IN THE PROVINCIAL COURT
Citation: R v. S.C.C., 2004 NSPC 41

Date: 20040330
Docket: 1321262
Registry: Kentville

Between:

Her Majesty the Queen

Informant

v.

S.C.C.

Defendant

SENTENCING

Restriction on publication: **Ban under Sec. 486.3 CC re name of Complainant or any info leading to such identity**

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

Judge: The Honourable Judge Alan Tufts

Heard: March 30, 2004, in Kentville, Nova Scotia

Written Decision: June 17, 2004

Counsel: Lloyd Lombard, Crown Attorney
Chris Manning, Defence Attorney

By the Court:

(ORALLY)

[1] This is the sentencing of S.C.C. Mr. C. has pled guilty to one offence under Sec. 271(1) CC, the offence of sexual assault. The victim of this offence is the offender's 11 year old step-son. The issue in this proceeding is to determine the proper sentence. The Crown seeks a two year Federal Sentence, together with three years Probation and the Defence requests a Conditional Sentence of two years, less a day, together with Probation.

THE FACTS:

[2] The offence began by the offender rubbing the victim's body and legs which led over time to touching of a sexual nature. This included touching the victim's buttocks and masturbating the victim. In addition, the offender ejaculated himself and touched the victim's genitals. He also performed fellatio on the victim and there was some minor digital penetration.

[3] It appears that the abuse occurred over several months, beginning in late 2002 and ended when the victim disclosed the abuse to his mother in June of 2003.

The abuse appeared to occur fairly frequently and the number of occasions was referred to in the submissions. The offender admits that he was sexually attracted to the victim. It appears that the victim suffers from * and was prone to violent rages. He was also described as being "inappropriately" affectionate and at times initiated the sexual conduct and was sexually aggressive. I mention this only because it is referred to in the psychological assessment report and attributed to the comments made by the offender. As I will discuss later in this Decision, these are not mitigating features in any respect whatsoever.

[4] Also in submissions made to the Court this afternoon, much was said about the victim's general deportment and the fact that he was a large child and his mother and step-father were afraid of him at times. I have concluded after consideration, that these factors while certainly presenting some parental challenges, cannot in any way mitigate the seriousness of the offence.

[5] The offender is a 42 year old man. He has been married twice. His current spouse and mother of the victim is supportive of him. The victim now lives with his grand-parents. The offender has a son now aged thirteen from his first marriage, however, there is no evidence or suggestion that any inappropriate

behaviour occurred between the offender and his son. The son no longer wishes any contact with his father. The offender also has a small child with his present wife. He has no criminal record. He is university educated and is presently employed in the Halifax area as a delivery person, although his chosen vocation is in the computer business.

[6] The offender has been the subject of a Pre-Sentence Report, as well as a Psychological Pre-Sentence Assessment for Sexual Offenders prepared by Mr. Michael Hennessey of the East Coast Forensic Psychiatric Hospital under the supervision of Dr. Angela Connors. It is a comprehensive report. The Court is familiar with the form and methodology of these reports.

[7] The report assessed the offender's sexual deviancy, his risk to re-offend, his personality and other mental health issues. It also makes recommendations regarding treatment. While the offender admitted he was attracted to this boy, the assessment testing included in the report could not conclude that this offender was a paedophile or had a sexual preference for prepubescent males. The report considered the offender to be a low risk for violent recidivism and a low to moderate risk to re-offend if proper controls are in place. The report is very

detailed about the offender's personality and while I do not propose to go into it in any detail, it is suffice to say that he was described as having a certain level of cognitive immaturity and is somewhat self-centred and self-indulgent and easily over-whelmed by life's stressors.

[8] Although these characteristics apparently favour against prospects for successful treatment, the report does conclude that he is motivated and does have a capacity to remain in treatment.

[9] I was also presented this afternoon with a Victim Impact Statement that was prepared by the victim's grandmother and the present custodian. It details the impact that this matter has had on her and she also describes the victim's relationship with his father and the impact that these offences have had on the victim.

