

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. R.M.S., 2014 NSSC 139

Date: 20140331

Docket: CRH 407458

Registry: Halifax

Between:

Her Majesty the Queen

v.

R. M. S.

Restriction on publication: Section 486.4 C.C.C.

Editorial Notice

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

Judge: The Honourable Justice Felix A. Cacchione

Heard: November 26, 2013 and March 31, 2014, in Halifax,
Nova Scotia

Written Decision: April 16, 2014

Counsel: James Giacomantonio, for the Crown
Alfred Seaman, for Mr. S.

By the Court (Orally):

[1] Mr. S. pled guilty to sexual assault, sexual assault causing bodily harm and unsafe storage of a firearm. The facts surrounding the underlying offences are as follows:

THE FACTS

[2] Mr. S. was in a common law relationship with the complainant M. H.'s mother. They were engaged to be married. His common law spouse's three children lived with them. M. regarded Mr. S. as her step-father. She trusted him. The offences in question occurred in M.'s bedroom in the family home. The accused first crossed sexual boundaries with his step-daughter after he convinced her that he was interested in becoming a massage therapist and wanted to try a new massage technique on her to relieve the pain she was suffering due to an injury to her lower back.

[3] Mr. S. told Dr. Connors that he had expressed an interest in massage therapy to his common law wife but that she had belittled him. Whereas M. had agreed to help him.

[4] In December 2009 Mr. S. entered M.'s bedroom in the early morning hours. He woke her so he could try a new massage technique on her. M. was wearing a T-shirt and panties. He removed her panties saying that they would be in the way. He also asked her to remove her T-shirt. Once she was naked he began to massage her. He rubbed her buttocks and genitals. He then laid beside his naked step-daughter facing her back in what was described as "spooning". The entire episode made M. feel very uncomfortable and she asked him to leave, which he did. M. also left. She left the home and went to her boyfriend's house where she remained for the rest of the night.

[5] M. told her mother and her older sister what had happened. Mr. S. was confronted by them, but denied any inappropriate touching or spooning. M. reported that she thought highly of Mr. S. and that she loved him. His denial of any inappropriate behaviour made her began to doubt herself. She also did not want to lose another father figure in her life. M.'s mother had threatened to leave Mr. S. because of his actions.

[6] In May 2010, some five months later, Mr. S. again entered M.'s bedroom in the early morning hours and woke her. They began talking. M. was wearing a T-shirt and panties. Mr. S. began to massage her legs and her back under her shirt. He then began to rub her buttocks. M. became uncomfortable. At or near this time M.'s older sister, T., arrived home and she and M. began texting each other. M. texted her sister that she was uncomfortable. Once M. stopped texting her sister became concerned and woke her mother. Both T. and M.'s mother entered the bedroom. Mr. S. put the blankets over M. and sat up. He was again confronted by his common law spouse and he again denied any inappropriate behaviour. They discussed that he was not to enter M.'s room again and also they discussed putting a lock on M.'s bedroom door. Subsequent to this event the family moved to a new home. A lock was installed on M.'s bedroom door in that new home.

[7] On July 1st at approximately noon Mr. S. again entered M.'s bedroom while she was asleep. The bedroom door had been left unlocked earlier that morning when M. unlocked it to let out her cat. She returned to bed and fell back to sleep forgetting to lock the door.

[8] While in the bedroom Mr. S. sat on the bed and began talking to M. and rubbing her body. She again became uncomfortable. Mr. S. then had her move to the edge of the bed and started rubbing her tailbone and pulling down her underwear. M. kept pulling her underwear back up and telling Mr. S. that she wanted him to leave. He touched her breasts. At some point he began to remove his clothing, which I understand from Crown's submission consisted of a T-shirt and boxer shorts. M. yelled at him and reached for her phone. Mr. S. then took her cell phone and the house phone and threw them out of reach. M. began screaming and kicking. The screams were so loud that two of the neighbours from across the street heard them. Mr. S. then began to choke M.. She fought back to the point where she could not breathe. M. lost control of her bladder and urinated on herself and on the bed. She continued struggling. Mr. S., at some point, loosened his grip on her neck and she asked him to stop promising him that she would tell no one what had happened. Mr. S. then apologized to her. He told her that if he was her age she was the kind of girl he would go for, because she was perfect.

