IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Mebrate 2007 NSPC 17

Date: 23April2007
Docket: 1480534
Registry: Halifax

Her Majesty the Queen

v.

Elias Woubet Mebrate

Judge:	The Honourable Judge Castor H. Williams
Sentence:	April 23, 2007
Charge:	**Section 271 (1) (a) Criminal Code**
Counsel:	Ron Lacey for the Crown R. Kuzelwski for the Defendant

Introduction

[1] On July 17, 2006, following a trial, I found the accused Elias Woubet Mebrate, guilty of the offence of sexual assault on B.D. who, at the time of the incident, was under the age of fourteen years. Also, I entered a conditional stay on the charge of touching a child under the age of fourteen years for a sexual purpose. My decision is reported in ***R. v Mebrate***, [2006] N.S.J. No. 298, 2006 NSPC 35.

[2] After several delays, in addition to a ***Presentence Report***, I ordered a ***Comprehensive Psychological Presentence Assessment for Sexual Offenders*** which I have received and reviewed. This latter report was completed by Dr. Angela Connors, Clinical & Forensic Psychologist and dated February 28, 2007. The Presentence Report was authored by Danielle Timmons, Probation Officer and was prepared August 31, 2006. I have also received a Sentencing Brief from the Crown who has indicated that pursuant to the ***Criminal Code***, s. 490.012(1) he will apply for an order requiring the accused to comply with the provisions of the ***Sexual Offender Information Registration Act,*** S.C. 2004, c.10 (hereinafter referred to as ***"SOIRA"***). The

Defence did not submit any Presentence Brief but opposes the imposition of a ***SOIRA*** order and submitted that a proper disposition of this case ought to be a conditional sentence order with conditions. Today is the scheduled sentencing hearing.

Comprehensive Psychological Presentence Assessment for Sexual Offenders

[3] Here, the psychological tests that the accused completed were the Beck Depression Inventory (BDI), Millon Clinical Multiaxial Inventory-lll (MCMI-lll), Minnesota Multiphasic Personality Inventory (MMPI-2), Paulhaus Deception Scale (PDS) and State-Trait Anger Expression Inventory (STAXI-2).

[4] The tests suggest that the accused has:

> a characterological reactivity to stressful events and negative emotions that he is not likely to contain. When stressors are severe or prolonged a decompensation in functioning can be expected, with Mr. Mebrate evidencing difficulty coping with everyday responsibilities and demands. (p.20).

[5] Additionally, PPG Assessment that was designed "to provide indications of an individual's sexual arousal profile" was done. The results of the PPG procedure:

> ... revealed sexual arousal for both consenting adult females (particularly those who initiate sexual activity), as well as for illegal sexual acts. Specifically, when both child and adult stimuli were presented, Mr. Mebrate demonstrated preference for passively resistant female children with secondary arousal shown for both passively resistant male children and consenting adult females. When only adult stimuli were presented, Mr. Mebrate showed preference for consenting adult females with some weaker secondary arousal for rape motivated by the desire for sexual contact. In no part of the assessment did Mr. Mebrate show strong arousal for violence in the absence of sexual contact. *These results are consistent with an individual who has adult heterosexual relationships, as well as the potential for child-oriented sexual contact.* [Emphasis added].(p.22).

[6] It would therefore appear that the accused possesses the potential ability "to sexualize children" which is possibly "influenced by his culture of origin and his familial experiences." (p.24). Moreover, as opined by Dr. Connors, which I am inclined to accept based on the trial evidence of his infatuation with "pretty girls like B.D., " as I have found, "it is possible that Mr. Mebrate does not respond to a 12-13 year old girl as a "child" at all, furthered by expectations that females will be unequal to men." (p .24).

[7] In terms of his risk for recidivism Dr. Connors adopted a threefold approach to risk assessment, utilizing " a measure of psychopathy (PCL-R), actuarial risk assessment measures (SORAG, Static-99) and empirically derived instruments that inform structured clinical judgment (HCR-20, SVR-20)." Under the PCL-R, Mr. Mebrate was "at the 48th percentile" that indicated "a moderate risk for violence associated with psychopathy" and he:

> demonstrates dramatic and fleeting affect that is primarily self-focused, some willingness and capacity to make instrumental use of others, and difficulty embracing personal responsibility for the consequences of his choices. (p.26)

[8] On his actuarial risk management (SORAG), Mr. Mebrate was in the 8th percentile. This score indicates that the accused is "at a low risk for future violent recidivism when compared to the subset of sexual offenders upon which the tool was validated.' However, the results of the combined results of his SORAG and Static-99 assessments suggest that, over the long term, the accused is "one to two times the risk of the average sexual offender for recidivism." (p.27).

