SUPREME COURT OF NOVA SCOTIA
Citation: R. v. G.K.N., 2014 NSSC 150

Date: 20140415
Docket: CRY 416538
Registry: Yarmouth

Between:

Her Majesty the Queen

v.

G. K. N.

SENTENCING DECISION

Restriction on publication: Section 486.4(1) C.C.C.

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

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated May 5, 2014.

Judge: The Honourable Justice Felix A. Cacchione

Heard: Jury Trial
February 10-13, 2014, in Yarmouth, Nova Scotia

Written Decision: May 1, 2014

Counsel: Richard W.P. Murphy, for the Crown
R.K. Murray Judge, for Mr. N.

By the Court: (Orally)

[1] The accused, G. K. N., was convicted by a jury of six counts of sexual interference and three counts of sexual assault committed in relation to his step-daughter M. B.. As this was a jury trial, Section 724(2)(a) and (b) of the **Criminal Code** is applicable. Section 724(2)(a) mandates that the Court accept as proven all facts, expressed or implied, that are essential to the jury's verdict of guilty. Subsection (b) permits the Court to find any other relevant fact disclosed by the evidence at trial to be proven or to hear evidence presented by either party with respect to that fact. There was no additional evidence presented.

THE FACTS

[2] M. B.'s evidence was that incidents of sexual touching and inappropriate sexual behaviour occurred in three separate and distinct areas of the house she occupied with her mother, brother and the accused her step-father.

[3] All incidents occurred when her mother was away from the home.

[4] The first incidents occurred in what was described as the downstairs red room. These incidents took place when she was seven to eight years old. Her evidence was that she would sometimes fall asleep or pretend to be asleep on the couch in that room. The accused would enter the room wearing a bathrobe and would sometimes masturbate in front of her. On a couple of occasions the accused rubbed her stomach with his penis and hand. He also tried to put his penis in her mouth and touched her vagina. She did not testify about the number instances of the latter.

[5] M.'s testimony about the red room incidents did not include any reference to the accused attempting to put his penis in her vagina or ejaculating on her belly as the Crown submitted in its written sentencing brief.

[6] The second set of incidents occurred in the master bedroom when M. was between seven and nine years old. Her evidence was that she would sometimes crawl into bed with the accused because she did not want to sleep alone or because she was having nightmares. She would be sleeping with her back to the accused. The accused would masturbate and she would feel his penis touching her back or

buttocks. On some occasions she could feel his ejaculate. At times the accused would touch her shoulders, thighs, stomach, buttocks and breasts. On some occasions he would kiss her neck and lips.

[7] M.'s testimony did not include any reference to the accused touching her vagina during these incidents as was submitted by the Crown in its written submissions.

[8] The third set of incidents occurred in the bathroom shower. M.'s evidence was that she began showering when she was in grade 5. Before that she would take baths. When she was in grade 6, at approximately age 11, the accused would enter the bathroom when she was showering and begin masturbating. M. could see him doing this through the glass shower doors. The accused would open the door, put his penis in the shower and masturbate. Sometimes he would touch her back and shoulders if she had her back to him. If M. was facing him, he would touch her breasts and shoulders.

[9] As indicated earlier to the Crown and defence, I am staying some of the charges.

[10] The two sets of offences charged are based on the same facts. There is no dispute that the *Kienapple* principle applies in this case. There exists a factual nexus between the charges as they are both based on the same acts of the accused. There is also a legal nexus between the two sets of offences as the constituent elements of one offence are in essence the same as those of the other offence. There is no additional and distinguishing element that goes to guilt with respect to the sexual assault or the sexual interference offences.

[11] The evidence at trial was clear regarding multiple occurrences of inappropriate sexual behaviour by the accused toward M..

[12] The Crown submitted that the three sexual assault convictions should be judicially stayed and the accused should be sentenced for the six sexual interference convictions.

[13] Counsel for the accused argued the opposite. He submitted that the accused should be sentenced for the sexual assault convictions and the sexual interference convictions should be stayed.