[10] The report which I referred to is very descriptive of the offender's personality, This description places his relationship and the nature of the abuse into some context. However, I want to be clear that the offender is not to be sentenced for his personality traits, but his conduct. In short, it is what he did, and not who

he is that is important. While his personality traits may impact on his risk to re-offend and his opportunity to be rehabilitated, in this sentencing it is his conduct which is the primary focus.

[11] I will now briefly review the law relative to sentencing. The general principles related to sentencing are included in Section 718 to 718.2 of the Criminal Code. The fundamental purpose of sentencing is to contribute to respect for the law and to the maintenance of a just, peaceful and safe society. This is achieved by the imposition of sanctions which have the following objectives: (a) denunciation; (b) specific and general deterrence; (c) separation of offenders from society where necessary; (d) rehabilitation; (e) reparations to victims; and finally, (f) promotion in offenders of a sense of responsibility and acknowledgement of harm to victims.

[12] Sentencing objectives are achieved by employing three principles of sentencing, namely: Proportionality - Sections 718.1 and 718.2(a), Parity - Section 718.2(b), and Restraint - Section 718.2 (c),(d), and (e).

[13] Proportionality means that the sentence must be proportionate to the gravity of the offence and the moral blameworthiness of the offender. This principle must also take into account the presence of any aggravating or mitigating circumstances including those listed in Section 718.2(a).

[14] Parity means that the sentence must be similar to those sentences imposed for similar offences on similarly situated offenders. This necessarily requires a review of the sentences approved or imposed by other Trial Courts in this Province, our Appeal Court, and the Appeal Court of other Provinces.

[15] I will now review those principles as they apply to the crimes of sexual assault against young children by persons in authority. Our Appeal Court and those of other provinces have repeatedly stated that general deterrence and denunciation are the objectives to be emphasized in the offences of sexual assault against children. This is not to say that the other objectives are not important or are not to be considered, however, I believe that because of the view which our courts and our society takes of these crimes, which I will review later, these objectives must be the primary focus. A sentence which is unduly lenient can

provide neither the necessary deterrence or denunciation required to meet the fundamental purpose of sentencing - see R. v. G.A.L. infra, para. 60.

[16] There are few crimes that are more serious and have a more devastating effect on its victims than sexual assault against young children by their parents or guardians. Both in terms of gravity and moral blameworthiness such crimes represent serious criminal conduct which requires proportionate criminal sanctions. Other factors which impact on this aspect are the following aggravating features which may exist in varying degrees in different crimes:

(1) the degree of invasiveness or the nature of the assaults and the variety of the acts;

(2) the presence of other form of physical violence beyond the abuse itself;

(3) the presence of threats or other psychological forms of manipulation;

(4) the age of the victim;

(5) other forms of vulnerability of the victim besides the parent/child relationship;

(6) the number of incidents and the period of time over which the abuse occurred;

(7) the impact on the victim;

(8) the risk to re-offend.

[17] Mitigating features include a guilty plea at an early stage, remorse and acknowledgement of harm to the victim, a lack of a criminal record, disabilities or character of the offender or other characteristics which reduce the moral blame worthiness of the offender and prospects of treatment.

[18] I will now review the law relative to parity. To properly apply the principle of parity it is necessary to examine the sentences of other similar offences to determine the range of sentences imposed by other trial courts and those approved by the Court of Appeal of this and other Provinces. This will allow the Court to place the facts surrounding this case and the distinguishing characteristics of this offender in some context and on a continuum of sentences. In my opinion, it is particularly important to focus on cases which have occurred since 1996 when the **Criminal Code** was substantially amended with regard to sentencing, and to which I referred to in part above.

[19] The cases referred to are in chronological order and intend to represent a range of sentencing for sexual offenses against young children. I will simply

provide a cursory review of the Decisions with only limited reference to the factual circumstances of those of the offender and simply summarize the dispositions imposed. Later in my Decision I will summarize the import of these decisions collectively and attempt to succinctly describe the central principles related to the sentences to these types of crimes.

[20] The first case is **R. v. I.(Part 2),** [1996] N.S.J. No. 153. This involved a offence of indecent assault - oral sex. The complainant was eight to eleven years old and the offender was fifty-two years of age and it was a daughter that was involved in the offence that occurred over a three-year period. The Nova Scotia Supreme Court imposed a term of three years.

