NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. E.M.W.***, 2011 NSCA 87

Date: 20110928
Docket: CAC 321590
Registry: Halifax

Between:

E.M.W. (No. 2)

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 486.4 of the **Criminal Code**

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	June 14, 2010, in Halifax, Nova Scotia
Held:	Leave to appeal sentence is granted and the appeal against sentence is dismissed per reasons for judgment of Fichaud, J.A., Beveridge and Farrar, JJ. A. concurring.
Counsel:	Donald C. Murray, Q,C., for the appellant James A. Gumpert, Q.C., for the respondent

486.4 (1) **Order restricting publication – sexual offences –** 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

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

Reasons for judgment:

[1] This is an appeal against a sentence of two years incarceration. The Appellant was convicted of sexually assaulting his 9 to 11 year old daughter by repeated incidents involving digital penetration of the vagina.

Background

[2] E.M.W. was tried by a Provincial Court Judge without a jury. On July 13, 2009, Judge Jamie Campbell convicted E.M.W. of sexually assaulting E.M.W.'s daughter, R., contrary to the ***Criminal Code***, s. 271(1), (2009 NSPC 33). The events occurred when R. was between 9 and 11 years old. By an oral decision on November 24, 2009, the judge sentenced E.M.W. to two years incarceration. E.M.W. appealed his conviction and applied for leave to appeal his sentence. This Court heard the arguments on June 10, 2010, overturned the conviction and did not comment on the sentence (2010 NSCA 73). On June 17, 2011, the Supreme Court of Canada allowed the Crown's appeal and restored the Provincial Court's conviction (2011 SCC 31).

[3] It remains for this Court to rule on E.M.W.'s sentence appeal. The Court offered counsel an opportunity to refresh their submissions. Counsel were content to rely on the submissions made June 10, 2010 and the factums filed before that hearing.

[4] The facts are set out in the conviction decision of the Provincial Court. The judge summarized R.'s testimony:

> 60) R's evidence was that while at her father's house she would sometimes sleep in his bed, because she felt safer. Sometimes she would wake up and find his fingers inside her vagina. She would either get up or move without saying anything. She wasn't sure whether he was awake or asleep. [2009 NSPC 33]

E.M.W. testified, denied the assaults outright and suggested that his daughter invented the allegation for an ulterior motive. The judge believed R. and disbelieved E.M.W..

Issue

[5] E.M.W.'s factum summarizes his submission on sentence:

> It is respectfully submitted that the Learned Trial Judge erred in sentencing the Appellant to a federal term of incarceration of two years because he erred in the application of sentencing principles that are appropriate for those found guilty of sexual offences, as a result of which the sentencing judge overemphasized the use of incarceration as the means to achieve the statutory objectives for sentencing in this case.

E.M.W.'s factum requests "that Mr [E.M.W.] be sentenced by this Court to a conditional sentence of imprisonment of 18 months, followed by 24 months probation with conditions to be proposed at a further hearing".

Standard of Review

[6] In *R. v. Shropshire*, [1995] 4 S.C.R. 227, paras 46-50, Justice Iacobucci for the Court stated or adopted the views that:

(a) An appellate court should vary a sentence only when "the court of appeal is convinced it is not fit" or "clearly unreasonable", or the sentencing judge "applied wrong principles or [if] the sentence is clearly or manifestly excessive".

(b) "If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts".

(c) "[S]entencing is not an exact science", but rather "is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender".

(d) "The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range".

(e) "Unreasonableness in the sentencing process involves the sentencing order falling outside the 'acceptable range' of orders".

[7] In *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, paras 89-92, Chief Justice Lamer for the Court reaffirmed *Shropshire*'s principles and added (para 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. [citations omitted]. 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. [citations omitted]. 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.

[8] In *R. v. L.M.*, [2008] 2 S.C.R. 163, Justice LeBel for the majority discussed the effect of sentencing asymmetry on appellate review:

> 36. Owing to the very nature of an individualized sentencing process, sentences imposed for offences of the same type will not always be identical. The principle of parity does not preclude disparity *where warranted by the circumstances*, because of the principle of proportionality. [citation omitted] As this Court noted in *M. (C.A.)*, at para. 92, "there is no such thing as a uniform sentence for a particular crime". From this perspective, an appellate court is justified in intervening only if the sentence imposed by the trial judge "is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*M. (C.A.)*, at para. 92). [Justice LeBel's italics]

See also, paras 14-15, 22.

