

IN THE SUPREME COURT OF NOVA SCOTIA
Citation: R.v. A.J.A., 2004 NSSC 242

Date: 20041109
Docket: CR 218670
Registry: Halifax

Between:

Her Majesty the Queen

v.

A. J. A.

Editorial Notice

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

Restriction on Publication: s.486(3) C.C.C. The presiding judge has made an order directing that the identity of the complainant and any information that could disclose the identity of the complainant shall not be published in any document or broadcast in any way.

Judge: The Honourable Justice Felix A. Cacchione

Heard: November 9th, 2004, in Halifax, Nova Scotia

Written Decision: November 19th, 2004

Counsel: Leonard MacKay, for the Crown
Donald C. Murray, Q.C., for the Defendant

By the Court: (Orally)

[1] A. J. A. was initially charged with four offences; three of them under the provisions of either s.151 or s.153 of the **Criminal Code** and the fourth one under s.271, a sexual assault.

[2] Mr. A. has pled guilty this afternoon to one count of while being in a position of trust or authority towards a young person, he did for a sexual purpose, touch that young person with a part of his body to wit his hands and penis contrary to s.153(a) of the **Criminal Code**. That offence carries with it as a maximum penalty five years of imprisonment.

[3] Mr. A. is 49 years old and he has a grade 10 education. Well in advance of today's proceedings he underwent a psychological assessment prepared by Dr. Brad Kelln. The Crown has received a copy of that report and acknowledges its contents and according to representations made this afternoon is in agreement with the contents. The report, together with Mr. A.'s circumstances underlie the joint recommendation which is before me.

[4] Dr. Kelln found Mr. A. an eccentric but open and honest individual throughout the period when he assessed him. He noted that there were no attempts by Mr. A. to misrepresent himself or the events which led up to these charges. Mr. A.'s background has been described as an exceptionally difficult upbringing. His father was a violent and abusive drunk who would assault the children's mother in their presence. By the age of 12 Mr. A. was exhibiting self-destructive behaviour which resulted in criminal offences. He was sent to the Shelburne's school for boys where he experienced significant sexual abuse by different staff members over a prolonged period of time. Mr. A. was compensated for that abuse, but as a result of the abuse he was diagnosed with post traumatic stress disorder. Upon his release from Shelburne he was put in the custody of a man who then attempted to molest him. Mr. A. reacted violently and stole the man's car. He was apprehended and imprisoned.

[5] Following that there was a period of criminal activity where it seems that between the ages of 20 and 29 he committed numerous offences set out in his criminal record, including offences of theft, break and enter, escaping custody,

narcotics offences, mischief and assault. His change in criminal behaviour and activities apparently began with the birth of his first son in 1985.

[6] He does have a work history in sales, barbering and as a business man. However, for the past eight years he has been on disability or social assistance.

[7] He acknowledges a long history of alcohol and drug abuse which was worse when he was younger. He also admitted to Dr. Kelln to having a quick temper, especially with people that he does not know.

[8] Most of his criminal behaviour involved alcohol abuse usually brought on by the break up of a relationship. This would lead to alcohol abuse and then criminal behaviour and subsequently to incarceration. It is noteworthy, however, that this cycle has not been present for the past 25 years. He has fathered three children who are now all adults or young adults. Mr. A., it is noted, met the complainant's mother in [...] when she was having a difficult time in her life. He was trying to help this woman with her drug abuse or substance abuse problem.

[9] He, together with the complainant's mother and the complainant moved to Nova Scotia. They resided together, however when Mr. A. attempted to move out, both the complainant and her mother begged him not to do so. Included in that apparently were threats of self-harm by the complainant.

[10] The complainant in this matter was sent to a youth detention facility as a result of some criminal activity. Mr. A. became very concerned about her well being. When she was released he felt extremely protective toward her and began to believe that she was his soul mate. She told him she wanted to become pregnant. He agreed to father her child; a decision he now views as misguided and ridiculous. He no longer has any contact with the complainant.

