

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. W.F.B.*, 2015 NSSC 353

**Date:** 2015-12-07

**Docket:** Halifax No. 430782

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

W.F.B.

<b>Restriction on Publication: s. 486 C.C.</b>
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**Judge:** The Honourable Justice James L. Chipman

**Heard:** December 7, 2015, in Halifax, Nova Scotia

**Counsel:** Brian F. Warcop, for the Crown  
Eugene Tan, for the Defendant

## **Orally by the Court:**

### **Introduction**

[1] On October 16, 2014, W.F.B. entered not guilty pleas in respect of these charges:

That he between the 7<sup>th</sup> day of February, 2011 and the 2<sup>nd</sup> day of October, 2013 at, or near Halifax, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on T.B., contrary to Section 271(1)(a) of the *Criminal Code*.

AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose touch T.B., a person under the age of sixteen years, directly with a part of his body, contrary to Section 151 of the *Criminal Code*.

AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose, invite T.B., a person under the age of sixteen years, to touch directly a part of his body, the body of W.F.B., contrary to Section 152 of the *Criminal Code*.

[2] W.F.B. waived a preliminary inquiry and the matter was scheduled for a judge alone trial in Supreme Court on September 8-11, 2015.

[3] On September 8, 2015, W.F.B. changed his plea in respect of count 1 of the Indictment (s.271(1)(a)). The remaining charges were adjourned until today's sentencing. Once sentencing on the first count is completed, it is anticipated the Crown will provide no evidence and the remaining charges will be dismissed.

[4] On September 8, 2015, the Court ordered a pre-sentence report and this was received on November 25. On the same date, the Crown provided their brief and accompanying authorities. On December 2, the Defence submitted their brief and a case in support of their position.

### **Background**

[5] The facts giving rise to the offences are pursuant to an Agreed Statement of Facts (Exhibit 1) entered by the Crown on September 8. The Agreed Statement of Facts was signed by Crown counsel, Defence counsel and W.F.B.. Exhibit 1 reads as follows:

Mr. W.F.B. is the paternal grandfather of T.B.. Between the dates of February 8th 2011 and October 15t 2013, T.B. would on occasion have sleepovers at W.F.B.'s home. W.F.B. resided at [...]. T.B. was between the ages of 12 and 13 during this time. T.B. would share a bed with her grandfather, the accused, and her grandmother. W.F.B. would lay in the middle of the bed between T.B. and her grandmother.

T.B.'s parents trusted W.F.B. to take care of and protect his granddaughter during these sleepovers.

Several times when T.B.'s grandmother would fall asleep W.F.B. would touch T.B. sexually. This touching would begin over the clothing and then moving gradually to underneath her pajamas. This occurred while everyone was in bed together. This touching would include the fondling of T.B.'s breasts and the touching of her vagina. T.B. would feel his penis as he was touching her against her backside around her buttocks. T.B. remembers her grandfather wearing only shorts to bed. T.B. was never penetrated. When T.B. was wearing underwear W.F.B. would remove her underwear and open her legs during these times. These sexual assaults occurred as W.F.B. was laying behind T.B..

During these incidents T.B. would try to wrap herself in a blanket and pretend to be asleep. T.B.'s hope was that W.F.B. would leave her alone to sleep; this was sadly to no avail.

On one of the last times T.B. stayed over at W.F.B.'s residence her grandmother was not home. T.B. believes her grandmother was at either Bingo or cards that night. While T.B. was sitting on the coach watching television W.F.B. went over to T.B. and removed her pants and underwear. When W.F.B. had T.B. undressed he placed his mouth on her vagina and attempted to perform oral sex. When he tried to use his tongue T.B. felt ill and told him that she felt ill. She immediately went to the washroom and closed the door. Inside the washroom T.B. cleaned herself up. Nothing further happened that night.

After each of these sexual assaults W.F.B. told T.B. to keep quiet and not to tell anyone what happened. By the time T.B. was 14 years of age she felt strong enough to tell her mom what her grandfather did to her. Shortly thereafter the police were contacted.

## **Joint Recommendation**

[6] The Crown submits the facts to which W.F.B. has plead guilty may be described as a mid-range sexual assault. In all of the circumstances, they submit an appropriate sentence (which is a joint recommendation) to be 24 months of custody, followed by 24 months of probation. As well, the Crown seeks an order

that W.F.B. have no contact with T.B. while he is serving his sentence (s.743.21(1)), a lifetime weapons prohibition (s.109), a s.490.012(a) order for W.F.B. to comply with the Sex Offender Registration for a period of 20 years, a DNA order (s.487.051) and a s.161 order prohibiting W.F.B. from specific activities.

[7] The Defence agrees with the above and for the reasons set out below, the Court is prepared to accept the joint recommendation.

### **Analysis and Disposition**

[8] The objectives of sentencing are set out pursuant to s.718 of the *Criminal Code*. These oft-repeated principles are deterrence, denunciation, separation of the offender from society, rehabilitation, reparation to the victims and promotion of a sense of responsibility for the harm to victims.

[9] Section 718.2(a) requires me to consider any aggravating factors or mitigating circumstances in my determination of the nature and extent of sentence.