[21] **R. v. G.O.** [1997] O.J. No. 1911. This case involved offences involving hugging, kissing and oral sex and fondling. A term of fifteen months in jail was imposed and a Conditional Sentence was specifically rejected. The offender was an Instructor at a Recreation Centre and the complainant victim was between eight and twelve years old.

[22] **R. v. G.C.S.** [1997] N.S.J. No. 309. This decision of the Nova Scotia Supreme Court involved indecent assault, gross indecency, sexual intercourse with a daughter. The accused was fifty-one years of age and the victim was a daughter under the age of sixteen. A period of five years in custody was imposed.

[23] **R. v. D.W.B.** [1998] N.S.J. No. 198. This case was a decision of the Nova Scotia Supreme Court which involved sexual assault and sexual touching. The complainant was eleven to fourteen years of age and the offender was a friend of the victim's daughter. The Court imposed a period of thirty-four months in custody.

[24] **R. v. L.S.M.** [1999] N.S.J. No. 154. This was another decision of the Supreme Court of Nova Scotia which involved a sexual assault. The complainant was thirteen years of age and the accused was twenty-nine years of age. Again, the victim was the step-daughter of the offender. In this case the child became pregnant. A term of five years, less remand time, was imposed.

[25] **R. v. P.J.G.** [1999] N.S.J. No. 155. This is a decision of the Supreme Court of Nova Scotia which involved gross indecency, intercourse, forced oral sex. The

complainant was seventy-eight years of age and there were a number of complainants. A period of six years in custody was imposed.

[26] **R. v. E.M.C.** [1999] N.S.J. No. 259. This is a decision of the Nova Scotia Supreme Court. This case involved fondling, cunning lingus, and four counts of assault. A six month period of custody was imposed for a thirty-seven year old offender and the victim was fourteen to fifteen years of age and was a babysitter. The offender was in a position of trust. A Conditional Sentence was specifically rejected.

[27] **R. v. A.P.S.** [1999] N.S.J. No. 242. This involved the sexual assault of two adopted boys, including indecent assault. The accused was a middle-class individual with a good income. He was active in the Boy Scout movement and the abuse occurred repeatedly over a two year period. The Court imposed a two and a half year sentence in a Federal Institution. A Conditional Sentence was specifically rejected.

[28] **R. v. D.A.M.** [1999] N.S.J. No. 468. This was another decision of the Nova Scotia Supreme Court. This involved five counts of sexual assault, one

invitation, and sexual touching. A seventeen month jail term was imposed for vaginal fondling, fellatio, and attempted sexual intercourse. The accused was thirty-eight years of age, had no record and it included many, many acts of abuse.

[29] **R. v. H.A.V.** [2000] N.J. No. 60. This is a decision of the Newfoundland Court of Appeal involved sexual assault, sexual touching, and sexual intercourse. The complainant was fifteen years of age. The accused was forty-one years of age. A two and a half to three year term in jail was imposed.

[30] **R. v. R.W.B.** [2000] N.J. No. 59. This case involved four counts of assault, including fondling and sexual intercourse. An eighteen month jail term was upheld for a stepfather on his twelve year old stepdaughter.

[31] **R. v. D.B.S.** [2000] N.S.J. No. 172. This is a decision of the Nova Scotia Supreme Court which involved fondling, digital penetration, and ejaculation on the victim. The victim was seven to fifteen years of age and included abuse over an eight year period. A term of five years in a Federal Institution was imposed.

[32] **R. v. States** unreported. This is another decision of the Nova Scotia Supreme Court. It involved repeated sexual abuse, including ejaculation. The complainant was fifteen years of age. A five year term in the Federal Institution was imposed.

[33] **R. v. E.C.M.** [2001] N.S.J. No. 375. This is a case from the Nova Scotia Court of Appeal involved the sexual touching of step-daughter and common assault. A two year sentence was upheld and a Conditional Sentence was rejected.

[34] **R. v. C.J.C.** [2001] N.S.J. No. 525. This is another decision of the Nova Scotia Supreme Court involved touching and mutual oral sex. The complainant was in Grade 7 or 8 and was the accused's daughter. A term of twenty-one months in jail, together with a year's Probation was imposed.

