PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. M.M*, 2021 NSPC 41

Date: 20211018
Docket: 8330438
Registry: Truro

Between:

HER MAJESTY THE QUEEN

v.

M.M

Restriction on Publication:
No one shall publish the name of a young person if it would identify the young person as a young person dealt with under this Act—s. 110 Youth Criminal Justice Act

Judge:	The Honourable Judge Bégin,
Heard:	October 18, 2021, in Truro, Nova Scotia
Decision	October 18, 2021
Charge:	s. 271 Canadian Criminal Code
Counsel:	Thomas Kayter, for the Crown Attorney Hanna Garson, for the Defendant

Restriction on Publication:

Pursuant to subsection 110(1) of the *Youth Criminal Justice Act*, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as having been dealt with under this Act. This decision complies with this restriction so that it can be published.

There is a Publication Ban in this matter protecting the identity of the accused (youth) and of the victim. (All emphasis added)

[1] This is the sentencing of M.M. now 18 years of age, but was 15 ½ years of age at the time of the offense in March 2019.

[2] M.M. is being sentenced for one count of sexual assault on J.D. on March 4, 2019, contrary to section 271 of the *Criminal Code of Canada.*

[3] It is important to point out that the term sexual assault covers a broad spectrum of illegal behaviour that is sexual in nature. With regards to M.M. the activity was at the highest end of the spectrum, sexual intercourse. Or, rape, in the old terminology. This was a very violent offense.

[4] The facts were summarized in my decision after trial (***R. v. M.M.,*** 2021 NSPC 27), but in summary M.M. vaginally penetrated J.D. with his penis while she was asleep.

[5] The Crown is seeking a custodial sentence of 4 months, followed by 2 months of open custody/supervision. The custody to be followed by a period of probation for 18 months.

[6] Defence counsel is recommending a period of Probation for 24 months. The rationale for this is that M.M. is attending therapy and he has suffered collateral consequences because of his criminal actions, in that he had to leave his school because of bullying.

Youth Sentences

[7] Sections 38 and 39 of the YCJA lay out the principles of sentencing for young persons:

> 38 (1) The purpose of sentencing under section 42 (youth sentences) is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

Sentencing principles

(2) A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in subsection 3 and the following principles:

(a) the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances (Note: an adult would be looking at a maximum sentence of 10 years, and quite likely looking at a sentence in the 3-to-4-year range);

(b) the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances;

(c) the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence;

(d) all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;

(e) subject to paragraph (c), the sentence must

(i) be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),

(ii) be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and

(iii) promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community;

(e.1) if this Act provides that a youth justice court may impose conditions as part of the sentence, a condition may be imposed only if

(i) the imposition of the condition is necessary to achieve the purpose set out in subsection 38(1),

(ii) the young person will reasonably be able to comply with the condition, and

(iii) the condition is not used as a substitute for appropriate child protection, mental health or other social measures; and

(f) subject to paragraph (c), the sentence may have the following objectives:

(i) to denounce unlawful conduct, and

(ii) to deter the young person from committing offences.

Factors to be considered

(3) In determining a youth sentence, the youth justice court shall take into account:

(a) the degree of participation by the young person in the commission of the offence;

(b) the harm done to victims and whether it was intentional or reasonably foreseeable;

(c) any reparation made by the young person to the victim or the community;

(d) the time spent in detention by the young person as a result of the offence;

(e) the previous findings of guilt of the young person; and

(f) any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles set out in this section.

Committal to custody

39 (1) A youth justice court shall not commit a young person to custody under section 42 (youth sentences) unless

(a) the young person has committed a violent offence;

(b) the young person has previously been found guilty of an offence under section 137 in relation to more than one sentence and, if the court is imposing a sentence for an offence under subsections 145(2) to (5) of the Criminal Code or section 137, the young person caused harm, or a risk of harm, to the safety of the public in committing that offence;

(c) the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt or of both under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985; or

(d) in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are

such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

Alternatives to custody

(2) If any of paragraphs (1)(a) to (c) apply, a youth justice court shall not impose a custodial sentence under section 42 (youth sentences) unless the court has considered all alternatives to custody raised at the sentencing hearing that are reasonable in the circumstances, and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles set out in section 38.

Factors to be considered

(3) In determining whether there is a reasonable alternative to custody, a youth justice court shall consider submissions relating to

(a) the alternatives to custody that are available;

(b) the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and

(c) the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.

Imposition of same sentence

(4) The previous imposition of a particular non-custodial sentence on a young person does not preclude a youth justice court from imposing the same or any other non-custodial sentence for another offence.

[8] There are 18 possible sentences under s. 42(2) of the *Youth Criminal Justice Act.* The range is from a Judicial Reprimand to an Intensive Rehabilitative Custody and Supervision Order.

[9] I am hard-pressed to recall many occasions during my 5+ years as a judge when I would have sentenced a youth to custody. I have been a strong advocate of keeping youth out of custody, if possible.

[10] In ***R. v. B.W.P.*** **1 SCR 941 (2006)** the Supreme Court of Canada held that "specific deterrence" and "general deterrence" were **not** sentencing principles under the YCJA.

