



**IN THE COURT OF APPEAL  
OF NEWFOUNDLAND AND LABRADOR**

**Citation:** *R. v. R. B.*, 2019 NLCA 22

**Date:** April 11, 2019

**Docket Number:** 201701H0100

Section 486.4 of the *Criminal Code* respecting the non-publication of the identity of a complainant or of a witness and any information from which they might be identified applies to this judgment.

**BETWEEN:**

HER MAJESTY THE QUEEN

APPLICANT/APPELLANT

**AND:**

R. B.

RESPONDENT

**Coram:** Welsh, White and Goodridge JJ.A.

**Court Appealed From:** Provincial Court of Newfoundland and Labrador  
St. John's

**Appeal Heard:** March 13, 2019

**Judgment Rendered:** April 11, 2019

**Reasons for Judgment by:** Welsh J.A.

**Concurred in by:** White and Goodridge JJ.A.

**Counsel for the Appellant:** Iain Hollett

**Counsel for the Respondent:** Michael King

**Welsh J.A.:**

[1] R.B. pleaded guilty to and was convicted of charges of sexual assault, arson, theft, mischief, breach of a recognizance, assaulting a police officer and uttering threats. He was sentenced to twelve months imprisonment for the sexual assault and a total of fourteen months to be served conditionally for the remainder of the offences, followed by six months probation.

[2] The Crown, having been granted leave, appeals two components of the sentence. First, it is submitted that the trial judge erred in fact and law and that the sentence for the offence of sexual assault is demonstrably unfit given that the appropriate range of sentence is three to five years; and second, a conditional sentence was not available for the offence of arson.

**BACKGROUND**

[3] Regarding the offence of sexual assault, the complainant was unable to give valid consent to the sexual relationship due to her age and the application of provisions of the *Criminal Code*. The trial judge accepted that the complainant had been in a sexual relationship with R.B. beginning when she was fourteen years and ten months old and R.B. was twenty years and two months old. Sexual intercourse occurred early in the relationship.

[4] The complainant became pregnant in September 2015 when she was fifteen years of age, and gave birth in July 2016 when she was sixteen years of age. In her oral decision, the trial judge accepted:

[The complainant] considered [R.B.] to be her boyfriend, and said that both her parents and [R.B.'s] parents knew about the relationship. She said she was a willing participant and despite some on and off periods, the relationship was continued and consistent until the police became involved in April 2016. ...

[5] R.B. was sentenced to the minimum term of one year imprisonment for the sexual assault. The judge assigned remand credit of 365 days with the result that the sentence was deemed to be time served.

[6] Regarding the arson charge under section 434 of the *Criminal Code*, R.B., with an accomplice, stole an all terrain vehicle. When it got stuck in a bog, they put a rag in the gas tank and lit it. The machine was destroyed. The trial judge sentenced R.B. to a six month conditional sentence for the arson offence.

[7] The total fourteen month conditional sentence was completed on January 13, 2019. Pursuant to the trial judge's decision, R.B. will be on probation until July 13, 2019.

## ISSUES

[8] At issue in this appeal is whether the trial judge erred by imposing (1) a demonstrably unfit sentence for the offence of sexual assault, and (2) a conditional sentence for the offence of arson.

## ANALYSIS

### Leave to Appeal

[9] Because this is an appeal by the Crown as to sentence, leave to appeal is required pursuant to section 676(1)(d) of the *Criminal Code*. At the hearing, the Court granted leave to appeal after considering the written submissions of counsel and applying the test for granting leave (*R. v. Martin*, 2018 NLCA 12, at paragraph 6).

### Appeal Against Sentence

[10] This is an appeal against sentence which engages principles discussed in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089. Wagner J., for the majority, reiterated:

[44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.

...

[51] Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.

...

[60] In other words, sentencing ranges are primarily guidelines, and not hard and fast rules: *Nasogaluak* [2010 SCC 6, [2010] 1 S.C.R. 206], at para. 44. As a result, a

deviation from a sentencing range is not synonymous with an error of law or an error in principle. ...

## Sexual Assault

### The Law

[11] Section 271 of the *Criminal Code* provides for the offence of sexual assault:

Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year;

[12] Section 150.1(1) of the *Code* addresses the defence of consent when a complainant is under sixteen years of age:

Subject to subsections (2) to (2.2), when an accused is charged with an offence under section ... 271, ... in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

[13] Section 150.1(2.1) provides for an exception:

If an accused is charged with an offence under section ... 271 in respect of a complainant who is 14 years of age or more but under the age of 16 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused

(a) is less than five years older than the complainant;

[14] Section 718.01 addresses the objectives of sentencing in this context:

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.