[9] Empirically based clinical risk measurements indicated that the accused scores on the HCR-20 put him as “a moderate risk for violent recidivism.” His SVR-20 showed similar moderate risk. However, in the assessment of risks variables specific to the individual it is noted that it is a concern that the accused has a predictive sexual attraction for underage persons. Moreover, his personal experiences of physical and emotional abuses, as reported, are “related to risk for recidivism, perhaps due to the likely impact on the ability to suspend empathy and have difficulty connecting with others.”

[10] It is also noted that the accused “ has demonstrated difficulty coping positively and effectively with stressful situations. Stress is positively related with risk for recidivism.”(p.28). Likewise, noted of some concern is the proposition that as the accused has not accepted responsibility for the crime it would be difficult to engage him in a treatment process “aimed at managing his risk for future such conduct.”

[11] Similarly, it would appear that change in behaviour is difficult in one who has not accepted personal responsibility for improper conduct. It would also appear that such admittance of responsibility is crucial for relapse prevention.

Furthermore, in the absence of admittance of personal responsibility such a person is not considered a “malleable treatment target” particularly, as here, where additionally, the accused is also an inconsistent self-reporter.

[12] From the offence history, as reported and on the facts as I have found, B.D. was a total stranger to the accused which according to the Report (p.28) is “a significant risk marker.” This is so as:

> [it] makes it more difficult to contain risk as it is not specific to a certain environment nor is it dependent upon having the time to develop a relationship with the victim. Hence, an offence can occur at any place in relatively little time. (p. 28).

[13] Likewise, I think that it is significant to note that the Summary Statement of Risk submitted by Dr. Connors states at p.29:

> Overall, Mr. Mebrate’s baseline risk for future violence (including sexual assaults) appear moderately low. At the present time, dynamic variables suggest that Mr. Mebrate’s risk is not fully managed as some of the same risk variables remain active. His risk for violent recidivism would be considered to be at a substantial increase should he continue to be without a positive intimate relationship, continue to be stressed, and be unsupervised with an underage female. Moreover, in consideration of his history and the current test results, Mr. Mebrate is considered to present the most risk to young inexperienced females in the pubescent and older prepubescent age range. Further, it is possible that Mr. Mebrate’s risk may extend beyond his known victim pool, should he recidivate in the future.

[14] As a result of her clinical assessment, Dr. Connors recommended among other things, that, in all the circumstances presented, it would be prudent to place the accused on the Sexual Offender Registry.

Presentence Report

[15] However, despite Dr. Connors`assessment, I note from the Presentence Report that collateral sources, who knows the accused, described the offence as not only out of character of the accused but also of his East African community. He is described as a “very compassionate individual who is extremely hard working and has a sense of obligation to both his family and the community around him.” (p.6). Likewise, he is described as having the ability to “deal with a tremendous amount of stress.” (p.6) Finally, it is surmised that a period of community supervision to address the issues underlying the offence could be facilitated.

Position of the Parties

(A) The Crown

[16] Crown counsel, in his application, reviewed the circumstances of the offence. Essentially, he stated that the offence was aggravated because it was a bold and brazen act committed by the accused in a public place and perpetrated upon a vulnerable member of society who, in relationship to him, was a stranger. Additionally, the Crown emphasized that, given the contents of the Comprehensive ***Psychological Presentence Assessment for Sexual Offenders Report*** and the recommendations that it suggested, when combined with the facts, as I have found, this was a compelling case for placement on the Registry.

[17] Moreover, placement on the Registry, in the circumstances and concerning the accused privacy or liberty, was not grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature. To that effect, the Crown submitted, in reply, that the accused has a conviction for sexual assault that would be on CPIC which

is available to police services. Also, he could apply, if he has demonstrated some control over his tendencies, as reported, for a termination order under the relevant ***Code*** provisions. Presently, however, for the protection of society, it would be prudent to place him on the Register.

(B) The Accused

[18] On the other hand, counsel for the accused submitted that the accused is a thirty-four old new immigrant to Canada who is a first time offender and who has not as yet fully integrated into Canadian society by citizenship or through educational achievements. However, these are goals that he is pursuing. With respect to his education, he is attending university part time, and is two courses short, that he plans to complete by April, from having the necessary requirements for his Bachelor of Arts degree.

