

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. D.C.S.*, 2023 NSSC 242

Date: 20230720

Docket: CRH No. 499649

Registry: Halifax

Between:

His Majesty the King

v.

D.C.S

Restriction on Publication: ss. 486.4 and 486.5 of the Criminal Code

SENTENCING DECISION

Judge: The Honourable Justice Scott C. Norton

Heard: June 20, 2023, in Halifax, Nova Scotia

Decision: July 20, 2023

Counsel: Nicole Campbell, Crown Counsel
D.C.S., Self-Represented Defendant

Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Order restricting publication — victims and witnesses

486.5 (1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Justice system participants

(2) On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is of the opinion that the order is in the interest of the proper administration of justice.

Offences

(2.1) The offences for the purposes of subsection (2) are

- (a) an offence under section 423.1, 467.11, 467.111, 467.12 or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;
- (b) a terrorism offence;
- (c) an offence under subsection 16(1) or (2), 17(1), 19(1), 20(1) or 22(1) of the *Security of Information Act*; or

(d) an offence under subsection 21(1) or section 23 of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

Limitation

(3) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

Application and notice

(4) An applicant for an order shall

(a) apply in writing to the presiding judge or justice or, if the judge or justice has not been determined, to a judge of a superior court of criminal jurisdiction in the judicial district where the proceedings will take place; and

(b) provide notice of the application to the prosecutor, the accused and any other person affected by the order that the judge or justice specifies.

Grounds

(5) An applicant for an order shall set out the grounds on which the applicant relies to establish that the order is necessary for the proper administration of justice.

Hearing may be held

(6) The judge or justice may hold a hearing to determine whether an order should be made, and the hearing may be in private.

Factors to be considered

(7) In determining whether to make an order, the judge or justice shall consider

(a) the right to a fair and public hearing;

(b) whether there is a real and substantial risk that the victim, witness or justice system participant would suffer harm if their identity were disclosed;

(c) whether the victim, witness or justice system participant needs the order for their security or to protect them from intimidation or retaliation;

(d) society's interest in encouraging the reporting of offences and the participation of victims, witnesses and justice system participants in the criminal justice process;

- (e) whether effective alternatives are available to protect the identity of the victim, witness or justice system participant;
- (f) the salutary and deleterious effects of the proposed order;
- (g) the impact of the proposed order on the freedom of expression of those affected by it; and
- (h) any other factor that the judge or justice considers relevant.

Conditions

(8) An order may be subject to any conditions that the judge or justice thinks fit.

Publication prohibited

(9) Unless the judge or justice refuses to make an order, no person shall publish in any document or broadcast or transmit in any way

- (a) the contents of an application;
- (b) any evidence taken, information given or submissions made at a hearing under subsection (6); or
- (c) any other information that could identify the person to whom the application relates as a victim, witness or justice system participant in the proceedings.

NOTE: In reducing to writing the oral decision rendered in this matter, editing has taken place to include omitted citations and quotes from secondary sources and to make changes to format or to grammar for readability. No changes have been made to the substantive reasons for decision.

By the Court (orally):

Introduction

[1] By Decision on January 23, 2023, reported at 2023 NSSC 25, I found DCS guilty of the following charges, that he:

1. Did between January 1, 2013 and January 31, 2020 at Lower Sackville, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on [R], contrary to Section 271 of the *Criminal Code*.

2. AND FURTHER that he at the same time and place aforesaid, did for a sexual purpose touch [R], a person under the age of sixteen years directly with a part of her body, to wit, vagina, contrary to Section 151 of the *Criminal Code*.
3. AND FURTHER that he at the same time and place aforesaid, being in a position of trust and authority towards [R], a young person, did for a sexual purpose, touch directly the body of [R], a young person, with a part of his body, to wit., his hands, contrary to Section 153(1)(a) of the *Criminal Code*.

[2] The facts found in support of the guilty findings are set out in the reported decision.

[3] The Crown recommends a custodial sentence of 5.5 to 7 years. DCS did not provide the court with any written submissions in advance and at the sentencing hearing declined the invitation to provide any recommendation as to sentence. When asked if he had anything else he wished to say to the Court, he stated that he apologized to R and her family for his actions.

