NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. A.N.***, 2011 NSCA 21

Date: 20110218
Docket: CAC 310631
Registry: Halifax

Between:

A.N.

Appellant

v.

Her Majesty the Queen

Respondent

Editorial Notice

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

Publication Ban: pursuant to s. 486.4 of the Criminal Code

Judges: MacDonald, C.J.N.S.; Oland and Fichaud, JJ.A.

Appeal Heard: February 1, 2011, in Halifax, Nova Scotia

Held: Leave to appeal sentence is granted; appeal dismissed per reasons for judgment of Fichaud, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.

Counsel: David J. Mahoney, for the appellant
Mark Scott, for the respondent

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

Reasons for judgment:

[1] A judge of the Supreme Court of Nova Scotia, after a trial, convicted Mr. N. on five counts of indecent assault, rape and incest, under the former ss. 149(1), 144 and 150(2) of the *Criminal Code* . The crimes involved Mr. N.'s adopted daughter J.N. and his birth daughter L.N. Mr. N.'s assaults on J.N. began in 1970, when she was twelve, continuing for six years, and involving L.N. began in 1974 when she was twelve, also for six years. The judge sentenced Mr. N. to (1) five years for his rape of J.N., and three years concurrent for his indecent assault of J.N. plus (2) three years consecutive for his incest with L.N., with three years concurrent for his rape of L.N. and two years concurrent for his indecent assault of L.N. The total was eight years incarceration. Mr. N. appeals his sentence, not his convictions.

Background

[2] Mr. N. was represented by counsel at the preliminary inquiry. He was unrepresented at the trial. In the conviction decision (2009 NSSC 166) the trial judge, Beveridge, J. (as he then was), recited the circumstances respecting Mr. N.'s self-representation and finances, Legal Aid's decision not to represent him at that time, his unsuccessful *Rowbotham* application, and the judge's efforts during the trial to assist Mr. N. appreciate the elements of the offences and the trial process. The judge attempted to arrange for *amicus curiae* for Mr. N. during the trial, but Mr. N. was unable to retain counsel. He was represented later at the sentencing. The decision notes that his first language is French but that Mr. N. confirmed his ability and willingness to have the trial in English. Mr. N. initially appealed his conviction but, after retaining appeal counsel, abandoned the conviction appeal. His only appeal is against sentence. He does not challenge the convictions or trial process based on issues of self- representation or language.

[3] I will quote the judge's key findings. The conviction decision says the following about Mr. N.'s conduct with J.N. I have initialized the names:

> [32] J. N. testified that during the summer of 1970 she was 12, turning 13 in August. Up to that summer, she said she had a normal relationship with her dad. She said she has one specific recollection of a day in the summer of 1970 when she was 12. She said her mother was away for 2 weeks. There may have been a babysitter, but she did not sleep over. She says Mr. N. called her into one of the

bedrooms. She was clothed. Mr. N. was lying on his back in the bed with no clothes on. She said he asked her to touch his penis and she did so. She says he talked about his penis. How it was enjoyable when she touched it and it was normal for it to get hard. She says she knew that this was wrong. She does not recall anything else happening on that occasion. Her only other recollection was that her father had asked her to go get L. and to perhaps show her. She says she did go to get L., but has no recollection as to what happened after that. She said this was the first time and it stuck in her mind, but it escalated.

[33] She testified the family moved to R. D. in D. for the school year where she attended A. School. She says while living there the accused would get her to masturbate him, and after that, put his fingers into her vagina, and after that, full penetration. She said the accused put his penis in her vagina.

[34] J. was candid that she had no specific recollection of where in the house this abuse occurred. She had no recollection of her bedroom. She does recall moving to P. Street where she attended Grade 8. While at this residence, she provided considerably more specific details as to where and what kind of acts occurred. She said there was full penetration. She was 13 going on 14. She described acts of oral sex. She said he would frequently come into her bedroom in the middle of the night and she would wake up and he would be rubbing his penis on her face. She used to suck her thumb and he would try to get her thumb out of her mouth and put his penis in. Once she was awake he would take her to the bathroom and there she was to masturbate him. She said often he would take over as she was not doing it fast enough. He would make her kneel down in front of him and when he was ready to ejaculate, put his penis in her mouth, ejaculate and tell her to swallow the sperm as it was healthy for her.

[35] There was one incident on P. Street where she recalls sexual intercourse happening in a bedroom. Her mother was away on a trip. It was in the middle of the afternoon. Her father arrived home, took her in the house and had sexual intercourse with her. She recalls this because her siblings were all outside. At one point they had come home and they were banging on the door and ringing the doorbell to get in, but her father would not let them in until he was finished. Afterwards J. recalls her sister L. asking why the door was locked. She could not tell her why.

[36] By Grade 9 they had moved to B. *, where she attended C. School. She recalled that it was basically every Sunday morning her father would tell the rest of the kids to go downstairs and wait for him and he would have sexual intercourse with her.

