SUPREME COURT OF NOVA SCOTIA
Citation: R. v. W.R.M., 2013 NSSC 392

Date: 20130726
Docket: CRH 398699
Registry: Halifax

Between:

Her Majesty the Queen

v.

W.R.M.

Restriction on publication: 486 CCC Publication Ban

486.6 (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction. (2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order.

Judge:	The Honourable Justice Glen G. McDougall
Heard:	July 4, 25 & 26, 2013, in Halifax, Nova Scotia
Oral Decision:	July 26, 2013
Written Decision:	December 04, 2013
Counsel:	Eric Taylor, for the Provincial Crown Brian Bailey, for the defence

By the Court:

[1] WRM ("Mr. M" or the "offender") was charged on a three-count Indictment as follows:

> 1) that he between the 9th day of December, 2010 and the 5th day of April, 2011 at, or near Dartmouth, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on MCLR, contrary to Section 271(1)(a) of the Criminal Code.
>
> 2) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose touch MCLR, a person under the age of sixteen years directly with a part of his body, contrary to Section 151 of the Criminal Code.
>
> 3) AND FURTHER THAT HE AT THE SAME TIME AND PLACE AFORESAID, did for a sexual purpose invite MCLR, a person under the age of sixteen years, to touch directly a part of his body, contrary to Section 152 of the Criminal Code.

[2] After re-electing to be tried by Judge alone in the Supreme Court, Mr. M pleaded guilty to count number 2.

[3] Counts 1 and 3 will be dealt with later as part of this sentence hearing.

[4] For now, the Court has been asked to deliver its sentence on the offence of "sexual interference" contrary to s. 151 of the **Criminal Code**.

[5] Section 151 reads as follows:

> 151 **Sexual Interference** 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 sixteen 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;

[6] It should be noted that the minimum punishment for this offence was changed to a term of one year and proclaimed on August 9, 2012.

[7] The offence to which Mr. M has pleaded guilty was committed prior to the new minimum sentence coming into force and he therefore benefits from the lesser minimum punishment.

[8] At the time of the offence, the victim (whose identity has been and will continue to be protected from any form of disclosure or publication) was 14 years of age.

[9] Given her age at the time of the offence, the victim cannot give a valid consent in law. Section 150.1 of the **Criminal Code** makes it clear, subject to certain exceptions which do not apply in this case, that "it is not a defence that a complainant consented to the activity that forms the subject matter of the charges if she is under the age of 16 years."

SUMMARY OF THE FACTS:

[10] A summary of the facts of this case was provided by defence counsel in his written brief dated June 25, 2013 (filed the same day).

[11] A somewhat expanded view of the facts was presented by Crown counsel along with his written brief of July 19, 2013, first filed by facsimile on July 19, 2013 followed up by hand delivering on July 22, 2013.

[12] There are really no disputes as to the facts and due to the more detailed account of the facts contained in the Crown brief I will adopt that particular version on which to base my decision.

[13] I will therefore, with full attribution, recite those facts. There is some editing, of course, to redact the name of the victim.

> **The Facts:**
>
> On January 30, 2008 Mr. M was sentenced to a period of three years in a federal penitentiary as a result of a break and enter and other offences. He was released on parole on December 10, 2010, at age 22.

On December 26, 2010 an accused named SM sexually assaulted the victim in this matter. The victim was 14 years of age at the time and SM was 29 and dating the victim's older sister. The incident came to the attention of the victim's parents when she was diagnosed with a sexually transmitted disease. During the subsequent police investigation a production order was granted allowing police access to the victim's cell phone records. These cell phone records were reviewed and sexually explicit text messages were noted to have been passed between the victim and Mr. M as early as December 25, 2010 (one day before the sexual assault of the victim by SM and 15 days after Mr. M was released on parole). The content of the text messages between Mr. M and the victim made it clear that the two were in an intimate sexual relationship including full sexual intercourse.

