SUPREME COURT OF NOVA SCOTIA
Citation: R. v. A. N., 2009 NSSC 186

Date: 20090605
Docket: CRH 288914
Registry: Halifax

Between:

Her Majesty the Queen

v.

A. N.

Restriction on publication: S.486.4 C.C.C.

Editorial Notice

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

Judge: The Honourable Justice Duncan R. Beveridge

Heard: June 5, 2009, in Halifax, Nova Scotia

Written Release of Decision: June 11, 2009

Counsel: Eric Taylor and Terri Lipton, for the Crown
Ken Greer, for the defendant

By the Court:

[1] We are today to sentence Mr. N.. Mr. N. originally elected trial by judge and jury. With the assistance of duty counsel he re-elected to trial by judge alone and stood his trial before me March 24 to March 30 on a six count indictment.

[2] The first three counts alleged offences of indecent assault and rape over the time period of 1970 to 1976 in relation to his daughter J. N.. The last three counts alleged offences of indecent assault, rape and incest over the time period of 1974 to 1980 in relation to his daughter L. N..

[3] In an oral decision of April 2, 2009 I found him guilty on five of the six counts in the indictment. This decision is now reported at 2009 NSSC 166; [2009] N.S.J. No. 231.

[4] I will not review in detail today the evidence and facts, but some reference must be made to the circumstances of these offences.

[5] I found that during the summer of 1970 when J. N. was 12, turning 13 her otherwise normal relationship with her father changed. Mr. N. invited her to touch his penis and she did so. Mr. N. told her how enjoyable it was and it was normal for it to get hard. Even at that young age she says she knew this was wrong. She does not recall anything else happening on that occasion. This incident was the subject of the first count in the indictment. Mr. N. was found not guilty of that count, not because the incident did not occur, but due to the fact that it was not a crime as the *Criminal Code* then stood and that is the law that had to be applied. It

did provide a bench mark for when J. N. was able to relate the abuse she then suffered at the hands of her father over the next number of years.

[6] On moving to D. and commencing what should have been wonderful years in Junior High, instead the accused would have her masturbate him. He would put his fingers into her vagina. It was oral sex and soon full penetration. She described being woken in the middle of the night when she lived on P. Street and she was then in Grade 8. He would come frequently in the middle of the night and wake her up by rubbing his penis on her face, removing her thumb from her mouth to try to put his penis in. Once awake the accused would take her to the bathroom and there have her masturbate him, making her kneel in front of him and putting his penis in her mouth, ejaculating and telling her to swallow it because it was healthy for her.

[7] She also described acts of sexual intercourse and then by Grade 9 they had moved to *. There she recalled it was basically every Sunday morning. I should say at least every Sunday morning to have sexual intercourse with her. In other locations in the house, he would take her to the rec room, the laundry room, have her masturbate him and perform oral sex on him. He complained that she was stiff like a board, that she was emotionless, cautioned her that she would not get married as men would not like that. She described her repulsion at his approaches, her complaints to him that she did not want to do this, it hurt. She recalls him putting Vaseline on her for his penis to be able to penetrate her.

[8] She did not suffer any physical injuries but, as will be detailed later, she has certainly suffered tremendous emotional ones.

[9] When she said to him “I don’t want to, stop, it hurts” he ignored her. Afterwards he would assure her it will not happen again and apologize. She cried and at different times he cried. She said she believed him when he said it would not happen again because he was crying. But it did happen again. It happened until she was 16 in approximately 1974 when she disclosed this abuse to her mother. She explained she had not disclosed it before because of the accused telling her that if she did her mother would leave Mr. N. and as her mother did not work, the children would all have to go out to separate foster homes. She was very close to her siblings. She could not bear to see that happen to her family. But nonetheless, when she turned 16, her emotional state was such that she in essence felt she had no choice. She was having violent dreams, feelings of anger. She eventually disclosed to her mother.

[10] Her mother, M. S., confronted the accused. He in effect admitted that he had abused J.. Despite this intervention it started again and continued until 1976.

[11] J.’s evidence was corroborated in a number of material respects by other evidence, not the least of which is the video taped interview that he had with Detective Sergeants Sarkis and Boots on April 1, 2005. I think it is important to refer to this interview because it gives everyone an idea of what Mr. N.’s approach to these occurrences were then and I would have said up until today the same,

except for his protestation of remorse that he gave today. I will say more about that later.