[19] Additionally, the accused works several part-time jobs, care for his young daughter on weekends and has the support of his church community, his family and his MISA worker. The accused future was based upon his educational level and anything that impacts adversely on that would of

necessity affect the public interest in having the accused become a welfare-independent and productive citizen.

[20] Furthermore, the "public interest" was what society, at the end of the day, wanted the accused to contribute to it as a full member without any limits. Likewise, the Report can be considered only as a guide and not as a tool to assist the Court in arriving at a just and proper disposition of the case. From this perspective, the generalizations noted in the Report were biased against a member of a population that was not North American acculturized as it appears to ignore different cultural methods or modes of communication.

[21] Consequently, according to this view, Dr. Connor's recommendation that it was prudent to place the accused on the Registry, without any analysis of the ***SOIRA*** requirements appeared to have been a personal, subjective opinion. This opinion was therefore gratuitous, it distorted the fact-finding process, was more prejudicial than probative of any fact, was suggestive of evidence of character and it also attempted to determine the ultimate disposition of the application that was in the court's domain.

[22] Moreover, although the ***SOIRA*** case law speaks about the security and restricted access to the information, the Defence disagrees with this assertion. Counsel posited that if the purpose was to help police services with sexual assault cases, then the definition of "police services" was too vague as it conceivably could include international police forces as police services trade information both locally, nationally and internationally.

[23] Similarly, s.16(2) allows a member, employee or person retained by "police services" to access the information. This conceivably could create a problem for the accused as he is a stateless person and in the future may wish to emigrate. These factors, of course, would have significant impact on the accused privacy or liberty and was grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature.

Analysis

(A) Sentence Disposition

[24] Despite our cultural diversity, I am reminded that this was an offence against a vulnerable young child where the primary consideration must be given to the "objectives of denunciation and deterrence of such conduct." See: ***Criminal Code***, s. 718.01, s. 718.2 (a) (ii.1). These provisions highlight the sentencing principle that in considering the circumstances of the offence and the offender and taking into account any relevant aggravating and mitigating factors, I must impose a sentence that would denounce his unlawful conduct; deter him from committing a similar or other offence; assist in his rehabilitation; promote in him a sense of responsibility and an acknowledgment of the harm that he has done to B.D. and to the community; and to separate him from the society, where necessary. See: ***Criminal Code***, s.718.

Aggravating and Mitigating Circumstances

[25] In my opinion, the aggravating circumstances are that B.D. was thirteen years old at the time of the offence and a total stranger to the accused. However, in mitigation, the accused is employed part time, attending school and is supported by his family and church community. He has no prior criminal record of any type and is considered as a moderate to low risk to reoffend. The offence did not include any gratuitous violence and, as is commonly assessed, it was at the “low end” of sexual assaults.

Disposition

[26] Counsels have referred me to many cases with the Crown recommending a period of incarceration for a period of three to six months with a lengthy period of probation with severe conditions and weapons prohibition. On the other hand, the accused argued for a conditional sentence order of two to five months with probation attached and no weapons prohibition.

[27] I have considered the factors concerning the granting of a conditional sentence order as stated in ***R.v. Proulx***, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, approving those listed in ***R.v. Brady*** (1998), 121 C.C.C. (3d) 504 (Alta. C.A.), and ***R.v. Maheu*** (1997), 116 C.C.C. (3d) 361 (Que. C.A.) On this review, I determined that the sentence would not exceed two years. I note that the accused is now thirty-five years old with no prior criminal record. I also considered the circumstances of the offence and the aggravating and mitigating circumstances of both the offender and the offence. Additionally, I have considered the many case authorities, as presented by counsels.

[28] I accept the principle that these types of offences call for general deterrence and that it is only in exceptional cases that a conditional sentence order is warranted. ***R.v. Kloepfer*** (1999), N.S.J. No. 180 (C.A.), ***R.v. A.F.R.***, [2007] O.J. No. 540, 2007 ONCA 114. Clearly, the accused behaviour was repugnant and was a disregard for the sexual integrity of B.D.

[29] However, the nature of sexual offences and the offenders covers a wide spectrum and the range of sentences for these types of sexual assaults have varied from lengthy terms of imprisonment to probation. Even so, conditional

sentences have been imposed frequently. Thus, I think that, in the circumstances, considering all the principles of sentencing, I should "make the punishment fit the criminal rather than the crime." ***R.v. Campbell and Paige*** (1984), 60 N.S.R. (2d) 406 (C.A.), at p.413.

