

R. v. Erlich, 2015 ONCJ 151 (CanLII)

Date: 2015-03-17

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W A R N I N G

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under [subsection 486.4\(1\)](#) of the *Criminal Code*. This subsection and [subsection 486.6\(1\)](#) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under [subsection 486.4\(1\)](#), read as follows:

486.4 Order restricting publication — sexual offences.—(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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

(2) *Mandatory order on application.*— In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

- (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and
- (b) on application made by the complainant, the prosecutor or any such witness, make the order.

. . .

486.6 Offence.—(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.

COURT FILE No.:

DATE: 2015·March·17

Citation: *R. v. Erlich*, 2015 ONCJ 151

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

HARVEY ERLICH

Before Justice Leslie Pringle

Heard on February 2, 2015

Reasons for Sentence released to the parties on February 20, 2015

Released in Court on March 17, 2015

L. Schwalm..... counsel for the Crown

S. Weinstein..... counsel for the defendant

Pringle, J.:

1. Introduction and Overview

[1] Harvey Erlich has pleaded guilty to three counts of gross indecency and admitted the facts of a fourth incident that date back to the 1970’s and 1980. At the time, Dr. Erlich was in his late teens to early twenties and was the conductor of a number of

popular boys' choirs in the Jewish community; the boys were choir members who ranged in age from 9 to 13. One incident involved brief fondling, three involved masturbation, and in the most serious matter, he performed fellatio on a 13 year old boy.

[2] The after-effects of those incidents have remained with some of the boys for years. All four, (now men), testified at a preliminary inquiry in this matter and recalled what had happened to them decades before. At sentencing, two of them read moving Victim Impact Statements: one travelled many miles to confront his abuser and explain how that single act of betrayal by someone he respected and trusted shaped his life with devastating effect.

[3] I heard thoughtful submissions from both the Crown and Defence in this matter. On behalf of the Crown, Mr. Schwalm submitted that a jail sentence of 2 years less a day in a real jail cell was necessary to properly express denunciation and deterrence of the crimes. On behalf of Dr. Erlich, Mr. Weinstein urged me to find that a 12-15 month conditional sentence of jail in the community was appropriate.

[4] After considering all the material and the cases provided to me, I have concluded that a conditional sentence is appropriate here. I am confident that it will provide plenty of denunciation and deterrence in this case now that Dr. Erlich has publicly admitted his guilt in court and in the community. As a result of his plea, he is now a convicted sex offender, and will bear the legal consequences and stigma of that fact for the rest of his life. An 18-month conditional sentence followed by 18 months of probation will result in a very real deprivation of Dr. Erlich's liberty, as well as supervision and support for him over the next three years.

[5] For reasons that I will explain, I am satisfied that it will not endanger the safety of the community to have Dr. Erlich serve a conditional sentence, and I find that in the particular circumstances of this case, a conditional sentence is consistent with the fundamental purpose and principles of sentencing.

[6] It is trite to say that nothing can truly erase the pain that some of the victims have experienced over the years; however, I am hopeful that by knowing this wrong done to them has been exposed and punished, they can now achieve a degree of closure.

2. The Facts of the Offences

[7] Sometime before June of 1972, H.S. was around 11 years old and a member of a choir where Harvey Erlich was the choir master. Dr. Erlich was under 18 at the time. During a break in rehearsals one day, H.S. went to the bathroom in the synagogue and

noticed that Dr. Erlich was standing at a urinal masturbating. Dr. Erlich asked H.S. if he had ever done it before, and H.S. said no, to which Dr. Erlich replied, "it's ok". H.S. was very uncomfortable but didn't disclose this incident to anyone because Dr. Erlich was a respected religious man in the community and in the synagogue.

[8] H.S. came forward to the police in December 2012, when he became aware that Dr. Erlich had been arrested for sexual offences against other boys.

[9] On a choir trip sometime between January 1, 1973 and December 31, 1976 when J.G. was around 9 or 10 years old, the choir was on a bus ride to New York City. Dr. Erlich was 19 or 20, and the choir conductor at the time. While on the bus, he called J.G. over to sit on his lap, and J.G. went over because Dr. Erlich was an adult, and respected by all the boys in the choir. When J.G. noticed that Dr. Erlich had his hand on his crotch and felt him fondling his genitals, J.G. was surprised and felt awkward and returned to his seat.

[10] Like H.S., J.G. came forward to the police in early January 2013 after seeing a news release issued by the Toronto Police Service indicating that Dr. Erlich had been arrested for offences of gross indecency.

