C.A.C. No. 02914

NOVA SCOTIA COURT OF APPEAL

Hallett, Chipman and Pugsley, JJ.A.

Cite as: R. v. R.H.S., 1993 NSCA 218

BETWEEN:		
R. H. S.		Lou Ann Thomson for the Appellant
	Appellant	
- and -		
HER MAJESTY THE QUEEN		Gordon S. Gale, Q.C. for the Respondent
	Respondent	
		Appeal Heard: November 30, 1993
		Judgment Delivered: December 14, 1993

Editorial Notice

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

THE COURT: The appeal is allowed and the sentence is varied as per reasons for judgment of Chipman, J.A.; Hallett and Pugsley, JJ.A., concurring.

CHIPMAN, J.A.:

This is an appeal, leave having been granted in Chambers, from a sentence imposed

in Provincial Court upon the appellant for sexual assault.

On January 29, 1993 the victim of the offence, who is the stepdaughter of the appellant, phoned the Children's Help Line in Toronto, Ontario and stated that things had happened in her home about which she was not happy.

The Children's Help Line contacted the Children's Aid Society in Halifax, who in turn contacted the Halifax Police Department.

On February 2, 1993 two Children's Aid workers spoke with the victim at [...] School. They advised the victim that it would be necessary for them to contact the police and to meet with her on another date.

On Wednesday, February 10, 1993 the two Children's Aid workers, along with a police officer of the Halifax Police Department, spoke again with the victim. The victim described three incidents of touching which occurred in 1990 when she was nine years of age. They took place in the family residence, twice in her bedroom and once on the living room couch. The incidents involved the accused removing the victim's clothing and touching her vagina with his hand.

No force was used, and the victim was never asked to touch the appellant. The victim believed that the appellant thought she was asleep.

After the third incident, the victim told her mother and there was a family discussion. The appellant initially told his wife the touching had been accidental, but later admitted that it was not.

On February 12, 1993, after an interview with police, the appellant gave a full inculpatory statement. He said that he had touched his stepdaughter in places he should not have. He did concede involvement in the three incidents as described by his stepdaughter. He said that on one occasion he masturbated himself in the same room where the event occurred, but there is no suggestion that the victim was aware of this.

The accused elected to have the charge against him heard by a Provincial Court judge and entered a plea of guilty on May 4, 1993, the date of his election.

The trial judge reviewed the circumstances indicating a positive presentence report,

the fact that the appellant had readily accepted full responsibility for his actions and had taken steps to ensure that they would never be repeated. Having reviewed the principles of sentencing and, in particular, the emphasis placed on general deterrence in cases of sexual assault upon children by those in a position of trust, he continued.

> ". . . Please let the record reflect that I am fully aware of the case law cited before this Court and other case law. I know the position of the Appeal Division in relation to these matters and I know that not withstanding their clear position in relation to general deterrent, that they do give the presiding Trial Judge some discretion in relation to sentencing on first offence particularly."

The trial judge imposed a sentence of ten months incarceration, to be followed by two years probation.

In **R. v. W. M. D.** (1992), 110 N.S.R. (2d) 329 at 330 this Court said:

> "This court has repeatedly emphasized that in cases of sexual abuse of children, particularly by persons in a position of trust, the dominant consideration in passing sentence is the element of general deterrence. A number of recent cases reflecting this attitude are: **R. v. Wood** (1986), 74 N.S.R. (2d) 31; 180 A.P.R. 31; **R. v. Hawkes** (1987), 81 N.S.R. (2d) 156; 203 A.P.R. 156; **R. v. Chisholm** (1987), 81 N.S.R. (2d) 421; 203 A.P.R. 421; **R. v. Fillis** (1986), 94 N.S.R. (2d) 356; 247 A.P.R. 356; **R. v. R.G.R.** (1989), 88 N.S.R. (2d) 364; 225 A.P.R. 364; **R. v. Richard** (1991), 106 N.S.R. (2d) 236; 288 A.P.R. 236; **R. v. Williams** (1987), 80 N.S.R. (2d) 254; 200 A.P.R. 254; **R. v. Cunningham** (1992), 108 N.S.R. (2d) 265; 294 A.P.R. 265.
>
> Rare indeed are the cases where noncustodial sentences or minimal sentences are imposed in these cases. A recent review of the few cases where light sentences were imposed is found in **R. v. Dale** (1992), 110 N.S.R. (2d) 69; 299 A.P.R. 69."

