

**IN THE SUPREME COURT OF NOVA SCOTIA**

**Citation:** R v H.C.D., 2008 NSSC 246

**Date:** 20080813

**Docket:** 297278

**Registry:** Kentville

**Between:**

Regina

Plaintiff

v.

H. C. D.

Defendant

**Judge:**

The Honourable Justice Gregory M. Warner

**Heard:**

August 13, 2008 at Windsor, Nova Scotia

**Oral Decision:**

August 13, 2008 (written release August 15, 2008)

**Counsel:**

William N. Fergusson, Q.C., Crown Attorney  
L. W. Lance Scaravelli, Counsel for the Accused

**By the Court:**

[1] I came to Court today having absolutely no idea of the circumstances of the offence. The Court is familiar with sexual assault offences or circumstances similar to those that are before this Court, however, the absence of pre-hearing memoranda or any foreknowledge of the facts means that I will be somewhat unorganized in this decision and whether to accept the joint recommendation that has been advanced by counsel.

[2] I did have the benefit of reading a Pre-Sentence Report prepared with respect of Mr. D., the highlights of which have been orally set forth by Mr. Fergusson to the effect of Mr. D.'s age, education, employment and history. I also have had the benefit of reading the Victim Impact Statements.

[3] This sentencing is in relation to the offence of sexual assault, section 271, and possession of unregistered restricted fire arms with readily accessible ammunition, section 95. [The Crown and Accused's Counsel jointly recommend, on the sexual assault offence, incarceration for two years, exclusive of remand time, to be followed by three years of probation, and Mr. D. agrees to take a sexual offence psychological assessment. On the firearms offence, counsel recommend one year incarceration to be served concurrent with the other sentence. Ancillary orders are jointly recommended except the Crown's request for a s. 161 prohibition order.] (The two sentences in brackets were not part of the oral decision, but added upon transcription.)

[4] The determination of a fair sentence is one of the most difficult tasks that a Court undertakes. It is substantially modified by the fact that Courts of Appeal in this country have said that if experienced counsel on behalf of the Crown and on behalf of the Accused make a joint recommendation it is the obligation of Courts to accept that recommendation unless the Court determines that it does not come within the range of a fit and a proper sentence based on the facts before the Court, with respect to both the offence and the offender.

[5] Both Counsel have stated at the beginning that this is not an offence for which a so-called "conditional sentence" might be ordered. Conditional sentences are incarceration in the community, that are available in certain circumstances where the sentence can be less than two years. Before such a conditional sentence is imposed, it is required that the Court determine first that there is no risk or danger to the safety of the community and secondly that it would not bring the administration of justice into disrepute by imposing a sentence of incarceration in the community.

[6] As Mr. Scaravelli has acknowledged, this is not a matter appropriate for a conditional sentence, even though at the time the offence occurred it was a possible sentence. I therefore will no further consider that possibility, which I am required by law to consider in every instance.

[7] The purpose of sentencing is to contribute with respect to the law and the maintenance of a just, peaceful and safe society by imposing just sanctions based on the following six objectives:

- a) denunciation of crime;
- b) deterrence of the offender and others
- c) separation of the offender from society, where necessary;
- d) rehabilitation;
- e) righting a wrong done to victims and the community; and,
- f) promotion of a sense of responsibility to the offender.

[8] The fundamental principle is that the sentence must be appropriate to the gravity of the offence and the degree of responsibility of the offender. This is called the “proportionality principle”.

[9] There are a few other principles set out in Section 718 of the *Criminal Code* that I am required to consider.

[10] First, a sentence must be increased or decreased to account for aggravating or mitigating circumstances related to the offence or to the offender. Some aggravating factors are specifically enumerated in the *Criminal Code*. One of those is that, in committing the offence, the offender abused a person under the age of 18, and another is that the offender was in a position of trust or authority in respect of that victim when the offence occurred. These are two specifically designated aggravating factors that would tend to increase what would be an appropriate sentence.

[11] The second principle is that the sentence should be similar to sentences imposed on similar offenders for similar types of offences committed in similar circumstances. It is called the “parity principle”.

[12] Third, an offender should not be deprived of liberty if a less restrictive sanction is appropriate. In relation to that, all available sanctions other than imprisonment that are reasonable in the circumstances are to be considered. This is called the “restraint principle”.

[13] And fourth, when certain criteria are met, the sentence may be ordered to be served in the community. I have already indicated that in this case that is not on the table.

[14] The length of sentences for sexual assault is broad because the offence covers a big potential range of activity from the relative minor to the very serious. Until recently there were no minimum sentences for sexual offences but in November 2005 certain minimum sentences imposed were legislated.

[15] A useful starting point for the factors affecting sentencing in sexual assaults case is found in the Quebec Court of Appeal case called **R v. JL**. That decision enumerated seven factors that

were recently repeated by Judge Tufts in a case called **R v. SCC** which is sometimes cited in Courts of Nova Scotia respecting relevant factors for these kinds of offences.