[12] Mr. N. was told in the interview by the W. Police Service Sergeants that the H. Police had requested them to interview him on allegations that he had sexually assaulted J. N. when she was 13 to 17. Not a lot of details were canvassed with Mr. N. in that interview, but he was told that the allegation from J. was that it started out fondling and quickly escalated to having her perform oral sex on him and sexual intercourse at all three locations in Nova Scotia. He was specifically advised that they intended to charge him with rape and indecent assault all between 1970 and 1974.

[13] His response was along the same lines as he had given to J. and J.'s brother, M. N., when he referred to his unhappy marriage to M. S.. He said to the police "he had lived with this all his life". When asked "So why did you do it?" he said "There is no explanation really. She was starting to look good". There are many more inculpatory comments in that interview. They do not need to be reviewed. Suffice it to say that the assaults and rapes occurred on a regular basis, easily into the hundreds. This highly irregular heinous predatory conduct by the accused sadly became, from Junior High School to 1976, a regular part of J.'s life.

[14] In relation to L. N. his sexual predatory conduct also started when she turned 12 in 1974. She recapped that the first time there was such conduct on a trip they were then taking to O. That incident was not the subject of a charge here in Nova Scotia. It did serve as a milestone, a marker in her life as to when she could

pinpoint when the abuse then started in Nova Scotia. L. N. was somewhat vague in her recollections of what occurred on *. She does recall Mr. N. fondling her genitals and Mr. N. having her in essence masturbate him and perform oral sex on him.

[15] When L. N. was 16 she quit school, moved out to live with her father at his apartment on L. There the sexual abuse happened again. In terms of the numbers of times that L. N. was able to testify to these events occurring, she said overall it occurred 15 to 20 times. There was no consent to any of the sexual acts.

[16] In a summary way the accused in a ten year period when he was 32 to 42 years of age used his daughters as his sex partners without their consent, if consent could lawfully be given or even relevant to the conduct he engaged in. J. and L. are in no way to blame for that conduct, nor for not having pressed forward with charges closer in time to those events, nor are they to blame for now having the courage and fortitude to come forward.

[17] They have both provided victim impact statements to the Court which speak eloquently to the impact that these offences have had on them when they were young and how it is continued into their adult lives. I will refer to those statements later.

[18] In terms of the circumstances of Mr. N. himself, there was both evidence at the trial and in the documents that have been prepared for this sentencing hearing that set out Mr. N.’s background. Those documents are a Pre-Sentence Report and

a Pre-Sentence Comprehensive Psychological Assessment for Sexual Offenders prepared by Dr. Angela Connors, dated May 5, 2009.

[19] Mr. N. is presently 70 years of age. He is just one week away from turning 71. The Pre-Sentence Report discloses that he had a normal family upbringing, that he left school at an early age to learn a trade, which by all reports he has been very successful at. Although Mr. N. refers to an incident in *, I take it that for these purposes I accept that he has no previous record and certainly no related one at all. At most, he has had one prior involvement with an impaired driving matter that he voluntarily disclosed but for which there is no formal record.

[20] I also accept without hesitation that he has not only worked, I dare say he has worked very hard all his life. It is obvious that he is well liked by his current employer. He has worked there since May 2002 and earns an annual salary of $60,000.00. His supervisor refers to him as a wonderful and dedicated employee who displays an excellent work ethic. He completes tasks as directed and is responsible for supervising other employees. She confirms that she is likely unable to hold his position for him and added to the probation officer that Mr. N. was scheduled to head up a project, I take it of some size, in T. in the near future. She summed up her comments on Mr. N. as:

> ...the subject is a really valued employee who is held with high regard who puts in a concerted effort on a daily basis and it is unfortunate he finds himself in this position at his age.

[21] I note that Mr. N., despite his age, is healthy. He has a hearing defect which does not appear to interfere his ability to earn a substantial income. Mr. N. had

earlier seen an individual with the Windsor Ontario Sexual Offender Treatment Program. I do not think it is appropriate that I take into consideration his comments to that individual on the sentencing hearing, as I ruled inadmissible at his trial the results that came from, or as a result of J. N.'s pressure on him to pursue that counselling. Well intentioned pressure, I hasten to add, but in the circumstances I am not prepared to take into account those comments.

