PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R v J.R.P.,*** 2019 NSPC 43

Date: 20190909
Docket: Truro No.81260444
Registry: Truro

Between:

The Queen
v.

J.R.P.

Restriction on Publication:

Pursuant to Section 486.4 of the Criminal Code
Any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way

Judge:	The Honourable Judge Alain Bégin
Heard	September 9, 2019, in Truro, Nova Scotia
Counsel:	Thomas Kayter, for the Crown Laura McCarthy, for the Defence

Introduction

[1] This is the sentencing of J.R.P who was found guilty at trial of committing an assault contrary to s. 266 of the *Criminal Code* on his young son on July 7, 2017. The photos in Exhibit 2 show the results of the assault on his son.

[2] Even after being found guilty at trial of assault, J.R.P. continued to maintain his innocence. It was not until the very end of the sentencing hearing when J.R.P. had the opportunity to address the Court did he finally acknowledge that he had, in fact, assaulted his son, but was now indicating that Ms. L. was incorrect in stating that he had punched his child and the other blows described by her. J.R.P. now admits to only striking his son twice in the head with an open hand.

[3] I maintain my findings at trial that J.R.P. assaulted his son as observed by Ms. L. Specifically, J.R.P.:

- struck his son in the head with a lunging elbow strike
- raised and pinned his son against the house
- hook-punched his son in the head with such force that it lifted his son off of his feet

[4] The Crown is seeking a sentence of between 90 and 180 days in custody, to be followed by a period of probation.

[5] Counsel for J.R.P. is seeking a conditional discharge that would be accompanied by a period of probation.

[6] Section 718 of the *Criminal Code* explains the purpose and principles of sentencing:

> Purpose
>
> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> > (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> >
> > (b) to deter the offender and other persons from committing offences;
> >
> > (c) to separate offenders from society, where necessary;

> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[7] As confirmed by the Supreme Court of Canada in the case of ***R. v. Nasogaluak,*** 2010 SCC 6, at paragraphs 39 to 45, sentencing judges are required to consider s. 718 of the *Criminal Code*:

> [39] The central issue in this appeal concerns the possibility of reducing an offender's sentence to take account of a violation of his or her constitutional rights. Our Court must determine whether a s. 24(1) remedy is necessary to address the consequences of a *Charter* breach or whether this can be accomplished through the sentencing process. In addressing this issue, it is necessary first to review the principles that guide the sentencing process under Canadian law. The objectives and principles of sentencing were recently codified in s. 718 to s. 718.2 of the *Criminal Code* to bring greater consistency and clarity to sentencing decisions. **Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to "respect for the law and the maintenance of a just, peaceful and safe society". This purpose is met by the imposition of "just sanctions" that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.**
>
> ……
>
> [42] **For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused** (*R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p.

> 10). **Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.**
>
> ……
>
> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. **Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.**

[8] Section 718.01 specifically refers to offenses against children, and it is as follows:

> **718.01** When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, **it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.**

[9] Section 718.1 states that:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[10] Section 718.2 states the other principles that the sentencing court is mandated to take into consideration, which for the purpose of this case are:

> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> > **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing:
> >
> > > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> > >
> > > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[11] In ***R. v. Hamilton,*** (2004) 186 CCC (3d) (ON CA), the Court stated that:

> proportionality is a fundamental principle of sentencing. It takes into account the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction. Aggravating and mitigating factors, and the principles of parity, totality and restraint are also important principles that must be engaged in the sentencing process.

[12] The *Criminal Code* views imprisonment as a sentence of last resort. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[13] With regard to the overall sentencing process I note the words of Chief Justice Lamer in ***R. v. C.A.M.*.** [1996] SCJ No 28, at paras 91 & 92:

> 91. …The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offense, while at all times taking into account the needs and current conditions of and in the

> community. The discretion of the sentencing judge should thus not be interfered with lightly.
>
> 92. …It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime…Sentencing is an inherently individualized process and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offense should be expected to vary to some degree across various communities and regions of this country as the 'just and appropriate' mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred."

[14] In a rational system of sentencing the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. There is no easy test that a judge can apply in weighing these factors. Much will depend on the judgment and wisdom of sentencing judges whom Parliament has vested with considerable discretion in making these determinations pursuant to s. 718.3.