[11] Between January 1, 1975 and December 31, 1976, Dr. Erlich was in his early twenties, and D.W. was a 13 year old member of the choir where Dr. Erlich was the choir master. When D.W.'s father asked him to walk Dr. Erlich home on one occasion, D.W. went into Dr. Erlich's home and accepted cookies and a drink from him. Dr. Erlich showed him some pornography and told him to masturbate himself, and helped D.W. remove his pants. Removing his own pants next, Dr. Erlich put D.W.'s penis in his mouth and performed fellatio on him. When Dr. Erlich asked D.W. to perform fellatio on him, D.W. refused and went home.

[12] D.W. disclosed this incident to his father when he was 16 years old. He also went to the police in the fall of 2012 and reported it, along with another incident of abuse by a second choir master. The other choir master was Heshi Nussbaum, who was recently sentenced by Justice Taylor of this court for similar offences during the same time frame.

[13] In April of 1980, Dr. Erlich was 25 years old and the choir master of an Orthodox Jewish boys' choir. J.S. was 11 years old and a member of the choir when he received some extra voice training from Dr. Erlich. On one occasion while they were alone in a basement office, the subject of puberty and masturbation came up, and Dr. Erlich stood up, took his penis out and began to masturbate. He grabbed J.S.'s hand and attempted to place it on his penis, but J.S. resisted and pulled away. Dr. Erlich ejaculated into the

waste paper basket, and warned J.S. that he if told anybody what happened he would be in serious trouble. J.S. did not disclose it to anyone until approximately 20 years later when he told his mother. He also made a report to police at that time, and again in October 2012.

[14] Dr. Erlich was arrested on November 13, 2012. After a preliminary inquiry, he pleaded guilty on February 2, 2015, and admitted the facts of each of the offences relating to H.S., J.G., D.W., and J.S. Findings of guilt were entered in relation to the three offences that occurred when he was an adult.

3. Material provided by Dr. Erlich

[15] Dr. Julian Gojer is a psychiatrist with the Manasa Clinic who prepared a detailed and very helpful 20 page report on Dr. Erlich. Dr. Gojer used a number of recognized risk assessment tools to assess Dr. Erlich, and conducted extensive interviews with him, his family and friends. Dr. Gojer concluded that Dr. Erlich did not pose a risk to re-offend.

[16] Dr. Gojer noted that Dr. Erlich first engaged in sexual behaviours with other males at a time when he was a young teenager and confused over his sexual identity. As he grew into his late teens and early 20s, he continued to have inappropriate sexual contact with males younger than him, some of which forms part of the charges before the court. As he grew older, he realized that he was bi-sexual and began to act on his sexual impulses with adult males. Since his last contact with an underage male in the 1980's, he has not had any sexual contact with young males.

[17] Dr. Erlich's continued homosexual attraction to men as an adult has created tension with his wife, who discovered his secret bisexual life about 3 years ago. As a result, he made a commitment to her that he would seek help and, as he put it, "confront his demons". In July 2011, he began seeing a therapist to help him come to terms with his sexuality and his relationship with his wife. Recently, he has been taking counselling with a therapist for same sex attraction, and he attends therapy with Dr. Gojer as part of a Sex Offender Group program. He has indicated to Dr. Gojer that he would like to resume sexual activity with his wife and restrict all sexual activity to her.

[18] Sharon Erlich wrote an impressive letter to the court about their circumstances. She was very honest about the devastating nature of what she called the "horrible revelations" relating to these offences, and the fact that she had been blind for most of their years together about her husband's bisexual life. She openly expressed her fears that their home would be torn asunder by the charges, and that all the good that she and her

husband had accomplished in raising a family and in the community would be lost. However, she noted that through the support of many friends and her husband's own efforts to strengthen their marriage and his spiritual connections, she believed that the good has not been erased.

[19] Sharon Erlich also explained some of the shame, stress and emotion that their children have had to endure as a result of their father's charges. As she said, it has been a hard pill to swallow and it will never dissolve completely.

[20] Nonetheless, two of Dr. Erlich's sons, his oldest daughter, one of his brothers and a sister-in-law all provided insight into Dr. Erlich's character through the materials placed before me. While this family is obviously struggling with the aftershock of the revelations, they are clearly good people who will provide support to him and incentive for him to continue with his counselling and remain a positive force in the community.

[21] Indeed, many friends and community members attested to Dr. Erlich's character and to his many charitable and generous attributes, notwithstanding their knowledge of his intention to plead guilty to the charges before the court. Colleagues, friends, and members of his religious community spoke about his kindness, his pro bono activities in the dental field where he practices dentistry, his devotion to his faith, and his remorse about these incidents.

[22] The picture that emerged of Dr. Erlich was of someone who struggled with his sexual identity as a teenager and young man, and who committed a number of criminal offences with young boys during that time. Since then it does not appear that he has re-offended, and he has accomplished many good things. Today he is being punished for those crimes committed over 30 years ago.

