SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. B.W.B,* 2019 NSSC 279

Date: 20190904
Docket: CRBW No. 472453
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

BWB

LIBRARY HEADING

Restriction on Publication: Restriction on Publication: S. 486.4
A ban on publication of any information that would disclose the identity of the victim and/or complainant.

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	August 23, 2019 in Bridgewater, Nova Scotia
Written Decision:	September 4, 2019
Subject:	Criminal Law – Sentencing – Sexual Assault
Summary:	The 27 year-old offender, with a prior conviction for sexual assault on a minor, sexually assaulted the 14 year-old complainant. The offender knew the complainant was a minor. The assault included penetration of the complainant's vagina and anus by the offender's penis.
Issues:	(1) What is the appropriate sentence?
Result:	Given the circumstances of the offence and offender, the appropriate sentence is incarceration for 42 months and

ancillary orders.

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Heard: August 23, 2019, in Bridgewater, Nova Scotia

Counsel: Sharon Goodwin, for the Crown
David R. Hirtle, for the Accused

By the Court:

[1] In a judgment delivered May 22, 2019 I convicted BWB of committing a sexual on SH contrary to section 271 of the **Criminal Code of Canada**.

[2] The facts surrounding the offence are set out in detail in my judgment of May 22, 2019. The following is a brief summary.

[3] The offence occurred on June 16, 2016. BWB was 27 years old and SH was 14 years old at the time. At the time, SH was in Grade 9. SH met BWB through a school friend when she was in Grade 7. BWB and SH communicated over Facebook.

[4] On June 16, 2016, SH had been drinking with a friend. She got home about 3 p.m. and sent a message to BWB saying she was home alone and that BWB should come over. SH who was drunk, sent a message to BWB saying she was home alone and he should come "fuck".

[5] BWB, who knew SH was young, was concerned that SH's mother might come home early and asked SH, "Well, what door do I come in so nobody sees me, the back?"

[6] BWB met SH at a church near SH's home. They went to the home and had sex. BWB penetrated SH's vagina and anus with his penis.

[7] BWB, born June 1, 1989 is currently 30 years of age and was 27 years old at the time of the offence. He is single and has two children from previous relationships; a son age 11 and a daughter 3 months old. Both children live with their mothers. The last time BWB saw his son was in May of 2012. He has not seen his daughter due to the offence we are dealing with today, but noted that he and his daughter's mother remain friends.

[8] BWB lives at his father's home.

[9] BWB has completed Grade 9. He has trouble with reading and writing. Currently unemployed, during the last decade he has had various jobs such as cutting trees for various mills from 2012 to 2015; a removal company in 2011; a moving company from 2009-2010; a call centre for one month in 2009; a chicken farm in 2008; and during the winter of 2018-2019 shovelling and salting for a snow removal company.

[10] BWB has no current income but does not pay room and board to his father as he does most of the maintenance around the property.

[11] BWB has a previous criminal record. He was convicted of sexual assault, which assault occurred in 2010 and which was on a minor; in 2018 he was sentenced for failure to comply with the Sex Offender Registry.

[12] In the Pre-sentence Report dated July 4, 2019 the author states under the heading "Corrections History":

> This writer has supervised the offender in the past and currently as he is on an 18 month Probation Order dated October 16, 2018, expiring April 15, 2020. He has always reported as directed and presented as a cooperative and polite individual. The consistent area of concern has been employment, as the offender has been unable to secure steady work. There were no Breaches of Probation with respect to the present supervision term.

And under the heading, "Assessment of Community Alternatives/Resources":

> BWB is a 27 year old, repeat offender, who is appearing in Court for sentencing on a charge of one count of Sexual Assault, contrary to Section 271 of the Criminal Code. BWB did not accept responsibility for his actions and expressed no remorse regarding same. As a result of BWB's behaviour and position with respect to his actions, he would appear to present a risk to the Community, given his behaviour with an underage girl. His lack of acknowledgement that he victimized a child, as well as failing to express any motivation to change his behaviour, remains a concern. To mitigate potential risk, the offender and the community may benefit from restrictions regarding BWB's access to children, should a community based sentence be considered in this matter. The offender may benefit form [sic] having a Forensic Sexual Assessment prepared to determine his risk and recommendations for the future.

[13] BWB also has convictions for other previous unrelated offences.

