SUPREME COURT OF NOVA SCOTIA
Citation: R. v. MacIntosh, 2011 NSSC 341

Date: 20110131
Docket: CRPH 339509
Registry: Port Hawesbury

Between:

Her Majesty the Queen

v.

Ernest Fenwick MacIntosh

Restriction on publication: Pursuant to s. 486 of the *Criminal Code*

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

DECISION ON SENTENCE

Judge: The Honourable Chief Justice Joseph P. Kennedy

Sentencing Date: April 13, 2011 at Port Hawkesbury, Nova Scotia

Counsel: Diane McGrath and Alicia Kennedy for the Crown
David Bright, Q.C. for the accused

By the Court:

[1] This is a sentence hearing. The sentence hearing is specific to Ernest Fenwick MacIntosh on four charges, four charges, under the **Criminal Code**. I'll first ask Mr. Bright if Mr. MacIntosh wishes to address the Court prior to sentence.

[2] **MR. BRIGHT:** No. Thank you, My Lord.

[3] **THE COURT:** Thank you. The original Information, the Information before me, contained ten charges, ten charges. I convicted on four. I convicted on count number three, an indecent assault involving R. M. which took place in Guysborough. I convicted on count number four, gross indecency, again the victim was R. M., Guysborough, same incident. I convicted on count number nine, indecent assault. This involved W. J. M.R., took place at or near Port Shoreham. I convicted on count number ten, gross indecency, same victim, Mr. M., same general area, Port Shoreham, and arising out of same incident, same proximate circumstances.

[4] So these four charges that I'm sentencing on today relate to two complainants, two victims, and two incidents. Speak to counts number three and four, indecent assault and gross indecency. Again, the complainant was R. M. M.. And this is just

a shortened explanation of what I found. I found that sometime between the 1st day of June, 1973 - 30th day of September, 1974, that Fenwick MacIntosh, who was then in his early 30s, an adult, invited R. M., then an adolescent, somewhere between the age of 15 and 17, invited him to accompany both he, Mr. MacIntosh, and a business partner of his on a boat trip, Fenwick MacIntosh's boat.

[5] They traveled from the Port Hawkesbury area to Guysborough to attend the "Come Home Celebrations" in that town. On the second night of that visit, Mr. MacIntosh took Mr. M. to a private home some four or five kilometers from the Guysborough Wharf where the boat was moored. Took Mr. M. to a private home to spend that second night. At that private home, Mr. M. eventually goes to bed. Mr. MacIntosh later comes into the room that he was occupying ... that M. was occupying. He takes down R. M.'s underwear. He strokes his penis and he performs oral sex, fellatio, on him until Mr. M. ejaculated.

[6] Mr. M. testified. He said, and I quote, He didn't know what to do. Never happened to me before. I found that R. M. did not consent, did not consent, to these acts. I determined that the facts found constituted both an indecent assault and a gross indecency. I convicted on counts number three and four.

[7] As to counts number nine and ten, indecent assault and gross indecency, those counts, nine and ten, were specific to the complainant, to the victim, W. J. M.R. I found that between January the 1st, 1972 - 31 December 1972, when this complainant, when M. was between the ages of 16 and 17, he came into contact with Fenwick MacIntosh when Mr. MacIntosh, again then in his 30s, when Mr. MacIntosh visited Mr. M.'s parents' home after a funeral. The accused, Mr. MacIntosh, later invited the adolescent, Mr. M. to accompany him on a drive to Guysborough later in the day, that he attended at that home. Drive to Guysborough.

[8] At some point during the course of that motor trip, Mr. MacIntosh reached over and put his hands on Mr. M.'s penis and rubbed him. This was on the outside of his clothing. Mr. M. testified that he told Mr. MacIntosh not to do that. Later, during the same motor trip, Mr. MacIntosh pulls into a side road, puts his hand, this time, down inside Mr. M.'s underwear and rubs his penis directly until he ejaculates. After that, they continue back to Port Hawkesbury.

