NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. J.B.O.***, 2013 NSCA 97

Date: 20130905
Docket: CAC 407492
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

J.B.O.

Respondent

Restriction on Publication: 486 Criminal Code of Canada

Judges:	Fichaud, Beveridge and Farrar, JJ.A.
Appeal Heard:	May 30, 2013, in Halifax, Nova Scotia
Held:	Leave to appeal granted, conditional sentence varied but otherwise the appeal is dismissed per reasons for judgment of Farrar, J.A.; Fichaud and Beveridge, JJ.A. concurring.
Counsel:	Mark A. Scott, for the appellant
	Roger A. Burrill, for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(*a*) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(*b*) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (*a*)(i) to (iii).

Reasons for judgment:

Background

[1] The 70 year old respondent pleaded guilty to charges relating to sexual abuse of his two young granddaugthers. He was charged with touching his five year old granddaughter for a sexual purpose under s. 151 of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46. With respect to his nine year old granddaughter he was charged with exposing his genitals for a sexual purpose contrary to s. 173(2) of the *Criminal Code*.

[2] Associate Chief Provincial Court Judge Pamela S. Williams (as she was then) sentenced him to 90 days in jail followed by a three year probationary term on the s. 151 count. He was sentenced to serve a consecutive nine month conditional sentence on the s. 173 count. The conditional sentence contained a number of specific terms including house arrest for the first three months and a curfew for the next three months.

[3] The Crown appeals arguing that the sentence imposed was inadequate.

Facts

[4] The facts were outlined by the Crown attorney before the sentencing judge as follows:

> The young Ms. [O.], she was five years old at the time that these allegations came to light. She said that between June 1st, 2010 and April 9th, 2011, when she would go to her grandfather's house, she would sleep in the room beside the accused and sometimes he would sleep in the bed with her. She told the police that he would play with her vagina, with her hands, and with his penis and he would touch her under her pyjamas. He also used her hands to make her touch her own vagina.
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> She said she didn't like it when he put his penis close to her vagina, although it was discovered through reviewing the statements of the children that there was no penetration involved. She said that he would also blow kisses on her bum and on her vagina. And when she was in the bathtub, that he would invite her to touch and wipe his penis. And when he was in the bath, he would touch his penis with her hand. With respect to this count, count number two, we cannot quantify the precise number of times because there were several visits within this time period.
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> The second complainant, the young Ms. [G.], she was nine years old when the allegations came to light, ... between January 1st and April 9, 2011, a period of four months. She told the police that during her overnight visits [she] would be upstairs with the accused when her [grandmother] was downstairs. She said that [her grandfather] would pull down his pants, take out his penis and wiggle it with his hands. He asked

> her to keep it a secret. This had happened also in bed under the covers. She told police that it had happened four times.
>
> After these allegations came to light, the family confronted the accused and he admitted that he had touched the young Ms. [O.] and that he had exposed himself to [V.]. And the family said that, in their discussions with him, he was trying to minimize and making it seem as though it wasn't a sexual event. The accused also provided a statement to Cpl. Sarah Drummond of the HRP in which he admitted exposing his penis to [V.], admitted to touching [A.] with his penis and to having her touch him. He was asked why nothing further had happened with [V.] and he indicated to the police that it was because she was older than [A.] was. Those are the facts that the Crown relies on.

[5] The respondent entered an early guilty plea, provided a confession and expressed a great deal of remorse. He had a positive pre-sentence report which indicated that he was a suitable candidate for community supervision.

[6] He underwent a Comprehensive Forensic Sexual Behaviour Assessment where he was categorized as a low risk for future violence (including sexual assaults). He sought counselling at the early stage of his involvement with the authorities. And finally, his wife of 40 years was in ill-health and he was her main source of support, both financial and otherwise.

Issues

[7] The Crown cites the following issues in para. 43 of its factum:

1. The sentence ordered inadequately reflected the objectives of denunciation and general deterrence;

2. The sentence ordered is manifestly unfit.

[8] I will also address another issue not raised by the Notice of Appeal but addressed by the parties in submissions: the length of the conditional sentence.

Standard of Review

[9] The standard of review of a sentencing order is well-known. Sentencing is an individualized process that requires a trial judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Nasogaluak*, 2010 SCC 6, ¶43).

[10] Absent an error in principle, a failure to consider relevant factors or an over-emphasis of appropriate factors, this Court will only vary a sentence imposed

at trial if it were convinced that the sentence is demonstrably unfit (*R. v. Knockwood*, 2009 NSCA 98, ¶ 11.

Analysis

Issue 1 The sentence ordered inadequately reflected the objectives of denunciation and general deterrence

[11] 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.