[37] As well on B. *, he would take her into the rec room or laundry room in the basement. The other children would be on the other side of the wall. He would have her masturbate him and perform oral sex. She also recalled that once when her mother was simply out of the house, they were upstairs in the bedroom when her mother came home. Her father stopped intercourse, rolled up the condom he had been using and put it in the dresser drawer. J. had seen this. She took the condom out and punctured it with the hope or expectation that maybe the next time he used it with her she would get pregnant and everyone would find out and she would not be the one responsible for breaking the family up.

[38] Her evidence is abundantly clear that she had at no time consented to any of these acts. She testified the accused often told her she was stiff like a board, that she was feelingless or emotionless, and that she would not get married, as men did not like that. She found it repulsive when he tried to kiss her. She lived in fear when it was going to happen again. She would say to him "I don't want to do this, it hurts". She recalled him putting Vaseline on her for his penis to be able to penetrate her. At the very beginning she described he would get her to lay on top of him and he would just say "gradually let it go in". She said it was very painful. She does not know whether she suffered any injuries. Certainly none that she was aware of.

[39] To these complaints, she said, to him it did not matter. He did what he did. She also said that she would say to him "I don't want to, stop, it hurts." She described that often afterwards he would tell her "It won't happen again, I'm sorry." But it did happen again. He also performed oral sex on her more than once.

[40] In terms of frequency of intercourse, she testified it was a weekly thing - as frequent as couples. She says at least once a week, every Sunday. Every time it happened she told him she did not want to. She cried. At different times he cried. She said that she saw that he regretted it. She believed him because he was crying when he said it would not happen again.

[41] She never told anyone of these complaints until she was 16. She explained she had not done so earlier because her father warned her that if she did her mother would leave him, in essence kick him out. As her mother did not work outside the home, the children would all have to go out to foster homes. She said she was very close to her siblings. In essence, she could not bear to see this happen to her family.

. . .

[50] I have no hesitation in accepting the evidence of J. N.. I found her to be a credible witness who described in a generally careful and restrained manner the acts of sexual abuse and intercourse she suffered at the hands of the accused. Her evidence was not seriously challenged in cross-examination.

[51] Mr. N. was urged to put to her any inconsistencies he says there is in her evidence from previous statements or what she had said to others on earlier occasions or to put to her why her evidence does not accord with any evidence he may call, or his version of events. The theme of the cross-examination by Mr. N. was to have her accept her evidence from the Preliminary Inquiry where she had testified intercourse occurred six to seven hundred times, and to suggest to her that this made no sense. J. N. admitted that she had said that intercourse had happened on six to seven hundred occasions. She explained that it was an estimate based on an average. She insisted that sexual acts including intercourse were a regular part of her life.

. . .

[73] I do not know how many times intercourse or other sexual acts occurred. It may not have been the six to seven hundred times estimated by J. N., in light of the evidence about the times that Mr. N. was away working, but I am certainly satisfied that not only did the acts occurred, but they occurred on a regular basis - easily into the hundreds. The credibility and the reliability of J. N. is not detracted due to her estimate that over the years it was six to seven hundred times.

[4] The judge's findings respecting L.N. included:

[97] L. N. described that they stopped at a campground, likely someplace, somewhere in the Province of Q.. Three boys slept in the bunk above and L. below. She says during the night Mr. N. started to fondle her. He made her turn around on her hands and knees and tried to penetrate her with his penis. She has no recall of being awakened. She said that he played with her genitals, rubbing them and trying to make her climax. She did not know. She says he stuck his fingers inside of her. She did nothing. She has no recollection of responding or if he ejaculated. She says she was scared the three boys would see. She knew what he was doing was wrong. She described that after fumbling he attempted penetration. She could feel it and he penetrated her a little bit. He was very large and it was difficult. She described her feelings of pain, fear and bewilderment. Later she said that he did achieve full penetration.

[98] She ended up staying that summer with her friends in M.. She remembers as well that was the summer she started her period. When she returned home to D. at their residence on B. *. she said the abuse happened there as well. She was

quite vague on her evidence about the abuse at B.*. She does not recall how many times it happened, but said it did happen. She recalled once they were in her mom's bedroom. Her mother must have been away. She says she was crying and she remembers asking Mr. N., her father, why he was doing what he was doing. She has no recollection of his response. He fondled her genitals and had her play with his penis, making her stroke it and putting it in her mouth. She frankly admitted she has no recollection of how many times this would have occurred on B. *.

[99] When she turned 16, she quit school and moved out to live with her father at his apartment on *. She said F. was already living there. It was a three-bedroom apartment. Her bedroom was the closest to the living room, then F.'s and then her father's. She says she stayed there for one and a half years, but while there the sexual abuse started up again. She explained that she thought maybe it would not happen with her brother in the bedroom next door.

[100] Nonetheless, she testified that the accused would come in the night, get in her bed, fondle her and make her fondle him. She says she was scared her brother would know or see, but that he never did get up. She said Mr. N. used to play with her genitalia, her clitoris and all of that. Put his fingers inside of her. Make her stoke his penis. He would try and put his penis inside of her. She would be on her back or on her hands and knees. She used this language because she said it did not work very well because he was too big. When she was asked was he successful at all in having intercourse, she said yes he was successful. She was unaware of any form of birth control. She was not using any. Her reaction was it scared her. She was fearful she would become pregnant. She has no recollection of Mr. N. ever ejaculating. She told him "I didn't want to". She said she would just lay there and was mostly quiet. She made no sounds. She did not want to call out as she did not want her brother to know.