[23] It is also true that even as an adult, Dr. Erlich continued to live a secret, bisexual life which was contrary to his marriage vows and unacceptable in his conservative religious community. It is something that he has continued to struggle with throughout his adult life, and for which he is undergoing counselling. His lack of honesty in this regard is something that has to be considered in the sentencing calculus, but it is not the subject of these proceedings: homosexuality is not criminal.

4. Brief Legal Analysis

4.1 Aggravating Factors

[24] The Crown rightly points out that the most egregious aspect of the offences was Dr. Erlich's abuse of his position of trust as a religious man and choir master whom all

the boys in the choir looked up to and respected. Dr. Erlich used his position of respect and took advantage of these boys at a time when they were vulnerable and unable to speak up against him. As D.W. explained, he was a scared little boy, powerless and ashamed, unable to confront his perpetrator.

[25] The life-long effect of that betrayal was apparent in both J.S. and D.W.'s Victim Impact Statements. They have suffered from low self-esteem, and been unable to establish meaningful relationships. Depression, anxiety and distrust of others have been common denominators. J.S. also noted that because the incident took place in a synagogue, he felt estranged from his faith and the Jewish community.

[26] In circumstances such as these, the paramount principles of sentencing are denunciation and deterrence. In the cases of *R. v. Slater*, [2014 ONSC 4017 \(CanLII\)](#); *R. v. Cromien*, [2002 CanLII 4807 \(ON CA\)](#), [2002] O.J. No. 354 (C.A.); *R. v. Boudreau*, [2012 ONCJ 322 \(CanLII\)](#); and *R. v. G.O.*, [1997 CanLII 14501 \(ON CA\)](#), [1997] O.J. No. 1911 (C.A.), the courts held that a conditional sentence was not sufficient to meet the needs of general deterrence and denunciation and instead imposed a custodial sentence.

[27] In this case, the age of the victims, the breach of trust and the effect on the victims all cry out for denunciation by the court. While it is not an aggravating factor, it also has to be acknowledged that the victims had to testify at a preliminary inquiry before the plea was entered.

4.2 Mitigating Factors

[28] Dr. Erlich is a 60 year old man with no prior criminal record. Even though his plea of guilty came after a preliminary inquiry, his plea is entitled to recognition as an expression of remorse and a very public acceptance of responsibility of the wrong done to the victims. Moreover, I accept as genuine Dr. Erlich's apology to each of the victims in the court room.

[29] Dr. Gojer's report provides a solid foundation for a finding that Dr. Erlich is not likely to re-offend, (in fact, the psychiatrist opines, "I do not see him as posing any risk to re-offend"). Two other professionals from whom Dr. Erlich sought counselling, Robert Morgan, LCSW, and John Plunkett, MSW, further stated that they saw no indication he had any predilection to young boys or adolescents, or posed any risk of re-offending. These offences took place well over 30 years ago, and there is no evidence that they have recurred.

[30] While Dr. Erlich remains conflicted about his sexual identity with adult males, he

has sought counselling from a number of sources. The 12-step program that he is taking requires honesty and sharing, and one of the group participants attested to Dr. Erlich's strength and hope, indicating that Dr. Erlich has become a role model for the group. In this, he has the support of his wife and family, and he has many friends, colleagues and members of his faith community who will assist him.

[31] In these circumstances, I do not find that Dr. Erlich will pose a danger to the community if permitted to serve a conditional sentence.

4.3 Parity of Sentence

[32] Mr. Weinstein pointed to a number of cases involving sexual assaults or gross indecency on young victims where a conditional sentence was imposed: *R. v. A.C.*, 2011 ONSC 4389 (CanLII), [2011] O.J. No 3379 (S.C.J.), aff'd 2012 ONCA 608 (CanLII), [2012] O.J. No. 4293 (C.A.); *R. v. Palacios*, 2012 ONCJ 195 (CanLII), [2012] O.J. No. 1535 (C.J.); *R. v. Mehanmal*, [2012] O.J. No. 5164 (C.J.); *R. v. Arbuthnot*, [2008] O.J. No. 346 (S.C.J.); and *R. v. Heshi Nussbaum*, an unreported decision of Justice Paul M. Taylor of the Ontario Court of Justice, released May 6, 2014.

[33] In my view, *Nussbaum* is by far the most significant comparison case here. In that case, Justice Taylor sentenced another choir master from the same community as Dr. Ehrlich, who abused six young boys between the ages of 12 and 14 (including D.W. and J.S.) around the same time frame. Mr. Nussbaum also abused his position as a teacher, camp counsellor and volunteer in local schools to commit the offences. The facts in that case were depressingly similar to those found here: use of a position of trust to abuse young boys by fondling, masturbation and fellatio.

