NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. J.J.W.***, 2012 NSCA 96

Date: 20121002
Docket: CAC 353674
Registry: Halifax

Between:

Her Majesty The Queen

Appellant

v.

J.J.W.

Respondent

Restriction on Publication: Pursuant to s. 486.4,of the *Criminal Code of Canada*

Judges: MacDonald, C.J.N.S., Oland and Beveridge, JJ.A.

Appeal Heard: June 1, 2012, in Halifax, Nova Scotia

Held: Appeal against sentencing is dismissed per reasons for judgment of Oland, J.A.; MacDonald, C.J.N.S. and Beveridge, J.A. concurring

Counsel: Mark Scott, for the appellant
Vince A. Gillis, Q.C., 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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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:

[1] The Crown appeals the sentence imposed by Judge A. Peter Ross of the Nova Scotia Provincial Court on the respondent, J.J.W. for two assaults contrary to s. 266(a) and 266(b) respectively and sexual assault contrary to s. 271(1)(a) of the *Criminal Code*. For the reasons I will develop, I would dismiss the appeal.

Background

[2] The events giving rise to the charges of assault and sexual assault took place in August and November, 2007. In each case, the victim was the respondent's then wife, AB. The sentence imposed was informed by the judge's decision on conviction. Consequently, I will begin with that decision.

[3] The judge found the respondent guilty of an assault on AB on August 12, 2007. When the respondent and AB were inside Smooth Herman's nightclub, the conduct of a friend upset the respondent. Later when he was outside and coming to pick up his wife, the respondent saw the friend on the sidewalk. In his decision, the judge stated that the respondent:

> ...basically attacked [C], and, as I say, even by his own admission in the process grabbed his wife and threw her, or pushed her away. He attempts to minimize what he did, at least that's my conclusion having heard all the evidence and considered it. Ms. [B], herself, described having been thrown quite forcibly. As she said, he threw me into the middle of the street. She was shocked, it wasn't just a push ...

The respondent did this to his wife in front of family and acquaintances. Other witnesses testified how AB was slammed or thrown to the ground, and rolled into on-coming traffic.

[4] The charge of sexual assault and second charge of assault arose from events at the couple's bedroom on November 24, 2007. The judge described how, although the relationship was strained, the parties maintained a sexual relationship. It is apparent from his decision that the judge did not accept all of AB's detailed description of that evening. At the same time, he stated that in certain places, the respondent's credibility was strained. The judge explained where he had difficulties with the evidence and why. He also observed that the

respondent admitted that he had sexually assaulted his wife to one of his children, his wife's parents, and his own father and brother.

[5] The judge continued:

> . . . I don't think I can conclude beyond a reasonable doubt that there was no consensual sexual contact that evening. I know this is what [A] says. It seems to me it's possible that there was some consensual conduct ... contact, and conduct between the two. But at some point she refused to kiss him, and as I said, he snapped, and I do find that the crown has proven beyond a reasonable doubt that the anal intercourse engaged in that evening was without her consent. There's no indication whatsoever of any objectively reasonable and subjectively honest but false belief in consent that emerges from any of the evidence. He also physically assaulted her a few minutes later when he woke up by kicking her, and throwing her down. And I'm convicting him ... finding him guilty, rather, of a sexual assault upon [AB], and also of committing the simple assault on the 266 as a result of those findings, and those conclusions. (Emphasis added)

[6] I now turn to the judge's decision on sentencing. The judge noted that the Crown had proceeded by way of indictment and the respondent was to be sentenced according to the law in 2007. He stated that a number of principles were engaged, including those pertaining to consecutive or concurrent sentences, and totality. The judge referred to a number of cases, including this court's decision in *R. v. Adams*, 2010 NSCA 42 (which was referred to in our decisions in *R. v. Naugle*, 2011 NSCA 33 and *R. v. Bernard*, 2011 NSCA 53), and the Supreme Court of Canada decision in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.

[7] The judge referred to the victim impact statement. He stated that the impact on the victim "certainly is significant" and noted that the impact of the sexual assault is primarily psychological as opposed to physical. The victim impact statement poignantly conveys the victim's trauma and pain, and how the respondent's actions severely affected her dignity and self-esteem. It began:

> I was raped and beaten by my husband. There was no consent to anything and he lost control and raped me because I said NO. It was my punishment for not responding to him the way he wanted me to. What he did is unforgivable. He hurt me. He humiliated me and has made me feel ashamed of myself. I walk around smiling but hide the hurt, anger, and sadness I feel for what has happened. I still think sometimes that it must of [sic] been my fault but am learning that I didn't make him hurt me - that was a choice he made. I didn't do anything that

> justified what he did. It has taken me the last year talking to Dr. [M] to start believing this. I lost something that night and struggle to get it back. I lost a bit of my self respect and all of my trust. I've never been around violence before and when it happened, I froze. I couldn't fight back and stop what was happened [sic] because of shock and fear and I am still trying to get over the guilt of saying no.

The victim spoke of the psychological damage done to her and her children, the destructive and divisive effect of the sexual assault on the family, and her emotional struggles and loss of trust.

[8] With respect to the circumstances of the offender, the judge referred to the pre-sentence report and letters from certain individuals. The pre-sentence report read in part:

> **EMPLOYMENT**
>
> The offender reported he was employed as a fire fighter with ... from 1995 to May 20, 2011, at which time he was terminated as a result of the current convictions. He advised grievances have been filed concerning same.
>
> The offender reported extensive fire fighter training and various certificates of achievement including assistance with Hurricane Katrina. He advised he created and trained the ... Fire Services and is a qualified instructor of First Aid, CPR and WHIMS.
>
> [AH], Supervisor, ... Fire Services, was contacted for this report. Mr. [H] confirmed he supervised the offender for many years and described the offender as a motivated, good worker who took direction well. Further, Mr. [H] reported the offender was President of their International Union and in that capacity, was responsible for addressing many grievances. ...
>
> According to Mr. [H], the offender has an excellent work record and he would like him to be granted a second chance to pursue his career as a Fire Fighter, suggesting "he was very good at his job".
>
> Previous employment for the offender includes employment as an Airport Fire Fighter at the ... from 1992 to 1995. He advised he left this employment when he was successful in acquiring a position with ....

> The offender reported an extensive volunteer background including the ... Camp, fundraising for Muscular Dystrophy, Crones [sic] and Colitis, Instructing the Babysitting Course at ..., Soccer Coach and Hockey Games for Local Charities.

The respondent had no previous criminal record. In the pre-sentence report he was described as a good parent who was in a new relationship. His father who has terminal cancer relies on him heavily.

