SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. T.J.S.*, 2021 NSSC 328

Date: 20211126
Docket: CRH No. 491732
Registry: Halifax

Between:

Her Majesty the Queen

v.

T.J.S.

Restriction on Publication: *CCC* s. 486.4, 486.5 and s. 539(1)
SENTENCING DECISION

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	November 26, 2021, in Halifax, Nova Scotia
Oral Decision:	November 26, 2021
Written Decision:	December 6, 2021
Counsel	Katharine A. Lovett, for the Crown Joel E. Pink, Q.C., and George Franklyn, for the Defence

Coughlan, J. (orally):

[1] In a judgment delivered June 30, 2021, T.J.S. was convicted of four offences involving S.A.: sexual assault contrary to section 271 of the *Criminal Code*; assault contrary to section 266 of the *Code*; uttering a threat to cause bodily harm contrary to section 264.1(1)(a) of the *Code*; and with intent to commit sexual assault did attempt to choke S.A. by hands on her throat and mouth contrary to section 246(a) of the *Code*.

[2] The facts surrounding the offences are set out in detail in the judgment of June 30, 2021. The following is a brief summary.

[3] T.J.S. and S.A. met when they both started a course. During the course they developed a very close friendship. They were best friends. T.J.S. has a learning disability and struggled with the course as well as a subsequent course they both took.

[4] They studied together. Initially a study group of four or five persons, including T.J.S. and S.A., was formed. The group became just T.J.S. and S.A. as they developed a method to accommodate T.J.S.'s learning disability – they studied for 20 minutes, took a break and then went back to studying, which they repeated for hours. T.J.S. relied on S.A. to assist him with classwork, studying and preparing for tests and assignments.

[5] One night, T.J.S. and S.A. were studying after a test. S.A. went to T.J.S.'s residence after work. His girlfriend was not home. T.J.S. was worked up and angry with S.A. . He was pacing. S.A. had never seen him so agitated. She told him he could not study that night. S.A. who was sitting on a sofa, stood up to leave. T.J.S. walked toward her grabbed her arm, slapped her with his right open palm across her face, not hard but she was stunned as she was not expecting it. T.J.S. covered S.A.'s nose and mouth with his hand. His other hand went around her throat and he pushed S.A. down on the sofa. S.A. could not breathe. She panicked. Then T.J.S. took his hand which was around her neck and tried to pull her pants down. S.A. tried to move T.J.S.'s hand off her nose and mouth so she could breathe. Initially S.A. said stop but then could not say anything because of T.J.S.'s hand over her mouth. She tried to pull his hand off her face. T.J.S. pulled her pants down and put his penis in her vagina. He moved his hand so it was only covering her mouth so S.A. could breathe. He used his other hand to guide his penis into her vagina. He then told S.A. she had a choice to make she could keep fighting and he would have to hit her again, which he did not want to do because he liked her. S.A. asked T.J.S. to please not hurt her. He asked her "nice or mean" and S.A. said "nice" and T.J.S. said "good girl". T.J.S.

started moving his penis which was still in her vagina. T.J.S. then started crying and kissing S.A.'s face. She remained still. Then T.J.S. got off S.A., was apologetic and said if this is not what you want we can try another way. S.A. said she did not want it at all.

[6] Wanting to calm the situation, S.A. said she would make tea and they could talk. T.J.S. made tea. They had tea, watched television and after about an hour and a half S.A. said she was going home and left.

[7] A pre-sentence report dated October 20, 2021 was prepared. T.J.S. is 35 years old. He has no prior criminal record. He is married and has no children. T.J.S. graduated from high school and was certified as a […] . T.J.S. was diagnosed with Attention-Deficit/Hyperactivity Disorder (ADHD) in grade three or four but did not explore treatment until he was reassessed in 2013.

[8] Since his conviction T.J.S. has taken an anger management course. At the sentencing, T.J.S. stated he accepts responsibility for his actions. He stated he was remorseful – he hurt his best friend.

