SUPREME COURT OF NOVA SCOTIA
Citation: R. v. R.M. - 2015 NSSC 189

Date: 20150713
Docket: Cr. No. 426521
Registry: Halifax

Between:

Her Majesty the Queen

v.

R.M.

Restriction on Publication: s. 486.4
Sentencing Decision

Judge:	The Honourable Justice Robert Wright
Heard:	July 13, 2015 in Halifax, Nova Scotia
Oral Decision	July 13, 2015
Written Decision	July 27, 2015
Counsel:	Scott Morrison for the Crown Peter Kidston for the Defence

Wright, J. (Orally)

[1] On January 23, 2015, the Court in its reserved decision found R.M. guilty on all four counts charged in the indictment, namely:

1) Sexual assault (s. 271(1)(a)

2) Sexual interference with a minor (s.151)

3) Invitation to a minor to engage in sexual touching (s.152)

4) Attempted incest (ss. 155 and 463)

[2] It is acknowledged that the conviction under s. 151 (Count 2) should be judicially stayed under the *Kienapple* principle which precludes multiple convictions whenever criminal charges essentially describe different ways of committing the same criminal wrong. That is the case here with the convictions under both s.271 (1)(a) and s. 151. R.M. is therefore to be sentenced today on his convictions for sexual assault, invitation to sexual touching and attempted incest.

[3] In my oral decision on January 23rd, I recited in full detail the nature, extent, and duration of the sexual offences that occurred. The complainant's evidence, which was accepted by the Court in its entirety, described a horrific pattern of sexual abuse perpetrated by her father over a span of some 8 years, when she was between the ages of 6 and 14.

[4] All of these offences took place within the family home, with one exception out in the woods. They began with an isolated incident in 2004, when R.M. invited his daughter to squeeze his penis when she was age 6, but then progressed and escalated into a multiple series of incidents at various places within the home. The

abuse was frequent and regular, involving fellatio, cunnilingus, simulated intercourse (where R.M. would rub his penis against his daughter's vagina until he ejaculated) and requests for vaginal penetration. The abuse often occurred when other family members were in the house, and was not exclusive to R.M.'s periods of intoxication.

[5] The norms of societal behaviour make the perpetration of these offences almost incomprehensible. Yet they happen all too often. Fathers are meant to be a protector of their children, not a predator for self-gratification. Justice Campbell said it well in the following passage quoted by the Nova Scotia Court of Appeal in **R. v. E.M.W**., 2011 NSCA 87 (at para 13):

> Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment of a child in this way is an attempt to deny her basic human dignity. In the eyes of the adult, the child is reduced to being a nameless thing. She is robbed of her childhood and of her innocence. She has no choice in the matter. She is simply used. She has become a means to an end.
>
> When the person who has tried to turn a child into an object is a parent, the sense of moral outrage is almost unrestrained. There is no way to speak of these kinds of crimes without using language that reflects the sense that the most basic of moral standards has been violated. They are described by judges as being horrific, shocking, selfish, sordid, despicable, reprehensible, repugnant and depraved.

[6] At the conclusion of the trial verdict, Crown counsel requested, and defence counsel acquiesced in an order for a Sex Offender Assessment. That assessment took place on April 27-28, 2015 and was performed by Dr. Angela Connors at the Nova Scotia Hospital. The assessment was undertaken to investigate R.M.'s sexual deviancy, risk for sexual reoffence, personality and mental health issues, and treatment recommendations. Now before the Court is her report dated May 7, 2015 entitled "Forensic Sexual Behaviour Presentence Assessment".

[7] This lengthy and comprehensive report has been aptly condensed in the Crown's sentencing brief which I adopt for purposes of this decision. The Crown's summary reads as follows (with the necessary anonymization):

> Dr. Connors has written an extensive and insightful report about R.M.
>
> She notes he had a tumultuous marriage, which resulted in stresses and pressures related to family life. She says this was the context in which he began to assault [the victim].
>
> She noted that R.M.'s abuse of [the victim] was not exclusive to periods of time when he was intoxicated.
>
> Dr. Connors said R.M.'s incestuous offences against his daughter were facilitated by escapism, egocentricity, stress-facilitated destabilization in self-management and associated self-indulgence.
>
> She places him at a low-moderate risk to re-offend.
>
> She says sobriety is a necessary precondition to him remaining offence-free in the future. He requires treatment in a specialized treatment program for sexual offenders at the moderate level of intensity.