Victim Impact Statement

[4] A victim impact statement from R was filed with the Court. The Court appreciates R making the effort to provide her impact statement. It provides insight into how the events that are the subject of the findings of guilt have influenced her emotionally and socially. The Court notes in particular her statement that “I feel like I got robbed of a lot of things in my life and a lot of years due to what took place but I am trying learn how to change it because I am learning I never deserved any of it, some days I still have doubts in myself and I’m not sure if that will ever fully go away”.

Pre-Sentence Reports

[5] The Court received a Pre-Sentence Report (“PSR”) completed on April 21, 2023. It discloses that DCS is a 53-year-old male with grade 8 education, upgraded years ago by obtaining his Grade 12 G.E.D., and a prior criminal record.

[6] He was born in Halifax and lived in the North end of the city until his parents separated when he was age three or four. He then lived with his sister and father at his grandparents’ home and had no contact with his mother during his early years. He enjoyed a good upbringing with his father but explained that his father worked a lot and was not a presence at home. He first got into trouble with the law at ages of 12 and 14 and was incarcerated the first time at age 16. After being released from

the Shelburne Youth Centre, he lived on the streets for one year. While living on the street, he was the victim of sexual abuse by an older man. His father passed away in October 2020. He does not have any contact with his sister or his mother.

[7] He married at age 21, divorced ten years later, with two sons from that marriage, now ages 29 and 33. In his 30's he began to date his boss, the mother of the victim, R. They were together for a period of ten years. He is not currently in a relationship but continues to live with the woman he most recently had a six-month relationship with that ended about one year ago. He worked as a taxi driver for a period of 30 years. Due to the current charges before the court and his health, his family doctor revoked his taxi license. DCS suffers from diabetes and suffered heart failure in 2022. Both conditions are controlled with medication. As a result of his health conditions, he only consumes six beer per week and does not ingest any form of illicit drugs.

[8] The PSR raises some suggestion that DCS does not appreciate the seriousness of the charges. Although he acknowledges guilt for the charges before the Court, he believes that the incidents were consensual because the victim was over the age of 16 years. He says he takes responsibility for his actions, stating he is sorry that it happened and that he never hurt or threatened the victim. He says he also feels victimized because of threats and statements posted on social media about him.

[9] His criminal history shows that his last offence prior to the present charges was in 2011. The Crown points out that he would have been recently released and on parole for arson at the time of the first sexual assault on R and therefore there was no gap in his criminality.

[10] The PSR discloses a history of illicit drug use during his teens and alcohol abuse as an adult, suspected to be the cause of his heart disease.

[11] DCS voluntarily attended for a Comprehensive Forensic Sexual Behavioural Assessment conducted on April 17 and 18, 2023. The resulting report, dated May 24, 2023 ("Report"), was filed with the Court. It disclosed that in his early years DCS suffered physical abuse by his father. He also reported three unwanted sexual experiences as a teen, one involving a counsellor, another an adult male acquaintance and a third, another youth.

[12] He reported that his consenting sexual experiences have all been with females and stated his belief that he was a "sex addict" as he sought multiple outlets per day

since his adolescence. He claims reduced outlets at the present time due to physical discomfort, in particular, testicular pain.

[13] His psychological testing scores suggest someone who is interpersonally intolerant and insensitive, self-centred, and exploitive in relationships and able to convince others to do things they normally would not. The scores also predict his relationships to be superficial and that few are long-lasting. Testing also indicated a vulnerability to substance addiction.

[14] With regard to treatment, the test results suggest that he may enter treatment under external pressures but is likely to be resistant to psychological treatment.

[15] DCS underwent a voluntary Penile Plethysmography Assessment (“PPG”). This assessment is designed to provide indications of an individual’s sexual arousal profile. The assessment process was explained to DCS, and he gave his verbal and written consent to continue. His sexual responses overall were quite low. His sexual responses reflected heterosexual preference, with his strongest sexual arousal (which was still weak and possibly below subjective awareness) being to the persuaded elementary-school-aged female child. This reflects a deviant sexual preference and was scored as such in the actuarial assessment of his recidivism risk. DCS acknowledged sexual attraction to adolescent girls.