[9] To similar effect: *R. v. Solowan*, [2008] 3 S.C.R. 309, para 16; *R. v. McDonnell*, [1997] 1 S.C.R. 948, paras 15-17; *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, paras 39-46.

The Sentencing Judge's Reasons

[10] E.M.W. says the judge overemphasized sentencing principles such as consideration of victim impact, retribution, denunciation and deterrence that elevate

incarceration. To address his submission it is necessary to track the judge's characterization and application of those principles. I will quote passages from his unreported oral decision on sentence and, at each step, discuss whether the judge has made an appealable error.

[11] The decision opened with victim impact:

> [E.W.] has been found guilty of sexually assaulting his daughter, [R]. She described that as she lay in bed with him, he would put his fingers in her vagina. She was between 9 and 11 years old at the time. Talking about it was very difficult for her. That should come as no surprise to anyone. She could not bring herself to say some of the words.
>
> After all is said and done, she did not hate her father. At trial, she said that she hoped that some day they could get back to being a regular father and daughter. This has all taken a toll on [R]. How a daughter copes with being sexually violated by her father is hard to imagine. She is at a time in her life when adjusting to becoming a teenager provides its own kinds of stress. Now, she is faced with this.
>
> In her victim impact statement, she says, "I'm mad that it happened and I'm not sure why. I have a hard time talking to my friends and family. Also, sometimes I don't know what to do. My mind does not know what to do." [R]'s life has been changed by this. She may, in time, learn about ways to deal with it. Some may be healthy and some may lead to other problems for her. This will follow her in some way or another for the rest of her life.

[12] The judge's consideration of victim impact was directed by s. 722(1) of the *Code*. E.M.W. has identified no factual error in the judge's assessment.

[13] Next the judge framed his reaction to E.M.W.'s conduct, and its impact on R.:

> Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment of a child in this way is an attempt to deny her basic human dignity. In the eyes of the adult, the child is reduced to being a nameless thing. She is robbed of her childhood and of her innocence. She has no choice in the matter. She is simply used. She has become a means to an end.

> When the person who has tried to turn a child into an object is a parent, the sense of moral outrage is almost unrestrained. There is no way to speak of these kinds of crimes without using language that reflects the sense that the most basic of moral standards has been violated. They are described by judges as being horrific, shocking, selfish, sordid, despicable, reprehensible, repugnant and depraved.

[14] The sentencing judge drew these adjectives from a series of Nova Scotia decisions by higher courts that sentenced adults who sexually assaulted children, for instance: *R. v. Hawkes*, (1988), 81 N.S.R. (2d) 156 (C.A.), at para 6; *R. v. G.O.H.*, [1995] N.S.J. No. 316 (S.C.), at para 36, affirmed (1996), [1996] N.S.J. No. 61 (C.A.), at paras 3 and 10; *R. v. Oliver*, 2007 NSCA 15, para 23; *R. v. D.B.S.* [2000] N.S.J. No. 172 (S.C.), at paras 16, 20-21; *R. v. P.J.G.*, [1999] N.S.J. No. 155, (S.C.) paras 11-15; *R. v. M.*, 2002 NSSC 221, at paras 7-9, 11; *R. v. G.R.*, 2001 NSSC 183, [2001] N.S.J. No. 544, at paras 2, 8; *R. v. D.W.B.*, [1998] N.S.J. No. 198 (S.C.), para 11.

[15] The sentencing judge then correctly emphasized that, despite any pejoratives in the case reports, E.M.W.'s sentence must derive from the application of sentencing principles, not reactive impulse. Referring to the decision of a judge in another case, Judge Campbell said:

> He cautioned, very properly, I believe, that the pejorative adjectives should not detract from the principles of sentencing.

[16] The judge then moved to those sentencing principles.

[17] He said:

> A sentence must be the least restrictive sanction that meets the fundamental principles and purposes of sentencing.