[9] Mr. M., the adolescent, he testified that this was the first time that this kind of thing had happened to him and that he was confused. I found that the touching of the

penis outside the clothing was indecent assault and that the subsequent stroking of the penis directly under Mr. M.'s underwear to the point of ejaculation was a gross indecency and I convicted on counts number nine and ten.

[10] Both of these young men, both of these complainants were experiencing difficult family circumstances at the relevant times. Both were vulnerable, more easily victimized than other adolescents might have been at that age. Fenwick MacIntosh, again I state being his 30s at times relevant, he's 67 years old today, 67 now. These charges and those charges that were previously dealt with by Justice Simon MacDonald of this Court, these charges have had a dramatic effect on Mr. MacIntosh, the accused, dramatic change in his life. Any objective observer would, I think, be required to acknowledge that.

[11] At the time that these charges were laid, he was a successful business executive living in New Delhi, India. He was arrested there, held in an Indian jail while extradition proceedings took place. Was eventually extradited back to Canada, spent considerable time remand incarceration in Nova Scotia facilities, incarcerated pending trial. He's now free on bail – bail that was accomplished by the Nova Scotia Court of Appeal but subject to strict conditions that amount, his counsel says, to virtual

house arrest. He's lost his job. He's been assaulted on two occasions by other prisoners here in Nova Scotia.

[12] This ten-count Indictment before me, this trial before me, addressed only some of the charges against Fenwick MacIntosh, only some of the charges which resulted in his being brought back to Canada from India. There was a previous proceeding, a previous trial, before Justice Simon MacDonald of this Court. That trial involved charges of a similar historic sexual nature, all of which alleged incidents during the same period, 1970s. Charges before Justice MacDonald involved young men with a Port Hawkesbury connection, same type of charges.

[13] On the 28th day of September, 2010, last year, Justice Simon MacDonald convicted Fenwick MacIntosh on thirteen of these charges. He sentenced Fenwick MacIntosh on those matters, on those thirteen matters, to a total of four years in a Federal institution. Because of the similarity of charges, because this trial has been, in a sense, a continuation of the proceedings before Justice MacDonald, the sentences given in September of 2010 are significant to the sentencing that I will accomplish today.

[14] Let me say something about the type of offence that we're dealing with, sexual assault, gross indecency. These are particularly serious, reprehensible criminal acts involving consequences to victims that are commonly ongoing, that endure. It is particularly so in situations such as this when the acts involve an adult compromising a young person. This aspect of those offences, this enduring aspect, these type of offences cause because they involve not only the obviously bodily harm or bodily interference but also affect the integrity of the victims, the integrity, the lingering effect, the personality and the way the victims deal with their lives and the world.

[15] The continued effects on W. J. M.R. were made clear by his testimony. In the Victim Impact Statement before this Court, R. M., the other complainant, speaks of his low self-esteem, his feelings of shame and guilt, almost 40 years later, the great difficulty he has in trusting people. These kind of offences, these are the kinds of acts that have the potential to change lives. Harm is often for life. Let me say this to the complainants, the victims in this matter, that this was not your fault, period. You were victims. If you continue to blame yourselves, then it's time to stop that.

[16] Speak to the law, if you'll bear with me for a moment. Section 718 of the **Criminal Code** provides sentencing guidelines to Canadian judges. It reads,

> 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, safe society by imposing just sanctions that have one or more of the following objectives (the objectives) of sentencing; (a) to denounce unlawful conduct (b) to deter the offender and other persons from committing offences (c) to separate offences (sic) 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.

[17] Section 718(1) of the **Criminal Code** further provides as a fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[18] Section 718.2 of the **Code** provides additional sentencing principles. It states,

> 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.

[19] And without limiting the generality of the foregoing, the Section lists a number of things. The one that I wish to stress is "(ii) evidence that the offender in committing the offence abused a person under the age of 18 years." That is one of the additional factors that should be deemed to be an aggravating circumstance.

[20] In addition, Section 718.2 of the **Code** provides that 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, and (d) the offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances."