[9] Although he told her that he had been drinking since 9:00 a.m. M. did not view him as being intoxicated, but did agree that she could smell alcohol on his breath. Mr. S. told her that he would understand it if she told on him. But if she was not going to tell, he suggested that she make up a story about having a fight with a friend. This story would account for the bruising to her neck, cuts to hand and feet and the petechia from broken blood vessels on her face, neck and eyes.

[10] Mr. S. promised M. that he would pay for her to continue therapy. Mr. S., realizing M. had wet to bed, then washed the sheets, made himself a sandwich and offered M. his vehicle. M. left the house and reported the incident.

[11] When the police arrived they found a loaded shotgun with one shell in the chamber. The shot gun was locked in a storage cabinet, but it was unsafe storage. Mr. S., as I have indicated, pled guilty to that charge.

[12] Mr. S. told the police that he did not remember the incident, but when he woke that afternoon he had a bad feeling that “something bad had happened”. When questioned about the prior incidents of massaging he referred to it as “a misunderstanding”. He claimed that he gets black outs when drinking. He denied being aware that he had choked M. and attributed the lack of recall to his “blackouts”.

[13] Despite a reported lack of recall Mr. S. told Dr. Connors that he accepted that “something happened” and said he was “stepping up to the plate and taking responsibility”. Dr. Connors stated in her report at p.25:

...in all documented professional contacts, Mr. S. has emphasized his lack of control of his actions rather than his personal responsibility.

[14] Dr. Connors noted that his recall of the July 1st event, as told to the police, differed from what he told Dr. Brunet, the psychiatrist who assessed him for fitness to stand trial and a defence of not criminally responsible on account of mental disorder.

[15] Dr. Connors stated at page 26 of her report the following:

Mr. S. gave the impression of an individual who was truly sorry that he had treated M. in the way that he had...

[16] She goes on to say:

...as well as truly sorry that he had destroyed his own life, yet loath to take full responsibility for his actions in doing so. His attempts to be accepted by Mental Health Court and to be found NCR are related to his desire to see himself, and for everyone else to see him as well, as mitigated in his responsibility for his actions at the same time as he acknowledges that he committed these actions as reported by MH...

[17] Subsequent to the disclosure of the events leading to the criminal charges against him, Mr. S. was diagnosed as suffering from PTSD. Dr. Connors commented that since the diagnosis Mr. S. has reframed the index matters, that is the offences, as exclusively due to this diagnosis and thus indirectly the fault of his military experiences. She also found him to have reframed his drinking on July 1st as a coping mechanism for his PTSD. Dr. Connors continued by saying, and I quote:

...Under these circumstances, it is very difficult to help Mr. S. shift toward a greater appreciation of his personal responsibility independent from PTSD, and PTSD does not explain his inappropriate behavior toward MH across 2009 and 2010.

[18] Despite two previous occurrences where he entered M.'s bedroom and was sexually inappropriate with her and despite being told not to enter the bedroom to the point where a lock was installed on her bedroom door, Mr. S. told Dr. Connors that his only inappropriateness was waking M. in the early morning hours.

[19] Regardless of the turmoil and family upheaval caused by his actions in 2009 he persisted in attempting to be alone with M. in her bedroom and to touch her nude body. Dr. Connors found this persistence to be noteworthy and stated at p.28:

..the exclusivity with which he pursued this interest with MH (a young teen girl who was by nature agreeable, and with whom he had access and opportunity) is noteworthy. It is likely that Mr. S.'s claim of interest in massage to MH and (later) to her mother was a manipulative tactic designed to explain and justify pursuing something that he wanted - physical contact with MH, motivated by sexual interest.

