PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. J.W., 2010 NSPC 40

Date: 20100519
Docket: 1991450
Registry: New Glasgow

Between:

Her Majesty the Queen

v.

J.W.

Editorial Notice

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

Restriction on publication: Pursuant to Section 486 C.C.C. there is a ban on the publication of the identity of the Accused and the Complainant

Judge: The Honourable Judge T. K. Tax

Heard: September 14, 15, December 23, 2009 - Trial
April 14, 2010 - Submissions by Counsel
May 19, 2010 - Sentencing Decision

Charge: Section 271(1)(b) CC

Counsel: Edward Joseph McNeill, for the Crown
Stephen Robertson, for the Defence

By the Court: (Orally)

INTRODUCTION:

[1] The issue for the court to determine today is a fit and proper sentence for J.W., who is charged with sexual assault, contrary to section 271(1) of the **Criminal Code**. J.W. was 18 years of age at the time of this incident and did not have any prior adult or **Youth Criminal Justice Act** convictions. This case proceeded to trial, however, J.W. entered a guilty plea during the middle of his direct examination, and he accepted full responsibility for his actions. The Defence seeks a conditional discharge.

BACKGROUND FACTS:

[2] A police investigation was launched on September 27, 2008, when the complainant reported that her daughter, C.O., had been sexually assaulted by C.O.'s former boyfriend, J.W. The Complainant stated that her daughter had been sexually assaulted by J.W. between September 6 and September 13, 2008 while visiting with J.W., at his parent's residence in *, Nova Scotia.

[3] J.W.'s mother had left the residence and shortly thereafter, C.O., who was 16 years old at the time of this offence, arrived at the door. As she entered the house, he hugged her and then shut and locked the door. J.W. then grabbed C.O. and pushed her against the wall and held her there while he removed her shirt. As he removed her

shirt, J.W. touched C.O.'s breasts. She told J.W. to get off of her, to which he replied "why" and she again told him to get off of her. J.W. did not comply, but rather, took off his shirt, unbuttoned his pants and forced C.O.'s hand onto his penis.

[4] C.O. began to cry and told J.W. that she wanted to go home. She was able to remove her hand from J.W.'s grasp and picked up her shirt and was about to leave the residence when J.W. again pushed her against the wall, unbuttoned her pants, pulled her pants and panties down and touched her vagina with his hand. She continued to struggle to get away from J.W., but was unable to do so for a short period of time. At that point, J.W.'s mother returned home, and C.O. left the residence. As a result of this incident, C.O. ended the boyfriend/girlfriend relationship with J.W.

VICTIM IMPACT STATEMENT:

[5] In her victim impact statement, C.O. has described a physical pain in her back that she has suffered since this incident. She also spoke of the emotional pain that the incident has caused and the fact that she has not received counseling or therapy. C.O. said that she started acting out at home, and as result, her family did not wish to be around her. Moreover, she did not feel that she had the support of her school friends after this incident and the family decided to move to *, which has impacted the family's financial situation.

[6] During her trial testimony, C.O. stated that she was "upset" as a result of this incident but she did not provide any evidence of any physical or psychological harm having been occasioned by J.W.'s actions.

POSITION OF THE PARTIES:

[7] The Crown proceeded by way of summary conviction, and the Crown Attorney does not take the position that the facts of this case objectively constitute a "serious personal injury offence" as defined in section 752 of the **Code**. The Crown Attorney acknowledges that in her Victim Impact Statement, C.O. states that there has been a significant impact on her as a result of this offence, however, the Crown notes that C.O.'s trial evidence was that she was "upset" as a result of this incident. Therefore, the Crown Attorney relies on that evidence adduced at trial and does not seek to prove that there was any significant physical or psychological harm, but he submits that the court can presume that this offence occasioned some psychological "upset".

[8] The Crown's position is that this is a crime of violence and that deterrence should be the paramount concern of the court, but given the positive comments contained in the presentence report and the reference letters from the community, he recommends that the court suspend its sentence and order J.W. to be subject to the terms of probation for a period of 24 months. The probation order would ensure that J.W. receives all treatment and counseling necessary to rehabilitate himself. The

Crown seeks a DNA Order under section 487.051 of the **Code** since this is a "primary designated offence" and also seeks a **SOIRA** order under section 490.012 of the **Code**.

[9] Defence Counsel agrees with the Crown position that the court can presume some psychological upset, but that during the trial itself, C.O. presented no evidence of any physical or psychological harm or any financial impacts having been caused by J.W.'s actions. Defence counsel submits that the facts and circumstances of this case, the very positive presentence report and the positive letters of reference from the community support his position that the court should grant a conditional discharge. Counsel submits that suspending sentence and ordering probation will have serious and long-lasting repercussions on J.W.'s future employment opportunities, and in particular, he refers to his client's long-standing goal of joining the Canadian Forces.