[22] What is troubling to me is Mr. N.'s comments to the Probation Officer as he attempted to justify his actions by telling the officer "I had no wife" and adding that J. was very sympathetic toward him. He further stated to her "I feel absolutely terrible. I am almost 71 years old and everything I hear about me is bad". Sadly this comment is not, to me, an express of remorse but an expression of how selfish you still are, that it is all about you. It is all about your needs. Not anybody else's. Not your daughters, who you were supposed to protect, but about you and the predicament that you think you are in for the depraved acts that you carried out when you were an adult, a father.

[23] The report by Dr. Connors, dated May 5, 2009 reflects in many ways the information that was disclosed at trial and is already in the Pre-Sentence Report. If anything it underscores the previous concern that I have already highlighted. When Mr. N. was interviewed throughout, as I understand it, a two-day process, Dr. Connors noted that Mr. N. tended to perseverate, that means kept repeating, coming back to, insisting on, how hurt he was that his family put him through this process. You are responsible for this process Mr. N., not them. I see you nodding your head in agreement. That is a good sign.

[24] Similar comments appear in the report in terms of your everlasting hope that your daughters would back down and withdraw their allegations against you. Not that they were not true, but that they would back down and not actually come to court. And you expressed to Dr. Connors that you would have trouble trusting them now since they hurt you by going to court. Not how you had hurt them. Not how you had robbed them of their innocence, of their youth, of their lives, but how you were hurt by them now having the gall to take you to court. It is an appalling attitude Mr. N. expressed just a little more than a month ago with Dr. Connors. I sincerely hope that the glimmer of insight or the beginning of insight that Mr. Greer eloquently advocated on your behalf today is true and will continue.

[25] I note that you repeated to Dr. Connors your rationalization and justification how you did not have a wife and that J. N. was old enough to see that life was not too good for you and she was feeling a little sorry for you. Implying, as you have, to her and to others that she engaged in these sexual acts to make you feel better. That is just delusional. Delusional of the highest magnitude and selfish.

[26] I am concerned about what is to happen in the future Mr. N.. At page 10 of the report of Dr. Connors notes that Mr. N. admitted he is sexually attracted to females 12 to 60 years of age, but in the case of those who are age 12, only in some situations, and that he would act only if “she was thinking the same as me”. Girls who are 12 cannot consent to any sexual act. Why would you ever think that a 12 year old or a 13 year old or a 14 year old would truly consent to engaging in sexual

acts with you Mr. N. is troubling. I think you were being honest with Dr. Connors and I give you credit for that, but nonetheless it is troubling.

[27] I do note that based on statistical analysis and standardized tests that compared to others that there is not a high risk to re-offend and that you have in fact remained free from involvement with the criminal justice system since these acts stopped in 1980.

[28] Dr. Connors does highlight the need for caution in terms of permitting you to have access to be in the company of any young person. She writes:

> Overall, Mr. N. does make some admission of guilt, but he is only at the beginning stages of taking personal responsibility for the intrusive abuse that he perpetrated against his adopted daughter and eldest biological daughter. His understanding of his own motivators and vulnerabilities to committing sexual exploitation is limited, and some of his crime cycle variables remain active today. Mr. N. is hampered in his development of responsibility by the negation of harm that he caused, and his sense of being victimized. He does not have the personality profile of an individual who will be easy to engage in the therapeutic process, but despite his age he retains risk for recidivism (particularly within the family) making intervention a consideration that is current, and not just something that would have been helpful years ago.

[29] There are a number of principles of sentence that I today must take note of. In many ways the *Criminal Code* sections are codifications on what the common law has long provided, but the sections nonetheless provide direct statutory guides to the courts on how to deal with offenders. Section 718 provides:

> **Purpose** – 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 follow 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.

[30] Section 718.1 of the *Code* provides as a fundamental principle that:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[31] I can think of little offences as grave as this and you had the highest degree of responsibility, Mr. N..

[32] Section 718.2 of the *Code* provides by way of other sentencing principles that:

> 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,

The section lists a number of things, some of which are not relevant to Mr. N.'s situation and I will omit. Others are. In particular:

> (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,

These shall be deemed to be aggravating circumstances.

[33] In addition, 718.2 of the *Code* provides that:

> (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;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;

[34] In addition s.718.01 was later added by Parliament. It provides:

> 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.

[35] There are a host of aggravating facts or circumstances that are present in this case. By way of aggravating factors they are: the accused abused his children and I stress this was not just one child but two children. He obviously abused a position of trust and authority in relation to these victims. The abuse took place over many years involving all manner of sexually abusive behaviour from sexual touching, fellatio, cunnilingus, digital penetration and ultimately full sexual intercourse.

