SUPREME COURT OF NOVA SCOTIA
Citation: R. v. G.H.E.,2017 NSSC 281

Date: 20170925
Docket: Bwt No. 455350
Registry: Bridgewater

Between:

Her Majesty the Queen

v.

G.H.E.

SENTENCING DECISION

S. 468.4 CC – A ban on publication of any information that could disclose the identity of the victim and/or complainant.

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

Judge:	The Honourable Justice Mona Lynch
Sentencing Decision:	September 25, 2017, in Bridgewater, Nova Scotia
Written Decision:	November 8, 2017
Counsel:	Leigh-Ann Bryson, for the Crown Alan Ferrier, Q.C., for the Defendant

By the Court:

Overview:

[1] This is the sentencing for the accused for two charges of sexual interference contrary to s. 151 of the Criminal Code. The victims are two of his daughters.

Facts:

[2] Starting when the older daughter was two to two and a half years old the accused, her father, started touching her for a sexual purpose. At around that same time he tried on two occasions to digitally penetrate her vagina. Then he began to fondle her nude genital area on a regular basis and also exposed his penis and encouraged the older daughter to stroke his penis. He suggested that stroking his penis was special because usually only mommies get to do it and if you do a good job it will grow.

[3] When she was about five or six years old the touching of the accused stopped, however, the continued touching of her, by him, of her genital area continued. His touching of her involved his fingernails hurting her, whether that was penetration or not. There was also one incident of the accused getting in bed and touching her with his penis when she was about eight years old.

[4] While there were no threats of violence, as indicated by the crown, the accused did tell the older daughter that the family would break up if her mother knew.

[5] The accused, in the Sexual Behaviour Pre-Sentence Report, describes an inability to control what he described as an obsession in touching the older daughter. It happened when the older daughter sat next to him or on his lap and later when in her bedroom.

[6] He apologized many times to the older daughter but could not stop and he could not get help - he indicated that the family would break up. He began asking her permission and asking her to tell him “no”.

[7] He attempted to stop, but would touch the older daughter again. He finally stopped abusing the older daughter when he felt what he described as “peach fuzz” on her genitals and that shock helped him stop.

[8] The older daughter's earliest memories as a child were of her father sexually abusing her. With regard to frequency, as the crown indicated it is hard to say, but I would suggest a conservative estimate would be at least fifty times over ten years.

[9] The older daughter felt she could not say no to her father, she was supposed to obey him […].

[10] With regard to the younger daughter, she was touched when she was three to five years old, about the time the accused stopped abusing the older daughter. She recalls sitting on father's lap and him touching her genital area. This only occurred a few times as he stopped himself and told his wife about touching the older daughter, but not the younger daughter.

[11] His wife forgave him and he did not touch any of his children or anyone else, as far as we know, for over 17 years.

[12] The charges arose when the older daughter went for counselling and she reported the abuse to her counselor who contacted authorities.

[13] The accused felt that his use of pornography contributed to the offences.

[14] The accused is 55 years old, he is a first offender, he pleaded guilty to two charges of sexual interference contrary to s. 151 of the *Criminal Code*, against his two daughters between 1990 and 1999.

[15] He has been on an undertaking since the charges were laid and the conditions have been changed over time.

[16] He has been the primary income earner in his family by means of farming. He was raised in a home with both parents and one sister. He has a strong sense of family. […] He has a grade twelve education.

[17] His work history includes fishing, farming […] and he is very involved in his church.

[18] He has positive supports in the community from his pastor and other community members. His wife and mother both knew about the abuse of the girls and both continue to support him.

[19] He had a heart attack in 2016 and is taking medication. The testing shows that he has few psychological problems and he has good self control.

[20] The Sexual Behaviour Pre-sentence report shows a low risk for sexual recidivism.

[21] He is viewed positively by family and church members.