[30] A conditional sentence is a sentence of imprisonment served in the community and can still have the necessary denunciatory effect , ***Proulx***, *supra*., ***R.v. Desmond***, [2004] N.S.J. No.550, 2004 NSSC 33. Moreover, as I opined in ***R.v. Jesso***, [2006] N.S.J. No. 267, 2006 NSPC 30 at para 15:

> ....a conditional sentence order that is crafted with a set of conditions which are punitive, rehabilitative and restrictive could address the need of deterrence, denunciation and the protection of the community.

[31] Here, because of the circumstances of this case, as I have noted and reasoned, I am satisfied that the principles of deterrence, denunciation, and rehabilitation, can be met by a properly crafted conditional sentence order.

[32] Accordingly, I sentence him to a period of imprisonment for six months that pursuant to s.742.1 he can serve in the community on the following conditions:

> 1. Keep the peace and be of good behaviour.
>
> 2. Appear before the Court when required to do so by the Court.
>
> 3. Report to a supervisor at Halifax within two working days of today's date and as directed.
>
> 4. Remain within the Province of Nova Scotia unless written permission obtained.
>
> 5. Notify the supervisor in advance of any change of name, address, employment or occupation.

[33] And in addition, he shall :

> 1. Participate in and cooperate with any assessment, counselling or program directed by his supervisor.
>
> 2. Attend for counselling and treatment at a provincial community based sexual offender programme as directed by his supervisor.
>
> 3. Not attend a public park area where persons under the age of fourteen years are present or can reasonably be expected to be present, a daycare centre, school ground, play ground or community centre.

4. Be prohibited from seeking, obtaining or continuing any employment whether or not the employment is remunerated or becoming or being a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of fourteen years.

5. Not have contact with or be in the presence of anyone under the age of fourteen years, except his own child, unless in the company of an adult person of at least 25 years old.

6. Not have any direct or any indirect contact or communication with B.D.

7. Not take or consume alcohol or other intoxicating substances or a controlled substance as defined under the ***Control Drugs and Substances Act*** with the exception of prescription medication, taken as prescribed.

8. Maintain a land line telephone at his residence to facilitate contact with the supervisor and when not in his residence, carry a copy of this Order with him at all time.

9. For the first three months of this Order remain in his residence 24 hours a day, seven days a week. For the remaining period of this Order abide by a curfew between the hours of 2300 hours and 0600 hours seven days a week.

10. Also be assessed for and be a subject for electronic monitoring as deemed necessary and directed by the supervisor.

11. Prove compliance with the curfew/house arrest conditions by presenting himself at the entrance of his residence should a peace officer or the supervisor attend there to check compliance.

12. Make reasonable efforts to locate and maintain employment or attend an educational program as directed by his supervisor.

[34] The exceptions to the house arrest and the curfew are only permitted if:

(a) he has the written permission of the supervisor or when at regularly scheduled employment, which his supervisor knows about and travelling to and from that employment by a direct route;

(b) when attending a regularly scheduled education program, which his supervisor knows about or at a school or educational activity supervised by a principal or teacher and travelling to and from the education program or activity by a direct route;

(c) when dealing with a medical emergency or medical appointment involving him or a member of his household and travelling to and from it by a direct route;

(d) when attending a scheduled appointment with his lawyer, his supervisor or a probation officer, and travelling to and from the appointment by a direct route;

(e) when attending a counselling appointment, a treatment program at the direction of or with the permission of his supervisor, and travelling to and from the appointment, program or meeting, by a direct route;

(f) when attending a regularly scheduled religious service with the permission of his supervisor;

(g) when making application for employment or attending job interviews, Monday through Friday between the hours of 9:00 a.m. and 5:00 p.m.;

(h) for not more than 4 hours per week, approved in advance by his sentence supervisor, for the purpose of attending to personal needs.

[35] Additionally, pursuant to the Criminal Code, s. 161(1)(a), (b), he is prohibited from:

> (a) attending a public park or public swimming area where persons under the age of fourteen are present or can reasonably be expected to be present, a daycare centre, schoolground, playground or community centre.
>
> (b) seeking, obtaining or continuing any employment, whether or not employment is remunerated or becoming or being a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of fourteen years.

[36] The Prohibition under this order would be for the period of ten years.

