NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Kobylanski*, 2019 NSCA 57

Date: 20190626
Docket: CAC No 464095
Registry: Halifax

Between:

Michael Kobylanski

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: s. 486.4 of the *Criminal Code*

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	June 7, 2019, in Halifax, Nova Scotia
Subject:	Ineffective assistance of counsel; *Corbett* application; sentencing following conviction by jury
Summary:	Following a trial by judge and jury, the appellant was convicted of a single count of common assault. He was subsequently sentenced to a period of 20 months' incarceration, which was deemed served by virtue of pre-trial detention plus a three-year term of probation. On appeal to this Court, the appellant challenged both his conviction and sentence.
Issues:	1. Did the appellant's conviction give rise to a miscarriage of justice due to the ineffectiveness of his counsel? 2. Did the trial judge err in the determination of the appellant's *Corbett* application, which resulted in the jury becoming aware of his prior conviction for aggravated

assault?

3. In determining sentence, did the trial judge err in his identification of the relevant facts giving rise to the assault conviction, resulting in an unduly severe sentence?

Result: The appellant did not establish that a miscarriage of justice had arisen in relation to his conviction for common assault. His trial counsel had provided highly effective and competent representation.
The trial judge considered the correct principles in reaching his *Corbett* decision. Absent a clear error in principle, this Court declined to interfere with the trial judge's discretionary decision.
The trial judge considered and applied the appropriate sentencing principles. Although on the high-end of the range, the sentence imposed was not demonstrably unfit.
Conviction appeal dismissed. Leave granted to appeal sentence. Sentence appeal dismissed.

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Judges:	Farrar, Bryson and Bourgeois, JJ.A.
Appeal Heard:	June 7, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bourgeois, J.A.; Farrar and Bryson, JJ.A. concurring
Counsel:	Michael Kobylanski, on his own behalf Brandon Trask, for the respondent William L. Mahody, Q.C., for LIANS

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim 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, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application
(2) 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 victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

Victim under 18 — other offences
(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Mandatory order on application
(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

Child pornography
(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation
(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

Reasons for judgment:

[1] Following a trial by judge and jury, Michael Kobylanski was convicted of a single count of common assault. He was subsequently sentenced to a period of 20 months' incarceration, which was deemed served by virtue of pre-trial detention, plus a three-year term of probation.

[2] On appeal to this Court, the appellant challenges both his conviction and sentence. For the reasons to follow, I would dismiss the conviction appeal. Although I would grant leave to appeal sentence, I would dismiss the appellant's challenge to the sentence imposed.

Background

[3] In July 2015, the appellant was charged with a number of offences. The complainant, J.M.C., and the appellant were involved in an intimate relationship. Following a preliminary inquiry, he was committed to stand trial on six counts. The Indictment set out the charges against the appellant as follows:

> that he between the 1st day of December, 2014 and the 23rd day of June, 2015, at, or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did
>
> 1. unlawfully utter a threat to [J.M.C.] to cause bodily harm or death to the said [J.M.C.], contrary to Section 264.1(1)(a) of the *Criminal Code*;
> 2. AND FURTHER that he at the same time and place aforesaid, did sexually assault [J.M.C.], contrary to Section 271 of the *Criminal Code*;
> 3. AND FURTHER that he at the same time and place aforesaid, did without lawful authority confine [J.M.C.], contrary to Section 279(2) of the *Criminal Code*;
> 4. AND FURTHER that he at the same time and place aforesaid, with intent to enable himself to commit the indictable offence of sexual assault did attempt to choke, suffocate or strangle [J.M.C.] by using a belt, contrary to Section 246(a) of the *Criminal Code*;
> 5. AND FURTHER that he at the same time and place aforesaid, in committing a sexual assault on [J.M.C.], threatened to use a weapon or an imitation of a weapon to wit., a hammer, contrary to Section 272(1)(a) of the *Criminal Code*;
> 6. AND FURTHER that he at the same time and place aforesaid, did unlawfully assault [J.M.C.], contrary to Section 266 of the *Criminal Code*.

