Date: 20070226
Docket: 1500033, 1500034

IN THE PROVINCIAL COURT
Cite as: R. v. D.W.M., 2007 NSPC 12

HER MAJESTY THE QUEEN

- v -

D. W. M.

DECISION

HEARD BEFORE:	The Honourable Judge Carole A. Beaton
PLACE HEARD:	Amherst, Nova Scotia
DECISION HEARD:	February 26, 2007
WRITTEN RELEASE OF ORAL DECISION:	March 30, 2007
COUNSEL:	Bruce Baxter, Crown Attorney Rob Gregan, Defence Counsel

BEATON, J.P.C., Orally

[1] Mr. M. is before the court for disposition in relation to two offences occurring between the 6th and the 7th of January, 2005. Mr. M. has been convicted of touching Meghan M., his niece, a person under the age of fourteen years, for a sexual purpose contrary to s. 151(a) and he has also been convicted on the same date of having incited Meghan M., a person under fourteen, to touch him for a sexual purpose contrary to s. 152 of the **Criminal Code**.

[2] I heard three days of evidence at the time of trial. I've had the benefit of reviewing the Pre-Sentence Report. I've considered the contents of exhibit numbers 1, 2, and 3. I've read the Victim Impact Statements and I've listened to the mother of the victim read those statements in court this afternoon. I've heard the submissions of counsel and reviewed the case law referenced by counsel.

[3] The position of the crown is that Mr. M. should be the subject of an order of custody for three years in duration - federal time. The position of the defence is that Mr. M. should be the recipient of a conditional sentence and/or probation in relation to these matters.

[4] The mitigating factors, as I see them, are that Mr. M. has no prior record and what can be characterized for the most part as a positive Pre-Sentence Report, positive in the sense that he received a very favourable profile from individuals in the community and because of any absence of any prior record he does not seem, on the face of it, to be a threat in the community. Finally, and I hesitate to say this - I don't want to leave anyone with the wrong impression, but it has to be addressed - counsel will understand what I mean in a strictly legal sense when I say that these offences, both offences, occurred at the same time, so the principle of totality applies to them. Not diminishing the nature of Mr. M.' acts and not diminishing the facts that these acts were committed on a child, they are not, on the scale of offences that the court is unfortunately asked to deal with time and time again, the most grievous of assaults that could be perpetrated upon a child. I say that bearing in mind that Meghan is only a child and Mr. M. was a person who had control over her at the relevant time. He's a family member, he's an adult, she's a child and he was acting as her babysitter at the time the offences occurred and I will have more to say about how the court should view the abuse of a child in a moment. I'm cognizant of the comments made by Justice Bateman in the decision *R v. Weaver***,** [1993], N.S.J. No. 91, (N.S.S.C.) as cited by my colleague

Judge Buchan in *R. v. R.M.F.* (2005), N.S.P.C. 46. To provide some context, Judge Buchan in sentencing an individual who was the father of the victim, who had for the second time around abused his daughter, Judge Buchan imposed a period of two years custody. Mr. F. had previously been the recipient of a conditional discharge in relation to sexual activity involving the touching of his daughter and another female relative but the second time around, perhaps not surprisingly I might add, Judge Buchan found that custody of two years was the only appropriate disposition. In the course of the decision in *R.M.F.* Judge Buchan at paragraph 14 quoted from *Weaver* and the words of Justice Bateman, as she then was, of the Nova Scotia Supreme Court, as found at page 5 of that decision:

> Sexual offences range from touching, which is generally referred to as a low end assault, to intercourse, which is considered more serious. I have difficulty subscribing to the notion, particularly in sexual assaults involving children, that the extent of the interference so called, for example, touching as opposed to actual intercourse, necessarily speaks of less trauma to the victim. This factor must be weighed in the context of actual victim impact information. Absence such specifics on impact, I agree that Courts generally presume less trauma for what is called, a low end assault. It is clear, however, from the victim impact information presented today, that these crimes have had a significant impact upon all victims. This somewhat dispels the notion that "touching" carries less trauma than intercourse.