[9] The Crown sought a total sentence of two to three years imprisonment. The defence suggested a conditional sentence. The judge's decision reads in part:

> ... The section 271 offence, the sexual assault involves the forced anal intercourse. I heard evidence about the use of the vibrating device, taking clothing off, forced oral sex, mutual forced oral sex, et cetera, but what I could be sure was proven beyond a reasonable doubt was the forced anal intercourse. Looking at that conduct, it is extremely, of course, serious conduct, as the Crown has quite correctly pointed out. Looking at that charge, even if it stood alone, considering this offence as though it were the only offence charged, even with that, I do think that a sentence of less than two years would be fit and appropriate and that, therefore, a conditional sentence is a possibility based on the length of the sentence.
>
> I do not think that Mr. [W] poses a danger to the community at this point and so I don't think a conditional sentence would endanger the community. At the same time, however, I do not think that a conditional sentence of imprisonment would be consistent with the fundamental principles of sentencing as they apply to these circumstances here.
>
> As the Crown has pointed out, the accused forced anal sex upon the victim against her will and despite her protestations he did so to express dominance and control. He impacted the victim significantly, primarily in a psychological sense but significantly and seriously nonetheless.
>
> At the same time, Mr. [W] has suffered some consequences as a direct result of the conviction. He was fired from his job and his job is, obviously, very important to him. I know he's fighting that dismissal but he can't be sure that he'll be successful and even if eventually he wins at arbitration he will still have suffered this consequence to some extent.
>
> Secondly, Mr. [W] has been on conditions since February the 4th, 2008. This is more than three years and he has been before the court for quite a long

> time awaiting trial and sentence. This is certainly, in part, owing to his own elections, re-elections and the inherent time it takes to bring these [matters] to a conclusion. At the same time, having this hanging over his head, I think has been difficult for him and, undoubtedly, difficult for the victim, too. But looking at what the sentence ought to be is the impact on him that is significant here.
>
> And thirdly, the principle of totality comes into play in fashioning the length of sentence for the Section 271 offence. I can only speak to one sentence at a time, to one charge at a time, and there are three. I'm beginning with the most serious but in passing sentence for this offence I do so knowing the sentences that I will be imposing momentarily for the two 266 offences.
>
> And I have, thus, determined for the three reasons given here, the consequences to employment, the awaiting trial and being on conditions and a reduction in accordance with the totality principle, I have determined that the sentence for the sexual assault should be reduced from what it would otherwise be if it stood alone. (Emphasis added)

[10] The judge sentenced the respondent to:

(a) a five month jail sentence for the sexual assault;
(b) a consecutive eight month conditional sentence of imprisonment with house arrest for the assault the same night; and
(c) a consecutive three month conditional sentence of imprisonment for the earlier assault.

In summary, the sentence was a five month jail sentence and an 11 month conditional sentence.

[11] The judge also ordered a DNA and a 10 year firearms ban. After hearing submissions, he refused to make an order pursuant to the *Sex Offender Information Registration Act*, S.C. 2004, c. 10 ("*SOIRA"*).

Issues

[12] The issues on appeal are:

1. Whether the sentence was manifestly unfit;
2. Whether the judge misapplied the principle of totality; and

3. Whether the judge erred in law, and in law and fact, in declining to make a mandatory *SOIRA* order pursuant to s. 490.012 of the *Criminal Code*.

Demonstrably Unfit Sentence

[13] The standard of review for sentence appeals is well established. The approach to be taken on appellate review is a deferential one. In *R. v. L.M.*, 2008 SCC 31, LeBel J. writing for the majority stated:

> [14] In its past decisions, this Court has established that appellate courts must show great deference in reviewing decisions of trial judges where appeals against sentence are concerned. An appellate court may not vary a sentence simply because it would have ordered a different one. The court must be "convinced it is not fit", that is, "that ... the sentence [is] clearly unreasonable" (*R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46, quoted in *R. v. McDonnell*, [1997] 1 S.C.R. 948, at para. 15). This Court also made the following comment in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 90:
>
> > ...absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
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> (See also *R. v. W. (G.)*, [1999] 3 S.C.R. 597, at para. 19; A. Manson, *The Law of Sentencing* (2001), at p. 359; and F. Dadour, *De la détermination de la peine: principes et applications* (2007), at p. 298.)
>
> [15] Owing to the profoundly contextual nature of the sentencing process, in which the trier of fact has broad discretion, the standard of review to be applied by an appellate court is one based on deference. The sentencing judge has "served on the front lines of our criminal justice system" and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender (*M. (C.A.*), at para. 91). In sum, in the case at bar, the Court of Appeal was required -- for practical reasons, since the trier of fact was in the best position to determine the appropriate sentence for L.M. -- to show deference to the sentence imposed by the trial judge.

[14] In *Shropshire* and *M. (C.A.)*, the Supreme Court of Canada held that an appellate court should only vary a sentence if the sentence is "clearly

unreasonable" or "demonstrably unfit". In *R. v. W. (G.)*, [1999] 3 S.C.R. 597, Lamer C.J. emphasized at ¶ 19 that those two standards mean the same thing.

[15] In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court affirmed the sentencing principles in *Shropshire* and *M. (C.A.)*. At ¶ 46, LeBel J. stated:

> [46] Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

Sentencing judges enjoy a broad discretion. That discretion is fettered in part by case law that has, in some circumstances, set down ranges so as to give effect to the parity principle. However, ranges are only guidelines and a sentencing falling outside the regular range is not necessarily unfit (¶ 44).

[16] The Crown pointed out that the judge himself described the sexual assault here as "extremely . . . serious conduct". Forced anal intercourse is a major sexual assault. According to the Crown, the sentence of five months imprisonment that the judge ordered for that offence inadequately reflects the objectives of denunciation and deterrence. It submits that, having regard to the nature of the

offence committed and the circumstances of the offence and the offender, the sentence is simply not sufficient. The Crown also argues that the judge failed to consider the totality of the circumstances in ordering a conditional sentence of imprisonment for the assault convictions, and he overemphasized the impact of the conviction and the process on the offender.

