

SUPREME COURT OF NOVA SCOTIA

Citation: R. v. B.E.M., 2014 NSSC 282

Date: 20140627

Docket: CRH 412681

Registry: Halifax

Between:

Her Majesty the Queen

v.

B.E.M.

SENTENCING DECISION

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: February 3, 4, 5 and 6, 2014, in Halifax, Nova Scotia

Oral Decision: June 27, 2014

Written Decision: July 21, 2014

Counsel: Terri Lipton, for the Provincial Crown
Jill Lacey and Lisa Bevin, for BEM

By the Court:

[1] After trial the accused, BEM, was convicted of sexual interference contrary to section 151 of the *Criminal Code*, R.S.C., 1985, c. C-46.

[2] Count one of the Indictment, sexual assault contrary to section 271(1)(a), was conditionally stayed on the basis of the Kienapple principle, so-called.

[3] The facts of the case were reviewed by me in delivering my oral decision on March 5, 2014. I do not intend to re-hash what must have been and what, no doubt, is still a very disturbing if not traumatizing event in the life of the young victim.

[4] The exploitation of this young lady for the sexual gratification of her uncle will likely follow her for the rest of her life. I hope she continues to receive the support of those who truly care for her well-being and she avails herself of counselling that might be available to deal with the fall-out from such an assault. They say that time is a good healer. It will take time and determination for this young lady to put this incident behind her. I can only hope that she continues to demonstrate the kind of strength it took to report this incident in the first place and no doubt she did this so that it will not happen again to her or to any other vulnerable person.

[5] I cannot begin to comprehend how anyone could prey on the innocence of youth in such a despicable and reprehensible manner.

[6] Children need to feel safe but when they are abused by family who do they turn to for protection? It must be devastating to the victim to be put in that kind of situation. Things can never be the same after something like this occurs.

[7] A sentence must send the message that society will not tolerate the sexual abuse of children.

[8] The sentence must be one of deterrence, both specific and general. It should also reflect the principle of denunciation.

[9] 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. Specifically, 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:

718.21 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.

[10] 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.

[11] When 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.

[12] Section 718.2, which has particular relevance in this situation, 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;

[13] I have had the benefit of receiving Crown and Defence written submissions and having their supplementary oral submissions today. I thank them for those submissions.

[14] I have also considered the cases they have cited to provide some guidance on the range of sentences for this type of offence.

[15] I have also considered the Pre-sentence Report prepared by the Probation Officer – Mr. Francis H. MacArthur. I appreciate and offer my thanks to Mr. MacArthur for his efforts in preparing this report.

[16] Although BEM has a criminal record for past indiscretions those offences are quite dated and the offences that he committed in the past are totally unrelated to the offence for which he is being sentenced today.

[17] For the most part, BEM's Pre-sentence Report is positive although one disconcerting aspect of it is the fact that he *"did not feel that he was guilty of the offence before the court but did take responsibility for being with his daughter and niece at the time."* There is also an entry that states: *"... the offender stated he has experienced a great deal of stress regarding his 'presumed' involvement in the index offence."* The PSR goes on to state:

BEM further stated that he is remorseful for any harm it may have caused to the individuals involved and regrets being in such a vulnerable position when the offence occurred. The offender also relayed as well that he is sorry that it has caused friction amongst his own family members. BEM said he has experienced a great deal of shame regarding the situation before the court because it has

affected his relationship with his only daughter and he was adamant that he never did anything like this before.

[18] It would appear from reading this that BEM does not take responsibility for his crime. His only remorse appears to be that he placed himself in a vulnerable position not that he did anything wrong.

[19] The evidence heard by this Court, however, says something quite different. BEM's error in judgment was not simply lying next to the victim as she lay on the floor sleeping – it is what he did to her after positioning himself between her and his own daughter that gets him into trouble.

[20] It is for that, that he is being sentenced. His lack of remorse is not an aggravating factor but if he had expressed genuine remorse the Court could consider it as a mitigating factor.

[The Court gives BEM an opportunity to speak before passing sentence]

[21] On the charge that between the 1st day of July, 2009 and the 16th day of September, 2009 at or near Eastern Passage, in the County of Halifax in the Province of Nova Scotia, you did for a sexual purpose touch RM, a person under the age of 16 years directly with a part of your body, to wit., your hands, contrary to section 151 of the *Criminal Code* I sentence you to a period of incarceration of six months. In addition the Court requires that upon release that you be subject to a Probation Order for 18 months. Over and above the mandatory conditions spelled out in the *Criminal Code*, you shall also abide the following conditions:

- You shall report to a Probation Officer within 72 hours of release from the Correction Centre and thereafter when required by the Probation Officer;
- You shall remain within the jurisdiction of the Court unless permission from the Court or Probation Officer;
- You shall abstain from alcohol and other intoxicating substance;
- You shall abstain from direct or indirect communication with the victim;

- You are not to not attend a public park or public swimming area 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;
- You must not seek, obtain or continue any employment, whether or not the employment is remunerated, or become or be a volunteer in any capacity that involves being in a position of trust or authority towards persons under the age of 16 years.
- You must not have any contact, including communication by any means, with a person who is under the age of 16 years, unless you do so under the supervision of a person whom the Court considers appropriate;
- You must not use the Internet, other digital network, or computer system within the meaning of section 342.1(2), for purposes of communicating with a person under the age of 16 years;
- You shall attend at the East Coast Forensic Psychiatric Hospital for assessment in the Provincial Sexual Offender Assessment and Treatment Program;
- You shall attend for any counselling or programs recommended by the Provincial Sexual Offender Assessment & Treatment Program and as directed by Probation Services;
- You shall participate in and cooperate with any assessment, counselling or program that you are directed to attend by Probation Services.

[22] The Crown's request for a DNA Order under section 487.051(1) and (2) of the Criminal Code is granted. You will be prohibited under section 109 of the Criminal Code from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device or prohibited ammunition for life, and from possessing any other firearm or ammunition or any cross-bow, restricted weapon or explosive substance for a period of 10 years beginning on June 27, 2014.

[23] The Crown's request for a SOIRA Order, so-called, the *Sex Offender Information Registration Act* Order is granted for a period of 20 years.

Justice Glen G. McDougall