[15] This Court has recognized that the purpose of section 718.01 is the protection of young persons who are deemed to lack sufficient maturity to give valid consent (*R. v. J.B.*, 2013 NLCA 61, 341 Nfld. & P.E.I.R. 329, at paragraph 19). Similarly, in *R. v. A.B.*, 2015 NLCA 19, 365 Nfld. & P.E.I.R. 160, the Court explained:

[29] Regarding the second issue, the willingness of the child to participate in the offending conduct cannot be equated with consent. Parliament has specified that children below a certain age lack sufficient maturity and are mentally and psychologically incapable of consenting. Further, psychological manipulation of the child by grooming or luring may lead the child to a false understanding or naïve perception of the relationship with the adult.

[16] Finally, Parliament has directed that, in determining a fit sentence, the court will give primary consideration to denouncing the adult's conduct and to deterring others from similar conduct.

### Application of the Law

#### *The Trial Judge's Decision*

[17] In sentencing R.B. to a term of imprisonment of one year for the offence of sexual assault, the trial judge took into account that: R.B. had no prior criminal record, he pleaded guilty to the charges, the pre-sentence report is "quite positive", he has participated in counselling, and he "has a credible education, a credible work history, a supportive family, and a great deal of potential". Regarding R.B.'s employment, the judge recognized:

... On graduation [from high school] he did a nine-month bridge watching course at the Marine Institute, and secured employment on the Bell Island Ferry in December of 2014. He worked there for one and a half years until he was arrested on the sexual assault charges currently before the Court. He is presently employed as a roofer, but hopes to one day get his job back with the Bell Island Ferry.

[18] Citing authority from this jurisdiction, the trial judge accepted that the normal range of sentence for sexual assault involving intercourse with a person under sixteen years of age is three to five years imprisonment. With those cases in mind, the judge referenced the decision in *R. v. A.B.*, *supra*, in which the law was summarized:

[26] These decisions indicate that a term of imprisonment of three years is at the low end of the range in sentencing an adult offender for sexual assault involving intercourse where the complainant is below the age of consent. The range serves to assist the court in determining a sentence consistent with the principle that similar sentences should be imposed on "similar offenders for similar offences committed in similar circumstances" (section 718.2(b) of the *Criminal Code*). Determination of an appropriate sentence will, of course, depend on the facts of the particular case. A review of the case law provides a helpful summary of some relevant factors:

1. Position of trust, more serious where the offender is in a position of authority;
2. Age of the victim, being less serious where the victim is close to the age of consent;
3. Significant age difference between the parties;
4. Sexual encounters occurring over a period of time;
5. Manipulation of the victim;
6. Planned or calculated conduct by the offender;
7. Knowledge of and acting on the victim's vulnerability;
8. Continuation of conduct after being warned;
9. Particular impact on the victim;
10. Lack of remorse or acceptance of responsibility; placing of blame on the victim or others; limited appreciation of the harm caused; minimization of the offence;
11. Previous criminal record;
12. Prospects for rehabilitation and risk of re-offending;
13. Positive pre-sentence report;
14. Guilty plea;
15. Willingness to access counselling.

[19] Regarding this case, the trial judge went on to conclude:

... In the present case, there is no indication of grooming or child luring, leading to a false understanding or naïve perception about the relationship with [R.B.]. Regardless of the illegality of the situation, both sets of parents were aware that they were boyfriend-girlfriend, and no meaningful steps were taken to end it. This could have actually legitimized the relationship in [the complainant's] eyes.

In addition, [the complainant] was not misled into a false understanding of her relationship with [R.B.] as they continued to be together in an open relationship until he was charged with sexually assaulting her. It is apparent that both wish to continue a future relationship wherein they will raise their [child] together as a couple. As a

result, because they were in an open relationship that was being condoned, it cannot be equated with a surreptitious liaison that was cultivated by the offender for the sole purpose of sexual gratification. Right or wrong, there was a legitimization of the relationship that militates against an absolute conclusion that [the complainant] was psychologically manipulated into a naïve perception of her relationship with [R.B.]; it was known, and it was condoned.

(Emphasis added.)