[17] The Crown relied on a number of cases to establish the range of sentence for major sexual assaults and to show that the sentence here was manifestly unfit. These included cases from jurisdictions where the starting point approach has been followed. In Alberta, the starting point for non-consensual vaginal intercourse and other equally serious sexual assaults is three years, presuming a mature person with no criminal record and without pleading guilty: *R. v. Sandercock* (1985) 40 Alta. L.R. (2d) 265, 48 C.R. (3d) 154, 22 C.C.C. (3d) 79 (Alta. C.A.). In *R. v. Arcand*, 2010 ABCA 363, the majority of a five member panel of the Alberta Court of Appeal discussed the use of starting points on an appeal of sentence by an aboriginal man with no prior criminal record who sexually assaulted an unconscious woman. The majority wrote:

> [175] Rape and other major sexual assaults are grave and serious acts of violence. As the Supreme Court explained in ***R. v. McCraw***:
>
> > Violence is inherent in the act of rape.... It seems to me that to argue that a woman who has been forced to have sexual intercourse has not necessarily suffered *grave and serious violence* is to ignore the perspective of women.... *Violence and the threat of serious bodily harm are indeed the hallmarks of rape*.... rape is a crime that is *likely to have serious psychological consequences* and may, as well, have serious physical effects....[Emphasis added by Alberta Court of Appeal]
>
> [176] While these comments were made in the context of rape, that is non-consensual vaginal intercourse, they apply with equal force to other major sexual assaults. When an offender commits a major sexual assault, including rape, against a person, this act of violence causes harm. It is harm to both the victim and society. A major sexual assault constitutes a serious violation of a person's body and an equally serious violation of their sexual autonomy and freedom of choice. These breaches of one's physical integrity and privacy are indisputable and undeniable. That harm, and it is substantial, is inferred from the very nature of the assault. Add to this the serious breach of a person's human dignity and the gravity of a major sexual assault perpetrated on a victim becomes readily apparent.

> [177] In addition to this very grave harm, there is also intrinsic to major sexual assaults the *likelihood of other very real psychological or emotional harm*. That includes fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide. While these effects fall into the psychological or emotional harm category, they may be equally or even more serious than the physical ones but much less obvious, *indeed even unascertainable at sentencing*.
>
> ...
>
> [179] There is another aspect of the harm caused by an offender who commits a major sexual assault. That is the harm caused to society by this kind of criminal activity. Harm to one member of the community affects the rights and security of others. This is particularly striking in cases involving violence against women.

[18] Saskatchewan has adopted a similar starting point for major sexual assaults. See, for example, *R. v. Iron*, 2005 SKCA 84, at ¶ 12.

[19] In Newfoundland, the range for serious sexual assault with intercourse is stated in *R. v. H.A.V.*, 2000 NFCA 14 to be three to five years. The range was confirmed in *R. v. Freake*, 2012 NLCA 10. See however, *R. v. Squires*, 2012 NLCA 20 where the Court of Appeal discussed that range in the context of that particular case.

[20] The Crown points out that in *R. v. P.V.K.* (1992), 116 N.S.R. (2d) 110 (S.C.T.D.), Saunders, J. (as he then was) in sentencing a man found guilty of sexually assaulting his daughter over several years, stated:

> 25 I have considered the approach taken in Alberta beginning with the 1985 decision of the Alberta Court of Appeal in **R. v. Sandercock** (1985), 62 A.R. 382 (C.A.), which reaffirmed its commitment to "the starting point approach" to sentencing in cases of sexual assault. By this method typical categories are stated with precision. A "major sexual assault" would qualify upon evidence of the blameworthiness of the offender and the effect upon the victim. The starting point for a major sexual assault is three years' imprisonment "assuming a mature accused with previous good character and no criminal record". Such a starting point would not include major aggravating factors pointing to a planned and deliberate attack. Certain mitigating factors would include a guilty plea where it spared the victim from testifying or waiting to testify, waiving certain constitutional rights in deference to an expedited trial, remorse, immaturity or the

> totality principle following consecutive sentences. There, as here, the primary goals in sentencing for sexual assault are deterrence and denunciation.

After considering a decision of the Manitoba Court of Appeal, he indicated in ¶ 28 that, in his respectful view, there was much to be said for the approach taken in those provinces. The trial judge in *R. v. O.B. (No. 4)* (1995), 141 N.S.R. (2d) 339 (S.C.) at ¶ 9 agreed with this comment. *Sandercock* was quoted by this Court in *R. v. Blackburn* (1986), 75 N.S.R. (2d) 30 (C.A.) at ¶ 13.

[21] Nova Scotia has not adopted a starting point approach. Rather, this Court has chosen to remain focussed on the principles of sentencing as set out in the *Criminal Code* and the Supreme Court of Canada's affirmations that the approach on review on sentencing appeals is one of deference to the decisions of the sentencing judge.

[22] Since sentencing is such an individualized process and done in the context of the particular circumstances of each case, it is notoriously difficult to find cases that are factually similar. The Crown presented the following summaries, among others, in support of its argument that the five month jail sentence for sexual assault was demonstrably unfit:

> (i) *R. v. T.V.G.* (1994), 133 N.S.R. (2d) 299 (S.C.) -- The offender and victim had been separated a few days before the offence. The offender called her the night preceding the offence causing the victim to be afraid. She took her children next door to her father's house. When she returned to pick up some clothing, the offender confronted her, forced her into the bedroom, and raped her despite her struggles. The offender questioned the victim about her boyfriends as he repeatedly penetrated her. The Court viewed the assault on the former common-law wife as aggravating. The accused came from a stable, hard-working family. Offender and victim had two daughters. Victim Impact Statement demonstrated nervousness on behalf of the common-law wife. Sentence: two years and eight months' incarceration;
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> (ii) *R. v. B.(D.)*, 2005 NWTSC 89 -- Offender pleaded guilty to sexual assault on his common-law spouse. He was a twenty-five year old aboriginal with a work history and volunteer work. He and the victim had two children. He assaulted the victim two months prior to the sexual assault. The Court concluded that sexual assaults committed by a man against his wife are more serious than other sexual assaults. The range in that jurisdiction for a first offence involving full sexual

intercourse was two to four years' imprisonment. Sentence: two years less one day;

(iii) *R. v. S.D.M.* (1995), 141 N.S.R. (2d) 203 (S.C.) -- Twenty-six year old offender with driving offences sentenced to two years' imprisonment for sexual assaults on common-law spouse. Record did not manifest violence, though indicated a lack of control and responsibility on the offender's part;

(iv) *R. v. Toor*, 2011 ONCA 114 -- Appellant was a first time offender convicted of assault causing bodily harm, sexual assault and sexual assault causing bodily harm. He had punched the victim, dragged her across the floor, and violently forced sexual intercourse on her. Children were present. Appellant had subjected her to a situation of psychological imprisonment within the family unit. Sentence of four years upheld on appeal;

...