[101] In terms of the number of times it happened, she had difficulty articulating this. Overall between B. * and *. she said it occurred 15 to 20 times. In terms of intervals at L. she said "It didn't happen on a regular basis. It wasn't once a week. It would happen, then stop again." She acknowledges when she returned home to B. *, she denied to her mother any sexual abuse by her father.

[102] She said there was never any consent to any sexual acts. She told him she did not want to. She said that whenever he approached her she told him it was wrong. When he wanted her to play with his penis or masturbate it, she would stop, he would take her hand and put it back on his penis. She also described, once leaving, there was never any further sexual contact. After undergoing therapy she confronted him by writing a letter where she wrote to him that it was wrong what he had done and he was sick man. She recalls putting the

> supposition, what would happen if she pursued it legally and encouraged him to make apologies and amends.
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> . . .
>
> [112] I am satisfied beyond a reasonable doubt that the sexual acts described by L. N. in the camper, at B. * and at * did occur.
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> [113] As I noted, the act in the camper is not the subject of a charge, nor could it be, as it likely occurred somewhere in Quebec. It was admitted as part of the narrative and to provide context as to how and when L. N. could say when the sexual abuse started.

[5] The judge's sentencing decision (2009 NSSC 186) added the following about Mr. N.'s sexual assaults on his daughters:

> [6] On moving to D. and commencing what should have been wonderful years in Junior High, instead the accused would have [J.N.] masturbate him. He would put his fingers into her vagina. It was oral sex and soon full penetration. She described being woken in the middle of the night when she lived on P. Street and she was then in Grade 8. He would come frequently in the middle of the night and wake her up by rubbing his penis on her face, removing her thumb from her mouth to try to put his penis in. Once awake the accused would take her to the bathroom and there have her masturbate him, making her kneel in front of him and putting his penis in her mouth, ejaculating and telling her to swallow it because it was healthy for her.
>
> [7] She also described acts of sexual intercourse and then by Grade 9 they had moved to B. *. There she recalled it was basically every Sunday morning. I should say at least every Sunday morning to have sexual intercourse with her. In other locations in the house, he would take her to the rec room, the laundry room, have her masturbate him and perform oral sex on him. He complained that she was stiff like a board, that she was emotionless, cautioned her that she would not get married as men would not like that. She described her repulsion at his approaches, her complaints to him that she did not want to do this, it hurt. She recalls him putting Vaseline on her for his penis to be able to penetrate her.
>
> [8] She did not suffer any physical injuries but, as will be detailed later, she has certainly suffered tremendous emotional ones.
>
> [9] When she said to him "I don't want to, stop, it hurts" he ignored her. Afterwards he would assure her it will not happen again and apologize. She cried and at different times he cried. She said she believed him when he said it would

not happen again because he was crying. But it did happen again. It happened until she was 16 in approximately 1974 when she disclosed this abuse to her mother. She explained she had not disclosed it before because of the accused telling her that if she did her mother would leave Mr. N. and as her mother did not work, the children would all have to go out to separate foster homes. She was very close to her siblings. She could not bear to see that happen to her family. But nonetheless, when she turned 16, her emotional state was such that she in essence felt she had no choice. She was having violent dreams, feelings of anger. She eventually disclosed to her mother.

. . .

[13] His response was along the same lines as he had given to J. and J.'s brother, M. N., when he referred to his unhappy marriage to M. S.. He said to the police "he had lived with this all his life". When asked "So why did you do it?" he said "There is no explanation really. She was starting to look good". There are many more inculpatory comments in that interview. They do not need to be reviewed. Suffice it to say that the assaults and rapes occurred on a regular basis, easily into the hundreds. This highly irregular heinous predatory conduct by the accused sadly became, from Junior High School to 1976, a regular part of J.'s life.

[14] In relation to L. N. his sexual predatory conduct also started when she turned 12 in 1974. She recapped that the first time there was such conduct on a trip they were then taking to *.. That incident was not the subject of a charge here in Nova Scotia. It did serve as a milestone, a marker in her life as to when she could pinpoint when the abuse then started in Nova Scotia. L. N. was somewhat vague in her recollections of what occurred on B. *. She does recall Mr. N. fondling her genitals and Mr. N. having her in essence masturbate him and perform oral sex on him.

[15] When L. N. was 16 she quit school, moved out to live with her father at his apartment on L. There the sexual abuse happened again. In terms of the numbers of times that L. N. was able to testify to these events occurring, she said overall it occurred 15 to 20 times. There was no consent to any of the sexual acts.

[16] In a summary way the accused in a ten year period when he was 32 to 42 years of age used his daughters as his sex partners without their consent, if consent could lawfully be given or even relevant to the conduct he engaged in. J. and L. are in no way to blame for that conduct, nor for not having pressed forward with charges closer in time to those events, nor are they to blame for now having the courage and fortitude to come forward.