[20] Dr. Connors also found that Mr. S. related to his step-daughter as a sexual object. She commented that Mr. S.'s profile of grooming M. and progressing toward sexual contact with her does not appear to bear any relationship to diagnosis of PTSD.

[21] It would appear from reading Dr. Connors' report that Mr. S. was less than candid with her regarding his sexual performance. He advised Dr. Connors that he could not recall taking his clothes off on July 1st and stated at p.29:

...what was the point of taking my clothes off? I call it pushing rope.

[22] He claimed that he was prescribed Cialis for erectile dysfunction, but this was uncorroborated and incompatible with his common law wife's comments that they had a robust sexual life with high sexual frequency. Mr. S.'s lack of candour is further evidenced by the fact that he told Dr. Connors that before his relationship with M.'s mother he masturbated one to three times per week. However, the very next day he told another staff member that he masturbated twice a month.

[23] His perceived inability to be candid about many things including his use of pornography can be seen by the fact that he told Dr. Connors that he viewed a fair amount of pornography while in the military, but denied a particular predilection for pornography. In contrast, his common law spouse told Dr. Connors that she believed that he used pornography regularly because she had seen it on the computer and they had argued about it.

[24] Mr. S. dismissed Ms. H.'s concerns about his looking at teenage looking girls on the internet by saying that they had to be 18 or older to be on those pornography sites.

[25] Dr. Connors found Mr. S. not to be in a position to honestly look at his motivations for offending. He started by blaming alcohol as the reason for his behaviour, then moving to it being caused by the "beast" in him which was the result of his PTSD and unleashed by alcohol. He never acknowledged his sexual impropriety over time towards M.. This, according to Dr. Connors, prevents him from addressing his risk factors. She states at page 31:

...His relapse prevention plans are specific to ensuring that the “beast” does not gain control over his actions to commit violence in a situation he disagrees with again, not how to respond differently if he was sexualizing someone inappropriately in future.

[26] Dr. Connors’ testing found Mr. S. to be a moderate risk of reoffending in a violent manner. She also concluded that he has characteristics that are consistent with using others for his own ends and failing to appreciate the consequences of his actions from the perspective of others. This is evident as well from his comments to the author of the presentence report where he stated:

I have had everything taken from me - a house, a job and a family I loved.

[27] He never referred to the harm both physical and psychological that he caused to M..

[28] Since I have mentioned the matter of the presentence report, it is not particularly helpful. Not one of the best presentence reports I have ever read. Not only in terms of its contents, but also its preparation.

[29] Dr. Connors concluded that working on the risk factors that contributed to this situation is complex because Mr. S. is resistant to seeing his actions as anything other than caused by PTSD. She stated at p.38:

Mr. S.’s attempts to cast his actions in an involuntary light, the clear level of manipulation involved in gaining “legitimized” access to grooming MH, and the potential for lethality that appears impulsive to circumstance yet instrumental as well, are all variables that are difficult to address in a community based program given its group based skills-building nature.

[30] Dr. Connors recommends that Mr. S. not be in a position of authority over young females, or cohabit with children who are not his biological children.

[31] One of the many disturbing things found in Dr. Connors’ report is Mr. S.’s love of violence. He indicated that he was drawn to work in the security field at the forensic unit of the Nova Scotia hospital because “violence was something I was looking for. Something I needed.” and he felt there would be ample opportunity for violence in a forensic setting. He was also correctional officer at

the Central Nova Scotia Corrections Facility and was drawn to the job for the same reasons. He claimed to Dr. Connors that he wanted to work on the maximum security wing where others were less inclined to work. He claimed that he was the only corrections officer that was never assaulted there because the inmates were scared of him, and that is how he wanted it.

[32] The pride taken in his ability to be violent is very disconcerting. He described the most positive aspect of his work at the Correctional Facility being the fact that there was violence everyday.

