PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. M.J.W., 2011 NSPC 33

Date: 20110531
Docket: 2206590
Registry: Pictou

Between:

Her Majesty the Queen

v.

M.J.W.

SENTENCING DECISION

Restriction on publication: Order pursuant to sub-s. 486.4(1) of the Criminal Code of Canada: Any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge Del W. Atwood

Heard: May 2, 2011, in Pictou, Nova Scotia

Written decision: May 31, 2011

Charge: Incest, contrary to s. 155 of the *Criminal Code*

Counsel: Mr. Patrick Young, for the Nova Scotia Public Prosecution Service
Mr. Stephen Robertson, for M.J.W.

By the Court:

[1] [ORALLY] This is the case of M.J.W., information #613348. The offender is charged with one count of incest, contrary to section 155 of the *Criminal Code of Canada*. Section 155 of the *Criminal Code* states:

> "Everyone commits incest who, knowing that another person is by blood relationship, his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person."
>
> Subsection 2 states:
>
> "Every person who commits incest is guilty of an indictable offence and liable to imprisonment for a term not exceeding 14 years."
>
> Subsection 4 of section 155 states that:
>
> "In this section, "brother" and "sister" respectively, include half-brother and half-sister."

[2] The facts submitted to the Court by the Crown, in accordance with section 723(1) of the *Code* and accepted by Defence counsel, are that the 21- year-old offender had sexual intercourse with his 15-year-old paternal half-sister, S.D.D., on three separate occasions between the 28th of May, 2010 and the 7th of June, 2010.

[3] I would note that there is a publication ban in relation to the identity of the complainant, pursuant to section 486.4 of the *Criminal Code* and that publication ban obviously remains in full force and effect.

[4] The offender gave a statement to police acknowledging that he knew of his familial relationship with S.D.D. and knew that she was 15 years old but would be turning 16 soon. The Court heard sentencing submissions of counsel on the 2nd of May, 2011.

[5] The Court has reviewed, in detail, the following material:

- The presentence report dated the 4th of April, 2011.

- A court ordered comprehensive presentence forensic sexual behaviour assessment dated 2011-02-03 by Dr. Michelle St. Amand-Johnson, clinical and forensic psychologist.

- A report prepared at the request of defence counsel, dated 8th of September 2011, by Dr. Aileen Brunet , consulting psychiatrist.

- A defence-requested psychological assessment prepared by Dr. Andrew Starzomski dated the 27th of February, 2011.

[6] The Court has reviewed, in detail, the sentencing authorities submitted by counsel.

[7] Crown counsel seeks a prison sentence of 18 to 24 months and an array of ancillary orders under sections 109, 487.04, 490.013(2) and section 161 of the Criminal Code. The Crown asserts that the offence before the Court is a "serious personal injury offence" as defined in section 752 of the Criminal Code. Accordingly, the Crown takes the position that the offender is ineligible for a conditional sentence under section 742.1 of the Criminal Code. The Crown observes that the offender's sense of entitlement and his expression of impunity (and I here I refer parenthetically to page 7 of the presentence report, where the offender expressed the view that "he had done nothing wrong, she was as happy as I was") give rise to a reasonable inference of elevated risk.

[8] The Crown argues that the offender was in a position of trust and abused a person under the age of 18 years, accordingly, attracting the principles of aggravation set out in sub-paras. 718.2(a)(ii.1) and (iii) of the *Criminal Code*. Although the Crown asserted initially that the offender had infected S.D.D. with a sexually transmitted infection–a fact disputed by defence– the Crown acknowledged candidly that there was insufficient evidence to satisfy the proof requirement set out in para. 724(3)(e) of the *Criminal Code*.

