

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. J.A.H., , 2011 NSSC 434

Date: 20111118

Docket: CRH 329525

Registry: Halifax

Between:

Her Majesty the Queen

v.

J.A.H.

SENTENCING DECISION

Restriction on publication: Section 486.4 CCC order restricting publication — sexual offences:

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Judge: The Honourable Justice Glen G. McDougall

Heard: August 29 - September 2, 2011, in Halifax, Nova Scotia

Oral Decision: November 18, 2011

Written Decision: January 5, 2012

Counsel: Eric R. Woodburn and Tanya Carter, on behalf of the Provincial Crown
Luke Craggs, on behalf of J.A.H.

By the Court (Orally):

[1] I will begin by stating that this matter is subject to a s. 486.4 order restricting publication of any information that could identify the complainant or a witness to these proceedings.

[2] J.A.H. was convicted of both counts on a two-count indictment involving sexual assault (s. 271(1)(a) CCC) and sexual interference (s. 151(a) CCC).

[3] The victim is his daughter who was a little more than three months beyond her 9th birthday when the assault took place. She was almost 11 years old when she testified as to the events that happened on the 27th day of December, 2009.

[4] Although the evidence presented at trial established all of the requisite elements for both sexual assault and sexual interference, I will enter a Judicial Stay with respect to the sexual assault charge based on the Kienapple principle (**R. v. Kienapple**, [1975] 1 S.C.R. 729; 15 C.C.C. (2d) 524; 44 D.L.R. (3d) 351).

[5] I will, therefore, proceed with sentencing on the sexual interference charge only.

[6] Section 151(a) of the Criminal Code states:

Sexual interference

151. Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of forty-five days; ...

SUMMARY OF FACTS

[7] I will provide a brief summary of the facts as I found them.

[8] Late in the evening of December 27, 2009, J.A.H. returned to the apartment he shared with his daughter, M.H.

[9] Earlier in the evening both J.A.H. and M.H. had been visiting friends who lived in another apartment in the same complex.

[10] J.A.H. had been drinking for several hours prior to arriving home that evening. He had become involved in a verbal altercation with the teen-aged son of one of the persons he and his daughter were visiting.

[11] J.A.H. gave his daughter the keys to the apartment and told her to go home.

[12] M.H. was already dressed in her pyjamas and went to bed as soon as she got home. Shortly after she went to bed her father came home. He had to buzz the apartment in order to gain entry as he had previously given her the keys.

[13] M.H. left the apartment and went downstairs to let her father in. After opening the outside door she proceeded up the stairs and returned to her bedroom.

[14] J.A.H. summoned for his daughter to come to the kitchen where he was seated on a wooden chair. Following her father's instructions, M.H. went to the kitchen and stood in front of him. She was wearing her pajamas.

[15] J.A.H. then proceeded to put his hands down the front of her pyjamas. In so doing, he touched her stomach, the upper part of her thighs and her vagina.

[16] M.H. told her father to stop and then grabbed his hands and removed them. She immediately returned to the relative safety of her bedroom where she tightened the drawstrings around the waist of her pyjama bottoms and went back to bed.

[17] J.A.H. was heard throwing the wooden chair across the kitchen causing it to break. Fortunately for all, J.A.H. did nothing further to molest his daughter.

[18] M.H. first reported the incident to her aunt, B.N., approximately two weeks after it had occurred.

[19] B.N. reported the incident which resulted in Children's Aid involvement and eventually these criminal charges.

[20] I will now turn to the provisions of the Criminal Code that deal with sentencing.

PURPOSE AND PRINCIPLES OF SENTENCING – CRIMINAL CODE

[21] The **Criminal Code** has a number of provisions that deal with the purpose and principles of sentencing. They are found in sections 178 to 718.3. Section 718 states:

718. 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 following 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.

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

718.2 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, ...

...

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

...

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

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

[22] Section 718.3 deals with punishment generally and need not be recited here other than to say that the Court has considered the general intent of this particular section in reaching its decision today.

[23] Where an offence involves a child such as the one that is before me, section 718.01 has particular relevance. It states:

718.01 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.