(vi) *R. v . Smith*, 2011 ONCA 564 -- Numerous counts involving two victims on the sentence appeal. The facts involved a death threat to D.Q., and assaults on M.O., including a sexual assault. The Court endorsed the proposition that in cases of sexual assault involving forced intercourse with a spouse or former spouse, sentences generally ranged from twenty-one months to four years. The Court noted that the Crown had chosen to not cross-appeal sentence, and therefore would not impose a sentence exceeding three years' incarceration;

(vii) *R. v. M.(B.)*, 2008 ONCA 645 -- Accused had been sentenced to nine months' imprisonment with two years' probation and SOIRA Order for seven years of compliance. The Crown appealed. The Court allowed the appeal, increasing the imprisonment term to two years less one day, and a mandatory twenty year SOIRA Order. The Respondent had engaged in anal intercourse with his developmentally delayed wife without her consent. The Court indicated that prior abusive conduct may be relevant to the sentencing to show the character and background of the offender, particularly to assess the need for individual deterrence, rehabilitation, or the protection of the public. Sentence at trial failed to send the message that those who victimize their partners within the context of the marital relationship must know that serious consequences will follow;

(viii) *R. v. Cook* (1994), 92 Man.R. (2d) 231 (C.A.) -- Accused pleaded guilty to one count of sexual assault on his common-law wife and sentenced to four years' imprisonment. A knife was used involving forced anal and oral intercourse. A four year sentence was upheld on appeal;

...

> (x) *R. v. D.W.G.*, 1999 ABCA 270 -- Crown appeal of four month sentence plus one year probation for a sexual assault on the common-law wife. The Respondent served four months in remand. The facts illustrated a violent attempt at rape. The victim, trying to sleep, was confronted by her common-law husband who had been drinking. He slapped her, stripped her naked, choked her with one of his forearms across her throat, and attempted to have intercourse. He was too drunk to complete the sex act and she was eventually able to get away. The Court of Appeal took the view that the sentence was not fit. A sentence at first instance of three and one-half years would have been appropriate. The sentence, however, was reduced to eight months due to the fact that the Respondent had already completed the custodial portion of his sentence and four months' pre-trial custody.

[23] In these summaries, the lowest sentence for sexual assault is two years less a day in each of *B.(D.)* and *M.(B.)*.

[24] The respondent also relies on case law to buttress his argument that the judge's sentence should not be disturbed. However, his authorities are largely distinguishable. I will now discuss his cases.

[25] In *R. v. R.G.,* 2003 NLCA 73, the offender was sentenced to six months imprisonment for an act of non-consensual sexual intercourse with his spouse. In upholding the sentence, the Court of Appeal indicated that "in this Province the normal range of sentence for sexual assault involving penetration is three to seven years." However, it concluded the trial judge was correct in concluding that "the circumstances of this case are quite unusual and that this case is an appropriate one for a sentence below the normal range." There the couple remained together after the assault and had consensual relations for another seven months. The wife gave a statement to the police only after their separation. Moreover, the offender had served his sentence and been released. None of these facts are present in the matter under appeal.

[26] The respondent also pointed to another case from Newfoundland and Labrador, *R. v. G.W.P.,* 2006 NLTD 136. In that case, the spouse of the complainant was sentenced to five months imprisonment for an unsuccessful attempt to have non-consensual sexual intercourse with his wife. The two had been arguing, and he pushed the complainant onto the bed and pulled down her clothes and restrained her in an attempt to have sexual intercourse. She said it

lasted about 15 to 20 minutes and was quite frightening. Unlike the situation here, there was no penetration. In addition, the judge there relied upon *R.G.* which I have already distinguished on the facts.

[27] The respondent referred in *R. v. R.H.* (1994), 149 A.R. 230 (Alta. C.A.) where the offender forced his common-law spouse to have non-consensual sexual intercourse. The parties subsequently reconciled and married. The Court of Appeal increased the sentence from six months imprisonment to 15 months. It stated that a proper sentence was 18 months but the fact that the accused had already served the sentence created an expectation on his part. Neither the reconciliation or marriage justified a reduction in sentence.

[28] The respondent argues that in *R.H.* the sentence was 15 months, while he received a 16 month sentence, five of which were conventional jail time and the remainder house arrest but, nonetheless, a sentence totalling 16 months. However, the sentence in *R.H.* was only for the sexual assault and did not include assaults which the respondent incorporates into his calculation. Moreover, *R.H.* is no longer the law in Alberta. *Arcand* has confirmed *Sandercock* which established a starting point of three years imprisonment.

[29] Finally, the respondent drew our attention to *R. v. L.F.W.*, 2000 SCC 6. The accused, a 55 year old man with no previous criminal record, was convicted of indecent assault and gross indecency against his cousin over a six year period when she was between six and twelve. The trial judge sentenced him to a 21 month global sentence of imprisonment, to be served in the community. The Newfoundland Court of Appeal affirmed that sentence. The Supreme Court of Canada heard the appeal in *L.F.W.* together with the appeal in *R. v. Proulx*, 2000 SCC 5 and other cases. It applied the general principles governing the conditional sentencing regime set out in *Proulx* to the facts of that case.

[30] The respondent is correct that *L.F.W.* "is yet another precedent speaking to the need for appellate review to be deferential to the sentence imposed by a trial judge" and that there the Supreme Court of Canada "adopted a non-interventionist position". However, the deferential approach on appellate review of sentence is not in dispute. Furthermore, that case does not concern a sexual assault of the kind which is the subject of this appeal, and so is not helpful in determining the adequacy of the sentence.

[31] At the hearing of the appeal, the respondent acknowledged that he had not been able to find any case law where the sentence was as low as five months for sexual assault involving penetration.

[32] I agree with the Crown that a five month sentence for this sexual assault, forcible anal intercourse, is demonstrably unfit. In doing so, I recognize that sentencing judges are entitled to considerable deference from the appellate courts, and that ranges as established by case law are only guidelines intended to assist sentencing judges. However, the discrepancy between the sentence here imposed for a grave sexual assault, one committed by the appellant to dominate and control his wife, namely five months imprisonment, and the next lowest sentences found in the case law for similar major sexual assaults in comparable circumstances, namely two years less a day, is simply too large to ignore. The sentence contravenes the principle of parity. Persons convicted of serious sexual assaults must appreciate that the principles of sentencing include specific and general deterrence and denunciation, and such offences will attract serious consequences. The five month sentence of imprisonment for sexual assault on a spouse does not send that message. In my view, considering the principles of sentencing as set out in the *Criminal Code*, it is clearly unreasonable.

[33] Moreover, the reasons given by the judge show that he erred in principle. He pointed to three considerations in arriving at a sentence of five months incarceration: delay in the proceedings, loss of employment, and the principle of totality.

[34] If the delay in the completion of the trial process is lengthy and beyond the control of the offender, or if there is delay attributable to Crown conduct, delay can be a mitigating factor on sentence: see *R. v. Spencer* (2004), 186 C.C.C. (3d) 181 (Ont. C.A.) at ¶ 41.