[6] As to Mr. N.’s remorse, the judge’s sentencing decision says:

> [22] What is troubling to me is Mr. N.'s comments to the Probation Officer as he attempted to justify his actions by telling the officer "I had no wife" and adding that J. was very sympathetic toward him. He further stated to her "I feel absolutely terrible. I am almost 71 years old and everything I hear about me is bad". Sadly this comment is not, to me, an express [sic] of remorse but an expression of how selfish you still are, that it is all about you. It is all about your needs. Not anybody else's. Not your daughters, who you were supposed to protect, but about you and the predicament that you think you are in for the depraved acts that you carried out when you were an adult, a father.
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> [23] The report by Dr. Connors, dated May 5, 2009 reflects in many ways the information that was disclosed at trial and is already in the Pre-Sentence Report. If anything it underscores the previous concern that I have already highlighted. When Mr. N. was interviewed throughout, as I understand it, a two-day process, Dr. Connors noted that Mr. N. tended to perseverate, that means kept repeating, coming back to, insisting on, how hurt he was that his family put him through this process. You are responsible for this process Mr. N., not them. I see you nodding your head in agreement. That is a good sign.
>
> [24] Similar comments appear in the report in terms of your everlasting hope that your daughters would back down and withdraw their allegations against you. Not that they were not true, but that they would back down and not actually come to court. And you expressed to Dr. Connors that you would have trouble trusting them now since they hurt you by going to court. Not how you had hurt them. Not how you had robbed them of their innocence, of their youth, of their lives, but how you were hurt by them now having the gall to take you to court. It is an appalling attitude Mr. N. expressed just a little more than a month ago with Dr. Connors. I sincerely hope that the glimmer of insight or the beginning of insight that Mr. Greer eloquently advocated on your behalf today is true and will continue.

[7] The judge (paras. 29-34) cited the sentencing purposes and principles from ss. 718, 718.1, 718.2 and 718.01 of the **Code**.

[8] The judge listed aggravating factors:

> [35] There are a host of aggravating facts or circumstances that are present in this case. By way of aggravating factors they are: the accused abused his children and I stress this was not just one child but two children. He obviously abused a position of trust and authority in relation to these victims. The abuse took place

> over many years involving all manner of sexually abusive behaviour from sexual touching, fellatio, cunnilingus, digital penetration and ultimately full sexual intercourse.
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> [36] The sexual intercourse with J. occurred not just infrequently but on a regular basis. The abuse easily happened hundreds of times.
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> [37] I consider aggravating that the abuse of J. continued after it had been discovered and the accused was confronted over that abuse. It is also aggravating that the abuse of the second victim, L., seems to have occurred either around the same time or certainly after the abuse of the first victim was discovered.
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> [38] I have no hesitation also in concluding that his behaviour involved planning and forethought. He thought about it. He planned on it. He persisted in his abusive conduct despite verbal resistance by the victims.
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> . . .
>
> [40] I left out of that list of aggravating factors the very real impact that these offences have had on J. and L. N.. ...

[9] As to mitigating factors, he said:

> [39] By way of mitigating factors I do not consider a mitigating factor that Mr. N. is 70 years of age. I do consider a mitigating factor that he does not have any other convictions, but what weight to put to that is a different matter. I also would note that I do not consider it aggravating that Mr. N., to this Court on March 11 on March 23 and at the end of his trial on April 2 and again to Dr. Connors in his interviews with her, justified going to trial because he had always hoped the complainants would back out. They would withdraw. Not actually come to trial and testify. Yet, he put them through a preliminary inquiry and a trial. However, it is certainly wrong to ever consider, any accused who insists on their right to a trial, as an aggravating factor, and I do not do so. But having gone through a trial, not having accepted responsibility for what you obviously did, deprives you of any mitigating factor at all.

[10] The judge then considered sentences, ranging from five to twelve years, from Nova Scotia and other provinces. For each case the judge noted the differences in the aggravating or mitigating factors from those involving Mr. N.

[11] The Crown and Mr. N.'s counsel each recommended a sentence of five years. The judge acknowledged that a joint recommendation merits serious consideration:

> [67] Ordinarily, absent exceptional circumstances, I would follow a joint submission. That is because such a submission must be given serious consideration and in fact should be followed unless the jointly recommended sentence would be contrary to the public interest and bring the administration of justice into disrepute or is otherwise unreasonable.
>
> [68] However, these principles surrounding the deference and respect to a jointly recommended sentence apply only where there has been a negotiated plea. Respect is accorded such a recommendation since counsel know more about the case than the Court. There may be many reasons animating why the Crown and defence have arrived at a jointly recommended sentence. There may be background facts unknown to the Court, assistance by the accused to the authorities. If a court is to depart from a jointly recommended sentence, it should give notice to the parties of its intention to do so, so that they may have an opportunity to address the concerns identified by the court and ultimately may, and some would say should, give to an accused an opportunity to withdraw the guilty plea tendered pursuant to that joint recommendation.

