ONTARIO COURT OF JUSTICE

DATE: 2016·04·18
COURT FILE No.: Brampton 15-16140; 13-8583

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

[redacted]

Before Justice K.L. McLeod
Heard on January 15, 2016 and March 2, 2016
Reasons for Judgment released on April 18, 2016

Ms Lori Montague ..... **counsel for the Crown**
Ms Cynthia Fromstein ..... **counsel for the accused [redacted]**

MCLEOD J.:

[1] D[redacted] W[redacted] has pleaded guilty to the following particularised offence: that in April 2013 he did "by false pretence implicitly represent to A that he was a person with whom she could safely engage in sexual relations and thereby did cause her to rely upon that information respecting his health status for the purpose of procuring from , her consent to said relations, for his own benefit, pursuant to Section 362(1(a) of the *Criminal Code of Canada*". The Crown seeks a sentence of incarceration up to 90 days, the Defence an absolute discharge.

[2] Initially, Mr. W[redacted] was charged with a much more serious offence, but in recognition of the unusual circumstances of this case, it was agreed that the offence of False Pretences better represented the crime committed by Mr. W[redacted].

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[3] Mr. W[redacted] who is now 31 was advised in 2009, some four years after becoming a participant in a study under Dr.[redacted] to find a vaccine for HIV, that he had contracted the disease. However, despite that devastating diagnosis, the progress of the virus in Mr. W[redacted] was and continues to be unusual. The normal course of the infection is for the viral load to increase; in Mr. W[redacted]'s case it did not and was in fact noted as being "undetectable". In February of 2009 contained within the medical notes obtained by the Crown, a remark was that the lack of viral load was "amazing".

[4] In November of 2009 Mr. W[redacted]'s last documented viral load was again "undetectable. In an HIV test in 2011 there were no viral load records attached.

[5] I will now turn to the facts that make out the offence. Mr. W[redacted] was a friend of A C ; they had dated initially, but in 2013 they had progressed to being just friends. She was aware of his HIV status which he had disclosed to her online before they met.

[6] On Ms. C 's 27th birthday, April 28th, 2013, she rented a room in a hotel in Mississauga to celebrate. One of the invitees was the complainant, A A another was Mr. W[redacted] Ms. A had also rented a room which she anticipated sharing with two friends. All three friends had some drinks before joining the party at approximately 9:45 p.m.

[7] At the party, there were drinking games and both Ms. A and Mr. W[redacted] who, until that evening were strangers, drank. They then all attended a bar where they spent approximately four hours leaving in the early hours of the morning.

Both Ms. A and Mr. W[redacted] described themselves as "drunk" or "really drunk". Ms. A conversed with Mr. W[redacted] and thought him to be "really fun".

[8] After leaving the bar; all the partygoers returned to Ms. C[redacted]'s hotel room and continued to drink. Ms. A also took some MDMA.

[9] It had been Mr. W[redacted]'s initial intention not to stay at the hotel; as he had work the next morning. During the course of the evening, however, he called in to his work to say he would not be coming in and then proceeded to "pass out" and sleep on the couch in Ms. C[redacted]'s room.

[10] Ms. C[redacted] approached Ms. A and asked if Mr. W[redacted] could sleep in the latter's room as the couch in Ms. C[redacted]'s room had already been reserved. Ms. A despite her sense that Mr. W[redacted] should remain in Ms. C[redacted]'s room given they were friends, agreed as she considered Mr. W[redacted] "cool and fun".

[11] Mr. W[redacted] was awoken from his sleep and "staggered" along with Ms.

A to her room. Upon arriving in the room, Ms. A found one of her friends asleep on the bed and another on the pullout sofa in the living room.

[12] Ms. A woke the friend who was in the bed and asked her to move to the couch because Ms. A considered herself to be with Mr. W.

[13] Ms. A recalled pulling on pyjamas but could not recall what Mr. W was wearing; she thought maybe his shirt. She curled up close to him as she thought he was cute and eventually they engaged in what was described as "consensual stupid drunken sexual intercourse" without a condom. Mr. W ejaculated during the act. Upon Ms. A request a second bout of intercourse took place.

