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Sentencing for Spousal Sexual Violence: Different but Equal

By Jennifer Koshan

Cases Considered:

R. v. D.J.D., 2010 ABCA 207; see also *R. v. D.J.D.*, 2009 ABPC 216

Until 1983, the definition of rape in Canada excluded offences committed by a husband against his wife. In that year, reforms to the *Criminal Code* did away with the offence of rape altogether, and implemented a new scheme of sexual offences that were gender neutral and could, explicitly, be committed by one spouse against another (see Bill C-127, *Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, S.C. 1980-81-82-83, c. 125, s. 246.8). The issue of spousal sexual violence has received little specific attention in Canada since the reforms of 1983. However, the African and Canadian Women's Human Rights Project (ACWHRP) – a project involving lawyers, activists and academics in Canada, Ghana, Kenya and Malawi – is presently studying the lessons learned from the criminalization of marital rape in Canada in the context of efforts to criminalize this form of violence in the 3 African countries. I am completing a review of case law in Canada – some 275 decisions over the past 27 years – which shows that cases of spousal sexual violence still continue to be treated differently from other sexual assault cases when it comes to issues of consent, mistaken belief in consent, evidentiary matters, and sentencing. On the latter issue, a recent case of the Alberta Court of Appeal, *R. v. D.J.D.*, brings to light some of the considerations faced by judges when sentencing offenders for spousal sexual violence.

Before getting into the details of *D.J.D.*, a few preliminary points are in order. First, every reported case of spousal sexual violence since 1983 in my sample involved a male accused and female victim. Spousal sexual violence is thus a highly gendered crime. Second, cases of spousal sexual violence often involve actual incidents of rape, so although this specific crime has disappeared from the *Criminal Code*, it continues to be relevant to speak about "marital rape". (This is not to say that recent musings by Public Safety Minister Vic Toews about reinstituting the crime of rape should be embraced – in fact anti-violence groups denounced this now abandoned idea for several reasons (see Proposal to put 'rape' back in criminal code abandoned). Third, spousal sexual violence is often part and parcel of a pattern of abuse perpetrated by the offender against the victim. The facts of these cases are often horrific, as they are in *D.J.D.* The spousal context and the abuse of trust inherent in crimes of domestic violence is expressly enumerated as an aggravating factor for sentencing purposes under s.718.2(a)(ii) of the *Criminal Code*, R.S.C. 1985, c. C-46. Finally, while there are no specific sentencing guidelines for marital rape, it is important to keep in mind the guideline of three years for major sexual assaults established by the Alberta Court of Appeal in *R. v. Sandercock* (1985), 62 A.R. 382, [1985] A.J. No. 817 (C.A.). Major sexual assaults are those "where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a

reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs. The injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two. This category … includes not only what we suspect will continue to be called rape, but obviously also many cases of attempted rape, fellatio, cunnilingus, and buggery, where the foreseeable major harm … is present." (*Sandercock* at para. 13). The *Sandercock* starting point was reaffirmed by the Court of Appeal in *R. v. Law*, 2007 ABCA 203 and is referenced in *D.J.D.*

In *D.J.D.*, the accused was convicted of several offences against his wife of 20 years, including uttering death threats, assault with a weapon (2 counts), assault causing bodily harm, attempted strangling and sexual assault. The offences took place in their home over a 7 hour period, and the incident was described as "callous, humiliating torture" by the Court of Appeal (at para. 3). Without going into the all of the details, the attack involved handcuffs, whipping, insertion of a candle into the victim's vagina, urination, choking, and pliers. The victim was found to have sustained serious physical and psychological injuries as a result of the violence. This was not the accused's first conviction for acts of violence against his wife – he had three previous convictions for assaults and threats, and one previous conviction for sexual assault against her (see *R. v. D.J.D.*, 2009 ABPC 216 at para. 27).