[37] Upon the expiration of his conditional sentence order he shall be on a period of probation for thirty months on the terms and conditions that he shall:

1. Keep the peace and be of good behaviour.
2. Appear before the Court when required to do so by the Court.
3. Report to a probation officer at Halifax within five working days and as directed.
4. Remain within the Province of Nova Scotia unless written permission obtained.

5. Have no direct or indirect contact or communication with B.D., and not to be within 100 metres of the premises known to you, from time to time, to be her residence.

6. Make reasonable efforts to locate and maintain employment or an educational program as directed by his probation officer.

7. Continue any treatment/ counselling programs commenced under the conditional sentence order as directed by his probation officer.

8. Not have contact with or be in the presence of anyone under the age of fourteen years, except his own child, unless in the company of an adult person of at least 25 years old.

9. Not take or consume alcohol or other intoxicating substances or a controlled substance as defined under the ***Control Drugs and Substances Act*** with the exception of prescription medication, taken as prescribed.

[38] There shall be no victim fine surcharge.

[39] That is the sentence of this court. Sentenced accordingly.

(B) SOIRA Application

[40] Put succinctly, the purpose and principles of ***SOIRA*** are that the registration of sex offenders' information, with restrictive access, is required to assist the police in their investigation of sexual crimes. In addition to protecting the community and the offenders' privacy interests, such registration could reasonably expedite effective investigation of sex crimes and also could contribute to the offenders rehabilitation and communal reintegration. (See: s.2)

[41] First, however, I think that I should say that, in this case, there appears to be at play complex psychological factors which may have deep cultural underpinnings that call for an understanding and balancing of our society's cultural diversity. I say so particularly upon my examination of the comments of Dr. Angela Connors, in her submissions under the *Clinical Analysis of Sexual Offences* in her Report, at p.23:

> Mr. Mebrate's description of marital practices amongst various cultures of his country reflects that sexual contact with children is accepted under conditions of marriage. This indicates that sexualization of children, and sexual contact with children, is acceptable under certain circumstances, unlike in this culture.
>
> It is noted that Mr. Mebrate highlighted the fact that he grew up in a Christian family in an urban area where such early marriage practices are not followed;

> however, he also stated that within his own family an aunt had her first child at age 12. This indicates that Mr. Mebrate's personal familial experience supports seeing someone of 12 years as sexual. *It is considered likely that these experiences and considerations played a role in Mr. Mebrate's behaviour in the index matters;* however as he did not accept his responsibility in this matter, such could not be explored. [Emphasis added.]

[42] Further, she observed at p.25:

> Mr. Mebrate's description of a culture that considers anyone guilty of a sexual offence(and all his family by association) outcasts, provides an extremely persuasive personally meaningful reason not to admit guilt. This is further complicated by Mr. Mebrate's desire to become a citizen of this country. It is unlikely that there will be a shift in acceptance of responsibility given the perceived repercussions of doing so which extends beyond his potential personal legal sanctions.

[43] In any event, as I found the accused guilty of a "designated offence" (sexual assault) as defined under s.490.011(1), I am obligated to make the ***SOIRA*** order pursuant to s.490.012(1). To this end I have been referred specifically to three appellate level decisions on the exercise of my discretion under the exemption provision of the ***Code***. These cases are ***R.v. Redhead***, [2006] A.J. No. 273, 2006 ABCA 84. (Application for leave to appeal to the S.C.C., dismissed (without reasons) August 24, 2006 [2006] S.C.C.A. No.187), ***R.v. Cross***, [2006] N.S.J. No. 87, 2006 NSCA 30, and ***R.v. M.(D.B.),*** [2006] N.S.J. No. 45, 2006 NSCA 18, 205 C.C.C. (3d) 161.

[44] In ***Cross***, *supra*. , the Court considered whether a ***SOIRA*** order constituted a "punishment" within the meaning of the ***Canadian Charter of Rights and Freedoms,*** s.11(i) and within the context of a constitutional challenge to the retroactive application of s.490.012. Noting several factors (para. 84), the Court held that a ***SOIRA*** order was not "punishment" within s.(i) of the ***Charter*** as, amongst other things, it was "not a direct consequence of conviction . . . " Furthermore, such an order only can be made on the application of a prosecutor and a judge cannot make a ***SOIRA*** order without that application.