[22] The effect on the older daughter has been significant – she struggles to trust, has difficulty processing stress and has panic attacks. She spent much of her childhood, as she described, screaming inside. She has nightmares, low self esteem, struggles with trust on a physical and emotional level with her husband. She is a new mother and looks at her child and worries for her daughter and nieces. Her father, she says, took her innocence. She looks at photos and sees pain and confusion in her own eyes as a child and she describes being destroyed slowly from the inside. She also describes as a child feeling confused and scared and she felt trapped as a child in a situation too big for her, wanting, her father, or daddy as she said, to just be a daddy. She describes as being broken inside.

[23] The younger daughter testified today. She did not provide a victim impact statement and I would like the crown to find out why Victim Services did not contact her. She has some vague memories of her father sexually abusing her, but what she describes as positives about her father outweigh any wrong that was done to her.

Legal Parameters

Principles:

[24] The legal parameters under the *Criminal Code* provide for a number of principles for me to consider. The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Aggravating and mitigating circumstances have to be considered, and one of the aggravating circumstances outlined in s. 718.2 of the *Criminal Code* is abuse of a child and abuse when you are in a position of trust or authority, and both of those are present here.

[25] Also, the principle of parity is important. The sentence has be similar to sentences for similar offences on similar offenders.

[26] When consecutive sentences are imposed, the combined sentence should not be unduly long or harsh. At the time when these offences were committed s.718.2(d) of the *Criminal Code* read:

> (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 and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;

[27] The provision s. 718.3(7) of the *Criminal Code* for consecutive sentences was not in force when the crimes were committed.

[28] At the time of the commission of the offence there was not a mandatory minimum sentence and the maximum penalty was ten years. That has been amended since the time of the commission of the offence, and there is now a minimum sentence of twelve months imprisonment and a maximum of fourteen years imprisonment.

[29] The principles are a codification of the common-law principles at the time of the offences. It said that the fundamental purpose of sentencing is to contribute, along with 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.

Positions of Crown and Defence:

[30] The crown here is seeking a period of incarceration of two to two and one half years for count one, in relation to the older daughter, and six months to one year for count three, in relation to the younger daughter.

[31] The defence is seeking a sentence of six to eighteen months of incarceration to be served in the community, otherwise called a conditional sentence.

Case Law:

[32] Both counsel have indicated that the caselaw is all over the map. The outline of cases provided by the defence counsel range from conditional sentences

to double digit periods of incarceration. Our Court of Appeal in **R. v. E.M.W. (No. 2),** 2011 NSCA 87, an appeal where a conditional sentence was requested but not given, after an extensive review of sentences said, in para. 37, about a sentence of two years in the submission by defence counsel being demonstrably unfit and outside the range, while eighteen months was inside the range and they disagree that the range is so finally circumscribed. They say from the authorities that two years incarceration is available in appropriate circumstances for mid-range sexual offences without intercourse. In that case, they upheld the sentence of two years for sexual assault by a man of his daughter for two years with repeated digital penetration.

[33] There is other caselaw that both counsel have referred to. As I said, it is really not helpful. There are many cases and many sentences as a result of those cases.

Mitigating Circumstances:

[34] I have to look at the mitigating and aggravating circumstances, and certainly on the mitigating side the accused plead guilty and the victims did not need to testify. The offences occurred seventeen years ago. The accused stopped himself. He confessed to his wife at the time with regard to the offence against the older daughter. He confessed when he was arrested. He took full responsibility and as Mr. Ferrier said, some of the things known would not be known except for the full responsibility he took. In his confession to the police he did not minimize his involvement. He has no record, although I have to bear in mind our Court of Appeal in **R. v. Weaver**, [1993] N.S.J. No. 91, said that a clean criminal record "does not relieve the requirement of a lengthy prison term for sexual offence against children".

Aggravating Circumstances:

[35] There is a breach of trust. One of the people a child should trust the most, their parent, has abused their trust.

[36] The age of the children. Starting with the abuse for one child, the older daughter, at two and a half and for the younger daughter between three and five.