[14] There had been no prior discussion between the two about condom use or any infections.

[15] The following morning, Mr. W was advised by Ms. A that they had engaged in intimate relations: he could not recall it and had no recollection as to whether or not a condom had been used.

[16] Subsequently Ms. A friend took Mr. W home and in that person's presence, Mr. W told Ms. A she should get a pregnancy test, but never mentioned his HIV.

[17] One day later Ms. A confided in Ms. C that she had had sex with Mr. W and that a condom had not been used. Ms. C contacted Mr. W and confronted him over the acts of unprotected sex. Apparently Mr. W indicated variably, he thought they had used a condom, or that it might have broken.

[18] Ms. C gave Mr. W an ultimatum: he should call Ms. A immediately or she would. Mr. W apparently preferred to do it in person, but Ms. C 's wishes prevailed. Mr. W called and suggested that Ms. A go to the hospital to get treatment.

[19] Mr. W also offered Ms. A access to his HIV specialist so the lack of risk of her contracting the disease could be explained.

[20] Ms. A went to Guelph Hospital for treatment. Mr. W was contacted by the hospital and he confirmed his HIV status and acknowledged to the hospital that his doctor had told him to advise his sexual partners of his HIV status, to wear a condom and to follow up for treatment. None of this had taken place during the events in the hotel.

[21] Ms. A broke off her friendship with Ms. C and after considering her cousin's suggestion that she report the incident to the police, did so. She indicated she did not want anyone to go to jail or get into trouble: rather that if she did contract

the illness, she wanted her treatment funded. She also indicated the following: "she did not want to make his life a living hell, that people make mistakes and this was just a fucked up one." Fortunately, Ms. A did not contract the virus.

[22] Ms. A provided a Victim Impact Statement. As I say so often, Victim Impact Statements not only assist the court in appreciating the effect of any crime on a particular victim, it permits the offender to have an insight of which they would otherwise be ignorant.

[23] Ms. A speaks of the physical and emotional costs of the medication that she has to take to ensure her well-being and of its financial implications: at least $500. She became depressed and suffered from anxiety, which led to many days off and ultimately losing her job of 5 years. She lost her apartment and had to move back home, thereby bringing home to her mother and sisters how fearful and unwell she was. That naturally impacted their lives as well. She hated herself for her choice of engaging with Mr. W. She lost friends.

[24] Quite naturally she wishes she could have her life back. She described herself in this way: "I was an innocent 25 year old girl just starting my life off and its completely shattered by one thing. I wish he just told me before it happened. None of this would have happened and both of our lives would be normal."

[25] Frankly, what is remarkable is that Ms. A. in that last statement also acknowledges that Mr. W's life, as a result of this incident has not been normal. Her thoughtfulness and the obvious hard work in compiling this letter is of great assistance.

[26] I will now turn to Mr. W. He is the middle of three children and was primarily raised by his mother after his parents separated in 1996. He left home at 18, living both in the GTA and the U.S. He returned home in 2006 and he moved out, returning home in August 2014. He is not in a relationship at the present time.

[27] He graduated from grade 12 and subsequently completed a paralegal program. Letters attesting to his good work in the program were filed as exhibits. He had worked in the security field in 2006 and in that role was assaulted by a patient and subsequently tested positive for HIV. In 2012 he moved from security to collections, and then back to security. In July of 2013 he was let go from his employment because of his arrest on the original charge before the court.

[28] He found other employment as a roofer. Due to a motor cycle accident he was in, he was unable to continue that work. He now works in a fast food restaurant.

[29] Mr. W is desirous of returning to the security work business; as a trainer and has also applied for a position as a prosecutor. Clearly he is entertaining numerous options.

[30] In terms of his transgression with Ms. A he agreed his judgment was impaired, he was extremely drunk and that he forgot to disclose but admits there are details of the evening that due to his drunkenness; he had no recollection.

