

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. R.H., 2005 NSSC 134

Date: 20050525

Docket: C.R. 207639

Registry: Halifax

Between:

Her Majesty the Queen

and

R.H.

Restriction on publication: Restriction on publication of complainants' names pursuant to s. 486(3) of the *Criminal Code*

Judge: The Honourable Justice C. Richard Coughlan and Jury

Heard: February 14-18, 21-24 and March 1-2, 2005, at Halifax, Nova Scotia

Decision: May 25, 2005 (Orally) (On Sentencing)

Written Release: May 30, 2006

Counsel: Peter J. Craig, for the Crown
Thomas J. Singleton, for the Defence

Coughlan, J.: (Orally)

- [1] R.H. was charged on a five count indictment dated October 2, 2003. He pleaded not guilty to each count and a trial before a jury took place. The jury convicted Mr. H. on each of the five counts, which were as follows:

Count # 1

that he between the 15th day of October, 1978 and the 4th day of January, 1983 at, or near Dartmouth in the County of Halifax in the Province of Nova Scotia did indecently assault S.T., nee P., a female person, contrary to Section 149(1) of the Criminal Code;

Count # 2

AND FURTHER THAT HE AT THE SAME PLACE AFORESAID between the 1st day of January, 1979 and the 17th day of March 1980, did indecently assault B.S., a female person, contrary to Section 149(1) of the Criminal Code;

Count #3

AND FURTHER THAT HE AT THE SAME PLACE AFORESAID between the 29th day of December, 1978 and the 29th day of December, 1981, did indecently assault P.B., a female person, contrary to Section 149(1) of the Criminal Code;

Count # 4

AND FURTHER THAT HE AT THE SAME PLACE AFORESAID between the 1st day of March, 1983 and the 15th day of October, 1984, did have sexual intercourse with S.T. nee P., a female person not his wife under the age of 14 years, contrary to Section 146(1) of the Criminal Code;

Count # 5

AND FURTHER THAT HE AT THE SAME PLACE AFORESAID between the 4th day of January, 1983 and the 1st day of January, 1988 did commit an act of gross indecency with S.T., nee P., contrary to Section 157 of the Criminal Code.

- [2] There should be a ban on any information that would tend to identify any of the complainants.
- [3] I have read the presentence briefs of Mr. Singleton and Mr. Craig, the cases referred to therein, the presentence report dated May 20, 2005, heard the submissions of counsel and the oral victim impact statement of Ms. B.

- [4] Mr. H. testified in his own defence. He denied the allegations and continues to maintain his innocence. A jury disbelieved his evidence and was not left in a reasonable doubt of his guilt, on all counts. It is, therefore, my duty to impose a fit and proper sentence based on the evidence presented at trial.
- [5] The offences upon which I am passing sentence involve three children.
- [6] The offence against B.S. occurred when she was sixteen. It involved Mr. H. touching her vagina with his hand inside her clothing, taking his penis out of his pants and attempting to put his penis in her mouth.
- [7] The offence against P.B. occurred when she was under fourteen years of age on a family camping trip. P.B. awoke, naked, and in a sleeping bag with Mr. H. He was rubbing her breasts and fondling her vagina. He had his fingers inside her vagina. Then he took her hand and had her grab his penis and he squeezed her hand tighter, rubbing up and down.
- [8] Count one involving S.T., Mr. H. touched or rubbed his penis on S.T.'s body, put her hand on his penis, put his hand inside her vagina; and when taking showers with Mr. H., she would wash his penis and when his penis was hard, she would have to turn around and he would rub his penis between her legs.
- [9] Count four involves Mr. H. having sexual intercourse with S.T.
- [10] Count five involving S.T. dealt with R.H. taking showers with S.T. She would wash his penis and when his penis was hard, she would have to turn around and he would rub his penis between her legs.
- [11] The Crown seeks a custodial sentence in the range of six to eight years. The defence is seeking a conditional sentence.
- [12] The *Criminal Code* provides as follows:

718. Purpose - The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;

- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

718.1 Fundamental principle - A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 Other sentencing principles - A court that imposes a sentence shall also take into consideration the following principles:

- (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) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner or child,
- (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

....

shall be deemed to be aggravating circumstances.

