

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

(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 complainant of the right to make an application for the order; and

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

(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.

(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. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.C., 2012 ONCA 608

DATE: 20120917

DOCKET: C54148

MacPherson, Armstrong and Watt JJ.A.

BETWEEN

Her Majesty the Queen

Applicant/Appellant

and

A. C.

Respondent

Gregory J. Tweney, for the appellant

Luis Antonio Monroy, for the respondent

Heard: September 6, 2012

On appeal from the sentence imposed by Justice J. A. Thorburn of the Superior Court of Justice on July 15, 2011.

ENDORSEMENT

[1] The Attorney General applies for leave and, if leave is granted, appeals a conditional sentence of imprisonment followed by a period of probation imposed upon the respondent, a mature first offender, for an historical sexual assault on a teenaged relative. The Attorney General also asks that we increase the term of the SOIRA order made by the trial judge to 20 years to accord with s. 490.013(2)(b) of the *Criminal Code*.

[2] The respondent was convicted of sexual assault after a trial before a judge of the Superior Court of Justice sitting without a jury. The conduct described by the complainant occurred at night when the respondent entered her bedroom. The trial judge found that the sexual assaults included

- i. touching the complainant under her shirt;
- ii. attempting to kiss her;
- iii. lying on top of her; and
- iv. placing his penis near her vagina.

The trial judge had a reasonable doubt that the respondent's penis entered the complaint's vagina.

[3] Before the sentencing judge, Crown counsel sought a penitentiary sentence of 3-5 years in length. Counsel for the respondent urged the judge to impose a sentence of two years less one day to be served conditionally. Pre-sentence custody was not a factor in the sentencing submissions or determination.

[4] The sentencing judge imposed a sentence of imprisonment of two years less one day to be served conditionally, to be followed by probation for three years and accompanied by several ancillary orders.

[5] In her reasons for sentence, the trial judge noted the particular importance of the sentencing objectives of denunciation and deterrence in sexual offences against minors. She considered several factors in aggravation:

- i. the age of the complainant when the offences occurred;
- ii. the lasting impact the offence has had on the complainant;
- iii. the period of several months during which the offence occurred; and
- iv. the failure of the respondent to seek counselling.

[6] As mitigating factors, the judge noted:

- i. the absence of any prior criminal convictions and of any misconduct during nearly three years of judicial interim release;
- ii. substantial community and family support; and
- iii. a lengthy uninterrupted employment history and excellent work record.

[7] Counsel for the appellant argues that the sentence imposed by the trial judge is demonstrably unfit. He submits that the offence involved repeated acts of sexual abuse over a period of several months that culminated in an act of attempted sexual intercourse by an adult in a position of trust. In these

circumstances, he contends, a conditional sentence fails to accord with previous decisions of this Court that support the imposition of a penitentiary sentence as the appropriate sentencing disposition.

[8] In this case, the length of the sentence imposed by the trial judge coincided with the term proposed as an alternative by the trial Crown and by defence counsel. The sentencing judge recognized that the historical nature of the respondent's offence left open the prospect of service of the sentence in the community. She identified the appropriate sentencing objectives, the relevant aggravating and mitigating factors, and the principles to be applied to determine whether the sentence could be served conditionally.

[9] The terms of the conditional sentence imposed by the trial judge provide for house arrest, subject to the usual exceptions, for the entire length of the sentence. Unlike a reformatory term of equivalent length, the respondent will be required to serve his entire sentence. The remaining terms of the conditional sentence order and of the probation order, include provisions that prohibit contact with the complainant and other young persons and require the respondent to obtain and continue directed counselling.

[10] In our view, in the circumstances of this case, the sentence imposed reflects no error in principle except that, as the parties agree, the period of the

SOIRA order should be increased to 20 years to accord with s. 490.013(2)(b) of the *Criminal Code*.

[11] For these reasons, leave to appeal is granted, but the appeal as to sentence is dismissed except for the variation in the term of the SOIRA order.

“J. C. MacPherson J.A.”

“Robert P. Armstrong J.A.”

“David Watt J.A.”