IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. E.M.W. 2009 NSPC 65

Date: November 23, 2009
Docket: 1918544
Registry: Halifax

Between:

Her Majesty the Queen

v.

E.M.W.

Restriction on Publication: S.486.4 of the Criminal Code

Judge: The Honorable Judge Jamie S. Campbell

Decision: November 23, 2009

Charge: CC 271(1)

Counsel: Rick Hartlen, counsel for the Crown
Bob Cragg, counsel for the Defendant

Introduction

1) There are no easy ways to talk about some things. There are no careful phrasings that can take the sharp edge off them. There is no clinical language that can make them seem more distant. The sexual abuse of a little girl by her father is one of those things.

2) E.M.W. has been found guilty of sexually assaulting his daughter, R. She described that as she lay with him in bed, he would put his fingers in her vagina. She was between 9 and 11 years old at the time.

3) Talking about it was very difficult for her. That should come as no surprise to anyone. She could not bring herself to say some of the words. After all is said and done, she did not hate her father. At trial she said she hoped that someday they could get back to being a regular father and daughter.

4) This has all taken a toll on his daughter. How a daughter copes with being sexually violated by her father is hard to imagine. She is at a time in her life when adjusting to becoming a teenager provides its own kinds of stress. Now she is faced with this.

5) In her victim impact statement she says, " I am mad that it happened and I am not sure why. ...I have a hard time talking to my friends and family. Also sometimes I don't know what to do. My mind does not know what to do."

6) R's life has been changed by this. She may, in time learn about ways to deal with it. Some may be healthy and some may lead to other problems for her. This will follow her, in some way or another for the rest of her life.

7) Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment of a child in this way is an attempt to deny her basic human dignity. In the eyes of the adult the child is reduced to being a nameless "thing". She is robbed of her childhood and her innocence. She has no choice in the matter. She is simply used. She has becomes a means to an end.

8) When the person who has tried to turn a child into an object is a parent, the sense of moral outrage is almost unrestrained. There is no way to speak of these kinds of crimes without using language that reflects the sense that the most basic of moral standards has been violated. They are described by judges as being "horrific", "shocking", "selfish","sordid", "despicable", "reprehensible","repugnant" and "depraved".

9) His Honour, Judge Tufts, in *R*. .v. *S.C.C*., [2004] N.S.J. No. 272, 2004 NSPC 41, 225 N.S.R. (2d) 4, took note of the propensity toward the use of strong language. He referenced the comment from the Nova Scotia Court of Appeal in *R.* v. *H.(G.O.),* [1996] N.S.J. No. 61 that it is almost impossible to speak of such crimes without using pejorative adjectives to describe the gravity of the offences. Judge Tufts acknowledged, at para. 52, that this is entirely understandable. He cautioned, very properly I believe, that the pejorative adjectives should not detract from the principles of sentencing. A sentence must be the least restrictive sanction that meets the fundamental principles

and purposes of sentencing.

10) Judge Tufts' caution provides a valuable insight and poses the intriguing and profound question of the extent to which revulsion, anger and moral outrage should play a part in, or quietly creep into, the sentencing of individuals who have committed these kinds of crimes. Many people, upon hearing of a father sexually violating his young daughter would angrily use the phrase "throw away the key". For many, no language is too extreme and no sentence is too extreme.

11) When a person has been injured by a criminal act, it is not unusual to hear frustrated family members ask, "Is that all a child's life is worth?"If sentencing were somehow a statement or calculation of the worth or value of the life of the person injured, no sentence would ever be great enough. E.M.W.'s sentence, in this case, should not in any way be seen reflecting the value of his daughter's dignity or the cost to her of the long term implications of what he has done.

12) Retribution is a legitimate, accepted and in fact ,important principle in sentencing. In *R.* v. *M.(C.A.).*, [1996] S.C.J. No 28, (1996), 105 C.C.C. (3d) 327, Chief Justice Lamer defined retribution as "an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender and the normative character of the offenders conduct." Retribution is punishment. It is objective, measured and reasoned.

13) Vengeance and anger have no place in sentencing. When reason and objectivity give way to expressions of righteous indignation or revenge a sentence is no longer an expression of a system

of values. It has then become an emotional act and not a rational one. It is then not measured or restrained. Justice can be, and sometimes should be, hard. It must however be thoughtfully so.

14) It is important to treat the offender in a way that reflects his level of moral culpability. Simply put, the punishment, and punishment it is, should fit the crime and the person who committed it.

15) Denunciation has, as its object, the communication of society's condemnation of the offence. It is a symbolic, collective statement that the offender's conduct should be punished for encroaching on society's basic values.