[12] Sections 718.2(a)(ii.1) and 718.2(a)(iii) outline what a sentencing judge is to consider:

> **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, and, without limiting the generality of the foregoing,
>
> . . .
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
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> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> shall be deemed to be aggravating circumstances;

[13] The Crown argues that the sentencing judge's reasons reveal an overemphasis on specific deterrence "and a disconnect from the aims of general deterrence and denunciation". With respect, I disagree. The law was abundantly clear to the sentencing judge. It is best to assess the sentencing judge's position by what she actually heard, said and did: not by a perceived "discordance… between the words spoken and their true meaning" as suggested by the Crown.

[14] The Crown Attorney at the sentencing hearing referred specifically to s. 718.01 in her submissions:

> … so considering Section 718.01, the Code is very clear on this point; again, that denunciation and deterrence must be the primary factors.

[15] Further, the Crown Attorney referenced *R. v. A.N.*, 2011 NSCA 21 in her submission:

> … the law when it comes to sentencing offenders who have offended sexually against children in this province says that denunciation and deterrence must be the utmost priorities for the sentencing judge in imposing sentence. And that's reflected, as well, in the case of A.N.

[16] The sentencing judge acknowledged at the outset of her reasons that "denunciation and deterrence are first on that list".

[17] There was no doubt about the primacy of deterrence and denunciation in the mind of the sentencing judge. Indeed, the sentencing judge mused as to the seriousness of this type of offence as compared to residential break and enters which carry a more serious maximum penalty of life imprisonment.

[18] It is a little unfair to parse the words used by the sentencing judge to support the argument that denunciation and deterrence were not at the forefront of sentencing principles. It is true that the sentencing judge said: "denunciation and general deterrence also play a factor" suggesting, the Crown says, that they were relegated to a secondary role. However, this remark must be put into context. It was said after the judge recognized the primacy of deterrence/denunciation, and in the same paragraph where she recognized the respondent's remorse and the fact that specific deterrence was not likely a factor of significance. The sentencing judge then returned, after a consideration of other principles of sentencing, to the need to prioritize deterrence and denunciation, and how it could be achieved in these circumstances. She said:

> For an otherwise pro-social, mature individual, any period of custody is likely to be a significant deterrence. So I think that denunciation and deterrence can, in part, be achieved by a significantly shorter custodial period than the one suggested by the Crown. ...

I do not accept that the sentencing judge sacrificed general deterrence and denunciation at the altar of specific deterrence. They did not recede into a secondary role. The sentencing judge's reasons reveal they were at the forefront of her mind throughout the sentencing process.

[19] Nor can it be suggested that a conditional sentence result itself is symptomatic of the sentencing judge's non-application of the primacy of deterrence and denunciation. Chief Justice Lamer remarked in *R. v. Proulx*, 2000 SCC 5:

> 102 ... Incarceration will usually provide more denunciation than a conditional sentence, as a conditional sentence is generally a more lenient sentence than a jail term of equivalent duration. That said, a conditional sentence can still provide a significant amount of denunciation…
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> 107 … Judges should be wary, however, of placing too much weight on deterrence when choosing between a conditional sentence and incarceration:… The empirical evidence suggests that the deterrent effect of incarceration is uncertain:… Moreover, a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences.

[20] The sentencing judge was well aware of this principle when she said:

> …deterrence and denunciation can be addressed in two ways, through the imposition of a straight jail term and also by a further period of custody to be served in the community.

[21] Gilles Renaud,in his text, *The Sentencing Code of Canada: Principles and Objectives* (Markham, Ont: LexisNexis, 2009), at 228 said the following about the objectives of sentencing in child sexual abuse cases as compared to a standard sentencing in non-abuse case:

> … the ranking to be assigned to the six sentencing objectives listed in s. 718 of the *Criminal Code* are case specific and their relative importance will be determined by the nature of the offence and of the offender at the conclusion of an exercise of discretion by the sentencing judge. By way of contrast, there is no exercise of discretion in the case of abuse of one under the age of 18: the court begins by assigning pride of place to both denunciation and deterrence. That is not to say, of course, that the resulting sentence must be one in which imprisonment is selected or emphasized but the likelihood of such a result is enhanced given the dictates of Parliament.

[22] The sentencing judge, by mentioning specific deterrence, appropriately weighed this factor. She also considered rehabilitation. She was entitled, and expected, to do so. However, as long as the circumstances of the offence and the blameworthiness of the offender are properly considered within the concept of proportionality and tempered/escalated accordingly by the principles of sentencing within the prioritization formula recognized by Parliament, the sentencing judge's discretion should not be interfered with.

[23] I would dismiss this ground of appeal.