[24] Section 718.2, referred to earlier, lists some of the relevant aggravating circumstances in paragraph (a), sub-paragraphs (ii.1) and (iii). While not intending to be an exhaustive list it includes:

(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,

SUBMISSIONS OF COUNSEL

[25] With this as a backdrop I will now refer to the submissions of counsel. Allow me to first thank counsel for their assistance in enabling me to reach what I feel is a proper and just sentence given the circumstances of this case.

[26] The Crown is recommending a period of incarceration of one year followed by three years of probation.

[27] In addition, the Crown points out the requirement for the Court to make an order authorizing the taking of samples of bodily substances that are reasonably

required for the purpose of forensic DNA analysis pursuant to s. 487.051 of the **Criminal Code** (a DNA Order). The Crown is also seeking a s. 109 Weapons Prohibition Order and an order under s. 490.012 requiring the offender to comply with the Sex Offender Information Registration Act (a so-called SOIRA Order), for a period of 20 years as stipulated in s. 490.013(2)(b) of the **Criminal Code**.

[28] As these orders are mandated by the **Criminal Code** the Defence does not challenge their imposition. They are therefore granted.

[29] The Crown also seeks a s. 161 Prohibition Order that, if granted, would prohibit the offender from:

- (a) 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, schoolground, playground or community centre;
- (b) 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; or
- (c) using a computer system within the meaning of section 342.1(2) for the purpose of communicating with a person under the age of 16 years.

[30] The Defence points out that while the **Criminal Code** requires the Court to consider making such an order it is up to the Court to decide whether such an order is required and, if so, what conditions should apply.

[31] Counsel for J.A.H. points out that a section 161 order “is designed to prevent predatory sexual behaviour on children who would not be expected to know the offender.” Although J.A.H. has a prior criminal record he has never before been convicted of a sexual offence. Defence counsel characterizes his client’s behaviour as “opportunistic rather than predatory and against a child who was known to him rather than a random child in a playground, a schoolyard or a swimming pool.”

[32] He concludes by stating: “In other words, there is absolutely no evidence that J.A.H. is a sexual predator who needs to be kept away, under threat of prosecution and imprisonment, from places where children would normally gather.”

[33] Since s. 161(1) indicates that the Court “may, in addition to any other punishment that may be imposed” consider making such an order this determination should only be made once the primary aspects of the sentence have been decided. I will come back to this later.

PERIOD OF IMPRISONMENT

[34] Both the Crown and Defence have referred a number of cases to the Court to help in determining the appropriate sentence. As indicated earlier s. 151(a) of the **Criminal Code** sets a mandatory minimum of 45 days for a conviction under this section.

[35] The Crown is recommending one year of incarceration followed by three years of probation. The Defence meanwhile submits that with the appropriate credit for remand time the offender “is either at or close to a time served position.” As for probation a period of 12 to 18 months would be the appropriate range, based on Defence counsel’s recommendation.

[36] Both Crown and Defence agree that the Court should give primary consideration to the sentencing objectives of denunciation and deterrence. As mentioned previously s. 718.01 of the **Criminal Code** requires this.

[37] And, as stated previously, the Court must consider any relevant aggravating or mitigating circumstances relating to the offence or the offender. The major aggravating circumstances in this case are the age of the victim and the fact that she is the offender’s daughter.

[38] As a parent, it is incumbent on a person who might be blessed with a child to provide not only the necessities of life but also to protect, to nurture and to love their child. A child places his or her trust in their parents.

[39] As former Nova Scotia Appeal Court Justice, Kenneth Matthews, said in **R. v. Hawkes** (1987), 81 N.S.R. (2d) 156 at para [6] on p. 157

[6] We have also commented upon the fact that charges of sexual assault are before us with “alarming frequency”. We are powerless to prevent crimes but we do have the power and the duty to impose fit and proper sentences. 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.

[40] A parent who sexually abuses a child commits not only a criminal act – it is morally repugnant. It is an outrage. It can shatter a child's sense of self-worth. If they cannot trust their parents, who then, can they trust? Such conduct cannot be condoned. One can only hope that the victim in this case can, in time, and with the proper counselling and with the support of her other family members get through this without too much damage. Only time will tell.

[41] One other aggravating circumstance and one that ironically led to J.A.H.'s conviction was his decision after the offence to contact the maternal grandparents, in particular, the maternal grandfather. His telephone call to the victim's maternal grandfather can only be seen as an attempt to intimidate not only the grandfather but indirectly the victim as well. This, too, is reprehensible conduct on his part. He also has a prior criminal record.