[15] The Supreme Court of Canada in ***R. v. Lloyd,*** 2016 SCC 13, confirmed that a provincial court judge's determination of the appropriate sentence is entitled to deference. The Supreme Court also stated in ***Lloyd*** that appellate courts cannot alter a trial judge's sentence unless it is demonstrably unfit, and that an appellate court may not intervene simply because it would have weighed the relevant factors considered by the sentencing judge differently.

[16] As noted in ***R. v. Suter,*** 2018 SCC 34, trial judges have a "broad discretion to impose the sentence they consider appropriate within the limits established by law."

[17] As well, in ***R. v. Lacasse,*** 2015 SCC 64, the Supreme Court of Canada commented on the deference that is to be given to a trial judge's discretion in determining the appropriate sentence by noting at paragraph 48:

> First, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. Second, the sentencing judge is usually familiar with the circumstances in the district where he or she sits and therefore with the particular needs of the community in which the crime was committed.

[18] Denunciation is the communication of society's condemnation of the offender's conduct. A sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantial criminal law. Society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the court can show this is by the sentences that they pass.

[19] In ***R. v. EMW,*** 2011 NSCA 87, our Court of Appeal affirmed the words of Judge Campbell when discussing the difference between retribution and vengeance, at para 18:

> Retribution is punishment. It is objective, measured and reasoned. Vengeance and anger have no place in sentencing. When reason and objectivity give way to expressions of righteous indignation or revenge, a sentence is no longer an expression of a system of values. It has then become an emotional act and not a rational one. It is then not measured or restrained. Justice can be, and sometimes should be, hard. It must, however, be thoughtfully so. It is important to treat the offender in a way that reflects his level of culpability. Simply put, the punishment, and punishment it is, should fit the crime and the person who committed it.

[20] As also noted by our Court of Appeal in ***R. v. EMW***, rehabilitation is a much greater consideration for a sentencing judge when the offender has accepted responsibility. There still has **not** been full acceptance of responsibility by J.R.P.

[21] A court must exercise caution in placing too much weight on deterrence when choosing a sentence, especially incarceration. This caution arises from empirical research which suggests that the deterrent effect of incarceration is uncertain.

[22] I am mindful of the principles of sentencing as outlined in ***R. v. Grady,*** (1973) 5 NSR (2d) 264 (NSCA), where the court confirmed that the primary focus was on the protection of the public and how best to achieve that whether through deterrence or rehabilitation, or both. Protection of the public includes both protection of society from the particular offender as well as protection of society from this particular type of offense.

[23] The same court in ***R. v. Fifield,*** [1978] NSJ 42, stated at para 11:

> We must constantly remind ourselves that sentencing to be an effective societal instrument must be flexible and imaginative. We must guard against using…the cookie cutter approach.

[24] Crown counsel correctly emphasizes that this offense involved a parent assaulting a child. The Crown correctly notes that the Supreme Court of Canada has recognized the inherent vulnerability of children and their need for special protection by the Courts.

[25] In ***R. v. Oliver,*** (2007) 2007 NSCA 15, our Court of Appeal at para 20 confirmed that denunciation and deterrence:

> are given the highest ranking among all of the principles of sentencing in cases involving the abuse of children. Parliament's intention is clearly stated.

[26] In ***R. v. B.C.M,.*** (2008) 2008 BCCA 365, the BC Court of Appeal noted at para. 35 that:

> the principles of restraint and rehabilitation, while still operative, are given secondary status in offenses involving young victims.

[27] In ***R. v. Keough,*** 2012 ABCA 14, the Alberta Court of Appeal noted at para 33 that:

> Denunciation and deterrence are the primary considerations in sentencing for involving predatory crimes against children. Rehabilitation is a secondary consideration.

[28] In ***R. v. Marks,*** 1994 121 Nfld & PEIR 200 (NLCA), the Nfld Court of Appeal described physical child abuse at para 27 as:

> the application of force with, if not the intention, the expectation of causing injury or, an indifference as to whether injuries will result.

[29] It is clear from these cases that the Courts of Appeal right across this country have been strongly united in directing that sentencing Courts give denunciation and deterrence priority over rehabilitation when imposing a sentence on those who are guilty of physically abusing a child.

[30] I echo the comments of Judge Gabriel in the decision of ***R. v. Gilroy***, 2015 NSPC 45. The attack by J.R.P. on his son was a "gutless, cowardly attack." As well, the fact that J.R.P. has no prior convictions may simply mean that J.R.P. never had the courage to assault an adult who could arguably better defend themselves and even fight-back, but that his only conviction for violence was against a helpless child. In J.R.P.'s case it was a helpless child who looked to J.R.P. for protection.