[36] The sexual intercourse with J. occurred not just infrequently but on a regular basis. The abuse easily happened hundreds of times.

[37] I consider aggravating that the abuse of J. continued after it had been discovered and the accused was confronted over that abuse. It is also aggravating that the abuse of the second victim, L., seems to have occurred either around the same time or certainly after the abuse of the first victim was discovered.

[38] I have no hesitation also in concluding that his behaviour involved planning and forethought. He thought about it. He planned on it. He persisted in his abusive conduct despite verbal resistance by the victims.

[39] By way of mitigating factors I do not consider a mitigating factor that Mr. N. is 70 years of age. I do consider a mitigating factor that he does not have any other convictions, but what weight to put to that is a different matter. I also would note that I do not consider it aggravating that Mr. N., to this Court on March 11 on March 23 and at the end of his trial on April 2 and again to Dr. Connors in his interviews with her, justified going to trial because he had always hoped the complainants would back out. They would withdraw. Not actually come to trial and testify. Yet, he put them through a preliminary inquiry and a trial. However, it is certainly wrong to ever consider, any accused who insists on their right to a trial, as an aggravating factor, and I do not do so. But having gone through a trial, not having accepted responsibility for what you obviously did, deprives you of any mitigating factor at all.

[40] I left out of that list of aggravating factors the very real impact that these offences have had on J. and L. N.. The impact that they have described is the kind of impact that the courts see described in so many scenarios. It is not surprising yet it is always deeply disturbing. The impact you have when you take away their innocence is not momentary. It could last a long time. Sometimes victims can get over it or appear to get over it. But it impacts them and the community, in their employment relationships, in their relationships with other adults, and in J.'s case, with her own children. J. said:

> The greatest impact is that because of the baggage I carry inside me, I have not be able to let transpire the joy, the happiness and the love that my children have given me, and my son being a male creates even greater barriers between us. I hope someday, my father can realize how much it has impacted not only my life but my children's life as well. It cheated me of a secure, loving childhood, of a healthy, trusting relationship with a partner with a real family life and it cheated me from passing on to my children a love of life. And my children? It cheated them of a happy mom and that tears me up inside. I guess in the end, they also carry the weight of my father's actions...

[41] L., as well, describes the impact on her difficulty in forming lasting, trusting relations – something that she and J. had every right to have, and you took that away.

[42] A number of cases have been submitted to me, as I would expect, since the court is directed by s.718.2 to have regard to other sentences that have been imposed on similar offenders for similar offences, committed in similar circumstances. One of the difficulties in looking at other cases is that there is always, or at least frequently, differences. Some that make it worse. Some that mitigate. No two cases are going to be the same, but nonetheless we are driven to

this. We are driven to it because without that, sentencing might become arbitrary, and if arbitrary, unfair.

[43] So Mr. N., I am going to go through a few cases so you understand what kind of sentences are imposed for this kind of behaviour and where your behaviour fits in the overall scheme of how courts deal with these matters, sir.

[44] What we are dealing with here, it is admitted that the maximum sentence for indecent assault on a female is five years and the maximum sentence for the offence of rape is ten years, although it was life imprisonment at the time these offences were committed. By operation of law the maximum now is ten years. Incest remains an offence in the *Criminal Code* and the maximum sentence for that is 14 years.

[45] In *Her Majesty the Queen v. Weaver*, [1993] N.S.J. No. 91 the accused there was 69 years of age. He pled guilty to offences involving three young girls that occurred over a ten year period. He also pled guilty to two counts of sexual intercourse with a female under 14 and sexual assault. These occurred between 1978 and 1983. There were five victims in total. The conduct - low range from one incident of touching to repeated sexual intercourse. The accused was the neighbour of these victims and a friend of the family. The children he assaulted were friends of his daughter. In one instance the sexual intercourse lasted a number of years with one of the victims. As you might expect, there was a devastating impact on these victims.

[46] Justice Bateman, as she then was, noted that the accused was 69 years of age and not in the best of health due to high blood pressure and stress. She noted there was nothing to indicate that the accused's health was so poor that an otherwise fit sentence should be altered. She rejected the proposition that age would dictate an otherwise appropriate disposition to a lower one. The total sentence she imposed for these offences was one of five years.