[9] The Crown is seeking a period of imprisonment of four years. In addition, the Crown is seeking a DNA order pursuant to section 487.051 of the *Criminal Code;* a Sex Offender Information Registration Order for 20 years pursuant to section 490.013(2)(b) of the *Code*; a firearms prohibition for 10 years pursuant to section 109 of the *Code* and an order pursuant to section 743.21 of the *Code* prohibiting T.J.S. communicating with S.A. during his custodial sentence.

[10] The defence agrees the appropriate sentence is four years imprisonment in a federal institution. The defence also submits the assault conviction should be stayed on the basis of the principle set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[11] The purpose and principles of sentencing are set out in sections 718 to 718.2 of the *Criminal Code*. The principles particularly relevant to this proceeding are:

> 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;
>
> (c) where consecutive sentences are 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
>
> (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 …

[12] Non-consensual vaginal intercourse is a major sexual assault. 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. described the nature of forced sexual intercourse on women:

> 29… Violence is inherent in the act of rape. The element of sexuality aggravates the physical interference caused by an assault. Sexual assault results in a greater impact on the victim than a non-sexual assault. …
>
> 30 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. …
>
> 31 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.
>
> 32 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.

[13] While some provinces have adopted ranges for sentences in major sexual assaults Nova Scotia has not. The Nova Scotia approach was described by Oland J.A. in giving the Court's judgment in *R. v. W. (J.J.)*, 2012 NSCA 96:

> 21 Nova Scotia has not adopted a starting point approach. Rather, this Court has chosen to remain focussed on the principles of sentencing as set out in the *Criminal Code* and the Supreme Court of Canada's affirmations that the approach on review on sentencing appeals is one of deference to the decisions of the sentencing judge.
>
> 22 Since sentencing is such an individualized process and done in the context of the particular circumstances of each case, it is notoriously difficult to find cases that are factually similar. …

[14] Justice Oland went on to say at paragraph 32:

> … Persons convicted of serious sexual assaults must appreciate that the principles of sentencing include specific and general deterrence and denunciation, and such offences will attract serious consequences. …

[15] I have read the submissions of Crown and defence counsel, the cases to which I have been referred, the pre-sentence report and the victim impact statement of S.A. I have heard the oral submissions of counsel.

[16] A mitigating factor in this case is that T.J.S. does not have a prior criminal record.

[17] The following are aggravating factors in this case.

1. The act of vaginal penetration is a major sexual assault as set out above with the serious violation of S.A.'s personal integrity as set out by Cory J. in *R. v. McCraw, supra, (see also R. v. W. (J.J.)* at para 17).

2. The violent nature of the sexual assault including the slapping of S.A.'s face, covering her nose and mouth restricting S.A.'s ability to breathe, threatening to hit S.A. again if she kept fighting.

3. The assault had a significant impact on S.A. After the assault S.A., who was outgoing, started to become withdrawn, distant and sensitive to touch. She kept a baseball bat by her bed. In her Victim Impact Statement submitted to the Court S.A. stated that since the sexual assault she worries all the time, when she leaves her home in the morning, when she leaves work in the evening. She worries about her and her loved ones' safety. She worries if someone decides to do a bad thing, there is not much she can do to stop it. It is a terrible way to go through life. She does not know if she will ever be fine again. She has panic attacks. The event has had a terrible effect on her life. S.A. cannot get back the eight years of her life she lost to T.J.S. She does not know how to properly convey the enormity of what has been lost because of these offences.

[18] Section 718.2(a)(iii.1) provides evidence that the offence had a significant impact on the victim is an aggravating circumstance. It is clear the sexual assault had a profound impact on S.A.

[19] In determining an appropriate sentence, I must consider the circumstances of the particular offence and offender.

[20] I have been referred to a number of case by the Crown and defence. The Crown referred to:

1. *R. v. W. (J.J.), supra*. The Court of Appeal concluded the lowest sentence for major sexual assault the Court reviewed was "two years less a day".

2. *R. v. W.H.A.*, 2011 NSSC 246. An offender with a criminal record who forced non-consensual vaginal intercourse was sentenced to five years imprisonment.

3. *R. v. Simpson*, 2017 NSPC 25. Offender with no criminal record forced non-consensual vaginal intercourse was sentenced to three years imprisonment.