[4] The appellant was represented by Mr. Peter Kidston. The trial was heard over 10 days in March 2017, with Justice Felix Cacchione presiding. After deliberating in excess of two days, the jury returned verdicts on two of the six counts. The appellant was found guilty of assault and acquitted of the most serious charge of choking to overcome resistance.

[5] The jury was unable to reach a unanimous verdict on the remaining four counts, resulting in a "hung jury". The appellant is facing a new trial in relation to those charges (uttering a threat to cause bodily harm; sexual assault; confinement; and using a weapon in committing a sexual assault). As such, my reasons will be purposefully brief, containing only sufficient factual detail to dispose of the issues arising on appeal.

Issues

[6] The appellant is self-represented. He has filed extensive documentation with the Court, by way of both proposed fresh evidence and submission. He has identified many concerns with respect to not only his assault conviction and resulting sentence, but also with respect to the prosecution of the remaining four charges.

[7] Given the nature of the appellant's arguments, it is important to note that this Court has no ability to address his concerns and allegations of error unless they fall within our statutory authority. With respect to indictable matters, s. 675(1) of the *Criminal Code* provides:

> 675(1) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal
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> (a) against his conviction
>
> (i) on any ground of appeal that involves a question of law alone,
>
> (ii) on any ground of appeal that involves a question of fact or a question of mixed law and fact, with leave of the court of appeal or a judge thereof or on the certificate of the trial judge that the case is a proper case for appeal, or
>
> (iii) on any ground of appeal not mentioned in subparagraph (i) or (ii) that appears to the court of appeal to be a sufficient ground of appeal, with leave of the court of appeal; or
>
> (b) against the sentence passed by the trial court, with leave of the court of appeal or a judge thereof unless that sentence is one fixed by law.

[8] Based on the above, we can only address those concerns relating to the assault conviction and the sentence imposed. From his submissions, there are three permissible complaints raised by the appellant. I would state them as follows:

1. Did the appellant's conviction give rise to a miscarriage of justice due to the ineffectiveness of his counsel?
2. Did the trial judge err in the determination of the appellant's *Corbett* application, which resulted in the jury becoming aware of his prior conviction for aggravated assault?
3. In determining sentence, did the trial judge err in his identification of the relevant facts giving rise to the assault conviction, resulting in an unduly severe sentence?

Standard of Review

[9] I will address the standard of review in relation to the above issues in the analysis to follow.

Analysis

Did the appellant's conviction give rise to a miscarriage of justice due to the ineffectiveness of his counsel?

[10] To address the merits of this ground of appeal, it is helpful to start with foundational principles relating to claims of ineffective assistance of counsel. In *R. v. West*, 2010 NSCA 16, Justice Saunders wrote:

> [268] The principles to be applied when considering a complaint of ineffective assistance of counsel, are well known. Absent a miscarriage of justice, the question of counsel's competence is a matter of professional ethics and is not normally something to be considered by the courts. Incompetence is measured by applying a reasonableness standard. There is a strong presumption that counsel's conduct falls within a wide range of reasonable, professional assistance. There is a heavy burden upon the appellant to show that counsel's acts or omissions did not meet a standard of reasonable, professional judgment. Claims of ineffective representation are approached with caution by appellate courts. Appeals are not intended to serve as a kind of forensic autopsy of defence counsel's performance at trial. See for example, **B.(G.D.)**, **supra**; **R. v. Joanisse** (1995), 102 C.C.C. (3d) 35 (Ont. C.A.), leave to appeal ref'd [1996] S.C.C.A. No. 347; and **R. v. M.B.**, 2009 ONCA 524.
>
> [269] One takes a two-step approach when assessing trial counsel's competence: first, the appellant must demonstrate that the conduct or omissions amount to

> incompetence, and second, that the incompetence resulted in a miscarriage of justice. As Major J., observed in **B.(G.D.), supra**, at ¶ 26-29, in most cases it is best to begin with an inquiry into the prejudice component. If the appellant cannot demonstrate prejudice resulting from the alleged ineffective assistance of counsel, it will be unnecessary to address the issue of the competence.