- a) First is the nature and intrinsic gravity of the offence, which is affected, in particular, by the use of threats, violence or psychological manipulation;
- b) Second is the frequency of the offence and the time period over which it was committed;
- c) Third is the abuse of trust and abuse of authority involved in the relationship between the offender and the victim;
- d) Fourth is any disorder underlying the commission of the offence, whether the offender had psychological difficulties, disorders or deviancies and other similar factors;
- e) Fifth is whether the offender has previous convictions of a nature similar to those which are before the Court;
- f) Sixth is the offender's behaviour after the commission of the offence such as confessions, assistance in the investigation, immediate involvement in a treatment program, potential for rehabilitation, and financial assistance, as well as empathy and remorse for the victim; and,
- g) The time between the commission of offence and the guilty plea or verdict as a mitigating factor depending on the offender's behaviour.

[16] The Crown represents, and the Counsel for Mr. D. does not take issue with the fact, that this offence occurred over a period of about nine years until the victim left the home. That is a very long period of time.

[17] The Crown says that the offence was frequent and escalating in frequency. That is serious and aggravating.

[18] The Crown says that there was no actual intercourse. It does not put the offence at the low end but it does not put it at the very high end either.

[19] Those are the circumstances of the offence. In addition is the fact that the offender was her father, who breached the most fundamental of the obligations of the parent - to protect his child - especially in the beginning, when the child was defenceless. That is quite serious.

[20] With regards to the Victim Impact Statements, it is a matter of common sense, and it would be usual in respect of the offences of the nature described by the Crown - and he discreetly tried to protect the privacy of the victim a little in describing the particulars - that there have been serious psychological consequences, probably for a lifetime, that will continue to interfere with the personal development of this victim and with her ability to live a settled and positive life and accept - trust - other people. The Victim Impact Statement is obviously genuine and not manufactured.

[21] There were consequences to another victim, Mr. D's spouse, who provided a statement about the family, which should be the centre of everyone's life, and which no longer exists. There are huge consequences to everybody, not just to the victim and the offender.

[22] The Pre-Sentence Report generally provides no basis for suggesting that Mr. D. suffered from any disorder, although it is incomprehensible to people who are not involved in these offences that anyone in their right mind could do this.

[23] There is no evidence, in the Pre-Sentence Report or from any information before the Court, of disorders or psychological difficulties or of an abusive upbringing during Mr. D.'s youth, that might, I am not going to say excuse, but rather explain, what prompted his actions. His background is not a mitigating circumstance in this case.

[24] The Report does show an offender who has no prior conflicts with the law or involvement in similar circumstances as those for which he is before this Court. It shows that he has been a productive member of the community and financially responsible, although there are no details of his life. It appears he is a hard-working person.

[25] The Report says that he appears to be remorseful, and that he says he is "confused about life" and that he did not understand why he did what he did.

[26] That last statement concerns me. The Court does not have what is called a Sexual Offender Assessment, which assessment might indicate whether the circumstances that led Mr. D. to abuse the trust that he is given by society, is one suggestive of a low risk to re-offend, a medium risk to re-offend, or a high risk to re-offend. The Court has no information about that concern and cannot assume anything as a result of the absence of that information.

[27] There is, in effect, no explanation as to why this has happened. That makes sentencing particularly difficult. It makes the assessment of the joint recommendation extremely difficult.

[28] Those are my comments with regards to the offence and the offender.

[29] I do want to point out that for an offence like this, and an offence that has been committed over nine years, where there is an abuse of trust, there is a huge, I should say, great moral culpability. It is a deliberate act, it is not an accident, it is not a fleeting one-time momentary indiscretion. It is the opposite. That makes the offence more serious.

[30] As I indicated, the aggravating factors include the abuse of trust, the fact that the abuse was of a person under the age of 18, the fact that the acts were repeated over an extended period of time and only appear to have ended when the victim left the home.

[31] The mitigating factors are that there are no other prior convictions, and that there is no evidence of intercourse in the conventional sense, and that there is a guilty plea at an early stage, which preserves some of the privacy and some of the dignity of the victim by her not having to

testify. While some may not think that is important, testifying can sometimes be as devastating as the event itself.

[32] Factors which are neither aggravating nor mitigating, that is, neutral in a sense, are that Mr. D. had a normal upbringing, he was not a past victim himself, and he is not young.

[33] I have indicated that this sentencing is problematic because of the absence of a psychological assessment.

[34] Another important principle that I am required to consider is the “parity principle”. Just sentences cannot be harsher or more lenient than for comparable offenders and comparable offences. A wide range of sentences for people who are similarly situated brings disrespect to the law. At the same time, Courts recognize there is a wide range of sentences for sexual assault.

[35] Our Court of Appeal and the Courts of Appeal of other provinces has stated that general deterrence and denunciation are the objectives to be emphasized in offences of sexual assault against children. It is not to say that other objectives are not also to be considered, it simply says that the primary focus has to be on deterrence and denunciation. A sentence that is unduly lenient can provide neither the necessary deterrence nor denunciation.

[36] There are only a few crimes that are more serious, or that have a more devastating effect on their victim, than sexual assault against young persons by those in authority over them.

[37] The Courts of Appeal have consistently said that, absent very special circumstances, federal time is mandated for a person convicted of sexual assault. There are no special circumstances in this case. Federal time begins at two years. Offences can range from two years up, absent special circumstances.

