PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. E.S.M.*, 2017 NSPC 56

Date: 20170410
Docket: 8008815; 8008816 and 8008818
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

E. S. M.

Restriction on Publication: S. 486.4

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Chief Judge Pamela Williams, CJPC
Heard:	April 3, 2017, in Dartmouth, Nova Scotia
Decision	April 10, 2017
Charge:	156, 156 and 157 of the Criminal Code
Counsel:	Scott Morrison, for the Crown – April 3, 2017 Cheryl Byard, for the Crown – April 10, 2017 Brian Casey, Q.C., for the Defence

NOTICE OF BAN ON PUBLICATION

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CASE NO.: _____

BY ORDER OF JUDGE: _____

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x **Section 486.4 & 486.5**: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban stipulated in these Sections.

Details of Ban: _____

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□ **Section 517(1)**: At show cause hearings, the judge has made an order directing that the evidence taken, the information given or the representations made and the reasons, if any, given or to be given by the justice shall not be published in any document, or broadcast or transmitted in any way before such time as:

(a) if a preliminary inquiry is held, the accused in respect of whom the proceedings are held is discharged; or

(b) if the accused in respect of whom the proceedings are held is tried or ordered to stand trial, the trial is ended.

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□ **Section 539(1)**: At a preliminary inquiry the judge has made an order directing that the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way before such time as, in respect of each of the accused,

(a) he or she is discharged, or

(b) if he or she is ordered to stand trial, the trial is ended.

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By the Court:

Background

[1] This is a sentencing decision relating to historical sexual offences against children by a person in a position of trust. Defense counsel filed a book of cases and a forensic sexual behavior report. Crown counsel provided the case of *R. v. E.M.W.*, 2011 NSCA 87. This Court reserved decision, following a joint recommendation of 90 days' incarceration to be served intermittently, with two years' probation and several ancillary orders. One of the victims filed a Victim Impact Statement.

Facts

[2] On April 3, 2017, E. M. pleaded guilty to two counts of indecent assault against his nephew, W. M., which occurred over 35 years ago. He also entered a guilty plea to one count of gross indecency involving his niece, S. M. that occurred over 30 years ago. All offences occurred at Mr. M.'s residence at […] in Dartmouth.

[3] There were two incidents involving W. M., who was eight or nine years old at the time. Both incidents occurred in Mr. M.'s basement. In the first, Mr. M. wanted to teach W. how to ejaculate. He and his nephew fondled each other while lying side by side on the bed while naked. Eventually Mr. M. ejaculated on W.'s stomach. Afterwards they went upstairs and got cleaned up together. During the second incident, a month later, Mr. M. and W. were smoking hash and Mr. M. invited W. to do what they had done a month earlier. Mr. M. performed oral sex on W. and then W. performed oral sex on Mr. M. and Mr. M. ejaculated on his nephew's stomach and cleaned it off with a face cloth.

[4] One incident involved his niece, S. M. when she was between seven and nine years old, while in foster care at […]. She was laying on the couch with Mr. M. who was wearing a housecoat with nothing underneath. At one point, he pushed her off the couch and masturbated in front of her and her sister and he ejaculated. He said that the behavior was normal and that the girls should go to bed.

Victim Impact Statement

[5] In her Victim Impact Statement, S. M. describes the emotional impact that the crime had on her. She says that she attempted suicide at the age of 10. She ran away because of the incident and acted out inappropriately at a young age. She has no trust for anyone. She has lots of anger. She is over-protective of her children. Her relationship with her children's father fell apart because she was emotionally unavailable. From a physical perspective, she indicates that she continues to suffer from nightmares and flashbacks.

Sentencing Submissions

Circumstances of the Offender

[6] Mr. M. is now 67 years old and divorced. He lives alone in a seniors' complex. He is employed as a […]. He was between 30 and 32 years of age at the time of the offences. He has one prior conviction for sexual interference which occurred in March of 2007. On January 13, 2009, he was sentenced to a 90 day intermittent period of custody followed by three years' probation.

[7] Mr. M. successfully completed the 15 month Forensic Sexual Behaviour Program. Prior to taking the program, Dr. Angela Connors found Mr. M. at a low to moderate risk to re-offend. After completing the program, Dr. Connors commented that 'overall, Mr. M. can be said to have made excellent progress over the course of the program …'

[8] It is to be noted that the present charges pre-date by about 20 years the matter Mr. M. was sentenced for in 2009, and he has not offended since his diagnosis and treatment in 2009.

Circumstances of the Offences

[9] The offences involved touching of genitals, oral sex and masturbating in front of children. There was no digital penetration or intercourse.

[10] I am mindful of the principles of sentencing set out in s. 718, 718.1 and 718.2 of the *Criminal Code*. Denunciation and deterrence are primary considerations when imposing sentences on those who commit sexual crimes against children.