[31] In terms of health and, most importantly, Mr. W is now under the frequent care of a doctor and the doctor anticipates seeing Mr. W every 3 to 4 months. A letter from Dr. in Toronto confirmed that Mr. W is now on medication and that he will reach the 6 month "undetectability for the virus" milestone by August of this year. According to the doctor Mr. W has always been inquisitive about the care of his infection so much so that in 2009 he brought his then girlfriend to discuss pregnancy planning in the context of the infection.

[32] The Doctor also stated the he has referred Mr. W to psychotherapy for dealing with stress from these proceedings and the stress that he has incurred as a result of managing an incurable disease.

[33] Subsequent to hearing sentencing submissions, Ms. Fromstein forwarded to me "Further information and supporting materials regarding impact of conviction versus discharge upon Licencing". This brief followed on a discussion in court as to the various impacts of this sentencing on Mr. W future plans in the Security/paralegal fields.

[34] The Law Society who has now assumed the duty of licencing paralegals does not expressly prohibit those who are convicted or who receive discharges for criminal offences; rather it requires an applicant for a paralegal licence to be of good character and in pursuit of that assessment may require information as to whether a person has been found guilty or convicted of any offence, is the subject of criminal proceedings and or discharged from any employment whether an employer has alleged that there was cause.

[35] *The Private Security & Investigatory Services Act* however requires the following: that in order to act as a private investigator or security guard, one must be licensed and no person can be licenced unless they, *inter alia*, possess a clean criminal record. By regulation a "clean criminal record" does not exist if a person has been "convicted of or granted a pardon" for a number of offences amongst which is found the offence of False pretences. Obviously then if Mr. W is convicted of this offence, he will be unable to pursue a career in the security business.

[36] Both Ms. Montague, the Deputy Crown Attorney and Ms. F, both in their approach to this case through the initial stages, and in submissions to sentence, have emphasized that this is a unique set of circumstances. Mr. W was initially charged with Aggravated Sexual Assault and due to the provision by Ms. Fromstein of numerous cases and materials on Mr. W s unique situation; the offence of False Pretences was laid. Ms. Montague for her part concedes that there is no sentencing precedent for this fact situation. But argues that a jail sen-

tence is appropriate: Mr. W[redacted] she suggests and I agree, had a clear onus to tell Ms. A so that she was left with a real choice as to whether to engage in intimate unprotected sexual activity. She was robbed of that choice and while drunkenness clearly played a role here, Mr. W[redacted] has a moral and legal obligation to remain sober enough at all times so that if the opportunity arises he is sufficiently *compus mentus* to disclose. A jail sentence Ms. Montague argues will send a message of denunciation and general deterrence to all the Mr. W[redacted]s out there.

[37] On the other hand, as Ms. Fromstein points out, there was a constellation of colliding events here. "Drunken stupid sex" is unfortunately a common occurrence amongst the youth of today. Sometimes initiated by the man and sometimes as is the case here, initiated by the woman. What is clear however, until the initiation: all reports have Mr. W[redacted] having little interaction with Ms. A during the evening, indeed he was fast asleep on the couch before he was woken up and transported to Ms. A 's room and as she apparently so honestly described: she was the one who ensured that she was going to share a bed with him by moving her friends. Both instances of sex were initiated by her: there is nothing wrong with that, what is wrong was that Mr. W[redacted] reciprocated without any revelations. His guilty plea to the offence is evidence that Mr. W[redacted] does not hide behind the excuse: it wasn't my fault, I was drunk: rather it is indicative of him recognizing his legal, moral, ethical responsibility to 1) reveal his condition drunk or sober and 2) not to get so intoxicated that he is unaware of his actions and if he chooses not to reveal: then not to indulge and 3) if he chooses to indulge: always to take precautions.

[38] By not doing any of those things he represented to the young lady that it was indeed okay to have sexual intercourse with him, which it clearly was not.