[14] DH, the mother of SH, filed a Victim Impact Statement. She stated SH was not able to complete a Victim Impact Statement as it brought up memories of the offence. DH stated that since finding out the offence occurred it has taken an emotional toll on her and her daughter, "emotionally wearing is the best way to describe it." DH has had to take time off work because of the stress caused by the assault and related court process. It breaks DH's heart to know the pain her daughter has and will suffer because of the assault of this man on a 14 year-old girl. This violation of the comfort and security of their home causes DH much pain.

[15] DH and SH had to move from the affordable home they were living in as the offence occurred in SH's bedroom and SH could no longer go in that area of the house due to her harmful memories.

[16] Both DH and SH have fears of running into BWB.

[17] The Crown is seeking a period of imprisonment in the range of three to four years.

[18] In addition, the Crown is seeking a DNA Order pursuant to section 487.051(1) of the **Criminal Code**; a Firearm's Prohibition for life pursuant to section 109(1)(a) of the **Code**; a Sex Offender Information Registration Order for life, pursuant to section 490.012 of the **Code**; and an Order pursuant to s. 161(1)(c) and (d) for life.

[19] During argument Crown counsel stated the Crown was not pushing their position that there be an Order under section 161(1)(d).

[20] The defence submits an appropriate sentence would be a period of incarceration of 30 months. The defence takes no position with regard to the request made pursuant to section 487.051(1) DNA; section 109(1)(a), firearms' prohibition; or section 490.012, **Sex Offender Information Registration Act**.

[21] The defence opposes the requested Order pursuant to section 161, stating there is not an evidentiary basis justifying the requested Order. In the alternative, if there is an evidentiary basis the duration of any such Order should be 10 years, not life.

[22] The purpose and principles of sentencing are set out in the **Criminal Code**. The principles particularly relevant to this case include:

> 718 The fundamental purpose of sentencing is to protect society and 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 and the harm done to victims or to the community that is caused by 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 or to the community.

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.

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

718.2 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.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

. . .

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

. . .

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;

. . .

(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 and consistent with the harm done to victims or to the community should be considered for all offenders . . .

[23] In dealing with the appropriate sentence in connection with a sexual assault, Fichaud, J.A., in giving the court's judgment in *R. v. E.M.W.*, 2011 NSCA 87 stated at paragraph 23:

> This Court repeatedly has emphasized denunciation and deterrence in sentencing for sexual assaults against children. In *R. v. Oliver*, para 20, the Court said:
>
> > Given the age of the complainant and the circumstances surrounding the offence it was – as the judge said – a case that called for very strong denunciation with an emphasis on deterrence. In this Judge Digby's approach was obligatory. Denunciation and deterrence are given the highest ranking among all the principles of sentencing in cases involving the abuse of children. Parliament's intention is clearly stated.
>
> To similar effect: *R. v. P.J.G.*, paras 22-23; *R. v. Hawkes*, para 6; *R. v. G.O.H.* (S.C.), paras 34-36 and *R. v. G.O.H.* (C.A.), para 10; *R. .v. D.B.S.*, paras 20-21; *R. v. M.*, para 35; *R. v. E.A.F.*, [1994] N.S.J. No. 29 (C.A.), para 7; *R. v. L.R.S.* (1993), 121 N.S.R. (2d) 248 (CA), at para. 16.

[24] I have read the submissions of both Crown and defence counsel, the cases to which I was referred by both counsel, the pre-sentence report and the victim impact statement filed by DH, mother of SH. I have also heard the oral submissions of counsel

[25] Section 271 for BWB's offence carries a one-year mandatory minimum sentence, as the Crown proceeded by indictment and the victim was 14 years old at the time of the offence.

[26] A number of minimum mandatory sentences have been declared to violate the *Canadian Charter of Rights and Freedoms*. Neither the Crown nor defence counsel made reference to the mandatory minimum sentence in their sentencing submissions. The mandatory minimum sentence plays no part in the determination of BWB's sentence in this case.

[27] The following are aggravating factors in this case:

a) The sexual assault was committed on a minor, a 14 year-old girl, who BWB knew to be a minor. The assault included both vaginal and anal penetration. (Section 718.2 (a) (ii.1))

b) The offence had a significant impact on SH as described in her evidence at trial and in her mother's victim impact statement. (Section 718.2 (a) (iii.1)). DH described that SH could not complete a victim impact statement because of the memories it brought back. The assault has taken an emotional toll on SH. DH took time off work to be home with SH because of SH's stress as a result of the offence. They had to move as SH could not be in that area of their rented residence where the offence took place. SH fears seeing BWB in the community.