[12] The judge cited the test that governs joint sentencing submissions from *R. v. Cromwell*, 2005 NSCA 137, para. 20. During counsel's sentencing submissions, the judge had expressed concern whether five years would be appropriate and his sentencing decision says "both were given an opportunity obviously to address these concerns". He noted that because Mr. N. pleaded not guilty and underwent trial, this was not a "true joint recommendation" – i.e., a recommended sentence as a *quid pro quo* for a negotiated plea – contemplated by the test in *Cromwell*. Finally the judge said:

> [72] In any event, in these circumstances and for this offender a recommended sentence of five years is outside the appropriate range. As the Crown submitted during its comments the circumstances are nearly the most aggravating they can be.

[13] The judge found that Mr. N. had violated his parental trust and robbed his daughters of their innocence, scarring them for life, knowing the damage yet persisting through his daughters' tearful reactions. Mr. N. threatened J.N. with foster care if she resisted and disclosed. He said Mr. N. continued to deny

responsibility by shifting blame to others, including the victims for pressing their complaints.

[14] The judge ruled that the appropriate sentence was five years for the offences involving J.N. (hundreds of occasions of rape or indecent assault) and three years consecutive for the repeated offences involving L.N. (fifteen to twenty occasions of incest, rape or indecent assault), totalling eight years. He said: "I specifically arrive at that global sentence taking into account the 77 days you have spent on remand and in light of what appears to be at least a glimmer today of remorse from you in your comments to the Court. ". The judge's sentencing decision made no other comment on how the remand time figured into the sentence.

The Appeal

[15] Mr. N. applies for leave and, if granted, appeals sentence under s. 675(1)(b) of the *Code*. His grounds are that the judge (1) erred in principle by failing to give appropriate deference to the jointly recommended sentence of five years, (2) imposed a sentence that was demonstrably unfit or which contravened the parity and totality principles, and (3) erred in principle by failing to give appropriate credit for Mr. N.'s remand time. Mr N. separated his submissions on parity and fitness, but I have joined them in the second issue.

Standard of Review

[16] The parties agree to the standard of review stated by Justice Saunders in *R. v. Knockwood*, 2009 NSCA 98:

> [11] There is no dispute as to the proper standard of review in this case. This Court's review of a sentencing order is a highly respectful one. We must show great deference whenever we are asked to consider appeals against sentence. Absent an error in principle, a failure to consider a relevant factor, or an over-emphasis of appropriate factors, we should only vary a sentence imposed at trial if we are convinced that the sentence is demonstrably unfit. See for example, *R. v. L.M.*, 2008 SCC 31; *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500; *R. v. Longaphy*, 2000 NSCA 136 and *R. v. Conway*, 2009 NSCA 95.

See also *R. v. Solowan*, [2008] 3 S,C.R. 309, para. 16 and *R. v. McDonnell*, [1997] 1 S.C.R. 948, paras. 15-17. Similarly, in *R. v. Markie*, 2009 NSCA 119, Justice Hamilton said:

> [11] The parties agree the standard of review is one of deference as set out in *R. v. Longaphy*, 2000 NSCA 136:
>
> > 20 A sentence imposed by a trial judge is entitled to considerable deference from an appellate court. A sentence should only be varied if the appellate court is satisfied that the sentence under review is "clearly unreasonable": *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.) at pp. 209-210. 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 if the sentence is "demonstrably unfit": *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) at p. 374.

First Issue - Joint Recommendation

[17] In *Markie*, Justice Hamilton summarized the application of the "*Sinclair* protocol" which this court has adopted:

> [17] This process, together with her reasons, satisfy me she gave serious consideration to the jointly recommended sentence, that she only departed from it when she found it was unfit, unreasonable and contrary to the public interest, that she took into account all the circumstances before her with respect to the joint submission, such as Mr. Markie's guilty plea, the strength of the Crown's case and the length and cost of a trial, that she informed counsel of her concerns with the recommended sentence and gave them ample time to address her concerns and she provided clear reasons for departing from it. She thus met all of the criteria set out in *R. v. Sinclair*, 2004 MBCA 48, approved by this Court in *R. v. Starrett*, 2007 NSCA 21 at para 12.

[18] Mr. N. submits that the judge erred in principle by failing to give sufficient "serious consideration to the jointly recommended sentence" of five years incarceration.

[19] In *Cromwell*, the Court addressed the deference due to a joint sentence recommendation that accompanies a guilty plea:

> [18] In *R. v. MacIvor*, this Court approved with particular emphasis, the following comment by Fish, J.A. (as he then was), writing for the Court in *R. v. Douglas* (2002), 162 C.C.C. (3d) 37 (Que. C.A.):

> [51] ....the interests of justice are well served by the acceptance of a joint submission on sentence accompanied by a negotiated plea of guilty - - provided, of course, that the sentence jointly proposed falls within the acceptable range and the plea is warranted by the facts admitted.

