

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. M (CJP)*, 2022 NSSC 315

Date: 20221102

Docket: CRH No. 499815

Registry: Halifax

Between:

His Majesty the King

v.

CJPM

Publication Ban: *Criminal Code* ss. 486.4 & 486.5 – any information that will identify the Complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the ban stipulated in these sections.

DECISION on SENTENCE

Judge: The Honourable Justice James L. Chipman

Trial Heard: June 21, 22 and 23, 2022

Sentencing: November 2, 2022

Counsel: Emma Woodburn, on behalf of the Crown
Colin Coady, on behalf of Mr. M

By the Court:

[1] On September 7, 2022, I convicted CJPM of the sexual assault of JNM contrary to s. 271 of the *Criminal Code*, RSC, 1985, c. C-46. In my trial decision – *R. v. M (CJP)*, 2022 NSSC 253 – I provided the following background:

[2] The allegation dates back to August 2019 when the accused was [redacted] and the complainant [redacted] years of age. On the evening of August 4th J and her then [redacted]-year-old boyfriend, CH went to their friend HD’s parents’ house for the evening and overnight. Ms. D was also [redacted] and the girlfriend of CM. Her parents were away overnight and the four teenagers had the house to themselves.

[3] The teenagers drank alcohol and socialized until the early morning of August 5th when they all got into H’s bed together. At some point CH and H left the bed and went upstairs. Soon thereafter, J alleges that CM had non-consensual sexual intercourse with her.

[2] After reviewing the evidence and authorities, I made these findings:

[72] On the whole of the evidence I found J and CH to be truthful, authentic and compelling witnesses. They were credible witnesses whose testimony was largely corroborated by evidence external to their separate viva voce testimony. Both J and CH had decent recollections and the flaws in their memory, gaps or inconsistencies arise from normal expected failings and imperfections and not deceit or fabrication.

[73] The Defence argued that it would be dangerous to convict on the evidence of J and CH. In making this argument the Defence pointed to numerous times when each of these witnesses said that they did not remember or did not know about certain specifics dating back to August 2019. To this I make the obvious initial comment that by the time of the trial the matters in issue occurred almost three years earlier. To cite just one example, I appreciated the candour of J when she said that she could not recall whether she worked on the day of the get-together.

[74] Once at the D residence all four teenagers consumed alcohol. J was just [redacted]; however, she had about a year’s experience of drinking alcohol on a perhaps weekly basis. She knew about her tolerance and what it took to become “blackout drunk” and to the point of vomiting. At the time she was around [redacted]. During the course of four or five hours she drank four to seven coolers and on her evidence and her mother’s (which I prefer in this area over CH’s evidence), I find that she consumed five percent alcohol coolers; i.e., Mike’s Hard Lemonade and one of H’s coolers but not Black Fly coolers. Although she took her regular dosage (.75 mg in the morning) of sertraline, I find, based on the expert evidence of Ms. Hird, that this would not have had any bearing on her state of mind.

On balance, and having regard to all of the evidence, I find that at the time of the allegation, J would have been intoxicated but not extremely intoxicated.

[75] Undoubtedly J felt the effects of alcohol at the time in question. Given the totality of the evidence I find that soon after CH and H left the bedroom she was sexually assaulted by CM. CM got on top of her and, recalling the words of Justice Major in *R. v. Ewanchuk* (quoted herein at para. 71) proceeded further in the face of J making it clear that she was unwilling to engage in sexual contact. In particular, I find the complainant's evidence that she said "stop", "no" and "please stop" extremely compelling and believable.

[76] I find J's account of the sexual assault to be buttressed by the evidence of CH. His first-hand account of what he saw from the doorway of the bedroom is specific and provides corroborative evidence of CM sexually assaulting J in the immediate aftermath of her protestations. His description of what he observed was unshaken on cross-examination and I find that he did not embellish the circumstances.