[35] **R. v. Cromien** [2002] O.J. No. 354. This is a Decision of the Ontario Court of Appeal involving touching, masturbation, and anal penetration and oral sex. A term of twelve months in jail was imposed. This was by a Roman Catholic priest on a thirteen year old alter boy. A Conditional Sentence imposed at trial was overturned.

[36] **R. v. Boston** [2002] O.J. No. 887. This is a decision of the Ontario Court of Appeal. It involves two counts of sexual interference and one of sexual assault involving grabbing of the genitals, mutual masturbation and fellatio. A sentence of eighteen months in jail was imposed relative to three complainants, two which were thirteen years of age and one which was fifteen. A Conditional Sentence was rejected.

[37] **R. v. F.A.W.** [2002] N.S.J. No. 567. This is a decision by Justice Hall of the Nova Scotia Supreme Court and involved an historic sexual assault - a serious sexual assault of fondling, fellatio, and sexual intercourse, but involved an offender, who was presently sixty-eight, on his daughter who was four to fourteen years of age during the time in question. He was sentenced to six years in custody.

[38] **R. v. M.W.C.** [2002] N.S.J. No. 522. This is a decision of the Nova Scotia Court of Appeal involving attempted gross indecency, attempted sexual intercourse. A sentence of five years was imposed on a sixty year old offender. The complainant was three to sixteen years old and the abuse occurred over a period of thirteen years. This was a so-called “high end” offence.

[39] **R. v. S.L.** [2003] O.J. No. 250. This is a decision of the Ontario Court of Appeal involving four counts of indecent assault, one gross indecency, two assaults causing bodily harm and two counts of common assault. The sentence imposed was a twenty-eight month jail term and the offence involved the offender's daughters and nieces over a two year period. A Conditional Sentence was specifically rejected.

[40] **R. v. M.S.** [2003] S.J. No. 185. This case is from the Saskatchewan Court of Appeal and involved sexual interference and sexual touching. A term of nine months in jail was imposed and a Conditional Sentence overturned for a thirty-eight year old offender on a seven year old complainant. The abuse occurred over a two year period.

[41] **R. v. Camilleri** 58 W.C.B. (2d) 481. This case is from the Ontario Court of Appeal. This case involved sexual assault, fondling, and digital penetration. A term of fifteen months was imposed and a Conditional Sentence refused. The case involved the foster child victim of eight or nine years of age, over a two year period.

[42] **R. v. N.J.B.** [2003] N.S.J. No. 225. This is from the Nova Scotia Supreme Court per Goodfellow, J. Again, sexual assault and sexual touching was involved. A sentence of two and a half years relative to a step-daughter aged between fifteen and eighteen was imposed. This offender had a previous record.

[43] **R. v. Y.(E.)** 58 W.C.B. (2d) 481. This case is from the Ontario Court of Appeal involving touching escalating to oral sex. A sentence of eighteen months in jail was imposed. The accused was fifty-two years of age. The victim was his step-daughter. This occurred over a seven year period.

[44] **R. v. D.A.D.** [2003] B.C.J. No. 107. This case is from the British Columbia Court of Appeal which involved two victims. Full sexual intercourse and touching on two victims was indicated. A sentence of five years was imposed.

[45] I had an opportunity to review the decisions that were provided to me by counsel which I will not specifically refer to, although I do want to refer to a number of cases - three decisions of this Court - one of which was referred to by Defence.

[46] **R. v. S.L.C.** [2000] N.S.J. No. 126. This was a case involving a charge of sexual assault against two daughters on a limited number of occasions on the so-called "lower end" of the scale. In my opinion, this case can be distinguished from the case at bar. In that case, this Court imposed a period of eighteen months Conditional Sentence.

[47] **R. v. C.A.D.** (unreported) NS Prov. Ct. - Tufts, P.C.J. This was a sexual assault on a step-daughter including sexual intercourse, oral sex, and "sexual abuse of the worse kind". A period of four years in the Federal Institution was imposed.