[11] As to the range of sentence, I am guided by the comments of Justice Fichaud in *R. v. E.M.W.*, 2011 NSCA 87 at paragraph 30:

> [30] Moving downward from the high end of the range in the cases, one sees incarceration sometimes more and sometimes less than two years, depending on the severity of the circumstances, for sexual assaults on children without intercourse:
>
> a) Six years global for sexual offences, including digital penetration and attempted but unsuccessful intercourse with the offender's stepdaughter, committed over time while the victim was 10 to 14 years old [*R. v. J.B.C.*, 2010 NSSC 28]. The Court (para 24) noted that, under the caselaw, for a crime of this nature the offender's prior clear criminal record "is not accorded undue significance".
>
> b) Five years for various sexual assaults including digital penetration, not involving intercourse, over a period of years on the offender's stepdaughter. *D.B.S.*
>
> c) Two sentences of three years each (counts 1 and 5) for indecent assault and gross indecency without intercourse against a child to whom the offender had a parental relationship. He was given additional sentences for other offences. The court (para 17) adopted the statement of Justice Bateman in *R. v. Weaver*, [1993] N.S.J. No. 91 that a clean criminal record "does not relieve the requirement of a lengthy prison term for a sexual offence against children". *R. v. R.H.*, [2005] N.S.J. No. 212 (S.C.).
>
> d) Three years for one incident of sexual assault without intercourse on offender's four year old daughter. *R. v. E.E.C.*, 2005 NSSC 3.
>
> e) Three years for indecent assault without intercourse with the offender's daughter over a period of three years when she was 8 to 11 [*R. v. I. (Part 2)*, [1996] N.S.J. No. 153 (S.C.)]. The offender had no criminal record and was unlikely to reoffend.
>
> f) Sentences of thirty months and twelve months for two counts of sexual and indecent assault on the offender's two adopted sons. *R. v. A.P.S.*, [1999] N.S.J. No. 242 (S.C.).
>
> g) Two and one half years each (concurrent) for two counts of sexual assault and sexual touching, including attempted but unsuccessful intercourse, of the offender's 15 to 18 year old stepdaughter. *R. v. N.J.B.*, [2003] N.S.J. No. 225 (S. C.).
>
> h) A larger global sentence (with remand credit) that included twenty eight months each (concurrent) for two offences of sexual touching and invitation to sexual touching over a period of time of an 11 to 14 year old girl who was unrelated to the offender. D.W.B.

i) Two years exclusive of remand time plus three years probation for a number of incidents of sexual assault, without intercourse, over time on the offender's under aged daughter. The sentence was further to a joint recommendation after a guilty plea. The judge said that, if credit for remand had been considered, the sentence before credit would have been two and one half years (para 38). *R. v. H.C.D.*, 2008 NSSC 246. The judge said:

> 40. The joint recommendation, in terms of denunciation and deterrence, is within the range for offences of this kind. It could have easily been much higher; it is unlikely it would have been less than two years as opposed to more than two and a half years.

j) (j) Four years and five years on several counts of sexual assault that included intercourse with his older daughter, plus eighteen months for sexual touching without intercourse of his 9 to 12 year old younger daughter. *G.O.H.* The Court of Appeal said (para 10):

> It is impossible to speak of these crimes without using pejorative adjectives. This Court, and others, has repeatedly emphasized that sexual abuse of near helpless children (which is the case when the abuse of each daughter began) by adults upon whom they should be able to rely for protection, should incur sentences which may deter not only the perpetrator but others who may be so inclined. This proposition is exacerbated when the perpetrator, as here, is a parent, in a position of trust. Society's revulsion of such conduct must be demonstrated. The fact that the appellant is a first offender, at least in respect to the older daughter and may not need specific deterrence is not to be granted undue significance in crimes of this nature. General deterrence must be emphasized.

k) Six months incarceration plus two years probation for several incidents of sexual touching of offender's 9 to 11 year old granddaughter. The Court of Appeal said the sentence was not unfit under the appellate standard of review. *R. v. D.N.M.*, [1992] N.S.J. No. 356 (C.A.).

l) Four months plus one year probation for two counts of fondling the offender's daughter, aged 11 to 13. The offender was remorseful and accepting of treatment to overcome his psychological problem. *R. v. E.(E.B.)*, [1988] N.S.J. No. 425 (C.A.).

m) Ten months by the sentencing judge, reduced to 90 days by the Court of Appeal for several incidents of vaginal touching the offender's 9 year old stepdaughter. The victim had not suffered psychological effects. The offender pleaded guilty and accepted responsibility. There was evidence that rehabilitation would have a positive effect. *R. v. R.H.S.*, [1993] N.S.J. No. 489 (C.A.).

n) Three months incarceration plus two years probation for sexual touching of offender's 12 year old granddaughter. The offender was remorseful, and the Page 14 psychologist said he was "on the right track" to rehabilitation. *R. v. W.M.D.*, [1992] N.S.J. No. 161 (C.A.).

o) Three years suspended sentence with probation for repeated sexual touching of offender's 14 year old niece. Offender was gentle and well intentioned but feeble-minded, childlike and psychologically ill. He was remorseful and willing to secure treatment. *R. v. R.T.M.*, [1996] N.S.J. No. 218 (C.A.).

Aggravating Circumstances

[12] By way of aggravating circumstances the Crown indicates:

- Mr. M. was in a position of trust.
- This was sexual abuse of children.