[9] Defence counsel argues strongly in favour of a conditional sentence. Defence counsel does not concur in the Crown's submission that a relationship of

trust existed between the offender and S.D.D. The Defence points to the offender's lack of prior record and his low to moderate risk for future violence, including sexual assaults, as reported by Dr. St. Armand-Johnson and concurred in by Dr. Brunet. The offender's risk is described in those reports as manageable when regulated by appropriate rehabilitative measures and superintendence over the offender's conduct.

[10] The Court approaches its decision on sentence by noting that, pursuant to *R. v. Paré*, [1987] 2 S.C.R. 618 at paras. 25-27, any ambiguity in a penal statute must be construed in a manner most favourable to the accused.

[11] Similarly, statutory principles of restraint, as set out in paras. 718.2(d) and 718.2(e) of the *Criminal Code* require that the offender not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions, other than imprisonment, that are reasonable in the circumstances be considered for all offenders.

[12] In determining whether the offender was in a position of trust toward S.D.D., I apply the analytical framework described by the Supreme Court of Canada in *R. v. Audet*, [1996] 2 S.C.R. 171 at paras. 33 to 45. There was no relationship of authority between the offender and S.D.D., nor was the Court presented with evidence of an actual exercise of authority. There is no evidence

that the offender exploited any obvious or latent vulnerability of S.D.D. Although the offender was 21 years of age at the time, S.D.D. was almost 16. I am advised that S.D.D. consented to having sexual intercourse with the offender. While consent is obviously no defence to a charge of incest, I find that I cannot disregard this factor in determining the issue of whether a position of trust existed between the offender and S.D.D.

[13] The Court would note that the "consent-no-defence provisions of section 150.1 of the *Criminal Code* are not applicable to a charge under section 155 of the *Criminal Code*. The Court would note, as well, the short duration of the relationship between S.D.D. and the offender.

[14] As was stated in the opinion of Justice La Forest at paragraph 38 of the *Audet* decision, rendering judgment for the majority:

> It will be up to the trial judge to determine, on the basis of all the factual circumstances relevant to the characterization of the relationship between a young person and an accused whether the accused was in a position of trust or authority toward a young person.

[15] I would note parenthetically that while *Audet* turned on an interpretation of section 153 of the *Code*, I find that it is applicable and binding on me with respect to the interpretation of sub-para. 718.2(a)(iii). The totality of these factors lead the Court to conclude that the offender was not in a position of trust or authority

towards S.D.D. Accordingly, the Court is of the view that the Crown has not proven that aggravating factor beyond a reasonable doubt as required by para. 724(3)(e).

[16] While not in a position of trust or authority toward S.D.D., the offender's conduct was serious. The 21-year-old offender had sexual intercourse with his 15-year-old half-sister. Incest is a serious offence reflected in the potential penal consequence, a maximum term of imprisonment of 14 years. The offender's degree of responsibility is high. His conduct involved full intercourse on three occasions. Society expects that persons who have achieved the full age of 21 years will exercise the superior judgement and mature discretion commensurate of that age and not engage in illegal sexual activity with young persons. Furthermore, the Court is concerned by the offender's attitude toward this offence as expressed to the various assessors and the author of the presentence report: in short, the offender feels he did nothing wrong.

[17] This Court must ensure that the offender recognizes the serious illegality of his conduct. Furthermore, the Court must ensure that others who would share the offender's sense of impunity recognize that they too are subject to the law.

[18] In my view, the need for denunciation and deterrence in this case is substantial. Those overriding objectives require this Court to conclude that a

purely rehabilitative, that is, a suspended sentence, would not fulfill the necessary purposes and principles of sentencing set out in sections 718, 718.1 and 718.2 of the *Criminal Code*, particularly the principle of proportionality.

[19] The Court recognizes that a great range exists in the sentencing authorities with respect to penalties for incest. These authorities range from periods of suspended sentence, as in the case of the children of C.J.F. in *R. v. C.J.F.* (1996), 149 N.S.R. (2d) 91 at para. 4 (C.A.), to five-years' incarceration as reported in *R. v. Goler* (1985), 67 N.S.R. (2d) 200 (A.D.). I observe, as well, that a five-year sentence was referred to by the British Columbia Court of Appeal in its disposition of a prerogative remedy matter in *R. v. M.S.* (1995), 59 B.C.A.C. 316.

