

IN THE SUPREME COURT OF NOVA SCOTIA  
Cite as: R. v. D.B. M., 2005 NSSC 374

**Date:** 20050404  
**Docket:** CR 228949  
**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

D. B. M.

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DECISION

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**Judge:** The Honourable Justice Gerald R. P. Moir

**Date Heard:** 04 April 2005

**Counsel:** Tanya G. Nicholson, for Mr. M.  
Jennifer A. MacLellan, for the Crown

**Moir, J. (Orally):**

[1] Mr. M. pleaded guilty to a sexual assault upon the daughter of the woman with whom Mr. M. was living. The girl was eighteen at the time. There were some indications of a father/daughter-like relationship, though that remained ambiguous. The assault was fleeting and of a less violent character than many we see. Although she made no demand that it stop, the victim immediately telephoned her boyfriend once Mr. M. let her alone. Clearly, she was stunned and repulsed.

[2] Crown and defence were able to make a joint submission on sentencing which I accept. Mr. M. will be under a conditional sentence for nine months followed by probation for 15 months. He will be under supervision for two years.

[3] Further, the Crown sought and defence consented to an order for a sample of Mr. M.'s DNA. I presume that has been executed. (Ms. MacLellan advises the Court) So, that's about to be executed.

[4] I must grant an order under the *Sex Offender Information Registration Act* unless Mr. M. satisfies me that the impact upon him would be grossly disproportionate to the public interest in protecting society.

[5] Counsel have drawn my attention to the decision of our Court of Appeal in *Jordan*, which considered the question of gross disproportion in relation to DNA orders. I agree with Ms. Nicholson that orders under the *Sex Offender Information Registration Act* are far more invasive than DNA orders. The former go on and on and subject the citizen to placing himself before the police for ten to twenty years. Still, I think that this from para. 59 of *Jordan* offers me some guidance:

The first involves a comparison of the balance struck by parliament in the legislation for the majority of cases on the one hand and the particular circumstances of the case before the court on the other. If the circumstances of the particular offender or of the offence or of the risk of breach of privacy or security of the person vary remarkably from the sort of cases which parliament may be presumed to had in mind in devising the legislation, the impact of the order may be found to be grossly disproportionate.

[6] I have also considered the authorities to which counsel have referred me. My understanding of them will become apparent from my decision.

[7] A DNA order has a fairly specific impact. One is in the hands of the police briefly for a moment. True, the police then have information on the offender that they cannot collect from other citizens. I believe I must recognize and weigh the impact of a registration order against the kind of offender we have here in order to determine

if the impact is grossly disproportionate to the value of the information-gathering scheme.

[8] In my view, it is appropriate to keep in mind the impact that follows logically from being subjected to this scheme upon any citizen. There would be the internal shame of having to go to the police and speak about this subject in each circumstance required by this legislation. There would also be the objective loss of rights and freedoms in having to place oneself before the police regularly. Those impacts are magnified by the period over which the shame and the surrender of rights extends, twenty years mitigated only by the possibility of applying for a discharge after ten years. These impacts would be significant for most people and I find nothing about Mr. M. to diminish the impact in his case.

[9] I have considered Mr. M.'s prior record, one offence in 1999 for assault causing bodily harm in a domestic altercation. I have considered the violent nature of any sexual assault including ones at the so-called lower level. I have considered the relationship between victim and predator and the responsibility upon any mature man who lives in the home of a young woman because of a spousal relationship with her

mother. However ambiguous the relationship may have been, it puts Mr. M.'s actions among those of gravity.

[10] I have also borne in mind the fleeting nature of the assault and its ending before any express demand to stop. Further, Mr. M. will be under supervision of the state for two years. Furthermore, Mr. M. has already provided DNA information about himself should the police suspect him in future.

[11] In my assessment considering all of the circumstances I am aware of about Mr. M. and about the offence he committed, I am satisfied that the impact of an order under the *Sex Offender Information Registration Act* for ten to twenty years would be grossly disproportionate to the public interest in protecting society through such means.

[12] I will, therefore, not grant the motion made by the Crown.

J.