[10] The position of Defence counsel is that this was a crime of impulse and failure to exercise self control when J.W. did not heed the wishes of his girlfriend. In fact, Defence counsel pointed out that his client has accepted full responsibility for all of his actions, and that his client added that he had touched C.O.'s vagina and that he had placed her hand on his penis, even though during her testimony, she did not recall either of those two events having occurred. Counsel submits that J.W. is of good character and meets the criteria set out in section 730 of the **Criminal Code** for

a conditional discharge to be granted after serving between 12 to 18 months on probation.

CIRCUMSTANCES OF THE OFFENDER:

[11] J.W. is now 20 years old and is a youthful first-time offender with no prior involvement with the criminal justice system either as an adult or as a young person under the **Youth Criminal Justice Act**. He has obtained his grade 12 diploma and generally did well in school. He would like to be the third generation of his family to join the Canadian Forces. In the fall of 2009, he had full-time employment at the *, but he has since been laid off due to a lack of work. In addition, he does lawn care and snow removal for neighbors, especially senior citizens in the community – both for pay and on a voluntary basis. In addition, he has volunteered at the *Legion Branch * and participated in Legion parades since 2008.

[12] Both counsel have characterized the presentence report as being very positive and the Defence has supplemented the presentence report information by providing 12 letters of reference. Those letters of reference highlight J.W.'s community minded activities. The letters of reference have been written by neighbors, his landlord, his former music teacher who also pointed out that he volunteers to help lead the junior band at the junior high school, and by the President of the * Legion Branch * where he has volunteered and assisted since 2008.

[13] In the presentence report, J.W. expressed his sincere remorse and regret for his actions, and has accepted full responsibility for them. The investigating officer with the RCMP has also stated in the presentence report that the offender is known in the community in a positive manner, and that, in his opinion the offender has displayed remorse for his actions.

ANALYSIS:

[14] In order to assist judges in determining a fit and proper sentence, Parliament has set out in sections 718, 718.1 and 718.2 of the **Criminal Code**, the fundamental purpose and principles of sentencing. In section 718, Parliament has established that the fundamental purpose of sentencing and the objectives which the sentence should attempt to achieve include denunciation of unlawful conduct, general and specific deterrence, separation of offenders from society where necessary, rehabilitation and making reparations and the promotion of a sense of responsibility in the offender.

[15] In section 718.1 of the **Code**, Parliament has also established that a fundamental principle of sentencing is proportionality, which requires a sentence to be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[16] In addition, section 718.2 of the **Criminal Code** requires the court in assessing other fundamental sentencing principles to take into account relevant aggravating and mitigating circumstances of the particular case.

SENTENCING CONSIDERATIONS - AGGRAVATING & MITIGATING FACTORS:

[17] In assessing the sentencing considerations, Defence counsel has outlined, as mitigating factors, that J.W. has no prior record as an adult or as a young person under the **Youth Criminal Justice Act**. He is a youthful first-time offender who completed his grade 12 education and expressed a strong desire to be the third generation of his family to enlist in the Canadian Forces. The presentence report has been described as very positive, and there are glowing letters of reference outlining his good character, community-minded voluntary activities and his work record. In addition, Defence counsel points out that this offence was more of an impulsive nature committed by an 18-year-old boy who did not exercise sufficient self-control and engaged in inappropriate actions with his then 16-year-old former girlfriend. While counsel acknowledges that the circumstances of this offence constitute the essential elements of a sexual assault, he points out that in this case, the assault did not progress past sexual touching.

[18] The Crown Attorney has submitted that sexual assaults are crimes of violence which impact the sexual integrity of the victim and that this should be considered as an aggravating factor.

IS A CONDITIONAL DISCHARGE THE APPROPRIATE DISPOSITION?

[19] At the outset, it is important to state that sentencing has been explicitly recognized as an individualized process (**R.v. C.A.M.**, [1996] S.C.J. NC.O. 28). It is a process which requires the court to examine the facts of the offence and the circumstances of the offender as well as an assessment and weighing of the relevant sentencing principles in order to arrive at a fit and proper disposition. This point was reinforced in the 1996 amendments to the **Criminal Code**, which are reflected in sections 718, 718.1 and 718.2.

[20] The authority for the court to grant absolute or conditional discharges is found in section 730(1) of the **Criminal Code,** which reads as follows:

> 730(1) Where an accused, other than a corporation, pleads guilty to or is found guilty of an offence, other than an offence for which a minimum punishment is prescribed by law or an offence punishable by imprisonment for 14 years or for life, the court before which the accused appears may, if it considers it to be in the best interests of the accused and not contrary to the public interest, instead of convicting the accused, by order direct that the accused be discharged absolutely or on the conditions prescribed in a probation order made under section 731(2).