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[13] In this case, Mr. H. committed a serious breach of trust. S.T. and P.B. were in the care of the Children's Aid Society of Halifax. Mr. H. was married to

their sister. S.T. was living in foster care with Mr. H. and his wife at the time of the offences. Mr. H. was in a position of a parent to S.T. At the time of the offence involving P.B., she was in the care of the Children's Aid Society, living with persons other than Mr. H. and his wife, but on a camping trip with the H.'s and in the care of Mr. H. B.S. was a young person living with her sister and Mr. H. at the time of the offence against her. These crimes were committed on defenceless, vulnerable, young persons. Mr. H. took advantage of his position with the children.

[14] The shower incidents dealing with S.T., were of a continuing nature, occurring over a number of years.

[15] As Saunders, J., as he then was, stated in *R. v. D.B.S.*, [2000] N.S.J. No. 172 at para. 20:

... Sexual assaults against young children are crimes of violence. They require swift and unequivocal denunciation. Defenceless children must be protected from you and others like you. A fit punishment must emphasize your specific deterrence, general deterrence for anybody else who might be similarly disposed, and to a lesser extent, take into account the prospects and hope for your own reformation and rehabilitation.

[16] I heard the victim impact statement of P.B. and the emotional trauma caused to her. With regard to the other victims, the Court may presume emotional trauma and it is clear the offences had a significant traumatic effect on them.

[17] Mr. H. does not have a criminal record. This is a matter commonly considered in mitigation of sentence; however, as Bateman, J., as she then was, stated in *R. v. Weaver*, [1993] N.S.J. No. 91:

You have no criminal record. This is commonly a matter to be considered in mitigation of sentence. ... however, it is not uncommon that sexual offenders have no other criminal record. The absence of a criminal record does not relieve the requirement of a lengthy prison term for sexual offence against children.

[18] Mr. H. did not express his remorse and maintains he did not commit the offences.

[19] What is the appropriate sentence in this matter?

[20] I have been asked to consider a conditional sentence. Clearly the offences of which Mr. H. has been convicted are offences for which the option of a conditional sentence is available. Section 742.1 of the *Criminal Code* provides:

742.1 Imposing a conditional sentence - Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is 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 set out in sections 718 to 718.2,

the court may, for the purposes of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

- [21] The issue of conditional sentences was addressed by the Supreme Court of Canada in *R. v. Proulx* (2000), 140 C.C.C. (3d) 449 where Lamer, C.J.C. stated at para. 47 in referring to s. 742.1:

In my view, the first three criteria are prerequisites to any conditional sentence. These prerequisites answer the question of whether or not a conditional sentence is possible in the circumstances. Once they are met, the next question is whether a conditional sentence is appropriate. This decision turns upon a consideration of the fundamental purpose and principles of sentencing set out in s. 718 to 718.2. ...

- [22] In this case, the offences are not punishable by a minimum term of imprisonment. However, given the facts of this case, I am satisfied an appropriate sentence is not less than two years.

- [23] Mr. H., would you please stand?

- [24] I have considered the principles of totality and proportionality. Each sentence is to be served consecutively to each other, except the offences against S.T., which are to be served concurrently to each other but consecutively to the offences against B.S. and P.B. I impose the following sentences for the offences of which you were convicted: count number one, involving S.T., the charge of indecent assault - three years; count number two, involving B.S., the charge of indecent assault - six months; count number three, involving P.B., the charge of indecent assault - ten months; count number four, involving S.T., the charge of sexual intercourse with a female person under the age of fourteen not his wife - three years; count number five, involving S.T., the charge of gross indecency - three years.

- [25] This results in a total sentence of four years and four months.
- [26] I grant a firearms prohibition order pursuant to s. 109 of the *Criminal Code* for a period of ten years; a DNA order pursuant to s. 487 of the *Criminal Code*; and an order to comply with the *Sex Offender Information Registration Act*

pursuant to s. 490.012 of the *Criminal Code*. Mr. H. shall pay a victim surcharge in the amount of \$100.00 payable within thirty days.

Coughlan,

J.