SUPREME COURT OF NOVA SCOTIA
Citation: *R v. D.R.*, 2020 NSSC 153

Date: 20200220
Docket: *Kentville*, No. 468364
Registry: Kentville

Between:

Her Majesty The Queen

Plaintiff

v.

D.R.

Defendant

SENTENCING
Publication Ban S. 486.4 & 486.5 CC and S. 539(1) CC

Judge: The Honourable Justice Pierre L. Muise

Heard: February 20, 2020, in Kentville, Nova Scotia

Counsel: Saara Wilson, for the Plaintiff

Patrick Eagan, for the Defendant

Section **486.4 & 486.5**: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end that for the Ban stipulated in these Sections.

Oral Decision Rendered February 20, 2020

SENTENCING

[1] This is the matter of Her Majesty the Queen and D. R. It is court file number, Supreme Court file number CRK468364. It is the sentencing matter. The offences for which he is being sentenced are as follows:

[2] He was convicted of having between the 1st day of January 2004 and the 31st day of January 2013, committed a sexual assault on JVK contrary to section 271 of the ***Criminal Code***; and trafficked in hydromorphone contrary to section 5(1) of the *Controlled Drugs and Substances Act*, or the *CDSA* by giving and selling that substance to her, including in exchange for sex.

[3] He is being sentenced in relation to both of those offences today. The Crown proceeded indictably on the section 271. Therefore, the sexual assault offence carries a maximum penalty of ten years' imprisonment. The 5(1) *CDSA* offence is a straight indictable offence and carries a maximum penalty of imprisonment for life.

[4] In relation to the circumstances of the offences, they started after JVK turned 16 but before she turned 17 and continued until she was 22 going on 23. Mr. R.

engaged in sexual intercourse with JVK without her consent on multiple occasions. On some of those occasions, she would repeatedly communicate that she did not want to engage in sex then eventually give in to him bugging her for sex and not fight it. Towards the end, she was making arrangements for a friend to be present with her when she had contact with him. She did that so she would not be put into a position where she would give in to his coaxing her to have sex.

[5] He regularly provided her with hydromorphone, initially for free, then in exchange for money then at times in exchange for sex. Mr. R. was in his 40's during that period of time.

[6] I have received sentencing recommendations from the parties. The Crown recommends a three-year consecutive period of imprisonment for the trafficking and five years consecutive for the sexual assault adjusted in accordance with the totality principle to result in an additional seven years. The Crown seeks a SOIRA order for life, which is a sex offender information registry act order, a DNA order and a section 109 firearm prohibition order for 10 years.

[7] The Defence suggests four years, in their brief they suggested four years for the sexual assault and two years, both concurrent, for trafficking with the five year sentence, that is both sentences concurrent with the five year sentence imposed September 12, 2018, which was for sexual interference on another victim around

the time that JVK had turned 16. In his oral submissions today, they suggested that, perhaps applying the totality principle, that a one to two-year period above the cumulative sentence that he is presently serving might be appropriate.

[8] Determining the appropriate range of sentence requires the Court to consider the objectives and principles of sentencing. The purpose, objectives and principles of sentencing in section 718 to 718.2 of the ***Criminal Code*** are to be considered. 718 and 718.1 provides as follows:

> The fundamental purpose of sentencing 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 sanction 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.
>
> When a Court imposes a sentence that involved the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[9] So, I will make some comments in relation to those objectives. I will start with the objectives of denouncing unlawful conduct and deterring the offender and other persons from committing offences.

[10] They are of paramount importance in dealing with sexual offences, particularly when committed against a person under the age 18. In the case at hand, some of the incidents of sexual assault occurred before JVK turned 18. Therefore, I am statutorily directed to give primary consideration to the objectives of denunciation and deterrence.

[11] The incidents of sexual assault were highly intrusive, involving full intercourse and that adds to the very serious nature of sexual assaults generally. Denunciation and deterrence both specific and general, are especially paramount objectives in such circumstances.