This reflects ss. 718.2(d) and (e) of the *Criminal Code*.

[18] The judge discussed retribution, which he distinguished from vengeance:

> Retribution is punishment. It is objective, measured and reasoned. Vengeance and anger have no place in sentencing. When reason and objectivity give way to expressions of righteous indignation or revenge, a sentence is no longer an expression of a system of values. It has then become an emotional act and not a

> rational one. It is then not measured or restrained. Justice can be and sometimes should be hard. It must, however, be thoughtfully so. It is important to treat the offender in a way that reflects his level of moral culpability. Simply put, the punishment, and punishment it is, should fit the crime and the person who committed it.

[19] I have no difficulty with the judge's characterization of retribution as a sentencing principle. His concluding sentence paraphrases what the *Criminal Code* describes as the "Fundamental principle" of sentencing:

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

The sentencing judge's discussion of retribution mirrors Chief Justice Lamer's comments, for the Court, in *R. v. M.(C.A.)*, paras 77, 79-81. To similar effect - *Nasogaluak*, para 42.

[20] The sentencing judge then cited the principle of denunciation:

> Denunciation has, as its object, the communication of society's condemnation of the offence. It is a symbolic collective statement that the offender's conduct should be punished for encroaching on society's basic values.

This statement virtually repeats Chief Justice Lamer's description of denunciation, as a sentencing principle, in *R. v. M.(C.A.)*, para 81.

[21] The judge then prioritized the sentencing principles that govern E.M.W.'s crime:

> Deterrence and denunciation are the primary considerations in imposing sentences on those who abuse children.

[22] There is no error in that view. The *Criminal Code* says:

> 718.01 **Objectives - offences against children -** When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[23] This Court repeatedly has emphasized denunciation and deterrence in sentencing for sexual assaults against children. In *R. v. Oliver*, para 20, this Court said:

> Given the age of the complainant and the circumstances surrounding the offence it was - as the judge said - a case that called for very strong denunciation with an emphasis on deterrence. In this Judge Digby's approach was obligatory. Denunciation and deterrence are given the highest ranking among all of the principles of sentencing in cases involving the abuse of children. Parliament's intention is clearly stated.

To similar effect: *R. v. P.J.G.*, paras 22-23; *R. v. Hawkes*, para 6; *R. v. G.O.H.* (S.C.), paras 34-36 and *R. v. G.O.H.* (C.A.), para 10; *R. v. D.B.S.*, paras 20-21; *R. v. M.*, para 35; *R. v. E.A.F.*, [1994] N.S.J. No. 29 (C.A.), para 7; *R. v. L.R.S.*(1993), 121 N.S.R. (2d) 248 (CA), at para 16.

[24] Next the judge noted:

> This is particularly so for those who hold a position of trust such as a parent. The abuse of a person under 18 is an aggravating factor in sentencing.

[25] Again, no error. The *Code* says:

> 718.2 **Other sentencing principles -** A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > ...
> >
> > > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> > >
> > > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > ...

> shall be deemed to be aggravating circumstances;

[26] The sentencing judge then weighed the sentencing principles in the context of E.M.W.'s crime:

> Crimes involving abuse of children by people who should be protecting them are ones where a clear and unequivocal statement must be made. Children are valued. If you treat them as objects for sexual gratification, you will suffer serious consequences. ...
>
> The nature of the offence is such that the denunciation of it must be in very strong terms.
>
> ...
>
> The assaults that occurred in this case involve fondling and digital penetration. This was not touching over clothes. It was not incidental contact in the context of engaging in horseplay or wrestling. It was not isolated to one incident.
>
> ...
>
> It must be acknowledged then that what occurred here was not at that extreme end of the scale. There were no acts of intercourse or oral sex. There was no touching or exposure of the penis. There was no exposure of the child to pornography. There was no recording made. There was no violence involved. The lack of violence should not be overemphasized in cases involving children where no violence is required.
>
> It has been said that the offence of sexual assault is inherently a violent crime, yet it must be acknowledged that there are degrees of violence. The abuse here was not perpetrated by the use of physical force. ...
>
> Obviously, the fact that a child was sexually abused by her father in his home in his bed is very significant. The sexual violation of a ten-year old girl is shocking and profoundly disturbing. When a person who does it is one of the two people to whom she should be most able to look for absolute protection and in whom she should be safe in placing absolute trust, the phrase, "shocking and disturbing" seems woefully inadequate.