[21] Additionally, Section 718.01, later added by Parliament, and it provides that when a Court imposes a sentence for an offence that involves the abuse of a person under the age of 18 years, it shall be and shall primary consider the objectives of denunciation and deterrence in such cases, "denunciation and deterrence."

[22] Just as a comment, as a society, "as a society," we cannot stand by and will not stand by and allow the young or the old to be exploited. Those two vulnerable segments of our society, the young and the old, if you victimize those groups, then there should be a consequence.

[23] Both the Crown and Defence have provided me with examples of sentencing that they suggest involve similar offenders in similar cases, sometimes similar

circumstances. These cases serve as useful aids to sentence. I am required to consider them, keeping in mind that there is a unique quality to every case that there are no two victims, no two perpetrators, that are exactly the same. Each case is its own circumstance. Each sentence within the guidelines is a specific response. Try to customize sentencing to the situation before us.

[24] I've looked at all of the cases submitted. I will cite some that have been of particular interest. Please accept that I have read more than those cited. **R. v. A.N.,** [2009] N.S.J. No. 270. That was a decision of Justice Beveridge when he was a trial judge in this Court. He's now gone to the Court of Appeal. I've also looked at the appeal decision in that case which is cited as [2011] N.S.J. No. 87 which upheld Justice Beveridge as a trial judge.

[25] I've looked at **R. v. Boston**, Ontario Court of Appeal. The cite is [2002] O.J. No. 887. That is a decision that was delivered by Doherty, J., one of the foremost experts, criminal law, in the Canadian judiciary. **R. v. D.A.M.,** [1999] N.S.J. No. 468, a decision of Justice Cacchione of this court; **R. v. E.M.C.**, [1999] N.S.J. No. 259, decision of Justice Scanlan of this court; and **R. v. L.R.L.,** [2000] N.S.J. Nova Scotia Court of Appeal.

[26] I've examined the reason for sentencing. In addition to those cases just cited, I have looked carefully at the reasons for sentencing by Justice Simon MacDonald in relation to the thirteen matters that he had before him, that relate specific to Fenwick MacIntosh.

[27] All right. This is what the Crown is asking. The Crown has suggested that a period of two years Federal incarceration, two years Federal incarceration, on these four charges, two years that would be additional to the four years imposed by Justice Simon MacDonald that ... two years total on these four charges would be appropriate. They consider the additional two years, the two years, to be just and appropriate in all of the circumstances.

[28] Further, the Crown wants some Orders, the compulsory provision pursuant to Section 487.051, an order which would require Mr. Fenwick MacIntosh to provide a sample of his blood for a DNA data bank. Crown also wants a **SOIRA** order, an order requiring Mr. MacIntosh to be registered as a sexual offender under the **Sexual Offenders Registration Act.** That Order is pursuant to Section 490.012 of the **Criminal Code**.

[29] And, further, they want an order under Section 116, an order that would prohibit Mr. MacIntosh from attending at certain places, public parks, swimming areas, places where young people under the age of 16 years of age regularly congregate. Further, he would be restricted in relation to his employment in the sense that he would be required to stay away from persons under the age of 16. And, finally, there would be a restriction in relation to computer communication with persons under the age of 16, pursuant to that Order.

[30] The Defence, Mr. Bright, submits that an appropriate sentence, that a proper sentence in relation to these matters would be a period between 30 and 90 days' incarceration on each of the offences, 30 and 90 days. Now he's speaking of two offences when he speaks of 30 to 90 days because that's in conjunction with his *Kienapple* Application. He's asking this Court to stay two of the counts in that. They arise, he says, from the same incidents as the two other counts, so that there properly should be a stay of proceedings in two of the counts. He's asking for a period between 30 and 90 days.

[31] Let me speak firstly to the suggestion that *Kienapple* and the *Kienapple* case applies to these situations. I disagree. I tried to particularize the specific acts that resulted in convictions on each charge. I agree that they arise out of two incidents ... four convictions out of two general incidents, but I consider the four charges to respond to separate, distinct acts committed by Mr. MacIntosh in the course of those two incidents. So I do not think that *Kienapple* is applicable to this situation. I do, though, intend to at least partially address that issue with concurrent sentencing.