[14] The jury's verdict of guilty on all nine counts contained in the indictment is a clear indication of its acceptance that multiple occurrences of inappropriate sexual behaviour involving the accused touching M. with his lips, penis and hands took place. The characterization of what happened as either a sexual assault or sexual interference does not alter what occurred nor, in my opinion, does it alter the sentence that should be imposed in this case.

[15] Sentencing the accused for the six charges of sexual interference better reflects the time span and repeated nature of what occurred than does sentencing him on the three counts of sexual assault. The six convictions on sexual interference reflect the continued sexualization of a child by a person who was in a position of trust, that is her step-father.

[16] I therefore stay the sexual assault convictions and will sentence the accused on the six charges of sexual interference.

[17] Notwithstanding that there was no penetration, gratuitous violence or threats, this situation involved multiple acts of sexual interference towards a child commencing when she was approximately seven or eight years of age and continuing until she was almost 13. The impact of these offences on M. was set out in her victim impact statement filed with the Court this morning.

[18] M. described being taken into foster care with her younger brother for one month after she reported these events to the police. After leaving foster care she moved to [...] to be with her biological father. That did not go well, so she returned to Nova Scotia. Unable to deal with her conflicting emotions regarding a person she loved, her step-father and what he did to her, she began a downward spiral into alcohol, drug abuse and promiscuity. This led to self-mutilation and suicide attempts. She abused prescription medication as a means of blocking out the torture going on in her head. She returned to her biological father after being taken out of her mother's care a second time. This was a turning point. Her father set rules and got medical assistance for her. Thus began her road to recovery.

[19] These incidents caused her to lose trust in people. She still loves the accused and describes him as a great father because he bought things for her and her brother, took them places and played with them. She says that despite knowing what he did to her was wrong, she still loves him. She believes he is a sick person who needs assistance.

[20] The presentence report discloses that the accused is 60 years of age with a grade 12 education. He grew up in a supportive family where there was no family violence, no abuse of alcohol or drugs and no physical or sexual abuse. No family members have ever been involved in the criminal justice system. His family is aware of the present situation and remain supportive.

[21] His sister, B., describes him as a kind person who always appeared kind to children. She never witnessed any aggressive behaviour on his part and says that he has maintained his innocence to her.

[22] His other sister, L., described him as caring, helpful, quiet and intelligent. She has never been concerned about his contact or behaviour with her children. She indicated that since these charges arose he has become a sad and lonely person. She believes her brother to be innocent and says that this was a situation where his wife wanted to get out of the relationship and started something that got out of control.

[23] Both sisters do not view him as a threat to anyone and want him to remain in the community. Both also feel that counselling would assist him since he would then have someone to talk to in order to express his feelings about what happened.

[24] A long-standing friend and former common law partner described him as kind, friendly, outgoing and good natured. She has never known him to be violent or abusive. This person believes as well that he is innocent and that he was set up by his wife and the complainant in hopes of financial gain.

[25] The presentence report also notes that the accused was in an eight year relationship with the complainant's mother and that this relationship ended in 2011 after these offences were reported.

[26] There is one biological child from this union, a son D.. The accused has had no contact with the complainant or her mother, but has had supervised access with his 11 year old son.

[27] The accused is concerned that his family has broken up and fears that his son will be negatively affected by this situation since he is at present not aware of it.

[28] There was one prior marriage which lasted 17 years and ended in divorce.

[29] As a result of these charges the accused's 12 year employment at the [...] ended after he was charged with these offences. Since then he has worked as a carpenter and plumber. He has had fairly steady employment over the years.

[30] His present financial situation is precarious due to a line of credit and credit card debts which he attributes to his wife, the complainant's mother.

[31] Substance abuse has never been an issue in his life.

[32] The accused does not accept responsibility for the offences and maintains his innocence.

[33] The author of the presentence report indicates that comprehensive sexual offender assessment and/or treatment could take two to three years due to the volume of cases waiting for such assessments. The author also notes that the current wait period for an assessment is three to six months.

