

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** R. v. J.C.M., 2013 NSSC 126

**Date:** 20130422

**Docket:** PtH 347476

**Registry:** Port Hawkesbury

**Between:**

Her Majesty the Queen

v.

J. C. M.

**SENTENCING HEARING**

**Editorial Notice**

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

**Restriction on publication: S. 486.4 on identity of victim**

**Judge:** The Honourable Justice Cindy A. Bourgeois

**Heard:** January 24, 2013, in Port Hawkesbury, Nova Scotia

**Oral Decision:** January 24, 2013

**Counsel:** John MacDonald, for the Crown  
Pavel Boubnov, for the Defence

**By the Court (Orally):**

**Introduction:**

[1] On July 10, 2012, J. C. M., plead guilty to a charge alleging that he did on or about August 28, 2010, commit an aggravated sexual assault against M. K., contrary to Section 273(2)(b) of the **Criminal Code**.

[2] Counsel for Mr. M. states in his pre-trial submissions that the facts as submitted by the Crown in their brief are agreed. Accordingly, I rely heavily on the facts as outlined in Crown Counsel's brief.

**Facts:**

[3] On August 28, 2010, at approximately 4:30 a.m., the Port Hawkesbury RCMP received a report of a sexual assault. M. K. reported to them that she had been sexually assaulted a short time earlier on [...]. Police attended in response to this call and found Ms. K. at her parents' residence. She was swollen about the face, she had blood on her lips, and a gouge mark evident on the left side of her forehead. She indicated to the officers at that time that she had been "raped".

[4] Ms. K. indicated by a statement later that she had been at [...], the residence of her cousin, B.. There were a number of persons there, including B., her then boyfriend, Mr. M., at the residence. Those parties and the others that were there that evening, left the [...] residence, went to Dooley's, a local pool hall, and then after closing time, returned to [...].

[5] A short time after returning there, Ms. K. recalls going upstairs to say goodbye to B.. She recalls B. and Mr. M. together in the bedroom. Mr. M. offered to walk her home but M. declined indicating that she could walk home by herself. She believes that Mr. M. offered to walk her home six or seven times and she clearly indicated to him on all of those occasions that she did not want or need to be walked home. Ms. K. left the residence shortly thereafter. She indicated in her statement that on her way home she noticed Mr. M. just behind her, specifically when she was on the sidewalk in front of the Court house. She indicated this behaviour was "creeping her out" and she continued to walk down the hill and he continued to follow her. She turned right into the lower parking lot

of the Court house and proceeded down the hill at a 45 degree angle, or there about, and when she got close to the bottom of the hill, she was tackled by Mr. M. and landed on her back.

[6] Ms. K. then proceeds to describe in her statement a very long sexual assault. She indicated that Mr. M. was choking her with two hands and stating that he would kill her if she moved or tried to get away. She recalls Mr. M. telling her “do what I want to do” and another occasion saying “act like you like it”. Ms. K. appealed to Mr. M. telling him that B. was her cousin and that she loved B. and that he shouldn’t be doing this. These pleas had no effect on Mr. M.. Ms. K. recalls being punched in the face several times with Mr. M.’s fist and believes that she was also struck with an object but she can’t recall what that object was. Ms. K. indicated in her statement that Mr. M.’s anger would increase when she would struggle or make an attempt to get away. She recalls at one point being able to bite his finger.

[7] The sexual assault consisted of her clothing being pulled off. The accused then had vaginal intercourse with her which she estimates may have lasted five minutes. She then indicated that the accused straddled her and put his penis in her mouth forcefully. She recalls gagging while he was doing that. In her statement, she also recalls that the accused talked about anal intercourse with her and that he flipped her over and that she believes that anal intercourse lasted several minutes. This particular aspect of the sexual assault is not agreed by Mr. M.. Whether there was or was not anal intercourse, does not in my view alter the significance of the assault perpetrated against Ms. K. overall.

[8] Ms. K. does not recall under what circumstances the attack ended but she knows she got herself together, ran up her driveway into her house and immediately told her mom what happened. Her mother then telephoned the police.

[9] The police immediately attended and after collecting information from Ms. K., proceeded to [...] and they were permitted entry into the apartment by B.. Mr. M. was arrested at that time for sexual assault.

[10] The officers noted at the time that Mr. M. appeared to have a bite mark on one of his fingers.