In **R. v. D.N.M.** (1992), 114 N.S.R. (2d) 439, this court affirmed a sentence of six months imprisonment imposed upon a 61 year old who assaulted his granddaughter while she was between the ages of nine and 11 years and in his care. Although there was the same type of touching, the circumstances in that case were significantly different and more aggravating: (i) the victim was forced to touch her assailant and was shown a pornographic video; (ii) there was evidence of a serious effect upon the victim resulting in a deterioration in her schoolwork, need for professional help, running away from home and much inter-family distress, and (iii) the assailant denied his

involvement at all times.

The primary objective in sentencing is the protection of the public. The court must then consider whether this objective is best obtained by (a) deterrence or (b) reformation and rehabilitation of the offender or (c) both deterrence and rehabilitation. See **R. v. Grady** (1971), 5 N.S.R. (2d) 264 at 266.

In reviewing this sentence, the duty of this Court is to consider its fitness as mandated by s. 687 of the **Criminal Code**. We must take care to avoid being swayed merely by the fact that we might have imposed a different sentence at trial. It must appear that there was misdirection or nondirection on the proper principles or that the sentence is clearly excessive or inadequate. See **R. v. Cormier** (1974), 9 N.S.R. (2d) 687 at 694.

In **R. v. Crowell** (1992), 115 N.S.R. (2d) 355 at p. 358 Freeman, J.A., speaking for this court, said:

> "Sentencing is not a science but an art, practised, often with great skill, by judges in courts of criminal jurisdiction. The overriding concern is protection of the public, which is achieved through a careful balancing of factors relating to deterrence and reform. The judge must bring a wide array of considerations into an intensely personal focus upon the particular offender before the bench in relation to the offence for which he has been convicted . . ."

Thus there is more to sentencing than merely running other cases through a computer. Such a process would yield a good average result but it would overlook the individual attention which the court must give to the circumstances of the particular case. The appellant urges that here the trial judge did not properly balance rehabilitation against deterrence in view of the rather unique circumstances in this case. The trial judge quite properly emphasized general deterrence as an important factor. There is no doubt that the protection of society calls for the protection of children in cases such as this. There is no doubt that the emphasis upon general deterrence means that usually a jail term is mandated.

However, the trial judge did not make reference to the subject of rehabilitation or the

unusual circumstances in the record which call for more emphasis on that element than is usually warranted. He recognized that notwithstanding the hard line taken by this court with respect to such cases, there was latitude given to the sentencing judge. He failed, however, to take into account the circumstances which I believe called for the exercise of the discretion which was available to him.

The events took place in 1990. The young victim told her mother about them shortly afterward. There was a confrontation in the family, following which the appellant admitted his actions. He voluntarily left home for a time. He has since returned to the family and, as appears from the presentence report and the summation by Crown counsel at trial, all appeared well until the victim made the telephone call to the Help Line. No explanation is given on the record as to why she made the call, but her counsel told this court that a friend of hers had had a problem in her home and made the call to the Help Line at the same time.

The presentence report contains the following paragraph:

> "Ms. Jennifer Sewell, Children's Aid Society Worker, was contacted for the purposes of this report. She stated that she found [the appellant] to be very co-operative, and to be willing to take responsibility, expressing the desire to have the family back together. In referring to the victim, Ms. Sewell stated that the child seemed to be "thrown" by events, as her disclosure, which was simple enough in the beginning, appeared to "get out of control", leading to investigation, and subsequent events thereafter. Ms. Sewell stated that the victim did attend some limited counselling, but expressed no desire for it, and did not wish to give a Victim Impact Statement. At this point in time, Ms. Sewell expressed the opinion that the victim appears to be stable in her home situation, and she described the victim as being an "A" student, very bright, energetic and healthy. Ms. Sewell indicated that the counselling role with the mother was simply that of education and information, in order to assist the mother with any residual issues which might arise out of the incident. Ms. Sewell was of the opinion that incarceration would serve no purpose for the accused, but that the family might be able to benefit from extended counselling."

We are advised that the family is still together.

The appellant is 32 years of age. He is a first offender.

In my opinion, there was not sufficient emphasis given to the element of rehabilitation here. The probabilities of rehabilitation appear to be high. The proper consideration of this element mandates, in my view, that the sentence be reduced to one that will not keep the offender from his family and his employment for an extended period of time. I would propose substituting for the period of incarceration fixed by the trial judge a sentence of 90 days intermittent. The probation order as fixed by the trial judge should stand.

I would allow the appeal and vary the sentence accordingly.

J. A.

Concurred in:

Hallett, J.A.

Pugsley, J.A.