On March 6, 2011 the victim turned 15. A month later, on April 4, 2011 she was interviewed by police concerning the text messages. She initially claimed Mr. M was just a friend she knew from his having dated her older sister. When shown the text messages she acknowledged them. She confirmed she and Mr. M had had sexual intercourse as late as two weeks before, and that he had worn a condom. She claimed she was a fully consenting partner to the sexual activity, which occurred at her family's home. She advised that Mr. M had been living at her home for two to three months with her, her brother, and her parents RR and LR. Her parents had given Mr. M permission to live at their home and to date her. She claimed her parents were aware of the sexual nature of her relationship with Mr. M.

RR, father of the victim, was interviewed by police. He confirmed Mr. M had been living with the family and working for him. He advised he knew his daughter was in a relationship with the victim. He denied knowing they had a sexual relationship. He was not supportive of charges against Mr. M. He declined to provide a formal statement to police.

LR, mother of the victim, was also interviewed by police. She confirmed Mr. M had been living with the family. She was not

supportive of charges against Mr. M. She declined to provide a formal statement to police.

On June 23, 2011 Mr. M was arrested by police for sexual assault, sexual interference and invitation to sexual touching. He was released on conditions including having no direct or indirect contact with the victim or going to her residence. Six days later Mr. M applied to Provincial Court to vary these conditions of his police undertaking, but abandoned his application when the Crown and the Department of Community Services indicated their opposition to the variation request.

Mr. M ultimately sought a judge and jury trial and a preliminary inquiry. On the preliminary inquiry date he waived the hearing and consented to committal on all charges in Supreme Court. In Supreme Court he re-elected trial by judge alone and sought a resolution conference.

On October 29, 2012 the resolution conference was held, but Mr. M did not appear for the sentencing hearing that was expected to take place following the resolution conference, and on November 1, 2012 a warrant was issued for his arrest.

Mr. M remained at large from November 1, 2012 until March 14, 2013 when he was arrested in a vehicle driven by RR, the victim's father. The victim was also present in the vehicle. He was noted to be in violation of several bail conditions, including having no contact with the victim.

Mr. M has been held on remand from March 14, 2013 to the present with respect to the charge before the Court. He pled guilty to a charge of having contact with the victim at the time of his arrest, as well as to other charges, and was sentenced to a total of 25 days in custody. The custodial period has been completed, served while he has been on remand for the offence before the Court.

PURPOSE AND PRINCIPLES OF SENTENCING – CRIMINAL CODE PROVISIONS:

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

Section 718.1 states:

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

Section 718.2 states:

> 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.

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

[16] 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.

[17] Section 718.2, referred to earlier, lists some of the relevant aggravating circumstances in paragraph (a), sub-paragraph (ii.1) which states:

> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> ...
>
> shall be deemed to be aggravating circumstances;

[18] I have had the benefit of both written and supplemental oral submissions of Crown counsel, Mr. Eric Taylor, and defence counsel, Mr. Brian Bailey.

[19] In addition to the submissions of counsel, the defence called LR, the mother of the victim, to testify.

[20] I have been referring to MR as the victim despite how she presents herself and how she is perceived by her parents.

[21] They portray her not as a victim but as someone who was a willing and consenting party to not simply a sexual act but a full blown sexual relationship. And, a relationship that had the approval of her parents despite her tender years.

[22] Regardless of this, the law is clear. The new age of consent, as I mentioned earlier, is 16 years. With very limited exceptions, an individual under 16, cannot in law, consent to sexual activity. Parental acceptance and consent, no matter if it is overt or as a result of wilful blindness, does not turn an otherwise criminal activity into a blossoming romance.

[23] There is a victim in this case regardless of whether the object of Mr. M's affections or her parents wish to acknowledge it.

[24] The age of the victim is an aggravating circumstance and I am obliged by section 718.2(a)(ii.1) to treat it thus.

[25] While I might not agree with the boundaries and moral standards imposed by the victim's parents on their daughter, I at least commend them for supporting her and Mr. M who appears to have been accepted as a member of their family.

[26] They seem willing to give him the benefit of their home along with some structure and guidance that appears to have been absent during much of Mr. M's formative years.

[27] Perhaps the pending birth of Mr. M's child by the now 17-year-old victim will also provide him with an added incentive to change his, hitherto, criminal lifestyle. One can only hope.

[28] Based on the Justice Enterprise Information Network (JEIN) report, Mr. M has been convicted of 61 prior criminal offences.