[48] **R. v. Snow** (unreported) NS Prov. Ct. - Tufts, P.C.J. This was a sexual assault case involving touching of his daughter's breasts and vagina. There was no penetration, however, the offender had a record for a similar offence and a period of four years was imposed.

[49] The case which was referred to me this morning by defence counsel, **R. v. B.S.** [2004] O.J. No. 1170, did impose a Conditional Sentence, but I would suggest that it was at the lower end of the scale relative to the case at bar.

[50] In my view, it is clear from the authorities cited above that the sentences for sexual assault against young children by a person in authority attract a severe sentence. Certainly, in Ontario and in Nova Scotia, I believe Conditional Sentences are rare - see **R. v. Bedard** [2001], 158 C.C.C. (3d) 217; **R. v. Cromin [**2002] O.J. No. 354; **R. v. D.R.** [2003] O.J. No. 561; **R. v. R.W.B.** [2000] N.J. No. 59, which all emphasize this point.

[51] Ordinarily a federal sentence is required - see **R. v. D.D.** [2002] O.J. No. 1061; **R. v. S.L.** [2003] O.J. No. 250. As I referred to above, deterrence and denunciation need to be emphasized, see **R. v. A.S.G.** [2003] N.S.J. No. 10. While there are several cases where Conditional Sentences have been imposed, they generally represent cases where unique circumstances are present or the particular offender has characteristics which mitigate against a custodial sentence. They often include historic cases, or so-called “low end” cases and I refer to specifically to **R. v. M.H.** [1998] N.S.J. No. 413; **R. v. Hirtle** [1999] N.S.J. No. 165; **R. v. S.P.C.** [1999] N.S.J. No. 133; **R. v. M.A.W.** [1999] 174 N.S.R. (2d) 83; **R. v. D.J.J.** [1998] S.J. No. 881; **R. v. Wismayer** [1997] O.J. No. 1380; **R. v. Scidmore** [1996] O.J. No. 4446; **R. v. Zimmer** [2002] B.C.J. No. 1655; **R. v.**

Bremner [2000] 146 C.C.C. (3d) 59; and **R. v. V.C.A.S.** [2001] M.J. No. 249. I will not go into the details and factual circumstances around those offences, but they do represent cases where the Court imposed a Conditional Sentence but, in my opinion, they represent exceptions rather than the rule.

[52] Finally, I want to discuss specifically, the principles of restraint. Our Appeal Court, in **R. v. G.O.H.** [1996] N.S.J. No. 51**,** has acknowledged that it is almost impossible to speak of crimes such as this without referring to pejorative adjectives to described the gravity of these offences. It is certainly understandable, given the nature of the crime and the degree to which these crimes offend the standards and values of our society. However, the Court must be careful not to let those pejorative adjectives detract from the requirement that Parliament has legislated that any sentence must be the least restrictive sanction which meets the fundamental purposes and principles of sentencing.

[53] Before dealing specifically with this case, I want to refer briefly to the proper consideration of the defence application for a Conditional Sentence. The proper procedure is defined in **R. v. Proulx** (1998) 127 C.C.C. (3d) 511 (S.C.C.). Before the Court can consider such a Disposition, the Court must determine if the

appropriate range of sentence requires a sentence of less than two years. This must be determined in accordance with the fundamental purposes and principles of sentences which I reviewed above. If after considering these principles, it is determined that a sentence of less than two years is appropriate, the Court must determine is the offender is a danger to the safety of the community and then again, consider whether a Conditional Sentence is consistent with the fundamental purpose and principles of sentence.

[54] In the following analysis, I will be focussing on the fundamental purpose and principles of sentencing, not only regarding the range of sentences, but as well with respect to whether a community-based sentence meets the same purpose and principles.

[55] I will now apply the principles that I described above to the case at bar. As I referred to the above, the offender has been the subject of a Pre-Sentence Report, as well as a comprehensive Sexual Offender Assessment. The offence is a serious one. The offender was in a position of trust and while the extent of the abuse fell short of more evasive features often found in the types of cases such as the various forms of penetration, and certainly perhaps not as serious as some of the cases I

referred to above, it did include touching, fondling, masturbation, fellatio, ejaculation, and exposure of the offender to the victim. The abuse continued over an extended period of time, and included periods of grooming which escalated to more evasive and intrusive abuse. It is likely, in my opinion, that the abuse may have led to further and greater abuse if left undetected.