[34] The accused has one prior conviction for indecent assault on a female. That offence occurred on January 1, 1991. The accused pled guilty to that offence in June of 1992 and was sentenced to a period of 90 days incarceration.

[35] The Crown recommends a custodial sentence in the range of two and a half to three years in a federal institution with a recommendation that the accused be considered for a sexual offender treatment program while incarcerated and while on parole.

[36] The defence submits that an intermittent sentence of 90 days coupled with an assessment for recidivism would be appropriate.

[37] The maximum penalty for sexual interference contrary to s.151 is 10 years imprisonment. In this case, at the relevant time, the minimum mandatory penalty for the present offence was 45 days imprisonment. The present minimum mandatory penalty of one year imprisonment for s. 151 offence was not in force at the time of these incidents.

[38] Section 718.01 of the **Criminal Code** states:

> 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.

[39] Section 718.2(a) states:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victims.

[40] Even before the amendments to s.718 of the **Criminal Code** the case law stressed that both deterrence, specific and general, is the primary sentencing consideration and that general deterrence should be emphasized when the offence involves children. This is not to say that reformation and rehabilitation is not relevant to these types of cases. I have considered the following cases: **R. v. Hawkes** (1987), 81 N.S.R. (2d) 156 (C.A.); **R. v. Henderson**, 109 N.S.R. (2d) 349 (C.A.); **R. v. W.M.D.** (1992), 110 N.S.R. (2d) 329 (C.A.); **R. v. E.J.W.** (1993), 120 N.S.R. (2d) 66 (S.C.); **R. v. Fillis** (1986), 94 N.S.R. (2d) 356; **R. v. Richard** (1991), 106 NS.R. (2d) 236; and **R. v. Cunningham** (1991), 108 N.S.R. (2d) 265.

[41] There is no such thing as a uniform sentence for a particular offence. Sentencing is an inherently individualized process.

[42] In **R. v. H.C.D.**, 2008 NSSC 246 Justice Warner at para. 15 summarized the mitigating and aggravating factors affecting sentencing in sexual assault cases which was drawn from previous case law. These factors are as follows:

> a) First is the nature and intrinsic gravity of the offence, which is affected, in particular, by the use of threats, violence or psychological manipulation;
>
> b) Second is the frequency of the offence and the time period over which it was committed;
>
> c) Third is the abuse of trust and abuse of authority involved in the relationship between the offender and the victim;
>
> d) Fourth is any disorder underlying the commission of the offence, whether the offender had psychological difficulties, disorders or deviancies and other similar factors;
>
> e) Fifth is whether the offender has previous convictions of a nature similar to those which are before the Court;
>
> f) Sixth is the offender's behaviour after the commission of the offence such as confessions, assistance in the investigation, immediate involvement in a treatment program, potential for rehabilitation, and financial assistance, as well as empathy and remorse for the victim; and,
>
> g) The time between the commission of offence and the guilty plea or verdict as a mitigating factor depending on the offender's behaviour.

[43] The range of sentences for cases of sexual offences against children not involving sexual intercourse was set out by our Court of Appeal in **R. v. E.M.W.** (No.2), [2011] 308 N.S.R. (2d) 15 (N.S.C.A.). The range set out in **E.M.W.** is from a suspended sentence of three years with probation for repeated sexual touching, by what was described as a gentle well intentioned but feeble-minded, childlike and psychologically ill offender, to six years incarceration where the offences involved digital penetration and attempted but unsuccessful intercourse over a period of years.

[44] I have considered the principles of sentencing as codified in ss.718 to 718.2 of the **Criminal Code**. In the present case I am satisfied that denunciation and

deterrence are the paramount consideration. The deterrence must be both specific and general in order to stress society's revulsion for offences such as these committed against vulnerable children. While deterrence and denunciation are to be stressed, I cannot overlook rehabilitation.

[45] I have also considered the following cases in arriving at the sentence: **R. v. D.A.M.**, [1999] NSJ No.468 where the accused was convicted of five counts of sexual assault and one count of inciting for a sexual purpose. The victims in that case were four girls between the ages of eight and 15 years. The most serious assaults related to the accused's niece and those incidents consisted of fondling, cunnilingus, fellatio, masturbation, and on at least three occasions attempted intercourse. The accused was sentenced to 17 months imprisonment and three years probation.