[20] The judge then referenced section 150.1(2.1) of the *Criminal Code* with respect to the defence that may apply if the offender is less than five years older than the complainant. Counsel agree that the judge made a factual error when she concluded that the age difference was five years and four months, considerably less than the actual difference of six years and five months. In addition, counsel agree that the judge stated, in error, that R.B. and the complainant wanted to continue their relationship.

[21] The judge referenced the pre-sentence report where R.B. acknowledged that he knew the complainant's age, "but did not feel he did anything wrong". The judge found that R.B. "has limited insight into the serious offence he committed when he began a sexual relationship with a 14 year old when he was 20 years old".

[22] That said, the judge emphasized the principle of rehabilitation. Being satisfied that R.B. was not in a position of trust in relation to the complainant and that there was no evidence that he was a sexual predator, the judge concluded:

... Twelve months is consistent with the seriousness of the offence, and meets those principles of sentencing particularly where there is no indication of coercion, plying with alcohol or drugs, vulnerability related to diminished circumstances such as hunger, homelessness, or lack of family support, mental or physical compromise, or that [the complainant] suffered from psychological or emotional harm as a result of the offence.

[23] While acknowledging the three to five year sentencing range, the trial judge concluded:

... I have found no cases suggesting that a 12 month sentence could never be imposed in a situation where sexual intercourse occurs between an adult and a child. Rather, the principle seems to be that a mandatory minimum sentence is available to the best offender in the best circumstances. As a result, I am satisfied on the basis of all the information before me in this matter, that [R.B.] fits that description for all of the reasons discussed above. ...

*Analysis of the Trial Judge's Decision*

[24] On appeal, counsel for the Crown submits that factual errors and errors of law made by the trial judge resulted in a demonstrably unfit sentence for the offence of sexual assault. The errors of fact which the Crown submits had an impact on the sentence are the mistake regarding the age difference between R.B. and the complainant, and the fact that the complainant did not have a continuing relationship with R.B. The errors of law relate to the trial judge's conclusion that R.B. had not engaged in luring or grooming the complainant, and that the judge failed to give effect to the principles of denunciation and deterrence. It is this combination of errors that, the Crown submits, leads to the conclusion that the sentence imposed for the offence of sexual assault is demonstrably unfit.

[25] First, it is clear from reading the decision as a whole that the age difference was an important consideration because, by the judge's calculation, R.B. was only four months outside the five year exception under section 150.1(2.1). The actual six years and five months difference would not have the same impact, though it would still be a relevant consideration. The age difference was not as significant as if, for example, R.B. had been in his thirties or older, but he was an adult and the complainant, at fourteen years of age, was not near the age of consent. R.B. knew how old she was, but regardless of that fact, he proceeded with a sexual relationship involving intercourse over several months, resulting in the complainant's pregnancy at the age of fifteen. These factors, among others, take R.B. out of what the trial judge described as "the best offender in the best circumstances".

[26] Similarly, the judge erred by taking account of a continuing relationship between R.B. and the complainant, which was a mistake of fact. This was a consideration which buttressed the judge's above characterization of R.B. While it is possible that such a consideration may be relevant in particular circumstances, it is not relevant for purposes of this case.

[27] Further, the fact that the complainant's parents may have condoned the relationship is, in my view, irrelevant. Parents could not, with any effect, condone what Parliament has determined to be a criminal offence. Indeed, the fact that they may have condoned the relationship may well have assisted R.B. in pursuing the sexual relationship with the complainant. This factor leads to the question of grooming or luring.

[28] I do not accept the trial judge's determination that there was no indication of grooming or luring in this case. It is true that there is no evidence that R.B. used inducements such as alcohol or drugs, as set out in paragraph 22, above. Such factors would undoubtedly serve to increase the offender's responsibility, and hence, an appropriate sentence. However, the absence of such inducements does not indicate the absence of grooming or luring. As discussed in *R. v. A.B.*, *supra*, at paragraph 18, above, grooming or luring may be accomplished in less obvious ways. For example, the adult may engage in subtle psychological manipulation of the child which leads the child to "a false understanding or naïve perception of the relationship with the adult". Here, the fact that the complainant considered that R.B. was her boyfriend and that sexual intercourse was an appropriate component of that relationship suggests such a false understanding or naïve perception for which R.B. must take some responsibility.