[37] This is a crime of violence by its nature. The abuse occurred over a lengthy period of time, on numerous occurrences.

[38] The many years, I said over ten years for the older daughter. I have to look at the big impact on the older daughter's life. The fact that the accused went on to abuse a second child. When I look back again, when I look at the threat that if the older daughter said anything that the family would break up. That is a responsibility that should not have been put on a child. I have to look at the manipulation that the accused used with his manipulation to get the older daughter to fondle his penis. He indicated "usually only Mommies get to do this, if you do it right it will grow". I have to look at the attempted digital penetration of a two-and-a-half-year-old.

[39] The concerns I have in the Sexual Behaviour Pre-Sentence Assessment, the accused describes himself as a good father and the younger daughter did that today. I am concerned with that because good fathers do not sexually abuse their children, and you were not a good father to the older daughter and the younger daughter when you robbed them of their ability to trust and their innocence. Good fathers do not sexually abuse their children.

[40] Also, I had concern in the report that there seems to be a blaming by both the accused and the accused's wife for the reporting of the offences to authorities, instead of placing the blame where it belongs, with the accused. It appears from the Sexual Behavior Pre-Sentence Assessment that it was reported when the older daughter went for counselling and the counsellor reported the abuse.

[41] There seemed to be some blame placed on your sister and what you perceive as her jealousy of you, in encouraging the older daughter to report the abuse to authorities.

[42] I understand from listening to the accused's wife this morning, and from reading the Pre-sentence Report and the Sexual Behaviour Pre-Sentence Assessment, that you and your family would have preferred that there had been no report to authorities and you would have continued to suffer no sanctions for your offences other than what you suffered in your family. That is a very self-centered view, as certainly the older daughter went to get assistance that she needed, and probably needed much before she went. It is not unusual for victims to not report their abuse until they are older, maybe not living in the home where the perpetrator is, and having gained the strength to report the abuse.

[43] The other concern, as outlined, is asking the older daughter to say "no" to you and putting the responsibility on the child to control the situation, when that was your responsibility.

Principles of Sentencing:

[44] The other principle of sentencing is that it has to be tailored to the individual. I must look at protection of the public, deterrence and denunciation, and rehabilitation.

[45] Because the offences occurred before the amendments were made for a minimum sentence and the maximum of fourteen years, a conditional sentence is available as a sentence. The **R. v. Proulx,** 2000 SCC 5, decision from the Supreme Court of Canada, outlined what I am to consider when I am considering a conditional sentence. I have to first look at whether the appropriate range of sentence, which has to be less than two years, is within the range of appropriate sentences. Then, if less than two years was within the range for the sentence, I have to look at whether the offender is a danger to the safety of the community and whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing.

[46] As I indicated, and counsel indicated, certainly there are sentences all over the place -- probation, conditional sentences and sentence ranges from six months to double digit terms of imprisonment.

[47] In the **R. v. E.M.W.**, supra, case from our Court of Appeal, a conditional sentence was requested of the trial judge and the trial judge gave two years, and that was upheld on appeal. In that case, the Court of Appeal reviewed many cases from three years suspended sentence to six years in prison. They say that incarceration in the cases they reviewed were sometimes more, and sometimes less, than two years depending on the severity of the circumstances for sexual offences on children without intercourse.

[48] In **R v. S.C.C**., 2004 NSPC 41, (Judge Tufts) he reviewed a number of cases and considerations for conditional sentences and determined that less than two years was in the range of appropriate sentences for the offence.

[49] So, I accept from the Court of Appeal and from Judge Tufts in the review of their sentences, and the review that I have done with the cases that were provided

by counsel, that less than two years is within the appropriate range of sentences for the offence.

[50] I then look at whether serving the sentence in the community would endanger the safety of the community, and I am satisfied here that leaving the accused in the community would not endanger the safety of the community.