[35] The Information charging the respondent was sworn on February 5, 2008. The Court Appearance Record is straightforward. It shows that at his first appearance in April 2008, the respondent elected trial before a judge and jury. In December 2008, he re-elected to judge alone and, at that time, the trial was set down for March 2, 2010. It was subsequently rescheduled to May 6, 2011. There

is no indication of any unusual matters that slowed the court process. Nor is there any suggestion of delay attributable to actions or failures to act by the Crown.

[36] In *Spencer,* Doherty J.A. for the Ontario Court of Appeal wrote:

> **43** In deciding whether any delay in the completion of the process should mitigate sentence, it is appropriate to consider an offender's bail terms. The more stringent those terms, the more likely it will be that any delay in completion of the process will have some mitigating effect on sentence. Indeed, even absent delay, particularly stringent bail conditions can have a mitigating effect on sentence. ...

[37] Here, after the Information was sworn in February 2008, the respondent entered into an undertaking. When he first appeared in court that April, he again entered into an undertaking. Both those undertakings required him to keep the peace, not possess a firearm, not consume intoxicating substances, not be at a certain location, and not communicate with the complainant. These conditions are neither onerous nor unusual. He was at liberty throughout the proceedings until his convictions in May 2011.

[38] In my view, although the judge correctly noted that the appellant had been on conditions for more than three years and he had been before the courts for "quite a long time" which had been difficult for both the appellant and the victim, neither the terms of the appellant's undertakings, nor the length of time needed to complete the trial process, warranted any mitigation of his sentence.

[39] I turn then to the second reason the judge gave for reducing sentence, namely the respondent's loss, as a result of conviction, of his long-time employment as a firefighter. Clayton C. Ruby et al., *Sentencing*, 7th ed. (Markham, Ont: LexisNexis, 2008) at § 5.230 - 5.231 reads:

> **§5.230** Loss of employment is a serious blow for anyone, and it may mean the destruction of an entire family. It is, therefore, always serious, and must be considered as part of the circumstances in which penalty is being imposed ... Any job loss is mitigating.
>
> **§5.231** A loss of employment is a frequent result of criminal conviction for persons in every walk of life, particularly for those in the public service such as police, school teachers, firefighters and professionals. The possibility of future

> loss of employment may be taken into account. Loss of a pension would be significant. Bankruptcy as a result of the arrest is a mitigating factor.

[40] Loss of employment as a mitigating factor is reflected in the case law. See, for example, *R. v. Ens*, 2011 MBQB 301, at ¶ 20; *R. v. Maguire*, 2005 CarswellOnt 1696 (S.C.), at ¶ 23; *R. v. Campbell* (1992), 102 Nfld. & P.E.I.R. 259 (P.E.I.S.C.T.D.), at ¶ 8-11. However, while it may mitigate the need for specific deterrence for a guilty plea, it does not displace general deterrence and denunciation: see *R. v. Jaikaran*, 2007 ABCA 98. Moreover, an error in assessing mitigating circumstances, such as job loss, may offend the principles of proportionality and parity and lead to an increased sentence on appeal: see *R. v. Van de Wiele*, [1997] 3 W.W.R. 477 (Sask.C.A.).

[41] The third reason the judge gave for a reduction in the sentence for the sexual assault was the application of the totality principle. He stated that in passing sentence for that offence, he did so knowing that he would also be imposing sentence for the two assault offences.

[42] The totality principle applies when several sentences are imposed. It calls on the judge to take a last, careful look at the total of all the sentences to ensure that it does not offend the principle of proportionality. While the application of the totality principle can lead to a reduction of the overall sentence, it does not always do so. Here, although the judge referred to the Court's decision in *Adams*, it is not apparent from his reasons that he conducted the requisite analysis.

[43] In my view, the sentence itself and the judge's three reasons for reducing sentence show error in principle. It appears that the judge gave the respondent's personal circumstances excessive importance. Although he took specific deterrence into account, he failed to consider appropriately general deterrence and denunciation.

The SOIRA Appeal

[44] The judge refused to make the *SOIRA* order sought by the Crown. In doing so, he relied upon a statutory exemption. He reasoned:

> ... I think the central feature of these crimes is violence and not sexual proclivities or sexual propensities. It is not a case a childhood sexual abuse, you know, the

> pedophile or anything of that sort. The conduct arose within a domestic context. He has a new partner who says it's a good relationship. I don't think that there's really any public interest or public protection served in requiring sexual offender information registration in this particular case in comparing the type of conduct to the impact and privacy. There is a serious disproportionality and so I'm going to decline to impose the requirement to register under that legislation.

Before this Court, the Crown submitted that the judge erred in law, and in law and fact, in declining to make the order pursuant to s. 490.012 of the *Criminal Code*. In two unsolicited post-hearing submissions, it provided additional information to the Court.

[45] The authority for a sentencing judge to direct a person sentenced on conviction of a crime to register under the *SOIRA* is found in the *Criminal Code*. Section 490.011 sets out the definition of "designated offence." Those offences are divided among six paragraphs. Since sexual assault (s. 271) is found under paragraph (a) of the definition of "designated offence", s. 490.012(1) applies. It reads:

> **490.012** (1) When a court imposes a sentence on a person for an offence referred to in paragraph (a), (c), (c.1), (d) or (e) of the definition "designated offence" in subsection 490.011(1) or renders a verdict of not criminally responsible on account of mental disorder for such an offence, it shall make an order in Form 52 requiring the person to comply with the *Sex Offender Information Registration Act* for the applicable period specified in section 490.013.

[46] Section 490.012(1) uses the word "shall" rather than the permissive "may." As a result, in cases governed by that provision, an order is mandatory on application by the prosecutor after conviction of a designated offence.

[47] Prior to the *Protecting Victims From Sex Offenders Act*, S.C. 2010, c. 17, s. 490.012(4) of the *Criminal Code* provided for a possible exemption:

> **490.012(4)** The court is not required to make an order under this section if it is satisfied that the person has established that, if the order were made, the impact on them, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under the *Sex Offender Information Registration Act*.

[48] The s. 490.012(4) exemption called for a balancing of interests. The impact of registration on the offender's interests as an individual, including his or her interest in privacy or liberty, was to be weighed against the public interest in protecting society through the effective prevention and investigation of sexual offences through registration of information about sex offenders. Only where the impact of registration on an offender's individual interests would be *grossly* disproportionate to the public interest is an exception to registration to be granted. The burden of establishing a grossly disproportionate impact rested on the offender.