[29] Finally, the trial judge, emphasizing rehabilitation, failed to give adequate effect to section 718.01 of the *Criminal Code* which requires that, where the complainant is fourteen years of age, "primary consideration" shall be given to the objectives of denunciation and deterrence. While I agree that rehabilitation is a relevant factor in this case, as discussed above, R.B. cannot be characterized as the best offender in the best circumstances for whom the minimum sentence would adequately address the objectives of denunciation and deterrence.

[30] Parliament has mandated a minimum sentence of one year imprisonment for the indictable offence of sexual assault where the complainant is between fourteen and sixteen years of age. In this case, R.B. engaged in sexual intercourse early in the relationship when the complainant was fourteen years old, with a resulting pregnancy when she was fifteen. In such circumstances, in the absence of mitigating factors, which are not present here, the objectives of denunciation and deterrence require a sentence more severe than the mandatory minimum. In the result, I am satisfied that the trial judge erred by failing to give due consideration to the objectives of denunciation and deterrence as required by section 718.01 of the *Code*.

[31] The above errors of fact and law must be considered in the context of the normal range of sentence of three to five years for a conviction for sexual assault involving intercourse where the complainant is fourteen years of age. I am satisfied that, in the circumstances, a sentence of one year imprisonment is demonstrably unfit.

[32] It is necessary, then, to consider variation of the sentence pursuant to section 687(1) of the *Criminal Code*.

*Variation of the Sentence*

[33] While I have concluded that a sentence of one year imprisonment is demonstrably unfit, I am satisfied that a sentence outside the range of three to five years imprisonment is appropriate in this case.

[34] In determining an appropriate sentence, it is helpful to review the factors set out in *R. v. A.B.*, *supra* (paragraph 18, above). The following considerations support imposition of a sentence outside the range of three to five years but more than the minimum one year imprisonment:

1. R.B. was not in a position of trust or authority in relation to the complainant.
2. The difference in age was not substantially more than the five-year defence under section 150.1(2.1). That said, the complainant, at fourteen years of age, was not near the age of consent.
3. There is no evidence that R.B. coerced the complainant or plied her with alcohol or drugs, but he knew her age and took advantage of her immaturity. As discussed above, this amounted to a form of luring or grooming. As stated by the trial judge, R.B. “has limited insight into the serious offence he committed when he began a sexual relationship with a 14 year old when he was 20 years old”.
4. R.B. had no prior criminal record, pleaded guilty to the charges, has participated in counselling, and received a “quite positive” pre-sentence report.
5. The relationship was open in contrast to a surreptitious liaison.
6. Rather than discouraging the relationship, the parents of both the complainant and R.B. apparently condoned it.
7. The trial judge was satisfied that R.B. had good prospects for rehabilitation. Indeed, the post-sentence report provided to this Court indicated that he had regained his employment on the Bell Island ferry.

However, at the hearing, without further explanation as to the cause, he advised that his employment had again been terminated.

[35] In all the circumstances, a sentence of imprisonment of two years less a day would achieve the objectives of sentencing, with primary consideration given to denunciation and deterrence. Under the *Criminal Code*, it is not lawful to engage in sexual intercourse with a girl under sixteen years of age where the girl is more than five years younger. Parliament's objective is to protect young persons who are not sufficiently mature to give informed consent.

[36] In summary, for the above reasons, I am satisfied that the trial judge erred in fact and law by imposing a sentence of one year imprisonment for the offence of sexual assault. Such a sentence is demonstrably unfit. In the circumstances, subject to the discussion below regarding varying the length of sentence, I would vary the sentence to impose a term of imprisonment of two years less a day.

#### Arson

[37] The trial judge sentenced R.B. to six months, to be served conditionally, for the offence of arson. The Crown does not appeal the length of the sentence, but submits that a conditional sentence is not available for that offence. This follows from a reading of sections 434 and 742.1 of the *Criminal Code*.

[38] Section 434 of the *Code* provides for the indictable offence of arson:

Every person who intentionally or recklessly causes damage by fire or explosion to property that is not wholly owned by that person is guilty of an indictable offence and liable to imprisonment for a term not exceeding fourteen years.

[39] Because this offence carries a maximum sentence of fourteen years, a conditional sentence is not available. Section 742.1 provides:

If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

...

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

[40] It follows from the clear language of the *Code* that a conditional sentence was not an option available when R.B. was convicted of arson because the requirement of section 742.1(c) was not satisfied. The effect of the fact that he has completed that sentence is discussed below.