[46] In **R. v. D.M.S.**, [2000] NSJ No.172 the accused was convicted of sexually assaulting a female complainant on multiple occasions. The child was between the ages of six to 15 when the incidents occurred and was the daughter of the accused's female partner. A term of five years imprisonment was imposed in that case.

[47] In **R. v. M.S.**, 2003 S.K.C.A. 33 the Saskatchewan Court of Appeal overturned a 23 month conditional sentence and imposed a nine month jail term where the accused entered a guilty plea to sexual interference. The incidents forming the basis for the charge involved the adopted daughter of the accused and occurred over a two year period when the child was between the ages of seven and nine. The incidents consisted of open-mouth kissing, fondling, simulated intercourse, forced touching of the man's penis, ejaculation in front of the child and on the child's hand, and on the final occasion digital penetration of the child. The court listed a number of mitigating factors which reduced the sentence, including: taking responsibility for his actions, entering a guilty plea, the receipt of professional psychiatric help, and attempts made by father and daughter to make amends.

[48] In **R. v. P.C.**, [2003] O.J. No. 2355 the accused sexually assaulted a young foster child in his care over a two year period when the girl was between the ages of eight to nine years old. The accused regularly went into the young girl's room at night and fondled her breasts and vagina. This escalated to digital penetration

of the vagina. The Court of Appeal for Ontario affirmed a sentence of 15 months imprisonment.

[49] In **R. v. E.Y.**, [2002] O.J. No. 673, affirmed [2003] O.J. No. 3027 the accused was convicted of sexually assaulting his step-daughter over a seven year period when she was between the ages of seven and 14. The incidents consisted of extended open-mouthed kissing and fondling of the breasts and vaginal area. There was also evidence that the misconduct was escalating to attempts at forced oral sex. The court imposed a sentence of 18 months imprisonment and 18 months probation.

[50] In **R. v. P.A.S.** 2009 BCCA 360 the accused was the common law partner of the complainant's mother. He was convicted of sexual assault for one incident involving the 14 year old complainant. While the complainant was sitting at a computer the accused began rubbing her breasts and engaged in digital penetration. He also fondled her and performed oral sex. He rubbed his penis against her, but did not engage in intercourse. The British Columbia Court of Appeal upheld a sentence of one year imprisonment and three years probation.

[51] In **R. v. J.B.C.**, 2010 NSSC 28, the accused was convicted of sexual interference, invitation to sexual touching and sexual assault in relation to a child victim. The child was the daughter of his common law spouse. The offences occurred when the child was living with the accused and his common law partner. The incidents consisted of fondling, digital penetration, forced touching of his penis, and on at least one occasion attempted intercourse. The accused had a previous conviction for similar charges. The previous charges were in relation to his two nieces who were between the ages of six and 11 years old. The former charges also involved a 13 year old babysitter, and his 22 year old pregnant sister-in-law. The accused in that case was sentenced to six years imprisonment.

[52] In **R. v. D.M.**, 2010 ONCA 894 the accused sexually assaulted his step-daughter over an eight year period when she was between the ages of 12 and 20 years old. Those incidents consisted of sexual touching and digital penetration. The Court of Appeal reduced a five year term of imprisonment to four years imprisonment.

[53] The aggravating factors in this case are:

(1) that the accused was in a position of trust vis-a-vis his step-daughter. He should have been her protector not her predator;

(2) the victim was a child well under the age of 18 years;

(3) there was a repetition of the offences over a span of five years; and

(4) the accused has a prior, albeit dated, conviction for a related offence.

[54] The mitigating factors are a 20 year gap between his prior conviction and the present offences together with an uneventful but fairly positive presentence report. The accused denied at trial and denied to the probation officer that he committed the offences for which he was convicted. He maintains his innocence as is his right to do.

