IN THE PROVINCIAL COURT OF NOVA SCOTIA

Cite as: R. v. G.J.O., 2008 NSPC 59

Date: September 25, 2008
Docket:1832115
Registry: Sydney

Between:

The Queen

v.

G.J. O.

SOIRA ORDER DECISION

****BAN OF PUBLICATION ON BOTH ACCUSED'S AND VICTIM'S NAMES****

Judge:	The Honourable Judge A.P. Ross
Date:	September 25, 2008
Charge:	s. 246.1 cc
Counsel:	Mr. Shane Russell for the Crown Mr. Mangesh Duggah for the Defence

The accused, JGO pled guilty to a charge of sexual assault occurring between January 1984 and December 1985. The accused's behavior, however, does not consist of a course of conduct, but rather of one incident at the home of the victim. The accused, the victim's uncle, was visiting family in Cape Breton. One evening he was left to mind his nephew, the victim, who was then about 8 years old. The accused took a bath with his young nephew. They then lay on a bed where the accused fondled and kissed him and coaxed him to perform oral sex.

After that evening the victim was never again alone with the accused. In an impact statement, read in court in the presence of the accused, he described in vivid terms the impact of this crime, including physical and psychological effects. The victim has undertaken extensive counseling with several therapists, at significant cost, yet he speaks in the present tense, now an adult with family of his own, of feeling guilty, of being a horrible person, of being ashamed.

In 2000 the accused came forward to the victim's stepfather and acknowledged what he had done. It appears he wished to apologize, citing the fact that he himself had been abused by an older brother. The accused has, ever since, been estranged from his family in Nova Scotia. He did not even attend his father's funeral.

This sordid incident became a public matter when, in October of 2007, the accused was charged with this criminal offence. Given that the accused was living in Ontario, and the practical difficulties entailed in making a court appearance, it can be said that he pled guilty to the charge at an early opportunity.

At the sentencing on August 21, 2008 the court was supplied with a pre-sentence report on the accused, the above-noted victim impact statement, and a written report from a psychiatrist who has examined and treated the accused. Crown and defense made a joint recommendation, pursuant to which the accused has received a conditional sentence of imprisonment of one year which includes a house arrest component and a requirement to undertake sex offender counseling. A s.487.051 order was made, requiring the accused to provide a sample for the national DNA

data bank. At issue, however, was whether a so-called SOIRA order should be made pursuant to s.490.012 of the Criminal Code. This is the court's decision on that aspect of the proceeding.

With certain "designated offences" s. 490.012 of the Criminal Code states that where a prosecutor makes application for an order requiring the accused to comply with the registration requirements of the Sex Offender Information Registration Act the court must do so unless, pursuant to subsection (4), it is satisfied that the accused has established that the impact of such an order on him would be grossly disproportionate to the public interest in protecting society which registration under the Act seeks to achieve. The Act's stated purpose is "to help police services investigate crimes of a sexual nature by requiring registration of certain information relating to sex offenders." It goes on to annunciate principles by which the Act is to be implemented, and which presumably bear on the possibility of an exemption from registration. These include (I) rapid access to information about persons previously proven to be sex offenders by police who are currently investigating sex offences (ii) keeping such information current and reliable, and (iii) protecting the privacy of sex offenders by putting restrictions on access and use of such information.

S.490.013(2) ties the length of any order to the maximum punishment available for the predicate offence. The result is three broad categories, with orders lasting either for 10 years, 20 years or for life. Within these broad categories of offences, i.e. for orders of a similar duration, the impact of registration on a person's privacy and liberty is the same regardless of the nature and circumstances of the underlying offence. Section 490.021(4) requires the court to place two things side by side - the impact on privacy and liberty; the public interest in effective crime investigation - and then determine whether there is a gross disproportionality.

In R. v. S.S.C. [2008] B.C.J. No, 1148 Chaisson J.A., writing for the British Columbia Court of Appeal, summarized his analysis of the exemption provision at paragraph 87. He said, at point 2 of his summary, that "the public interest is fixed." If that is so, one would think that the only circumstances which would matter in deciding an application for exemption would be personal circumstances of the offender *as of the date of the application*. Point 3 states that "an offender seeking exemption is obliged to establish that his or her registration would be grossly

disproportionate to the public interest." This appears to be consistent with the foregoing, as does point 1 in which it is said that the public interest requires all sex offenders to register, not just those who fit a certain psychological profile. However in point 4, which deals with "the offender's circumstances", factors well outside his or her current circumstances are invoked. Instead, courts are here called upon to consider the nature of the offence. It is not clear to me why, if the public interest in registration is "fixed", and given the wording of the Code, one should here return to consider the nature of the crime.

Statutory interpretation aside, however, it seems natural and fair to consider what the crime entailed when assessing the public interest advanced by registration of the criminal. There is a wide range on possible conduct within any of the three broad categories which determine the length of time the offender must maintain registration. Sexual assault, for instance, can be committed in many different ways, and sexual assault is but one of many designated offences. To stick with this particular one, a sexual assault can vary with respect to the nature and extent of force used, the duration of the assault, the age of the victim, the relationship between the parties, etc. This is so, as I have said, even within one of the three broad categories defined by the maximum punishment. In one case the sexual assault may be a clumsy grope by a drunken customer in a bar; in another it may be the planned and carefully executed abuse of a child in its own home over the course of an evening. Ought the court be blind to this difference? Ought it look only at the current circumstances of the offender - at, for instance, the impact on the person's employment of having to report a travel itinerary - regardless of the nature of the underlying conduct that presumably gives rise to the need for registration? I realize that the prosecution may not always apply for a SOIRA registration, but courts have no control over this and in the absence of any fixed criteria to guide the use of that discretion courts will be left to grapple with the foregoing questions.