[27] The judge's characterization of the circumstances was objective and, so far as I can discern, pointedly accurate.

[28] The judge then considered similarity of sentences given to similar offenders in similar circumstances, the parity principle in s. 718.2(b) of the *Code*:

> Case law can provide a general sense of a range of sentences and some sense of the principles that have been applied. It does not dictate a precise sentence. Judge Tufts in **R. v. S.C.C.** [2004 NSPC 41, paras 19-54] provided a comprehensive review of the case law with respect to sentencing for matters involving the sexual abuse of children up to 2004. Since that time, there has been no significant change in the approach.
>
> Sentences range from conditional sentences to federal prison terms of six years. Those at the higher end of the sentencing range have tended to involve intercourse or oral sex. They have included case [*sic*] where abuse has been ongoing over a period of years. Sexual touching in various forms generally attract sentences ranging from conditional sentences to two to three years of incarceration. Where the touching is over clothing or is a single incident or happens in an unplanned way in the context or [*sic* "of"] wrestling or horseplay, the sentence is more likely to be toward the lower end of the range. Where the touching involves masturbation and touching of the penis, the sentence is likely to be toward the higher end of the range. Where the perpetrator has a record of similar offences, the sentences have certainly tended toward the more severe end of the range. Where the abuser is a person in a position of trust, the sentence has reflected that.

[29] The statutory maximum term of imprisonment for an offence under s. 271 of the *Code* is ten years. But that does not mean the effective "range" for parity purposes in E.M.W.'s sentencing has a ceiling of ten years. In *R. v. Cromwell*, [2005] N.S.J. No. 428 (C.A.), para 26, Justice Bateman discussed the meaning of "the range":

> [Counsel] broadly defines the range of sentence, in these circumstances, as all sentences that might be imposed for the crime of impaired driving causing bodily harm. I disagree. In my opinion the range is not the minimum to maximum possibilities for the offence but is narrowed by the context of the offence committed and the circumstances of the offender ("... sentences imposed upon similar offenders for similar offences committed in similar circumstances ..." per

> MacEachern, C.J.B.C. in *R. v. Mafi* (2000), 142 C.C.C. (3d) 449 (C.A.)). The actual punishment may vary on a continuum taking into account aggravating and mitigating factors, the remedial focus required for the particular offender and the need to protect the public. This variation creates the range.

To similar effect *R. v. A.N.*, 2011 NSCA 21, para 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* ([1997] 1 S.C.R. 948), 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.

[30] Moving downward from the high end of the range in the cases, one sees incarceration sometimes more and sometimes less than two years, depending on the severity of the circumstances, for sexual assaults on children without intercourse:

(a) Six years global for sexual offences, including digital penetration and attempted but unsuccessful intercourse with the offender's stepdaughter, committed over time while the victim was 10 to 14 years old [*R. v. J.B.C.*, 2010 NSSC 28]. The Court (para 24) noted that, under the caselaw, for a crime of this nature the offender's prior clear criminal record "is not accorded undue significance".

(b) Five years for various sexual assaults including digital penetration, not involving intercourse, over a period of years on the offender's stepdaughter. *D.B.S.*

(c) Two sentences of three years each (counts 1 and 5) for indecent assault and gross indecency without intercourse against a child to whom the offender had a parental relationship. He was given additional sentences for other offences. The court (para 17) adopted the statement of Justice Bateman in *R. v. Weaver*, [1993] N.S.J. No. 91 that a clean criminal record "does not relieve the requirement of a lengthy prison term for sexual offence against children". *R. v. R.H.*, [2005] N.S.J. No. 212 (S.C.).

(d) Three years for one incident of sexual assault without intercourse on offender's four year old daughter. *R. v. E.E.C.*, 2005 NSSC 3.

(e) Three years for indecent assault without intercourse with the offender's daughter over a period of three years when she was 8 to 11 [*R. v. I. (Part 2)*, [1996] N.S.J. No. 153 (S.C.)]. The offender had no criminal record and was unlikely to reoffend.