[11] And in ***R. v. C.T.*** **2006 MBCA 15 (Man. C.A.)** the Manitoba Court of Appeal stated that denunciation was **not** a sentencing principle applicable to youth.

> **"Rehabilitation", "meaningful consequences" and "accountability" appear to be the guiding principles in youth sentences, along with proportionality. These principles do not exclude custody as sometimes custody is required for the youth to be rehabilitated, or to fully understand accountability and meaningful consequences.**

[12] 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.

[13] The Criminal Code and the YCJA view 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.

[14] 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.
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> 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."

[15] In a rational system of sentencing the respective importance of "rehabilitation", "meaningful consequences" and "accountability" 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.

[16] The Supreme Court of Canada in ***R. v. Lloyd*** **2016 SCC 13** confirmed that a 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.

[17] 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."

[18] 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.

[19] 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.

[20] In ***R. v. Fifield*** **[1978] NSJ 42** the NS Court of Appeal stated at para 11 that "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."

[21] I have reviewed the cases provided by Crown and Defence for my consideration. They are all worthy of consideration, and as frequently noted by counsel and the Courts, it is almost impossible to find cases that are similar to the case before the Court that can act as a strong precedent.

[22] That being said, I also pointed out to counsel the case of ***R. v. B.S.*** **[2017] M.J. No. 290, 2017 MBCA 102 (Man. C.A.)** where the Manitoba Court of Appeal found that the trial judge had erred in finding there was no 'serious bodily harm' in the absence of expert evidence and in imposing a deferred custody and supervision order. The offense was a major sexual assault, forced sexual intercourse, while the victim was sleeping. The sentence appeal was allowed and the sentence was varied to a five-month custody and supervision order.

[23] Further, the recent ***Friesen*** case from our Supreme Court has emphasized the serious, long-lasting, and pervasive damage inflicted on young people who are sexual assaulted. All courts have been directed by the Supreme Court of Canada to deal with these types of cases very seriously.

[24] This was a sexual assault that was at the high end of the sexual assault spectrum. And it was a sexual assault against a young person.

Victim Impact Statements

[25] J.D. filed a Victim Impact Statement. It is brief but it contains what one would expect from a young sexual assault victim – feelings of self-blame, flashbacks, sadness, hair loss, and changes in trust in others.

[26] Comments in the pre-Sentence report also note that J.D. suffers from panic attacks, and that she suffers from increased anxiety.

Pre-Sentence Report

[27] The Pre-Sentence Report was dated July 21, 2021. It shows a reluctance by M.M. to engage in treatment as he sees no benefit in treatment. There is also a lack of acceptance of responsibility, and a change in how he refers to the victim of

the sexual assault between the trial and now as he now claims that J.D. was a friend instead of his girlfriend, despite strongly testifying otherwise at trial.

[28] It is clear from the Report that M.M. is in need of mental health services even though he does not think that it would be of benefit to him.

Submissions by Defence Counsel

[29] Defence counsel points out that M.M. is a first-time offender, and advises the Court that M.M. is back in school.

[30] He is volunteering at the church and he is on anti-depressants.

Decision

[31] M.M., please stand. Your sentence, which is intended to provide "meaningful consequences" for what was a very violent sexual offense against a young person, along with "accountability" and "rehabilitation" is as follows:

[32] What you did to J.D. was a "major sexual assault." You violated the trust of someone who was a good friend and trusted you. Instead of honouring that trust you sexually assaulted her for your own selfish sexual urges. Your actions will no doubt have long term consequences for J.D. She will continue to suffer long after you have completed serving whatever sentence I impose.

[33] To ensure 'meaningful consequences' for your violent offense of sexual assault which caused 'serious bodily harm' to J.D., I am sentencing you to 3 months Custody followed by 1 ½ months Open Custody /Supervision Order. For your 'accountability' and 'rehabilitation,' your period of custody will be followed by a period of probation for a maximum sentence of no longer than 24 months so that you can get the necessary counselling that you require.

[34] The specific terms of your Probation for 19 months are as follows:

(a) Report to a supervisor at 14 Court Street, Suite #206, Victoria Court, Truro, Nova Scotia within 3 days from the date of expiration of your sentence of imprisonment and thereafter when required and in the manner directed by the supervisor;

(b) Undergo and successfully complete any counselling or program regarding domestic violence as directed by your supervisor;

(c) Undergo and successfully complete any psychiatric, psychological or mental health counselling directed by your supervisor;

(d) Undergo and successfully complete any counselling directed by your supervisor regarding: sexual deviance;

(e) Do not contact or communicate with, or attempt to contact or communicate with, directly or indirectly J,D.;

(f) Do not go to or enter on the residential property or premises of J.D.;

(g) Do not beset, watch, or follow from place to place J.D.;

(h) Do not associate with or be in the company of persons known to you to have a criminal record, Controlled Drugs and Substances Act record, Youth Court record, or Youth Justice Court record;

(i) Do not have in your possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substance; and do not have in your possession any weapon as defined in the Criminal Code, namely, anything used or intended for use (a) in causing death or injury to any person, or (b) for the purpose of threatening or intimidating any person;

(j) 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.

Judge Alain Bégin, JPC