[20] In my view, given the circumstances of this offence, the age of the offender, the youthfulness of S.D.D., the fact that the offender had sexual intercourse with S.D.D. on three different occasions and the attitude of the offender towards the offence, an appropriate range of sentence is between 12 to 18 months of incarceration.

[21] Having excluded the possibilities of a purely probationary term or a penitentiary term, I continue to follow the analytical framework adopted by the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61 at paras. 50, 59 and 60, and I proceed to the second stage of the *Proulx* analysis.

[22] Incest is not a terrorism or criminal organization offence. It is not an offence punishable by a minimum term of imprisonment. Is it a "serious personal injury offence" as defined in section 752 of the *Criminal Code*, as incorporated in section 742.1 of the *Code*, as a class of offences excluded from conditional sentencing, in virtue of S. C. 2007, c. 12, section 1, in force December 1, 2007?

[23] Section 752 lays out a definition of "serious personal injury offence":

> Serious personal injury offence means:
>
> (a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving
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> (i) the use or attempted use of violence against another person, or
>
> (ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage upon another person,
>
> and for which the offender may be sentenced to imprisonment for ten years or more, or
>
> (b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[24] The Court would note that section 155 is not an enumerated offence under the definition of "serious personal injury offence", paragraph (b). Additionally,

section 155 (just as section 159, and the former section 157, R.S.C. 1970, c. C-34) is a crime with respect to which all both participants may be considered–in a purely parties-focussed legal analysis–to be accomplices. The Court recognizes that public-interest factors are integral to the decision to prosecute any case and the Court does not suggest, in any way, that S.D.D. was responsible for this offender's conduct. She was not. S.D.D. was a true and authentic victim of the offender's actions. The Court observes merely that section 155, because of the constituent elements of the offence, does not fall necessarily within those classes of offences where there is always going to be a clear demarcation between assailant and victim.

[25] There was no evidence put before the Court that the offender's conduct endangered or was likely to endanger the life or safety of another person or that it inflicted or was likely to inflict severe psychological damage upon another person. The Court was not presented with medical evidence regarding the medical status of S.D.D., and S.D.D. declined to submit a victim-impact statement.

[26] Given the circumstances of this offence, the Court finds that it would be unsafe for the Court conclude that the offender's conduct would be captured by sub-paragraph (a)(ii) of the definition of "serious personal injury offence" in section 752.

[27] Does the offence before the court involve "the use or attempted use of violence against another person", so as to be caught by sub-para. (a)(i) of the definition of "serious personal injury offence"? There exists a significant body of authority suggesting that any offence of sexual assault involves the use of violence. The Court would refer to *R. v. McCraw*, [1991] 3 S.C.R, 72 at p. 83, as well as *R. v. Currie*, [1997] 2 S.C.R. 260 at para. 22, where it was held that sexual assault is inherently violent, whatever form it may take. The Court is of the view that this characterization of sexual assault is reflected in section 271 being included in the definition of "serious personal injury offence" in section 752. [28] However, the offender in this case was not charged with sexual assault. He is charged with incest. The offender had sexual intercourse with S.D.D., with her consent. While consent is no defence to this charge, the Court cannot disregard the existence of defence completely, noting as I have, that section 150.1 of the *Code* is inapplicable to section 155.

[29] I find in the circumstances of this case that the offence committed by the offender is not a "serious personal injury offence".

[30] The assessment reports before me satisfy the Court that M.J.W. is an immature, impulsive, somewhat sheltered and isolated young man. I am satisfied that his risk to the community can be minimized significantly by appropriate

intervention. The Court recognizes that M.J.W.'s risk is a very focused risk to "younger females who assent to sexual activity" as described in the assessment reports.