[33] Mr. S. is quick to blame everyone but himself for what he does. Dr. Connors' report is replete with examples. For instance, when he told Dr. Connors that in the last two years he began a collection of pellet guns that have the same weight and appearance as a real weapon and was advised that his release conditions might have a condition that he not possess weapons. His response to this was that his lawyer never told him about this condition, but that he would not be surprised by such a condition since one of the charges he was facing was a weapons related offence. He dismissed Dr. Connors' concern by saying that the guns did not have enough velocity to be considered weapons and that he could always blame his lawyer for failing to advise him.

[34] The impact of Mr. S.'s actions on a person who trusted him and viewed him as a father figure was eloquently stated by M. when she read into the record her victim impact statement. Her life since the offence now revolves around coping with fear. She has lost the ability to trust those around her including her family members. She finds it almost impossible to be alone in the same room with a man including her biological father. The emotional pain she has suffered has affected her performance at school, at work and her relationships. Most poignantly these events have affected her relationship with her mother, a person she said she should be able to go to with her concerns. She wrote, and I quote:

...she, (that is her mother) mourns the loss of someone she thought she cared for a great deal, I mourn the loss of my innocence, and we both mourn the loss of the relationship we once had with each other. (Emphasis added)

[35] The rift in the family has caused M. to no longer live with her family. She finds it difficult to maintain friendships or relationships because she no longer trusts anyone.

[36] Her physical pain as a result of the July 2010 incident has required massage therapy, but because the sexual assaults began as supposed massages, she is unable to make it through a session without feeling uncomfortable and upset and therefore cannot receive the treatment that she requires.

[37] She is easily overwhelmed with a sense of insecurity. She states that she feels like a burden to those around her because her past has become such a big part of her present. She cannot always separate her experiences and move beyond them. She has had suicidal thoughts. She lives with a dark cloud hanging over her everyday.

[38] The physical manifestations of the assault has caused people to question her about what happened. Questions to which she could not respond.

[39] Because of the presence in her home of anyone she does not know or did not know was a trigger for her, she chose new living arrangements. This added further financial burden on top of the costs of physiotherapy, osteopathy and massage therapy and added another stressor to her life.

[40] She describes being in a constant state of worry and paranoia and not feeling safe. She feels violated, which she was, by the betrayal of trust that she had in someone she viewed as a father. In short, M. has had the sense of being safe in her family and community taken away from her. She has been robbed of her physical and psychological integrity.

[41] The presentence report notes that Mr. S. is 43 years old. He has no prior criminal record and a grade 12 education. He pled guilty to sexual assault, sexual assault causing bodily harm and unsafe storage of a firearm. He described his family to the probation officer as cold. He says that as kids they were always well provided for, but it was not a loving environment. There was no abuse in the home but he was bullied from grade 6 to junior high school. He has had no contact with his mother since his parents separated approximately 23 years ago and limited contact with his siblings, although he has maintained contact with his father.

[42] At age 18 he joined the U.S. military where he did tours of duty in Haiti, Panama and Somalia. He received training as a sniper, jungle school, which I assume to be jungle warfare. He has expertise in weapons and also has medic training.

[43] As I stated, he was employed as a correctional officer for a number of years. His employment history, which has been consistent since he left the military, has been mostly in the security field. He advised the author of the report that he has also worked at [...] for one year as a general labourer. However, Dr. Connors' Forensic Sexual Behaviour Assessment Report under the employment and financial history section states that he told Dr. Connors that he was in charge of a 12 man security team at [...]. Dr. Connors' report also notes that he told Dr. Angelopoulos that he worked at [...].

[44] Mr. S. suffers from diabetes and was diagnosed in 2010 as having PTSD. He described himself to the author as an alcoholic who has not consumed alcohol in two years. He has no other dependency issues.