(f) Sentences of thirty months and twelve months for two counts of sexual and indecent assault on the offender's two adopted sons. *R. v. A.P.S.*, [1999] N.S.J. No. 242 (S.C.).

(g) Two and one half years each (concurrent) for two counts of sexual assault and sexual touching, including attempted but unsuccessful intercourse, of the offender's 15 to 18 year old stepdaughter. *R. v. N.J.B.*, [2003] N.S.J. No. 225 (S. C.).

(h) A larger global sentence (with remand credit) that included twenty eight months each (concurrent) for two offences of sexual touching and invitation to sexual touching over a period of time of an 11 to 14 year old girl who was unrelated to the offender. *D.W.B.*

(i) Two years exclusive of remand time plus three years probation for a number of incidents of sexual assault, without intercourse, over time on the offender's under aged daughter. The sentence was further to a joint recommendation after a guilty plea. The judge said that, if credit for remand had been considered, the sentence before credit would have been two and one half years (para 38). *R. v. H.C.D.*, 2008 NSSC 246. The judge said:

> 40. The joint recommendation, in terms of denunciation and deterrence, is within the range for offences of this kind. It could have easily been much higher; it is unlikely it would have been less than two years as opposed to more than two and a half years.

(j) Four years and five years on several counts of sexual assault that included intercourse with his older daughter, plus eighteen months for sexual touching without intercourse of his 9 to 12 year old younger daughter. *G.O.H.* The Court of Appeal said (para 10):

> It is impossible to speak of these crimes without using pejorative adjectives. This Court, and others, has repeatedly emphasized that sexual abuse of near helpless children (which is the case when the abuse of each daughter began) by adults upon whom they should be able to rely for protection, should incur sentences which may deter not only the perpetrator but others who may be so inclined. This proposition is exacerbated when the perpetrator, as here, is a parent, in a position of trust. Society's revulsion of such conduct must be demonstrated. The fact that the appellant is a first offender, at least in respect to the older daughter and may not need specific deterrence is not to be granted undue significance in crimes of this nature. General deterrence must be emphasized.

(k) Six months incarceration plus two years probation for several incidents of sexual touching of offender's 9 to 11 year old granddaughter. The Court of Appeal said the sentence was not unfit under the appellate standard of review. *R. v. D.N.M.*, [1992] N.S.J. No. 356 (C.A.).

(l) Four months plus one year probation for two counts of fondling the offender's daughter, aged 11 to 13. The offender was remorseful and accepting of treatment to overcome his psychological problem. *R. v. E.(E.B.)*, [1988] N.S.J. No. 425 (C.A.).

(m) Ten months by the sentencing judge, reduced to 90 days by the Court of Appeal for several incidents of vaginal touching the offender's 9 year old stepdaughter. The victim had not suffered psychological effects. The offender pleaded guilty and accepted responsibility. There was evidence that rehabilitation would have a positive effect. *R. v. R.H.S.*, [1993] N.S.J. No. 489 (C.A.).

(n) Three months incarceration plus two years probation for sexual touching of offender's 12 year old granddaughter. The offender was remorseful, and the

psychologist said he was "on the right track" to rehabilitation. *R. v. W.M.D.*, [1992] N.S.J. No. 161 (C.A.).

(o) Three years suspended sentence with probation for repeated sexual touching of offender's 14 year old niece. Offender was gentle and well intentioned but feeble-minded, childlike and psychologically ill. He was remorseful and willing to secure treatment. *R. v. R.T.M.*, [1996] N.S.J. No. 218 (C.A.).

[31] In assessing the similarity of precedents for the parity principle, it is useful to recall Chief Justice Lamer's statements in *R. v. M.(C.A.)*, para 92 [above para 7]. The Chief Justice said "[t]here is no such thing as a uniform sentence for a particular crime", and "[s]entencing 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". From a similar perspective, in *R. v. A.N.* this Court recently said:

> 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.