[12] As noted at paragraph 32 of **R. v. Percy**, 2019, NSPC 12**:**

> "A sexual assault involving intercourse is recognized as a serious act of violence, even when no extrinsic or gratuitous violence is used. … In **R. v. Arcand** … the Alberta Court of Appeal commented on the harms caused by 'major sexual assaults', a category which includes non-consensual intercourse:
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> ● Harm can be inferred from the very nature of the assault;
>
> ● The harm is both to the victim and society;
>
> ● A major sexual assault is a serious violation of a person's body, sexual autonomy and freedom of choice and a breach of the person's physical integrity, privacy and dignity;
>
> ● There is also a likelihood of psychological and emotional harm that 'includes fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide; and,
>
> ● These psychological and emotional harms may not be obvious or even ascertainable at the time of sentencing."

[13] Trafficking in a Schedule I substance is also a very serious offence. The devastation created by it has repeatedly been judicially recognized. It is an offence in relation to which the objectives of denunciation and deterrence are also paramount.

[14] Another objective is, where necessary, separating the offender from society. In this case, both parties agree that, at least for the cumulative total, a federal period of custody is necessary in the circumstances of the case at hand and in fact, taking into consideration the recommendation, whether consecutive or concurrent, they all agree that even for each individual one there should be a federal period of custody. The discrepancy comes from application of the totality principle.

[15] Another objective is to assist in rehabilitating the offender. Mr. R. maintains his denial that the offences occurred. That factor is neither aggravating nor mitigating. However, it does raise a question regarding the potential for successful rehabilitation measures.

[16] At the time of these offences, he had recently been released from imprisonment for a prior sexual assault in relation to which he was sentenced to three years' imprisonment. That raises additional concerns for rehabilitation, particularly considering his - - the comments of his counsel today, that he had attended sex offender treatment at that time.

[17] As recently as January 30, 2019, he was sentenced to two months consecutive for resisting or obstructing a peace officer and breaching a release condition, and, on August 29th, 2018, he was sentenced to a fine and 1 day of custody for what appears to be perhaps a breach of a peace bond or recognizance. All of those offences were committed after the within offences and that raises additional concerns regarding the prospects of rehabilitation.

[18] In the pre-sentence report or the PSR it is noted that Mr. R. has asked to see a therapist for what he believes to be PTSD. It is a positive sign that he is seeking professional assistance. However, I note that there is no confirmation of such a diagnosis. The PSR also indicates that Mr. R. stopped all drug usage in 2016, which is also very positive from a rehabilitative point of view.

[19] Further, it is positive that he now expresses a desire to once again attend sex offender treatment.

[20] I will deal with the objectives of providing reparations for harm done to the victim and the community and promoting a sense of responsibility in the offender and acknowledgement of the harm done to the community together.

[21] Unfortunately, no sentence imposed will provide true and full reparation for the inevitable harm caused to the victim by having her sexual integrity violated

multiple times over several years. However, a sentence involving imprisonment can serve to acknowledge the level of harm done, not only to the victim herself but also to the community at large and promote a corresponding sense of responsibility in the offender.

[22] He has not accepted responsibility. Thus he cannot be expected to acknowledge the harm done to the community. However, in addition to the detrimental impact upon the victim, these types of offences also have a detrimental impact on the community at large.

[23] The common impact it can have on an individual victim, such as depression, anxiety, anger, low self-esteem and other mental health difficulties, can flow over to the community at large in the way of diminished productivity and higher health care costs.

[24] More generally it leads to distrust and fear, for the victim and for the community at large, limiting our sense of security and freedom.

[25] In relation to the trafficking offence, hydromorphone trafficking is not a victimless crime. It diverts medication from those who need it for pain management. At times it commences with theft of such medication from the most vulnerable, such as elderly people afflicted with painful and debilitating

conditions, including terminal cancer. It wreaks havoc on those in society who abuse it and a significant period of incarceration hopefully brings that message home to people who want to traffic in hydromorphone.

[26] The following codified principles also apply, and they are from 718.1 and 718.2 of the ***Criminal Code***, which state as follows:

> 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 circumstance 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 abuse the person under the age of 18 years,
>
> ….
>
> shall be deemed to be aggravating circumstances;
>
> (b) The sentence should be similar to sentences imposed on similar offenders for similar offences committing in similar circumstances;
>
> (c) Where a consecutive sentence is 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,
>
> (f) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders … .

