CRSK 9690

IN THE SUPREME COURT OF NOVA SCOTIA
[Cite as R. v. R.K.P., 2001 NSSC 147]

BETWEEN:

HER MAJESTY THE QUEEN

- and -

R. K. P.

S E N T E N C I N G

Editorial Notice

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

PLACE: Kentville, Nova Scotia

BEFORE: The Honourable Justice Allan P. Boudreau.

DECISION: October 1, 2001.

COUNSEL: John Nisbet, Esq.,
Counsel for the Crown.

Jean Morris,
Counsel for the Defendant.

Boudreau, J.

[1] Mr. R. K. P. has been charged and has pled guilty to committing a sexual assault on N.C. contrary to s. 271 of the **Criminal Code of Canada**. Mr. P. is presently nineteen and a half years of age. He was eighteen years and four months of age when the offence was committed.

[2] Mr. P. is a young aboriginal person. The purpose and principles of sentencing have been codified and expanded in sections 718 to 718.2 of the **Criminal Code.** Needless to say the fundamental purpose of sentencing is to protect the public, and s. 718 requires that the courts must, in sentencing persons, denounce unlawful conduct, deter the offender and other persons from committing offences, separate offenders from society where necessary, assist in rehabilitating offenders, provide reparations for harm done to victims or to the community where possible, and to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and to the community.

[3] Section 718.1 requires that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." Section 718.2 is probably where the **Criminal Code** expands on what I have just read as the general principles of sentencing.

[4] Section 718.2 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 ("aggravating" is a word we all know, "mitigating" is one that is suppose to reduce) relating to the offence or the offender, . . .

[5] The section goes on to enumerate things like motivated by bias or hate, based on the usual factors; abuse of persons in one's family and people who are in a position of trust in relation to victims, which are parents, or guardians, or babysitters and people like that, relatives; association with a criminal organization. Those are aggravating circumstances enumerated in the **Criminal Code** and we do not have any of those present in this particular instance.

[6] The section goes on to say that:

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[7] And further:

(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.

[8] It appears both the Crown and defence are in agreement that this is not a case where a sanction other than imprisonment would be reasonable. The reason, as I understand it, is the seriousness of the offence in this particular case, and, of course, coupled with Mr. P.'s record, because Mr. P. does have a significant young offender record. Many of his previous convictions are breaches of probation or recognizance, but obviously the most serious is the conviction for sexual assault causing bodily harm , which conviction was in April of 1997.

[9] The main factors in this case favoring rehabilitation are Mr. P.'s relatively young age and the fact that this offence occurred apparently under serious impairment from drugs. Marijuana and pills have been indicated as the substances used to a significant degree. The witness, Mr. B., testified to the significant substance abuse problems for aboriginal persons, especially those living on reserves. The use of the drugs may explain what appears to be the apparently unplanned and un-premeditated nature of the attack on the victim. There was a very short time from the time that the victim walked by and observed Mr. P. talking to one of the other residents of the Reserve and the attack. What triggered the attack has not been explained and it is apparently the second time that such an unprovoked incident has happened regarding Mr. P.. That is a serious aspect of this case. For the protection of the public, it would be important to know what is the trigger that causes that. Obviously the trigger may be more easily pulled or fired accidentally when drugs are being used. That appears to be the case, but there obviously is an underlying reason which I don't believe has been explored to this point.

[10] There was some discussion about where this rape fits on the scale. In my view, a rape is always a violent and serious crime and it is so particularly in these circumstances, where threats are made and force is used to over power the victim and it does little to attempt to place such a rape on a particular scale. It is always serious and has serious consequences for the victims. In this particular case we do not have a victim impact statement since the victim has declined to take part in such a statement and wishes to get on with her life and put the matter behind her.

[11] I have also taken into account the fact that Mr. P. has pled guilty and I am not in any way holding it against him that it took some time to arrive at that result and I accept the confusion that probably arose surrounding the case and the explanation given by defence counsel and I do not find that as a factor that should be held against Mr. P. in any way. In pleading guilty he has saved the victim the trauma of having to testify a second time.

[12] There is no question that Mr. P. needs a good deal of rehabilitative help. Of course, the first decision comes from him and the rest comes from outside.