To the same effect *R. v. LeBlanc*, 2011 NSCA 60, para 26. The sentencing judge is not expected to idealize a sentence that perfectly conforms to a hypothetical symmetry in the body of precedent. That would be a futile assignment because the actual precedents are not always consistent. It is not uncommon to find similar sentences in cases with significant factual differences. The overarching factor is the *Code*'s "Fundamental principle" of proportionality (s. 718.1) that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": *R. v. L.M.*, para 36 (quoted above para 8); *Nasogaluak*, para 44.

[32] At this point in his sentencing itinerary, a judge is prepared to apply the applicable sentencing principles to the circumstances of this offender and offence and fix a sentence within the appropriate range. Once the judge has reached this threshold without appealable incident, as is the case here, the judge's core analysis is guarded by a standard of review that mandates significant appellate deference.

[33] The sentencing judge here formulated his conclusion as follows:

> In this case, the nature of the offence involves digital penetration of the vagina on a number of occasions. It was not a momentary lapse of self-control. While it was not planned and there was no grooming of the victim, it was something that occurred more than once in a context where the circumstances could easily have been avoided. It is not an offence that would attract a sentence at the lowest end of the range. It is further exacerbated by the fact that the abuser is the child's father. He is not only a person in a position of trust, he is a person who should be willing to sacrifice everything for her. He has, instead, done the opposite and sacrificed her well-being for his gratification
>
> I have noted that sentencing is not an exercise in precise calculation. A sentence of two years would take this sentence out of the range for the consideration of a conditional sentence. If the sentence were two years less a day, that matter would be considered. The proper process is, first, to determine whether the sentence is less than two years. If it is not, then a conditional sentence is not available.
>
> The appropriate sentence in this case is two years.

[34] To review - there were repeated incidents involving E.M.W.'s digital penetration of his young daughter's vagina. These occurred while R. was in E.M.W.'s home, on access visits further to an Order of the Family Division of the Supreme Court of Nova Scotia. R. has suffered lasting psychological impact.

[35] E.M.W.'s submission correctly notes that the judge did not mention rehabilitation. But E.M.W. has not accepted responsibility, normally a feature of rehabilitation. He chose instead to challenge the credibility of his daughter, whom the judge believed. In the Comprehensive Forensic Sexual Behaviour Pre-Sentence Assessment, Dr. Connors (Clinical and Forensic Psychologist) said, in her Summary and Prognosis:

> The scope and depth of his denial precludes Mr. [W.] from meaningfully engaging in the treatment process at this time, unless participation in truth verification is consented to as a component of his treatment approach. Without same, rehabilitation does not appear to be a meaningful pursuit with Mr. [W.] at this time. In contrast, consequences are likely to have a positive impact on future behaviour based on Mr. [W]'s personality makeup.

[36] E.M.W.'s crime did not occupy the low end on the range. Neither was it at the high end. It was for the sentencing judge to weigh the principles and fix a sentence in the mid-range. It is not for the appeal court to micro-manage the judge's calibration of the scale. In *Nasogaluak*, para 46, the Court adopted a passage from Justice Laskin's reasons in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (O.C.A.), para 35:

> To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review.

[37] E.M.W. submits that two years was demonstrably unfit and outside the range, while the eighteen months incarceration plus twenty four months probation that he proposes would be fit (above, para 5), opening the door to a conditional sentence of imprisonment in the community. I disagree that the fitness range is so finely circumscribed. E.M.W. has cited no authority to suggest that a fit sentencing perimeter for EMW's circumstances and crime lies somewhere between incarceration of 18 months (plus 24 months probation) and incarceration of 24 months. Nor can I say that 24 months incarceration is a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*Shropshire, M.(C.A.)* and *R. v. L.M.* above paras 6-8). From the authorities, two years incarceration is available in appropriate circumstances for mid-range sexual offences without intercourse. Whether the circumstances of E.M.W. and his offence are appropriate is a shades of gray appraisal for the sentencing judge. The appeal court's job is to determine whether the sentence offends a principle outlined in *Shropshire, M.(C.A.), R. v. L.M.* and *Nasogaluak*, and it does not.

[38] The sub-text of E.M.W.'s submission is his request for a conditional sentence. But E.M.W.'s term of incarceration cannot be reduced below two years simply to enable a conditional sentence. The conditional sentencing regime under s.