[45] However, after observing at para.84:

> 10. The consequences of an order do not align with the traditional indicia of punishment – there is no confinement or other that a trivial interference with liberty; there is no stigma attached nor a general deterrent effect– . . .

[46] The Court, nonetheless, added at paras. 85 and 86:

> 85 There may be an unusual case where, due to the unique circumstances of the offender, the impact of the order could constitute the "severe handling" or "harsh treatment" that is characteristic of punishment. In such an event, the exemption provision would suffice to relieve the offender from such effect:

> 490.012(4) The court is not required to make an order under this section if it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the Sex Offender Information Registration Act.

> 86 The exemption section succeeds in striking an appropriate balance between individual rights and societal interests. It is a "constitutional compromise" which, in this context, addresses the need to assist and streamline criminal investigations yet protect offenders from the unfairness of subjecting them to harsh or severe sanctions not contemplated at the time of the offence (see R. v. Araujo, [2000] 2 S.C.R. 992 at para. 26; R. v. Duarte, [1990] 1 S.C.R. 30 at para. 23 to 25; and R. v. R.C., supra, at para. 21). *I am satisfied that the exemption clause provides adequate protection in the exceptional situation where the impact of the order on the offender could otherwise be punitive.*[Emphasis added.]

[47] Thus, the test that I must apply concerning an exemption to ***SOIRA*** is as enacted in ***Criminal Code***, s. 490.012 (4). Here, I must consider, before imposing such an order, the impact that it would have on the accused, the public interest in protecting society through the effective investigation of crimes of a sexual nature and whether the impact on the accused would be grossly disproportionate to the public interest. See also: , ***R.v. R.E.M.***, [2005] B.C.J. No.1191, 2005 BCSC 698, ***R.v. Have***, [2005] O.J. No.388, 2005 ONCJ 27, ***R.v. A.G.N.***, [2005] B.C.J. No.2781, 2005 BCPC 582, ***R.v. Randall***, [2006] N.S.J. No.348, 2006 NSPC 38. But, it would also appear that under the ***Cross,*** *supra.,*

decision I can consider whether the "impact on the accused could otherwise be punitive."

[48] Here, the Crown, has argued that the public interest was the same in every case and relied chiefly on ***Redhead***, *supra. ,* where the Court held that the circumstances of the offence or the absence of a record were not determinative factors in imposing a ***SOIRA*** order. Likewise, this case expressed the opinion that in the absence of any "disproportional impact" the order is mandatory. Also, given "the underlying assumption that a sex offender will re-offend," registration is not confined or "related to the investigation of predatory offenders with a disposition to commit similar offences in the future" but recognizes the need to protect victims of any age from "predictable repetitive behaviour of sexual offenders."

[49] Consequently, according to ***Redhead,*** *supra.,* factors such as low risk to re-offend, lack of criminal history, severity of the offence, acceptance of responsibility for the offence and a willingness to undergo treatment may not be proper assessment considerations as they were not the clear literal intention of

the legislation. Thus, the focus of my inquiry should be "not on whether there is a public interest in having the offender registered, but rather whether the impact on the offender would be grossly disproportionate to the public interest." Furthermore, the accused must adduce evidence to show gross disporportionality.

[50] Even so, ***Redhead***, *supra. ,* also mentioned that, in assessing the impact of the order on the privacy and liberty interests of the offender, it may be necessary to consider his or her unusual characteristics. For example, at para. 31:

> 31 Other factors might include unique individual circumstances such as a personal handicap, whereby the offender requires assistance to report: R. v. J.D.M., [2005] A.J. No. 1258, 2005 ABPC 264 at para. 48. Courts have also considered the intangible effects of the legislation, including stigma, even if only in the offender's mind; the undermining of rehabilitation and reintegration in the community; and whether such an order might result in police harassment as opposed to police tracking: J.D.M., ibid.; A.G.N., supra at para. 21; R. v. Have (2005), 194 C.C.C. (3d) 151, 2005 ONCJ 27 at para. 12.