[11] The charge before me involves two instances of sexual intercourse and the complainant was not at law in a position to consent to the intercourse, however it would appear from the uncontested report that it was a mutual decision.

[12] The complainant's mother agreed to talk to Dr. Kelln about her relationship and experiences with Mr. A.. She described him as the person who saved her life and a person who stuck with her when she was in a bad state. She says that he

helped her get into treatment programs. She moved to Nova Scotia with him and her children. The complainant in this matter was particularly fond of Mr. A. and she was the one who was urging him not to leave the home.

[13] The complainant's mother describes Mr. A. as a dependable person and a good friend. She said that he shows respect to everyone and is always willing to help anyone. Mr. A. told Dr. Kelln that he is willing to enter psychotherapy and is very conscious of adolescents and children and makes efforts not to be alone with them. He realizes his vulnerability to false accusation and therefore always has an adult present whenever young persons are around.

[14] He has had three prior admissions to the Nova Scotia Hospital. One in 1978 and the others in 1996 and 1997. He was diagnosed as having a post traumatic stress disorder and an anti-social personality disorder. Dr. Kelln administered a battery of psychological tests to Mr. A. and also considered other sources of information such as collateral information, clinical interviews and interviews of close personal friends in arriving at his conclusion that Mr. A.'s risk of sexual offence specific recidivism is in the low range. His risk is described as firmly routed in historical or static factors which are influenced by his early non-sexual criminal activity. Dr. Kelln believes that the risk can be well managed in the community.

[15] It is important to note that all psychological measures used to detect false or bias responding to the tests administered to Mr. A. indicated that he was open, honest and cooperative participant in that testing. In other words he was not lying or gilding the lily.

[16] As a result of the significant sexual abuse that Mr. A. suffered while incarcerated as a young person he was left, according to Dr. Kelln, with a reservoir of difficult and dangerous emotions ranging from confusion and mistrust to rage. However, his criminal pattern ceased by the time he was in his early 30's and apart from the present offence and save for two common assaults he has been without offences for nearly 15 years. I should say he has been without offences for nearly 15 years and there were significant gaps between those common assault charges which were dated 1990 and the previous ones which were dated 1983. The bulk of his record really is between 1972 and 1980.

[17] Mr. A. is able to talk about the factors and the circumstances of the present offence and his misguided motivations which derived from his own experiences. Importantly he accepts responsibility for his behaviour and has altered his lifestyle to try and eliminate the likelihood of ever being in a vulnerable position with children again.

[18] Dr. Kelln says he is a good candidate for psychotherapy through individual counselling with a qualified forensic psychologist. He also says, however, that he should not be alone with underage females and should not be allowed to take a responsible role for children of either sex.

[19] As indicated previously this is a joint recommendation presented by both Crown and defence. Both counsel are experienced and very competent. The recommendation is for a conditional sentence of imprisonment under house arrest for a period of 12 months, followed by three years probation with strict conditions. I am mindful of the provisions of section 718 to 718.2 of **Criminal Code** and I will not read them into the record. Counsel are well aware of them.

[20] The aggravating factors present in this case are that the accused, Mr. A., while in a position of trust with a minor, had sexual intercourse with her on two occasions which resulted in the birth of a child.

[21] The mitigating factors in my view are as follows; an early guilty plea. I acknowledge that the trial in this matter is set to begin some three weeks from today. However, it was quite a few weeks ago that counsel for Mr. A. sought to have this matter docketed in order for a change of plea to be entered. It is evident from a review of the file notes that both counsel were discussing the resolution of this matter without the need of a trial many months ago.

[22] I acknowledge, however, that the complainant did testify, or was required to testify at a preliminary inquiry. It would seem to me, however, that that cannot be viewed as an aggravating factor given that counsel in his thoroughness is entitled to explore the Crown's case in order to properly advise his client as to the future course of action. I do take into consideration that the guilty plea has removed the requirement for the complainant in this matter to testify at trial.