[31] I am of the view, in this particular case, that M.J.W. is, indeed, eligible for a conditional sentence as set out in section 742.1 of the *Criminal Code.* I am satisfied that, with appropriate intervention, supervision, penal and rehabilitative measure, permitting M.J.W. to serve the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in section 718 to 718.2 of the *Criminal Code*. However, recognizing that while punitive, a conditional sentence order "constitutes a very significant difference between being behind bars and functioning within society on conditional release" (and I refer here parenthetically to the decision of the Supreme Court of Canada in *R v. Shropshire*, [1995] 4 S.C.R., 227 at para. 21), I am of the view that a conditional sentence at the upper end of the prescribed 12-to-18-month range is appropriate.

[32] Accordingly, if you could stand up please, Mr. W. The Court sentences you to imprisonment for 18 months and is satisfied that your serving the sentence in the community would not endanger its safety and would be consistent with the

fundamental purpose and principles of sentencing. You shall serve this sentence in the community under the following conditions:

You are to keep the peace and be of good behaviour.

You are to appear before the Court when required to do so by the Court.

You are to report to a supervisor at * on or before 4 p.m. June 3, 2011 and thereafter as directed.

You are to remain in the Province of Nova Scotia, unless written permission is obtained in advance, and you are to notify promptly your supervisor of any change of your name, address, employment or occupation.

In addition, you shall not possess, take or consume alcohol or any other intoxicating substances.

You shall not possess, take or consume any controlled substance as defined in the Controlled Drugs and Substances Act except in accordance with a physician's prescription for you or pursuant to the Medical Marihuana Access Regulations.

You are to submit for urinalysis or other alcohol or controlled substance screening as directed by your supervisor.

You are not to have in your possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance. In addition, if you hold any authorizations, licenses or registrations in your possession for any of those things, you must surrender all of those documents or things immediately to the * Police, in a lawful fashion.

You are not to be in any place or establishment where alcohol is the primary product of sale.

You are to attend for mental health assessment and counselling as directed by your supervisor, including social skills counselling, human communication counselling, coping skills and stress and anxiety management and counselling.

You are to attend for any other assessment, counselling or programming directed by your supervisor.

You are not to associate with or be in the company of the following persons, namely: Individuals whom you know to have a criminal record under the Controlled Drugs and Substances Act, Criminal Code of Canada, Narcotic Control Act, Food and Drug Act, Young Offenders Act, Youth Criminal Justice Act except incidental contact in an education or treatment program or while at work and only when in the immediate presence of a staff member or supervisor.

You are to stay away from the person, premises and place of education, if any, of S.D.D. and have no contact or communication with her, directly or indirectly, even if invited to do so. There will be no exceptions.

You are to make reasonable efforts to locate and maintain employment as directed by your supervisor.

You are to attend and successfully complete any treatment program for sexual offenders as arranged by your supervisor and that will include the forensic sexual behaviour program if determined appropriate by your Supervisor.

You are to be subject to electronic supervision as directed by your Supervisor.

You are also to attend for any psychiatric consultation as directed by your supervisor.

And I take it, Mr. Robertson, from your submissions last day, that Mr. W.

would be prepared to consent to a condition that he take medication as prescribed?

MR. ROBERTSON: Yes.

THE COURT: You are also to take all medication as prescribed by your physician or psychiatrist.

You are to remain in your place of residence at [identifying information redacted], during all times, beginning at 5 p.m. on today's date, 31st of May, 2011 and ending at 11:59 p.m. on the 30th of May, 2012.

So, it's house arrest for one year, subject to the following exceptions: When travelling to and from any of these exceptions to the house arrest, you are to travel by the most direct route from your residence.