[31] I have reviewed the cases submitted by counsel.

[32] I have also reviewed the Pre-Sentence Report, the additional submissions by counsel for J.R.P. with numerous attachments, as well as the lengthy submissions written by J.R.P.

[33] There is no doubt that J.R.P. endured a difficult upbringing. To his credit he appears to have risen above those initial setbacks and difficulties and he found respectable employment in the healthcare field where he has been gainfully employed for many years.

[34] J.R.P. is to be commended for, very late in the process, commencing counselling. Hopefully going forward in his counselling he will be fully honest with his counsellors as to what he actually did to his son on July 7, 2017 so that he gets meaningful assistance. Counselling requires candor, and honesty, with the counsellor to be successful

[35] Counsel for J.R.P. requests that the Court consider a conditional discharge for J.R.P. A conditional discharge is always in the best interest of someone who is being sentenced, so the real test for the Court is whether a conditional discharge would be contrary to the public interest. I refer again to the comments by the Courts of Appeal across this country when dealing with cases of child abuse and it is crystal clear that a conditional discharge for J.R.P. considering his violent assaults on his helpless child would be absolutely contrary to the public interest.

Aggravating Factors

[36] The aggravating factors are that J.R.P. assaulted a vulnerable child who was in a position of trust, and who looked to J.R.P. for protection. The repeated assaults on the child are also aggravating. This was not a single blow out of frustration and a momentary lapse of judgment, but this involved several assaults on his child.

[37] I also need to consider the obvious emotional trauma to the victim. Hopefully the involvement of the Department of Community Services has provided him the assistance and counselling that he needs.

Mitigating Factors

[38] J.R.P. has, finally, accepted partial responsibility for his actions. It was late in the day, but it was a start.

Decision

[39] I understand that J.R.P. is in a precarious financial situation and that a lengthy jail term would result in his losing his home, so I will endeavor to craft a sentence that will show more compassion for J.R.P. than he showed for his child on July 7, 2017 and that will permit J.R.P. to continue working, that respects the clear guidance from the Courts of Appeal across this country regarding sentences for individuals who abuse children, shows restraint, contains deterrence and denunciation for his actions, and also provides for J.R.P.'s rehabilitation.

[40] J.R.P., stand up. I am ordering a 10 years firearms prohibition pursuant to s. 110 of the Criminal Code. I am not making a DNA Order.

[41] I sentence you to 90 days incarceration which can be served intermittently to commence this Friday September 13th at 7 pm until Sunday September 15th at 4 pm. This shall continue every weekend until your 90 days are served. I am also placing you on probation for a period of 30 months on the following conditions:

- keep the peace and be of good behaviour
- appear before the court when required to do so by the court
- notify the court or probation office, in advance, of any change of name or address and promptly notify the court or probation office of any change of employment or occupation
- report to a probation officer at 14 Court Street, Suite 206, Victoria Court, Truro, Nova Scotia, before noon today and thereafter in the manner directed by the probation officer
- remain within the province of Nova Scotia unless written permission to leave the province has been obtained from your probation officer, in advance
- you are not to possess or consume illicit drugs or prescription drugs or marijuana without a valid prescription

- you are to undergo and successfully complete any counselling or program regarding drug use directed by your probation officer including, if so ordered, any residential program

The reason I'm doing those drug terms is that J.R.P. indicated that he was, perhaps experimenting, self-medicating at the time these offences occurred.

- undergo and successfully complete any counselling or program regarding anger management as directed by your probation officer
- you're to undergo and successfully complete any counselling or program regarding domestic violence as directed by your probation officer
- you're to undergo and successfully complete any psychiatric, psychological or mental health counselling directed by your probation officer
- you're not to contact or communicate or attempt to contact or communicate with, directly or indirectly, J.P. except as authorized by the Department of Community Services or a court of competent jurisdiction.
- you're not to have in your possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, explosive substance. You're not to have in your possession any weapon as defined in the *Criminal Code* namely anything used or intended for use in causing (a) death or injury to any person or (b) for the purpose of threatening or intimidating any person.
- sign all consents required by service providers to release information on your participation in any assessment, counselling, or programs to permit the probation service to monitor your progress.

Alain Bégin, JPC