At trial, the accused was sentenced to a global period of 5 years in jail for the latest string of offences. The Crown appeal was successful, and a sentence of 9 years was substituted by the Court of Appeal (Justices Marina Paperny, Jack Watson and Patricia Rowbotham writing as "the Court"). This sentence was to be served consecutive to the 15 month sentence imposed for the sexual assault in 2009.

The Court of Appeal acknowledged that deference is normally owed when appellate courts review sentencing decisions, but found that the trial judge's decision "provided no useful reasons for the sentence imposed", such that there was "little to which appellate deference can attach" (at para. 9).

The Court held that the most important sentencing objectives in this case were denunciation, deterrence and protection of the public. The accused, who represented himself on the appeal, made a case for the importance of his rehabilitation, but the Court found that "a fit sentence cannot turn on serving that objective". Rather, "[a]t his age and level of life experience, his rehabilitation is in his hands" (at para. 8).

In terms of aggravating factors, the Court pointed to the gravity of the offences and their "violent, degrading, humiliating" nature (at para. 10). It also noted s. 718.2(a)(ii) of the *Criminal Code* and the presence of the family violence context as aggravating. It stated that "mitigating circumstances are few", but did not in fact point to any particular mitigating factors that were seen as relevant (at para. 12). Based on a consideration of all of the relevant factors and objectives, 5 years imprisonment was seen to be a demonstrably unfit sentence. Indeed, the Court noted that, in light of *Sandercock*, 5 years would have been within the range of appropriate sentences for the sexual assault alone. Cumulatively, the Court found that a sentence "in excess of 10 years" would have been in order, but taking into account the principle of totality in s.718.2(c) of the *Criminal Code*, it imposed a global sentence of 9 years imprisonment (at paras. 14-15).

D.J.D. is similar to other decisions where the Court of Appeal has handed down lengthy custodial sentences for spousal sexual violence. For example, in *R. v. O.F.B.*, 2006 ABCA 207,

the accused was convicted of 3 sexual assaults against his former partner, two of which the Court characterized as major sexual assaults. The Court of Appeal found that the trial judge had failed to give sufficient weight to the domestic context and abuse of trust as required by s. 718.2(a) of the *Criminal Code*, and to the accused's previous record for spousal sexual assault. According to Justice Sheila Greckol, "Sexual assault committed by a domestic partner or former domestic partner violates the victim's emotional, psychological and physical autonomy in a way that may permanently harm her intimate and trust relationships; relationships that most view as integral to a fulfilled life" (at para. 12). The Court overturned the sentence of 2 years imprisonment and substituted a global sentence of 5 years.

Another marital rape case, *R. v. D.W.G.*, 1999 ABCA 270, is of broader interest as the Court of Appeal used this case to confirm that attempted rape constitutes a major (or "serious") sexual assault, such that the *Sandercock* starting point applies (at para. 5). The Court also noted the aggravating nature of the circumstances in light of the spousal context. Rather than citing s. 718.2(a)(ii) of the *Criminal Code*, the Court of Appeal relied on its earlier decision in *R. v. Brown* (1992), 13 C.R. (4th) 346, as authority for treating the marital context as an aggravating factor for sentencing purposes. *Brown* was found to apply to spousal sexual assaults in *D.W.G.*: "the principles … apply with equal force to situations in which violence has manifested itself not only in assault, but in sexual assault. … Indeed, the consequences may be worse from the victim's perspective" (at para. 10). The Court would have sentenced the accused to 3.5 years jail in this case, but as he had already served the 4 month sentence imposed at trial, a sentence of 18 months was substituted, minus time served.