#### Aggravating Factors

1. This case involves a clear breach of trust. T.B.'s parents entrusted their daughter (who was 12 and 13 at the material time) to the care of her grandfather. By his actions, W.F.B. violated this trust. During sleepovers, W.F.B. took full advantage of being in a position of trust to sexually exploit his granddaughter;
2. Section 718.2(a)(ii.1) deems an abuse of anyone under the age of 18 as aggravating. T.B. was only 12 when the abuse started and just into her teens when it ended;
3. T.B.'s victim impact statement reveals her vulnerability at the time of the sexual assaults. She could not bring up the courage to tell anyone what occurred until she reached age 14. T.B. was clearly uncomfortable and afraid. W.F.B. preyed upon this vulnerability of youth; and
4. The repetitive nature of the sexual assaults show willful planning on W.F.B.'s part. After his wife fell asleep, W.F.B. took advantage of his granddaughter, when the three were in bed together. One of the last times T.B. stayed over at her grandparents' residence, her

grandmother was not home. On this occasion, W.F.B. attempted to perform oral sex on his granddaughter.

### Mitigating Circumstances

1. By pleading guilty, W.F.B. has accepted responsibility for his actions. In addition to entering his guilty plea, W.F.B. waived his right to a preliminary inquiry, which saved T.B. the trauma of testifying;
2. W.F.B. has no criminal record. Further, there is evidence in the pre-sentence report of commentary from family and acquaintances of his prior good character;
3. W.F.B. is 67 years of age and has health issues; and
4. He has taken on the role of primary caregiver to his elderly mother, who has health issues including vision impairment.

### Guiding Law

[10] In *R. v. E.M.W.*, 2011 NSCA 87, Justice Fichaud (Beveridge and Farrar, JJ.A. concurring) provided an extensive review of relevant sentencing ranges available for sexual assault of children. At para. 37, the Court held:

[37] E.M.W. submits that two years was demonstrably unfit and outside the range, while the eighteen months incarceration plus twenty four months probation that he proposes would be fit (above, para 5), opening the door to a conditional sentence of imprisonment in the community. I disagree that the fitness range is so finely circumscribed. E.M.W. has cited no authority to suggest that a fit sentencing perimeter for EMW's circumstances and crime lies somewhere between incarceration of 18 months (plus 24 months probation) and incarceration of 24 months. Nor can I say that 24 months incarceration is a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" (*Shropshire, M.(C.A.)* and *R. v. L.M.* above paras.6-8). From the authorities, two years incarceration is available in appropriate circumstances for mid-range sexual offences without intercourse. Whether the circumstances of E.M.W. and his offence are appropriate is a shades of gray appraisal for the sentencing judge. The appeal court's job is to determine whether the sentence offends a principle outlined in *Shropshire, M.(C.A.)*, *R. v. L.M.* and *Nasogaluak*, and it does not.

[Emphasis added.]

### Discussion

[11] The parties appear to agree, and I find, that the facts to which W.F.B. has plead guilty amount to a mid-range sexual assault on a minor. Indeed, the *E.M.W.* facts (see para.11) are similar to the case at bar.

[12] W.F.B. committed sexual assaults on his granddaughter while she was in his care. These assaults occurred mostly at night during sleepovers and involved the groping and touching of T.B.'s breasts and vagina. Although there was no digital penetration (as in *E.M.W.*), there was an attempted act of oral sex.

[13] Having regard to the authorities and the facts of this case, I find that an appropriate sentence involves 24 months of custody. As for probation, I find a period of 24 months probation to be appropriate. Further, I have seen fit to adopt all of the other recommendations set forth by the Crown, which will be reflected in my final disposition.

[14] W.F.B., your selfish actions deprived your granddaughter of her innocence. Your abusive behaviour was brought on by your own urges for sexual gratification. T.B. paid the price but now it is your turn to suffer the consequences of your vile behaviour.

## **Sentence**

[15] Having regard to all of the factors, W.F.B. is sentenced as follows:

- a) To 24 months imprisonment for unlawful sexual assault, contrary to s.271(1)(a) of the *Criminal Code*.
- b) Pursuant to an s.743.21(1) Order, to have no contact with T.B. while serving his sentence.
- c) To 24 months probation on the following terms:
  - 1) To keep the peace and be of good behaviour;
  - 2) To appear before the court when required to do so by the court;
  - 3) To notify the probation officer of any change of name or address;
  - 4) To report to a probation officer within two days of his release from custody and thereafter when required by the probation officer to do so;

- 5) To remain within the jurisdiction of the court unless written permission to go outside the jurisdiction is obtained from the court or a probation officer;
  - 6) To attend for a forensic sexual offender assessment and treatment, if required, as directed by his probation officer;
  - 7) To attend any mental health assessment and treatment programs as directed by his probation officer;
  - 8) To have no contact, directly or indirectly, with T.B. and T.M.;
  - 9) To have no contact, directly or indirectly, with S.B., except with his consent; and
  - 10) Not to go within 20 metres of any place where T.B. or T.M. resides, attends school, attends religious services or is employed.
- d) There will be an Order made under s.109 which prohibits him for his lifetime from owning, possessing or carrying any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance.
- e) There will be an Order made under s.490.012(a) to comply with the *Sex Offender Registration Act* for a period of twenty years.
- f) There will be an Order made under s.487.051 authorizing the taking of such bodily substances as are necessary for the purposes of a forensic DNA analysis.
- g) There will be an Order pursuant to s.161 prohibiting:
- 1) 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;
  - 2) 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 towards persons under the age of 16 years; and

3) Using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.

[16] Given W.F.B.'s limited financial means, coupled with the period of incarceration, victim fine surcharge will be waived.

Chipman, J.