NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Oliver***, 2007 NSCA 15

Date: 20070202
Docket: CAC 265935
Registry: Halifax

Between:

Percy Garfield Oliver

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on publication: Pursuant to s. 486(3) of the **Criminal Code**

Judge(s):	Saunders, Oland & Hamilton, JJ.A.
Appeal Heard:	January 23, 2007, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Saunders, J.A.; Oland & Hamilton, JJ.A. concurring
Counsel:	Brad Sarson, for the appellant Dana Giovannetti, Q.C., for the respondent

Publication Ban: Pursuant to s. 486(3) of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46, as am.

Publishers of this case please take note that Section 486(3) of the **Criminal Code** applies and may require editing of this judgment or its heading before publication. The subsection provides:

> (3) **Order restricting publication** - Subject to subsection (4) where an accused is charged with
>
> > (a) an offence under section 151, 152, 153, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,
> >
> > (b) an offence under section 144, 145, 149, 156, 245 or 246 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
> >
> > (c) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988,
>
> the presiding judge or justice may make an order directing that the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way.

Reasons for judgment:

[1] The appellant pleaded guilty to sexual assault and on April 11, 2006 was sentenced by Judge William B. Digby to two years in a federal penitentiary followed by one year probation. An agreed statement of facts was filed prior to sentencing. The appellant admitted to having sexual intercourse with a 12 year old friend of his family on three occasions between February 1, 2004 and December 31, 2004. The appellant was 19 years of age when the assaults first began and turned 20 in October, 2004. The young girl became pregnant as a result and she subsequently gave birth to a baby boy.

[2] At the hearing the Crown asked that the appellant be sentenced to three years' imprisonment, and as well be subject to various DNA and security type orders.

[3] The defence asked for a conditional sentence of two years less a day.

[4] In addition to sentencing the appellant to the penitentiary for two years, followed by one year probation, Judge Digby imposed a ten year firearms prohibition, signed a DNA order which obliged the appellant to provide a sample of his DNA, and had him statutorily identified as a registered sex offender subject to reporting requirements.

[5] Mr. Oliver now appeals his sentence. Leave to appeal was granted by order of Roscoe, J.A., dated June 29, 2006 releasing the appellant pending the appeal.

[6] Mr. Oliver who was represented by the same counsel at both his sentence hearing and on appeal argues that Judge Digby erred in failing to consider the suitability of a conditional sentence. The appellant asks us to overturn his sentence and replace it with "a conditional sentence of two years less a day . . . with appropriate conditions, including a condition of house arrest with exceptions" that being the position advanced by the defence at the original sentencing hearing.

[7] The several issues, grounds and submissions advanced by the appellant may be distilled and restated as a principal complaint with three parts. In effect, the appellant says the sentencing judge erred in not sentencing him to a conditional

sentence of house arrest where he would then have access to appropriate psychological and sexual therapy because:

(i) the judge misconstrued or ignored the evidence of a defence expert and as a result overemphasized the principles of denunciation and deterrence without proper regard to the appellant's chances for rehabilitation,

(ii) certain statements made by the judge during the sentence hearing indicate that he would never have considered imposing a conditional sentence following this man's conviction for sexual assault, which refusal prejudiced the appellant and constitutes a serious error of law, and

(iii) the sentence imposed is demonstrably unfit.

[8] At the hearing, counsel for the appellant's submissions also morphed into an *insufficiency of reasons* argument citing **R. v. Sheppard**, [2002] 1 S.C.R. 869. Specifically the appellant said that Judge Digby did not explain why he chose not to adopt the expert evidence called by the defence, or why a conditional sentence was seen to be inappropriate and that these omissions prevented us from conducting a proper appellate review.

[9] For the reasons that follow I would reject each of the appellant's complaints. I can dispense summarily with the submission that the sentencing judge failed to provide sufficient reasons. On the contrary, Judge Digby's decision shows a careful consideration of the evidence, the issues, and the law, and it provides a window through which his reasoned analysis may be discerned.

[10] I will now turn to a consideration of the appellant's first submission as it relates to the expert evidence called by the defence.