Mitigating Circumstances

[13] Mr. M. entered guilty pleas and excepts responsibility at an early opportunity.

Extenuating Circumstances

[14] From the Crown's perspective, the most important factor taken into consideration is 'certainty of result'; that is guilty pleas. Mr. Morrison concedes, that these offences, historic in nature, would have been very difficult crimes to prove. As he puts it,

> … the memory of the victims is impressionistic at best. They have spoken to each other about these events, for years after they have taken place. They have spoken to counsellors. Additionally, there was a lengthy pre-charge delay; two years passed from the time of disclosure to the laying of charges. For historic sexual offenses, a result is a key factor.

The Crown acknowledges that they are seeking a sentence like the one previously imposed, but "the price of compromise is that, usually, most people leave unhappy and so what we sacrifice in this instance is a sentence that could be much higher; a sentence which brings home a much stronger message of deterrence and denunciation". But the reality is that can only exist when the Crown has proven what is a difficult charge to prove at the best of times.

Sentencing Decision

[15] A person charged is innocent until proven guilty. The burden always rests on the Crown to prove all offenses beyond a reasonable doubt. It is a high standard. And it is a high standard for a very important reason – Canadians do not want innocent persons convicted.

[16] Based on the assessment of Crown, these would have been very difficult offenses to prove beyond a reasonable doubt. The options were to take their chances or to accept guilty pleas based on a 'lower range' joint sentencing recommendation.

Joint Recommendations

[17] The leading case on joint recommendations is *R. v. Anthony-Cook*, 2016 SCC 43. Of the four possible tests that the SCC could adopt as the test for accepting a joint submission, they chose the 'public interest test'. At par 32, Moldaver J. states:

The Proper Test

> [32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest …

[18] At par 33 he explains the test, adopting two decisions from the NLCA, *R. v. Druken*, 2006 NLCA 67 and *R. v. B.O.2*, 2010 NLCA 19:

> [33] In *Druken*, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system". And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19, at para. 56 (CanLII), when assessing a joint submission, trial judges should "avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts".

[19] Furthermore, at par 34 Moldaver J., addresses the need to follow joint submissions:

> [34] … a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold …

[20] At a cursory glance, this recommendation, within the extreme lower range of sentencing for similar offences, is woefully inadequate. And if left to my own devices, I would have imposed a sentence which placed greater emphasis on deterrence and denunciation.

[21] I am, however, faced with a joint recommendation, taking into consideration the realities of the weaknesses of the Crown's case. Sexual assault prosecutions are difficult. Historic sexual assault prosecutions are more difficult. It is not uncommon to hear that complainants feel further victimized by the trial process.

[22] I must ask myself, would this joint submission bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so "markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the criminal justice system.

[23] Put another way, would accepting this joint submission causes an informed and reasonable public to lose confidence in the institution of the courts. I do not believe it would.

[24] Harkening back to the comments of Mr. Morrison – 'certainty of result' is an extenuating circumstance which justifies this joint recommendation, admittedly in the extreme lower range of sentencing for similar offenses.

[25] I impose a sentence of 90 days on each offense, concurrent to one other and to be served on an intermittent basis from 8 pm Friday to 6 am Monday, beginning Friday April 14, 2017 until completed to be followed by two years' probation with the following conditions:

- Report to a probation officer at 277 Pleasant Street today and thereafter as directed by your probation officer

- Have no direct or indirect contact or communication with W. M., S. M. or X M.
- Do not be on or within 50 metres of the residences of W. M., S. M. or X M.
- Make reasonable efforts to maintain employment
- Attend for assessment, counselling or a program directed by your probation officer
- Participate in and co-operate with any assessment, counselling or program directed by the probation officer.

Ancillary Orders

SOIRA

[26] Section 490.011 sets out designated offences for the purposes of the *Act*. Indecent assault is a designated offence per (c)(iv). Gross indecency is a designated offence per (d)(iv). Pursuant to s. 490.012(1) when a court imposes a sentence on a person for an offence referred to in par (c), it shall make an order and in the case of an offence referred to in par (d), upon application of the Prosecutor, shall make an order, both in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in s. 490.013 – and in this case 490.013(2.1) for life as Mr. M. has been convicted for more than one designated offence. The order is granted.

DNA Order

[27] Indecent assault and acts of gross indecency are primary designated offences as per s. 487.04(b)(v) and (vi). The order is granted.

Prohibition Order s. 161

[28] Pursuant to s. 161(1), when an offender is convicted of an offence referred to in ss(1.1) in respect of a person who is under the age of 16 years, the court that sentences the offender shall consider making and may make an order prohibiting the offender from, among other things, attending public places where persons under the age of 16 frequent, seeking employment or volunteering in a position of trust towards persons under the age of sixteen years and using computer systems for the purpose of communicating with persons under the age of 16 years.

Indecent assault and gross indecency are offences set out in s. 161(1.1)(b) and (c). Accordingly, I grant the order requested by the Crown. The prohibition will be for 10 years. I do so on the basis that there was more than one offence and it addresses, in some measure the safety of the public, and in particular those under the age of 16 years.

[29] No victim fine surcharge.

Pamela Williams, CJPC