

IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R v. J.H., 2010 NSSC 120

Date: 20100318

Docket: Cr.SP 313547

Registry: Pictou

Between:

Her Majesty the Queen

v.

J.H.

Restriction on publication: Pursuant to Section 486(3) of the Criminal Code of Canada

Editorial Notice

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

Judge: The Honourable Justice N.M. (Nick) Scaravelli

Heard: March 18, 2010, in Pictou, Nova Scotia

Counsel:
Jody McNeil, Esq., counsel for the Crown
Thomas J. Singleton, Esq., counsel for the Defence
J.H. present

By the Court: (Orally)

[1] I confirm the publication ban in effect pursuant to Section 486(3) of the *Criminal Code*, which provides that the identity of the complainant or a witness, or any information that could disclose the identity of the complainant or a witness, not be published or broadcast in any manner. So for this reason, I intend, for the record, to use initials when I refer to the victim and the accused.

[2] J.H. is before the Court for sentencing. On February 1, 2010, he entered a plea of guilty to the charge that on December 14th, 2008, he did commit a sexual assault on J.M. contrary to Section 271(1) of the *Criminal Code*. The Crown and Defence agreed to a statement of fact which was read into the record at that time. In summary the victim J.M. who was 15 years of age at the time was attending a party with friends including the offender J.H.'s daughter. Alcohol was consumed at the party after which J.M. was escorted to the home of J.H.'s daughter to spend the night. While J.M. was sleeping next to a girlfriend in a bed facing the wall, J.H. entered the room and rubbed J.M.'s back. He then placed his hand under her panties and placed his hand on her anus and vagina. Approximately one minute of time was involved. J.H., according to counsel, was intoxicated at the time.

[3] I have reviewed the Pre-sentence Report. I listened to the Victim Impact Statement and submissions of counsel. The Crown and Defence have made a joint recommendation on sentencing.

[4] According to the Pre-sentence Report, J.H. is a 49 year old married father of three children. He and his family reside in *. He has a prior conviction in 1992 for having a blood alcohol content in excess of .08 for which he received a fine and suspension of his driver's licence for a period of one year. He is in good health generally and is employed on a seasonal basis with *. He is *. He continues to have support from his employer and his spouse.

[5] I note that J.H. has accepted responsibility for the offence and has expressed remorse. He stated a commitment to abstain from alcohol. He indicated his willingness to comply with any conditions imposed by the Court including assessment and counselling in the areas of substance abuse and sex offending.

[6] During preparation of the Pre-sentence Report, the probation officer spoke with the mother of the victim. She noted that her daughter continues to have a positive relationship with the offender's daughter and that they attend school regularly

together. The mother made it clear she did not want to interfere with this relationship, but was concerned with further contact between the offender, and her daughter and her immediate family members.

[7] By way of Victim Impact Statement read today in Court, the victim has explained the emotional impact of having suffered this abuse from a family friend who is the father of her best friend. Also the negative impact on the relationship between the two families in this small community. I admire her courage in attending and speaking here today.

[8] The joint recommendation is for a suspended sentence with a period of probation for two years. As stated by our Court of Appeal in *R v. Cromwell* [2005], N.S.C.A. 137 joint submissions arising from a negotiated guilty plea are generally accepted by the sentencing Judge provided the sentence is within the acceptable range.

[21] A trial judge may decline to give effect to a joint recommendation, not simply because she would have imposed a more severe sanction, but where the sentence is clearly unreasonable and then, only if the judge is satisfied there are no other compelling circumstances justifying, as in the public interest, a departure from an otherwise fit sentence.

[9] Section 718 to 718.2 of the *Criminal Code* contain the fundamental purpose and principles of sentencing. As stated by our Court of Appeal in *R v. Dale*, [1992] N.S.J. No. 75, (NSCA), deterrence, both specific and general is a primary consideration in sentencing for sexual abuse of children. In cases of less aggravating circumstances, rehabilitation of the offender merits a degree of consideration that may result in a suspended sentence or a very short period of incarceration. In that particular case, the Court upheld the sentence of a fine and probation for a period of one year where the offender was convicted of three counts of touching three young girls for a sexual purpose. The offence occurred over a weekend where the offender touched the girls several times on the vagina over their bathing suits while swimming with family and friends.

[10] In a recent decision of *R v. Tanner*, [2010] NSSC No. 82 our Court on Summary Sentence Appeal upheld a suspended sentence of one year probation where the offender touched the breast of a cashier at a local store with accompanying words that were disgustingly sexual in nature.

[11] Counsel have referred the Court to several other decisions in the Provinces across the Country that have imposed suspended sentences for sexual offences that have been described as being at the low end of the seriousness scale.

[12] The offender's conduct in this present case is deserving of condemnation. I do note that there are mitigating circumstances. The offender entered a plea of guilty without a necessity of trial. This saved the victim from having to deal with the emotional impact of testifying at trial. As disgusting as the offender's behaviour was, the assault in these circumstances was at the low end of the scale of sexual offences. The offender has no relevant prior criminal record and his behaviour has had a significant impact on him, his family and friends in this small community.

[13] I find that the sentence as recommended by the Crown and Defence is within the acceptable range of sentences for an offence of this nature.

[14] Mr. H. would you stand, please. I sentence you to a suspended sentence with probation for a period of two years. The probation order shall contain the conditions as set out by Crown counsel in his submissions. In addition, I will grant a mandatory DNA databank order. I also order under SOIRA. Counsel have consented, and I will

order, a prohibition Mr. H. of you being alone with persons under the age of 16 years. That's under Section 161. There will also be a Firearms Prohibition Order under Section 109.

J.