[27] So, I'll address the principle of proportionality first. Given the circumstances of these offences, they are clearly very grave offences.

[28] There is no evidence establishing a diminished level of capacity on the part of the offender which would show diminished responsibility. He argues that his

addiction to narcotics made it such that he was out of control and, in his words, "unable to recognize the amorality of his actions".

[29] However, the evidence that was presented at trial does not support that argument and there is no evidence presented today supporting the argument. It is contrary to JVK's description of him at trial, which I accepted. She described him as a person who was very much in control, to the point where she trusted him, thought he was a great guy and saw him as her protector.

[30] He acted alone, there is no evidence establishing any other factors related to diminished responsibility. As such he was solely and fully responsible for these offences.

[31] I will address the aggravating and mitigating circumstances in the case at hand. First, the aggravating circumstances are as follows.

[32] The offender abused a person under 18 and then continued abusing her afterwards.

[33] The victim was also vulnerable because of her dilaudid addiction.

[34] He provided her dilaudid on a regular basis over multiple years.

[35] That is a schedule I drug and its trafficking has been judicially recognized as being as serious as cocaine trafficking.

[36] The provision of dilaudid to her following sex, given her addiction, helped facilitate convincing her to give in to sex that she did not want.

[37] There were multiple incidents of sexual assault over multiple years.

[38] Sexual offences against persons under 18 make deterrence a paramount objective as I have already indicated.

[39] The sexual offences started not long after he was released from prison for a prior sexual assault in relation to which he was sentenced to three years' imprisonment on June 8, 2004. In addition, he had another prior sexual assault for which he was sentenced to 15 months' imprisonment on April 22, 1999.

[40] I will now turn to the mitigating circumstances, which include the following.

[41] In relation to the trafficking charge, he had no prior drug offence on his record at the time.

[42] His lawyer indicated that he had spoken to Mr. R.'s mother, his most recent ex-wife and his two youngest children and they were supportive of him. Some of that is contrary to what Mr. R. told the writer of the PSR. He told the PSR writer

that his mother does not talk to him at all. It's unclear why that was said. However, to the extent that he does have a support system, it does have a mitigating effect. That is especially so considering that some of those (his ex-wife and two youngest children) are providing that support in face of being negatively treated by the community members - - by some community members - - because of their association with Mr. R.

[43] He suffers from mental and physical health difficulties. He has attempted suicide on multiple occasions. A construction accident resulted in injuries which required two reconstruction surgeries on his foot which he indicates still cause him pain. He has arthritis all over and Type II diabetes.

[44] The workplace injuries led him to become addicted to dilaudid himself.

[45] He had a difficult childhood. His parents separated when he was very young and he did not know his father. He was raised by his grandparents, that is his maternal grandparents. His father became violent … the grandfather became violent when drinking. His grandmother disciplined him physically. He suffered sexual abuse in his neighbourhood between the ages of eight and ten.

[46] While in custody in jail, he has received threats and assaults and he has had to be placed in solitary confinement because of it.

[47] He has been unable to do all the programming that he would have liked because of frequent movements within the correctional system.

[48] I will move on now to the parity principle, that is a principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[49] Counsel have not provided closely comparable cases for the sexual assault. Of course, that is difficult to do because all cases are different. I note that in **Percy** there was only one incident of non-consensual intercourse, albeit with the victim being unconscious which was an aggravating feature.

[50] In **R. v. Stewart**, 2014 NSPC 64, although it involved multiple victims of sexual offences and included trafficking in a Schedule IV substance, did not involve many incidents and did not occur over a long period of time compared to the case at hand.

[51] Plus, the offender had pleaded guilty and was a 71-year-old in poor health. Having said that, he also had breaches of release conditions. His sentence after considering totality and deducting remand credit, was still one of five years total.