(i) The judge misconstrued or ignored the evidence of a defence expert and as a result overemphasized the principles of denunciation and deterrence without proper regard to the appellant's chances for rehabilitation

[11] The appellant did not testify at the sentencing hearing, but called in his defence an expert, Irmi Lenzer, Ph.D., R. Psych., DABFM. Dr. Lenzer referred to the many hours of interviews spent with the appellant which she described as a "dynamic approach" intended to "get at the processes that led to the offence in his case." She described herself as "a therapist" who did "restructuring through . . . dynamic therapy" where "the most important feature" was to:

> . . . find whether the person has a conscience . . . by the interview, whether unconscious drivers of unconscious anxiety and guilt arise within the session. And those are the best, best predictors of knowing whether the person can be safe in the community.

[12] Dr. Lenzer described the appellant as "low functioning definitely . . . within . . . the intellectual scale," someone who in "standard intelligence test with all the subtests, he falls into the borderline range . . . definitely a low functioning individual overall." She said that in her assessment the appellant showed "absolutely no indication that he has intense sexual urges and fantasies about children. What he does is he has attachments. He wants an attachment with one individual."

[13] On cross-examination Dr. Lenzer thought the appellant clearly grasped the fact that the complainant was 11 and then 12 years of age during "their relationship." She described him as feeling "lonesome" and that once the complainant's pregnancy became obvious he "felt betrayed" because they "loved each other" and "she lied about the three times," meaning that when she was confronted with the accusation that she had had sex with the appellant she claimed it had only been once and so - according to Dr. Lenzer - the appellant thought the girl had "lied" by failing to acknowledge the two other incidents of sexual intercourse.

[14] During her interviews the appellant disclosed to Dr. Lenzer that <u>he</u> had had sexual intercourse at age 8, apparently with an 18 year old girl who was at a party. Growing up he had other sexual relationships as verified by his mother who reported to Dr. Lenzer that her son had had sex at age 12 or 14 with a similarly aged individual.

[15] In the report she filed with the court, Dr. Lenzer opined that the appellant "needed intensive therapy which gets at long standing psycho dynamic issues" and that:

> (I)f he were to receive a "custodial sentence in the community" consideration should be given towards placing Mr. Oliver in a structured, supervised setting as a base from which therapy and work-related activities can be addressed by professionals.

[16] In his factum, counsel for the appellant complains, in effect, that the sentencing judge chose to ignore, or at least gave insufficient weight to the opinion of Dr. Lenzer. This, so it is argued, prompted the judge to err in law by overemphasizing the principles of deterrence and denunciation and failing to recognize the prospects for the appellant's rehabilitation. Counsel put it this way:

> It is submitted that, in reading Judge Digby's decision in its entirety, it is apparent that he had some difficulty with Dr. Lenzer's opinion with respect to Mr. Oliver's capacity for learning and understanding. With all due respect, Judge Digby was not in a position to doubt the accuracy or veracity of Dr. Lenzer's findings. . . .
>
> It is therefore submitted that Dr. Lenzer's assessment with respect to Mr. Oliver's ability to participate in and benefit from sexual offender programming in a federal institution environment should be accepted in the absence of any evidence to the contrary. . . .
>
> Although the appellant does not dispute the fact that the case law consistently states that emphasis should be placed on denunciation and deterrence in these types of cases, an appropriate sentence should be reflective not only of the nature of the offence and the circumstances surrounding its commission, but also must take into account the unique circumstances of the offender. Without explicitly doing so, Judge Digby apparently disregarded Dr. Lenzer's opinion as expressed in her testimony that she considered Mr. Oliver's involvement with the victim in this case to be of a non-predatory nature. . . .
>
> It is submitted that the principles of denunciation and deterrence could have been met in this case by the imposition of a conditional sentence of the nature recommended by Defence at the time of sentencing - a conditional sentence order to be imposed for a period of two years less one day, the entirety of which would have been served under a condition of house arrest, with some exceptions.

[17] With respect, there is no merit to this submission. It is clear that Judge Digby paid close attention to the evidence given by Dr. Lenzer. He said:

> Mr. Oliver, by attending at appointments with Dr. Lenzer has shown, in my view, an interest in understanding his behaviour in a more global sense, his sense of anger and frustration as well as his activities. Having said that, I think emphasis has to be placed on deterrence.
>
> The fact that Mr. Oliver does not have a record of previous criminal convictions, the fact that he may have felt a relationship of some kind with the young lady as opposed to being a complete stranger that he played upon at random, although that is somewhat countered by the fact that he was trusted as a member of the family, I am encouraged by the fact that Mr. Oliver appears to have a conscience, according to Dr. Lenzer. I am also taking into account Mr. Oliver's disabilities as they may have played a part in his poor thinking and judgment which resulted in this unfortunate situation.