[29] Many of those prior offences were for breach of conditions of bail release or probation. He has also, in the past, been charged with other offences while still on parole from on other convictions.

[30] All in all, Mr. M's history of criminal activity is quite extensive, first as a young offender and subsequently as an adult.

[31] Indeed, the Forensic Sexual Behaviour Presentence Assessment Report, prepared by Dr. Angela Connors of the East Coast Forensic Hospital, suggests on page 34 that:

> ... in the actuarial measures which estimates Mr. [M's] risk for violent reoffense in the high to moderate high categories.

[32] Dr. Connors' report is, however, not all so negative. She also states on page 34:

> Mr. [M] appears to have started to make significant changes in his life commensurate with attempting to live a more prosocial lifestyle and achieving the basic milestones of adulthood in terms of stability in employ and intimate relationships.

[33] Dr. Connors goes on to express some reservations, however, by stating:

> However, these goals and tasks are new to him, and he has yet to confine his choices and actions exclusively to prosocial alternatives. Further, he does not yet have a substantial time frame demonstrating stability, prosocial actions, and a lack of criminal activity to balance against his negative past.

[34] This leaves the Court in a bit of a quandary. While section 718.01 obliges me to give primary consideration to the objectives of denunciation and deterrence it does not state that the other sentencing objectives, particularly rehabilitation, have to be ignored or sacrificed to assuage the public's condemnation of such conduct.

[35] In addition to the Forensic Sexual Behaviour Presentence Assessment, the Court has had the benefit of receiving a Pre-Sentence Report ("PSR") prepared by Probation Officer, Ms. Johna Edwards on 20 June 2013.

[36] In addition to corroborating the R family's acceptance and support for Mr. M, it provides a fairly comprehensive view of the offender's family background, his corrections history, his education / training, his health and lifestyle, his employment history and prospects for employment upon release from jail and his overall financial circumstances.

[37] The Probation Officer's comments regarding Mr. M, found under the heading of "Assessment of Community Alternatives/Resources" states that Mr. M "has

accepted responsibility for the offence and did appear genuinely remorseful for his actions which he expressed were the result of lack of knowledge."

[38] It was pointed out by Crown counsel that the offender's statement to the Probation Officer that "..., if I'd known the law I'd never be in this situation" rings rather hollow in that he obviously continued his sexual relationship with MR after being charged and while subject to a Court order to have no contact with her. I agree.

[39] I also agree with the Probation Officer's recommendation that:

> Should the Court consider the subject suitable for a community based disposition, this writer would suggest one with **strict supervision as well as immediate consequences for non-compliance**. [emphasis added]

[40] Obviously because there is a mandatory minimum involved in this particular offence there is no allowance or provision for a conditional sentence, but there will be, as will be outlined later in this decision, conditions attached to a period of probation that I propose to implement.

[41] The Court also acknowledges having received and read three letters written by people acquainted with Mr. M all of which are quite supportive of him. They speak of his usually calm demeanor, his work ethic and his willingness to learn new job-related skills.

[42] Furthermore, I was presented with an approximately one and one-half page hand-written note prepared and signed by Mr. M. In it he pledges to continue leading his recently acquired, non-criminal lifestyle. He also states that his principal goal in life is to now support his girlfriend and their child who is due to be born in a couple of weeks time.

[43] As stated earlier, perhaps this might be the incentive Mr. M needs to take responsibility for his own actions and to begin a new chapter in his development; a new and, hopefully, more positive chapter as a father and potential husband to the child's mother. Time will tell.

CROWN'S POSITION ON SENTENCE:

[44] The Crown is recommending, together with time spent on remand, that Mr. M be sentenced to a period of two years' incarceration in a federal institution on a go-forward basis.

[45] Crown counsel calculates the offender's time on remand pending sentencing as 55 days up to and including July 25, 2013. Adding one day for the adjournment to allow the Court to arrive at its decision on sentence the total number of days on remand amounts to 56 days or approximately two months. This would mean an overall sentence in the range of 26 months if I was to accept the Crown's recommendation.

[46] This reflects the offender's risk to re-offend both violently and sexually based on Dr. Connors' assessment results.

[47] It also takes into consideration the availability of programming that is only offered through Correctional Services Canada as part of a federal sentence of incarceration.

