confidential information about other crimes, disclosure of which would endanger his safety or compromise an on-going investigation. For that reason, even where a joint submission falls outside the range, it should be given serious consideration (***McIvor***, *supra* at para. 37).

[30.] And on the fitness of the proposed sentence, Bateman continues at para. 26:

> **FITNESS OF THE PROPOSED SENTENCE**
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> 26. … 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 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.

[31.] In ***R. v. Wall***, 1999 CarswellNfld 79, Halley, J., addressed the issue of whether a conditional sentence is appropriate in sexual offences at paras. 12 and 13:

> 12. The issue as to whether a conditional sentence is appropriate in sexual assault offences was considered by our Court of Appeal in ***R. v. W. (L.F.)*** 1997 C.C.C. (3d) (Nfld. C.A.) Marshall, J.A. at para. 49 stated:
>
> > In sum, therefore, it is neither within the province of the courts to exempt certain categories of offences from the new conditional sentencing option, nor to impose more rigorous standards for the application to them, on grounds that the gravity of a given crime accentuates the imperatives of deterrence and denunciation to such a level that only incarceration in a penal institution will adequately address them. Scope for giving due weight to deterrence and denunciation with other relevant considerations is provided in the process defined by paragraph 742.1(b) upon which

> Parliament was directed judicial discretion must rest. It is no function of the judiciary to qualify or otherwise restrict the application of a conditional sentencing based on its notion of the effectiveness of service in the community in deterring and denouncing specific categories of crimes. Rather as directed by the legislation, its role is to examine the specific circumstances of each offence and offender, whilst screening them through the requirement that a conditional sentence be "consistent" with the principles of sentencing, to determine if service of the sentence in the community can, nevertheless, be justified.

13. That principle was again confirmed by the Court of Appeal in ***R. v. S. (A.J.)*** 1998, 167 Nfld. & P.E.I.R. 183 (Nfld. C.A.) where it upheld a conditional sentence of three months for sexual assault by a male adult on a fourteen year old female.

Review of Case Law:

[32.]

R. v. Wall, 1999 CarswellNFLD 79 – the defendant was 19 years old, complainant was 13 – s. 151 – Defendant convicted – 4 months CSO, 2 years probation – 1 minor offence – defendant friend of complainant's older brother – 6 month relationship – consensual sexual intercourse.

R. v. Young, 2010 CarswellNfld 380 – sexual intercourse (once) – complainant 13 years old – defendant 22 years old – met two weeks before and started "dating" a week before – 14 months jail, 2 years probation

R. v. C. (C.R.), 2004 CarswellNfld 189 – defendant 19 years old – complainant 12 years old – 4 occasions of inappropriate sexual contact – the last included digital penetration of the complainant's vagina; complainant rubbing and kissing the defendant's penis – 6 month conditional sentence order

R. v. Tillotson, 1982 CarswellSask 691 – defendant 22 years old – complainant 13 – "ongoing affair" – (6) acts of intercourse with victim's consent – 1 year jail

R. v. P.H.H., [1997] O.J. No. 4234 – defendant 28 years old – complainant stepdaughter – several incidents – touching her bum, legs, licking leg, kissing mouth, one act of touching penis – 15 days jail, 5 month CSO

R. v. Sheppard, [1997] N.J. No. 88 – 2 counts of sexual interference – touched complainants breasts on 2 separate occasions – complainant 12-13 years old – defendant 67 years old – father figure to mother of complainant – 60 days CSO – rehabilitation/reformation could not be overlooked.

R. v. P.E.S., [2000] N.S.J. No. 341 – sexual touching – complainant 10 years old – mother's friend was the spouse of the defendant – put hand down shirt – grabbed breast – serious effect on complainant – defendant denied offence – no remorse – previous criminal record – 6 month CSO

R. v. Welcher, [2000] N.J. No. 103 – S. 151 – touching a person under 14 with his hand and penis – court round touching consensual – defendant 23 years old – remorse – no record – no aggravating factors (S. 718.2) – 6 month CSO, 2 years probation

R. v. McIvor, 1992 CarswellMan 268 – defendant 19 years old – complainant nearing 14 years old – involved in a romantic relationship for over one year – consensual sexual intercourse – defendant pled guilty to one sexual touching and one sexual interference – 9 months jail, 18 months probation – on appeal reduced to 4 months jail.