[18] However, the weight he chose to give to the opinion evidence was entirely a matter for Judge Digby to decide. Having reviewed Dr. Lenzer's testimony and the report she filed, I see little in it that would assist the court in predicting Mr. Oliver's future, or more importantly, in understanding the risk he posed to the community at the time of sentencing, or in crafting an appropriate penalty.

[19] Dr. Lenzer neither provided nor undertook any therapy for the appellant. She said "I did not do therapy with him." In fact, she did not complete the assessment. Rather, she recommended further assessment by another and apparently more qualified expert. While saying that in her opinion the appellant was willing to undergo therapy, she said he remained "a deeply troubled man with emotional difficulties."

[20] As I read Judge Digby's carefully considered reasons, it seems clear to me that in his eyes the appellant remains a substantial risk to the community. 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. The **Criminal Code** provides:

> **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.**

[21] Finally, as noted by Mr. Giovannetti in his able submissions on behalf of the Crown, the appellant will presumably be entitled to pursue appropriate therapy and counselling upon his release from prison. There is nothing in the record to say that he would be foreclosed such opportunities, provided he were motivated.

(ii) Certain statements made by the judge during the sentence hearing indicate that he would <u>never</u> have considered imposing a conditional sentence following this man's conviction for sexual assault, which refusal prejudiced the appellant and constitutes a serious error of law

[22] The appellant argues that the sentencing judge committed two errors in principle. First, he is said to have referred to a conditional sentence as a "non-custodial sentence." Second, he is said to have "usurped the role of Parliament" by reasoning - so it is argued - that offences involving sexual intercourse with a child demand a minimum period of imprisonment. Both "errors" are said to arise in the following passage from the judge's reasons:

> The law has deemed that [children under the age of consent] need protection. Certainly Parliament has reaffirmed that view with respect to their amendments to the Criminal Code dealing with possession of child pornography and it would seem odd to me that if you had a picture of a child having sexual intercourse, you would have a minimum period of incarceration whereas if you actually had intercourse with a child, the same child, you would be possibly not serving a sentence of actual incarceration.
>
> To impose a non-custodial sentence would seem to me to be somewhat illogical and irrational in the circumstances. The message of deterrence and denunciation has to be strong because these are offences that cannot be unwound so to speak. In offences involving property, the property can possibly be returned or the people, through their own efforts, can replace the property. Here you can never get back to the starting point. And I have already addressed that at considerable length.

[23] I disagree with the appellant's characterization. With respect, the appellant is parsing the words and missing the meaning. As I read it, Judge Digby was simply indicating that in light of the horrific circumstances of this case, the need for deterrence and denunciation required a custodial sentence, in other words actual, institutional incarceration.

[24] Second, the appellant ascribes error to Judge Digby's reference to the mandatory minimum sentence for possession of child pornography. In my view, the sentiment expressed by Judge Digby was in fact true. In the context of this case it would "seem odd" to punish possession of child pornography by at least a year in jail, but not to impose a jail or penitentiary sentence for the triple rape of a 12 year old girl. Judge Digby was injecting a healthy dose of common sense into the analysis. The need to protect a young child from sexual intercourse at the hands of an adult surely cannot be any less than the need to protect that same child from being depicted in a single pornographic photograph.

[25] The appellant also complains that the impugned comments constitute legal error because they effectively "created a de facto minimum period of imprisonment" thereby barring consideration of any of the s. 742.1 factors beyond the first prerequisite ("except an offence that is punishable by a minimum term of imprisonment").

[26] The short answer to this complaint is that Judge Digby clearly did not dispose of this issue in a perfunctory manner. If he were really thinking that this was a mandatory minimum case, I suspect he would have said so and that would have brought an abrupt halt to his reasoning. Rather, it is clear to me that Judge Digby reviewed in some detail and with considerable perception a number of crucial issues that factor into the larger concerns of s. 742.1. This included reference to the principles in s. 718, to a number of aggravating and mitigating factors that arose in the case, and to the victim impact statements, from which he drew certain conclusions, for example " . . . Ms. L. has been robbed of the remainder of her childhood . . . "

[27] Harm to the immediate victim as well as to society generally were matters that weighed heavily in Judge Digby's decision. With respect, it is fanciful to argue that he "usurped the role of Parliament." Rather, his reasoning reflects a correct understanding of the legislation and the leading jurisprudence.