[47] You will note, sir, that there was no abuse of trust or not nearly the kind of abuse of trust that occurred in your case involving your two daughters. But five years was imposed there where the accused pled guilty – a significant mitigating factor.

[48] Justice Cacchione in a decision reported as *R. v. D. A. M.*, [1999] N.S.J. No. 468 referred to a number of important principles that you should be aware of. He wrote at paragraph 64:

> 64 In cases involving sexual abuse of children certain principles have emerged from cases such as...
>
> 65 These cases stand for the following propositions:
>
> That deterrence both specific and general is the primary sentencing consideration with emphasis on general deterrence when the offence involves children.
>
> 66 This is not to say that reformation and rehabilitation is not relevant to these types of cases.
>
> 67 Prior to the conditional sentencing provisions becoming law, the courts viewed as rare the cases involving a non-custodial sentence or a minimal sentence when children were sexually abused. These cases and others describe the sexual abuse of children by an adult as a reprehensible crime calling for a sentence of

> denunciation. The lack of a prior criminal record was held by these cases to not be unusual and to not militate against a sentence of lengthy incarceration. Our courts have also commented that an accused's unsatisfactory sexual history is not a mitigating factor.

[49] At paragraph 83 to 85 he noted:

> 83 The sexual assault of a child or children by an adult is a reprehensible crime. It is made even more reprehensible when the adult is in a position of trust vis-a-vis the child. The Court of Appeal in this Province has emphasized that sentences for sexual assaults on children cry out for denunciation. In R. v. Hawkes (1987), 81 N.S.R. (2d) 156 the court stated at page 157:
>
> "...Sexual abuse of near helpless children by adults, upon whom they should be able to rely for protection, should incur sentences which hopefully deter the perpetrator and others so inclined and demonstrate society's revulsion of such conduct. Children must be protected; deterrence must be both specific and general, with emphasis on the general aspect of deterrence."
>
> 84 The Manitoba Court of Appeal in R. v. C.D. (1991), 75 Man.R. (2d) 14 distinguished sexual assaults on children from other sexual assaults and noted that repeated sexual abuse of a child by a parent is a crime like no other and should be placed for sentencing purposes in a category of its own.
>
> 85 The sentence for this type of an offence is one that must reflect society's outrage at the sexual assaults committed on helpless children. I am entitled to presume, according to the authorities, that a sexual assault of a child on the verge of sexual maturation will have a particularly lasting impact...

[50] Justice Kelly in a case called *G.O.H.*, [1995] N.S.J. No. 316 had to deal with a situation that has some marked similarities to the one before me. The accused was convicted after a jury trial of five counts of sexual abuse of his two daughters. The abuse commenced with sexual touching and progressed to digital penetration of her vagina and fellatio and ended in sexual intercourse. The offences related to the youngest daughter was between when she was nine and 12 consisted generally only of incidents of sexual touching. The 41 year old accused had no criminal

record. There was in that case, I would note, evidence relating to physical abuse of both of these victims as children. Justice Kelly found that the accused encouraged his daughters to participate in the sexual acts by giving them treats, riding in cars. Other times he threatened them that he would commit violence to them or their mother if they told anyone about the acts. Each were victims of violence from their father sometimes in the guise of discipline.

[51] Justice Kelly noted such decisions as that of *R. v. Cambill* from the Ontario Court of Appeal where an accused was sentenced to seven years for having sexual intercourse with one daughter with no violence.

[52] After a review of the authorities he imposed a total sentence of 9.5 years.

[53] I accept that in the situation before me there does not appear to have been any overt acts of violence. Mr. Greer makes that submission on your behalf and I think it is accurate. But nonetheless your acts were incessant, insistent and afflicted great emotional harm by utilizing your power as their father.

[54] This sentence was appealed to the Nova Scotia Court of Appeal which upheld it.

[55] Justice Matthews, writing for the Court, noted apart from the fact the appellant is a first time offender, no mitigating features existed.

[56] Our Court of Appeal, in a case called *E.A.F.*, [1994] N.S.J. No. 29 dealt with a more elderly offender. He was 65 when he pled guilty to a number of offences involving indecent assaults on his nieces and a grand-niece. The offences occurred over periods of, in one instance, seven years and then later one year. First time offender. Joint recommendation on a guilty plea for six to eight years. The assaults involved rubbing and ejaculation on the bare thighs and stomachs of the young girls and later advanced to oral sex and then attempted anal and vaginal intercourse. The trial judge imposed a sentence of ten years and the Court of Appeal found no error in that sentence.