[77] Both J and CH acknowledged their respective levels of alcohol ingestion and understandable memory failings dating back three years. Their evidence was genuine and did not come across as scripted or choreographed. There were inconsequential inconsistencies in their evidence; however, when I weigh the totality of the evidence, I find that these two witnesses were entirely credible and reliable in their separate accounts of CM engaging in unwanted sexual intercourse with J. In the result, I find the requisite elements of s. 271, sexual assault, are made out. I find beyond a reasonable doubt that CM sexually assaulted JM.

[78] CJPM is hereby convicted that he on or about the 5th day of August 2019 at or near Lucasville, Nova Scotia, did unlawfully commit a sexual assault on JM.

[3] In advance of today's sentencing hearing the Court received a September 22, 2022 Pre-Sentence Report (PSR) authored by probation officer Johna Edwards. On October 20, 2022, counsel advised that they would be making a joint sentencing recommendation and on October 26, 2022, provided sentencing briefs and authorities. On October 31, 2022, the Court received a Victim Impact Statement (VIS) from JM. Today the Court heard oral submissions and JM read her VIS.

[4] The joint recommendation includes the following:

- two years federal custody (with a condition prohibiting contact with JM, CH or TM, pursuant to s. 743.21(1));
- 24 months probation; and
- statutory Mandated Ancillary Orders:

- DNA Order (Primary Offence)
- SOIRA Order for twenty years
- Firearms Prohibition for 10 years pursuant to s. 109(1)(a).

[5] Having reviewed all of the written documentation and oral submissions, I am of the view that the jointly recommended disposition is a fit and proper sentence in light of the applicable caselaw and the relevant aggravating and mitigating factors. The disposition sought is not contrary to the public interest and would not bring the administration of justice into disrepute based on the authorities provided.

PURPOSES AND PRINCIPLES OF SENTENCING

[6] The fundamental purposes of sentencing is to protect society and contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society through the imposition of just sanctions (*Criminal Code*, s. 718)

[7] In *R. v. F.H.*, 2015 NSSC 43, Justice Murray set forth the purposes and principles of sentencing in the context of sexual offences:

60 The underlying consideration for the Court is set out in section 718.1 of the *Criminal Code* which is referred to as the fundamental principle of sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In plain words, it must be a fit and proper sentence. In determining that, I must look at and consider the fundamental purpose of sentencing and the objectives which are also set out in the *Criminal Code*. There are six of them. Section 718 of the *Code* reads:

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.

...

62 There are additional considerations and those considerations involve aggravating and mitigating factors. A sentence should be increased or reduced to account for aggravating or mitigating circumstances relating to the offence or to the offender. Also, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. There are others which I will not refer to verbatim, but one of those reflects a consideration that incarceration and deprivation of liberty would be a last resort.

63 ...Denunciation requires that a sentence should communicate society's condemnation of the offender's conduct. Deterrence is another objective and it refers to a sentence that will specifically deter the offender from committing further offences as well as deter other like-minded individuals from offending.

64 These objectives are particularly relevant here.

65 These, however, are not the only objectives. For example, rehabilitation is an important factor in establishing any sentence and is of particular importance when dealing with young people and first offenders. ...

66 There is, as well, the need to account for individual circumstances. I am not intending to make an exhaustive list at this time but have referred to those which may apply here.

CIRCUMSTANCES OF THE OFFENDER

[8] The PSR discloses the following relevant information regarding his personal circumstances.

Family Background

[9] Mr. M was born and raised in Halifax and is the oldest of three children. He spent his formative years participating in sports and volunteering, including coaching hockey. Mr. M continues to have a supportive relationship with both of his parents and is close with his two younger siblings.

[10] Mr. M is currently engaged and his fiancé is supportive of him. They are parents to a 15-month-old son.

Education and Employment

[11] Mr. M successfully completed Grade 12 and then enrolled in the Corrections and Law Enforcement program at Maritime Business College in 2019. He did not

complete this program after learning that it was not accredited. Mr. M maintains an active interest in furthering his education and may pursue a skilled trade.