[45] The report notes that he takes full responsibility for his actions and has a great deal of guilt and remorse as a result of his actions. He is quoted as saying:

I have had everything taken from me - a house, a job and a family I loved.

[46] Interestingly, as I have said previously, he does not mention the pain and suffering his actions caused to his step-daughter.

[47] Mr. S. was assessed for fitness to stand trial and for a finding of not criminally responsible on account of mental disorder. Dr. Brunet assessed him in 2010. Her report was also reviewed by Dr. Connors in preparation for Dr. Connors' assessment. Dr. Brunet found Mr. S. fit to stand trial. A second NCR assessment was prepared with the same result. Dr. Brunet found insufficient evidence that he was suffering from a mental disorder that rendered him incapable of appreciating the nature of his acts at the time of the offences. She also opined that it would be rare for a diagnosis of PTSD to qualify for a s.16 defence. She found his purported amnesia for the core elements of the July 2010 offence suspect and that his account of his mental state at the time of the occurrence did not impress as being consistent with a known mental illness.

[48] The Crown seeks a total sentence of four years incarceration. It proposes a sentence of four years on the second count, which is the sexual assault causing bodily harm, together with a six month concurrent term for counts one, sexual assault, and count three, the weapons offence.

[49] The defence is seeking a non-custodial sentence of three years probation with numerous conditions including: no contact with M. or her family; 150 hours of community service work; mental health assessment and counselling; assessment and counselling for substance abuse, anger management, violence intervention and prevention together with an 11:00 p.m. to 6:00 a.m. curfew, seven days per week.

[50] The defence recommendation is based on: Mr. S.'s guilty plea; his lack of any prior criminal record; his abidance by the terms of his release since the charges were laid almost 4 years ago, the fact that M. did not have to testify; his remorse and his loss of an employment which it would appear he truly enjoyed.

[51] Mr. Seaman, on behalf of Mr. S., argues that these charges were the breaking point for Mr. S.. Since the charges were laid he has sought out treatment, been properly diagnosed with PTSD and substance abuse issues. He is now properly medicated and has attended regular counselling for the past three years. All of this is submitted as being very positive, and it is. It may well be that he is addressing issues arising from the PTSD, and his addressing of these issues is a positive factor. However, in my opinion, his lack of insight into his objectification of women in general and M. in particular, his use of extreme violence to achieve his goal, his manipulation of a young person who trusted him and viewed him as a father does not speak positively of his potential rehabilitation.

[52] Mr. S.'s view of women is misguided. His objectification of women as sexual objects can be inferred from his prior sexual history as told to Dr. Connors. He advised her that he had approximately 40 sexual partners in his lifetime, with the majority, perhaps 37 out of 40, being casual encounters mostly with prostitutes.

[53] Further support for this inference is found in his former common law spouse's comment to Dr. Connors, that Mr. S. was a regular viewer of pornography, in particular pornography involving teenage-looking woman and his

possession of a grocery bag full of actual photographs of naked women, some of them with him in the picture which he told his common law spouse were past sexual partners, many of them being prostitutes.

[54] Counsel for Mr. S. submits that he is now properly medicated and this eliminates the symptoms that went untreated before the offence date. It may eliminate the PTSD symptoms, but it does not eliminate who Mr. S. is.

[55] Dr. Connors reviewed the reports of Mr. S.'s counsellor which suggests that he is not taking his medications properly and has at times abused them. Counsel for the accused takes issue with the Crown submitting that the choking had a potential for lethality. Dr. Connors did use that phrase, potential for lethality, in her report. It is understood that Mr. S. plead guilty to sexual assault causing bodily harm and not the sexual assault endangering the life of M.. He is being sentenced and will be sentenced for the offence of sexual assault causing bodily harm and nothing else.