[19] There are many situations in which it is in the public interest for Crown and defence counsel to enter into negotiations which result in a guilty plea and a joint sentence recommendation. There may be uncertainties in evidence which induce both counsel to prefer a compromise. Avoidance of a trial may save substantial public expense and spare prosecution witnesses the trauma of testifying. A negotiated resolution, which shortens the time between the charging of the offence and disposition, protects the public from those who would re-offend while on pre-trial release and spares victims of crime the long ordeal of awaiting trial of the perpetrators. Offenders sometimes provide the police with critical information leading to the solution of other crimes. This can serve as a *quid pro quo* for a sentence somewhat reduced from what would otherwise be appropriate. Heavy criminal caseloads resulting in court backlogs can also be alleviated through consensual resolution, in the proper circumstances. Such resolutions are more likely to be achieved where it is probable that the sentencing judge will accept the recommendation of counsel.

[20] Joint sentence submissions arising from a negotiated guilty plea are generally respected by the sentencing judge. Ultimately, however, the judge is the guardian of the public interest and must preserve the reputation of the administration of justice. Where the agreed resolution is contrary to the public interest, would bring the administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject the joint submission (*R. v. Cerasuolo* (2001), 151 C.C.C. (3d) 445 (Ont. C.A.); *R. v. Dorsey* (1999), 123 O.A.C. 342 (C.A.); *R. v. C. (G.W.)* (2000), 150 C.C.C.(3d) 513 (Alta. C.A.)).

[20] In *Knockwood*, the Court confirmed that deference is attracted by the *quid pro quo* in the parties' collaborative effort to arrive at a mutually satisfactory conclusion to the prosecution:

> [17] Communications between Crown and defence counsel concerning sentence cover a broad spectrum. Situations will vary ranging from virtually no communication at all, to a casual overture without any tangible result, to a representation from one side which turns out to be virtually the same as the other, to serious bargaining in which a negotiated guilty plea is exchanged for leniency or some other concession. The sentencing judge must be apprised of, and take into account, all of the circumstances underlying the "joint submission" in order to see where the case falls on that continuum. See for example *R. v. Sinclair*,

> 2004 MBCA 48, [2004] M.J. No. 144 (Q.L.)(Man. C.A.). The weight to be attached to counsels' submissions will depend upon the degree to which they truly collaborated in concluding their mutually satisfactory arrangements. As was emphasized by Justice Bateman in *G.P., supra* at para. 17:
>
> > [17] It is appropriate to distinguish between the treatment of sentence recommendations that have resulted from a true plea bargain, and those that are made after a finding of guilt or the voluntary entry of a guilty plea, not prompted by discussions of sentence. ...

[21] A more substantial *quid pro quo* elevates the deference. A joint sentence recommendation exchanged for a guilty plea carries more weight than mere coincident sentence recommendations after a trial.

[22] A trial after a not guilty plea presents the sentencing judge with the benefit of factual texture. So the judge has full understanding of the circumstances of the offence. As the Newfoundland Court of Appeal said in *R. v. Newman*, 2009 NLCA 32:

> 48 When there is a guilty plea, the uncertainties and procedures associated with a trial are avoided, a factor generally benefiting the Crown in particular. The general principle that the court will, in the ordinary course, accept a joint submission following a guilty plea is beneficial in so far as it fosters confidence in the accused who must surrender his right to a trial. (See: *R. v. Druken (J.K.), supra*, at paragraphs 9 to 16.)
>
> 49 These factors are not engaged when, as here, the accused has been convicted after trial. This is not to say that a joint sentencing submission by counsel should not be given careful consideration by the trial judge. However, having completed a trial, the judge has an understanding of the issues and circumstances as a whole. This places the judge in a position to assess counsels' submission without the constraints imposed when there has been a guilty plea.

[23] Mr. N. says that his lack of legal representation at the trial handicapped the prospect of a negotiated plea. Mr. N. made pre-trial admissions and inculpatory comments during the trial. His factum says that these admissions and statements "should raise a question as to whether Mr. N. would have attempted to negotiate a guilty plea had the opportunity presented itself through the assistance of counsel". He submits that this merited higher deference from the sentencing judge to the joint recommendation of five years incarceration.

[24] There was discussion between counsel for Mr. N. and the Crown before the joint sentencing recommendation. So the mutual suggestion of five years was not unconscious coincidence. But there was no *quid pro quo* as contemplated by the case law. I disagree with Mr. N.'s submission that the circumstances effectively establish a hypothetical guilty plea or a constructive "true joint recommendation". Mr. N. had counsel during the preliminary inquiry. Yet there was no guilty plea. The judge's *Rowbotham* ruling, referring to Mr. N.'s comments, said that Mr. N. delayed retaining a lawyer for the trial because he preferred to save money for his retirement. On several occasions, Mr. N. did not appear for scheduled court dates, leading to adjournments and to his remand. The pre-sentence report, and the judge's comments in his rulings indicate that Mr. N.'s approach to trial was neither to come to grips with the merits of the charges nor to accept responsibility, but to procrastinate while hoping that the complainants, his daughters, would relent. There is no authority cited for the notion of a constructive *quid pro quo*. Neither is there support in the judge's findings or the record for an inference that Mr. N. hypothetically would have pleaded guilty, had he been represented at the trial.

[25] The judge considered the jointly recommended sentence, then determined that the five years incarceration was below the appropriate range. He told counsel of his concerns during argument, giving them an opportunity to address the concerns. I will discuss the range of sentence with the next ground of appeal. I see no error of principle in the judge's treatment of the sentence recommendation, and I would dismiss this ground of appeal. The real issue is whether that eight year sentence was demonstrably unfit or clearly unreasonable.