[42] On the other hand there are some mitigating circumstances as well. Until the sexual abuse was reported, J.A.H. had the primary care and control of his daughter. According to the evidence heard during the course of the trial his daughter loved him. He must have been doing certain things right.

[43] And, as pointed out by Defence counsel in his sentencing brief, J.A.H. was convicted of a single incident that was minimally intrusive. Although once is one time too often and while it cannot be either condoned or forgiven it, hopefully, will not result in irreparable harm to the victim.

SENTENCE TO BE IMPOSED

[44] After taking into consideration the submissions of counsel, which include references to a number of previously decided cases, and all the various relevant factors which include the aggravating and mitigating circumstances of this case and with particular emphasis on denunciation and deterrence, both general and specific, I have decided to impose the following sentence: [J.A.H. asked to stand]

[45] On the charge that you, for a sexual purpose, touched directly with a part of your body a part of the body of a person under the age of 16 years, I sentence you to six months incarceration.

[46] You will receive credit for the time you have spent on remand since the day of your conviction on October 3, 2011 up to and including today being November 18, 2011 – a period which I calculate to be 47 days. Since the offence for which you have been convicted pre-dates the *Truth in Sentencing Act* which came into force on February 23, 2010 you are to receive credit at the rate of two days for each day you have been on remand. This, again, based on my calculation, amounts to an overall credit of 94 days which is to be used in determining your earliest parole date.

[47] In addition to the period of incarceration, upon your release you will be subject to an order of probation for 18 months. The probation order will contain all the compulsory conditions spelled out in s. 732.1(2) of the **Criminal Code** as well as the following optional conditions:

- (a) (i) report to a probation officer within 72 hours of the date of your release from the Correctional Centre; and
- (ii) thereafter, when required by the probation officer and in the manner that he or she directs. You must comply with all instructions given to you by the probation officer and agree to participate in any assessments that are ordered for you by the probation officer and to take all counselling and treatment sessions recommended by him or her which will include assessments, treatment and counselling for any alcohol abuse problems that you have or any other drug or substance abuse problems that you have, or anger management issues you might

have and also to determine whether or not you have problems involving sexual dysfunction.

- (b) you must remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the probation officer;
- (c) you must abstain from
 - (i) the consumption of alcohol or other intoxicating substances; or
 - (ii) the consumption of drugs except in accordance with a medical prescription.
- (d) you must refrain from having any contact direct or indirect or communication in any form or in any manner with the victim in this case except as may be authorized by a court having jurisdiction in such matters or as permitted by the child's current guardian or, if the contact or communication is initiated by the victim, with the permission of her guardian;
- (e) you are prevented from being alone with any child under the age of sixteen years at anytime and for any reason or to attend where persons under sixteen years of age are present or can reasonably be expected to be present, such as a daycare centre, schoolground, playground or community centre;
- (f) you are not to use a computer system within the meaning of s. 342.1(2) of the **Criminal Code** for the purpose of communicating with a person under the age of 16 years.

[48] You will notice that the wording of these last optimal conditions pretty well mirror the wording of s. 161(1) of the **Criminal Code**. Given that the offender has not previously been convicted of any sexual assault related offences nor is there any evidence or even a suggestion that he is at risk to re-offend in this nature I choose not to grant a s. 161 order other than as previously indicated during the period of probation.

[49] In conclusion, I will once again reiterate how morally repugnant and reprehensible this crime is. It should never have happened nor can it be allowed to ever happen again. It is J.A.H.'s responsibility to seek out whatever counselling or treatment he might need to ensure there is no repeat of this kind of conduct.

[50] My final thoughts are with the victim. I hope she too gets whatever treatment or counselling she might need to get over this very serious episode in her life.

[51] The order reflecting this decision will be prepared and read over and explained to J.A.H. whereupon he will be returned to the Central Nova Correctional Centre or such other facility as determined by the authorities to serve out the balance of his sentence.

[52] The victim surcharge fine is waived.

[53] Finally, once again, I want to thank counsel for their assistance throughout. You have all conducted yourselves with the utmost professionalism and have shown a great deal of respect to the court and to the staff. I appreciate that very much. Thank you. Have a good day.

McDougall, J.