[34] There are some differences in the two cases. In events post-dating the matters before Justice Taylor, Mr. Nussbaum had been charged and pleaded guilty to a sexual assault on two young boys in the mid-1980s. At that time, he received a conditional discharge and took significant counselling. As a result, Mr. Nussbaum was diagnosed as a pedophile or hebephile, and agreed to chemical castration. He was permitted to remain as a member of his synagogue.

[35] Justice Taylor noted that Mr. Nussbaum intended to plead guilty from the outset, and did so without the need for the victims to testify. He found that it was of great significance that Mr. Nussbaum had rehabilitated himself, and had been crime free for over 25 years. He found that the principles of denunciation and deterrence could be met by a conditional sentence of 2 years less a day, followed by probation for 3 years.

[36] In Dr. Erlich's case, emanating from the same community and sadly, even involving two of the same victims, it is important to observe some degree of parity in sentencing. In Dr. Erlich's case, although he did not plead guilty as early as Mr. Nussbaum, there were fewer victims and far fewer incidents in totality.

[37] I am satisfied that Dr. Ehrlich too, is genuinely remorseful. While the circumstances of his rehabilitation are different than Mr. Nussbaum's, I find that he too has been crime-free for many decades. Since there is no indication that he is a pedophile or hebephile, he is at even lower risk of re-offending.

4.4 Denunciation and Deterrence

[38] In *R. v. Proulx*, [2000 SCC 5 \(CanLII\)](#), [2000] 1 S.C.R. 61, Justice Lamer held that a conditional sentence can have a significant denunciatory effect and act as a general deterrent. Moreover, in *R. v. L.F.W.*, [2000 SCC 6 \(CanLII\)](#), [2000] 1 S.C.R. 132, (decided at the same time as *Proulx*), the majority of the Supreme Court held that a conditional sentence was in the acceptable range for offences of indecent assault and gross indecency. In that case, the Court upheld a conditional sentence of 21 months for numerous incidents of forced masturbation and fellatio in a locked shed where the victim was a young girl between the ages of 6 and 12.

[39] Since then, the Ontario Court of Appeal has cautioned that it will be the rare case involving the sexual touching of children by adults in a position of trust that a conditional sentence will be sufficient to meet the needs of denunciation and deterrence: see for example, *R. v. D.R.*, [2003 CanLII 9127 \(ON CA\)](#), [2003] O.J. No. 561. Taylor J. addressed this in *Nussbaum*, but nonetheless found that a conditional sentence was appropriate, and I agree with him.

[40] In this case, there were four incidents involving young males, over three decades ago. Although far too belatedly, Dr. Erlich's arrest and court proceedings have now resulted in widespread knowledge and public condemnation of his crimes. While it is true that many people were prepared to nonetheless acknowledge the good that Dr. Erlich has accomplished in the community, every letter and report provided to the court accepted the seriousness of the charges and the shame of the offences.

[41] Through his plea of guilty, Dr. Erlich has accepted and confirmed his responsibility for the wrongs done to H.S., J.G., D.W. and J.S. The court has entered convictions, and found him to be a sex offender. The sentence will include an order for DNA, a sex offender registration requirement for life, as well as substantial deprivations of liberty for Dr. Erlich on a conditional sentence.

[42] Denunciation and deterrence are loudly and publicly present in this case. I am satisfied that the fundamental purpose and principles of sentence are met by a conditional sentence here.

5. Sentence Imposed

[43] The sentence imposed in this case will be a conditional sentence, which is a form of jail but served outside a real jail cell under house arrest. In recognition of the fewer victims and incidents than in the *Nussbaum* case, and considering the absence of evidence of risk, the duration will be 18 months with 12 months of house arrest, and 6 months under curfew. Community service will be ordered in the amount of 90 hours. I will hear submissions on appropriate exceptions and other conditions.

[44] In addition, there will be an order for 18 months of probation once the conditional sentence is completed. While Mr. Weinstein submitted that probation was not necessary, I believe that by his own admission, Dr. Erlich is still struggling with issues of sexual identity and wishes to continue with counselling: probation will provide continued supervision and support in this area. A copy of Dr. Gojer's report, along with these reasons, will be provided to probation.

[45] I agree with the Crown that there should be no exception relating to non-association with H.S. while attending at continuing education programs in their common field of dentistry: Dr. Erlich will simply have to obtain his CEP hours at other events than ones where H.S. is present.

[46] As these are primary designated offences for DNA, there will be an order for DNA. Pursuant to [s.490.013\(2.1\)](#) of the *Criminal Code*, there will also be an order for lifetime registration under the *Sex Offender Information Registration Act*.

Justice Leslie Pringle

Released: to the parties on February 20, 2015; in court on March 17, 2015.

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