[5] I raise that because we have here, for lack of a better description, the aggravating element of a traumatic event for a child, within the context of the mitigating factor that it's not the worse, the most heinous of assaults, it is, nonetheless, an assault on a child and clearly involved a complaint by the child of digital penetration by the accused.

[6] This matter involved Mr. M. victimization of a child of four years and ten months at the time of the offence. I'm certainly prepared to recognize that, broadly speaking, this is an offence for which the age of the child and her relationship vis-a- vis the victim is an aggravating feature, even if the Criminal Code did not require me to consider it as such. Clearly, the code does require me to consider the matter under s. 718 and I do so.

[7] I should say as well that it does not escape me, speaking perhaps more broadly about the offences and the impact they've had not only upon the victim herself, that this is a matter which has brought great division to the extended family of Mr. M.. That was abundantly clear in the evidence that was provided at the time of trial. I note parenthetically that I can't ignore that Mr. M. was subject of a prosecution, and if I'm not mistaken I found him not guilty in relation to an

allegation of breach of release conditions by having contact with the victim's parents. I raise this not to rehash that decision, but again that matter clearly demonstrated to the court that the revelation of these allegations by the victim to her parents have had a great deal of impact on this entire family. The sentence that this court imposes is not in any way, shape or form intended to address the issues outstanding in this family. If that happens, it's collateral to what the court's role is and I can't imagine that anyone could leave here today with any sense of a positive feeling, simply by virtue of the sentencing process, given the offence that has occurred.

[8] Mr. M. is a brother, an uncle and a family member. The sentence the court imposed on him is going to affect him personally and it can't help but affect his family, however Mr. M. will receive a sentence because he abused his niece and that clearly had an impact on his niece. As to other members of the family, I seriously doubt that anything the court says or does this afternoon is going to assist in repairing those divisions and anybody hoping that the court would do that or address that will probably be feeling left short.

[9] The Pre-Sentence Report reveals that Mr. M. is an offender who comes before the court with some particular challenges and the sentence that the court imposes has to be tailored to the offender in the context of his history and the offences as they occurred.

[10] Mr. M. has a history of education programming that indicates he attended a special education program. With a grade seven education he left school around the age of seventeen. He says he had literacy problems but reports he is able to read and write. He is the recipient of a disability pension. He does odd jobs, including working around the house - physical tasks such as shovelling snow and piling wood - and he resides with his mother. He says that he used to have some social interests, such as bingo and shopping, but he tends now to stay at home.

[11] As I mentioned earlier, individuals in the community speak positively of Mr. M. as do some family members. Individuals in the community who offered their comments for the pre-sentence report do not feel that Mr. M. has a negative reputation in the community or that he presents any danger to the community. Indeed, Mr. Reid opined on page 6 of the report that he would be fearful for Mr. M. if he were to be placed in a correctional facility.

[12] The author of the report discusses programming that might be available to Mr. M. and the cost of such programming and I note that the Assessment of Community Alternatives/ Resources as contained on page 7 was provided in advance of Dr. Kelln's report, which is contained in exhibit 1.

[13] Dr. Kelln's report reveals that Mr M. is not a good candidate for traditional specialized sex offender programming because of several factors: Mr. M. has a grade three reading level and a grade two writing level and his cognitive limitations would significantly interfere with his ability to participate in the programming, as I paraphrase from Dr. Kelln's report. As a result says Dr. Kelln, Mr. M. could only be a candidate for individual programming which would be very costly and very difficult to obtain, but furthermore Mr. M. is not a candidate for that programming because he denies the offences and Mr. M. denial of the offences is also recounted in the Pre-Sentence Report.

[14] Dr. Kelln also notes that he predicts that Mr. M. would likely score in the low range of having potential to be a repeat offender and that doesn't negate the

importance of programming but makes the point that it is not as crucial as it would be if Mr. M. was characterized as being a high risk to re-offend.

