NOVA SCOTIA COURT OF APPEAL
Citation: *R v. K.R.D., 2005 NSCA 13*

Date: 20050127
Docket: CAC 224291
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

K.R.D.

Respondent

Judge(s):	MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A.
Appeal Heard:	January 20, 2005, in Halifax, Nova Scotia
Held:	Appeal dismissed as per reasons of MacDonald, C.J.N.S.; Bateman and Saunders, JJ.A. concurring.
Counsel:	Daniel A. MacRury, for the appellant Nash T. Brogan, for the respondent

Reasons for judgment:

[1] In February of 2004 following a trial, Nova Scotia Provincial Court Judge A. Peter Ross convicted the respondent of sexually assaulting his young daughter. In May of that year, he was sentenced to a term of imprisonment of two years less one day, to be served in the community. The Crown has now appealed that sentence maintaining that institutional incarceration is required to properly achieve the statutory objectives of denunciation and deterrence.

[2] At the conclusion of the hearing, we announced our unanimous decision to dismiss this appeal, with reasons to follow. Here are those reasons:

Background

[3] The incidents occurred at the family home. They involved repugnant acts ranging from fondling to oral sex, spanning a period of approximately five years when the victim was between 5 and 10 years of age. Judge Ross described the offence this way:

> ... from the age of five or slightly more until [A] was in I think Grade V when she was about ten years old, there were certain incidents of sexual assault. The second of I think six that she particularized involved what she said, you know, generally was oral sex. He put his penis in her mouth and he did that again on a third occasion. He rubbed her vagina, she said she was unsure of the number of times this occurred, and that seemed to suggest that it happened more than just the twice. But at the same time I didn't get the sense that this was a daily event by any means. It did seem to be occasional, sporadic and separated in time.
>
> She described another incident when ... on his bed when he made her sit on top of him and put his penis between her legs, under her panties and achieved sexual gratification in that fashion. Then she described another incident when he was rubbing her back and her vagina and her mother came into the room and he made an excuse. Those were the particular incidents that she remembered. She said that she thought some of this may have happened more than just those occasions.
>
> . . .
>
> The overall course of conduct here had an almost casual quality and I don't say that to minimize it at all. But it didn't appear that [A] was the primary outlet for Mr. [D.]'s sexual urges. But on occasion when he was drinking heavily he used his daughter as a sexual tool for his own sexual gratification. Repugnant behaviour, but not quite the regime of terror and daily abuse that has been seen in other cases either.

[4] In sentencing the offender to a community term, Judge Ross directed that the offender be under house arrest with strict conditions for the first 12 months, followed by a curfew for the duration of the sentence.

The Grounds of Appeal

[5] The Crown lists the following grounds of appeal:

> 1. THAT the sentence ordered inadequately reflects the objectives of denunciation and deterrence.
>
> 2. THAT the sentence ordered is inadequate having regard to the nature of the offence committed and the circumstances of the offence and the offender.
>
> 3. Such other grounds as may appear from a review of the record under appeal.

[6] As stated earlier however, the thrust of the Crown's case involves the first ground. Put simply, the Crown submits that a community sentence cannot possibly meet the goals of denunciation and deterrence where, as here, a father in the position of ultimate trust, on numerous occasions, preys upon his own child for sexual gratification.

The Standard of Review

[7] For good reason, a trial judge on a sentencing appeal is owed significant deference. Bateman J.A. of this court in **R. v. Bratzer** (2001), 198 N.S.R. (2d) 303; N.S.J. No. 461 (Q.L.); 2001 NSCA 166, beginning at para. 7, noted:

> [7] As with other discretionary decisions, the standard of review on appeal is a deferential one. This standard has been articulated in a number of ways. It was neatly expressed by Macdonald, J.A. of this Court in **R. v. Cormier** (1975), 9 N.S.R. (2d) 687 at p. 694:
>
> > 20 Thus it will be seen that this Court is required to consider the "fitness" of the sentence imposed, but this does not mean that a sentence is to be deemed improper merely because the members of this Court feel that they themselves would have imposed a different one; apart from misdirection or non-direction on the proper principles a sentence should be varied only if the Court is satisfied that it is clearly excessive or

> inadequate in relation to the offence proven or to the record of the accused.
>
> . . .

[9] Similarly, in **R. v. C.A.M.**, [1996] 1 S.C.R. 500; S.C.J. No. 28 (Q.L.) (S.C.C.), Lamer, C.J.C. said, for a unanimous Court, at p. 565-566:

> [90] Put simply, 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 imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the *Criminal Code* ...
>
> . . .