[49] I turn then to the standard of review on an appeal of a *SOIRA* order. In *R. v. Debidin*, 2008 ONCA 868, Watt J.A., for a unanimous court, wrote:

> **71** Section 490.014, which confers on the prosecutor and offender the right to appeal the refusal or grant of a *SOIRA* order and describes the dispositive authority of the appeal court, is silent about the standard of review that prevails. Similar language appears in s. 487.05(4), which governs appeals from grants or refusals of DNA orders. In each case, an appeal court may alter a decision only where the sentencing judge has:
>
> i. erred in principle;
>
> ii. failed to consider a relevant factor;
>
> iii. overemphasized an appropriate factor; or
>
> iv. made a clearly unreasonable decision.
>
> *Redhead* at para. 13; *R.C.* at paras. 48-49; *R. v. Turnbull (A.)* (2006), 261 Nfld. and P.E.I.R. 241 (N.L. C.A.), at para. 21.

[50] On appeal, the Crown argued that the judge erred by declining to make a *SOIRA* order pursuant to the s. 490.012(4) exemption. The respondent made submissions towards having the judge's reasoning in refusing that order upheld.

[51] In a letter sent to the Court a month after the hearing of the appeal, the Crown correctly pointed out that s. 5 of the *Protecting Victims From Sex Offenders Act,* which came into force April 15, 2011, eliminated the exemption under s.

490.012(4) and made offenders found guilty of the designated offences subject to an order for automatic inclusion in the national registry. Any judicial discretion to decline to impose such orders for the reasons set out in former s. 490.012(4) vanished.

[52] The sentencing hearing in this matter took place on July 13, 2011. The s. 490.012(4) exemption was not available when the respondent was sentenced. This was not brought to the judge's attention nor, indeed, to this Court's attention before or at the hearing of the appeal. The Crown acted properly in writing to this court when it realized that the submissions by it and defence counsel were not well-founded in the law.

[53] In its most recent letter, the Crown drew to the Court's attention the very recent decision of the New Brunswick Court of Appeal in *R. v. Chisholm*, 2012 NBCA 79. There, Drapeau C.J.N.B. writing for the court reiterated that appeals are creatures of statute and that there must be a statutory basis for appellate intervention. After reviewing the relevant provisions of the *Criminal Code* and the jurisprudence pertaining to whether such orders are sentences, he concluded that there is no right of appeal for *SOIRA* orders issued under s. 490.012(1), as here. As a result, the Crown's appeal against the duration of the order had been initiated without lawful authority, and its Notice of Appeal was quashed.

[54] Although the question in *Chisholm* pertained to the duration of the *SOIRA* order, here the appeal is of the judge's decision not to impose any such order. However, that difference does not affect the careful analysis undertaken in *Chisholm*. In my view, the reasoning is persuasive. Accordingly, the Crown had no right of appeal from the judge's decision. I would quash its ground of appeal regarding *SOIRA*.

The Appropriate Sentence and Reincarceration

[55] The judge sentenced the respondent to a five month jail sentence for the sexual assault on his former spouse, an eight month conditional sentence with house arrest for the assault on her the same night, and a three month conditional sentence for the earlier assault. The sentences were consecutive. The respondent has served the term of imprisonment for sexual assault, the conditional eight month

sentence with house arrest for the assault that same night, and the final conditional three month sentence for the first assault. There have been no reporting problems.

[56] The lowest sentence in the jurisprudence presented by the parties for sexual assault alone is two years less a day. In seeking a conditional sentence at trial, counsel for the defence could not and did not strenuously argue that a penitentiary term would not be fit. Rather, he stated:

> "less than two years is not inappropriate. I'm not saying that more than two years is outside the range either."

[57] Where I determined that the trial judge committed an error in principle, the sentence he imposed is no longer entitled to deference and it falls to this court to impose the sentence it thinks is fit. What is an appropriate sentence for this offender in the particular circumstances of these offences? Does that sentence include imprisonment?

[58] The Crown submits that, in light of a sentence that it describes as "woefully inadequate sentence", the appellant should be reincarcerated. In its written submission on appeal, the Crown reiterates its recommendation at trial for a sentence of two to three years imprisonment for the sexual assault and two assaults. Asked at the hearing to refine its recommendation, the Crown suggested two and one-half years, perhaps adjusted down to two years because of the reincarceration, less time already served.

[59] The Crown relies on several cases where courts ordered reincarceration because the sentence imposed at trial was so manifestly unfit. In *R. v. Escott* (1985), 10 O.A.C. 89, 1985 CarswellOnt 1461 (C.A.), the respondent plead guilty to aggravated assault. After drinking heavily, he picked up a prostitute, choked her with his hands until she lost consciousness, and left her unconscious on the road with a belt tied tightly around her neck. He was 21 years old when he committed this crime, and had no prior record.

[60] The Ontario Court of Appeal held at ¶ 7 that the 90-day intermittent sentence followed by 3-years probation was "wholly inadequate to reflect the gravity of the offence and to express society's revulsion of the conduct involved in the commission of the offence." It took into account the respondent's sincere efforts in

the eight years since the offence to rehabilitate himself, his abstention from alcohol, his success in university, his employment, and his compliance with the terms of his probation. It recognized the strong character evidence presented in support of the respondent. Nevertheless, the Ontario Court of Appeal determined that reincarceration was required:

> 13 An appellate court is always reluctant to re-incarcerate an accused after he has served the sentence imposed by the trial judge and will only do so where the sentence is so inadequate that the interests of justice require the court's intervention. This is such a case.

The respondent received credit for the 90 days he had served and was ordered to spend one year less 90 days in prison.

[61] The Crown also drew our attention to two recent decisions of the Ontario Court of Appeal which dealt with reincarceration, namely *R. v. D.G.F.*, 2010 ONCA 27, and *R. v. Leo-Mensah*, 2010 ONCA 139, leave to appeal to the SCC refused [2010] S.C.C.A. No. 170. In *D.G.F.*, the appellant plead guilty to two counts of sexual assault, three of making child pornography, and one each of possessing and distributing child pornography. The facts were horrific. The victim of his sexual assaults was his own four year old daughter. The child pornography he transmitted included images of her. His actions included a live sexual assault of his daughter which the respondent transmitted by webcam in an internet chat room set up for pedophiles. The respondent, 35 years old at sentencing, had no criminal record. Although the Crown requested a seven-year sentence, the trial judge gave the offender 28 months credit for time in pre-trial custody and ordered 20 more months in custody, followed by three years on probation.