[48] The Crown has indicated that if the Court agrees with defence counsel's recommendation that his client be given a provincial sentence followed by probation then the recommendations set out in Dr. Connors' report should be incorporated in the conditions of probation. Regardless of whether the sentence is two years or more (federal time) or less than two years (provincial time) the Crown recommends that Dr. Connors' recommendations be included in the Warrant of Committal.

[49] The Crown also asks for a number of ancillary orders including (i) SOIRA order; (ii) DNA order; (iii) Firearms Prohibition Order; and, (iv) section 61 Prohibition Order. I will address these orders later in my decision.

DEFENCE'S POSITION ON SENTENCE:

[50] Counsel for Mr. M is seeking the mandatory minimum sentence of 45 days, less time earned on remand, together with a period of probation.

[51] The defence recognizes that given section 151 is a primary designated offence as defined by section 487.04(a) of the **Criminal Code**, a DNA Order is mandatory.

[52] Nor is the defence opposed to the Court exercising its discretion to order a Firearms Prohibition pursuant to section 109 of the **Code.**

[53] There is also a requirement under section 151 of the **Code** to have Mr. M registered under the Sex Offender Registration Act. There is a yet unresolved issue regarding the duration of supervision which counsel will be invited to determine if that period should be 20 years or life, given Mr. M's prior finding of guilt for sexual assault as a young offender. Counsel have been kind enough to provide cases to assist the Court in deciding whether the sexual assault offence that Mr. M was charged with when he was a youth under the *Young Offenders Act* should be considered when deciding this issue. Upon review of these cases and any supplemental research done by the Court's Law Clerk, I will share the benefit of that research with counsel and invite any further comments they might have. I also reserve the right to ask counsel to appear to answer any questions I might have or to supplement the cases with further oral argument that might assist me in determining this particular issue. In any event, that is not going to delay the sentencing. It would appear that there is a minimum of 20 years but it could be a lifetime supervision or reporting requirement.

[54] Both counsel have also recognized there might have to be some amendments to the section 161 order proposed by Crown counsel to only allow Mr. M to attend public parks or public swimming areas where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or community centre with his child (or children) unless accompanied by an adult so that he can also do so if accompanied by the mother of his child (or children). I thank Crown counsel for his efforts in amending the order and I would ask that you consider my suggestions to further amend it so that it accounts for the possibility of Mr. M fathering additional children in future.

[In reference to paras. 53 and 54, please see attached addendum]

COURTS DISPOSITION ON SENTENCE:

[55] Again, I wish to thank both Mr. Eric Taylor, on behalf of the Public Prosecution Service, and Mr. Brian Bailey, defence counsel, for their thorough and well-reasoned submissions, both written and oral.

[56] I have considered the various cases referred to me by counsel. They provide some guidance in helping me to reach what I think is the appropriate sentence taking into consideration the circumstances of the case and the circumstances of the offender.

[COURT PROVIDES MR. M AN OPPORTUNITY TO SPEAK]
[COURT ASKS MR. M TO PLEASE STAND]

[57] On the charge that you did, for a sexual purpose, touch MCLR, a person under the age of 16 years with a part of your body, contrary to section 151 of the **Criminal Code of Canada**, the Court sentences you to five months of incarceration.

[58] You are to be given credit on a one to one basis for the time you have spent on remand which to date totals 56 days. This is to be deducted from your overall sentence.

[59] Upon your release from jail, you will subject to an order of probation lasting 24 months.

[60] In addition to the compulsory conditions outlined in section 732.1 of the **Criminal Code**, the following optional conditions shall also apply:

(a) you will report to a probation officer within two working days of your release from imprisonment, and when further required to do so, as directed by your probation officer or supervisors.