[23] As a mitigating factor I also note that Mr. A. sought and obtained a psychological assessment which shows that he is in a low risk category of re-offending in the same manner. Mr. A., as a mitigating factor, has accepted responsibility for the offence and is prepared to undergo psychotherapy to address some of the underlying factors which led to his offending. In mitigation as well is the lack of a prior record for a sexually related offence together with his lack of offending over the past 15 years.

[24] I also note that it would appear from my reading and from the comments of counsel that the offence for which he is being sentenced was isolated in nature, uncharacteristic of Mr. A.'s previous behaviour including his previous criminal behaviour and motivated by his misguided judgment. No victim impact statement has been filed. I have queried counsel with respect to that. The complainant was aware that she could file a victim impact statement. Crown has spoken with her and she has decided not to do so.

[25] I have also been informed that the complainant, her mother, the police and the Department of Community Services have all been made aware of the joint sentencing recommendation. They have all agreed that this recommendation is appropriate and acceptable to them given the circumstances of this case.

[26] According to the Supreme Court of Canada in **R. v. M(TE), [1997] 1 S.C.R. 948** at p. 983

...A just sentence is one which reflects the seriousness of the crime and fits the individual circumstances of the offender...

[27] I should add, perhaps out of sequence, that as a mitigating factor I would consider that there is no suggestion before me or any evidence that Mr. A. groomed the complainant in order to achieve his sexual gratification. And I am not sure that sexual gratification was the motivation for the offence. Rather, I would accept the professional opinion of Dr. Kelln that the offence was as a result of his misguided judgment.

[28] In **R. v. C(GW) (2000), 150 C.C.C. (3d)** at p. 513 Justice Berger of the Alberta Court of Appeal commented that joint recommendations should be accepted by the trial judge unless they are unfit.

[29] The Ontario Court of Appeal in **R. v. Dorsey** (1999), 123 O.A.C. at 342 at p.353 stated that:

...a joint submission should be departed from only where the trial judge considers the joint submission to be contrary to the public interest and... if accepted, would bring the administration of justice into disrepute.

[30] I have read and considered the following cases in arriving at my decision that the joint recommendation presented should be accepted.

[31] In **R. v. K.(R)**, 2002 Carswell Ont. 587. The accused was in his mid-20's when he engaged in sexual intercourse with his half-sister. She was between 12 and 14 at the time. The accused accepted responsibility and pursued treatment in advance of sentencing. He was granted a conditional sentence of two years less a day imprisonment, followed by 18 months probation.

[32] In **R. v. A(G.A.)**, 1998 Carswell Alberta 1026. After some abusive sexual touching, the accused engaged in sexual intercourse repeatedly with his niece while she was under the age of 18. She was living with the accused at the time, therefore putting him in a position of trust. At the time of the event the accused was about 15 years older than the complainant. He had himself been the victim of childhood sexual abuse. He was a leader in the aboriginal community. A sentence of 23 months imprisonment to be served in the community with significant conditions and three years probation was imposed.

[33] In **R. v. Hughes**, 1999 Carswell BC 93, the accused who had a dysfunctional upbringing and suffered severe emotional and physical abuse from his step-father was egocentric and disrespectful of the boundaries of others, sentenced to two years imprisonment for a single act of sexual intercourse committed against the will of the complainant, who was only an acquaintance. The court noted that the usual range in British Columbia for such behaviour was between two and eight years.

[34] In **R. v. M**, 2000 Carswell B.C. at 916, the accused had sexually assaulted his step-daughters over a long period of time. He had had intercourse with one of the girls for several years between the time she was 14 until she was 17. He was sentenced for the offence with that girl to two years less a day imprisonment together with three years probation and the judge noted that he could have been

within the appropriate range if he had imposed a sentence as high as six years for the intercourse offence.

[35] **R. v. Robinson**, 2000 Carswell Ont. 5473, the 42 year old accused met a 13 year old girl on a chat line. They had intercourse once. Twelve months imprisonment and probation was imposed. No conditional sentence was imposed in that case.

[36] In **R. v. Genge**, the accused was a teacher who sexually assaulted two of his female students. He was in a position of trust. He had consensual sexual intercourse with one of them on about 15 occasions and for that he was sentenced to 14 months, a conditional sentence with one year probation.