[38] Counsel for Mr. D. properly points out that normally Courts are required to consider the pre-sentencing period of incarceration. There are no counselling and some other services available that might help in rehabilitation when one is on remand. The norm is to credit two months on the length of the sentence for one month on remand. Counsel is correct in stating that the joint recommendation is effectively a sentence of about two and a half years - two years from today.

[39] The Court does not have details as to the extent of the sexual assault except that it was on a child by a person in a position of trust and was carried out over an extensive period of time. I am assuming that it was not of the lowest level but I am also assuming that it did not include intercourse, which is at the highest level.

[40] The joint recommendation, in terms of denunciation and deterrence, is within the range for offences of this kind. It could have easily been much higher; it is unlikely it would have been less than two years as opposed to more than two and a half years.

[41] An important consideration, in deciding to accept the joint recommendation, is the request by the Crown, and the agreement by Counsel for Mr. D., that there be an assessment of why Mr. D. committed the acts for which there is no explanation before this Court, so that the Court can be reasonably satisfied that the community will be in no danger when he has served his time. The three-year period of probation commencing when he has served his time, combined with an agreement that either before, or immediately at the beginning of the period of probation, he undertakes a sexual offence psychological assessment, in addition to the usual terms of a probation order, and that he carry out as directed by any probation officer any counselling that may be recommended as a result of the assessment, will minimize the potential risk to society.

[42] For these reasons I am prepared to accept the joint recommendation. I do have to deal with some ancillary issues.

[43] The Crown has asked that I sign an Order that Mr. D.'s name and information be filed with a Sex Offender Registry. I grant that Order.

[44] The Crown has asked that I sign an Order that Mr. D. provide his DNA to the government's database. That is a requirement upon a plea of guilty, or a conviction, and I grant that Order.

[45] In addition to the minimum one year period of incarceration for the firearms offence, which I make concurrent with the two-year incarceration for the sexual assault offence, I will sign a mandatory firearms prohibition order. I believe Crown said that the mandatory order had to be ten years or more. I make it for ten years.

Crown: It is a maximum of ten years.

Court: I make it for ten years.

Crown: Following release from custody.

Court: Yes, that is following his release from custody.

[46] The contested request was the request by the Crown that I make an order prohibiting Mr. D. from:

- a) attending at any public park or public swimming area where persons under the age of 14 are present, or can reasonably be expected to be present, or any day care centre, school ground, playground or library; or
- b) seeking, obtaining or continuing any employment whether or not the employment is remunerated or becoming or being a voluntary in that capacity that involves being in a position of trust or authority toward persons under the age of fourteen; or
- c) use a computer system, within the meaning of the *Criminal Code* and certain section that is listed in this Order, for the purpose of communicating with a person under the age of 14 years.

[47] I am required, if I do not grant that Order, to give an explanation as to why. I have already indicated in questions to Crown and to Mr. Scaravelli that my biggest concern is that I do not have an explanation of why Mr. D. did what he did or an assessment of his risk to re-offend. It is not a matter defining him as a predator outside of the home. There is no explanation, as to why, over a nine-year period, a person would do what he has done. It does not make sense, and, quite candidly, in the absence of an explanation or assessment, there is a risk to public safety.

[48] The requested order is, in my view, appropriate because my obligation is to protect the community. I make the Order for ten years from the date the offender is released from prison and I sign that Order.

[49] I am not making a Restitution Order, on the representation that the restitution requested has been paid to the victim, and the victim's acknowledgement of payment of that restitution.

[50] None of the sentencing process can undo what has been done. None of the sentencing process can right a wrong. Sentencing can bring accountability.

[51] Mr. Fergusson and Mr. Scaravelli have recommended a fit and proper sentence and that is the basis on which I am imposing it.

[52] Anything else from counsel?

Crown: If I could have a couple of those signed DNA Orders the officer is here to take the sample now.

Court: All right. I have signed one, do you need me to sign more than one?

Crown: I will need two.

Court: Okay.

Court: Make sure Ms. DeGraaf has whatever she has to have. Do you want the file to Ms. DeGraaf?

Court Reporter: May I ask a question?

Court: Yes, Ms. DeGraaf.

Court Reporter: The terms of the probation order,

Court: The terms of the Probation Order are going to be the usual terms for a Probation Order and, in addition, as I indicated, a requirement that Mr. D. first attend, if he has not done so before the period of probation commences, for a sexual offender assessment and secondly, if I can find the proper wording here,

Crown: Sexual Offender Treatment Program, I believe is the Provincial one.

Court: Yes. Attend and actively participate in such rehabilitative programs as may be directed by the probation officers.

Court Reporter: And if I may just clarify further, the normal conditions being keep the peace, be of good behaviour, reporting to the probation officer immediately upon being released from custody.

Court: Correct.



Court Reporter: Thank you. One more thing, if I might clarify Justice Warner, counts two, four and five . . .

Crown: They are withdrawn, my Lord.

Court: Yes, counts two, four and five are withdrawn.

Court Reporter: Thank you, your Honour.

J.