[39] In the absence of specific guidance as to the appropriate sentence in this case: i.e., to similar cases, resort must be had not only to the fundamental principle of sentencing: i.e. on a court's obligation not only to impose a fit sentence proportionate to the seriousness of the offence and to the degree of responsibility of the offender but also adhere to the purposes of sentencing all of which are contained in Section 718 of the *Criminal Code*.

[40] Any *Criminal Code* violation is serious and the offence to which Mr. W[redacted] pleaded guilty, as with so many offences, covers a range of activity. The case at bar is an unusual fact scenario but clearly one that is encompassed by the definition. It is a difficult, perhaps impossible task to determine at first blush where Mr. W[redacted]'s wrongdoing falls in the spectrum of seriousness for this offence and the degree of his responsibility, thus an assessment of the facts in terms of the aggravating and mitigating factors may assist.

Aggravating:

1. First and foremost: both by operation of Section 718.2 (iii.1) of the *Criminal Code* and from the facts themselves, the effect on Ms. A was profound. She was young and like most, probably not knowledgeable as to the differing degrees and nuances of the disease that has afflicted Mr. W. Thus to receive the news that she had unprotected sex with a person suffering from HIV was life altering. Not surprisingly, she thought her life was to be cut short. Fortunately, it was not. However she endured treatment and continues to endure the psychological effects of what occurred.
2. As already indicated Mr. W has an obligation over and above that of an unafflicted man when engaging in intimate relations: he is carrying with him a life threatening virus which is transmitted through the exchange of bodily fluids.
3. As soon as he was alerted to the fact of intercourse, he should have disclosed: he did not, he required prompting and threatening by a friend.

Mitigating:

1. Mr. W pleaded guilty.
2. He has no criminal record.
3. He is still a young man.
4. Mr. W was arrested and held in custody until he received bail on this charge: two days.
5. He has always admitted he did not disclose; he has never denied the facts of the case i.e. that despite his inability to immediately recall due to drunkenness, that he had intercourse with Ms. A . Mr. W did not delay his process through the criminal justice system, rather the unusualness of the facts of this case its progress.
6. Mr. W has taken steps to ensure that he continues to be monitored for the disease; he is medicated.
7. Prior to this event: Mr. W had demonstrated a willingness to disclose to his partners: his doctor has confirmed a meeting with his then girlfriend to explain the nuances of the situation.
8. Mr. W, while diagnosed with the virus has been in the unusual and indeed fortunate position that his viral load is undetectable and indeed has no symptoms. While he is not permitted from a legal perspective, to forget about his diagnosis: it is understandable if it is something that does not pervades his every thought every minute of the day.
9. Mr. W has been unable to pursue his chosen career path until he

knows the end result of these proceedings.

[41] Having enumerated what I perceive to be the aggravating and mitigating circumstances, I find that what Mr. W did has had a devastating effect on Ms. A but there are unique and powerful mitigating circumstances in this case.

[42] Additionally there is a factor that is neither aggravating or mitigating but is most relevant to any assessment of the degree of Mr. W 's responsibility in this: Mr. W , it is agreed was not the initiator of this act: he had not pursued Ms. A during the evening, had not made any romantic overtones to her, had little to do with her and had indeed signed off for the night by going to sleep on a couch. Due to a series of events: none of which was his doing, although he capitulated in climbing into bed with Ms. A he ended up in a position where the sex act could and did take place.

[43] I now turn to the fundamental principles of sentencing and consideration of them in light of Mr. W 's wrongdoing.

[44] Section 718 of the Code requires me to impose a just sanction that meets the following objectives:

1. to denounce unlawful conduct;
2. to deter this offender and others from committing offences;
3. to separate where necessary offenders from society;
4. to assist in rehabilitation of the offender;
5. to provide reparation for the harm done to the victim or to the community; and
6. to promote a sense of responsibility to offenders and acknowledge of the harm done to the victim and to the community.