[15] In relation to the two points I've just raised, the question of therapy and the question of Mr. M. position in the community, I want to make two things clear. First, that Mr. M. might be an individual who would have a difficult time in a federal custodial setting or any other kind of custodial setting is not in and of itself justification for not imposing that kind of sentence. If it were, I daresay that some considerable percentage of the individuals who do receive custodial sentences would otherwise never be a candidate, if the only criteria was how they were going to cope in custody. The principles of sentencing can't be held to ransom simply because of Mr. M.' cognitive difficulties. Most certainly the jails and penitentiaries across this county are filled with people who have cognitive challenges and that is one of the challenges of providing meaningful rehabilitation to those people inside the custodial setting. Secondly, I want to make it clear that Mr. M., while he denies these offences, was found guilty by the court and the court moves forward on the basis of those determinations. I'm aware the conviction is under appeal but that is not for me to consider in assessing what is an appropriate sentence. That Mr. M. says he didn't do it is no reason for the

court to throw up its hands and say well gosh, he's in denial so he can't have any programming. That's not the way it works. There are any number of people who are sentenced to probation for example, and I use it only as an example, and told to participate in treatment, counselling, assessment and programming as directed by their probation officer and they move forward on the basis that they didn't do it and they still have to do the things the court tells them to do. So, I'm very cognizant of what Dr. Kelln says in that respect and I see how it creates a real road block to having Mr. M. engage in counselling, but it's not going to persuade me one way or another that I should or shouldn't do any particular thing simply because of the element of denial on the part of Mr. M.. To summarize that train of thought, the court can't ignore the need for rehabilitation simply because Mr. M. says these offences didn't happen.

[16] What causes me more concern, quite frankly, is Dr. Kelln's assessment that Mr. M.' cognitive deficits compromise his capacity to engage in meaningful sex offender counselling in the traditional sense in which it is offered.

[17] The defence urges me that one of the factors I should consider is that Mr. M. is of assistance to his mother, who is not in good health, and I inferred that

those comments were being made in support of the argument that a conditional sentence would be appropriate. As I've had occasion to say in the past, there comes a point where, for a variety of reasons, people need to serve a sentence of custody and because they have children at home or a partner at home who is totally dependent on them doesn't mean that they can be excused from the sentence that they would otherwise attract. Likewise in the same way, Mr. M. can't be excused from a sentence that he would otherwise attract simply because he needs to help his mother at home.

[18] Defence counsel has referred me to three decisions, the *S.P.C.* decision of Judge Stroud, the *S.L.C.* decision of Judge Tufts, and the *A.J.A.* decision of Justice Cacchione. The Crown has pointed out that in the context of all three decisions they pre-date the enactment of s. 718.01 in 2005 and I appreciate that distinction. In all three cases the individuals received a conditional sentence to be served in the community and in *S.P.C.* and *A.J.A.* the individual had no prior record. To put it broadly, the upshot of all three cases is that the activity was of a more invasive nature and/or occurred over a longer period of time than the offending activity with which the court is concerned here and presumably that is why the defence has raised them, to make the argument that worse offences have attracted

conditional sentences for people with worse situations or situations that equate to that of Mr. M. in terms of prior record.

[19] In terms of what has been happening more recently since the 2005 enactment of 718.01, I've considered two decisions. The first is a very recent decision of the Court of Appeal, *Percy Garfield Oliver v. Her Majesty the Queen* [2007], N.S.C.A. 15. In that case the Court of Appeal upheld the decision of my colleague, Judge Digby, to impose a sentence of: two years custody followed by one year probation, a firearms prohibition, a DNA order and SOIRA order. The Court of Appeal was asked to review that sentence and replace it with a conditional sentence on the basis that Judge Digby had erred in not imposing a conditional sentence. The Court of Appeal dismissed the appeal and noted that the trial judge had not ignored the evidence concerning the appellant's intellectual deficits or the need for appropriate therapy and counselling, but denunciation and deterrence were to be given the highest ranking among all of the principles of sentencing in cases involving the abuse of children as per s. 718.01. In that case, the accused pled guilty to three incidents of sexual intercourse with a twelve year old which resulted in her impregnation and the delivery of a baby. It's clear that

those fact circumstances are much more grievous than those involved here, again within the context of the aggravating aspect of any assault on a child.