[32] Further, Mr. Bright, the Defence, has asked me to consider time spent on remand when determining the sentence in this matter, the time that Mr. MacIntosh has spent incarcerated in Nova Scotia facilities, also the time that he spent in the jail in India which, by his account, was a horrendous experience.

[33] I have considered that suggestion. I find that Justice Simon MacDonald fully addressed that issue, fully addressed it, both in relation to the Canadian incarceration and the incarceration in India. He considered remand time in the process of his sentencing in this matter. I do not find that there was any additional remand time beyond the remand time that he considered any additional remand time for this Court to consider.

[34] As to the conditions of bail pending this trial, the bail that was accomplished prior to Justice MacDonald's sentencing, the conditions of that bail were addressed by Justice MacDonald. I do not find it necessary to do that again. And the conditions of the bail subsequent to that sentencing, been created by the Nova Scotia Court of Appeal, I do not consider that it is ... better put, I do not intend to address the conditions of the present bail. That may be something that the Nova Scotia Court of Appeal may wish to do at some point.

[35] The Defence further points out that for purposes of these four counts, Mr. MacIntosh is a first offender. Some explanation; after the time frame of these four charges, after the '70s, Mr. MacIntosh entered a plea of guilty to one charge of indecent assault in 1983. There was another charge, sexual assault, in 1984. The 1983 charge, he received a suspended sentence. I think there's some dispute as to whether he pleaded guilty or was convicted. At any rate, there was an indecent assault conviction in 1983 and a sexual assault conviction in 1984.

[36] For the 1983 charge, he received a suspended sentence. In 1984, he received a $500 fine that was required and was required to undergo an assessment. These are

what are referred to as subsequents. They are offences that were committed after the acts that are the subject of the sentencing process today. Crown has cited that **Skolnick v. the Queen**, [1982] S.C.J. No. 60 for guidance in relation to how subsequents are to be treated. There's some benefit to that information being before the Court in relation to Mr. MacIntosh's situation with respect to rehabilitation, things of that nature. The Defence is correct in stating that he is, for purposes of sentencing in this matter and the matters that were before Justice MacDonald, to be considered a first offender.

[37] Further, the Crown says it's significant, especially when one takes a look at much of the so-called similar case law, that Fenwick MacIntosh has not been charged with breaching any position of trust in relation to these four charges. Although he was an adult dealing with young people, he was not in a circumstance normally considered to be one of trust. He was not a parent, he was not a step-parent, he was not a Boy Scout leader, he was not in any way connected with the young people beyond a connection that derived from the fact that they shared mutual interests in the same community.

[38] I do, though, note that while that is true, there's evidence of planning and manipulation by this adult with respect to these adolescents and I think that that is made clear on the evidence. I will repeat, Fenwick MacIntosh is 67 years of age. He's a businessman or was a businessman and successfully so, both in this Country and abroad. He's got some medical issues, but my impression is that they're under control. He has consistently denied the events that led to the conviction on these four matters, consistently and to this day denies the events, denies that he committed these offences. He does allege consensual sexual relations with these two complainants at other times ... other occasions.

[39] He was, as Dr. Connors testified, examined and tested by that doctor, that expert, that forensic psychologist, at the Nova Scotia Hospital. She described him, in her report, as charming and clever, with underlying arrogance, self-centeredness. That would apply to a lot of people. To this day, he does not believe that he did anything wrong. That, I note, is not an unusual reaction in relation to sexual offenders. Dr. Connors referred to level of risk for re-offending to be ... I think it would be fair to add only of the moderate/low range. Particularly, she made reference to the fact that there have been no offences, 25 years or so, and that he is 67 years of age. I suggested before, but I will repeat, that there is no question but that the charges have already

dramatically altered his life. The consequences following his arrest in India have been dramatically negative. Even had he not been convicted, "had he not been convicted," of anything, he would have suffered significantly.

