IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R. v. R.D.H., 2005 NSSC 34

Date: 20050209
Docket: CRSBW 230908
Registry: Bridgewater

Between:

Her Majesty the Queen

Respondent

v.

R. D. H.

Appellant

DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Gerald R. P. Moir
Date Heard:	23 November 2004
Written Submission Received:	5 January 2005
Counsel:	Paul Scovil, for the Respondent Joel E. Pink, Q.C., for the Appellant

Moir, J.:

[1] *Introduction.* More than once in 2003 or early 2004 R. D. H. enticed a young girl in his neighbourhood to touch him sexually and to preform oral sex on him. He is in his thirties. She was only thirteen. He was charged with the dual procedure offences under s. 151, s. 152 and s. 271(1) of the *Criminal Code*, the Crown proceeding by way of summary conviction rather than indictment. After the defence counsel and the Crown attorney reached agreement for a joint recommendation on sentence, Mr. H. pleaded guilty to sexual assault and the other charges were withdrawn. In September 2004, Judge James H. Burrill conducted the sentencing hearing and received the joint recommendation, nine months to be served under a conditional sentence, including house arrest during all of the nine months, and three years probation. The Provincial Court Judge rejected the joint recommendation and sentenced Mr. H. to seven months incarceration with three years probation. Mr. H. appeals.

[2] In *R.* v. *MacIvor*, [2003] NSCA 60, the Court of Appeal summarized holdings of the Supreme Court of Canada on the standards for reviewing a decision on sentence:

> A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": *R.* v. *Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence if the sentence is "demonstrably unfit": *R.* v. *M.* (C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374. The Supreme Court of Canada reiterated this standard of appellate review in reviewing a conditional sentence in *R.* v. *Proulx* (2000), 140 C.C.C. (3d) 449, [2000] 1 S.C.R. 61 at [paragraph] 123-126.

No one argues that the sentence in this case is clearly unreasonable or is demonstrably unfit. On behalf of Mr. H., Mr. Pink submits that the rejection of the joint recommendation was occasioned by errors in principle. On behalf of the Crown, Mr. Scovil, who was not the Crown attorney at the sentencing hearing, supports the position taken by the defence.

[3] *Facts of the Offence.* The sentencing judge found the facts of the offence:

> The facts in this matter are as follows. I'm advised that during the fall of 2003 the accused, who lives approximately 80 yards from K. C. and her family, became close friends with that family and spend a lot of time with K. and her family, both at the residence and at other places.

> I'm advised that during this period the accused was drinking a lot and that some time during the fall of 2003, he jokingly, he says, referred to their relationship as boyfriend/girlfriend. It's clear that the accused cultivated that relationship through

> the exchange of notes with Ms. C. and that this passing of notes began near the 1st of December, 2003. In some of those notes, he indicated to this 13 year old that he loved her and wanted to be with her forever. He indicated that he wanted to have sex with her and that if she kept saying no, he would not wait forever, and after cultivating that relationship, the accused ultimately committed sexual assault against that 13 year old individual.
>
> I'm advised that there were two incidents where the accused drove the victim to an area on a 4 wheel all terrain vehicle where no other persons were present. He undid his survival suit that he was wearing, undid his pants and produced his penis and had this 13 year old preform oral sex on him while holding her head, at least on one occasion, and telling her not to stop. I'm advised that there was no ejaculation during either of those incidents.
>
> In addition there were incidents at the home or an incident at the home, as well as incident, at least one incident, on a 4 wheel all terrain vehicle where he had placed the hand of the complainant, Ms. C., on his crotch area and had her rub over the clothing.
>
> This incident was discovered on February 13th of 2004 when the victim's mother discovered some of the notes that had been passed. Those note were deemed to be of inappropriate content and ultimately those notes were caused the mother to take her daughter, Ms. C., to the R.C.M.P. Detachment where a statement was provided.