[16] As to the risk of recidivism, the Report concludes that overall, the baseline risk of recidivism for DCS is similar to the average person adjudicated for crossing legal sexual boundaries and his risk for general violence is moderate. If he were to reoffend, the assessment results suggest it would be against a pubescent or older female who is either passively resistant or vulnerable to manipulation (due to intoxication, emotional upheaval, or cognitive deficits). The Report suggests that he would be unlikely to reoffend with no preamble of a relationship.

[17] The Report recommends treatment should be moderate in intensity that may be available in the federal correctional system. It further recommends that DCS not have unsupervised contact with females under the age of 16 years, including biological relatives, nor should he be in a position of trust or authority over children under 16, precluding him from working for or volunteering with agencies that hire or provide services to youth or doing so on a non-official basis (e.g., mentoring, coaching, babysitting, etc.). The Report notes that this does not refer to incidental contact on the street as DCS is not believed to pose a risk to strangers. He should be prohibited from residing or overnighting in a home where female minors also live or are staying, as constant supervision cannot be maintained when household

members are sleeping. It is recommended that DCS abstain from alcohol consumption.

Law

[18] I am instructed on the fundamental purpose and principles of sentencing set out in section 718 of the *Criminal Code* and following. The sentence to be imposed must be proportional to the gravity of the offence and the degree of responsibility of the offender. The principal of parity mandates that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A sentence must be the least restrictive sanction that meets the fundamental principles and purposes of sentencing.

[19] Section 718.01 of the *Criminal Code* states:

Objectives — offences against children

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.

[20] The unanimous decision of the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9, redefined and refocused the approach to be taken in sentencing offenders who commit sexual violence against children. The lengthy and comprehensive decision contains several key principles that I must consider in imposing a sentence on DCS. I reviewed these principles in *R. v. T.K.B.*, 2022 NSSC 150, at para. 25-26:

[25] The Supreme Court then provided specific instruction on how courts should approach sentencing in relation to child sexual abuse:

- Courts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle (para. 75).
- Courts must impose sentences that are commensurate with the gravity of the sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. Specifically, courts must recognize and give effect to: (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and (3) the actual harm that children suffer as a result of these offences (para. 76).
- Violence is always inherent in the act of applying force of a sexual nature to a child (para. 77).

- Sexual violence against children has the potential to cause several recognized forms of harm: harm that manifests itself during childhood and long-term harm that only becomes evident during adulthood (paras. 79-80). Courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence (para. 84).
- When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence (para. 85).
- Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or willfully blind to (para. 88). The fact that the victim is a child increases the offender's degree of responsibility. The moral blameworthiness of the offender increases when offenders intentionally target children who are particularly vulnerable, including children who belong to groups that face discrimination or marginalization in society (para. 90).
- Sentences for sexual offences against children should correspond to Parliament's legislative initiatives and contemporary understanding of the profound harm that sexual violence against children causes. The following guidance is provided to courts (at para. 107):
 - Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;
 - sexual offences against children should generally be punished more severely than sexual offences against adults; and
 - sexual interference with a child should not be treated as less serious than sexual assault of a child.
- There is no requirement for there to be rare or special circumstances in order to impose a substantial sentence where that substantial sentence is proportionate (para. 112).

[26] The Supreme Court articulated additional significant factors to consider for sexual offences against children:

(a) **Likelihood to reoffend:** where the sentencing judge finds that the offender presents an increased likelihood of reoffending, the imperative of preventing further harm to children calls for emphasis on the sentencing objective of separating the offenders from society (para. 123). The offenders likelihood to reoffend is relevant to the objective of rehabilitation. In some

cases, the only way to achieve both short term and long term protection of children maybe two impose a lengthy sentence (para. 124).

(b) **Duration and frequency of sexual violence:** can significantly increase the harm to the victim. The immediate harm the victim experiences during the assault is multiplied by the number of assaults. Long term emotional and psychological harm to the victim can also become more pronounced where the sexual violence is repeated and prolonged. This increased harm magnifies the severity of the offence. It also increases the offender's moral blameworthiness because the additional harm to the victim is a reasonably foreseeable consequence of multiple assaults. Repeated and prolonged assaults show that the sexually violent conduct is not an isolated act, a factor which increases the offender's degree of responsibility (para. 131). The duration and frequency of the sexual violence must receive weight in sentencing. A court should not discount a sentence simply because numerous incidents of sexual violence are covered by a single charge instead of multiple charges (para. 132). Sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentence is that reflect the full cumulative gravity of the crime (para. 133).