[20] The other decision which I have had opportunity to consider before today in contemplating this hearing is *R. v. K.R.D.* , [2005] N.S.C.A. (13). In that case the accused was convicted of sexually assaulting his daughter. The assaults occurred over a five year period when the victim was between the ages of five and ten and involved acts ranging from fondling to oral sex. My colleague, Judge Ross, imposed a conditional sentence and the Court of Appeal was asked to review that decision on the basis that the crown argued that a community sentence could not possibly meet the goals of denunciation and deterrence where a father in a position of trust had on numerous occasions preyed upon his own child for sexual gratification. The Court of Appeal reviewed the manner in which Judge Ross analyzed the factors in coming to his decision and upheld his decision to impose a conditional sentence. I note with interest, as defence counsel raised the ***Winters*** decision this afternoon, in endorsing the decision of Judge Ross the Court of Appeal also mentioned the ***Winters*** decision. At paragraph 15 the court said:

> This court as well has confirmed community sentences for similar offences; again in special circumstances. See *R. v. Winters* [1991] N.S.J. No. 49.

[21] The other interesting aspect which defence counsel touched upon was this question of the message that is sent to the community when somebody in a small community, well known, like Mr. M., receives a conditional sentence. The Court of Appeal also talked about that in *K.R.D.* and had this to say at paragraph 16:

> Finally, Judge Ross recognized that this offender would be serving his sentence in a relatively small community. As such, the goals of denunciation and deterrence are more likely to be achieved. He stated:
>
> > "Other cases, including some in this court, have echoed that sentiment, that in smaller communities a conditional sentence of so called house arrest can have a more stigmatizing and negative and denunciatory effect than it would in a large city where people are more anonymous and where people don't understand what their neighbours are doing and it's not obvious in other words, that somebody is home serving a criminal sentence for a sexual assault. In a smaller town such as the one we're living in here, I think it would be widely known, and that is an aspect of the sentence that is worth bearing in mind and considering whether that form of sentence is appropriate."

[22] So, the Court of Appeal makes room for the notion that in some respects, although in my view it should likely be a very narrow application of the notion, when looking at the question of

> denunciation and deterrence the court may consider the community in which the sentence is or may be served.
>
> [23] There's no doubt that these matters have had, in addition to the family divisions that I discussed earlier, an impact on the victim. It is not surprising at all that any child of four years and ten months of age at the time of the commission of the offence would be a child who would be today, some two years later, still suffering difficulty with respect to attachment to male family members and with respect to being fearful in the absence of her parents. One can, as the crown put it, only hope that with time this young victim will be able to overcome the trauma she has experienced as a result of these events and one would hope that her parents, who have clearly been diligent in seeking out counselling for her, would continue to support her and I certainly don't have any reason to believe that they won't.

[24] For the reasons that I've discussed and set out herin, given the presence of the mitigating and the aggravating factors and bearing in mind the principles discussed in the *Proulx* decision of the Supreme Court of Canada , I am persuaded

that Mr. M. most certainly must be the subject of a custodial sentence. Given the very nature of the offences, that is in my view, inescapable. But I am also persuaded that under the circumstances, for this particular offender, the emphasis on denunciation and deterrence and the safety and protection of the public will not be compromised if Mr. M. serves that sentence in the community. So, I am going to impose a conditional sentence and it is going to contain a number of terms.

[25] I am also going to grant a DNA order because given Mr. M.' involvement in these offences and the fact that they are so called primary designated offences any expectation of privacy that he had, in keeping with the principles discussed in the *Hendry* decision of the Supreme Court of Canada, has in my view been diminished, most certainly to the extent that he should be the subject of a DNA order.

[26] Also, and counsel don't have any particular parting of the minds on this point, there does need to be, in keeping with the principles in the *Cross* decision, the imposition of a SOIRA order for a period of twenty years as the code mandates it.