16) Deterrence and denunciation are the primary considerations in imposing sentences on those who abuse children. Section 718.01 of the Criminal Code confirms that. This is particularly so for those who hold a position of trust, such as a parent. The abuse of a person under the age of 18 is an aggravating factor in sentencing. Section 718.2(a)(ii.1) of the Criminal Code confirms that. Furthermore, evidence that an offender abused a position of trust is also an aggravating factor. Section 718.2(a)(iii) of the Criminal Code confirms that.

17) Sentencing is, in some limited way, the manner in which courts communicate how seriously certain crimes are viewed. Crimes involving abuse of children by people who should be protecting them are ones where a clear and unequivocal statement must be made. Children are valued. If you treat them as objects for sexual gratification you will suffer serious consequences. That statement may do nothing to stem the flow of such cases. It may do nothing to deter a person who is willing

to take the risk of being caught. At its most basic level though, the sentencing process is a way of saying that despite wildly different views on a wide range of matters there are some values that we share as a society and that make us a community.

18) The nature of the offence is such that the denunciation of it must be in very strong terms. "Sentences which appear on their face to be exceptionally lenient in the circumstances can be presumed to generate neither deterrence nor denunciation". *R.* v. *M.(G.)* (1992), 77 C.C.C.310 (Ont. C.A.). Saying offences are serious is not enough. They must be treated seriously.

19) As with retribution, the statement must be sent while respecting the values of the system of criminal justice and must be done in a way that is measured and constrained by rationality. The message of what we value as a society has to reflect the value we place on children but it must at the same time reflect the value we place on having a system that responds rationally and proportionately.

20) A sentencing judge must consider retribution, denunciation and deterrence. That judge also has to consider other factors, including the nature of the offence and the way in which other people have been sentenced for similar crimes. It is easy to speak with moral outrage but the ability to express unrestrained moral outrage is a luxury a judge does not have.

21) Reviewing the case law with respect to a matter of this kind provides a glimpse into the depths of depravity to which people can descend. Viewing what appears to be a catalogue of moral degeneracy and perversion can have a numbing effect. Those cases do help to place this offence in

a context, albeit a uncomfortable one.

22) The assaults that occurred in this case involved fondling and digital penetration. This was not touching over the clothes. It was not incidental contact in the context of engaging in horseplay or wrestling. It was not isolated to one incident.

23) Especially when the victim is a vulnerable child it does appear to be almost perverse to rate the degree of sexual violation along some kind of scale. The long term affects for the child may be no different. Yet, it must be acknowledged, perhaps grudgingly, that some forms of abuse are, by their nature, more abhorrent than others. If all sexual abuse is treated with the same level of moral opprobrium there is nothing more than can said about extreme forms of abuse. It must be acknowledged then that what occurred here was not at that extreme end of the scale.

24) There were no acts of intercourse or oral sex. There was no touching or exposure of the penis. There was no exposure of the child to pornography. There was no recording made. There was no violence involved. The lack of violence should not be overemphasized in cases involving children, where often no violence is required. It has been said that the offence of sexual assault is an inherently violent crime. Yet it must be acknowledged there are degrees violence. The abuse here was not perpetrated by the use of physical force.

25) This is not a way of saying , “it could have been worse”. It is simply an acknowledgment that when considering the proper sentence this offence must be seen for what it is.

26) Obviously the fact that the child was sexually abused by her father, in his home, in his bed, is very significant. The sexual violation of a 10 year old girl is shocking and profoundly disturbing. When the person who does it is one of the two people to whom she should most be able to look for absolute protection and in whom she should be safe in placing absolute trust the phrase ‘shocking and profoundly disturbing” seems woefully inadequate.

27) There is no scale of sexual abuse. It is not graded or somehow categorized. Each circumstance is unique in its impact on a unique person and a unique set of people. Each offender is a different person. Yet all of these factors must be weighed and considered.

28) It is important that a sentence be similar to those imposed on similar offenders in similar circumstances. That becomes a challenge in light of the vast number of cases and the seemingly limitless number of variations. The search for the case on “all fours” will end in vain. Every case can be distinguished. It is impossible to separate out the multiple factors that receive consideration in each case. It cannot be said that abuse of a particular kind will attract a particular sentence. Nor is it possible to say that abuse by a parent or other person in a position of trust will attract a certain sentence. Case law can provide a general sense of as range of sentences and some sense of the principles that have been applied. It does not dictate a precise sentence.

29) Judge Tufts in *R.* v. *S.C.C.* (supra), provided a comprehensive review of the case law with respect to sentencing for matters involving the sexual abuse of children up until 2004. Since that time there has been no significant change in approach.