(b) you will remain within the jurisdiction (Nova Scotia) of the Court unless written permission to go outside the jurisdiction (Nova Scotia) is obtained from the Court or the probation officer in charge of your file;

(c) you will abstain from:

(i) the consumption of alcohol or other intoxicating substances, or

(ii) the use or consumption of drugs except in accordance with a medical prescription;

(d) you are not to associate with anyone known to be engaged in criminal activity or whom possess a criminal record (members of the R household if they fall into that category are exempted or excepted, if such applies)

(e) you are to participate in any treatment program recommended by your probation officer or supervisor;

(f) you will make all reasonable efforts to locate and maintain employment or an education program as directed by your probation officer or supervisor upon your release;

(g) you are to attend for substance abuse assessment and counselling as directed by your probation officer or supervisor;

(h) you are to attend for assessment and counselling in a violence intervention and prevention program as directed by your probation officer or supervisor;

(i) you will participate in and cooperate with any other recommended assessment, counselling or program directed by your probation officer or supervisor;

(j) you will submit for urinalysis or other alcohol or controlled substance screening as directed by your probation officer or supervisor.

[61] In addition to the foregoing, the Court also grants the ancillary orders requested by the Crown, as follows:

(i) DNA Order, recognizing that there might already exist a sample on record and if that sample remains in the data base that it be preserved for the purpose of identification but if it is no longer to be found in the data base then a new sample be supplied sufficient to make a proper DNA analysis;

(ii) a section 109 Firearms Prohibition Order for ten years and for the mandatory period of life for those weapons listed in section 109(2)(b) of the **Criminal Code**.

(iii) a section 161 Prohibition Order for a period of 20 years. And again, the Prohibition Order is to be further amended to reflect the comments that I made earlier today to account for any other children that Mr. M might father down the road.

(iv) a SOIRA Order under s. 151 of the **Criminal Code**. As I indicated earlier, it will be for a minimum period of 20 years; however, if after I review the cases provided by counsel and I receive the benefit of further research and the further submissions of counsel either written or oral or both, I will then decide whether to increase the reporting period to life.

[62] The Victim Fine Surcharge is waived as it would result in undue financial hardship to the offender.

[63] The condition that prohibited Mr. M from having any contact, direct or indirect, with MR or from attending at her place of residence where she resides presently with her parents is removed and provided Mr. M has the permission of MR and her parents he is at liberty to attend the residence and to have contact with her and eventually with their child unless, of course, there is any future Court order that would prevent him or restrict him in any such manner from having such contact with that child.

[64] With regard to counts one and three, the Crown moves to withdraw these counts with the consent of defence. Therefore, counts one and three are dismissed.

McDougall, J.

See Addendum attached: [cross-reference paras. 53 and 54, page 12 of this decision]

ADDENDUM

JUSTICE GLEN G. MCDOUGALL
SUPREME COURT OF NOVA SCOTIA

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November 14, 2013

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Dear Counsel:

RE: Her Majesty the Queen v. WRM, CRH 398699

I have reviewed the cases provided by counsel with respect to the duration of the section 161 Prohibition Order as well as the section 4(1) of the *Sex Offender Information Registration Act*.

I have concluded that the relevant period for both orders should be 20 years, not life. I base my decision primarily on the case of **R. v. Able**, [2013] O.J. No. 2675; 2013 ONCA 385 which is a decision of the Ontario Court of Appeal.

Previously, Mr. M was sentenced for a sexual assault contrary to section 271(1)(a) for an offence that was committed between the 1st day of July 2001 to the 17th day of January, 2002. He was sentenced on the 11th day of June, 2002 to three days open custody, followed by 18 months probation under the provisions of the *Youth Criminal Justice Act* ("*YCJA*"). Given the definition of "period of access" as defined in section 119(2) of the *YCJA* the relevant definition from section 119(2)(h) is as follows:

> **Period of Access**
>
> (2) The period of access referred to in subsection (1) is
>
> ....
>
> (h) subject to paragraphs (i) and (j) and subsection (9), if the young person is found guilty of the offence and it is an indictable offence, the period ending five years after the youth sentence imposed in respect of the offence has been completed;

.../2

My reading of paragraphs 11 to 29 of the **Able** decision leads me to conclude that Mr. M's prior conviction as a youth back in 2002 should not be considered when deciding on the during of the section 161 Prohibition Order and the SOIRA Order. As a result I conclude that the appropriate duration of these two orders should be 20 years, not life.

The appropriate orders have been prepared. Issued copies are attached for your review.

Yours truly,

ORIGINAL SIGNED BY:

Glen G. McDougall

GGMcD*dml

(Without Attachments)