4. *R. v. Percy*, 2021 NSSC 110. Offender with no prior criminal record forced non-consensual vaginal intercourse on an intoxicated 19-year-old victim. The victim was physically injured by offender. The sentence was five years imprisonment.

5. *R. v. Blake*, 2020 ONSC 5658. Offender had fellatio with sex worker and then with violence had non-consensual vaginal intercourse. He was convicted of sexual assault causing bodily harm and related offences and sentenced to six years imprisonment.

6. *R. v. Alas*, 2019 NSSC 68. There was a joint recommendation of seven years imprisonment for an offender who punched the victim's face, pulled her hair, told the victim she was going to die, forced fellatio, vaginal and anal intercourse.

7. *R. v. Clase*, 2017 ONSC 2484. The offender with no prior record after a hard struggle raped the victim and over 15 to 20 minutes vaginally penetrated her twice. He was sentenced to five years imprisonment less credit given.

8. *R. v. Grant*, 2018 BCSC 1362. Offender with no criminal record sentenced to four years imprisonment. He persuaded the victim to go to his sailboat, where he exercised control and forced sexual intercourse followed by a series of sexual assaults which were at times rough. It lasted over several hours from which the victim had no realistic means to escape.

9. *R. v. Cook*, 2014 MBCA 29. Offender sentenced to six years for a violent major sexual assault.

10. *R. v. Sauverwald*, 2019 ABQB 482. The offender digitally penetrated the victim and choked her without consent was sentenced to three years imprisonment for sexual assault and two years for choking to overcome resistance to be served consecutively.

[21] To support its argument the defence relies on the following cases.

1. *R. v. W. (J.J.), supra.* The offender was sentenced to five months' custodial sentence followed by two consecutive eight month and three month conditional sentences. The Court of Appeal found the sentence was demonstrated unfit and would have imposed a sentence of two and

one-half years but on the facts dismissed the appeal as reincarceration would not serve the interests of justice.

2. *R. v. G.A.L.*, 2001 NSCA 29. The offender was sentenced to 14 months' imprisonment followed by 18 months' probation. On appeal the summary conviction appeal court varied the sentence so that the term of imprisonment be served in the community and the offender perform 200 hours of community service. On further appeal the Court of Appeal restored the trial judge's sentence and on the facts of the case stayed the sentence of incarceration.

3. *R. v. Garrett*, 2014 ONCA 734. A sentence of 18 months was imposed. At para 23 of the endorsement the Court stated:

> The sentence imposed by this court should not be taken as a sentence within the appropriate or usual range. We are constrained in this regard by the Crown's position at trial.

4. *R. v. Iron*, 2005 SKCA 84. The case involved fondling and digital penetration and was not considered a major sexual assault. As the offender had served a part of the conditional sentence set aside, he was sentenced to 20 months' imprisonment.

5. *R. v. J.R.M.*, 2012 NSSC 108. A joint recommendation of two years imprisonment was accepted.

6. *R. v. Burton*, 2017 NSSC 181. This case involved a major sexual assault that included unprotected vaginal intercourse. The offender twice masturbated next to the victim and rubbed his ejaculate on her hand. The victim was asleep or unconscious when assaulted. The sentence was two years imprisonment followed by three years probation. The offender with no criminal record successfully battled his addiction issues, ran a successful business, admitted guilt and was remorseful and the sole caregiver for twin toddlers and would be eligible for community based sexual offender treatment which was ordered as part of the conditions of probation.

7. *R. v. Al-Rawi*, 2020 NSSC 386. Offender, a taxi driver, picked up an intoxicated stranger, took her to his apartment and had sex with her. The offender, who had a good pre-sentence report, was sentenced to two years imprisonment.

8. *R. v. J.A.M.*, 2018 NSSC 285. The victim who was extremely intoxicated woke up on a bed in a cottage. The offender had non-consensual anal intercourse with the victim. The offender was

sentenced to two years imprisonment followed by three years probation.