[10] This deference reflects a recognition of the unique qualifications of front line judges and is equally applied whether the sentence arises after a trial or from a guilty plea. As explained by the Court in **R. v. C.A.M.**, **supra**:

> [91] This deferential standard of review has profound functional justifications. As Iacobucci J. explained in *Shropshire*, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both *Shropshire* and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. . . .

[8] In the case at Bar, Judge Ross had the added advantage of sentencing the respondent following a full trial. This provided him with a unique perspective as to all the circumstances of this case.

Analysis

[9] After carefully considering the record and the submissions of counsel, I find that Judge Ross committed no reversible error in ordering a community sentence with strict conditions. I reach this conclusion for the following reasons.

[10] Judge Ross was fully aware of the very serious nature of this offence. He wrote:

> ... Here the overriding characterization, I guess that one would put ... that any right thinking person would put upon this conduct is one of repugnance to the course of conduct. The abuse of young children whether in this way or in any other way, but particularly in sexual offences, is quite properly regarded by society as abhorrent and deserving of the clearest condemnation. ...

[11] Furthermore Judge Ross addressed the very question that the Crown raises on appeal. In fact, he identified the issues of denunciation and deterrence as the most difficult:

> ... But the more difficult question is whether a conditional sentence of imprisonment is consistent with the fundamental purposes of sentence and here we're talking about denunciation and deterrence. As I say this is a difficult aspect of sentence.

[12] In reaching this disposition, Judge Ross properly identified the statutory criteria and correctly followed the procedure for imposing a community sentence as established by the Supreme Court of Canada in **R. v. Proulx**, [2000] 1 S.C.R. 61 (S.C.C.). Specifically, he noted:

> This is a case where a conditional sentence could be imposed, ... it meets the criteria in the Criminal Code in certain obvious ways. There's no minimum sentence, the term would be less than two years as I've indicated, and also I think it's reasonably clear that Mr. [D.] does not now pose a danger to the community. He doesn't strike me as being a pedophile in the classic sense, someone who would be a sexual predator, who would seek out victims.

[13] Judge Ross then went on to consider the relevant principles of sentencing including again the goals of denunciation and deterrence.

[14] Furthermore, while this is a very serious and troubling offence, the Supreme Court of Canada has confirmed in **Proulx**, **supra**, that all offences may nonetheless qualify for a community sentence, provided there is no prescribed minimum term of imprisonment. I refer to paragraph 79 where Lamer, C.J. noted:

> 79 Section 742.1 does not exclude any offences from the conditional sentencing regime except those with a minimum term of imprisonment. Parliament could have easily excluded specific offences in addition to those with a mandatory minimum term of imprisonment but chose not to. As Rosenberg J.A. held in Wismayer, supra, at p. 31:
>
> > Parliament clearly envisaged that a conditional sentence would be available even in cases of crimes of violence that are not punishable by a minimum term of imprisonment. Thus, s. 742.2 requires the court, before imposing a conditional sentence, to consider whether a firearms prohibition under s. 100 of the Criminal Code is applicable. Such orders may only be imposed for indictable offences having a maximum sentence of ten years or more "in the commission of which violence against a person is used, threatened, or attempted" (s. 100(1)) and for certain weapons and drug offences (s. 100(2)).
>
> Thus, a conditional sentence is available in principle for all offences in which the statutory prerequisites are satisfied.

[15] This court as well has confirmed community sentences for similar offences; again in special circumstances. See: **R. v. Winters**, [1999] N.S.J. No. 49; (1999) 174 N.S.R. (2d) 83 (N.S.C.A.).

[16] Finally, Judge Ross recognized that this offender would be serving his sentence in a relatively small community. As such, the goals of denunciation and deterrence are more likely to be achieved. He stated:

> Other cases, including some in this court, have echoed that sentiment, that in smaller communities a conditional sentence of so called house arrest can have a more stigmatizing and negative and denunciatory effect than it would in a large city where people are more anonymous and where people don't understand what their neighbours are doing and it's not obvious in other words, that somebody is home serving a criminal sentence for a sexual assault. In a smaller town such as the one we're living in here, I think it would be widely known, and that is an aspect of the sentence that is worth bearing in mind and considering whether that form of sentence is appropriate.

[17] In conclusion, as the trier of fact, Judge Ross is entitled to deference. It is not our task to substitute what we might have imposed in the circumstances. Judge Ross properly directed himself on the principles of sentencing and his disposition is not clearly inadequate in the circumstances. I would grant leave to appeal but dismiss the appeal.

MacDonald, C.J.N.S.

Concurred in:

Bateman, J.A.

Saunders, J.A.