(iii) The sentence imposed is demonstrably unfit

[28] I reject this submission. Courts throughout Canada emphasize denunciation and deterrence when sentencing adults for the sexual abuse of children. This is a case of major sexual assault. It involved the triple rape of a 12 year old girl, the child was impregnated, a baby was born, and there are no substantial mitigating factors.

[29] A sentence imposed by a trial judge is entitled to considerable deference on appeal. Absent error in law, we will only intervene to vary a sentence if we are satisfied that the impugned penalty is "clearly unreasonable": **R. v. Shropshire** (1995), 102 C.C.C. (3d) 193 (S.C.C.); or "demonstrably unfit" **R. v. M.(C.A.)** (1996), 105 C.C.C. (3d) 327 (S.C.C.); **R. v. Proulx**, [2000] 1 S.C.R. 61; **R. v. Longaphy**, [2000] N.S.J. No. 376 (Q.L.) (NSCA); and **R. v. C.V.M.**, [2003] N.S.J. No. 99 (Q.L.) (NSCA).

[30] In imposing a sentence of two years in a federal penitentiary, Judge Digby expressly took into account the appellant's limited intellectual capabilities that "may have played a part in his poor thinking and judgment which resulted in this unfortunate situation."

[31] As I have already explained, I see no error in law in the judge's reasons. Accordingly, the penalty he imposed is entitled to considerable deference. There were major aggravating features in this case which I would summarize as follows:

- the victim was twelve years of age;
- three acts of sexual intercourse, i.e., rape;
- pregnancy and the birth of a baby;
- long-term substantial adverse effects for all.

The young complainant's mother captured the repercussive effects the appellant's criminal actions had on her family, with these statements in her Victim Impact Statement:

> . . . I feel my whole life and the life of my daughter are ruined. As come the first week of June a baby will be here. I can't even imagine the turmoil my daughter has gone through these last several months, keeping quiet about what happened to her. She said to me she was never going to tell me as she knew how disappointed I would be.
>
> I feel my life is over, even though it just began, I have 5 kids 3 reside with me and 2 with my x-husband. My youngest daughter is 6 years old. As I raise her by myself. I was just starting to get myself together. I just completed 2 years at the community college in computer. I decided that recently I wanted to become a teaching assistant.
>
> I was looking forward to this, as all my kids' are in school. I finally have time to myself and decide what it is I want to do in life. I finally found it, and now I am in a position that I will have to remain at home and look after a baby. . . .

[32] Very little can be said by way of mitigation. Mr. Oliver's timely guilty plea did save the complainant from painful court appearances. The appellant's intellectual deficits may, arguably, have prompted him to think that the incidents of sexual intercourse were "consensual" (when of course there was never "consent" here, as a matter of law, on account of her age). These features were obviously considered by the trial judge in deciding an appropriate sentence. The appellant has no prior criminal record, but sexual offenders often present in court with an otherwise good character. The appellant says there was no overt violence; however, I question how it could ever be said that multiple rapes of a 12 year old ought not to be characterized as "overtly violent."

[33] The Crown has emphasized - properly in my view - the penalty imposed in **R. v. L.S.M.**, [1999] N.S.J. No. 154 (Q.L.) (NSSC). There a 29 year old accused was convicted of sexually assaulting his 12-13 year old stepdaughter. The assault consisted of two acts of intercourse resulting in the victim becoming impregnated and giving birth to a baby. The accused was sentenced to five years' incarceration, less four months' credit for time served, a penalty which the Crown here describes as "in accord with the modern range," adding in its factum:

> It is doubtful that a sentence as low as two years reflects an adequate standard of denunciation and deterrence. Nevertheless, the Crown has chosen not to cross-appeal and does not ask that the Court exercise its jurisdiction to increase the sentence under the principal in R. v. Hill, [1977] 1 S.C.R. 827.

[34] For all of these reasons, I would reject the appellant's submission that the sentence he received was demonstrably unfit.

Conclusion

[35] Accordingly, while leave to appeal has been granted, I would dismiss the appeal.

Saunders, J.A.

Concurred in:

Oland, J.A.

Hamilton, J.A.