Issue #2 The sentence imposed was manifestly unfit

[24] In *R. v.E.M.W.*, 2011 NSCA 87, Justice Fichaud conducted an extensive review of sentencing for sexual assaults on children without intercourse. After citing 15 cases with sentences ranging from six years for sexual assaults involving digital penetration and attempted but unsuccessful intercourse to three years suspended sentence for repeated touching of the offender's 14 year old niece (*R. v. E.M.W.*, ¶30), he says:

> [31] In assessing the similarity of precedents for the parity principle, it is useful to recall Chief Justice Lamer's statements in *R. v. M.(C.A.)*, para 92 [above para 7]. The Chief Justice said "[t]here is no such thing as a uniform sentence for a particular crime", and "[s]entencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction". From a similar perspective, in *R. v. A.N.* this Court recently said:
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> > 30. An assessment of the gravity of Mr. N.'s offences with Mr. N.'s culpability for them is, as Chief Justice Lamer said, an inherently individualized process, not an exercise in academic abstraction. I say this here because Mr. N.'s parity submissions on this appeal appeared to assume that sentences in other cases established a binding matrix of precedent into which this case must be slotted.
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> To the same effect *R. v. LeBlanc*, 2011 NSCA 60, para 26. The sentencing judge is not expected to idealize a sentence that perfectly conforms to a hypothetical symmetry in the body of precedent. That would be a futile assignment because the actual precedents are not always consistent. It is not uncommon to find similar sentences in cases with significant factual differences. The overarching factor is the Code's "Fundamental principle" of proportionality (s. 718.1) that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": *R. v. L.M.*, para 36 (quoted above para 8); *Nasogaluak*, para 44.

[25] The sentencing judge here instructed herself as follows:

> The Question is, whether a short period of jail with a lengthy period of community supervision can adequately address the principles of sentencing or whether there is the need to impose a lengthy period of custody.

[26] After discussing the respondent's individual circumstances including his pre-sentence report she formulated her conclusions as follows:

> ... In my view this was not a "one instance-only" situation. It involved the four-year-old over a considerable period of time. Something greater than 45 days, I believe is needed in order to address denunciation. The sentence with respect to count number two will be 90 days, followed by a three-year probationary term. Count number four has no mandatory minimum. I'm mindful that the charge is exposure as opposed to touching.

> It happened less frequently; four times, I believe I was told, over a four-month period. I am prepared to consider, in that instance, a conditional sentence order. That is a jail term but served in the community. ...

[27] Associate Chief Judge Williams then went on to impose an additional nine month conditional sentence on the s. 173(2) count.

[28] It was up to the sentencing judge to weigh the principles and to fix a sentence having regard to the individual circumstances of the respondent. I am not satisfied that the sentence imposed in this case is a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes" that it requires appellate intervention (*R. v. Shropshire*, [1995] 4 S.C.R. 227, ¶46-50 and *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500, ¶92).

[29] In *R. v. M.(C.A.)*,*supra*, Chief Justice Lamer reaffirmed the *Shropshire* principles and added at ¶92:

> Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada. ... But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. ...

[30] In this case, the sentencing judge did not set out the cases and range of sentence as Justice Fichaud did in *R. v. E.M.W.*, *supra*, but we are able to glean from her reasons why she felt the respondent fell at the lower end of the scale. She said:

> ... But given the low risk for sexual reoffending, given that you're a candidate for a program that is in existence in the community, together with your sincere remorse and early guilty plea, I'm prepared to consider something other than a federal period of incarceration.

[31] In her reasons the sentencing judge noted that sentences for these types of actions are "all over the map". The Crown says that the trial judge's comments are unresponsive to the consideration of the role of ranges in sentencing. The sentencing judge's comments reflect the submissions that were made to her by counsel. She also had very little assistance from counsel in this regard. She was provided one case by Crown counsel for the purposes of setting out the principles of sentencing, but it was not factually similar to this case. Defence counsel

provided two cases. Similarly, these were of little assistance to the sentencing judge. It may have been helpful to have greater reference to the range of sentence in cases such as this. However, as I have noted above, I am satisfied that a review of the sentencing judge's reasons overall, indicate why she felt this case fell within the lower range of the scale.

[32] I also refer to *R. v. Nasogaluak*, 2010 SCC 6, ¶44:

> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[33] I am satisfied that even if it can be argued that the sentence falls outside the regular range of appropriate sentences, in these circumstances, it is not unfit. The sentencing judge had regard to appropriate principles and objectives of sentencing and took into account the circumstances of the offence and the offender in coming to her conclusion. In doing so she did not err.

[34] I would dismiss this ground of appeal.

Conditional Sentence Order in Excess of Six Months

[35] The parties agree that the sentencing judge erred in imposing a nine month conditional sentence on the s. 173(2) count.

[36] At the time of this offence, s. 173(2) was a summary conviction offence and, therefore, the maximum conditional sentence that could have been imposed was six months. As a result, the nine month conditional sentence on the s. 173(2) count is reduced to six months.

Conclusion

[37] I would grant leave to appeal, vary the conditional sentence by reducing it from nine months to six months but otherwise dismiss the appeal.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Beveridge, J.A.