[11] Mr. M. proceeded to provide an exculpatory statement to the police. He indicated that he was asked by his girlfriend, B., to walk Ms. K. home and that he did so. He indicates that they were gone for approximately one hour and during that time, two unknown males attacked, one attacking him and one attacking Ms. K..

[12] B. gave a statement that corroborates all of the events up until the time that Ms. K. was leaving the residence. She indicated that Mr. M. told her "I am going down anyways and make sure she makes it home safe because she is pretty drunk..." B. indicated that Mr. M. was gone she believes at least a half an hour or 45 minutes and she didn't really know what took him that long as Ms. K.'s house was just a 5 minute walk down the street. B. indicated in her statement when Mr. M. returned "he's like all out of breath and sweating." He reported to B. that a couple of guys tried to take M. and they jumped him and they started hitting him, and punching him and kicking him and wrestling him to the ground. Ms. H. had noticed that Mr. M. was bruised and swollen and she put peroxide on his cut finger and about that time the police arrived at the residence.

[13] Ms. H. indicated in her statement that when M. was leaving that evening M. had indicated to Mr. M. that she was fine to walk home on her own, she did not need his accompaniment.

[14] DNA collected by vaginal swab from Ms. K. after the assault was matched with Mr. M.'s DNA and the result was that the estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile was 1 in 34 billion.

[15] As a result of the assault, Ms. K. suffered a fractured jaw, a laceration above her left eye, scrapes and bruises to her face, arms, legs back, and some bruising around the neck. She required surgery to repair her fractured jaw resulting in a period where her jaw was wired shut.

**Sentencing Hearing - Dr. Connors:**

[16] The sentencing in this matter was postponed from last fall in order for Mr. M. to undergo a forensic sexual behaviour assessment. This assessment was ordered based upon the request of the Crown, and consented to by Mr. M.'s Counsel.

[17] The assessment was undertaken by Dr. Angela Connors, Program Manager of the Forensic Sexual Behaviour Program at the East Coast Forensic Hospital. Her report dated January 16, 2013 has been submitted into evidence and referenced by both Counsel in their oral submissions here today.

[18] After undertaking a comprehensive review of Mr. M.'s educational, social and mental health history, Dr. Connors outlined the outcome of the psychological and PPG assessment results undertaken by her. To summarize, Mr. M. has a primary diagnosis of biastophilia, meaning he becomes sexually aroused by non-consensual sexual contact. He has an alcohol dependence, as well as a well documented history of both street and prescription medication abuse. Dr. Connors opines Mr. M. presents with an Anti-social personality disorder. He does not fit the diagnosis of schizophrenia, nor was the offence attributable to any form of mental illness.

[19] Dr. Connors opined that Mr. M. suffers low self-esteem perhaps stemming from or at least partially attributable to bullying he experienced as a child in the school setting. Mr. M. experiences high levels of anger and lacks the mechanisms to control this from bubbling over. This is consistent with his documented history of impulsive, angry outbursts, most notably in the penitentiary setting.

[20] Dr. Connors, after considering several measures, reached the conclusion that Mr. M. is at high risk for future violence, including sexual assault, a risk which is not presently managed due to his ongoing antisocial behaviour while on remand including his reactive anger and continued abuse of intoxicants.

[21] Dr. Connors opines that Mr. M. requires a specialized treatment program aimed at violent offenders, with attention to anger management. Even if Mr. M. applies himself to the suggested programs and treatment, Dr. Connors opines it will require a lengthy time commitment to effect positive change.

**The pre-sentencing report:**

[22] I have also reviewed and considered the Pre-sentencing Report prepared in relation to Mr. M.. Both he and his mother, S. M. were interviewed. Mr. M. apparently enjoys a positive relationship with his parents who have maintained regular contact with him. As a positive for Mr. M., it appears as if he will continue to benefit from the positive support that his parents are willing to offer to him.

[23] Mr. M. was diagnosed with ADHD around the age of 10. He completed Grade 8 and had difficulties academically. His mother reported difficulties with his peers at school, both at the elementary level as well while he was in junior high.

[24] Reportedly, during a previous incarceration, Mr. M. received psychiatric treatment and was, according to his mother, subsequently diagnosed with schizophrenia. There is no indication before the Court that this offence was in any way related to the existence of a current mental health disorder.

[25] When interviewed for the Pre-Sentencing Report, Mr. M. acknowledged having a problem with alcohol, and viewed this as the major contributing factor to the offence. He stated he was willing to undertake services. He reported feeling “pretty bad” about the assault, and indicated he took responsibility for the offence. This sentiment was also expressed on his behalf by his Counsel this morning.