It is interesting to contrast the Court of Appeal's approach to sentencing to that of the Provincial Court in the earlier case of sexual assault for which D.J.D was convicted. As noted, in this case the accused received 15 months imprisonment (in addition to 1 year probation) for 1 incident of forced anal intercourse against his wife. He was acquitted of 2 similar allegations at trial. Judge J.N. LeGrandeur reviewed a number of sentencing decisions in Alberta and other jurisdictions, and noted that there was some debate about the starting point / guidelines approach exemplified in *Sandercock*, including debate at the Court of Appeal (at para. 23, and see my earlier ABlawg post Sentencing in Sexual Assault Cases – Whither Appellate Guidance?). However, courts in a number of jurisdictions have cited *Sandercock* with approval (see *R. v. Cappo,* [1993] S.J. 571 (Sask. C.A.), *R. v. E.L.D.*, [1992] M.J. 445, 81 Man. R.(2d) 264 (Man. C.A.), *R. c. Bonnier,* [1992] J.Q. 2061 (C.A.Q.), *R. v. Savoie,* [1993] N.B.J. No. 319 (N.B.Q.B.), and *R. v. Adams*, [1988] N.W.T.J. No. 141 (N.W.T.C.A.)). *Sandercock* thus remains an important precedent in this regard.

After canvassing the debate about starting points, Judge LeGrandeur found that the *Sandercock* starting point was not relevant in any event, and that a sentence in the range of 12 to 18 months was appropriate. He based this on a number of factors, including the fact that there was only one incident of sexual assault (at para. 27), there was no violence used by the accused "other than the inherent violence that is associated with the undertaking of an [sic] non-consensual sexual act" which the complainant "endured without resistance" (at paras. 28 and 30), and there was no evidence of any lasting physical or emotional harm to the victim (at paras. 31-2).

With respect, this is a tenuous basis for distinguishing *Sandercock*. *Sandercock* also involved a single incident of sexual assault, and it did not require proof of actual physical or emotional injury, rather it noted that some sexual violence (including forced anal intercourse) is "of a sort or intensity … that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs"

(*Sandercock* at para. 13). *Sandercock* defined major sexual assaults as those where there was "violence or threat of violence", but there was no consideration by Judge LeGrandeur of whether the history of violence perpetrated by D.J.D. on his wife and the threat of further violence may have led to her resistance.

Judge LeGrandeur also took matters into account that were of questionable relevance. For example, he noted that the parties were cohabiting at the time of the offence but were now divorced, "however, the Court was provided with no evidence as to what led to their separation and ultimate divorce, or when the separation in fact occurred" (at para. 27). He does not say why this evidence would have been relevant, but the implication seems to be that if the victim had continued residing with the accused after the offence this may have diminished its seriousness. The imposition of an exit requirement on victims of domestic violence is problematic, and again ignores the complexity of spousal relationships and the sometimes limited resources available to women who want to leave their partners.

Judge LeGrandeur also noted the active sexual relationship between the parties, and the lack of any "suggestion that sex was ever used to hurt or demean the complainant" (at para. 39). It is unclear how this evidence of past sexual history between the parties came before the court. Section 276 of the *Criminal Code* (the "rape shield" provision) requires that the accused make an application to the court before evidence of past sexual history will be admitted, but there is no mention of any such application in this case. Perhaps an application was made during the course of the trial. Alternatively, this may be one of the many marital rape cases where evidence of the past sexual history between the accused and complainant "creeps in" without a section 276 application (see Melanie Randall, "Sexual Assault in Spousal Relationships, "Continuous Consent", and the Law: Honest But Mistaken Judicial Beliefs" (2008) 32 Manitoba Law Journal 144). This phenomenon is an example of how marital rape victims may not receive the equal benefit of the law as compared to victims of sexual assault outside the marital rape context.

In contrast, the Court of Appeal's approach to sentencing in spousal sexual assault cases, now buttressed by s. 718.2(a)(ii) of the *Criminal Code*, serves as an example of how the differential treatment of spousal sexual violence may be in keeping with notions of substantive equality. The concept of substantive equality recognizes that sometimes differential treatment is required in order to achieve equality of results. The treatment of the spousal context as an aggravating factor in sentencing, by recognizing the additional harms that abuse of trust and power can have on marital rape victims, is a good example of how differential treatment may lead to equality.