[45] I find that in Mr. W 's case that the objective of specific deterrence has already been satisfied. Mr. W has learned his lesson: the three-year process of this case through the Criminal Justice system and indeed his own obvious sense of responsibility has achieved that. In terms of the need for a sentence to send a message to others: Mr. W 's situation was so unique, I am satisfied that deterrence to others is not an issue in this case. If however I am incorrect in that assumption: again I conclude that others who are in the position of Mr. W would receive the message loud and clear upon becoming acquainted with the three-year history of this case.

[46] The only other potentially relevant principles of sentencing are the rehabilitation aspect and the promotion of the sense of responsibility. All of this has been

the course of his life, Mr. W[redacted] has lead a crime free existence. Is probation necessary for Mr. W[redacted] to ensure a state monitored compliance with his medical requirements? He has been on bail for this offence since being charged: that is longer than any probation and I am satisfied that given his heretofore compliance there is no requirement for a continuous monitoring. In terms of any other terms of probation: Mr. W[redacted] did not know Ms. A before the evening of the offence: they had no relationship that would bring about need for either of them to have contact. Having said that I am aware that Ms. A did incur some costs; I am sure that if counsel was so minded and it was appropriate to do so, she could facilitate a repayment by her client of Ms. A 's medical costs.

[54] I see no need to attach probation to the discharge: accordingly the discharge will be absolute.

Released: April 18, 2016

Katherine L. McLeod

Justice K.L. McLeod

undertaken and indeed Mr. W[redacted]'s actions **BEFORE** he committed this offence are indicative of his sense of responsibility.

[47] While I appreciate the rationale for Ms. Montague's submission that jail is appropriate: to send a message: I am reminded of Section 718.2(d) namely that Parliament requires "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and subsection (e) which states: all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders..." I find that jail is not appropriate. Neither the nature of the facts in this case or Mr. W[redacted]'s circumstances require the imposition of a jail sentence

[48] I must now consider whether Mr. W[redacted] should be convicted of this offence or receive a discharge. A discharge is certainly available but can only be imposed if I conclude it is both in the best interests of the accused, and not contrary to the public interest. (Section 730 of the *Criminal Code*).

[49] A discharge is in Mr. W[redacted]'s best interests. He is a man with no record: a criminal record brings with it all kinds of disadvantages and particularly for him, it would disallow him from pursuing a private investigation career, in which he has demonstrated certainly more of an interest that attaching it to a wish list. He has worked in the area, taken a course in the area and has gone so far as to define how he wants to work in the field in the area of training. He would not be able to obtain a licence given the regulatory scheme.

[50] The real question is whether it would be contrary to the public interest. Is it in the public interest that the Mr. W[redacted]'s of this world never put themselves in the position that he did: too drunk to care? Of course the answer is in the affirmative.

[51] However, that is not the issue here: the question is: given the circumstances of this case, which I have articulated many times in this judgment, would it be contrary to the public interest to grant Mr. W[redacted] a discharge. In coming to the conclusion I have, I would note that the only account of what actually occurred between Mr. W[redacted] and Ms. A comes from the complainant. Her description of herself as the initiator of the sexual contact and Mr. W[redacted]'s passivity in the manoeuvres that led the two young people into the same bed are what in fact I find crucial to my determination. Without Ms. A 's truly honest account: I would not be able to conclude that Mr. W[redacted] was so uninvolved in any of the approaches.

[52] For this reason, for all of the other articulated mitigating factors I have concluded that a discharge would not be contrary to the public interest.

[53] The next issue is a consideration as to whether probation is necessary. Clearly there is no need for the mandatory conditions of keeping the peace; during

WARNING

The court hearing this matter directs that the following notice should be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.5(1) or (2) of the *Criminal Code*. These subsections and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.5(1) or (2), read as follows:

> **486.5 Order restricting publication — victims and witnesses.**— (1) Unless an order is made under section 486.4, on application of the prosecutor, 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 satisfied that the order is necessary for the proper administration of justice.
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> (2) *Justice system participants.*— On application of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection 486.2(5) or of the prosecutor in those proceedings, 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 satisfied that the order is necessary for the proper administration of justice.
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> **486.6 Offence.**—(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.