[57] From Alberta is the case that the Crown submitted of *R. v. W.B.S.* and *Powderface*, [1992] A.J. No. 601 (C.A.) where the court there went through a number of decisions from their province. One of those decisions has some similarity. The court there referred to the following:

> A grave case of sexual assault, prosecuted as one of incest, was R. v. A.I.S. (1989), 98 A.R. 249 (C.A.). The accused's conduct, as summarized in Cote, J.A.'s memorandum of judgment, "involved incessant, forcible rapes of his two daughters over many years beginning about age 11 in each child's case." He continued: "Two pregnancies resulted to one daughter, the first when she was only 13. The other daughter suffered severe psychiatric difficulties resulting in extended hospitalizations at an early age, and though many years have passed, she is still not in complete mental health." The trial judge sentenced the accused to 14 years' imprisonment, which is the maximum penalty for incest. (The maximum for sexual assault is 10 years; for aggravated sexual assault the maximum is life imprisonment.) The Court of Appeal reduced the term of imprisonment to 12 years because the accused had pled guilty and his daughters had never had to testify or even be briefed to testify, and because the accused was 64 years of age.

[58] Another case from Alberta which is illustrative here is *F.J.S.*, [2005] A.J. No. 1974 a decision by Justice P.M. Clark, Alberta Queen’s Bench. The offences

involved the son and stepson of the offender. The offences with respect to one lasted some four years from when he was 12 to 16, and the offences in relation to the other son was three years between 1969 and ‘72. So they were historic sexual allegations. They happened on each victim some 40 to 60 times. The same kind of aggravating facts were noted by Justice Clark. There were multiple victims, multiple acts. The offences were not spontaneous or impulsive. The children were young. One was a biological child, the other a stepson. The acts represented an egregious abuse of a position of trust. The abuse had the affect of poisoning relationships amongst the children. Each boy was groomed for his personal sexual gratification which took away their childish innocence and introduced them to a pattern of behaviour that impacted their lives.

[59] The sentence there imposed was one of eight years.

[60] Justice Saunders, as he then was, in *R. v. L.S.M.*, [1999] N.S.J. No. 154 where an accused pled guilty, which is a significant mitigating factor, to having committed two acts of sexual intercourse. One resulted in the impregnation of his stepdaughter. In that situation the appropriate sentence for one victim, for two incidents of sexual intercourse, was five years and he was given then credit for time served of some months.

[61] Justice Saunders also in a case called *R. v. D.B.S.*, [2000] N.S.J. No. 172 imposed a sentence of five years where there was one victim. There was a lengthy course of criminal conduct but did not go beyond vaginal digital penetration. He invited her to perform fellatio which she refused. The incidents went, as I say, for

a lengthy period of time when she was in first grade until graduation from Junior High. So although the incidents were not as intrusive, they went on for a long period of time. A sentence of five years was imposed.

[62] Justice Hall, in a case called *F.A.W.* of this court reported, [2002] N.S.J. 567 pled guilty to sexually assaulting his daughter from the age of four to 14. So a ten year period. The incidents occurred once or twice a week throughout the period. It began with fondling, included fellatio and intercourse when the daughter became a pre-adolescent. The Crown sought a sentence of six to nine years. The accused was there 68 years of age. In terms of that individual's health Justice Hall noted that he is not in good health, had suffered five heart attacks and experienced a mild stroke, had no prior record and had entered a plea of guilty. There Hall, J. imposed a sentence of six years.

[63] There is Justice Murphy's decision *R. v. S.*, [2002] N.S.J. No. 419 where an accused pled guilty for having sexually abused his daughters. Again, roughly over a ten year time period. Mr. Greer noted there was some two days of *viva voce* character evidence called on behalf of Mr. S. and that Mr. S. was 68 years of age and had been a very, very hard working individual over his life, had expressed remorse, as Justice Murphy said substantial remorse, but still had some difficulty accepting full responsibility for his conduct. A sentence of five years.

[64] The last case I want to refer to is from the Ontario Court of Appeal, *R. v. D.D.*, [2002] O.J. No. 1061 where Justice Moldaver dealt with an appeal from the imposition of a global sentence of nine years and one month, which had been

reduced by virtue of time spent in pre-trial custody to eight years, one month. There were four victims involved. The accused was a close and trusted family friend and in one instance described as being akin to a stepfather. Not nearly the position of trust that Mr. N. was in in relation to his daughters, but none the less serious. In addition, in the case before Justice Moldaver there was some indication of violence, both actual and threats of violence. Although it appears from the report to be quite low level. The assaults had impact on the victims.