[56] Much has been said about the victim, his particular challenges and his conduct. There is some suggestion in the report that on occasions the victim initiated the contact and wanted it to continue. The abuse started as a result of the offender's desire to deal with the victim's deportment, that is his * condition and his difficult behaviour. In my opinion, it is difficult to imagine a case where a child's conduct would ever mitigate against either the gravity of the offence or the moral blameworthiness of the offender's conduct. This is certainly not such a case. This was an eleven year old boy. The offender was his de facto father. It is only the offender's conduct that is relevant here. Certainly had the offender used more aggressive and threatening techniques to perpetrate his abuse of this boy, that would have aggravated the offense.

[57] This, however, does not change the real nature and character of the offender's conduct. He had a duty to protect this boy and he breached that duty to the greatest extent possible. In fact, it certainly could be argued that the offender exploited this boy's challenges and rationalized his behaviour to satisfy his own need for gratification. In fact, it could be argued that this is an aggravating feature. I do acknowledge that the offender has pled guilty. He voluntarily took the Sex Offender Assessment which he was not required to do. He is motivated to be treated and he has the support of his spouse. Also, the presence of other aggravating features, such as other physical violence and threats, are absent.

[58] I want to address the submission that the offender's disclosure to Family and Children's Services and the plea should be given considerable consideration. I have certainly taken that into account and although some credit will be attributed to that, much more credit would have been given had the offender initiated the original disclosure, rather the victim himself. For that reason I have not attributed as much weight to this factor as requested.

[59] I also want to acknowledge and accept the offender's statement of remorse and his acceptance of responsibility which he manifested this afternoon. I

understand that the offender takes some issue with some of the statements made in the Report. I believe it is best to look at those comments in a clinical sense, rather than to apply a traditional interpretation to those comments.

[60] On the whole, I believe that the Report was not negative. It does show a motivated individual who has some insight into the issues at hand. However, as I stated above, the central focus must be denunciation and deterrence, and while these factors which helped to mitigate the offender's profile and his risk to the community, the nub of the matter is whether a sentence of less than two years served in the community can meet these important objectives. The gravity of the offense and the moral blameworthiness and the degree of responsibility of the offender is the central focus. How best can the Court convey it's sense of denunciation, particularly with respect to this serious crime?

[61] In my opinion, the only sanction which can properly address and fulfill the objective of deterrence and denunciation is a term of custody served in a Federal Institution. Applying all the principles that I reviewed above, I believe that this is the proper conclusion to reach.

[62] Certainly the weight of the authorities favour that disposition given the aggravating features that I have outlined and notwithstanding the mitigating aspects and the very forceful and persuasive submissions made by defence counsel today of which I gave very thoughtful and serious consideration. I want to add that even if I determined that the range of sentencing was to be under two years, I could not, for the same reasons that I stated above, order that the sentence be served in the community. In these circumstances such a sentence, in my opinion, would not be a fit and proper disposition. It would not be in accordance with the principles that I have outlined above, or in accordance with the precedents that I referred to earlier.

[63] I believe that the Crown's recommendation is an appropriate one, and quite frankly, a very reasonable one in all of the circumstances, and certainly the Crown, given the range of sentences which I referred to earlier, were at liberty to request a much greater sentence.

[64] I accept the Crown's recommendation and I impose a sentence of two years, together with three years Probation on the terms and conditions recommended by the Crown Attorney.

[65] Mr. Lombard, if you want to repeat those terms and conditions for the record, those will be ordered and, as well, the Order for the DNA will also be issued in accordance with the Crown's request.

[66] Mr. C., could you stand, Sir. For the reasons that I stated, the sentence of this Court is two years in the Federal Institution together with a three year period of Probation. The terms and conditions of the Probation will be reduced to writing and you will be required to sign that and that should be done today before you leave, Sir.

[67] Thank-you. You may go with the Sheriff now.

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TUFTS, J. P. C.