Health and Lifestyle

[12] Mr. M is in good physical and mental health and remains actively involved with playing sports on a regular basis. Mr. M's mother confirmed that her son has no issues with drugs or alcohol and no mental health or anger management issues.

Offender Profile

[13] Mr. M has no previous criminal history. The PSR states that he is not in need of any type of specific intervention except potentially for counselling.

AGGRAVATING AND MITIGATING FACTORS

Aggravating Factors

[14] Given that the victim in this matter was under the age of 18, this is a statutorily aggravating factor under s. 718.2(a)(ii.1) of the *Criminal Code*.

[15] The Crown cites *R. v. McGraw*, [1991] SCR 72 at paras. 30 – 33 in adding that the violent nature of sexual assaults generally and due to the significant impact on the victim, that the Court must be especially mindful of the aggravating factors. They also cite *R. v. Friesen*, 2020 SCC 9 in emphasizing the young age of the victim. The Defence cites *R. v. Lamure*, 2019 ONSC 2144 at para. 25 in asserting:

“At the same time, because Mr. M was only 18 years old at the time, Defence respectfully submits that the impact of this factor should be reduced.”

[16] Today in oral submissions, the Crown acknowledged that the offender was “also very young” and the victim and offender were part of the same peer group.

Mitigating Factors

[17] The following are mitigating factors:

- no prior criminal record;
- relatively young age of the offender; and

- evidence of good character as outlined in the PSR.

VICTIM IMPACT STATEMENT

[18] The VIS is powerful. J provides details to support her opening sentence; “on August 4th, 2019, my life changed drastically.” The VIS documents the significant mental and physical health toll brought upon J in the nearly three and one-half years since the offence.

THE RELEVANT CASELAW

[19] Unlike some other jurisdictions, Nova Scotia has declined to adopt a “starting point” approach to the sentencing of sexual assault. As noted by Justice Oland in *R. v. J.J.W.*, 2012 NSCA 96 at para. 21:

21 Nova Scotia has not adopted a starting point approach. Rather, this Court has chosen to remain focussed on the principles of sentencing as set out in the Criminal Code and the Supreme Court of Canada's affirmations that the approach on review on sentencing appeals is one of deference to the decisions of the sentencing judge.

[20] The parity principle suggests that a sentencing range can be identified for similar offenders in similar circumstances. In Nova Scotia, the range of sentences for sexual assaults involving complainants who were sleeping, otherwise unconscious, or too intoxicated to consent at the time of the assault runs from 14 months to more than three years' imprisonment. Similarly, the range of sentence for a single sexual offence involving intercourse is between 18 months and four years' imprisonment.

[21] The parties provided the Court with a number of helpful Nova Scotia sexual assault sentencing cases which may be distilled as follows:

- *R. v. Al-Rawi*, 2020 NSSC 386, sentence: two years custody;
- *R. v. S.L.*, 2020 NSSC 381, sentence: two years custody and probation for two years;
- *R. v. Percy*, 2019 NSPC 12, sentence: two years custody for sexual assault and one year consecutive for voyeurism, as well as three years probation;

- *R. v. J.A.M.*, 2018 NSSC 285, sentence: two years custody followed by three years probation;
- *R. v. Simpson*, 2017 NSPC 25, sentence: three years custody;
- *R. v. D.H.E.*, 2012 NSSC 260, sentence: three years custody;
- *R. v. J.J.W.*, 2012 NSCA 96, sentence: two and one half years custody;
- *R. v. W.H.A.*, 2011 NSCA 246, sentence: five years custody; and,
- *R. v. Marshall*, 2008 NSSC 132, sentence: three years custody.

[22] A two-year custodial sentence followed by two years probation is fit and appropriate in the circumstances. Upon a review of the totality of the circumstances, including the mitigating factors identified and the applicable caselaw, this disposition is in the public interest and a reasonable, fit sentence for CJPM. I therefore impose the jointly recommended sentence and will sign the ancillary Orders.

Chipman, J.