742.1 of the *Code* requires the judge to decide first whether a conditional sentence is available - because the appropriate term of incarceration is under two years - before considering whether a conditional sentence is appropriate. The initial determination depends on the sentencing principles in ss. 718-718.2 of the *Code*. Only if the judge decides, based on those sentencing principles, that federal incarceration is unwarranted does the judge turn to whether it is appropriate that the offender should serve his term conditionally in the community: *R. v. Proulx*, [2000] 1 S.C.R. 61, paras 49, 55, 58-60; *R. v. Fice*, [2005] 1 S.C.R. 742, paras 13-17; *R. v. Conway*, 2009 NSCA 95, paras 8-12; *R. v. Butler*, 2008 NSCA 102, para 22; *R. v. Knickle*, 2009 NSCA 59, paras 15-18, 28; *R. v. Metzler*, 2008 NSCA 26, paras 27-28.

[39] The sentencing judge could have signed off at this point in his reasons, because a conditional sentence is unavailable if the appropriate term of imprisonment is two years. But his decision continued to discuss a conditional sentence:

> It would be wrong, in my view, to deal with the issue of conditional sentence by adopting the pretense of precision. The issue of whether a conditional sentence should be ordered should be confronted head-on.

[40] As of December 1, 2007, s. 742.1 was amended to exclude a conditional sentence for a "serious personal injury offence as defined in section 752": S.C. 2007, c. 12, s. 1. Section 752, during the relevant period in this case, defined "serious personal injury offence" to include "an offence or attempt to commit an offence mentioned in s. 271 (sexual assault)". E.M.W. was convicted under s. 271. But the dates of E.M.W.'s offence were imprecise (October 1, 2006 to June 12, 2008). Accordingly the Crown took the position at trial that the Court was entitled to consider a conditional sentence, but, on the merits, should decline to issue one. From the perspective of that concession, the judge discussed a conditional sentence.

[41] Section 742.1 permits a conditional sentence where the term of imprisonment is under two years, and the sentencing judge "is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2". The judge said "I am satisfied that Mr. [E.M.W.] presents no danger to the community."

[42] But the judge was not satisfied that a conditional sentence would satisfy s. 742.1's other prerequisite. He said:

> A man who sexually violates his own ten-year-old daughter in these circumstances cannot be allowed to serve his sentence by going to work, going out to the grocery store for a few hours on Saturday, watching television from his favourite chair and enjoying the fellowship of friends and family in his home.
>
> A conditional sentence does not, in these circumstances, provide for punishment that is measured and thoughtful. It would, to put it simply, be the kind of sentence that does not speak of justice and compassion but of weakness and naivete.
>
> When abuse of children is involved, punishment matters. When the abuser is a parent, punishment matters a lot. While the restrictions of a conditional sentence can indeed be punishment, there are times when they are no replacement for the sound of a shutting jail cell.

[43] E.M.W.'s submission seizes on the judge's concluding sentence. His factum says:

> It is submitted that by confining himself to the tool of federal imprisonment here because he felt that there was no substitute for the sound of a shutting jail cell, the trial judge made an error in principle. The choice of the sound of shutting federal jail cell disabled the Court from setting the terms of any community supervision via probation.

[44] E.M.W.'s submission assumes that the judge uttered a preference for incarceration, in principle, that conflicts with Parliament's purpose for conditional sentencing. With respect, E.M.W pounces on the metaphor but dodges the reasoning. After careful consideration the judge concluded that nothing less than E.M.W.'s incarceration would be consistent with the fundamental purpose and principles of sentencing. That conclusion means that s. 742.1's prerequisite for a conditional sentence is not satisfied in E.M.W.'s case. The judge's reference to a clanging cell door was not a freestanding pronouncement of law. It just recapitulated, in the context of E.M.W.'s submission on s. 742.1, the judge's earlier detailed application of sentencing principles to the circumstances of this case, an analysis that in my view is unassailable on appeal.

Conclusion

[45] I would grant leave to appeal the sentence, but dismiss the appeal.

Fichaud, J.A

Concurred: Beveridge, J.A.

Farrar, J.A.