[4] *Facts Respecting the Offender.* The record includes a pre-sentence report prepared by Probation Officer Doug Bruce, an assessment respecting addition services prepared Clinical Therapist Bill Middleton and a "Comprehensive Pre-Sentence Psychological Assessment for Sexual Offenders" prepared by Psychologist Michelle St. Amand of the Sexual Offenders Program at the Nova Scotia Hospital. Judge Burrill summarized these as follows:

> The Court has received a Pre Sentence Report, an Addiction Assessment and the Sex Offender Assessment. The Pre Sentence Report indicates that the accused is a candidate for community based supervision. The Addiction Assessment indicates that there has been and continues to be a problem with regard to addiction and that continued abstinence from alcohol is recommended with treatment can be provided in the community.
>
> The Sex Offender Assessment indicates that the accused is of moderate risk to re-offend violently, which of course includes the offence of sexual assault and indicates that there is a community based program that can, if successfully completed, manage the risk within the community.

For present purposes, these reports require some elaboration.

[5] The pre-sentence report describes a thirty-four year old man who had a record dating from his late teens not involving sexual offences and who had been a serious user of street drugs until he was twenty-five. After that, he had one conviction, which was for impaired driving. At the time of his pre-sentence report interview, Mr. Mann was coming to see he had a problem with alcohol. The report also records that Mr. H.'s girlfriend died in a car accident when he was twenty. Mr. H.'s father died in an accident at his place of work when Mr. H. was twenty-five and it was Mr. H. who discovered his father's body. The next year saw the death of Mr. H.'s uncle, an uncle with whom he had been close.

[6] The addiction services assessment concludes "prior to the age of twenty-five [Mr. H.] was a poly drug user and since the age of twenty-five is a problem drinker who should have a serious look at his use of alcohol".

[7] The Sexual Offenders Assessment is very extensive. In addition to a detailed report on Mr. H.'s sexual history, an account of the offences and an assessment of Mr. H.'s sexual interests, the report detailed information he gave concerning substance abuse, prior offences, family history, education, employment and mental health. A series of psychological tests were administered. As will be seen, Judge Burrill's finding that "the accused cultivated that relationship through the exchange of notes" became an important factor in his rejection of the joint recommendation. This passage from the "Clinical Analysis of Sexual Offences" portion of the report may cast a different light on that behaviour:

> By writing notes to the victim, Mr. H. claimed to have thought that it made her "feel better." However, it is equally probable that their relationship was personally soothing and gratifying for Mr. H., particularly given his break-up with his girlfriend (after which he began spending increased time with the victim's family). In either case, it is evident based on Mr. H.'s report, that he was able to develop a special relationship with the victim, where she shared problems and he offered advice, and where they maintained a secret line of communication.

The report concluded that Mr. H. posed "a moderate risk for recidivism". It stated that a moderate intensity sexual offender treatment was available in the community and in federal prisons but not in provincial jails. The report also recommended counselling "to address issues related to his father's and former girlfriend's deaths, as well as his general lack of assertiveness...and dependant personality."

[8] Judge Burrill also had before him victim impact statements and a statement Mr. H. chose to make to the Court. Judge Burrill stated, "I accept his expression of remorse uttered today as genuine."

[9] *Judge's Decision.* The Provincial Court Judge referred to the provisions of the *Criminal Code* respecting the purposes of sentencing, factors to be taken into consideration on sentencing and conditional sentences. He also stated "a joint submission from counsel should be seriously considered and should not be rejected unless it is contrary to the public interest or...it is unreasonable...or would bring the administration of justice into disrepute." The sentencing judge also recognized that a recommended sentence that would be "unfit", meaning outside an acceptable range of penalties, should be rejected by the Court. In this case, the judge was of the

opinion that a conditional sentence would be unreasonable and would bring the administration of justice into disrepute. He was also of the view that "a Conditional Sentence in this case would be...unfit...". Among the aggravating circumstances, Judge Burrill noted "the premeditated nature of the act, the cultivation of the relationship over a period of months through the exchange of notes, the fact that the conduct was repeated on more than one occasion".

