

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Kotio*, 2020 NSSC 68

Date: 2020/02/06

Docket: Halifax No. CR. 472166

Registry: Halifax

Between:

Her Majesty The Queen

v.

Eastman Tamba Kotio

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Judge: The Honourable Justice C. Richard Coughlan

Heard: February 6, 2020 in Halifax, Nova Scotia

Oral Decision: February 6, 2020

Written Release: February 19, 2020

Subject: Criminal Law – Sentencing – Sexual Assault

Summary: The offender with no prior criminal record sexually assaulted the complainant. The assault included penetration of the complainant's vagina and anus by the offender's penis.

Issues: What is the appropriate sentence?

Result: Given the circumstances of the offence and the offender, the appropriate sentence is three years incarceration and ancillary orders.

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Sentencing Decision

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Counsel: Cory J. H. Roberts, and
Dan Boucher, Articled Clerk, for the Crown
Joshua N. Nodelman, for the Defence

By the Court:

[1] On May 10, 2019, I convicted Eastman Tamba Kotio of sexual assault on HDG contrary to Section 271 of the *Criminal Code of Canada* (“Code”).

[2] In my judgment delivered on May 10, 2019, the facts of the assault were set out in detail. I will briefly review the facts for the purpose of this sentencing judgment.

[3] In my judgment finding Mr. Kotio guilty, I stated I found HDG to be a credible witness and accepted her evidence as to what occurred between her and Mr. Kotio on August 20, 2017.

[4] The facts were as follows:

[5] HDG met Mr. Kotio in 2017. Prior to August 20, 2017, HDG saw him twice in person. During the spring and summer of 2017, HDG and Mr. Kotio were texting and snap chatting each other.

[6] Mr. Kotio called HDG on August 20, 2017 and they made arrangements for her to visit Mr. Kotio later that day in Halifax. HDG travelled to Halifax thinking she would be spending the night with Mr. Kotio.

[7] After they got together, HDG and Mr. Kotio had consensual oral sex and vaginal intercourse. HDG testified, and I accept, she consented until the sex got too rough. It made her uncomfortable and sore. She told Mr. Kotio it hurt. Mr. Kotio was videotaping her with his phone. HDG did not consent to the videotaping. She asked Mr. Kotio to delete it. He refused saying it was for his personal use.

[8] Mr. Kotio then tried to insert his penis in HDG’s anus. She told Mr. Kotio to stop, it hurt. HDG was crying in pain when she told Mr. Kotio to stop. Mr. Kotio said No and kept going with the anal penetration. HDG tried to move away and was scared. Mr. Kotio laughed saying she should not be crying, he had done it with other people before.

[9] HDG went into the bathroom. Mr. Kotio followed her, saying he was not finished yet, as he had not ejaculated. Mr. Kotio had HDG lean over the bed and he put his penis in her vagina. HDG did not wish this vaginal intercourse. She just

wanted to finish. HDG concluded the sexual activity by masturbating Mr. Kotio's penis with her hand. Mr. Kotio ejaculated.

[10] HDG felt violated. She did not consent to the anal sex or the vaginal sex after the penetration of her anus. The pain from the activity lasted a week and a half when she was urinating or defecating.

[11] Mr. Kotio, born April 21, 1993 is 26 years old and was 24 at the time of the offence. He does not have a prior criminal record.

[12] A pre-sentence report prepared January 23, 2020 sets out Mr. Kotio has been in a common-law relationship since October 2017. He graduated from high school in 2013. He attended Dalhousie University from September to December 2016 and from January 2017 until April 2019 he attended St. Mary's University. He put his university study on hold because of the charge we are dealing with today.

[13] Mr. Kotio is currently unemployed but sells music he has recorded for extra money.

[14] The author of the pre-sentence report stated Mr. Kotio has the support of his immediate family and his common-law girlfriend, who consider the charge out of character for Mr. Kotio.

[15] At the sentencing hearing Mr. Kotio said he was sorry.

[16] I have read the pre-sentence submissions of counsel, the cases to which they referred me, the pre-sentence report and heard the submissions of both Crown and Defence counsel.

[17] The Crown is seeking a sentence of incarceration for a period of three years.