[51] However, I also have to consider whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

[52] Here, for sexual abuse of children, particularly by a parent, deterrence, general deterrence, and denunciation are paramount considerations in the **R. v. G.L.,** 2003 117 O.A.C. 117, the Ontario Court of Appeal said at para. 7:

> This court has repeatedly indicated that a conditional sentence should rarely be imposed in cases involving the sexual touching of children by adults, particularly where, as here, the sexual violation is of a vulnerable victim by a person in a position of trust. In addition, circumstances that involve multiple sexual acts over an extended period of time and escalating in intrusiveness generally warrant a severe sentence.

[53] Justice Abella, when she was on the Ontario Court of Appeal, in 1992 in **R. v. G.M.**, (1992) 58 O.A.C. 390, said at para. 9:

> The public can logically be expected to infer from the nature of the sentence the extent to which a court views as serious, certain conduct by a given individual… Sentences which appear on their face to be exceptionally lenient in the circumstances can be presumed to generate neither deterrence nor dununciation.

[54] Our Court of Appeal in **R. v. H. (E.R.),** (1987), 81 N.S.R. (2d) 156 (N.S. C.A.), the court stated at p. 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.

[55] In **R. v. C. (E.M.)** (1999), 178 N.S.R. (2d) 184, the court said:

> Child victims are the most helpless in our society. As adults we teach them from birth to obey adults and place trust in them. Children are taught to go to an adult when they need help or protection. This is especially so of relatives. Who does a

> child go to for protection when the adults in their family betray that trust. Surely these victims must feel alone in the world. In the circumstances of this case the only thing the children could expect from E C was a betrayal of that trust as he preyed upon them.

[56] In **S.C.C**., supra, that is Judge Tufts again, he finds that: conditional sentences are rare in sexual assault against young children by a person in authority; they usually attract a severe sentence; ordinarily a federal sentence is required; and a conditional sentence is the exception, rather than the rule.

[57] As the crown cited in the **R. v. E.M.W**, supra, the court quoted the trial judge and said at para. 42:

> A man who sexually violates his own ten-year-old daughter in these circumstances cannot be allowed to serve his sentence by going to work, going out to the grocery store for a few hours on Saturday, watching television from his favourite chair and enjoying the fellowship of friends and family in his home.
>
> A conditional sentence does not, in these circumstances, provide for punishment that is measured and thoughtful. It would, to put it simply, be the kind of sentence that does not speak of justice and compassion but of weakness and naivete.
>
> When abuse of children is involved, punishment matters. When the abuser is a parent, punishment matters a lot. While the restrictions of a conditional sentence can indeed be punishment, there are times when they are no replacement for the sound of a shutting jail cell.

[58] In this case, the accused, clearly has started on the path and is well on his way on the path to rehabilitation, but that is only specific deterrence and I have to consider general deterrence as well.

[59] Leaving the accused in the community to run […] or leaving him in the community not to run […] would not send the message of society's revulsion of such conduct. As I indicated, his conduct was a breach of trust, an exploitation of children, and a conditional sentence is not consistent with the fundamental purpose and principles of sentencing in s. 718 to s. 718.2 of the *Criminal Code,* and so I will not be granting a conditional sentence to the accused.

Ancillary Orders:

[60] The crown has asked for ancillary orders and we were just discussing s.109 of the *Criminal Code,* which requires a prohibition from possessing any prohibited

firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for life and any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance for ten years. The accused will provide a sample for DNA, as it is a primary designated offence. With regard to no contact while in custody, the older daughter is not here to indicate her wishes and the crown did not think it to be a problem. With regard to the Sexual Offender Information Registry Act, the accused is placed on that for life. I must consider s. 161, but in light of the Pre-Sentence reports and in particular the report from Dr. Connors, I do not find it necessary to impose the s. 161.

SENTENCE:

[61] With regard to the sentence, as I have indicated, there are many different sentences. Mr. Ferrier mentioned this morning **R. v. I. (Part 2),** 1996 NSSC 3, and indicated that that was, while some of the facts are similar, in that case the offender did not accept responsibility, and certainly that is not the case here for the accused. In that case, it was three years of imprisonment.