[10] Counsel were given no notice that rejection of the joint recommendation was under consideration and the Court made no inquiry into the reasons for agreement.

[11] *Issues on Appeal.* The appellant submitted, firstly, that the finding that a conditional sentence would be "unfit" was contrary to principle. Secondly, the sentencing judge failed to inquire into the circumstances underlaying the joint recommendation. Both of these are characterized as errors justifying interference within the standard to which I have referred. For his client, Mr. Pink submitted that this was an appropriate case in which to impose sentence on appeal rather than to refer it back to the sentencing court. The Crown supported the appellant's positions.

[12] Later, Mr. Pink referred me to *G.P.* v. *R.*, [2004] NSCA 154, which was released after argument in this case. Consequently, a third issue was raised as to the sentencing judge's failure to give notice he was considering rejection of the joint recommendation. Consequently, the issues are:

1. Whether it was reversible error for the sentencing judge to find a conditional sentence to be "unfit".

2. Whether it was reversible error for the sentencing judge to reject the joint recommendation without conducting an inquiry into the circumstances that lead to it.

3. Whether it was reversible error for the sentencing judge to reject a joint recommendation without giving notice that such was under consideration.

[13] <u>*Recommended Sentence as "Unfit".*</u> A sentencing judge must not reject a joint recommendation unless the judge finds that the sentence is unfit, that is, it is outside an acceptable range. The correct approach is explained by Justice Cromwell at para. 31 of *R.* v. *MacIvor*, [2003] NSCA 90, to which Mr. Pink referred me:

> I am also of the view that, with respect, the judge erred in "jumping" the joint submission. It is not doubted that a joint submission from a plea bargain while not binding on the Court, should be given very serious consideration. This requires the sentencing judge to do more than assess whether it is a sentence he or she would have imposed absent the joint submission: see, e.g., *R.* v. *Thomas* (2000), 153 Man. R. (2d) 98 (C.A.) at para. 6. It requires the sentencing judge to assess whether the jointly submitted sentence is within an acceptable range - in other words, whether it is a fit sentence. If it is, there must be sound reasons for departing from it: see, for

example, *R.* v. *MacDonald* (2001), 191 N.S.R. (2d) 399; N.S.J. 51 (Q.L.) (N.S.C.A.); *R.* v. *Tkachuk* (2001), 159 C.C.C. (3d) 434 (Alta. C.A.) at para. 32; *R.* v.*C. (G.W.)* (2000), 150 C.C.C. (3d) 513 at paras. 17-18; *R.* v. *Bezdan,* [2001] B.C.J. No. 808 (C.A.) at paras. 14-15; *R.* v. *Thomas,* supra, at paras. 5-6; *R.* v. *B.(B.)*, 2002 Carswell NWT 17 (N.T.C.A.) at para. 3; *R.* v. *Webster* (2001), 207 Sask. R. 257 (C.A.) at para. 7.

[14] The conditional sentence has its own parameters. The question of fitness is largely statutory. The discretion to impose house arrest and other conditions under supervision in the community as an alternative to imprisonment arises if:

1. There is no minimum imprisonment prescribed for the offence;
2. Punishment merits more than probation and less than two years imprisonment;
3. Severing the sentence in the community would not endanger the community and;
4. Serving the sentence in the community would be consistent with the fundamental purpose and principles of sentencing.

We have now had ten years experience with s. 742.1 of the *Criminal Code.* The purpose of s. 742.1 and its intended operation were throughly canvassed by the Supreme Court of Canada in *R.* v. *Proulx* (2000), 140 C.C.C. (3d) 449 (SCC). For the

Court, Chief Justice Lamer began his reasons by saying "Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison.": [para. 1]. In the end [para. 127] the Chief Justice provided a helpful summary of the thirteen major points made by the decision. Points one, three and seven are particularly germane to the present discussion:

> 1. Bill C-41 in general and the conditional sentence in particular were enacted both to reduce reliance on incarceration as a sanction and to increase the use of principles of restorative justice in sentencing.
>
> 3. No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence for specific offences.
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> 7. Once the prerequisites of s. 742.1 are satisfied, the judge should give serious consideration to the possibility of a conditional sentence in all cases by examining whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. This follows from Parliament's clear message to the judiciary to reduce the use of incarceration as a sanction.