(c) **Age of the Victim:** the power imbalance between children and adults is ever more pronounced for younger children (para. 134). This consideration is relevant to both the gravity of the offence and the degree of responsibility of the offender (para. 135).

(d) **Degree of physical interference:** the degree of violation of the victim's bodily integrity is a recognized aggravating factor (para. 138). However, the court cautions courts about the dangers of defining a sentencing range based on penetration or the specific type of sexual activity at issue (para. 140).

[21] I have applied these principles to the facts in this case.

[22] In the present case the offender was sexually abusing R over a long period of time (6 years), starting when she was 11 years old. As I found at the trial, there was clear evidence of grooming behaviour and escalation of conduct. His moral blameworthiness is accordingly very high.

[23] The Report indicates that DCS is average in terms of recidivism for sexual abuse behaviour and a moderate risk for violence. There is a particular preference for prepubescent girls identified as well as persons in vulnerable circumstances. DCS admitted to the author of the Report that he pursued sexual encounters with customers when he was a cab driver and when the customer was under the influence

of substances. He also admitted that he sometimes persisted after a sexual partner had initially refused his sexual advance, sometimes prompting them to give in.

[24] I found at trial that DCS was in a position of trust with R. The abuse of this position of trust is a significant aggravating factor, both statutory and as stated by *Friesen*, that should call for a lengthier sentence than an offender who is a stranger to the child.

[25] Another significant aggravating factor is the duration, frequency, degree of interference, and escalation of the sexual abuse. As stated, it began when R was 11 and continued until she was approximately 17 years old. It began with the incident at the Ramada Hotel and progressed to sexual comments, grabbing, sexual touching, masturbating the offender, and dry humping. It was admitted to be a regular occurrence and DCS provided R with weed, cigarettes, transportation, and alcohol in exchange for sexual favours. The abuse often occurred in the victim's own home, mostly in the bedroom of DCS, but also in the victim's bedroom, the offender's car, and in public.

[26] The victim's participation in the events in this case is irrelevant due to my finding that the offender was in a position of trust to the victim. The grooming behaviour by DCS in this case is a highly aggravating factor that according to the victim impact statement caused real and actual harm. It is reasonably anticipated that the victim will continue to suffer harm in the future.

[27] There are no apparent mitigating factors, other than perhaps that at the sentencing hearing the offender expressed remorse and told the victim and her family that he was sorry for his actions. Sadly, each day we read in the newspaper of one or more charges of sexual assault. The incidence of such charges by men in the role of stepfather to young women is particularly concerning. Mr. S., your conduct towards R is both disgusting and despicable. You were in a position of trust as a parent towards her. The fact that you found her to be a sexual object when she was 11 years old is particularly revolting. Having been the victim yourself of sexual abuse when you were a teenager, you knew what a devastating impact your actions would have on R, not just at the time that you committed these offences, but the many years of ongoing trauma that would result. I hope for your sake that while serving your sentence you take stock of your conduct and make the best use of the programming and treatment available to you so that when you return to society from custody you can live a peaceful and productive rest of your life.

[28] I have reviewed and considered the numerous cases cited in the Crown's written submissions. The sentences in cases post-*Friesen* range from 3.5 years to 9 years. As acknowledged by the Crown, each case must be determined on its own unique facts as to what a fit and proper sentence is.

[29] In this case I have determined that a fit and proper sentence is as follows:

1. For the charge under section 271, the facts establish multiple events of sexual assault, calling for a sentence of 3 years.
2. For the charge under section 153, sexual touching in breach of trust, a consecutive sentence of 2 years.
3. For the charge under section 151, sexual touching, a consecutive sentence of 1 year.

[30] I have considered that the totality of the sentence of 6 years is not excessive for DCS as an individual.

[31] I order the following mandatory ancillary orders:

1. A DNA Order as this is a primary designated offence.
2. A SOIRA Order for a period of 20 years (section 490.012(1) and 490.013(2)(b) of the *Code*).
3. A weapons prohibition Order for a period of 10 years (section 109(2)(a) of the *Code*).

[32] I also grant the Crown's request for non-communication order and section 161 Prohibition Order in the forms provided.

Norton, J.