[27] I'm certainly convinced as well that a s. 161 order, which I must consider, should be imposed and in my view that order should be for a period of ten years. It will prohibit Mr. M. from attending a public park or public swimming area where persons under the age of fourteen years are present or can reasonably be expected to be present or any daycare centre, school ground, playground or community centre. The only exemption to that will be if Mr. M. is at all times during his attendance at those locations in the immediate presence of an adult over twenty-one years of age. Under s. 161(1)(b) for the same period of time, Mr. M. is prohibited from seeking, obtaining or continuing any employment, whether or not it is remunerated, or from 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. Under s.161(1)(c) for the same period of time, ten years, he is prohibited from using a computer system within the meaning of subsection 341.1(2) of the Criminal Code, for the purpose of communicating with a person under the age of fourteen years.

[28] The Conditional Sentence which I impose will be for a period of two years less a day and it will be followed by a period of twenty-four months probation.

[29] The Conditional Sentence that I am imposing is concurrent on each count one with the other. Mr. M., I am ordering you to serve a sentence of custody in the community and these are the conditions:

> You will keep the peace and be of good behaviour.
>
> You will appear before the court when required to do so.
>
> You will report to a sentence supervisor at 30 Church St., Amherst, Nova Scotia before 4:30 p.m. on Wednesday, February 28th, in person and thereafter at such times and in such manner as your sentence supervisor may direct you to do from time to time, including but not limited to supervision by electronic means if so directed by your supervisor.
>
> You will remain within the Province of Nova Scotia unless you have written permission to be elsewhere obtained from you supervisor in advance.
>
> You will notify your supervisor within 48 hours of any change in your address within the Province of Nova Scotia, your telephone number, your employment or occupation circumstances.
>
> You will not take or consume alcohol or other intoxicating substances.
>
> You will not take or consume a controlled substance as defined in the Controlled Drugs and Substances Act except in accordance with a physician's prescription or a legal authorization to do so.

[30] I insert those two conditions even though there is no suggestion that alcohol or drugs play a role here, because in my view due to the nature of the offences to have Mr. M. limited cognitive skills impaired by alcohol or a drug could present further problems.

> You will participate in and cooperate with and successfully complete any and all assessments, counselling, treatment or programming directed by your supervisor.

[31] I am going to leave it at that because the supervisor is in the best position to steer Mr. M. in the direction of programming and rehabilitation efforts without me specifically enumerating them to Mr. M., because quite simply if his supervisor is able to access for Mr. M. meaningful sex offender therapy or programming, then I'm sure the supervisor knows how to go about doing that and that it will be done.

> You will not associate with or be in the company of any person under the age of fourteen years unless an adult of twenty-one years of age or greater is immediately present at all times.

> You will have no direct or indirect contact or communication with Meghan M., Perry M. or Kim Arsenault except through legal counsel.

> You will not be on or within 10 meters of the premises known as the residence of Meghan M. as it may be from time to time.

For the first fourteen months of the conditional sentence you will remain under house arrest, which means that beginning this evening at 9:00 p.m. and continuing through to 11:59 p.m. on the last day of the fourteenth month of your sentence order you will remain in your residence at all times. The only exceptions to the house arrest are when you attend at regularly scheduled employment of which your supervisor is aware of in advance and travel to and from by the most direct route, or when attending a regularly scheduled education program of which your supervisor is aware of in advance and travel to and from by the most direct route, or when dealing with a medical emergency involving you or a member or your household and travel to and from by the most direct route, or when attending a scheduled appointment with your legal counsel, or your supervisor and travel to and from by the most direct route, or when attending court at a scheduled appearance or under subpoena and travel to and from by the most direct route, or when attending a counselling appointment, a treatment program or any other rehabilitation program as directed by your supervisor and with the permission of your supervisor and travel to and from by the most direct route, or when in a residential treatment program, if your supervisor is advised in advance where you will be, and you give your supervisor permission to access that information from the facility, if your supervisor chooses to do so, and for a period of not more than three consecutive hours per week, approved in advance by the supervisor, for the purpose of allowing you to attend to your personal needs. For the purposes of this order, you residence is defined as 41 Pitt Road, Joggins, Nova Scotia, being the residence of Vera M..