[65] What I think is important to reflect on is what Justice Moldaver concluded. He said:

> 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...

[66] Today the Crown has changed its recommendation from having the Court impose a sentence of six to eight years to one as imposing a sentence of five years. The Crown's recommendation has been phrased as being a joint recommendation. Mr. Greer, on behalf of Mr. N., also describes it as a joint recommendation. Both Mr. Taylor and Mr. Greer acknowledge that, as the trial judge, I have a discretion to not follow a joint recommendation.

[67] Ordinarily, absent exceptional circumstances, I would follow a joint submission. That is because such a submission must be given serious consideration and in fact should be followed unless the jointly recommended sentence would be contrary to the public interest and bring the administration of justice into disrepute or is otherwise unreasonable.

[68] However, these principles surrounding the deference and respect to a jointly recommended sentence apply only where there has been a negotiated plea. Respect is accorded such a recommendation since counsel know more about the case than the Court. There may be many reasons animating why the Crown and defence have arrived at a jointly recommended sentence. There may be background facts unknown to the Court, assistance by the accused to the authorities. If a court is to depart from a jointly recommended sentence, it should give notice to the parties of its intention to do so, so that they may have an opportunity to address the concerns identified by the court and ultimately may, and some would say should, give to an accused an opportunity to withdraw the guilty plea tendered pursuant to that joint recommendation.

[69] The law in this area was referred to by Bateman J.A. in *R. v. Cromwell,* [2005] N.S.J. No. 428 as follows:

> 20 Joint sentence submissions arising from a negotiated guilty plea are generally respected by the sentencing judge. Ultimately, however, the judge is the guardian of the public interest and must preserve the reputation of the administration of justice. Where the agreed resolution is contrary to the public interest, would bring the administration of justice into disrepute or is otherwise unreasonable the judge retains the discretion to reject the joint submission...

[70] Justice Berger of the Alberta Court of Appeal in *R. v. G.W.C.*, [2000] A.B.C.A. 333 wrote:

> 17 The obligation of a trial judge to give serious consideration to a joint sentencing submission stems from an attempt to maintain a proper balance between respect for the plea bargain and the sentencing court's role in the administration of justice. The certainty that is required to induce accused persons to waive their rights to a trial can only be achieved in an atmosphere where the courts do not lightly interfere with a negotiated disposition that falls within or is very close to the appropriate range for a given offence. "The bargaining process is undermined if the resulting compromise recommendation is too readily rejected by the sentencing judge."

[71] During the course of submissions I did pose to each the Crown and the defence why five years would be an appropriate disposition for the Court to follow. Both were given an opportunity obviously to address these concerns. As I have already indicated, in my opinion, the recommendation made by the Crown and joined by the defence is not a true joint recommendation.

[72] In any event, in these circumstances and for this offender a recommended sentence of five years is outside the appropriate range. As the Crown submitted during its comments the circumstances are nearly the most aggravating they can be.

[73] In terms of the impact, Mr. N., you took away their innocence, their right to be little girls, to have a chance at developing normal healthy relationships with a significant partner. Instead, you tried to teach them what you were doing to them was normal. “Don’t be so stiff”. It was anything but normal. It was sick. It was wrong. You knew it to be so, but you have over the years rationalized your outrageous behaviour first by blaming M. S. and then by suggesting that J.

understood, was sympathetic to your situation and needs, implying that she somehow consented or acquiesced in your criminal behaviour. When I say you took away their innocence, I mean you robbed them of it. Both J. and L. have been permanently scarred by your depraved behaviour and they have had the courage to come forward.

[74] The factors that are important, that I am directed, both by case law and by the *Criminal Code*, to here stress are elements of retribution, general deterrence and denunciation.

[75] The Supreme Court of Canada in a case called *C.A.M.*, [1996] S.C.J. No. 28 clarified what is meant by these terms. Chief Justice Lamer there wrote:

> ...Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct...

[76] He went on at paragraph 81 to say:

> 81 Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law...