[28] There are no mitigating factors in this case.

[29] Review of other cases provides guidance, but the sentences in each depends on the facts of that particular case. For example, was the offender in a position of trust; did the offender have a prior relevant record; the severity of the assault and other factors.

[30] I was referred to various cases by the Defence:

[31] *R. v. Deyoung*, 2016 NSPC 67. The offender who had no prior record, aged 21, had vaginal and oral sex with a 14 year-old and was sentenced to 12 months imprisonment followed by 24 months probation.

[32] *R. v. Angel*, 2018 BCSC 1751. The 53 year-old offender, with no criminal record, had oral and anal intercourse with a 14 year-old. The judge was not satisfied beyond a reasonable doubt that the offender knew that the complainant was under 16. Mr. Angel was sentenced to 1 year imprisonment followed by 18 months probation.

[33] *R. v. B(A.P.S.)*, 2016 NSSC 29. The 20 year-old offender, knowing the complainant's age of 14 years old, had sexual relations including sexual intercourse over a period of 1 week. The offender had no criminal record. The judge accepted the joint recommendation of 12 months imprisonment followed by 24 months probation.

[34] *R. v. Whiting*, 2013 SKCA 101. The 19 year-old offender with no criminal record picked the 14 year-old complainant up and went to a nearby parking lot where they each removed their clothes and commenced sexual intercourse. When the complainant asked the offender to stop, he did. The sentence was increased from 6 months to 14 months.

[35] *R. v. Hussein*, 2017 ONSC 4202. The 27 year-old offender was told by the complainant's mother that the complainant was 14, although she was only 13 years old. They had sexual intercourse. The offender did not have a prior record. The sentence was 15 months imprisonment followed by a 2-year probation.

[36] *R. v. Menicoche*, 2016 YKCA 7. The 27 year-old aboriginal offender had unprotected anal intercourse with a 15 year-old complainant. The offender did not know the complainant's age but knew or was indifferent if she was under 18. The offender had one previous conviction for an assault some 7 years earlier, when he punched another male. The pre-sentence report suggested the offender's chances for rehabilitation were good and that there were compelling Gladue factors present which the sentencing judge failed to give genuine effect to the offender's aboriginal status. The offender was an aboriginal offender who came before the court as essentially as first offender. The sentence was reduced from 23 months to 17 months imprisonment.

[37] *R. v. Reddekopp*, 2018 ABCA 399. The 19 year-old offender with no prior record has two acts of sexual intercourse with a 13 year-old complainant. Given the facts, the Court of Appeal did not interfere with the 20-month imprisonment sentence.

[38] *R. v. Brake*, 2014 NLTD(G) 97. The female offender, aged 23, fondled and also had sexual intercourse on two occasions with a 12 year-old boy. The offender did not have a criminal record. The offender received a 12-month sentence for a charge under section 151 and 12 months less a day for a charge under section 271.

[39] *R. v. Fitzgerald*, 2014 NSPC 1. The offender had sexual intercourse with a 14 year-old acquaintance and received a sentence of 2 years imprisonment followed by 18 months probation.

[40] *R. v. Piche*, 2013 SKQB 202. The 25 year-old offender had intercourse with a 14 year-old babysitter when he drove her home. When she asked him to stop, he did and drove her home. The offender did not have a prior criminal record. The offender was sentenced to 30 months imprisonment.

[41] *R. v. Muise*, 2018 NLSC 8. The aboriginal offender who was 18 years old at the time admitted to having sexual intercourse with a 13 year-old victim. The offender was sentenced to 30 months for sexual interference.

[42] *R. v. Arnold*, [2019] N.J. No. 120. The offender aged 22 years old had sexual intercourse with a complainant who was 15 years old. The offender who pleaded guilty had no criminal record. The offender received a 30 month sentence for the charge pursuant to section 271.

[43] *R. v. Holyes*, 2015 NLTD(G) 164. The 33 year-old offender had sex with a 14 year-old complainant on three occasions. The offender pled guilty. The offender had a prior criminal record unrelated to the offence for which he was being sentenced. The judge accepted the joint recommendation of 30 months imprisonment, less time served.