[8] To this summary, I add the following original quotations from Dr. Connors' report:

> In summary, [R.M.] has a life-long alcohol problem that has interfered with his employment, his marriage, his availability to his children, his judgment, and his freedoms as it pertains to the sanctions of the court . . .
>
> In summary, [R.M's] sexual offenses against his daughter appear primarily motivated by self-indulgent escapism and destabilized by stress. She was the only female child easily accessible and available to him to be utilized in this manner, possibly further disinhibited by the close biological tie between them (translated as enhanced control) and the distortions that he possessed about how unharmful his actions were and how entitled he was to pursue escapisms (as with alcohol). His responsibility as a father was not inhibitory, nor was her pre-pubertal age at the onset of offending - likely as [R.M.] is sexually responsive to this age range even if it is not his sexual preference (as suggested by PPG).

[9] There is also before the Court a Correctional Services Pre-sentence Report dated April 23, 2015 which does not materially add much new information not otherwise found in the report by Dr. Connors.

[10] I will refrain from reciting background details of R.M.'s personal profile from the Pre-sentence report in the interest of maintaining anonymity in this decision. This report does detail, however, R.M.'s past criminal record (9 offences in all) which consists of somewhat dated convictions for domestic assault, breaches of court orders, and impaired driving offences.

[11] In interviews for both these pre-sentence reports, R.M. continued to deny that any of the sexual offences of which he has been convicted ever happened. Dr. Connors' report lends at least some insight as to why that is. Up until today, R.M. has refused to face up to his horrific abuse of his daughter, and appeared to lack any level of understanding of the immense harm he has inflicted upon her which can never be erased. The severity of that harm is palpably evident from the lengthy Victim Impact Statement she courageously read in court this morning.

[12] It was only after listening to his daughter's Victim Impact Statement read with such raw emotion that R.M., when later asked if he wished to speak before being sentenced, relented and finally accepted responsibility for what he had done. He himself became overcome with emotion in trying to verbalize an apology to his daughter which was much too little, too late. Hopefully, that will be a first step toward his rehabilitation. I note from his pre-sentence report that he has indicated that he will cooperate with counselling as directed by the Court.

[13] However strongly R.M.'s abuse of his daughter is to be condemned, his sentence must derive, as the Court of Appeal put it in **E.M.W.**, "from the

application of sentencing principles, not reactive impulse". I therefore turn now to the sentencing principles to be applied in this case.

[14] I begin with s. 718 of the Criminal Code which sets out the fundamental purpose and principles of sentencing generally. It reads as follows:

> **718.** The fundamental purpose of sentencing is 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;
>
> (*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 and to the community.

[15] The foregoing section is followed by s. 718.01 which sets out sentencing objectives for offences against children. It reads 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.

[16] Section 718.1 then states the fundamental principle of proportionality relative to the gravity of the offence and the degree of responsibility of the offender.

[17] Other sentencing principles of relevance to this case are set out in s.718.2(a)(b) and (c) which read as follows:

> **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. . .
>
> (*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;

[18] The latter provision invokes the principle of totality in multiple offence cases, whereby a judge is to fix a sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced (see **R. v. Adams**, 2010 NSCA 42 at para 23).

[19] There are a number of aggravating factors present in this case. The first three are deemed under s.718.2 above recited, namely, abuse of a person under 18, abusing a position of trust or authority, and the significant impact here on the victim.

[20] In addition to these aggravating factors is the scope and magnitude of sexual offences committed here (everything short of actual penetration) against a

vulnerable child, which escalated as the victim got older, over a duration of some eight years and which occurred dozens upon dozens of times. R.M. manipulated his daughter into these acts through guilt if she refused him and grooming in a premeditated way. As she put it in her trial testimony, "He raised me to be molested".

[21] There is also the matter of R.M.'s criminal record earlier summarized. Past criminal activity is usually considered as an aggravating factor, but given its nature here, mostly rooted in R.M.'s alcohol addiction, I attach little weight to it for purposes of this sentencing.

[22] As for mitigating factors, there are none to be found in this case. His belated expression of remorse comes after putting his daughter through the added trauma of a trial in which he falsely denied the allegations against him.

[23] The Crown's position on sentence in this egregious case is that R.M. should be incarcerated for a term of six years for his s.271 sexual assault conviction, one to two years for the s.152 offence of invitation to sexual touching (to be served concurrently), and two to three years for the attempted incest offence under ss. 155 and 463 (also to be served concurrently due to totality). The Crown also requests ancillary orders for a 10 year firearms prohibition, a lifetime SOIRA Order, a DNA Order and a 10 year prohibition against access to minors.

[24] In reply, defence counsel has joined with the Crown in making the same recommendation of an overall sentence of 6 years incarceration by concurrent sentences. Neither does the defence dispute any of the ancillary orders sought by the Crown.

[25] The question for the Court to now determine is whether to accept this joint recommendation or to depart from it, keeping in mind that in this case the joint submission on sentence did not arise from a plea bargain.

[26] The objective seriousness of these crimes is measured by the maximum sentences set out in the Criminal Code.