The exceptions will be:

When at regularly scheduled employment; when dealing with a medical emergency or medical appointment involving you or a member of your household; when attending a scheduled appointment with your lawyer or with your supervisor; when attending court at a scheduled appearance or under subpoena; when attending a counselling appointment or a treatment program at the direction of or with the written permission of your Supervisor; when making applications for employment or attending job interviews Monday through Friday, between the hours of 8:30 a.m. and 4:30 p.m., with the prior written permission of your Supervisor; when in a residential treatment program, if your Supervisor is told in advance where you will be and you agree that the facility can tell your Supervisor if you are there, should your Supervisor inquire; when attending to your personal needs for not more than 3 hours per week approved in advance by your supervisor, in writing; and any other exceptions approved in writing by your Supervisor setting out the specific times when and places where you may be outside your residence. And the remain in residence will be remain in residence [identifying information redacted], lands and building.

> You are to carry on your person, at all times, when outside your residence, a copy of your conditional sentence order and a copy of any permission slips from your supervisor and you are to prove compliance with the house arrest condition by presenting yourself at the entrance of your residence should your supervisor or peace officer attend there to check compliance.

[33] In addition, the Court will grant a primary-designated-offence DNA collection order. The Court will also sign a 20-year SOIRA order pursuant to the provisions of para. 490.013(2)(e) of the *Criminal Code*.

[34] The Court also finds it necessary to sign an order, pursuant to the provisions of section 161 of the *Criminal Code*, and therefore the Court will order and direct Mr. W., that you be prohibited from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present or a daycare centre, school ground, playground or community centre. The Court also orders and directs that you 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 toward persons under the age of 16 years or using a computer system within the meaning of subsection 342.1(2) of the *Criminal Code* for the purposes of communicating with a person under the age of 16 years.

That order is to take effect immediately. It begins immediately and it ends 5 years following the expiration of your conditional sentence order.

[35] Given the Court's findings in relation to the commission of violence, the Court is of the view that the provisions of section 109 are not applicable and I decline to make an order under that section or under section 110; however, I have included a firearm prohibition in the conditional sentence order, which, for purposes of the *Firearms Act* , obviously constitutes a prohibition order.

[36] Finally, given your current circumstances, I am satisfied that the imposition of a victim surcharge amount would work an undue hardship and therefore the Court is going to decline to impose a victim surcharge amount.

[37] The Court is of the view that the rehabilitative needs of sentencing will be accomplished within the 18 months of this conditional sentence order and the Court recognizes that a conditional sentence order is not subject to the ordinary provisions of the *Corrections and Conditional Release Act* or the *Prison and Reformatories Act*. There's no earned remission. A conditional sentence runs for the full duration; therefore, the Court will decline to impose a further period of probation.

[38] Now, I will tell you this: getting a conditional sentence order does not mean you've dodged the bullet. The Supreme Court of Canada says that it is a real

punishment and the reason that it says that is this: persons who breach conditional sentence orders can be arrested immediately. They can be held in custody until they prove that they should be released. A conditional sentence order breach can be proven by the Crown by an accelerated, speedy process where the Crown doesn't have to bring in witnesses, and need only give the court signed statements. The burden of proof on the Crown proving a conditional sentence order breach is on the balance of probabilities. It's not proof beyond a reasonable doubt. And here's the most important thing: that case that I referred to that qualifies you for a conditional sentence, *R. v. Proulx*, also says that the presumption is that if somebody breaches a conditional sentence order, that person will get whip sawed into custody as fast as you can image and spend the rest of the conditional sentence order in custody. So, if you got picked up tomorrow for doing something that this order tells you not to do, what would, in all likelihood, happen is that you would spend 18 months less a day in jail. You don't want that.

[39] The presentence report tells me that you're an individual, Mr. W., with considerable potential. Do not waste it.

Orders accordingly.

Dated 31 May 2011 at Pictou, Nova Scotia.

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JUDGE DEL W. ATWOOD, A JUDGE OF
THE PROVINCIAL COURT FOR THE
PROVINCE OF NOVA SCOTIA