[21] In **R. v. Fallofield** (1973), 13 C.C.C. (2nd) 450, the British Columbia Court of Appeal outlined the proper considerations to be taken into account when assessing whether or not to grant a discharge. The Court of Appeal noted, at pages 454 – 455, that the section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life. The court went on to note that there is nothing in the language of the section which limits its usage to a technical or trivial violation, but rather, the section does contemplate the commission of an offence.

[22] In this case, J.W. has entered a guilty plea to a charge of sexual assault contrary to section 271(1) of the **Criminal Code**. The Crown has proceeded summarily, and therefore the maximum punishment is a term of imprisonment not exceeding 18 months. Moreover, this offence does not have a minimum punishment prescribed by law and as a result, a consideration of the discharge provisions contained in section 730(1) of the **Code** is one of the available options to the court.

[23] Section 730(1) of the **Code** outlines two pre-conditions for the court to consider before granting a discharge. That section states that the sentencing court may grant an absolute or conditional discharge if the court considers that the discharge be in the "best interests of the accused" and "not contrary to the public interest."

[24] In **Fallofield,** *supra,* the court determined that the first pre-condition to granting of a discharge, namely, the "best interests of the accused" generally presupposed that the accused was a person of good character, usually without previous conviction, and that it was not necessary to enter a conviction against him or her in order to specifically deter that offender from future offences or to rehabilitate the offender, and that entry of a conviction may have "significant adverse repercussions."

[25] The second precondition, that is, that the grant of discharge would not be contrary to the public interest brings into play a consideration of the public interest in the deterrence of others. The British Columbia Court of Appeal said in **Fallofield,** *supra* that while deterrence of others must be given due weight, it does not preclude the "judicious use of the discharge provisions." In the case of **R. v. Meneses** (1974), 25 C.C.C. (2nd) 115 (Ontario Court of Appeal) Dubin J.A. stipulated that the "public interest" is broader than the need for general deterrence. Moreover, Mr. Justice Dubin commented that, in some circumstances, the need for deterrence can be fulfilled by the fact that the accused was arrested, compelled to appear in court and face the notoriety that comes with an appearance and the fulfillment of judicially imposed probation requirements. Thus, while general deterrence is to be considered, the public interest also encompasses other factors.

[26] From my review of several authorities concerning the second precondition regarding the “public interest”, I note that many factors should be considered including the need for general deterrence, the seriousness of the offence, the prevalence of this offence in the community, whether there is a need to warn the public at large about the accused through the medium of a criminal record, and an analysis of the aggravating and mitigating factors in the case and whether the order of discharge would be consistent with the fundamental purpose and principles of sentencing to contribute to respect for the law and public safety.

[27] Having carefully considered all of the facts and circumstances of this case, I have no doubt that a conditional discharge would be in the “best interests of the accused.” I find that J.W. is a person of good character, and that fact is highlighted in the very positive presentence report which has been prepared by probation services and the numerous letters of reference which have described him in “glowing” terms. I am satisfied this was an isolated incident involving two teenagers in what was then a boyfriend/girlfriend relationship and that J.W. acted impulsively, did not exercise self-control or heed the clearly stated wishes of his girlfriend. Moreover, in terms of future employment opportunities, J.W. has indicated that he wishes to join the Canadian Forces with a view to becoming a medic. Defence counsel has provided information that the personnel screening form for the military requires a criminal

records check and based upon information provided by the recruitment officer, a conviction for a sexual assault would probably prevent J.W. from joining the Canadian Forces. As a result, I find that the entry of a conviction would have significant adverse repercussions on his enlistment plans with the Canadian Forces.

[28] As for the second pre-condition, namely the order not being contrary to the public interest, while it is not commonplace for a conditional discharge to be granted in sexual assault cases, Defence counsel has provided several cases for the court to consider. Those cases included **R. v. Stout**, (2003) Carswell BC890; **R. v. Gilmour** (2005) Carswell Alta. 645 (Alta Q.B.); **R. v. Troutlake** (2002) Carswell Ont. 3263 (Ont. C.J.); **R. v. J.J.J.W.L.L** (2004) C.O.J. 3137 (Ont. Superior Ct. Of Justice) and **R. v. Ingrey** (2003) Carswell Sask. 549 (Sask. Q.B.). In addition, I have located other cases such as **R. v. N. (H.T.)** (2006) Carswell Que. 7567 (Cour du Quebec) and an unreported decision of **R. v. Campbell** (N.S.P.C.) of the Nova Scotia Provincial Court decided June 10, 2008, where the court has granted a conditional discharge for an offender who was convicted of a sexual assault. As stated in **Fallofield**, *supra,* the court is required to act in a "judicious manner" in balancing individual and societal interests in order to determine whether the granting of a discharge would be in the best interests of the accused and not contrary to the public interest.