[27] For convictions for sexual assault and invitation to sexual touching, the maximum sentence under an indictment is 10 years.

[28] For attempted incest, the maximum sentence is determined by s.155(2) and s.463 respectively. The maximum for a conviction of incest is 14 years. For attempted incest, as is the case here, the maximum is a term that is one half of that.

[29] A prominent case authority on the appropriate range of sentence for sexual offences of these kinds is the decision of the Ontario Court of Appeal in **R. v. D.(D.)** 2002 O.J. No. 1061. In that case, Justice Moldaver provided the following summary for guidance to trial courts (at para. 44):

> To summarize, I am of the view that as a general rule, when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent basis over substantial periods of time, they can expect to receive mid to upper single digit penitentiary terms. When the abuse involves full intercourse, anal or vaginal, and it is accompanied by other acts of physical violence, threats of physical violence, or other forms of extortion, upper single digit to low double digit penitentiary terms will generally be appropriate. Finally, in cases where these elements are accompanied by a pattern of severe psychological, emotional and physical brutalization, still higher penalties will be warranted.

[30] That precedent was affirmed just last year by the Ontario Court of Appeal in **R. v. H.S., 2014 ONCA 323** (see paras. 41 and 42) where the Court stated that "mid-to-upper single digit penitentiary sentences are appropriate where an adult in

a position of trust sexually abuses a young child on a regular basis over a substantial period of time".

[31] The Crown has also referred me to a number of Nova Scotia decisions where the sentencing outcomes are consistent with the principles and range of sentencing set out in **R. v. D.(D.)**, namely, **R. v. E.M.W., supra**, **R. v. J.B.C.** 2010 NSSC 28, **R. v. D.B.S.** [2000] N.S.J. No. 172 and **R. v. G. (R.R.D.)** [2014] N.S.J. No. 311.

[32] I have also reviewed the more recent decision in **R. v. F.H.** [2015] N.S.J. No. 105 which contains a useful summary of the sentencing jurisprudence on cases of this nature. I note that in both the **G.(R.R.D.)** and **F.H.** decisions of this court, the range of sentencing set out in **R. v. D.(D.)** was affirmed and applied.

[33] I therefore conclude that the appropriate range of sentence for the offences of sexual assault and attempted incest in like circumstances is between 5 and 9 years imprisonment. It is within that global range that both Crown and defence counsel have made their joint recommendation of a 6 year sentence of imprisonment overall.

[34] It should be recognized that because the accused plead not guilty and underwent a trial, this is not a true joint recommendation. This distinction was dealt with at some length by the Court of Appeal in **R.v. A.N.** 2011 NSCA 21. The Court there referred to its earlier decision in **R. v. McIvor** [2003] N.S.J. No. 188 which stands for the proposition that when presented with a joint sentencing recommendation from counsel arising from a genuine plea bargain, the sentencing judge is required to assess whether the joint recommendation is within an acceptable range as a fit and proper sentence and if it is, there must be sound

reasons for departing from it. The underlying policy considerations for that premise are discussed at length in that decision which need not be repeated here.

[35] The Court in **A.N.** then observed (at para. 21) that "A joint sentence recommendation exchanged for a guilty plea carries more weight than mere coincident sentence recommendations after a trial". It affirmed that it is appropriate to distinguish between the treatment of sentence recommendations that have resulted from a true plea bargain, and those that are made after a finding of guilt or the voluntary entry of a guilty plea, not prompted by discussions of sentence (see para. 20).

[36] It is also clear from the case law that although a coincident sentence recommendation made by counsel after a trial is to be given less weight by the sentencing judge than one arising from a genuine plea bargain, the judge ought nonetheless to give it careful and serious consideration.

[37] I have done so in this case. While I consider that a term of 6 years imprisonment is on the low side because of the many aggravating factors present here, I am prepared to accept it as within the established range of sentence for the main offences of sexual assault and attempted incest here committed. I am satisfied that this represents a fit and proper sentence.

[38] The offender is therefore sentenced as follows:

(a) Under Count #1 for sexual assault, a term of imprisonment of 6 years;

(b) Under Count #3 for invitation to a minor to engage in sexual touching, a term of imprisonment of 1 year (to be served concurrently);

(c) Under Count #4 for attempted incest, a term of imprisonment of 6 years (to be served concurrently).

[39] In addition, the following ancillary orders will be granted:

(a) A firearms prohibition order for a period of 10 years, pursuant to s.109(1)(a) of the Code;

(b) A DNA order pursuant to s.487.051 of the Code;

(c) A lifetime SOIRA order pursuant to s.490.013(2.1) of the Code; and

(d) An order in the usual form under s.161 of the Code prohibiting the offender from access to minors for 10 years.

[40] I also impose a victim surcharge of $300 ($100 for each conviction) payable within one year of the offender's release from prison.

J.