[62] Writing for the court, Feldman J.A. observed at ¶ 29 that the range for such offences can extend "well into the double-digit level." She determined that the effective sentence of four years imposed by the trial judge was manifestly unfit and failed to reflect the gravity of the conduct and the moral blameworthiness of the offender. She stated:

> **33** In most cases, this court is reluctant to re-incarcerate an offender who has served the sentence originally imposed and has been released into the community: see, for example, *R. v. C.N.H.* (2002), 62 O.R. (3d) 564 (Ont. C.A.); *R. v. Mann*, [1995] O.J. No 474 (Ont. C.A.). The factors referred to, Crown delay and the

> respondent's progress in the community, would also militate against an order that would require the offender to be re-incarcerated: *R. v. Crazybull*, [1993] A.J. No. 473 (Alta. C.A.); *R. v. Banci*, [1982] O.J. No. 58 (Ont. C.A.).
>
> **34** However, this is a case where the sentence imposed was so far below the sentence that was required and was "so inadequate that the interests of justice require the court's intervention": see *R. v. Cheng* (1991), 50 O.A.C. 374 (Ont. C.A.), at para. 5.

The appellate court imposed the sentence of seven years which had been recommended by the Crown at trial and had been the basis for the respondent's guilty plea. Although the respondent had already been on release for nine months and was receiving treatment and making progress, and although the Crown had caused pre-appeal delay, the respondent was re-incarcerated.

[63] The Crown also pointed to *Leo-Mensah* to support its argument for reincarceration. There the respondent who prepared income tax returns provided false charitable donation receipts to clients. Over a three-year period, he submitted over 800 returns which led to over $3,000,000 in tax refunds. At trial, he plead guilty to two counts of tax evasion and one of fraud. The judge gave him double credit for pre-trial custody, sentenced him to one further day in jail, and ordered a fine of $145,766.

[64] The Ontario Court of Appeal determined that the judge had made several errors, including the imposition of a sentence below the range for large-scale fraud cases which usually attract a penitentiary sentence unless there were extraordinary mitigating circumstances. After determining that the sentence was manifestly unfit, it reiterated:

> **15** While this court has been reluctant to re-incarcerate an offender who has served the sentence originally imposed and been released into the community, reincarceration is warranted where the original sentence was so far below that which was required that the interests of justice require the court intervene: see *R. v. D.G.F.*, 2010 ONCA 27 at paras. 33-34. In my view, this is such a case and a period of reincarceration is necessary.

It allowed the Crown's appeal and imposed a further two-year period of incarceration.

[65] In his submissions on a fit sentence and against reincarceration at the hearing of the appeal, the respondent argued vigorously that he had already served most of the sentence imposed by the trial judge, he was doing well, and no purpose would be served by his reincarceration. He relied heavily on the recent decision of this court in *R. v. Best*, 2012 NSCA 34. There the trial judge found the appellant guilty of break and enter and aggravated assault committed with another person. He ordered a 90-day intermittent sentence followed by a two-year term of probation, based on the offender's secondary involvement in the assault (not landing any blows) and the apparent spontaneity of the attack.

[66] On appeal, MacDonald C.J.N.S. writing for the court, concluded that the sentence was unfit - it should have been around the three-year mark. However, he declined to substitute an additional sentence involving incarceration. In his reasons, the Chief Justice explained why exceptional relief could be given. In doing so, he addressed relevant criteria as set out in certain case law:

> [34] ...in my view, this is one of those rare cases where, despite the initial inadequate sentence, it is no longer in the interests of justice to re-incarcerate Mr. Best. I say this because he has completed his term of incarceration and is well into his period of probation. Furthermore, by all accounts he is doing well. In these exceptional circumstances, I am convinced that sending him back to jail would not serve the interests of justice.
>
> [35] I realize that this represents an exceptional form of relief. However it is not unique. For example, in **R. v. Butler**, 2008 NSCA 102, the Crown appealed a community sentence for armed robbery (robbing a taxi driver at knife point by an offender suffering from addictions). This court found this disposition to be demonstrably unfit in the circumstances and declared a 30-month sentence to be appropriate: ...
>
> [36] However, despite this conclusion, the court resolved not to incarcerate Mr. Butler:
>
> > ¶39 Although I have concluded that the sentence imposed by the trial judge, notwithstanding the need for rehabilitation, inadequately reflects denunciation and general deterrence, in view of the sentence served and the post-sentence update, I am not persuaded that it is in the interests of justice to now substitute incarceration for the conditional sentence. (See, for example, **R. v. C.S.P.** 2005 NSCA 159, [2005] N.S.J. No. 498 (Q.L.) (C.A.); and **R. v. Hamilton**, [2004] O.J. No. 3252 (Q.L.) (C.A.) and **R. v.**

> **Edmondson**, 2005 SKCA 51, [2005] S.J. No. 256 (Q.L.) (C.A.); leave to appeal refused [2005] S.C.C.A. No. 273).
>
> ¶40 Mr. Butler has successfully completed the six month addiction program at Booth Centre. He is pursuing an upgrading program with a view to entering Community College for which he has funding in place. It would not be in the interests of justice to now commit him to a prison environment which may adversely affect his rehabilitation (**R. v. Bratzer, supra**, at para. 47 and **R. v. Parker** [1997] N.S.J. No. 194 (Q.L.) (C.A.)). I have considered, as well, the fact that Mr. Butler, having spent five and one half months on remand, prior to trial, is now aware of the realities of prison life. Indeed, that experience may well have motivated him to get his life in order and will hopefully keep him moving forward on that path. (**R. v. C.S.P., supra; R. v. Hamilton, supra; R. v. Edmondson, supra; R. v. Symes**, [1989] O.J. No. 528 (Q.L.) (C.A.); **R. v. Shaw**, [1977] O.J. No. 147 (Q.L.) (C.A.); **R. v. Boucher**, [2004] O.J. No. 2689 (Q.L.)(C.A.); **R. v. Hirnschall**, [2003] O.J. No. 2296 (Q.L.) (C.A.); **R. v. Fox**, [2002] O.J. No. 2496 (Q.L.) (C.A.); and **R. v. G.C.F.**, [2004] O.J. No.3177 (Q.L.) (C.A.)).

[37] A similar approach has been taken by other Canadian appellate courts. For example, in **R. v. Shaw**, [1977] O.J. No. 147, two respondents were convicted of "serious drug trafficking offences" for which the trial judge gave them no jail-time, but rather, strict probation for two years. The sentences were imposed ten months after the offence, and at the time of the appeals the two respondents had carried out four months of their two-year probation order. Post-sentence reports meanwhile indicated that their work records were exemplary, and that their community involvement was providing needed services in the community. The Ontario Court of Appeal observed: "[i]t is apparent that the rehabilitation program directed by the trial judge is working" and "[t]o impose a custodial term now would be a sentence far more crushing than it would have been if it had been imposed at the time of trial". The court moreover stated:

> ¶15 Although as I have observed this was a case in which an appropriate sentence should have included the imposition of a custodial term, in the circumstances which now confront this Court general principles of sentencing are not paramount.