Second Issue - Fitness of Sentence, Proportionality, Parity and Totality Principles

[26] Mr. N. refers to s. 718.2(b) of the *Code*

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> ...
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[27] Mr. N. says that the judge, by ruling five years was outside the range, failed to appropriately consider the similarly circumstanced authorities proposed by counsel, particularly *R. v. S.*, 2002 NSSC 221, and violated the parity principle of s. 718.2(b). Mr. N.'s factum submits that "a sentence in the range of five to six years was an appropriate and fit sentence based upon the principles of parity and the other general principles of sentencing", and "the cases which imposed a sentence of eight years were characterized by more aggravating facts and circumstances that were distinguishable from the Appellant's case." Mr. N. contends that eight years was demonstrably unfit.

[28] Earlier I referred to the Supreme Court of Canada's admonition (*Shopshire*, para. 46, *M. (C.A.)*, para. 89, *L.M.*, para. 14, *McDonnell*, paras. 15-17) that a court of appeal should not vary a sentence unless the sentence is unfit or clearly unreasonable. In *M. (C.A.)*, Chief Justice Lamer elaborated with comments that are apposite here:

> 92 Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. See, e.g., *R. v. Knife* (1982), 16 Sask. R. 40 (C.A.), at p. 43; *R. v. Wood* (1979), 21 Crim. L.Q. 423 (Ont. C.A.), at p. 424; *R. v. Mellstrom* (1975), 22 C.C.C. (2d) 472 (Alta. C.A.), at p. 485; *R. v. Morrissette* (1970), 1 C.C.C. (2d) 307 (Sask. C.A.), at pp. 311-12; *R. v. Baldhead*, [1966] 4 C.C.C. 183 (Sask. C.A.), at p. 187. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. See *Mellstrom*, *Morrissette* and *Baldhead*. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

To similar effect *R. v. McDonnell*, para. 16 and *R. v. L.M.*, paras. 15, 20, 22, 35-36.

[29] Parity in s. 718.2(b) appears among "other sentencing principles" in s 718.2. But s 718.1 defines the "fundamental principle" of proportionality:

> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of culpability of the offender.

[30] An assessment of the gravity of Mr. N.'s offences with Mr. N.'s culpability for them is, as Chief Justice Lamer said, an inherently individualized process, not an exercise in academic abstraction. I say this here because Mr. N.'s parity submissions on this appeal appeared to assume that sentences in other cases established a binding matrix of precedent into which this case must be slotted. Yet his submissions included barely a glancing mention of what Mr. N. did to his daughters, the gravity of his conduct and its consequences for his victims, and Mr. N.'s culpability and failure to accept responsibility for his actions.

[31] Mr. N. used his fatherly power to make his household a colony of predation with hundreds of sexual assaults forced on his stepdaughter throughout her teens, then turned his sexual attention to his birth daughter during her adolescence, threatened relegation to foster care as punishment for disclosure or resistance, and responded to the prosecution by deflecting responsibility to his daughters with his delusory self-victimization by their complaints. I agree with the sentencing judge that there are "a host of aggravating facts" and that "the circumstances are nearly the most aggravating they can be". These circumstances affect the range of sentence.

[32] *R. v. S.*, upon which Mr. N. relies heavily, was an unappealed sentencing decision for repeated sexual assaults on Mr. S.'s two daughters. But the trial judge noted (para. 15) that there is "certainly remorse, substantial remorse", that Mr. S. " is a changed man", and there was medical evidence that "rehabilitation may provide assistance to him". This differed significantly from the trial judge's assessment of Mr. N. The judge, in Mr. N.'s case, referred to *R. v. S.*, and to other sentencing decisions with significantly higher terms of incarceration. The judge's sentencing decision focussed on Mr. N.'s conduct, its gravity and his culpability, then concluded that "in these circumstances and for this offender a recommended sentence of five years is outside the appropriate range".

[33] In *R. v. Su*, 2000 BCCA 480, the court said:

> 9 The key question that is left to sentencing courts, and to courts such as this one reviewing sentences, following the decisions three years ago or so from the Supreme Court of Canada in a group of cases, including *R. v. C.A.M.*, [1996] 1 S.C.R. 500, and *R. v. Shropshire*, [1995] 4 S.C.R. 227, is to establish the range of sentences that could

> be said to be fitting. If a sentence falls within that range, then this court should not interfere with it, and the trial judge should decide what sentence to impose within the range. But deciding the range is not a simple matter. Ranges are not set with firmness nor is an analysis of previous cases and a comparison with those cases the sole measure of the appropriate range. It is quite possible that ranges should change, change in width to wider or narrower, and change in accordance with social circumstances. So one cannot be certain about range merely from an examination of prior cases.