[55] The accused up to the time of these offences had led, save for one offence more than 20 years ago, a productive and law-abiding life. He maintained employment over those years and supported his family.

[56] The sentence proposed by the Crown, while it addresses denunciation and deterrence, does not in my view allow sufficient room for assessment, treatment and continued supervision of the offender. There is, in this case, a place for rehabilitation. Rehabilitation would best be served by a longer period of supervision which would allow for more time for a proper forensic sexual offender assessment to be prepared and treatment, if required, to be put in place.

[57] A federal term of incarceration in the suggested range together with parole would not, in my experience, allow sufficient time for a forensic sexual offender assessment program and treatment to be implemented. The waiting lists for such programs in federal institutions are very long and it is doubtful that the accused would ever be enrolled in one, let alone complete it before the sentence proposed by the Crown expired.

[58] The sentence I will impose will allow for more time for a forensic sexual offender assessment and treatment as well as addressing denunciation and deterrence.

[59] Mr. N., if you would stand please sir.

[60] On the first count on the indictment I sentence you to a period of 45 days incarceration. On the second count of the indictment, I sentence you to 45 days consecutive. On the third count, I sentence you to a period of 90 days consecutive. Count 4, 5 and 6 are stayed. On count 7, a sentence of 90 days consecutive. On count 8, a sentence of four months or 120 days consecutive, and on count 9, a sentence five months or 150 days consecutive.

[61] Total sentence is 18 months incarceration in a provincial facility. That is to be followed by three years of probation with the following conditions. (1) You are to keep the peace and be of good behaviour; (2) You are to appear before the court when required to do so by the court; (3) You are to notify the probation officer in advance of any change of name or address and promptly notify the probation officer of any change of employment; (4) You are to report to a probation officer within two days of your release from custody and thereafter when required by the probation officer to do so; (5) You are to remain within the jurisdiction of the court unless written permission to go outside the jurisdiction is obtained from the court or a probation officer; and (6) You are to attend for a forensic sexual offender assessment and treatment if required as directed by your probation officer.

[62] There will be, as well, an order under s.743.21(1) prohibiting you from communicating directly or indirectly with M. B. and V.S..

[63] There will also be an order under s.109 of the **Criminal Code** prohibiting you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substances. That order will be enforced for 10 years.

[64] There will also be an order under s.487.051 requiring you to provide a DNA sample.

[65] The Crown is also seeking an order under s.161, which is not contested by the defence. There will as well, therefore, be an order under s.161 prohibiting you from attending a public park or a public swimming area where persons under the

age of 16 are present or can reasonably be expected to be present or a daycare centre, school ground, playground or community centre; prohibiting you from seeking, obtaining or continuing any employment, whether or not such employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards a person under the age of 16. You are as well prohibited from having contact, including communicating by any means, with a person who is under the age of 16 with the exception of your son D.. Such contact with D. must be under the supervision of Adam Oickle or such other person designated by the probation officer. The order under s.161 also includes that you are prohibited from any contact or communicating by any means with a person who is under the age of 16 unless you do so with the supervision of a person that the court considers appropriate, in this case Adam Oickle or someone else nominated by the probation officer, and as well you are prohibited from using the internet or other digital network unless you do so in accordance with conditions set out by the court.

[66] There will also be an order under 490.012 under the **Sexual Offender Information Registration Act.** That order will be enforced for a period of 20 years.

[67] Given the present circumstances victim fine surcharge is waived.

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Cacchione, J.

SUPREME COURT OF NOVA SCOTIA

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SENTENCING DECISION

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Revised Decision: The text of the original decision has been corrected according to the erratum below dated May 5, 2014

Judge: The Honourable Justice Felix A. Cacchione

Heard: Jury Trial
February 10-13, 2014, in Yarmouth, Nova Scotia

Written Decision: May 1, 2014

Counsel: Richard W.P. Murphy, for the Crown
R.K. Murray Judge, for Mr. N.

Erratum:

"Heard" date reads: February 20-13, 2014

"Heard" date should read: February 10-13, 2014