[37] As well, a similar sentence was imposed in **R. v. McCrackin**, 2004 Carswell Alberta 15, a 31 year old school teacher and wrestling coach had a consensual eight month sexual relationship with a 16 to 17 year old student. A 15 month conditional sentence plus one year probation was imposed.

[38] In **R. v. M(C)** 2000 Carswell B.C. 2939 a 53 year old teacher had consensual sexual relationship with his 16 year old student. He was sentenced to eight months conditional sentence.

[39] In the circumstances of the present offence there are distinguishing features between the cases noted and Mr. A.. The most prominent is that in most of the cases, if not all of the cases noted, the accused had no prior criminal record. Mr. A. comes to court with 30 prior convictions. I acknowledge that those prior convictions were at a time when he was much younger when he was much closer temporally to the sexual abuse that he had suffered.

[40] Mr. A. has made attempts in his life to assist others and it would seem from the assessment prepared by Dr. Kelln that he has made attempts to assist himself. As I stated, I am prepared to accept the joint recommendation.

[41] I sentence you to a period of 12 months incarceration to be served in the community. That is to be followed by three years probation. During the entire period you are to keep the peace and be of good behaviour. You are to appear before the court when required to do so by the court. You are to report to a

supervisor at 277 Pleasant Street in Dartmouth on or before November 12th, 2004 and as directed. You are to remain within the Province of Nova Scotia unless you obtain written permission to leave the province. As well, you are to notify your probation officer or your supervisor of any change of name, address or employment or occupation within 24 hours of such change. You are as well to participate in and cooperate with any assessment, counselling or program directed by your sentence supervisor. You are to have no direct or indirect contact or communication with C.A.D.. You are to attend for individual counselling with a qualified forensic psychologist to explore the issues around your offences and your past experiences of abuse. You are not to be alone in the presence of any underage females. You are not to be left with the custody or responsibility of a minor of either sex, excluding your son A. A., [...]

[42] During the 12 months of your sentence you will be under house arrest which means that you are to remain in your residence at all times with the following exceptions. You are allowed to be out of your residence when dealing with a medical emergency or medical appointment involving you or a member of your family, that is A. in this case and you are to travel to that appointment and back by a direct route. As well, when you are attending a scheduled appointment with your lawyer, your conditional sentence supervisor or your probation officer, you are to travel to and from that appointment by a direct route. When attending court at a scheduled appearance or under subpoena, you are to travel to and from court by a direct route. When attending a counselling appointment, a treatment program or a meeting of either Alcoholics Anonymous or Narcotics Anonymous at the direction of or with the permission of your supervisor, you are to travel to and from that appointment by direct route. When in a residential treatment program, if the police are told in advance where you will be and you agree, that the facility can tell the police if you are there should the police inquire. As well, you are allowed to be out of your residence for no more than four hours per week, which has to be approved in advance by your supervisor for purposes of attending to your personal needs, such as banking, haircuts, groceries, etc.

[43] As well, you are to prove compliance with the house arrest conditions by presenting yourself at the entrance of your residence should your supervisor or a peace officer attend there to check on your compliance.

[44] Once you have completed the 12 months of house arrest you will be placed on probation for a period of three years with the statutory conditions which I have already outlined for you. You are to report as directed to the probation officer. You are to participate in and cooperate with any assessment, counselling or program directed by your probation officer.

[45] You are to have no direct or indirect contact or communication with C. A. D. and you are to attend for individual counselling with a qualified forensic psychologist to explore the issues surrounding your offences and your past experiences of abuse. You are not to be alone in the presence of underage females and you are not to be left in the custody or responsibility of minors of either sex, excluding your son A. A.,[...]

[46] Do you understand those conditions Mr. A.? Are you prepared to abide by them? Do you understand that if you violate the conditions of your house arrest you may be brought back before this court and you may be sentenced to serve the remainder of your sentence in a correctional facility? You also understand that if you breach the terms of your probation, you can be charged with the criminal offence of failure to comply with a probation order and be sentenced on that as well?

Cacchione, J.