**Victim Impact Statement:**

[26] A Victim Impact Statement was filed with the Court by Ms. K.. She outlines in that statement the physical, emotional and financial consequences of the sexual assault. It is clear that the consequences to her are serious, life altering and permanent. As to the emotional consequences she writes:

The emotional effect that this has had on me has been constant and ongoing. I was the happiest I've ever been in my life before the accused took this away from me. My whole life flashed before my eyes, and I was so scared I wouldn't get to see the next day, as there was and is so much that I still want to accomplish in my life. I never could believe that anyone could ever do something so horrible and terrifying to another human being. My carefree and positive spirits were washed

away and replaced with anxiety and darkness. I am still constantly looking behind my shoulder and am terrified to walk alone when it is dark, even if it's only 6 o'clock. He took away my freedom, and because of this I am unable to feel safe in my own hometown, where a good portion of my family live. A place where I have lived since I was in elementary school is now a deep and dark memory of a horrible tragedy that will forever affect my life in a way I couldn't even begin to explain. I find it hard to visit my family at home, since it happened right beside my parent's house, for fear some bad memories will come back and haunt me. I haven't been home much since this has happened.

[27] This case embodies every parent's worse nightmare. No matter how old children become, parents worry and pray for their well being. I am certain Ms. K.'s parents would, if they could, do anything to turn back time and change the past and protect their girl from the harm that befell her. Mr. M.'s parents too must have many sleepless nights worrying about what the future will hold for their boy. No parent wants to sit in a courtroom while their child is sentenced for any offence, let alone one so serious.

#### **Position of the parties:**

[28] It may be appropriate at this juncture to outline the position of the Crown and Defence.

[29] The Crown, relying on a number of Nova Scotia decisions, namely **R. v. McAuley** [2005] N.S.J. No. 153; **R. v. Schrubbsall** [2002] N.S.J. No. 466; **R. v. Patey** [1992] N.S.J. No. 361; and **R. v. Challis** [1990] N.S.J. No. 26, seek a term of imprisonment of 12 to 14 years. It is further submitted that given this offence occurred following the passage of the **Truth in Sentencing Act**, Mr. M. should receive no added credit for his period of pre-trial custody, other than straight time. The Crown advises that as of today, Mr. M. has been incarcerated for 28 months, 26 days and that his credit against sentence should be just that.

[30] The Crown further seeks a lifetime prohibition on firearms, ammunition and explosives be imposed, as well as an Order compelling Mr. M. to provide a sample of his DNA.

[31] Finally, the Crown seeks an Order under Section 490.013(2) of the Code, relating to his registration as a sexual offender.

[32] Mr. M.'s Counsel asserts that an appropriate and fit sentence in this matter would be 6 to 8 years. It is submitted that Mr. M.'s guilty plea is a major mitigating factor, and that his history of ADHD, mental health issues and alcohol problems be considered by the Court. Mr. M.'s counsel relies upon the following authorities in terms of the range of sentence: **R v. Alman** 1999 ABCA 316, **R. v. Lemay** 2007 BCCA 501, **R. v. Munroe**, 2006 MBQB 89, and **R. v. Ogushing** 2005 CanLII 633 (QCCQ).

[33] Mr. M.'s counsel acknowledges that the offence took place after the amendments brought about by the **Truth in Sentencing Act**. He relies upon **R. v. Orr**, 2008 BCCA 76, a decision of the British Columbia Court of Appeal that a one and a half for one credit for pre-sentence custody is appropriate.

### **Principles of sentencing:**

[34] The principles of sentencing are contained in Section 718 of the **Criminal Code** and are well known to counsel. I find it useful to reiterate them, however, to focus upon the task at hand. The provisions read:

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 the community;  
and

- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and the community.

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

[35] Section 718.2 also mandates that this Court 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, 1995, c.22, s.6; 1997, c.23, s.17.

[36] Given the positions advanced by the parties, the Court is also mindful of the provisions contained in Section 719 of the **Code**, most notably:

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

**Disposition:**

[37] I agree with the submissions of Mr. M.'s counsel, that a guilty plea, even on the eve of trial, is to be considered a mitigating factor. Although the evidence, particularly the DNA evidence to be marshalled at trial may have made the outcome of a trial almost a certainty, a guilty plea in this instance, no matter how late, did spare the victim the need to recount in this public forum the traumatic events and details of the offence perpetrated against her.

