IN THE SUPREME COURT OF NOVA SCOTIA

Citation: R. v. W.A.S., 2012 NSSC 376

Date: 2012/10/22
Docket: CRP346557
Registry: Pictou

Between:

Her Majesty the Queen

Plaintiff

v.

W. A. S.

Defendant

SENTENCING DECISION

Editorial Notice

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

Restriction on publication: Pursuant to 486.4 (1) Subsection (2) of the **Criminal Code of Canada**

Judge: The Honourable Justice N. Scaravelli.

Heard: May 14th, 2012, in Pictou, Nova Scotia

Final Written Submissions: October 11, 2012 - Crown
October 15, 2012 - Defence

Written Decision: November 2nd, 2012

Counsel: Jody MacNeil, for the Crown
Douglas Lloy, for the Defence

A ban on publication of the contents of this file has been placed subject to the following conditions:

486.4 (1) Subject to subsection (2), the presiding Judge or Justice may make an order directing that the identity of a complainant or a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way when an accused is charged with

(a) any of the following offences:

(I) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 170, 171, 172, 173, 210, 211, 212, 213, 271, 272, 273, 346 or 347,

(ii) an offence under section 144, 145, 149, 156, 245, 246 of the **Criminal Code**, chapter C-24 of the Revised Statues of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under section 146, 151, 153, 155, 157, 166 or 167 of the **Criminal Code**, chapter C-24 of the Revised Statues 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), (ii) and (iii).

This ban is in effect until further Order of the Court.

REPORTING OF THIS PROCEEDING IN ANY MANNER THAT WOULD IDENTIFY THE NAME OF ANY INDIVIDUAL WHOSE NAME IS COVERED BY THE BAN IS STRICTLY PROHIBITED WITHOUT LEAVE OF THE COURT. THE INTENT OF THE FOREGOING IS TO PROTECT THE WELFARE OF ANY CHILDREN OR VICTIMS REFERRED TO IN THE PROCEEDING AND/OR AVOID PREJUDICE TO ANY PERSONS FACING CRIMINAL CHARGES.

By the Court: (Orally)

[1] I confirm the publication ban in effect pursuant to ***Section 486.4 (1)*** of the ***Criminal Code*** which provides that the identity of the complainant or witness or any information that could disclose the identity of the complainant not be published or broadcast in any manner. So for this reason I intend to use initials when referring to witnesses.

[2] W.S. is before the court for sentencing following a guilty plea that he:

> "between the 20th day of December , 2005 and the 20th day of December, 2006 at or near [...], Pictou County, Nova Scotia, did commit a sexual assault on J.L.D. contrary to Section 271 of the Criminal Code."

[3] The sexual assault consisted of one act of sexual intercourse with the victim who was 13 years of age at the time.

[4] By way of brief background the assault occurred at the offender's home. The victim was a friend of the offender's daughter. She was a frequent visitor to the home and on the date of the incident was sleeping over in the daughter's bedroom. She was asleep on the floor when the offender knocked on the bedroom door. The victim

opened the door and spoke to the offender. He then grabbed her, placed his hand over her mouth and carried her downstairs to his bedroom where he had forced intercourse with her.

[5] I am required to consider the purpose and principles of sentencing as set out in ***Section 718 of the Criminal Code***. The court is to impose 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. 1995, C. 22, s. 6."

[6] ***Section 718.1 of the Code*** provides that a sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender.

[7] ***Section 718.01*** dealing with offences against children provides that when a court imposes a sentence for an offence that involves the abuse of a person under the age 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[8] Other relevant sentencing principles are set out in ***Section 718.2*** which provides in part that a court that imposes a sentence shall also take into consideration the following principles:

> “(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 limited the generality of the foregoing ...
>
> (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, ...
>
> shall be deemed to be aggravating circumstances;
>
> (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;"

[9] The victim is currently 19 years of age and has not filed a victim impact statement. The emotional effects of the victim's recounting the incident during the sentencing hearing was evident to the court.