[18] The Crown is also seeking an Order pursuant to Section 487.051 of the *Criminal Code* for the taking of bodily substances required for the purpose of forensic DNA analysis; an Order pursuant to Section 490.012(1) and 490.013 of the *Code* for 20 years; and a firearms prohibition pursuant to Section 109 of the *Code*.

[19] The Defence agrees with the sentence and ancillary orders sought by the Crown.

[20] The purpose and principles of sentencing are set out in the *Criminal Code*. The principles 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.

718.1 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,

...

- (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,

[21] Aggravating factors present in this matter are as follows:

The sexual assault arose out of what was initially consensual sexual activity involving oral and vaginal sex. However, that changed when Mr. Kotio inserted his penis in HDG's anus without her consent. This was not a momentary act. Mr. Kotio continued penetrating HDG's anus despite her telling him to stop while she was crying in pain. HDG also told Mr. Kotio, "No". She tried to move away, and Mr. Kotio laughed saying she should not be crying, he had done it with other people. When HDG went into the bathroom, Mr. Kotio followed her saying he had not finished yet. He had HDG lean over the bed and inserted his penis in her vagina. The sexual assault continued until Mr. Kotio satisfied himself by ejaculating.

[22] This was a violent sexual assault involving anal and vaginal intercourse.

[23] The anal intercourse caused HDG pain for many days. She experienced pain when urinating or defecating for approximately a week and a half. The evidence showed the assault had a profound emotional effect on her. After the assault, she was hysterical, distraught and vomiting.

[24] The mitigating factors present here are that Mr. Kotio has no prior criminal record and was relatively young at the time of the offence, being 24 years old.

[25] In any particular case, the appropriate sentence depends on the circumstances of the particular offence and offender.

[26] The effect a sexual assault can have on a victim are well known. In giving the Court's judgment in **R. v. McCraw**, [1991] 3 S.C.R. 72, Cory J. stated at page 83:

It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered grave and serious violence is to ignore the perspective of women. For women rape under any circumstance must constitute a profound interference with their physical integrity. As well, by force or threat of force, it denies women the right to exercise freedom of choice as to their partner for sexual relations and the timing of those relations. These are choices of great importance that may have a substantial

effect upon the life and health of every woman. Parliament's intention in replacing the rape laws with the sexual assault offences was to convey the message that rape is not just a sexual act but is basically an act of violence. See K. Mahoney, 'R. v. McCraw: Rape Fantasies v. Fear of Sexual Assault' (1989), 21 *Ottawa L. Rev.* 207, at pp. 215-16.

It is difficult if not impossible to distinguish the sexual component of the act of rape from the context of violence in which it occurs. Rape throughout the ages has been synonymous with an act of forcibly imposing the will of the more powerful assailant upon the weaker victim. Necessarily implied in the act of rape is the imposition of the assailant's will on the victim through the use of force. Whether the victim is so overcome by fear that she submits or whether she struggles violently is of no consequence in determining whether the rape has actually been committed. In both situations the victim has been forced to undergo the ultimate violation of personal privacy by unwanted sexual intercourse. The assailant has imposed his will on the victim by means of actual violence or the threat of violence.

Violence and the threat of serious bodily harm are indeed the hallmarks of rape. While the bruises and physical results of the violent act will often disappear over time, the devastating psychological effects may last a lifetime. It seems to me that grave psychological harm could certainly result from an act of rape.

The psychological trauma suffered by rape victims has been well documented. It involves symptoms of depression, sleeplessness, a sense of defilement, the loss of sexual desire, fear and distrust of others, strong feelings of guilt, shame and loss of self-esteem. It is a crime committed against women which has a dramatic, traumatic impact. See D.J. Giacomassi and K.R. Wilkinson, "Rape and the Devalued Victim" (1985), 9 *Law and Human Behavior* 367; *R. v. Billam* (1986), 8 Cr. App. R. (S.) 48 (C.A.), at pp. 49-50; P. Marshall, "Sexual Assault, The Charter and Sentencing Reform" (1988), 63 C.R. (3d) 216, at p. 221; A. W. Burgess, "Rape Trauma Syndrome" (1983), 1:3 *Behavioral Sciences and the Law* 97; C.H. Herd, "Criminal Law: Kansas Recognizes Rape Trauma Syndrome" (1985), 24 *Washburn L.J.* 653. To ignore the fact that rape frequently results in serious psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law.