[29] From my review of the cases involving a sexual assault in which a discharge was granted, not surprisingly, the court in each one of those cases objectively characterized the offence at the low end of the range of sexual assaults. In the present case, there is no doubt that the sexual integrity of C.O. was violated, but the assault did not go beyond the inappropriate touching of her body in a sexual manner. In the circumstances of this case, I find that the sexual assault committed by J.W. must be objectively characterized as being at the lower end of the range or continuum of sexual assaults.

[30] In addition, I note that no physical or psychological harm has been asserted or proved by the Crown, and both counsel submit that the most that the court can presume from C.O.'s trial testimony is that she suffered some psychological "upset." In this regard, I am mindful of the Supreme Court of Canada decision in **R. v. M (T.E.)** (1997), 114 C.C.C. (3rd) 436 where Sopinka J. for the majority and McLachlin J. (as she then was) for the minority held that each aggravating factor, including psychological harm, cannot be presumed, and if the Crown intends to rely on a certain aggravating factor, it must be proved beyond a reasonable doubt without the aid of any presumption.

[31] Looking at the facts and circumstances of this case, I find that the sexual assault was an isolated incident which was impulsive in nature. Moreover, based upon the

positive presentence report and the glowing letters of reference, I conclude that J.W.'s actions were out of character, but did demonstrate a very serious lack of judgment and self control in failing to stop his actions when requested to do so by C.O. J.W. has fully accepted responsibility for his actions, and in that regard, I have previously noted that he admitted to and accepted responsibility for additional actions that even the complainant herself, did not recall.

[32] In the presentence report, J.W. has stated that he clearly realizes what he did in this case was wrong and he has genuinely expressed his remorse for his actions in court, to his probation officer, in discussions with his family, and even to the investigating officer. Defence Counsel has indicated that J.W. has been seriously affected by this charge, by the fact that he was arrested, by being compelled to appear in court on numerous occasions and to face the notoriety that comes with each court appearance, especially in a small community. In this case, I find that specific deterrence has been largely achieved by the effects of the proceedings to date on J.W. I also find that he has certainly learned from this experience, and from that and the information contained in the presentence report, I conclude that his likelihood of re-offending is quite low.

[33] In addition, there is a very positive presentence report and glowing letters of reference speaking to the character of J.W. and given his long standing desire to be

the third generation of the family to enlist in the Canadian Forces, the entry of a conviction would have significant repercussions on that career aspiration. While it is true that the court must also consider the deterrence of others from acting in a similar manner, I must also consider that it is in the public interest in a youthful first-time offender with strong family and community support to rehabilitate himself in order to retain the ability to pursue his career and become a law abiding and productive contributor to society.

[34] In conclusion, having regard to all of the purposes and principles of sentencing contained in sections 718, 718.1 and 718.2 of the **Criminal Code**, as well as the aggravating factors and the numerous mitigating factors which I have previously highlighted, I conclude that both specific and general deterrence as well as denunciation of the unlawful conduct can be achieved by ordering a conditional discharge under the following terms and conditions of a probation order for a period of 15 months:

1) keep the peace and be of good behavior;

2) appear before the court as and when required to do so by the court;

3) notify the court, probation officer or supervisor, in advance, of any change of name, address, employment or occupation;

4) report to a probation officer at 115 MacLean Street, New Glasgow, Nova Scotia within 10 days of today's date and thereafter as directed;

5) remain within the province of Nova Scotia unless you receive

written permission from your probation officer;

6) stay away from the person, premises and place of business if any of C.O. and have no communication or contact with her, directly or indirectly, even if invited to do so, and there are no exceptions;

7) make reasonable efforts to locate and maintain employment or educational program as directed by your probation officer;

8) attend for assessment, counseling or program directed by your probation officer;

9) participate in, and cooperate with any assessment, counseling or program as directed by your probation officer.

[35] In addition, the Crown has requested and I hereby order J.W. to provide a DNA sample under section 487.051 of the **Criminal Code** at a date, time, and place to be determined by the local police agency responsible for collecting that sample in this county.

[36] In their sentencing submissions, the Crown Attorney also indicated that they were seeking a 10 year **Sex Offender Information Registration Act ("SOIRA")** Order. The Defence made an application for J.W. to be exempt from registration under that **Act** on May 19, 2010. After hearing oral submissions, counsel were given the opportunity to make further written submissions in light of any decision to grant J.W. a conditional discharge and I reserved my decision on the SOIRA exemption to July 6, 2010.

. . . .
THEODORE K. TAX,
A Judge of the Provincial Court
For the Province of Nova Scotia