[44] *R. v. F.B.*, 2018 ONSC 5812. The 43 year-old offender touched the 15 year-old complainant's thighs, breasts and vagina and penetrated her vagina with his finger. The offender had a previous conviction for sexual interference, invitation to sexual touching and luring a child under 16 years of age. The offender was sentenced to 36 months imprisonment for sexual interference.

[45] As previously stated, I have also reviewed the cases referred to me by the Crown.

[46] In *R. v. W.H.A.*, 2011 NSSC 246, in discussing the appropriate "range" of sentences in the category of serious sexual assault, that is non-consensual sexual assault, Rosinski, J. stated at paragraph 75:

> In summary, it is very difficult to set out the "range of sentences" that would be appropriate in a case of similar offences and a similar offender, due to the great differences that make up the facts of each case. Determining a fit sentence is a "complicated calculus" and should not be seen as a simple numbers game. Nevertheless, in the category of sexual assault, previously known as a "rape", it does appear to be the case that, in the absence of exceptional circumstances, an offender with no significant criminal record, who has committed a non-premeditated rape, will receive a sentence around three years in jail.

[47] Of course, the appropriate sentence in a particular case depends on the circumstances of that specific offence and specific offender.

[48] In this case, BWB, an individual who had a prior conviction for sexual assault, sexually assaulted a 14 year-old girl. He was 27 years old when the assault

on SH took place. The assault included penetration of SH's vagina and anus by BWB's penis. BWB knew SH was a minor. During the extensive messaging between SH and BWB arranging for their encounter on June 16, 2016, BWB was concerned SH's mother might come home early and also asked SH what door he should use so that no one would see him.

[49] The facts present in this case show BWB's culpability and the gravity of the offence to be high. In addition, as set out in the pre-sentence report, BWB has not accepted responsibility for or expressed remorse for his actions.

[50] BWB, please stand. I sentence you to a term of incarceration of 42 months to be served in a federal institution.

[51] There will be an order in Form 5.03 authorizing the taking of DNA samples from you pursuant to section 487.051(1) of the **Criminal Code**.

[52] I make an order pursuant to section 109(1)(a) prohibiting you from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substances and any prohibited firearm and restricted firearm, for life.

[53] I make an order in Form 52 that you comply with the **Sex Offender Information Act** for a period of life, pursuant to sections 490.012(1) and 490.013(4) of the **Criminal Code**.

[54] The Crown is also seeking an order pursuant to section 161 of the **Criminal Code**. The section requires the sentencing judge to consider an order prohibiting certain activities set out in the section.

[55] The Supreme Court of Canada considered this section in *R. v. J (K.R.)*, 2016 SCC 31 in giving the Court's judgment. Karakatsanis, J., stated at paragraphs 47 and 48:

> 47 As well, the design of s. 161 is consistent with its purpose of protecting children from sexual violence. Section 161 orders are discretionary and "subject to the conditions or exemptions that the court directs" (s. 161(1)). They can therefore be carefully tailored to the circumstances of a particular offender. The discretionary and flexible nature of s. 161 demonstrates that it was designed to empower courts to craft tailored orders to address the nature and degree of risk that a sexual offender poses to children once released into the community. Failure to comply with the order can lead to a term of imprisonment for up to four years (s.161(4)).

> 48 Further, I agree with the line of cases holding that s. 161 orders can be imposed only when there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the judge is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk: see *A. (R.K.)*, at para. 32; see also *R. v. B. (R.R.)*, 2013 BCCA 224, 338 B.C.A.C. 106 (B.C. C.A.), at paras 32-34. These orders are not available as a matter of course. In addition, the content of the order must carefully respond to an offender's specific circumstances.[2]

[56] I am prepared to grant a prohibition order pursuant to section 161(1)(c) that BWB have no contact including communicating by any means with a person who is under the age of 16 years, unless when the offender is under the supervision of a person who knows the offender has convictions for sexual assault on a minor and in the presence of such person, with the exception of contact incidental to employment, incidental contact with persons under the age of 16 years in a public place or excepting members of his immediate family for a period of 20 years.

[57] I am not prepared to grant an order pursuant to section 161(1)(d) of the **Criminal Code**.

Coughlan, J.