Is “consent” a mitigating factor:

[33.] In ***R. v. Young***, 2010 CarswellNfld 380, P.C.J. Gorman addresses this issue beginning at para. 58:

> **58** In ***Hann***, the accused, a teacher, was convicted of an offence, contrary to section 153(1)(a) of the *Criminal Code*. The accused had engaged in three acts of consensual sexual intercourse with one of his fifteen year old students. He had no previous convictions. The trial judge imposed a period of one year incarceration. On appeal to the Court of Appeal, the appeal from sentence was dismissed. Mr. Justice Marshall indicated that "in an offence where the element of non-consent has been removed as a component of the crime, consent should have no direct bearing upon the sentence":
>
> > As to his main ground, with respect, in my view in an offence where the element of non-consent has been removed as a component of the crime, consent should have no direct bearing upon the sentence. To do so would also make the young person's conduct subject to examination and this would be contrary to the intent of the Code provisions creating the offence.
> >
> > The appropriate punishment for any crime must take into account the affect of the crime upon the person injured by it. The victim impact statement prepared by a psychologist states that the young survivor "has been greatly and negatively affected by the sexual involvement with the teacher". Thus the element of consent assumes particular irrelevance in the circumstances of this case. The appellant is guilty of a grave and serious breach of trust and deterrence must play a significant role in his sentencing. While the appellant is a first offender and apparently in an

> emotionally frail state at the time, the impact upon the complainant and the need for deterrence must supersede.

59 Similar comments were made by the Alberta Court of Appeal in ***R. v. Pritchard*** (2005), 371 A.R. 27, at paragraph 7:

> ... the sentencing judge overemphasized the willing participation of the young girl in these activities. While there may well be a difference in degree between a perpetrator who uses force, as opposed to persuasion, on an underage victim to accomplish his objective, the fact remains that the end result is the same -- a sexual assault on someone who cannot, in law, give consent. Put simply, a young girl's willing participation is not a mitigating factor. And yet, the sentencing judge effectively treated it as if it were.

60 However, in ***R. v. Allen*** (1989), 77 Nfld. & P.E.I.R. 138 (N.L.C.A.), the Court of Appeal said (at paragraph 10):

> The nature of the consent given by a person under the age of 14 years may be a factor to be weighed by the trial judge in mitigation of sentence. That of course depends on the circumstances. A very young child may submit to sexual assault by a parent or other person in a position of parental authority because he or she does not appreciate the nature of the act. An older child may acquiesce because he or she feels there is no choice but to do so. Obviously in such circumstances the consent of the child will not weigh in the offender's favour or sentencing. Where, however, the complainant is close to the statutory age of consent and, for example, is knowledgeable in sexual matters and/or initiates the sexual activity, the situation may be different. The consent may well be a mitigating factor.

61 In ***R. v. Revet*** (2010), 256 C.C.C. (3d) 159 (Sask. C.A.), the Court of Appeal, at paragraph 12, concluded that "the whole purpose of the legislation is to protect children, who are not

> sufficiently mature to appreciate all of the consequences of sexual activities. We agree that a child's willing participation is not, *per se*, a mitigating factor in the imposition of a sentence for sexual assault upon that child. It means nothing more than an absence of aggravating factors such as the use of force, violence, intimidation or trickery."

[34.] In ***R. v. McIvor***, 1992 CarswellMan 268, Philip, J., writing for the Manitoba Court of Appeal cites ***R. v. Baker*** (unreported, February 4, 1992) N.S.S.C. at para. 7:

> "…the court found that consent, while not a defence to the offence of invitation to sexual touching, is nevertheless a circumstance to be considered on sentencing; with the age of the complainant affecting the extent to which consent is a mitigating factor."

Further Submissions by Counsel

[35.] (1.) Defence counsel supplied the court with five cases that were similar to the case at bar.

(2.) It is now known by the court:

(a.) Defence counsel says there were problems with evidence (differences with witness statements);

(b.) The Crown agrees but says these differences were minor and did not affect their test of a reasonable prospect of conviction;

(c.) The key consideration was that the Crown wanted to spare the young witness from the stress of testifying in open court. (She was unable to complete a victim impact statement.)

(3.) The defendant is in an educational course five days a week, with a job placement to begin the end of December.

[36.] The Crown has not changed its original sentence request of a two to three month conditional sentence order, followed by two years probation with a condition the defendant be assessed for any sexual offender treatment or counseling.

[37.] Defence counsel still requests a two month conditional sentence order but will leave the length of probation up to the court, making no further mention of the sexual offender assessment condition.

[38.] While there may have been discussions between counsel regarding facts, change of plea, and sentence, after reviewing all before me, I find this is not a joint recommendation. Counsel only agrees it should be a conditional sentence followed by probation. As to its length and conditions of each, the very crux of the matter, they do not.

[39.] I do not find there was any *quid pro quo*; the Crown wanted to spare the complainant, assessed the circumstances, agreed a jail sentence was required but was satisfied with a conditional sentence order.

[40.] Even though counsel do not agree, I must still go on to decide whether what counsel are recommending is a fit and proper sentence, or is some other disposition appropriate.