In R. v. Cross, 2006 NSCA 30 the Nova Scotia Court of Appeal determined that there was nothing to bring that offender within the exemption. After distinguishing registration from punishment *per se*, the court stated at paragraph 85 that "there may be an unusual case where, die to the unique circumstances of the offender the impact of the order could constitute ... harsh treatment that is characteristic of punishment", in which case the exemption might be warranted. It considered that

only in exceptional cases would the impact of an order for registration be punitive. In doing so it expressed disagreement with suggestions made in certain other cases that registration created a "stigma", that such persons would be "tracked", or that registration equated to "community supervision". It referred to the privacy protections built into SOIRA and the limited use of and access to the information. It characterized SOIRA requirements to supply basic personal data, report yearly, and file any travel itineraries by registered mail as more of an inconvenience to Mr. Cross than a significant deprivation of his personal liberty.

In its subsequent decision in R. v. D.B.M., 2006 NSCA 18 our Court of Appeal upheld a sentencing judge's decision to grant an exemption, saying that the decision of the Supreme Court of Canada in R. v. R.C. [2005] S.C.J. No. 62 was instructive on the proper approach to be followed. At paragraph 14 of the D.B.M. judgement it says that the exemption, and the analysis of the sentencing judge in granting it, appeared to accord with the approach taken in R.C. in that the sentencing judge "considered the circumstances of the offence and the nature of the order sought . . ."

I am unsure of the duration of the respective SOIRA orders in Cross and D.B.M., but note that Cross was sentenced to 42 months in a penitentiary, whereas D.B.M. received a 9 month conditional sentence of imprisonment followed by probation. Cross was sentenced on sexual assault, assault and unlawful confinement. D.B.M. was sentenced on one count of sexual assault. It appears, however, that both cases proceeded by indictment.

I would like to think that in considering applications for exemption, here and in future, I can take the nature and circumstances of the offence into consideration, including the date of occurrence. Until I hear otherwise, I consider that D.B.M. is authority for doing so. It seems logical to view this as being on the "public interest" side of the equation - as relevant to the likelihood of recidivism which is the theoretical underpinning of registration in the first place. Such things as criminal record, post-offence conduct, any psychological disorders, and current psychiatric assessments would also be relevant here. One would, of course, in accordance with Cross, also consider any "unique circumstances of the offender" which might make registration, and what flows from it, unduly punitive in a particular case.

A feature of this case which favors exemption is the long time which has passed since the commission of the offence, coupled with the facts that (a) JGO has no other criminal record and (b) there is no indication that such behavior was repeated with this victim or anyone else. If, for instance, this application were being heard within months of the offence, the scale would, in my view, weigh even more heavily on the side of making a registration order.

Other significant factors are contained in an expert report authored by Dr. Julian Gojer, a staff psychiatrist at Toronto Western Hospital. I will reproduce extracts from his "diagnosis" ;

> JGO does not suffer from any major mental illness. There is no prior history of him having any sexual contact with any other young males. He denies any sexual attraction to children. Erotic Preference testing did not reveal any overt attraction to children. He does not suffer from Pedophillia.
>
> JGO has a history of abusing and being dependent on drugs. He has been sober for about 3 years. His use of alcohol and marijuana at the time of the offense likely disinhibited him.
>
> JGO appears to also be distressed from his own sexual abuse and there are features of a Post Traumatic Stress Disorder.
>
> JGO accepts that what he did was wrong and is remorseful. He is willing to engaged in counseling to address the abuse of his brother's son and his own abuse. JGO has no history of sexual offending against any other children, does not suffer from any personality disorder and recognizes his behavior was traumatic for the victim. He is presently a low risk to reoffend. With counseling and abstinence from drugs and alcohol, his risk is likely to become even lower. '

These conclusions were based on interviews and physiological testing. They are uncontradicted by any other evidence in the proceeding.

I know from other material filed that JGO has worked his entire adult life, holds a steady job, and appears now to be settled in one part of Ontario.

JGO, however, has a heavy onus to meet. I have in mind the words of our Appeal Court in Cross when it characterized the impact of reporting, etc, on the average person. There are no circumstances peculiar or unique to this accused which would make registration especially punitive. I have heard that JGO may wish to travel and vacation elsewhere in Canada and abroad, but this is not something he will be prevented from doing by a SOIRA registration. As noted in numerous cases, it is the impact of registration, not the impact of conviction, which is relevant here.

This crime involved an abuse of trust of an innocent young victim. While it was not a protracted course of abuse, neither was it just a fleeting occurrence. Psychiatrists may give opinions, valuable ones, but nobody can give any absolute assurances; otherwise, presumably, further treatment in a specialized sex offender program would not have been recommended, as it was by Dr. Gojer.

Defense counsel has presented a strong and well-supported case for an exemption from the usual registration, but I think it falls somewhat short given the need to show gross disproportionality. Consequently an order for registration for 20 years will issue.

Dated at Sydney, Nova Scotia, this 25th day of September, 2008.

A. Peter Ross
Provincial Court Judge