See also *R. v. Fraser*, 2011 NSCA 70; *R. v. Gogan*, 2011 NSCA 105; *R. v. G.K.N.*, 2016 NSCA 29; and *R. v. Symonds*, 2018 NSCA 34.

[11] In support of his claim of ineffective assistance of counsel, the appellant provided both affidavit and *viva voce* evidence. Mr. Kidston filed a responding affidavit and was cross-examined at the hearing. It is of assistance to set out the principles relating to the introduction of fresh evidence. In *R. v. Symonds*, *supra*, the Court noted:

> [23] Typically, when an appellant makes an allegation of ineffective assistance of trial counsel, it is accompanied by a motion to adduce fresh evidence. The test for the admission of fresh evidence is well-known. Section 683(1) of the *Code* allows this Court to accept fresh evidence "where it considers it in the interests of justice" to do so. In *R. v. Palmer*, [1980] 1 S.C.R. 759 the Supreme Court set out four factors which govern that analysis:
>
> > 1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
> >
> > 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
> >
> > 3. The evidence must be credible in the sense that it is reasonably capable of belief.
> >
> > 4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> [24] It is also well-established that where an appellant's complaints are focused on the fairness of the trial process itself, that fresh evidence may be accepted for that purpose. This was explained by the Ontario Court of Appeal in *Truscott (Re)*, 2007 ONCA 575:
>
> > [85] The second category of fresh evidence that may be tendered on appeal is not directed at re-litigating factual findings made at trial, but instead is directed at the fairness of the process that produced those findings. Where an appellant proffers this kind of evidence on appeal, he or she attempts to demonstrate that something happened in the trial process that materially interfered with his or her ability to make full answer and defence. An appellant claims that the verdict is rendered unreliable because the unfairness of the process denied the appellant the

> opportunity to fully and effectively present a defence and to challenge the Crown's case. When this kind of fresh evidence is received and acted on in the court of appeal, the conviction is quashed as a miscarriage of justice. The miscarriage of justice lies in the unreliability of a verdict produced by a fatally flawed process.

See also *R. v. Assoun*, 2006 NSCA 47 and *R. v. Ross*, 2012 NSCA 56.

[12] The evidence relating to the nature of Mr. Kidston's representation ought to be admitted, as it relates to the appellant's claim he was denied an opportunity to present a full defence. The appellant argues his trial was unfair because Mr. Kidston failed to advance his defence theory; he failed to cross-examine the complainant on important inconsistencies in her previous statements; he failed to recall the complainant as a defence witness; and he failed to introduce important documentary evidence key to questioning the complainant's credibility.

[13] As the re-trial is pending, I will not elaborate further on the alleged shortcomings in the advancement of the appellant's defence. I am satisfied, after carefully reviewing the record and considering the fresh evidence, the appellant has not demonstrated a miscarriage of justice arose in relation to his conviction.

[14] Given the two-step analysis set out above, the failure to establish prejudice is sufficient to dismiss the appellant's claim of ineffective assistance of counsel. I will add, however, that the record abundantly demonstrates Mr. Kidston provided highly competent and effective representation to the appellant.

Did the trial judge err in the determination of the appellant's Corbett application which resulted in the jury becoming aware of his prior conviction for aggravated assault?

[15] During the course of the trial, Mr. Kidston on behalf of the appellant brought a *Corbett* application seeking to limit the Crown's ability to cross-examine him on his previous criminal record. The appellant's adult record included a 1997 conviction for aggravated sexual assault resulting in a 12-year sentence; a 1999 conviction for escaping lawful custody; and a 2002 conviction for forgery. It was the aggravated sexual assault conviction that was the subject of the application, the appellant being concerned with the prejudicial effect of the jury becoming aware of it, given the nature of the current charges.