[10] The pre-sentence report reveals that the offender is now 49 years of age. He is single, unemployed and resides with his mother. He is in receipt of a Canada Disability Pension. The offender reports a bi-polar disorder as well as schizophrenia and takes prescribed medication. According to the report the offender minimized his behaviour and responsibility for the incident indicating he believed he was in a relationship with the victim at the time and could not help his actions.

[11] A court ordered pre-sentence comprehensive forensic sexual behaviour assessment was completed. The report indicates the offender has a history of psychiatric episodes with the most recent diagnoses of bi-polar disorder which has been managed pharmacologically for the past 5 or 6 years. During the assessment the offender characterised the sexual intercourse as consensual and that he believed he and the victim had a relationship. Although 43 years of age at the time, the offender

fails to recognize his criminal culpability for the offence. He expressed no remorse or empathy for the victim. Following obtaining a history and testing, the report concludes the offenders risk for future violence including sexual assault was low. However, it was determined that his risk for recidivism would increase substantially when in the company of pubescent females in an unsupervised setting.

[12] The report recommended a treatment program for sexual offenders at a low to moderate level of propensity. It was further recommended that he not have unsupervised contact with females under the age of 18 years in his home or otherwise.

[13] The defence submitted a report from the offender's family physician. She confirmed a historical diagnoses of bi-polar illness and schizo-effect disorder. The offender exhibits symptoms of anxiety or delusional ideas when stressed. The report indicates the offender has been on a regular regime of medication since 2003. He has been compliant and stable since that time. The report concludes that incarceration would likely be very stressful and aggravate the offender's symptoms of anxiety.

[14] The Crown is requesting the court impose a period of imprisonment between 3 and 4 years together with necessary collateral orders and prohibitions as set out in the ***Criminal Code.***

[15] The defence submits a conditional sentence would be appropriate. In the alternative a period of imprisonment in provincial jail or in the case of federal time a period of 2 years imprisonment.

MITIGATING FACTORS

[16] In terms of mitigating factors the offender entered a guilty plea. However, the court is aware the victim did have to testify at a preliminary hearing. She also had to testify at the fact dispute hearing on sentencing.

[17] The offender is 49 years of age and has no prior related criminal record.

[18] According to the sexual behaviour assessment the offenders risk to re-offend is low. This is tempered by an increased risk for recidivism when in the company of pubescent females in an unsupervised setting.

[19] The court recognizes that the offender has been diagnosed with a psychological disability. However, the information is that he has been stabilized through medication since 2003.

AGGRAVATING FACTORS

[20] In terms of aggravating factors the offender was 43 years of age at the time. The victim was 13 years old.

[21] I am not certain the offender was in a position of trust as alleged by the Crown. The information before the court is that the victim frequently visited the offender's daughter in the home where the offender resided with his mother. However, there appears to be insufficient information that he had any degree of control or influence over the victim. There is no indication that there was a relationship of dependancy between the two.

[22] Despite entering a guilty plea the offender expressed no remorse for his act or empathy for the victim and denies moral responsibility. He, in fact expressed resentment towards the victim.

[23] The offender denied using force to commit the assault. The court concluded, the following testimony, that the offender did forcibly take, and confine the victim in his room at the time.

[24] Counsel have provided me with a number of authorities on sentencing which I have reviewed. In ***R. vs. Hollohan (1998) NSJ 61*** a 50 year old accused sexually assaulted two none relative girls who were between 11 and 12 years of age. He took advantage of a brief opportunity to take one child to a remote wooded area where he preformed forcible sexual intercourse on her. The accused did not have a prior related criminal record. He was sentenced to a period of 3 years imprisonment.

[25] In ***R. vs Oliver 2007 (NSJ 40) NSCA*** a 19 year accused entered a plea of guilty to sexual assault involving three instances of sexual intercourse with a non relative 12 year old girl, who was a friend of the family. As a result, the girl became pregnant and later gave birth to a baby. The ***Court of Appeal*** upheld a sentence of 2 years

imprisonment followed by 1 year of probation. The ***Appeal Court*** recognized the sentencing Judge considered and gave weight to the accused's limited intellectual capabilities that may have played a part in his poor judgment. Expert evidence was tendered before the sentencing Judge indicating a borderline functioning of the intellectual ability requiring intensive psycho therapy.