[34] Unless expressed in the *Code*, there is no universal range with fixed boundaries for all instances of an offence: *R. v. M.(C.A.)*, para. 92; *R. v. McDonnell*, para. 16; *R. v. L.M.*, para. 36. The range moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability. Five years for the offences involving J.N. and three years for those involving L.N. are each within the range. Once the sentence occupies the range, is fit and is not clearly unreasonable, the court of appeal should defer to the sentencing judge's selection of a point in the range.

[35] Section 718.2(c) of the *Code* directs that, when imposing consecutive sentences, the judge should consider the totality principle to ensure that the combined sentence is not "unduly long or harsh". I adopt Justice Bateman's comments from *R. v. Adams*, 2010 NSCA 42, paras. 19-30, 65-69, discussing the authorities and principles for the application of the totality principle. From Chief Justice Lamer's decision in *M.(C.A.)*, and from *Adams*, it is clear that there is no fixed ceiling for the total of consecutive sentences, unless one is stated in the *Code*. So the sentencing judge should not start with an assumed hard-capped number, to be allocated among the convictions. Rather the sentences are to be determined individually as appropriate for each offence, and made consecutive or concurrent in accordance with principles of consecutivity, then the total should be assessed, with a backward look, to determine whether the global sentence is either just and appropriate or unduly harsh for the aggregated criminal behaviour.

[36] As noted, the five and three year sentences are each fit and within the range. It was entirely appropriate that the sentences for L.N. be consecutive to the separate offences involving J.N. There is nothing clearly unreasonable in the sentencing judge's conclusion here that an eight year total is just and appropriate for Mr. N.'s aggregated criminal conduct.

[37] I would dismiss the grounds of appeal challenging fitness of the sentence, and the application of the parity or totality principles.

Third Issue- Remand Time

[38] Section 719(3) of the *Code* says that the sentencing court "may take into account any time spent in custody by the accused as a result of the offence". The judge's sentencing decision said: "I specifically arrive at that global sentence taking into account the 77 days you have spent on remand...". The decision said nothing further to explain how Mr. N.'s remand time figured into the sentence. Mr. N.'s factum asks: "In effect, does the sentence really reflect a period of eight years and five months [i.e., 2 for 1 credit] or did he determine that no credit for pre-trial detention was deserved." Mr. N. cites *R. v. Wust*, 2000 SCC 18, para. 45 for the proposition that 2 for 1 credit "is entirely appropriate", and similar comments in *R. v. Doiron*, 2005 NBCA 30, paras. 20-26. Mr. N. submits that the sentencing judge erred in principle by neither giving Mr. N. that credit, or any credit, nor explaining how Mr. N.'s remand time affected the sentence.

[39] I disagree with Mr. N.'s suggestion that the judge ignored remand time. The judge specifically said he took account of the 77 days of remand. This case differs from *Doiron* where the Court of Appeal said (para. 25):

> ... the sentencing court's reasons in the case at bar do not advert to the three months Mr, Doiron spent in custody prior to sentencing. In our view, that omission constitutes reversible error. ...

[40] In *Doiron*, the Court of Appeal also said (para. 26) "the record does not reveal a principled basis for disallowing any credit for time served in pre-sentence custody". Mr. N., on the other hand, was remanded because, on several occasions, he failed to appear for scheduled court dates. This would be a principled basis for abridging the normal remand credit: e.g., *R. v. Ali*, 2009 ABCA 120, paras. 4 1nd 19.

[41] Though 2 for 1 credit has been the norm, there is no strict formula and the calculation of credit for remand is a matter of judicial discretion: e.g., *R. v. Vermette*, 2001 MBCA 64, paras. 64-66. But, as the Crown acknowledges, a judge who departs from the practice should give reasons to explain the departure: *R. v. A. (R.K.)*, 2006 ABCA 82, para. 5. Here the judge's sentencing reasons do not express a reason for a departure. But the judge's comments to counsel during the sentencing submissions state:

> **THE COURT:** Why would you say I should give him 2:1 credit for his remand time when the only reason . . . the only reason he's on remand is because he failed to show up when directed by the Court and then when he was arrested on the warrant never applied for bail. He consented to remand. So I certainly think, you know, 1:1 is appropriate but I'm not entirely convinced that 2:1 is appropriate other than the conditions you've mentioned certainly would be a factor.

[42] My interpretation of the judge's comments, in tandem with his reasons, is that he took account of the remand time with a 1 to 1 credit, leaving an eight year term of incarceration after that credit. This would be within his discretion and would display no error in principle. The judge's explanation of his use of the credit would have been better situated in his formal reasons. Under *R. v. Sheppard*, [2002] 1 S.C.R. 869, para. 55(10) and its companion *R. v. Braich*, [2002] 1 S.C.R. 903, paras. 41-42, item # 10, the court of appeal may fill the reasons breach with its own reasons. I would apply the same approach the judge expressed in his comments to counsel. Namely Mr. N. should receive a 1 for 1 credit, instead of the 2 for 1 practice, because Mr. N.'s remand resulted from his failure to appear. Based on my interpretation of the judge's sentence before the credit, this leaves an eight year term after the credit. The result is the same sentence of eight years.

Conclusion

[43] I would grant leave to appeal sentence, but dismiss the appeal. I thank counsel for a very well argued appeal on both sides.

Fichaud, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.