[16] After considering the positions of the parties, the trial judge concluded that should the appellant choose to testify, the prior conviction would be referenced as an aggravated assault which garnered a 12-year term of imprisonment. Reference

to the sexual nature of the offence was precluded. The appellant argues the trial judge erred by permitting any reference at all to his previous conviction, asserting this would have signalled to the jury he was the type of person who would be more likely to act violently.

[17] With respect to this ground of appeal, the standard of review is one of deference. In *R. v. Seymour*, 2005 NSCA 5, leave to appeal refused [2005] S.C.C.A. No. 99, Justice Saunders explained:

> [43] It ought to be remembered that we are dealing here with the exercise of a trial judge's discretion. As the Court stated in **Corbett** a trial judge has a discretion to exclude prejudicial evidence of previous convictions in an appropriate case. La Forest, J., in dissent (although not with respect to this particular point) described the deference owed on appellate review to the exercise of a trial judge's discretion. He said at p. 746:
>
> > I would stress, however, that, as is the case when an appellate court undertakes to review a trial judge's decision which is based at least in part on the unique circumstances of the case before him and his own first-hand view of the proceedings, restraint ought to be exercised in interfering with a trial judge's exercise of discretion. More specifically, an appellate court should never, in the absence of clear error, simply substitute its own view of how that discretion ought to have been exercised for that of the trial judge.
>
> [44] The principle of appellate deference in matters relating to a trial judge's decision whether to exclude evidence of previous convictions has been reiterated in numerous instances. See, for example, **R. v. Mulligan** (1997), 115 C.C.C. (3d) 559 (Ont. C.A.); **R. v. Warriner**, [2001] O.J. No. 4311 (Q.L.) (Ont. C.A.); and **R. v. Gayle** (2001), 54 O.R. (3d) 36; 154 C.C.C. (3d) 221 (Ont. C.A.), leave to appeal dismissed, [2001] S.C.C.A. 359.

[18] In reviewing the trial judge's ruling, it is clear he considered the correct legal principles and was mindful of the positions advanced by the parties. He was aware of the need to insulate the jury from the risk of propensity reasoning. I am satisfied he exercised his discretion judicially. The appellant has not demonstrated a clear error justifying our intervention.

[19] With respect to the appellant's concern the jury would use his past criminal record in a prejudicial fashion, I would note the trial judge provided the following mid-trial instruction:

> Members of the jury, you've heard that Mr. Kobylanski has a prior criminal record. You must not use prior convictions to conclude or to help you decide that, because the accused committed offences in the past, he must have committed the

> offences which are presently charged. You may only use his prior convictions to decide on his credibility, that is to assess how much or how little you believe or rely upon his testimony. Previous convictions do not necessarily mean or make the evidence of Mr. Kobylanski unbelievable or unreliable. It is just one of many factors that you have to consider during your deliberations.

[20] In the final charge, the jury was further directed:

> You've heard that the accused has previously been convicted of criminal offences. You must not use any prior convictions to conclude or to help you decide that, because the accused has committed those crimes in the past, he must have committed the crimes charged on the indictment. You may only use those convictions to help you decide how much or how little you will believe of or rely upon the accused's testimony in this case. Previous convictions do not necessarily make the evidence of the accused unbelievable or unreliable. It is only one of the many factors which you must consider.

[21] I would dismiss this ground of appeal.

In determining sentence, did the trial judge err in his identification of the relevant facts giving rise to the assault conviction, resulting in an unduly severe sentence?

[22] On April 28, 2017, the trial judge sentenced the appellant in relation to the common assault conviction. He had the benefit of a Pre-Sentence Report, written and oral submissions from the Crown and Mr. Kidston, psychological reports, and a victim impact statement.