[38] The aggravating factors however, far outweigh those mitigating against sentence. These include:

- a) The attack was completely unprovoked. Mr. M. saw an opportunity for sexual gratification and he acted on it, without regard to the consequences for Ms. K..
- b) The violence perpetrated against her was prolonged and varied. She was choked, she was struck, she was forced to perform various sexual acts against her will, by all the while being threatened.
- c) The nature of the physical injuries sustained are significant, with Ms. K. suffering a serious jaw injury which required ongoing treatment and several surgical interventions. She has suffered devastating emotional damage, including taking away her sense of security and erasing her positive feelings about her home town. She had to see the impact that this offence had on her parents who stood by her hospital bed and cried because they could say nothing to change the situation.
- d) Mr. M. does not have a prior criminal history of aggravated sexual assault, and his previous offences, at least those which are before this Court, are somewhat dated. The Court is concerned however, that the previous aggravated assault was particularly serious in nature, an assault which certainly placed that victim's safety in question. A previous period of incarceration has not dissuaded Mr. M. from perpetrating this serious offence. It would appear that he did not learn deterrence from his previous incarceration.

[39] I have carefully considered the opinion of Dr. Connors. I accept her conclusions, in particular, that without intensive intervention and a real desire on the part of Mr. M. to engage in change, he is at high risk of re-offending, including the commission of violent offences. The key to Mr. M. changing his future life

path is Mr. M. himself. Although many may not view a term of incarceration as an opportunity, Mr. M. will be afforded the opportunity to engage in specialized services, services that may not otherwise be available to him.

[40] I understand from reviewing the materials that Mr. M. has a young son with whom he has no contact. Someday that little boy will ask about his father. Someday that little boy as he grows to a teenager or a man, may want to meet his father. Mr. M., you can't change the past. No one can. But you can change the future. You can, if you want with effort, become a person that your son may want to know. You may become a person that notwithstanding the offences that you've committed and the harm that you've done, your son may respect you for the changes that you will make in your life. But that's up to you, Mr. M., to do that. Only you. No one else can do that. If turning your own life around and making it better is not enough of an incentive, if turning your life around and taking the worry from your parents' shoulders about what will happen to you in future is not enough incentive, then please consider engaging in services, changing your life, taking the opportunities that will be afforded to you while you're incarcerated. Take those opportunities for your son so that you may become a man in the future that that little boy may want to know. Don't lose that opportunity.

[41] I direct that a copy of Dr. Connors' assessment be provided to Correctional Services Canada for the purpose of Mr. M.'s program planning, and strongly recommend that the treatment recommendations contained therein be facilitated as soon as possible.

[42] I am mindful of the principles of sentencing as outlined in Section 718 to 718.2 of the **Criminal Code**. Sentencing is a difficult and highly individualized undertaking. In every instance, reaching an appropriate sentence must be done considering the circumstances of the offence and the offender's own personal circumstances.

[43] In the present case, the determination of an appropriate sentence must emphasize denunciation of this terrible offence, deterrence to Mr. M. and others who think a young woman walking alone late at night is "fair game" for them. It must emphasize a recognition of the personal impact this conduct has had on Ms. K., her family, and the larger community, the quiet lovely community of Port Hawkesbury which thought their streets were safe. Finally the sentence must also

focus upon and consider the rehabilitation of Mr. M.. He is not a lost cause. He can turn things around if he wishes.

[44] Having considered the nature of the offence, the consequences thereof, and Mr. M.'s circumstances, I conclude that a fit and proper sentence in relation to this matter falls within the range suggested by the Crown.

[45] Regarding the calculation of pre-sentence credit, I note that the authority relied upon by Mr. M.'s counsel pre-dated the amendments to the **Criminal Code** brought about by the **Truth in Sentencing Act**. With respect, it is of no use to the Court.

[46] Looking at the provisions, there is nothing before the Court to suggest that the nature of Mr. M.'s pre-sentence incarceration was such that the Court should deviate from the one for one credit provided for in Section 719(3) of the **Code**.

[47] Mr. M. if you could stand please sir.

[48] In relation to the aggravated sexual assault against M. K., I hereby sentence you to a period of incarceration of 12 years, less time served in the amount of 28 months, 26 days, for a remaining period of incarceration of 9 years, 7 months and 4 days.

[49] I further find it appropriate in the circumstances to grant the additional orders sought by the Crown, namely, a lifetime firearms and explosive prohibition, an Order for the provision of DNA samples, and an Order under Section 490.013(2) of the **Code**.

J.