[51] Notwithstanding ***Redhead***, *supra*., in ***M.(D.B.).*** *supra*. , the Court, because of the similar legislative structures between s.490.012 (1) and s. 487.051 (1)(a) that deals with primary designated offence DNA orders, adopted the principles pronounced by Cromwell, J.A., in ***R.v. Jordan*** (2002), 200 N.S.R. (2d) 371,

[2002] N.S.J. No.20 (QL.), 162 C.C.C. (3d) 385 (C.A.), when considering the law applicable to the granting of DNA orders. It noted that the ***Jordan*** decision was cited with approval and endorsed by the Supreme Court of Canada in ***R.v. R.C.***, [2005] S.C.J. No.62 (QL.), 201 C.C.C. (3d) 321, per Fish J., at paras. 29-31:

> 29 The court must consider the impact of a DNA order on each of these interests to determine whether privacy and security of the person are affected in a grossly disproportionate manner. This inquiry is highly contextual, taking into account not only that the offence is a primary designated offence, but also the particular circumstances of the offence and the character and profile of the offender.
>
> 30 Some of the factors that may be relevant to this inquiry are set out in s. 487.051(3): the criminal record of the offender, the nature of the offence and the circumstances surrounding its commission, and the impact such an order would have on the offender's privacy and security of the person (*Jordan*, at para. 62).
>
> 31 This is by no means an exhaustive list. The inquiry is necessarily individualized and the trial judge must consider all the circumstances of the case. What is required is that the offender show that the public interest is clearly and substantially outweighed by the individual's privacy and security interests.

[52] However, I note that in ***R.v. Turnbull***, [2006] N.J. No. 328, in discussing the principles set out in ***Redhead***, *supra.* , Wells C.J.N.L., speaking for the Court opined at paras. 32 and 33:

> 32 With great respect to the Alberta Court of Appeal, that creates an insurmountable barrier to exemption. It is inconceivable that the adverse impact of registration on any offender could be so extreme as to be grossly disproportionate to the value of having a sex offender registration system for protecting society through effective investigation of crimes of a sexual nature.

> Nevertheless, I can readily understand how, on the wording of subsection (4), the Alberta Court of Appeal reached the conclusion it did. That cannot, however, be taken to be the standard intended by Parliament for the simple reason that entitlement to exemption could never be established. The impact on any individual could never be so great as to outweigh, let alone be grossly disproportionate to, the public interest in having a sex offender registration system. Parliament must be taken to have intended that an applicant for exemption had, at least, some possibility of establishing gross disporportionality.
>
> 33 There is no conceivable way that an offender could establish gross disproportionality between:
>
> > the impact on him or her of making an order requiring registration, and
> >
> > the public interest in protecting society through the effective investigation of crimes of a sexual nature
>
> without establishing either: no impact, or a very low level of impact, on the public interest of his or her not being registered. That, essentially, requires consideration of such factors as: the record of the offender; the nature of the offence; circumstances surrounding the offence; whether the offence was committed many years earlier and the record of the offender in the interim; and any other factors bearing on the potential impact of that specific offender not being registered.

[53] Thus, it seems to me that, on the binding Nova Scotian authority of ***M.(D.B.),*** *supra*., that adopted ***R.C.*** that approved ***Jordan,*** and which is supported by ***Turnbull***, *supra*., the inquiry under s.490.012(4) is contextual in nature and I can consider the circumstances surrounding the offence and that of the offender in deciding whether the public interest "is clearly and substantially outweighed by the [accused] privacy and security interests."

[54] Furthermore, I think, from a reading of the cited cases, that, in the balancing of interests, particularly in our ***Charter*** era, s.490.012(4) has preserved the court's residual constitutional discretion on whether or not to grant an order, with reasons. (S. 490. 012 (5)). In other words, the court does not rubber stamp the Crown's application, as seemed to have been suggested in the case at bar, but, as was put by Dickson J., in ***Beauregard v. Canada***, [1986] 2 S.C.R. 56 at para.28:

> 28 ... the enactment of the Canadian Charter of Rights and Freedoms (although admittedly not relevant to this case because of its date of origin) conferred on the courts another truly crucial role: the defense of basic individual liberties and human rights against intrusions by all levels and branches of government. Once again, in order to play this deeply constitutional role, judicial independance is essential.

[55] Nonetheless, the focus on protecting the public interest is that the registration of information of sex offenders permits the police to track them and to effectively investigate sex offences. Therefore, in assessing the public safety, I may also consider the effectiveness of the registration of the offender in the investigation of future sex related crimes and general crime prevention. See: ***Have***, *supra*., at paras. 15,16. In addition, as was put by Cromwell J.A. in ***Jordan***, *supra*., at para. 75:

> ... individualized grounds for belief that the offender will reoffend are not required and their absence, in general, will not, therefore, weigh very heavily against the making of the order. On the other hand, if the offender persuades the judge that the likelihood of recidivism is low, this will be entitled to due weight in the overall assessment of whether the impact of the order would be grossly disproportionate.