9. *R. v. Kasokeo,* 2009 SKCA 48. The offender laid behind a sleeping victim who was a bit intoxicated. She awoke to find her pants and underwear at her ankles and the offender thrusting against her. It was not clear if penile penetration took place but it probably did. The Court of Appeal varied the sentence to 30 months' incarceration less credit for time on remand.

10. *R. v. Simpson*, *supra,* also cited by the Crown.

11. *R. v. Stankovic*, 2015 ONSC 6246. The offender had non-consensual vaginal and anal intercourse with the victim. The offender did not use any violence but applied pressure to the victim so she could not move. The offender was sentenced to three years imprisonment.

[22] The defence submits Count 2, the section 266 offence, should be stayed on the basis of the principle set out in *R. v. Kienapple*, *supra.* The Crown says no charges are subject to the *Kienapple* principle.

[23] In *R. v. Prince*, [1986] 2 S.C.R. 480, the Court stated the rule against multiple convictions applies when there is a sufficient factual nexus as well as a sufficient nexus between the charges. In this case I find the factual nexus requirement is met.

[24] With regard to Count 2 the assault pursuant to section 266 all elements of the charge are also elements of the sexual assault charge and the necessary nexus between the charges exists.

[25] The Crown addressed the issue as to whether the *Kienapple* principle applies to the section 246(a) offence.

[26] In dealing with a case in which the appellant was convicted of unlawful confinement, sexual assault and choking with intent to commit an indictable offence Martin J.A. in giving the Court's judgment in *R. v Lemmon,* 2012 ABCA 103, described the nature of the section 246 offence and its relation to the sexual assault offence when he stated at para 27:

> Parliament's recognition of the inherent dangerousness of rendering a person unconscious to facilitate the commission of another offence is reflected by the maximum penalty prescribed for that offence: life imprisonment. Put in context, that is a significantly greater sentence than could have been imposed for the underlying offence in this case, the sexual assault, which carries a maximum penalty of ten years imprisonment. In other words, what is usually seen as the

> "incidental" offence, carries a much greater penalty than the one it facilitates. The only other related offences of personal violence subject to such a serious penalty are attempted murder and aggravated sexual assault.

[27] A charge under section 246(a) has elements separate and distinguishable from the elements of a charge pursuant to section 271. The elements of an offence pursuant to section 246 focus on overcoming resistance to the commission of an offence. *R. v. Milani,* 2017 ONSC 2420. See also *R. v. Snow*, [1996] B.C.J. No 3107 (C.A.) at para. 17; *R. v. Hill*, 2010 ONSC 5150 at para 35. I find the *Kienapple* principle does not apply to the section 246(a) offence.

[28] T.J.S., will you please stand.

[29] I sentence you for Count 1 that you committed a sexual assault on S.A. contrary to section 271 of the *Criminal Code* to a sentence of incarceration for four years to be served in a federal institution. The sentence for Count 1 has been increased to reflect the choking of S.A. by T.J.S. .

[30] Count 2, that you assaulted S.A. contrary to section 266 of the *Criminal Code* is stayed on the basis of the principle set out in *R. v. Kienapple*.

[31] For Count 3, that you uttered a threat to S.A. to cause bodily harm to S.A. contrary to section 264.1(1)(a) of the *Criminal Code,* I sentence you to a sentence of twelve months to be served concurrently to Count 1.

[32] For Count 4, that with intent to enable yourself to commit the indictable offence of sexual assault you attempted to choke S.A. by hands on her throat or mouth contrary to section 246(a) of the *Criminal Code,* I sentence you to imprisonment of two years to be served concurrently to Count 1.

[33] I grant an order authorizing the taking of samples of T.J.S.'s bodily substances reasonably required for the purpose of forensic DNA analysis pursuant to section 487.051 of the *Criminal Code.*

[34] I order that T.J.S. comply with the *Sex Offender Registration Act* for a period of 20 years pursuant to section 490.013(2)(b) of the *Criminal Code*.

[35] I order a 10-year weapons prohibition order pursuant to section 109 of the *Criminal Code*.

[36] I order that T.J.S. is prohibited from communicating, directly or indirectly, with S.A. during his custodial sentence pursuant to section 743.21 of the *Criminal Code*.

Coughlan, J.