[52] Justice Warner in **R. v. H.C.D.**, 2008 NSSC 246, at paragraph 15, stated as follows:

> A useful starting point for the factors effecting sentencing in sexual assault cases is found in the Quebec Court of Appeal case called **R. v. J.L**. That decision enumerated seven factors that were recently repeated by Judge Tufts in a case called **R. v. S.C.C.**, … which is sometimes cited in Courts of Nova Scotia respecting relevant factors for these kinds of offences.
>
> First, is the nature and intrinsic gravity of the offence, which is affected, in particular, by the use of threats, violence or psychological manipulation;
>
> Second is the frequency of the offence and the time period over which it was committed;
>
> Third is the abuse of trust and abuse of authority involved in the relationship between the offender and the victim;
>
> Fourth is any disorder underlaying the commission of the offence, whether the offender has psychological difficulties, disorders or deviancies and other similar factors;
>
> Fifth is whether the offender has previous convictions of a nature similar to those which are before the Court;
>
> Sixth is the offender's behaviour after the commission of the offence such as confessions, assistance in the investigation, immediate involvement in a treatment program, potential for rehabilitation, and financial assistance, as well as empathy and remorse for the victim; and,
>
> The time between the commission of the offence and the guilty plea or verdict as a mitigating factor depending on the offender's behaviour.

[53] In the case at hand, the incidents of sexual assault which I have already indicated are highly intrusive. Dilaudid was used as a manipulative tool to grant access to the victim, a young and addicted victim. Mr. R. also manipulated JVK by coaxing her to engage in sexual activity. The sexual assault occurred multiple times over several years. The trafficking occurred regularly over several years. JVK trusted Mr. R., as her best friend, to protect her. And, Mr. R. had two prior convictions for sexual assault. He took no actions to mitigate the effects of his offences following their commission. He did not enter a guilty plea.

[54] Therefore, the relevant factors do support a significant sentence for the sexual assault offence.

[55] In **R. v. Livingstone, R. v. Lungal and R. v. Terris**, which were all decided together in 2020 NSCA 5, so a very recent decision, at paragraph 25, the court stated:

> The range of sentences in Nova Scotia for Schedule I trafficking offences is typically a custodial sentence of two years or more. However, deviation from a sentencing range is not an error in principle unless it departs significantly and for no reason from the contemplated range.

[56] At paragraph 24, it listed factors which were required to justify straying from the range to the point of a suspended sentence. Those factors are:

> 1. The mitigating factors substantial outweigh the aggravating factors;
>
> 2. Specific and general deterrence are satisfied by the imposition of a community-based sentence; and,
>
> 3. A custodial sentence would negatively impact the offender's rehabilitation progress.

[57] None of those factors obtain in the case at hand and there is no reason to depart from the typical range.

[58] The parties submit, and I agree, that Mr. R. fits in *Fifield* category of "petty retailer". However, two years is often imposed for a single or few incidents of trafficking in a Schedule I substance by a petty retailer. In the case at hand, the trafficking occurred regularly and frequently over several years. Therefore, despite

a lack of prior drug-related record, a sentence above the minimum federal sentence is fit and proper.

[59] I move to the principle of restraint. I considered the principle that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. As indicated, and both parties recognize, no sanction other than some form of imprisonment is reasonable in the circumstances. The restraint principle still applies in determining the length of the sentence.

[60] Finally, I move to the totality principle. Where consecutive sentences are imposed the total sentence should not be unduly long or harsh. It must not exceed the overall culpability of the offender. However, a multiplicity of offences generally worsens the offender's level of criminality, which may make a severe sentence, just and appropriate.

[61] There were many more incidents of trafficking than of sexual assault. Those trafficking incidents which did not occur along with a sexual assault incident are separate from the sexual assault incidents. In those incidents, the same incident did not give rise to both offences.

[62] In addition, the sexual assault incidents in the case at hand are completely separate from the incident of sexual interference having been perpetrated on another victim before or shortly after JVK turned sixteen.

[63] Therefore, it is appropriate to impose consecutive sentences for the offences in the case at hand rather than concurrent sentences.

[64] Even in **Stewart**, where the offender was sentenced in relation to sexual offences against multiple victims as the same time, the court imposed consecutive sentences.

[65] **R v. Adams**, 2010 NSCA 42, so a decision of our Court of Appeal, with case citations omitted, outlined the proper approach to applying the totality principle as follows, and that is at paragraphs 23 and 24:

> In sentencing multiple offences, this Court has, almost without exception, endorsed an approach to the totality principle consistent with the methodology set out in C.A.M. The Judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The Judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced. …
>
> This Court has addressed and rejected any approach that would suggest that when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences … .

[66] In addition, as noted at paragraph 18 of **R. v. Parry**, 2012 ONCA 171, which was a case provided by the Crown, "the principle of totality applies where

an offender is sentenced and part of the total term of incarceration includes a pre-existing sentence".

[67] Pursuant to *The Corrections and Conditional Release Act*, *Statutes of Canada*, 1992, chapter 20, section 139, where an offender has been sentenced to multiple terms of imprisonment they are deemed to have been sentenced to one term of imprisonment. It starts at the beginning of the first sentence and finishes at the end of the last sentence.

[68] Since I have found that a sentence imposed for the within offences is to be consecutive to the sentences previously imposed, and which Mr. R. is still serving, the cumulative sentence must be just and appropriate.

[69] He is now still serving a cumulative sentence of seven years and two months for sexual interference, obtaining ... two charges of obtaining sexual services for consideration, trafficking, resisting or obstructing a peace officer, and breach of release conditions.

[70] However, the Court in **Park**, or **R. v. Park**, 2016 MBCA 107, at paragraph 10 stated:

> The jurisprudence confirms that in applying the totality principle, the court can and should look to the unexpired sentence still to be served by the accused … but only to the unexpired portion. … The unexpired portion of a prior sentence can address some of the public protection and rehabilitation concerns of the

> sentencing Court with respect to an offender being sentenced for a new offence. Where the prior sentence has been completely served, however, such concerns can only be met by a sentence for the current offence. Thus, the rationale for applying the totality principle when there is still a portion of a prior sentence to be served does not apply if that prior sentence has been served in full….

[71] I have had discussion with Counsel regarding what the unexpired portion of the cumulative sentence that he is serving is and it appears, there appears to be agreement, that his seven year and two month cumulative sentence commenced September 12, 2018. He has now served a year and five months and that leaves five years and nine months of unexpired sentence to serve.

[72] Considering these objectives, principles and factors I have noted, the comparison jurisprudence and the circumstances of the case at hand, I find that a fit and proper length of sentence, prior to applying the totality principle is:

1. for the sexual assault offence, five years consecutive; and,

2. for the trafficking offence, a further 2.5 years consecutive.

[73] However, in my view, a total sentence of 7.5 years exceeds what is just and appropriate in these circumstances, considering the cumulative sentence of 13 years and 3 months that it would create with the unexpired portion of the sentence he is now serving.

[74] Therefore, taking into account the totality principle, the overall additional sentence should be reduced to one of four years' additional imprisonment,

resulting in a total cumulative sentence (with the unexpired portion of his prior sentences) of nine years and nine months.

[75] That will be accomplished by sentencing him to three years consecutive for the sexual assault and one year consecutive for the trafficking. Those sentences are consecutive to any sentence that he is serving and to each other. They result in a total sentence of four years on top of the unexpired five years and nine month portion of the cumulative sentence that he is currently serving.

[76] In relation to the ancillary orders, the defence didn't comment on them, but they are all mandatory, so I will just go on with those.

[77] First of all, there is a DNA order requested. Sexual assault offences are primary designated offences in subsection (a) of the definition in 487.04. So, therefore, a DNA order is absolutely mandatory and there is no discretion to decline to make the order on the basis of grossly disproportionate impact.

[78] Also, a section 109 firearms prohibition order is mandatory for a minimum period of 10 years.

[79] In relation to the SOIRA order, section 271 is a designated offence under section 490.011(1)(a). This is not his first sexual assault conviction and a lifetime

SOIRA order was previously imposed on him. Therefore, pursuant to section 490.013 the SOIRA order is to be for life.

[80] And, I make all three of those orders, the DNA order, the section 109 firearms prohibition order and the SOIRA order.

[81] Also, the Crown's additional request for a non-communication order appears to be clearly appropriate in the circumstances. Pursuant to section 743.21 of the ***Criminal Code***, Mr. R. is prohibited from communicating directly or indirectly with the victim during the custodial period of his sentence. So, the necessary endorsement on the warrant of committal to that effect will be made.

Pierre Muise, J.