[27] In discussing appropriate sentences for non-consensual sexual intercourse in **R. v. A. (W.H.)**, 2011 NSSC 246, 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.

[28] In this case HDG told Mr. Kotio “No” or to stop. He did not. He continued until he was sexually satisfied. As Watt, J.A. stated in giving the judgment of the Ontario Court of Appeal in **R. v. Garnett**, 2014 ONCA 734: “This constitutes demeaning behaviour and contemptuous disregard for the personal integrity of the victim.”

[29] Mr. Kotio is an immigrant to Canada who has the status of a permanent residence of Canada.

[30] The issue of collateral immigration consequences of the sentence on Mr. Kotio has been raised.

[31] How collateral immigration consequences may be used by a judge in sentencing was addressed by the Supreme Court of Canada in **R. v. Pham**, 2013 SCC 15, where Wagner, J., as he then was, stated at paragraph 11:

In light of these principles, the collateral consequences of a sentence are any consequences for the impact of the sentence on the particular offender. They made be taken into account in sentencing as personal circumstances of the offender. However, they are not, strictly speaking, aggravating or mitigating factors, since such factors are by definition related only to the gravity of the offence or to the degree of responsibility of the offender (s. 718.2(a) of the *Criminal Code*). Their relevance flows from the application of the principles of individualization and parity. The relevance of collateral consequences may also flow from the sentencing objective of assisting in rehabilitating offenders (s. 718(d) of the *Criminal Code*). Thus, when two possible sentences are both appropriate as regards the gravity of the offence and the responsibility of the offenders, the most suitable one may be the one that better contributes to the offender’s rehabilitation.

and starting at paragraph 13:

13. Therefore, collateral consequences related to immigration may be relevant in tailoring the sentence, but their significance depends on and has to be determined in accordance with the facts of the particular case.

14. The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

15. The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.

16. These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de facto* if not a *de jure* special range of sentencing options where deportation is a risk.

and at paragraphs 18 and 20:

18. It follows that where a sentence is varied to avoid collateral consequences, the further the varied sentence is from the range of otherwise appropriate sentences, the less likely it is that it will remain proportionate to the gravity of the offence and the responsibility of the offender. Conversely, the closer the varied sentence is to the range of otherwise appropriate sentences, the more probable it is that the reduced sentence will remain proportionate, and thus reasonable and appropriate.

20. Accordingly, the sentencing judge is not compelled in all circumstances to adjust a sentence in order to avoid the impact of collateral immigration consequences on the offender. It remains open to the judge to conclude that even a minimal reduction, i.e. from two years' imprisonment to two years less a day, would render the sentence inappropriate for the particular offence and the particular offender. Collateral immigration consequences are but one relevant factor amongst many others related to the nature and the gravity of the offence, the degree of responsibility of the offender and the offender's personal circumstances.

[32] Therefore, it is clear that collateral immigration consequences are relevant in determining an appropriate sentence for an offender, but are not a mitigating factor. Any sentence varied to avoid collateral consequences must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[33] In this case, both Crown and Defence counsel submit a sentence within the appropriate range will not change the consequences of the sentence on Mr. Kotio's immigration status.

[34] Considering all the circumstances of the offence and Mr. Kotio, the case law, the submissions of counsel, the pre-sentence report and the principles and

objectives of sentencing, I am satisfied three years imprisonment is the appropriate sentence in this case.

[35] Mr. Kotio, will you please stand.

[36] I sentence you to three years imprisonment in a federal institution.

[37] I make an Order in Form 5.03 authorizing the taking of the number of samples of bodily substances that is reasonably required for the forensic DNA analysis from Mr. Kotio, pursuant to Section 487.051 of the *Criminal Code*.

[38] I make an Order in Form 52 requiring Mr. Kotio to comply with the *Sex Offender Information Registration Act* for 20 years pursuant to Section 490.012(1) and 490.013(1) and (2) of the *Code*.

[39] As the sexual assault was an act of violence, I make an Order prohibiting Mr. Kotio from possessing any firearm, cross-bow, restricted weapon, ammunition, and explosive substances for a period ending 10 years after Mr. Kotio's release from imprisonment and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life pursuant to Section 109 of the *Criminal Code*.

[40] The Crown is not seeking the imposition of a victim surcharge.

Coughlan, J.