[23] The trial judge imposed a sentence of 20 months, less credit for pre-trial custody (calculated as 1,000 days) resulting in the sentence being deemed served. A three-year period of probation was also ordered, along with a 10-year weapon prohibition. It is only the length of the custodial sentence that the appellant challenges. He argues the trial judge made findings of fact inconsistent with the jury's verdict. As a result, the appellant submits that the 20-month sentence is unduly harsh. Some context is required.

[24] At trial the complainant testified that the appellant physically assaulted her on several occasions. In his sentencing decision, the trial judge noted:

> Ms. [C.] testified to having been assaulted numerous times in the period from mid February to June 24th, 2015. She recalled four specific instances of physical violence but was unable to supply specific dates. The first was in December of 2014 when she said she was slapped across the face; the second she said was

> sometime around March of 2015; the third was around April of the same year; and the last was on June 23rd, 2015. The only independent evidence of an assault relates to the period in early April 2015 when Ms. [C.] was seen by her mother and Mr. [G.], a family friend. Both of them observed her as having bruising around her eyes. **I'm satisfied that the conviction entered occurred during what was described as the Weather Channel incident, which most likely occurred toward the end of March 2015**. (Emphasis added)

[25] With respect to the "Weather Channel" incident, the complainant had testified:

> There was a couple of incidents that stand out the most. There was the one time with the weather—he put the Weather Network on. There—like, it—I didn't answer him for a couple of hours, like I just—he was asking me questions and questions about my trip, and I just wouldn't reply, and this threw him into a rage. And he told me to stand up in front of the TV, and he turned the Weather Network on to watch the timer go by every minute, and he would ask me questions again about what happened during my trip, but this time, every minute that I didn't answer, I would get punched or kicked or hit.

[26] The appellant says the trial judge's identification of the "Weather Channel" incident as the event giving rise to the conviction was inconsistent with the jury's findings. He says the jury must have convicted him of a less serious instance, one involving a single slap or punch. On that basis, the appellant submits a custodial sentence of 20 months is unduly harsh.

[27] In his submissions to the trial judge, Mr. Kidston had argued the "Weather Channel" incident could not have grounded the assault conviction. He relied upon a series of questions posed by the jury during its deliberations, arguing:

> The jury also advised they had reached a verdict on 2 counts prior to asking to rehear the "Weather Channel" testimony. It is logical to conclude that it was not this incident that led to a finding of guilty as the assault charge.

[28] At first blush, this submission resonates. The record demonstrates that during deliberations on March 15, 2017, the jury sent a note to the trial judge. It read:

> We can't come to an agreement on 4 of the charges. We have reached a verdict on 2 charges. Where do we go next? Suggestions?

[29] Later the same day, the jury made the following request:

> We would like to re-hear [J.'s] testimony about the Weather Network incident and the cross-examination surrounding the Weather Network only.

[30] Mr. Kidston's point was if the jury had already reached verdicts on two counts (guilty of common assault and not guilty of choking to overcome resistance), when they asked to rehear the complainant's testimony, then clearly they did not accept the "Weather Channel" incident as grounding the conviction. This is the crux of the appellant's argument before this Court, asserting that the trial judge erred by sentencing him on the basis of that incident.

[31] Before explaining why I would decline to interfere with the trial judge's conclusion, I turn again to foundational principles. In *R. v. Landry*, 2016 NSCA 53, Justice Beveridge set out the standard of review in relation to sentencing appeals as follows:

> [35] Before turning to the appellant's complaints of error, it is appropriate to recognize that an appellate court is not at liberty to reassess the issues that faced a trial judge and substitute its own view as to the appropriate outcome. Sometimes an appellate court may well conclude that it would not have arrived at a particular result, but must defer to the trial court. The level of deference is conveniently referred to as the standard of review.
>
> [36] The standard of review is different for the two putative errors advanced by the appellant. A judge must correctly identify and apply the relevant legal principles in arriving at sentence. An appellate court is free to substitute its view of the correct legal principles. Furthermore, if a trial judge errs in law or principle, deference dissipates in relation to the discretionary decision as to sentence. The appellate court is free to arrive at the appropriate sentence (see *R. v. Hawkins*, 2011 NSCA 7 at para. 43; *R. v. Bernard*, 2011 NSCA 53; *R. v. Brunet*, 2010 ONCA 781; *R. v. MacDonald*, 2009 MBCA 36; *R. v. Provost*, 2006 NLCA 30; *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97 (Ont. C.A.); and *R. v. Willis*, 2013 NSCA 78).
>
> [37] But, as the Supreme Court of Canada recently emphasized in *R. v. Lacasse*, 2015 SCC 64, the legal error must have been one that impacted sentence.
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> [38] Absent legal error that had an impact on the quantum or type of sentence imposed, an appellate court must defer to the sentence imposed at trial. It can only intervene if it concludes that the sentence is unfit as being manifestly excessive or inadequate (see *R. v. Eisan*, 2015 NSCA 65 at paras. 25-26).

[32] *Landry* was also a case where an appellant alleged that a trial judge sentenced on facts inconsistent with the jury's verdict. After reviewing a number of authorities, Justice Beveridge set out principles to guide a sentencing judge following a jury verdict:

> [49] I would distill the rules for a court to follow as:
>
> 1. The sentencing judge shall accept as proven all facts, express or implied, that are essential for the jury's guilty verdict.
>
> 2. When the jury finding is ambiguous, the sentencing judge should not attempt to follow the logic of the jury. Instead, he or she must make their own independent determination as to the relevant facts.
>
> 3. The sentencing judge should only find those facts necessary to permit the proper sentence to be imposed.
>
> 4. The sentencing judge may not find as fact things that were rejected by the jury's verdict.
>
> 5. For any aggravating fact, the sentencing judge must be satisfied that the evidence is sufficiently cogent to enable her to find it proved beyond a reasonable doubt.

[33] In his sentencing decision, the trial judge set out the same principles. The issue for this Court is whether he applied them correctly.

[34] Contrary to the appellant's assertion, I do not agree that it is clear the jury rejected the "Weather Channel" incident as founding the assault conviction. Having reviewed the entirety of the complainant's evidence, I am satisfied that not only could it have founded the conviction, but was also relevant to the confinement and threat charges. The jury's request to rehear the "Weather Channel" testimony is not determinative they had rejected that incident as establishing an assault. They may well have requested a replay in order to give further consideration to whether it could reach a verdict on the other charges.

[35] In my view, the above discussion of what the jury may or may not have considered, and for what purpose, highlights that the jury's finding is ambiguous. It is not clear which incident led to the assault conviction. The appellant is inviting this Court to engage in speculation as to the jury's thought-processes and logic. This is clearly to be avoided. In light of the ambiguity, the trial judge was entitled to make his own determination of the relevant facts for sentencing. In the absence of an error of principle, it is not this Court's function to revisit his findings.

[36] A final word on sentence. As the Crown proceeded by way of indictment, the maximum available sentence for the assault conviction was five years. That being said, a review of case authorities places a 20-month sentence for a single common assault at the high-end of the range. I am not satisfied, however, the sentence imposed was manifestly excessive. As noted by the trial judge, this assault occurred within the context of a domestic relationship – an acknowledged

aggravating factor. Further, the trial judge found the complainant was vulnerable and the appellant manipulative. Finally, the appellant's prior conviction for aggravated sexual assault was a relevant consideration. I am not satisfied the trial judge erred in any fashion that would justify this Court's intervention.

[37] Although I would grant leave, I would decline to interfere with the sentence imposed.

Disposition

[38] For the reasons outlined above, I would dismiss the appellant's appeal of conviction. I would further grant leave, but dismiss the sentence appeal.

Bourgeois, J.A.

Concurred in:

Farrar, J.A.
Bryson, J.A.