In my assessment of s. 742.1 and *Proulx*, a conditional sentence can never be said to be unfit unless:

1. A minimum period of imprisonment is prescribed for the offence.
2. Probation or two years or more in penitentiary is the appropriate punishment.

3. The community would be endangered in the sense elaborated in *Proulx*.

4. Serving the sentence under supervision in the community would be inconsistent with the fundamental purpose and the principles of sentencing.

[15] In this case, the sentencing judge made no finding that a conditional sentence would be inconsistent with the purposes and principles of sentencing. He said that he considered "the various principles and purpose of sentencing" but, in my respectful assessment, that is not enough to justify rejecting a joint recommendation of a conditional sentence. There needs to be a finding that the recommended sentence is inconsistent with purpose and principle because a recommended conditional sentence is "fit" if it meets the statutory criteria.

[16] I would allow the appeal on this ground alone.

[17] *Duty to Inquire.* In *Hatt* v. *R.*, [2002] PEISCAD 4, the Court said at para. 15:

> I agree that there is no rigid formula that must be followed when considering a joint submission. However, if a trial judge is considering rejecting that submission, an

> inquiry must be made as to the reasons behind the submission, and clear reasons must be given, after an explanation by counsel of the rationale for the joint submission, as to why it would be contrary to public interest and why it would bring the administration of justice into disrepute to impose that recommended sentence.

This followed *R.* v. *G.W.C.*, [2001] A.J. 1585 (CA) and it is consistent with *R.* v. *Thomas*, [2000] M.J. 575 (CA).

[18] Mr. Scovil pointed out that had Judge Burrill asked why the agreement was reached he would have learned that the young complainant was a reluctant witness and the Crown was concerned especially about the impact upon her if she had to testify. Also, Mr. Scovil pointed out that Judge Burrill might have reached a different conclusion on "grooming" if the Crown had been challenged. The Crown would have drawn the judge's attention more acutely to the evidence in the Pre-Sentence Psychological Assessment for Sex Offenders.

[19] Because under our system judges adopt a passive rather than an inquisitorial stance, I think it better to speak of a duty of notice rather than a duty of inquiry. In any event, an authority binding on me determines the next issue.

[20] *The Need for Notice.* Very recently, our Court of Appeal followed *R.* v. *Sinclair*, [2004] M.J. No. 144 (MCA) at para. [17] where Steel, JA summarized "the law with respect to joint submissions" in five points, the third and forth of which most concern this discussion:

> 3. In determining whether cogent reasons exist (*i.e.*, in weighing the adequacy of the proposed joint submission), the sentencing judge must take into account all the circumstances underlying the joint submission. Where the case falls on the continuum among plea bargain, evidentiary considerations, systemic pressures and joint submissions will affect, perhaps significantly, the weight given the joint submission by the sentencing judge.
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> 4. The sentencing judge should inform counsel during the sentencing hearing if the court is considering departing from the proposed sentence in order to allow counsel to make submissions justifying the proposal.

In *R.* v. *G.E.P.*, [2004] NSCA 154 Bateman, JA, for our Court, stated, at para. 19:

> [B]efore rejecting the joint recommendation the judge should have advised counsel that he was considering departing from the agreed sentence and afforded them an opportunity to make submissions justifying their proposal *(R.* v. *Sinclair*, supra).

This applies at least in cases of "a genuine plea bargain" [para. 17].

[21] There was no notice in this case. I would allow the appeal on that ground also.

[22] *Disposition Under s. 687.* I will vary the sentence from seven months incarceration followed by probation to nine months house arrest under a conditional sentence followed by three years probation. My orders will include all of the conditions set out in the transcript.

J.