[77] With respect to general deterrence, as is obvious from the case law I have referred to, I am not the first judge to have to deal with sordid, despicable breaches of trust by fathers who in gross violation of their duty to protect, nurture and play a valuable and some would say invaluable role in the raising of their children, instead prey on them. Sadly I doubt I will be the last.

[78] Mr. N. well knew how wrong his conduct was when he not only breached his duty to protect his children, but victimized them. In doing so he committed an egregious breach of trust. He knew that by his tearful reactions after he committed these acts. He knew it since he threatened J. with the consequences of what would happen. He would surely be kicked out and they would not be able to afford to live still as a family unit with their mother but have to farmed out to foster homes. Mr. N. also, when confronted, says he suggested to M. S., not that she agreed with it, but suggested to her to go ahead and charge him. Get it over with. He knew all too well the criminality of what he had done, and then would later do again with J. and to L..

[79] I want to stress that if general deterrence is to mean anything it must be that the notion that no one will ever find out, my victim will not tell, is a fairyland delusion. You may have had temporary dominion over your relatively helpless victims, as others may, but sooner or later people who are tempted to conduct themselves in this fashion should know that that dominion will be lost one day and they will disclose and when you are brought to court the fact that it is many years later and you may be a completely changed man, even a fully reformed one, will not in any way prevent the administration of justice in imposing a sentence that

reflects the gravity of your conduct and society's denunciation and repudiation of such behaviour.

[80] Mr. N. you are, in my opinion, an incredibly selfish or delusional man or both. Your main focus appears to have been to justify your immoral and highly criminal acts by blaming your ex-wife, minimizing the damage you have done. I have noted that you obviously did know it was wrong at the time and felt guilty. I also note that you felt guilty at family gatherings. J. described how you would take her aside and say things to her. "If you knew what your mother was like". Reopening a sore. The only reason you would keep doing so is the guilt you must have continued to feel and perhaps looking for some forgiveness or understanding or even empathy from your daughter. What you should have been done was begging her forgiveness.

[81] When you cross-examined your daughters, you had them agree you were not all bad and they agreed. Why would they not? But even good people can do bad things.

[82] Sentencing is a difficult task. It can be even tougher when it is in relation to conduct that decades old. That is because when an accused comes before the court and is to be sentenced for crimes from long in his or her past, the court is frequently dealing with not the same person that committed those offences. They have become different people. They may have overcome their problem or problems that have led them to commit the offences. Here, in my opinion, the accused before me is very much the same man he was when he committed these

offences. I grant that more than a few birthdays may have passed, but he still blames his ex-wife as a justification and rationalizes his sick and depraved abuse of his daughters on the basis that J. understood his situation and was not really harmed or hurt by his actions. Instead he says he feels wronged by what he refers to as an attempt to extort money from him in 2003, taking him to court and exaggerating the abuse. If I have one thing to say to you sir that you might choose to remember, you and you only are to blame for your incredibly selfish and despicable behaviour.

[83] I note that I cannot lose sight of rehabilitation. If Mr. N. can achieve some insight into what truly happened and receive the necessary treatment to eliminate or at least reduce the risk of re-offending, he and society will be that much better for it. It will indeed be a necessary step, as Mr. Greer pointed out, for perhaps a reconciliation with your daughters when you do reach that appreciation. The treatment program recommended by Dr. Connors is available in the federal penitentiary system and in the community when you are eventually released on parole. I would note that her recommendation the better place for you to have this treatment is in prison.

[84] In terms of ancillary orders, there will be an order under s.161 of the *Code* for life. A SOIRA order for life, an order for DNA and mandatory firearms prohibition under s.109(2), also for life. Stand up Mr. N..

[85] The minimum sentence that is appropriate, having regard to the facts of this case, and the principles of sentence, is one of five years on count 3, your repeated

rape of J. N.; three years concurrent on count 2; for the offence of incest in relation to L. N., three years consecutive; for the rape of L. N., three years concurrent; and for the offence of indecent assault on L. N., two years concurrent, for a total sentence of eight years.

[86] I specifically arrive at that global sentence taking into account the 77 days you have spent on remand and in light of what appears to be at least a glimmer today of remorse from you in your comments to the Court. I include in that sentence a specific recommendation that you receive the treatment program outlined by Dr. Connors in her report of May 5, 2009.

[87] I am not imposing a victim fine surcharge.

[88] Good luck to you Mr. N.. I hope you can truly gain some insight into your behaviour and eventually, perhaps, make amends to the harm you have done to your children.

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Beveridge, J.