30) Sentences range from conditional sentences to federal prison terms of 6 years. Those at the higher end of the sentencing range have tended to involve intercourse or oral sex. They have included cases where abuse has been ongoing over a period of years. Sexual touching in various forms generally attracts sentences ranging from conditional sentences to 2 to 3 years of incarceration. Where the touching is over clothing or is a single incident or happens in an unplanned way in the context of wrestling or horseplay, the sentence is more likely to be toward the lower end of the range. Where the touching involves masturbation and touching of the penis the sentence is likely to be toward the higher end of the range.

31) Where the perpetrator has a record of similar offences the sentences have certainly tended toward the more severe end of the range. Where the abuser is a person in a position of trust, the sentence has reflected that.

32) In this case, the nature of the offense involves digital penetration of the vagina on a number of occasions. It was not a momentary lapse of self control. While it was not planned and there was no “grooming” of the victim, it was something that occurred more than once in a context where the circumstances could easily have been avoided. It is not an offence that would attract a sentence at the lowest end of the scale.

33) It is further exacerbated by the fact that the abuser is the child’s father. He is not only a person in a position of trust. He is a person who should be willing to sacrifice everything for her. He has instead done the opposite and sacrificed her well-being for his gratification.

34) I have noted that sentencing is not exercise in precise calculation. A sentence of two years would take this sentence out of the range for consideration of a conditional sentence. If the sentence were two years less one day that would be a matter to be considered. The proper process is first to determine whether the sentence is less than two years. If it is not, then a conditional sentence is not available. The appropriate sentence in this case is two years. It would be wrong I my view to deal with the issue of conditional sentence by adopting the pretense of precision. The issue of whether a conditional sentence should be order should be confronted head on.

35) E.M.W. was charged with an offence contrary to s. 151 and an offence contrary to s. 271. The essential elements of both offences were proven. The former is sexual interference with a person under the age of 16. The latter is sexual assault. Section 151 carries a minimum sentence of incarceration. A conditional sentence is not a sentencing option available for offences under s. 151. It is open for consideration with respect to offences under s.271.

36) On the basis of the Kienapple principle, that a person cannot be convicted twice for essentially the same offence, the s. 151 charge was judicially stayed when the conviction was entered on the s. 271 charge. Had the stay been entered on the s. 217 charge instead, there would be no discussion of a conditional sentence.

37) The Crown has asserted that it would be perverse to order a conditional sentence in such circumstances. The essential elements of the s. 151 charge had clearly been made out. A conditional sentence is specifically not available for such an offence. Why should such a sentence be considered when the elements of the more serious offence have indeed been proven?

38) That point is acknowledged. The fact is however, that this sentencing is with respect to an offence contrary to s. 271. A conditional sentence is a sentence open for consideration.

39) It was further noted that under s. 742.1 of the Criminal Code a conditional sentence is not a sentencing option open for consideration with respect to serious personal injury offences as defined by s. 752. Those offence include offences under s. 271. Under the current provisions of the Criminal Code a conditional sentence would not be available for consideration. These offences took place over a time span when those limiting provisions were not in force and at a time when a conditional sentence was therefore a sentencing option. A conditional sentence should then be considered.

40) I am satisfied that E.M.W. presents no danger to the community. He is not a predator. That is not the only consideration. E.M.W. is employed and provides support payment in respect of his daughter. It was argued that incarceration would deny her the benefit of those payments. As Mr. Cragg pointed out, such practical considerations are indeed relevant to the sentencing process.

41) A conditional sentence can be granted only if it respects the purpose and principles of sentencing. A conditional sentence can be punitive in nature especially if significant restrictions are placed on the person's liberty. In some circumstances the requirement for deterrence and denunciation can be met by a conditional sentence. In no way however can it be said to have the very same effect as a term of imprisonment.

42) A conditional sentence allows for the retention of some of the elements of a basic, normal

life. A man who sexually violates his own ten year old daughter, in these circumstances, cannot be allowed to serve his sentence by going to work, going out to the grocery store for a few hours on Saturday, watching television from his favourite chair and enjoying the fellowship of friends and family in his home.

43) A conditional sentence does not, in these circumstances, provide for punishment that is measured and thoughtful. It would, to put it simply be the kind of sentence that does not speak of justice and compassion but of weakness and naivety.

44) When abuse of children is involved punishment matters. When the abuser is a parent punishment matters a lot. While the restrictions of a conditional sentence can indeed be punishment, there are times when they are no replacement for the sound of a shutting jail cell.

45) E. M. W. is sentenced to a term of federal imprisonment for two years.

46) I am prepared to sign the DNA order, the SOIRA order, the s. 109 firearms prohibition order and the order under s. 161.