[62] In the **R. v. D.B.S.,** 2004 NSSC 80, case there was sexual abuse over eight years and there was a five year term. As I already indicated in **S.C.C.,** supra, Judge Tufts reviewed the case law and he said at para. 16:

> There are few crimes that are more serious and have a more devastating effect on its victims than sexual assault against young children by their parents or guardians. Both in terms of gravity and moral blameworthiness such crimes represent serious criminal conduct which requires proportionate criminal sanctions. Other factors which impact on this aspect are the following aggravating features…

And he reviews the ones in that case. In that case, a sentence of two years.

[63] In **R. v. G.K.N.**, 2014 NSSC 150 (Justice Cacchione) there were multiple acts of sexual interference from the age of seven or eight to thirteen and he reviews the case law and he gives a total sentence of eighteen months. That was, in that case, to allow for probation so the person could get the treatment recommended by the report.

[64] Then there was **R. v. D. (K.),** 2004 NSPC 549, referred to by the defence that was occasional, sporadic and separated in time, in a casual nature and that was two years less a day to be served in the community. And **R. v. Arsenault**, 2004

NSSC 242, which was a joint recommendation for twelve months to be served in the community.

[65] As I indicated, when I am looking at the concerns that I have outlined with regard to the threat of breaking up the family, that would have left the older daughter in the position where she either had to continue to endure the sexual abuse or break up her family, which was not an enviable position to put a child in.

[66] There was the manipulation. The blame for the reporting to authorities. The period, ten years. The young age when the abuse started. This was not spur of the moment, not just an impulse, not that many times, it was not just impulsive.

[67] The offences against the older daughter were the most serious, the most frequent, the longer, the nature of the sexual activity was more severe and the impact on the older daughter was more severe.

[68] The rehabilitation started by the accused stopping the abuse and telling his wife. Dr. Connors indicates he does not need group sessions, but he could use individual counselling.

[69] The relationship that was damaged, the damage to the children, the damage of trust, the damage to their intimacy and their innocence, was exploited for the accused's sexual gratification.

[70] There needs to be a message sent to others in the community that we will not accept this type of behaviour.

[71] Both the crown and defence discussed the level of seriousness of the abuse and there are references in the case law to levels of sexual abuse. I am hopeful that we are past the days when the degree of penetration of the victims' bodies determines the seriousness of the sexual assault or the abuse. The level of the violation of the victim's sexual integrity is not determined by the degree of penetration. Here, it was frequent and over a long period starting at a very young age, and included various forms of sexual abuse that were certainly a major violation of the older daughter's sexual dignity.

[72] There is no sentence that I can give that would give the older daughter and the younger daughter back what was taken from them. They are in no way to blame. They are in no way responsible. The blame lays solely with the accused. They were innocent children. The older daughter was brave to go forward and get

counselling, something she should probably have done, or had, many years ago. We normally do not leave it to children to decide if they need counselling. I know that the sentence imposed will not heal their wounds, and I hope that the older daughter and the younger daughter will be able to continue on their path to healing with support of the people in their lives who love and support them.

[73] I did consider a longer period, more in keeping with what the crown was asking for. I did, however, have to consider what defence counsel has indicated were the unique facts in this case with regard to the level of honesty, confession, co-operation, both to the police and to the accused's spouse, and no offences for seventeen years.

[74] For count one, which is the sexual interference contrary to s. 151 of the *Criminal Code* regarding the older daughter, I am sentencing you to a period of incarceration for eighteen months.

[75] The sentence for the younger daughter which was less frequent over a much shorter duration, I find that the appropriate sentence is six months imprisonment to run consecutively.

[76] I did consider two years less a day with probation, but it did not appear to be necessary to place him on probation. Hopefully, when you are released you will seek counselling on your own.

Justice Mona Lynch