[38] Then in **R. v. Boucher**, [2004] O.J. No. 2689, the respondent was sentenced to two years (less one day) plus two years of probation for attempting to murder his estranged wife. The Ontario Court of Appeal held that this sentence was unfit and that a term of six years less time on remand was more appropriate.

> However, the sentence at trial was varied only to increase the probation period to three years. The court stated:
>
> > ¶33 ... [A]t the time this appeal was heard, [the respondent] had been out of custody for several months. On the record before us, there is no indication that the [respondent] has made any attempt to contact the complainant, or otherwise repeat his previous misconduct, since being released. This court has commented on other occasions about the potentially deleterious impact of re-incarceration, particularly in relation to its effect on rehabilitation.... In all of the circumstances, I do not consider that it would be in the interests of justice to re-incarcerate the appellant at this time.
>
> See also: **R. v. C.S.P.**, 2005 NSCA 159 and **R. v. G.C.F.**, [2004] O.J. No. 3177 (ONCA).
>
> **DISPOSITION**
>
> [39] Therefore, despite the judge issuing a sentence that was demonstrably unfit, it is no longer in the interests of justice to re-incarcerate the respondent. In the result, I would dismiss the appeal.

[67] For a recent appellant court decision where it was held that although a fit sentence would have been four years imprisonment, in the particular circumstances of that case, the interests of justice were best served by allowing the conditional sentence of two years less a day to run its course, see *R. v. Kane*, 2012 NLCA 53.

[68] In *R. v. Veysey*, 2006 NBCA 55, the New Brunswick Court of Appeal provided a helpful overview of some of the facts taken into account when appellate courts decide the difficult issue of reincarceration when the sentence imposed at trial was too low:

> **32** We find nothing inherently harsh or oppressive in jailing a person who has served a sentence that was demonstrably unfit. The fact that the original sentence has been fully served does not, by itself, warrant special consideration. At the same time, we are left with the Supreme Court's caution that to require an accused to serve a fit sentence after having completed an unfit one may lead to an injustice. Thus, one must be prepared to recognize that in certain instances reincarceration could work an injustice. The difficult task is to identify the circumstances in which reincarceration would work such a result. In short: What constitutes special circumstances? Having regard to the jurisprudence discussed above, we have

> isolated four factors that one could reasonably consider relevant to the issue of whether a stay should be granted. This is not to suggest that the list is exhaustive. Other pertinent factors may exist. However, for purposes of deciding this appeal, we are content to examine the following: (1) the seriousness of the offences for which the offender was convicted; (2) the elapsed time since the offender gained his or her freedom and the date the appellate court hears and decides the sentence appeal; (3) whether any delay is attributable to one of the parties; and (4) the impact of reincarceration on the rehabilitation of the offender.

In addition to the factors in this non-exhaustive list, others include that relied upon by the Crown in this case, namely where the sentence imposed was so manifestly unfit that reincarceration is required; and the hardship occasioned by imposing sentences of imprisonment on appeal, such as where, had the offender received the appropriate sentences at trial, they would have been released from custody on parole months ago: see *R. v. Hamilton*, 2004 CarswellOnt 3214 at ¶ 165.

[69] The crimes committed by the respondent - two assaults and a sexual assault, all against the woman who was then his wife - were serious offences. The evidence established a basis for the trial judge's concern about the respondent's "propensity towards violence".

[70] In the first assault, in order to engage another person, the respondent shoved the victim aside and onto the ground. This sudden and public assault demonstrates his callous disregard for her personal safety. The respondent committed a reprehensible sexual assault by forcing anal intercourse on his victim. He responded to her saying "no", which she was entitled to do, by domineering and humiliating her. He damaged her psychological health. The respondent then committed a further assault by kicking his victim following the sexual assault.

[71] The victim of the crimes committed by the respondent was his then wife, the mother of their children. His offences are ones which involved domestic violence, and for which the level of moral blame worthiness is high. They are factually distinguishable from the break and enter and secondary involvement in an aggravated assault on an acquaintance in *Best*, and the robbery of a taxi driver in *Butler* and the drug trafficking in *Shaw*, both of which are relied upon in *Best*.

[72] The respondent has served the five month custodial portion of his sentence and all of the eight months conditional sentence with house arrest. He has just finished the final three month conditional sentence.

[73] Another relevant factor concerns the length of any delay in proceeding to the appeal and the party responsible for such delay. Neither the Crown nor defence counsel suggests there was any such delay here.

[74] This brings me to the impact that reincarceration would have on the rehabilitation of the respondent. The court was not presented with a post-sentence report. However, both Crown and defence counsel indicated that the respondent has been seeing a psychiatrist and is involved in a family violence program. The Crown does not say that he is not making progress or that his efforts are other than sincere. However, it suggests that if the respondent is reincarcerated, he can continue his involvement in that program while imprisoned. The respondent is seeking reinstatement to his position as a firefighter and his grievance arbitration was to be heard following his appeal. His counsel suggested that the arbitration would be "pretty much" determined if the respondent was reincarcerated. The respondent is also enrolled in a heavy equipment course.

[75] I have given the determination of an appropriate sentence and whether such a sentence should include reincarceration most anxious consideration. The reincarceration aspect is a close call. Having reviewed the case law, I agree with the Crown's position that, for this offender and these offences, a fit sentence for the sexual assault and two assaults would have been two and one-half years in custody. However, while the sentence imposed was demonstrably unfit, in my opinion it is no longer in the interests of justice to reincarcerate the respondent.

[76] As the cases cited by the Crown illustrate, even if an offender has already been released from custody and there are mitigating factors, an appellate court will reincarcerate an offender if the interests of justice require. The interests of justice require a holistic assessment of the objectives of sentencing and the offender's circumstances and what would be accomplished by him spending more time in custody. Resolution of this issue is not simply a mathematical or formulaic exercise, and number crunching alone will not determine whether reincarceration should be ordered. There is no stringent formula to follow, nor would one be appropriate.

[77] In this case, the sentence was for 16 months with 11 of those served in the community. When this appeal was heard, the respondent had completed the five month custodial portion of his sentence and the eight month conditional sentence portion which included house arrest. When this decision is released, he will have served the final three month conditional sentence. He followed the terms of those conditional sentences without fail. He is involved in a family violence program, and taking training that will assist in his finding employment should his efforts to be reinstated as a firefighter be unsuccessful. If those efforts should be successful, reincarceration could adversely affect his employment. In my view, returning him to custody would have a negative impact on the respondent's rehabilitation. It would not serve the interests of justice.

Disposition

[78] I would quash the ground of appeal regarding the judge's decision not to impose a *SOIRA* order, and would dismiss the appeal.

Oland, J.A.

Concurred in:

MacDonald, C.J.N.S.

Beveridge, J.A.