[56] The photographs of M.'s injuries do show serious petechial haemorrhaging and bruising to her neck area. Cutting off air circulation long enough to cause the haemorrhaging depicted in the photographs can, however, explain the use of the phrase "potential for lethality". I have heard enough medical examiners testify about what causes petechia to know that this was not just a simple very quick putting hands around the throat. This was prolonged to the point where it lead to petechial haemorrhaging.

[57] Counsel for Mr. S. submits that Mr. S. has formed a rapport with his psychologist and is prepared to address the issues beyond his PTSD with that therapist. Mr. S. has indicated the same. He has indicated that he is remorseful for his actions and trying to deal with the cause of those actions.

[58] The final submission by counsel for Mr. S. is that given Mr. S.'s prior employment as a corrections officer, group therapy in a custodial setting would not be ideal and would eliminate any chance of rehabilitation.

[59] In mitigation of sentence I have considered his guilty plea and the waiver of the preliminary inquiry which saved both the complainant and her family the trauma of having to relive the event by testifying in court. I take into account his

acceptance of responsibility for what occurred. However, I am not satisfied that Mr. S. is truly remorseful for what he did and the suffering it caused. Rather, I find that this remorse is because of what he lost, his home and his employment.

[60] The aggravating factors I find to be Mr. S. abused his position of trust. This abuse was repeated over a period of time, despite the fact that he had been made aware by M. and her mother that his inappropriate behaviour was not welcomed and that the behaviour progressed from an unwanted touching to the point where it would appear from the facts as read in, that is the removal of M.'s clothing and Mr. S.'s clothing, that it would have progressed to a more intrusive sexual behaviour. And finally, the violence that was perpetrated on this young woman. The sexual assault of July 2010 was a serious one involving violence, physical and psychological injury to the complainant.

[61] I find as well Mr. S.'s real lack of remorse and continued blaming everything but himself as an aggravating factor. I have considered the principles of sentencing as codified in s.718 to s. 718.2.

[62] In the present case I am mindful that Mr. S. has no prior record and has abided by his release conditions for an extended period of time. However, the seriousness of the offences, particularly the events of July 2010, leads me to conclude that denunciation and deterrence both specific and general are the paramount considerations in this sentencing.

[63] I am satisfied that there is as well some prospect of rehabilitation given Mr. S.'s lack of criminal antecedence and his efforts at counselling, albeit that the counselling to-date has been in relation to his PTSD and not his sexual offending. However, I am not satisfied based on the reports of Drs. Brunet and Connors, that his rehabilitation can be achieved in the community. Mr. S. continues to be heavily invested in being seen as not responsible for what happened. Dr. Connors recommends that he attend, participate in and successfully complete a specialized treatment program for those who have committed violent sexual offences. She states at page 38:

...His level of displaced blame on dissociative factors in conjunction with his level of perpetrated violence makes the community based FSBP treatment group less than ideal to Mr. S.'s treatment needs, although his actuarial risk level is not in the

high category. CSC programming which addresses violent offending as well as sexual offending is likely to be more appropriate to Mr. S.'s needs.

[64] Dr. Connors opines that other alternatives are difficult to develop for Mr. S..

[65] As a step-father, a person in the role of this young woman's father, he should have been a protector. Instead, he was her predator.

[66] With respect to the Crown seeking concurrent sentences, there is no nexus in time, no nexus in place with respect to counts one and two. Concurrent sentences on these counts is not appropriate.

[67] If you would stand please Mr. S..

[68] With respect to the first count on the indictment, that is count of sexual assault, I am sentencing you to a period of six months incarceration. With respect to count two, sexual assault causing bodily harm, I am sentencing you to a period of 36 months incarceration consecutive to the first count. With respect to the third count, one month incarceration concurrent to the other two counts. Total sentence is one of 42 months.

[69] There will be a DNA order, as well a firearms prohibition order under s.109, banning you from possessing or owning any firearms, ammunitions or explosives for the duration of your lifetime. You will also be entered on the Sexual Offenders Information Registration Act database.

[70] Thank you counsel. Court stands adjourned.

Cacchione, J.