[56] In summary therefore, in my opinion, the core principle that emerges from the cases is that, in weighing, assessing and balancing the interests, there is a paradoxical correspondence between the crime and the criminal. Although this principle appears to be evolving, at present, it holds that it is axiomatic that because of the varied types of sexual crimes and sexual offenders it is necessary to assess each case in its own context and to consider any peculiar characteristics of the offender.

Application of Principles to the Case at Bar

[57] The accused, at the time of the offence was thirty-two years old with no criminal record. He touched the breast and vaginal area of B.D., over her clothing for a brief moment when he was alone with her in the store. There may have been some element of adolescent infatuation, as I have found, or as

suggested by Dr. Connors, which was not explored or expanded upon, an expression of a deeper cultural sub-textual syndrome.

[58] Although the accused was a stranger to B.D., in the context of the offence, there is no suggestion that he is a predator, a "hunter," or a paedophile although he may be of some risk to "young inexperienced females in the prepubescent and older prepubescent age." Here, however, there was no gratuitous violence or attempt at confinement or coercion, and, contact ceased immediately when it became apparent to the accused that his touching was inappropriate.

[59] Thus, it seems to me, and I find, on all the materials before me and on the total evidence, that Dr. Connors' comments concerning his behaviour, in the index case, were in light of the self-reported culture of his origin rather than of him as an individual. Therefore, those non-anthropological comments, in my opinion, should not be considered as evidence of his character or general disposition. See: ***R.v. Mohan***, [1994] S.C.J. No.36, [1994] 2 S.C.R. 9. Also, I say so because collateral sources who knew him since his arrival in Canada, considered the offence as out of character to him and of his local cultural

community. Moreover, his risk assessment results indicated that he was at a moderate to low risk for recidivism. Additionally, with all respect, the test for registration under the ***SOIRA*** is not mere prudence but rather an analysis pursuant to the criteria set out in s.490.012(4).

[60] In any event, the accused has submitted that he is a stateless person who arrived in Canada in March 2003 after a reported period of five years in an oversees detention camp. He is attempting to establish himself in Canada through working at many part-time jobs and volunteer work while looking after an infant child on weekends. He is pursuing his educational goals to achieve and establish a stable, respectable and full integration into his newly adopted country. Additionally, he is currently experiencing many stressors in his life that involves medical intervention.

[61] Despite his conviction for and now a record of a sexual assault, he nonetheless has submitted that he is a first offender with no prior offence of a sexual nature and that the risk of recidivism is moderate to low. Therefore, any concerns can be addressed and be alleviated by a strict sentencing regimen.

[62] However, in terms of his everyday existence, the impact of registration as a sex offender, would be punitive. Likewise, it would be grossly disproportionate to the public interest in that it would psychologically and literally make him and his family outcasts not only in his local community but also in the general community and would adversely impact upon him acquiring citizenship. Further, given his peculiar cultural conditioning concerning sexual crimes, registration would undermine any rehabilitative efforts and impact negatively on his rehabilitation and reintegration into the community.

[63] Also, he may require to locate to seek employment and he would carry a stigma that would cause him and his family grief. Additionally, every time there is a sex crime in his neighbourhood his right to privacy would be affected as contact by the police could reveal to his employer and neighbours that he is on the registry. Thus, the net effect, to him, trying to come to terms with the many nuances of his new environment, when added to his prior experiences, would be perceived as police harassment rather than as police tracking.

[64] In the result, I conclude and find on the total evidence before me that his conduct was not predacious and that he was neither a pedophile nor a hunter.

Instead, his conduct, in my opinion, in the set of circumstances, was contextually one of poor judgment. Even so, I find that it was an unacceptable and an inappropriate interference with the sexual integrity of B.D.

[65] Additionally, I conclude and find, on the reports before me and on the submissions of counsels, that there is the likelihood of a moderate to low risk of recidivism; he does not pose a genuine predacious risk to the community and that registration, to him and his family, in his peculiar set of circumstances as noted above, would be a stigma and would also be punitive. Moreover, the value of registration, in his case, to protect the public interest by the effective investigation of sexual crimes, on the facts, and, in the circumstances, and, in my opinion, is minimal.

[66] As a result, I am satisfied that the accused has shown that he should be exempt from the ***SOIRA*** order as the impact on his privacy or liberty on him registering would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature. Accordingly, I decline to make the order.

J.