

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Brewer*, 2014 NSSC 109

Date: 2014/03/20

Docket: Pictou No. 424228

Registry: Pictou

Between:

Her Majesty the Queen

v.

Preston Harley Brewer

Restriction on Publication: Pursuant to s. 486 of the Criminal Code of Canada

Judge: The Honourable Justice N. M. Scaravelli

Heard: March 20, 2014, in Pictou, Nova Scotia

Oral Decision: March 20, 2014

Submissions: March 7, 2014 Crown

Counsel: T. W. Gorman, for the Crown
Douglas Lloy, for the Defendant

By the Court:

Orally

[1] Mr. Brewer was convicted of sexual assault in July 1996 following a Judge alone trial. The sentencing date was scheduled for September 12, 1996. Mr. Brewer failed to appear for sentencing and a Warrant for his arrest was issued. He was subsequently charged with failure to appear contrary to *Section 145 (2) of the Criminal Code*. Mr. Brewer was arrested in Ontario on February 2014. He has entered a plea of guilty to the *Section 145 (2)* charge and appears today for sentencing on both offences.

CIRCUMSTANCES OF THE OFFENCE

[2] The male victim was 15 years of age at the time he was sexually assaulted by Mr. Brewer in 1995. Mr. Brewer was 39 years of age. Both were working for the Bill Lynch Show in Pictou at the time. The victim stayed overnight in the offender's camper trailer. They both consumed beer that evening. The victim woke up to discover the offender naked and performing fellatio on him. The victim pushed him away and told him to stop. The offender complied and left the camper.

CIRCUMSTANCES OF THE OFFENDER

[3] A Pre-sentence Report was prepared. The offender is 58 years of age and is single. He is in receipt of Ontario disability benefits and is employed seasonally by Campbell's Amusement in London, Ontario. He reports having suffered three heart attacks in the past years [....]. The offender continues to deny the incident occurred.

[4] There was no Victim Impact Statement provided to the court.

POSITION OF THE CROWN

[5] The crown submits an appropriate sentence for the *Section 271* offence is 2 years incarceration. With respect to the *Section 145 (2)* offence a term of imprisonment of 60 to 90 days consecutive. The Crown submits there should be no credit for remand under the circumstances where the offender fled the jurisdiction to avoid sentencing. The Crown also seeks auxiliary orders pursuant to *Section 110* a Firearms Order 10 years; *Section 490.021* SOIRA Order 20 years and *Section 487.051* D.N.A. Order.

[6] The defence submits an appropriate range of sentence is a fine and probation to 1 year imprisonment and probation.

[7] The offence of sexual assault carries a maximum of 10 years imprisonment. The offence of failing to appear carries a maximum of 2 years imprisonment.

[8] I am required to consider the purpose and principles of sentencing as set out in *Section 718 of the Criminal Code*. They include the objectives of deterrence and denunciation as well as rehabilitation of the offender. A sentence must be proportionate to the gravity of the offence. Sentences should be similar to those imposed on similar offenders for similar offences.

[9] The courts have been consistent that where an offence involves the abuse of minors the objectives of denunciation and deterrence are given primary consideration.

AGGRAVATING FACTORS

[10] The respective ages of the offender and victim are an aggravating circumstance. As well the offender provided alcohol and assaulted the victim while he was asleep. He continues to maintain his innocence. The offender has a criminal record. His 18 convictions predating 1996 include assaults, breaches and uttering threats. In 1981 he was sentenced to 1 month incarceration for failing to appear. In 1988 he was sentenced to 3 months consecutive for each of 2 charges of

uttering threats. His record indicates similar convictions in Ontario between 1996 and 2003. There have been no criminal convictions for the past 11 years which shows promise for rehabilitation.

SENTENCE

[11] Authorities reviewed indicate a range of sentence from conditional sentence to 3 years imprisonment. Conditional sentences were unavailable for sentences committed in 1995.

[12] The Crown has referred the court to the Alberta decisions of *R. vs. Lyons [2005]ABCA 258* and *R. vs. Bushell [2010]ABCA 205*. In the Lyons decision the offender provided alcohol and cocaine to the female victim, had sexual intercourse with her after she passed out. The offender was sentenced to 3 years in custody. In *R. v. Bushell* the offender consumed alcohol and sexually assaulted the 16 year old male victim while he was sleeping. The victim awoke to find the offender performing fellatio on him. The offender was sentenced to a period of 24 months incarceration.

[13] The defence referred the court to cases in the Northwest Territories. In *R. vs. Squirrel [1993] NWTJ 234* the offender was intoxicated and performed oral

sex on a female victim while she was asleep. The court imposed a sentence of 15 months incarceration. ***R vs. Kendi [1990] NWTR 20***, the 52 year old offender had sexual intercourse with a 24 year old female while she was passed out. He was sentenced to 20 months incarceration. ***R. vs. Shah [1996] OJ 2148***. The *Summary Conviction Appeal Court* upheld a sentence of a fine where the offender committed fellatio on a 17 year old victim while he was sleeping.

[14] The court has also reviewed ***R. v. Luddington [2001] NSCA 29*** the offender was sentenced to 14 months incarceration for having sexual intercourse with the victim while she was asleep. In ***R. v. C(S.C)2004 NSPC 41*** the offender sexually assaulted an 11 year old male numerous times over a period of months. The assaults included fellatio. The offender was sentenced to a term of 2 years imprisonment. Although not available to this offender, the *Court of Appeal* upheld an 18 month conditional sentence for sexual intercourse and other sexual acts with a 12 year old boy, ***R. v. W (M.A)1999 NSJ 49***.

[15] In the present case the sexual assault, although an isolated incident, was highly invasive. I find an appropriate sentence in these circumstances is 15 months imprisonment. The sentence for failure to appear is 2 months imprisonment consecutive for a total of 17 months.

[16] *Section 721 (3)* in force at the time of this offence gave the Judge discretion to take into account any time spent in custody. Time in custody prior to sentencing is imprisonment. This time is not considered for parole. Under the circumstances I will grant 1 to 1 for time spent in custody. For clarity:

<i>Section 271</i>	15 months	450 days
<i>Section 145 (2)</i>	2 months	<u>60 days</u>
Total		510 days
Less Credit		<u>36 days</u>
Net Sentence		474 days

[17] I also grant the auxiliary orders requested by the crown.

[18] Given that the offender while incarcerated in Burnside facility was double bunked on a cot on the floor I will endorse the Warrant with a recommendation that he be place in a provincial facility other than the Burnside Dartmouth facility.

Scaravelli, J.