[13] The Crown has urged a sentence of six years primarily for reasons of rehabilitation and the length of time that this may take. The Crown also says six years is necessary to give a chance for Mr. P. to mature somewhat and hopefully when he makes the decision to change his behavior the next time, it will be more long lasting and easier to sustain.

[14] On the other hand, the defence urges a sentence of three years and indications are from the witness, Mr. ., that most of the treatments would fit in that time frame. The longest treatment being 5 months for the sex offender rehabilitation; the shortest one being approximately 5 weeks for the substance abuse, and the anger management has been mentioned as well as fitting in the short time frame. I believe the term “anger management” has come into some disfavor recently because it does little except try to simply help a person control their anger. It may not try to get at the root of the anger. Again, what is the trigger, what causes the anger is the important question. Recent courses that I have attended seem to indicate that “anger management” is an easy catch phrase which, unless the underlying causes are investigated, can be of little long term therapeutic value.

[15] In my view, there is some merit to the argument that Mr. P. does need some significant time for all this to take place - rehabilitation courses and maturity. I believe he wishes to do that, from what I have read. He has been trying to be more consistent in reconnecting with his native roots and native traditions. I understand that some of that can be achieved in prison. Mr. B. has testified that there is now a substance abuse program that is geared specifically to aboriginals. He is hopeful that the “In Search of the Warrior” program will be in this region soon, which, as I understand it, incorporates aboriginal values and traditions in all aspects of treatment, not just substance abuse. Certainly that would seem to be a worthwhile program to have in this region. Obviously we don’t know for sure when it will be here but I believe Mr. B. was hopeful that it may occur perhaps by the end of this year or sometime early next year.

[16] In arriving at a proper sentence for Mr. P., I am also considering the fact that he has spent some six to nine months on remand time, which regardless of which argument you accept in this particular situation, is equivalent to at least one year of regular incarceration if not more. The Crown’s recommendation of six years then, in my view, would amount to approximately seven years in this particular case. I accept the defence’s position that that would be unnecessarily high in the circumstances and might in fact work against rehabilitation, which is still a very significant factor to be considered in this case. On the other hand, this was a serious crime, a violent crime, it is always a violent crime. In my view it requires serious deterrence. Also one has to be mindful of the fact that there has to be some time to reflect, not just receive courses and short term rehabilitation training. It needs some water under the bridge to some extent. In my view a proper sentence to protect the public and to provide for Mr. P.’s rehabilitation is one of fifty-one months to be served in a federal institution.

[17] Mr. P. should be assessed for treatment for substance abuse and, as I said, what has in the past been referred to as anger management, but I think it needs more than that. I think it needs to explore the reasons why Mr. P. may have some violent reactions or actions, especially against women. I believe there are other convictions that do not involve women - there was an assault I believe, aggravated assault or assault causing bodily harm. He also requires assessment and sexual offender rehabilitation, keeping in mind the comments I have already made.

[18] In my view, considering Mr. P.'s young age and his need to reconnect with his traditional aboriginal roots and traditions, every effort should be made to provide him with rehabilitative services during his first year of incarceration. In my view it would be improper to let him sit there for a long time waiting for rehabilitative services because that would only work against and impede, and possibly impair rehabilitation. So this should be started as soon as possible. He should also be provided as soon as possible with all aboriginal services and contacts available in the federal institutions.

[19] There are apparently healing lodges available. There are none in this area at the moment, but probably any consideration for that would have to wait until Mr. P. has received the assessments and treatment which I have mentioned and again, this is another reason for not delaying the assessments and programs.

[20] It has been requested that a ten year weapons prohibition be granted and I will order such a prohibition. I will also order that a DNA sample be provided for the data bank. If the already received DNA sample is sufficient for the data bank purposes then I will order that it be used for that purpose; if not, then another sample will have to be obtained. I will grant the order Mr. Nisbet subject to you confirming first whether another DNA sample is necessary, but I will certainly order that it be made available to the data bank if for some reason it has been used for other purposes and is not available. So I will grant your order conditionally on that basis. I will also waive the victim surcharge in this particular case.

Boudreau, J.