[41.] The case law I reviewed involving similar circumstances and similar offenders imposed various sentences including to a period of custody, a period of custody to be served in the community under a conditional sentence order, and or followed by a period of probation.

Analysis:

[42.] To quote Madame Justice l'Heureux-Dube in ***The Queen v. O'Connor*** (1995), 103 C.C.C. (3d) 1 at page 57, para. 120:

> Unlike virtually every other offence in the Criminal Code, sexual assault is a crime which overwhelmingly affects women, children and the disabled. Ninety percent of all victims of sexual assault are female…

[43.] Parliament created the section surrounding consent and someone under the age of 14 years for a reason:

> This section exists for the protection of young girls. Parliament intended that activity such as this should be stopped even though a girl may well desire to engage in sexual intercourse.
> ***R. v. Tillotson,*** 1982 CarswellSask 691, para. 27

[44.] The courts have to consider the protection of society from this type of offence.

[45.] Counsel emphasized there was no violence, however, as J.J. Abella stated in ***R. v. G.M.*** (1992), 11 O.R. (3d) 225 at p. 230:

> Nor do I accept that the absence of tangible violence makes the offence less worthy of censure, since in my view "the offence of sexual assault is an inherently violent crime"…

[46.] Mr. K. planned the second incident. It was under the pretext of going for ice cream. Instead he drove to a secluded spot and began kissing and fondling the victim. When she said she wasn't sure, he continued for his own sexual gratification, going so far as to say "trust me" before he had her touch/fondle his penis.

[47.] Mr. K. knew this was wrong. Why else would he say don't tell anyone. Why else when confronted by the complainant's mother would he deny it. Why else would he hurl homophobic slurs at his once good friend and older brother of the victim.

[48.] So what if the victim said she had a "crush" on the defendant. This is about the defendant's actions not the victim's. He was the adult in this situation. There is no justification or excuse for what he did.

[49.] Mr. K. has pled guilty which is usually a demonstration of remorse and can be seen as a true step towards rehabilitation. It is noteworthy that this has spared the complainant from testifying. However, I must be mindful, and so should Mr. K., that the victim was very upset by what happened to her. She was not emotionally prepared for what happened. Mr. K. took advantage of a relationship with her brother and family for his own sexual gratification.

[50.] What is an appropriate sentence for Mr. K.? By counsel recommending a conditional sentence order they are saying that jail is an appropriate sanction, but the defendant can serve it in the community.

[51.] Based on all of the circumstances before me, I agree that there should be a period of custody. There was no minimum term of imprisonment for this offence in 2011. The Crown proceeded summarily on both offences. I agree that it should be less than two years.

[52.] Am I satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing? I have to consider the risk posed by the specific offender including his risk to re-offend and this includes the risk of "any" criminal activity, and the gravity of the damage that could ensue from any further offence.

[53.] In general a conditional sentence achieves the restorative objectives of sentencing better than incarceration, which is preferable when denunciation and deterrence are especially important. A conditional sentence may provide sufficient denunciation and deterrence, however, it depends upon:

(i.) the nature of the conditions imposed;

(ii.) the duration of the sentence; and

(iii.) the circumstances of the offender and the community.

[54.] The defendant's circumstances:

(1.) Absence of a criminal record;

(2.) Bail conditions – one breach – contact with the victim's brother – nothing since;

(3.) Positive Presentence Report – education – gainful employment – future goal;

(4.) No alcohol or drug issues;

(5.) The scale of offending – no evidence of cruelty, degradation or physical injury. That is not to say the victim has not suffered emotionally or psychologically.

(6.) Youthful offender – 19 years old at the time

Conclusion

[55.] What Mr. K. did was despicable and illegal. He will be convicted and sentenced at the end of this day.

> "We do not rely only on a jail sentence but the whole public process from investigation, arrest and sentence which hopefully culminates in the rehabilitation of the defendant and the deterrence of others."

> "Public abhorrence of this type of behavior cannot be overlooked and is of itself a form of punishment." (**R. v. Sheppard**, [1997] N.J. No. 88)

[56.] While I find the defendant's conduct deplorable and totally unacceptable, and note that specific and general deterrence must be addressed, I also realize that the rehabilitation and reformation of the defendant is also a principle of sentencing that I cannot overlook.

[57.] I am satisfied that there is no real risk of the defendant endangering the safety of the community if he serves his sentence in the community. He has been a productive citizen except for these illegal acts.

[58.] Therefore the sentence of the court is:

(1.) DNA Order on the s. 271;

(2.) SOIRA Order for 10 years;

(3.) Three months custody for the s. 271, plus 1 month concurrent on the s. 145(3), to be served in the community under a Conditional Sentence Order;

(4.) To be followed by two years probation.

[59.] There will be no victim fine surcharge.

The Honourable Jean M. Whalen, JPC