[40] As to sentence; first, I want to make clear that I continue my sentencing, that I consider my sentencing to be a continuation, to be a continuation, of the sentencing of this accused for similar offences that sentencing that was accomplished by Justice Simon MacDonald of this Court in September of last year. Consider my sentencing to be as though I was the judge on all of the charges, that the one judge sat as judge alone in relation to all of the charges against Fenwick MacIntosh. I think that is the proper and fair way, I know that it is, to deal with the matter.

[41] I have considered Justice MacDonald's total sentence of four years Federal incarceration, total sentence of four years Federal incarceration on the thirteen charges that were before that Justice. I have considered that sentence when I consider the sentencing on these four charges. The totality principle of sentencing is being applied in relation not only to the charges before me, but also in relation to the convictions in relation to the sentencing that was accomplished by Justice Simon MacDonald. I have looked at that sentencing when considering a proper global sentence.

[42] Let me say, as an aside that conditional sentencing, the often referred to as house arrest type of sentencing, home incarceration, conditional sentencing has not been suggested in this matter by either counsel. I'll simply say that although that type of sentencing is proper in many instances, many circumstances, I do not believe that it would be proper ... that it would properly address the requirements of denunciation and general deterrence with respect to these four charges. I put that on the record. I again point out that neither counsel mentioned conditional sentencing.

[43] I have, over the years on this Bench, been asked to consider ... to relate in relation to historic sexual offences, I've been asked to consider that these offences commonly happened so long ago. Questions have been put, in various forms, How can current sentencing address events of 30, 40, 50 years ago? What can we do today to address things that happened such a long time ago? My response is regularly this, that it was long ago but the same lifetime, "same lifetime," same lifetime for the victims, same lifetime for the perpetrators. Even after all these years, sentencing can still address these issues. Denunciation remains important. Society can still say "no."

[44] Let me firstly address the Orders sought by the Crown. As to the Order under Section 487.051 of the **Criminal Code**, the blood for DNA purposes order, it may be redundant but it is compulsory. I will grant it. As to the Order sought under Section 490.012, the sex registry order, I find it not to be necessary in this specific. I'll give reasons. There have been no offences since 1985, 26 years ago. Secondly, as pointed out by Mr. Bright, it is possible, at least, that notwithstanding these convictions, Fenwick MacIntosh may otherwise be able to resume his career, some other country. His career had an international aspect to it. Such an order, an Order pursuant to Section 490.012, would, I think, interfere with such a prospect. When I consider the benefit versus prejudice factor, I conclude that should be no Order under that section.

[45] Third order I consider is a Section 116 Order, the public place employment order. I do not consider it necessary in this specific, will not grant it, dealing with a 67-year-old, low/moderate risk 26 years without offence, accused. So the first of the three orders sought is granted, the other two not.

[46] As to sentence, keeping in mind the four-year sentence already imposed by Justice MacDonald, keeping in mind the totality principle, keeping in mind the circumstances of the individual before the Court, prospect of rehabilitation, the

necessity of both denunciation and deterrence, I find that a sentence of 18 months total incarceration, 18 months total incarceration, is appropriate in this specific.

[47] I accomplish that by sentencing to nine months' incarceration on count number one; nine months concurrent on count number two; nine months consecutive, count number one and count number nine; nine months concurrent on count number ten. That results in a total sentence of eighteen months' incarceration, thus causing the sentence on all convictions involving Mr. MacIntosh, those before Justice MacDonald and those before me, thus causing the totality to be a period of five years and eight months' incarceration. In the circumstances, no victim fine surcharge is applicable. Thank you, Counsel.

[48] **MS. MCGRATH:** My Lord, just before you recess, the Crown had, as well, asked you to address the issue of a Section 109 firearms prohibition.

[49] **THE COURT:** Firearms prohibition will be granted. Section 109 prohibition will be granted. Thank you. I ...

[50] **MS. MCGRATH:** And that would be ten years and life, respectively?

[51] **THE COURT:** Thank you.

Joseph P. Kennedy
Chief Justice