[26] In ***R. vs. Strong 2007 (NSJ 353)*** a 25 year old accused was convicted of a single incident of sexual intercourse with a 12 year old girl while brandishing a knife. At the time of the offence the victim had been babysitting at the home of the accused's sister. The accused was sentenced to four years in prison.

[27] In ***R. vs. Collins 2008 (NSJ 52)*** a 40 year old mother of five was convicted of sexual assault after having oral sex, sexual intercourse on multiple occasion on the friends 12 year old son for whom she provided child care no force or threats were used. The accused denied moral responsibility. The court imposed a sentence of 30 months incarceration.

[28] In ***R. vs. SEF 1998 (NSJ 345)*** a 36 year old had non consensual sexual intercourse with his 14 year old niece. He did not accept responsibility and had a

psychological attraction to teenage girls. The court imposed a sentence of 30 months of incarceration.

[29] I have also reviewed ***R. vs. Colsen 2001 (NSSC 188)*** a 50 year old offender was convicted of sexually touching his daughter's 13 year old friend during sleep overs. The conduct unfolded over the course of a year accumulating in reciprocal oral sex. The court imposed a sentence of 21 months incarceration.

[30] In ***R. vs. SS 2009 (ONCA 353).*** The offence involved an abuse of a 11 year old child on a single occasion by a mature adult to who's care the victim had been intrusted by her father. The offender was convicted of sexual assault for laying on top of the victim while he was naked though there was reasonable doubt as to whether there was viginal penetration. The ***Court of Appeal*** imposed a sentence of 2 years imprisonment in a Federal Penitentiary.

[31] Although in the present case the offender's conduct was an isolated incident, the act of forced intercourse is at the high end of the scale.

[32] Considering all of the circumstances I conclude that the gravity of the offence and the offender's culpability together with the requirement of deterrence and denunciation call for a term of incarceration in a federal institution.

[33] **COURT:** Mr. Lloy would you have your client stand please.

[34] The court imposes a sentence of 30 months imprisonment in a federal institution. As to collateral orders the offender must provide the bodily samples required for a D.N.A. analysis pursuant to ***Section 487 of the Criminal Code***. There shall be a Firearm Prohibition Order pursuant to ***Section 109 of the Code*** for a period of 10 years. The offender shall comply with the ***Sex Offender Information Registration Act*** for a period determined pursuant to ***Section 490.13 of the Code***, which I believe is 20 years.

[35] Under the circumstances of this case, there also should be an order that pursuant to ***Section 161 of the Code*** the offender be prohibited from attending public places and facilities alone where persons under the age of 16 years maybe present and from obtaining employment or volunteering in a capacity that involves being in a

position of trust or authority towards persons under the age of 16 years, it should be for a period of life.

[36] **<u>COURT</u>:** Is there anything further counsel?

[37] **<u>CROWN</u>:** Just one query with respect to ***Section 109*** Your Honour. By my read out subject "inaudible" it appears that perhaps there's two components to the order. Ten years is for any firearm generally but under 109 2 (b) any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, "inaudible" by my reading there seems to be two components, one 10 years for what I could describe as the lesser lifetime for the, those that are prohibited or otherwise are restricted. That's the only comment I have.

[38] **<u>COURT</u>:** So what's the Crown seeking?

[39] **<u>CROWN</u>:** There's two components, there's a 10 year. . .

[40] **<u>COURT</u>:** Oh yes life on the second section.

[41] **<u>CROWN</u>:** . . . ten years with respect to any and life with respect to those that are prohibited or restricted.

[42] **<u>COURT</u>:** Thank you.

[43] **<u>CROWN</u>:** Thank you.

[44] **<u>COURT</u>:** Mr. Lloy?

[45] **<u>DEFENCE</u>:** No real comment Your Honour, my client is not a hunter guns aren't part of his life.

[46] **<u>COURT</u>:** It's a, I grant the order the offence is one of violence in any event of sexual assault, so I'll grant the order and note the Crown's comment with respect to two parts of the ***Code in Section 109***. Thank you.

[47] **<u>CROWN</u>:** Thank you My Lord.