#### Effect of a Variation in Sentences

[41] R.B. has completed the conditional sentence of fourteen months imposed for the offences other than sexual assault. While the six months sentence imposed in respect of the arson offence should, by law, have been served in prison, I am satisfied that it would not be in the interests of justice to require R.B. to serve additional time in prison for that offence. In reaching that conclusion, I would take into account the length of the sentence, being just six months, which has been accepted as appropriate, together with the fact that R.B. has served the full term.

[42] Further, I recognize that an aggregate sentence of two years less a day for the offence of sexual assault plus six months for the offence of arson would have precluded R.B. from eligibility for a conditional sentence for the remaining offences. However, given the length of the individual sentences, which are not being varied, and the fact that the full fourteen month term has been served, I would not vary the sentences which the trial judge ordered to be served conditionally.

[43] Regarding the sentence for the offence of sexual assault, as discussed above, I would vary the original sentence of one year by imposing a sentence of two years less a day, subject to consideration of R.B.'s submission that, having served his entire sentence, he should not be re-incarcerated to serve an additional year less a day in prison.

[44] Depending on the circumstances, this Court has taken account of the effect of increasing a sentence on appeal where the original sentence has already been served. In *R. v. Butt* (1993), 106 Nfld. & P.E.I.R. 92, at paragraph 31, Marshall J.A., for the majority, referred to cases that demonstrated a reluctance to increase a sentence that has already been served. This result ordinarily obtains where the offender has demonstrated success as to the sentencing objective of rehabilitation.

[45] Similarly, in *R. v. Kane*, 2012 NLCA 53, 325 Nfld. & P.E.I.R. 78, this Court explained:

[48] ... An offender like Mr. Kane who, for the purpose of monetary gain, has played an active, trusted and necessary role in a sophisticated, commercial level conspiracy to traffic in significant amounts of cocaine, should expect a sentence in the range of four years imprisonment. The risk associated with such criminal activity is a sentence of that length. However, for the reasons discussed above, in the particular circumstances of this case, the interests of justice are best served by allowing the sentence imposed by the trial judge to run its course.

[46] In this case, the post-sentence report is generally positive. There is no indication that R.B. failed to comply with the conditions of the fourteen month conditional sentence or, to date, with the terms of his probation. In the circumstances, I would apply the approach taken in *Kane* to the length of the sentence of imprisonment imposed for the offence of sexual assault. That is, on the facts of this case, I am satisfied that the interests of justice are best served by allowing the one year sentence imposed by the trial judge to run its course, and not to vary the length of sentence to two years less a day.

[47] While I reach that conclusion in this particular case, I would reiterate that imprisonment for two years less a day is the appropriate sentence for the offence of sexual assault committed in circumstances such as this. The risk associated with such criminal activity is a sentence of that length. Under the *Criminal Code*, it is not lawful to engage in sexual intercourse with a girl under sixteen years of age where the girl is more than five years younger. Parliament's objective is to protect young persons who are not sufficiently mature to give informed consent.

[48] However, while I would not vary the length of the individual sentences imposed by the trial judge, I would vary the period of probation. The trial judge imposed six months probation based on time served in relation to the sexual assault and fourteen months conditional sentence for the remaining offences. In my view, given the seriousness of the offence of sexual assault and the number of additional offences, an appropriate period of probation is two years. Accordingly, I would extend the period of probation, under the same conditions, from six months to two years.

## **SUMMARY AND DISPOSITION**

[49] In summary, the trial judge erred in fact and law, and imposed a sentence for the offence of sexual assault that was demonstrably unfit. An appropriate sentence for that offence, in similar circumstances, is imprisonment for two years less a day. However, in this particular case, given that the sentence imposed by the trial judge has been served, with the exception of the period of

probation, in the interests of justice, I would not vary the length of the sentence, but would allow the sentence imposed by the trial judge to run its course. However, I would extend the period of probation from six months to two years, with the same conditions.

[50] The trial judge erred in law by imposing a conditional sentence, which is not an available option, for the offence of arson. However, I would not vary the length of the six-month sentence, and because R.B. has completed serving the sentence, I would not vary the conditional sentence to one of imprisonment.

[51] Accordingly, leave to appeal having been granted, I would allow the appeal, and would vary the sentence by extending the period of probation from six months to two years, with the same conditions.

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B. G. Welsh J.A.

I Concur: \_\_\_\_\_

C. W. White J.A.

I Concur: \_\_\_\_\_

W. H. Goodridge J.A.