From the first day of the fifteenth month of the order to the expiration of the order you will be under a curfew daily in your residence from 7:00 p.m. until 7:00 a.m. the following morning. Again the residence is defined as the dwelling house at 41 Pitt Road and the lands surrounding it within five meters of the dwelling. Again the exceptions to the curfew are when you are attending at regularly scheduled employment of which your supervisor is aware of in advance and travel to and from by the most direct route, or when attending a regularly scheduled education program of which your supervisor is aware of in advance and travel to and from by the most direct route, or when dealing with a medical emergency involving you or a member of your household and travel to and from by the most direct route, or when attending a counselling appointment, a treatment program or any other rehabilitation program as directed by your supervisor and with the permission of your supervisor and travel to and from by the most direct route.

You will prove your compliance with the curfew by presenting yourself at the entrance of the residence in the event that a peace officer or supervisor attends there to check on your compliance.

[32] Do you understand the terms of the sentence order, Mr. M.? Do you understand what I've told you that you have to do?

[33] **MR. M.:** Yes.

[34] Following the expiration of the Conditional Sentence, you will be on probation for a period of twenty-four months. The terms of the Probation Order are:

> You will keep the peace and be of good behaviour.
>
> You will appear before the court when and if required to do so.
>
> You will reside within the Province of Nova Scotia and not live outside the Province unless you have the permission of your probation officer received in advance.
>
> You will within seven days after the expiration of the conditional sentence report to your probation officer at 30 Church St., Amherst, Nova Scotia and thereafter you will report at such times and in such manner as your probation officer may direct you to do from time to time.

> You will notify your probation officer within 48 hours of any change in your name, address, employment circumstances or telephone number as those changes may occur from time to time.
>
> You will not take or consume alcohol or other intoxicating substances.
>
> You will not take or consume a controlled substance as defined in the Controlled Drugs and Substances Act unless you have a physician ‘s prescription or a legal authorization to do so.
>
> You will not own, possess or carry any weapons, ammunition or explosive substances.
>
> You will not associate with or be in the company of any person under the age of fourteen years unless an adult, twenty-one years of age or greater, is immediately present at all times.
>
> You will have no direct or indirect contact or communication with Perry M., Meghan M. or Kim Arsenault except through legal counsel.
>
> You will not be on or within ten meters of the premises known as the residence of Meghan M. as that may be from time to time.
>
> You will participate in and cooperate with and successfully complete any and all assessment, counselling, treatment or programming or any other rehabilitation program as you may be directed to do by your probation officer from time to time.

[35] Do you understand the terms of the probation order, sir? Do you understand what you have to do on probation? Alright, I’ve just listed to you a whole bunch of things you need to do, do you understand what you need to do?

[36] **MR. GREGAN:** I will explain it to him as well, Your Honour, before he leaves today.

[37] Okay, thank you, and the Justice of the Peace before whom he signs will explain it to him as well.

[38] **MR. M.:** Does that mean I have to stay in the house?

[39] Yes you do, sir.

[40] **MR. M.:** For how long?

[41] You have to stay in the house for fourteen months but you have some opportunities to be out of the house as well.

[42] **MR. M.:** What time?

[43] Mr. Gregan will review all that with you, okay, and you need to understand Mr. M. if you violate the terms of your sentence or your probation order, you may be brought into custody and required to serve the sentence inside the jail or you may be charged with breach of probation. I appreciate that is a tremendous amount of information to deliver to a person who has a grade two and grade three level of reading and writing but it has to be said and I know it will be said to him again after we've finished.

[44] Mr. Baxter, I did not ask this question earlier, and I apologize, did the crown have any conditions that you wanted me to consider in light of the crown's position on disposition which was not for a conditional sentence.

[45] No, Your Honour.

[46] I think I addressed the DNA order and the SOIRA order and the prohibition order. Mr. M. will need to remain until the paperwork has been complete and reviewed with him and once that is done, then he is able to go.

J.P.C.