NOVA SCOTIA COURT OF APPEAL

Citation: *R. v. Lapierre*, 2022 NSCA 12

Date: 20220203
Docket: CAC 500695
Registry: Halifax

Between:

Danzel Lapierre

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: Pursuant to Section 486.4 of the *Criminal Code*

Judge:	The Honourable Justice Anne S. Derrick
Appeal Heard:	October 13, 2021, in Halifax, Nova Scotia
Subject:	Criminal law. Sexual assault. Deference to trial judge's credibility findings. Assessing credibility. Post-incident text message. Sentencing.
Summary:	The appellant was convicted in the Nova Scotia Provincial Court of sexual assault contrary to s. 271 of the *Criminal Code*. He received a one-year sentence of imprisonment to be followed by thirty months' probation. He appealed conviction and sentence. He did not testify at trial. His counsel argued the sexual contact with the complainant was consensual and that her claim of being sexually assaulted was not credible. At sentencing he sought a community-based sentence that emphasized rehabilitation. On appeal, he submitted the judge committed various errors of law.
Issues:	(1) Did the trial judge err in ruling, pursuant to a s. 276 application, that trial counsel could not ask a particular question on cross-examination?

(2) Did the trial judge err in law by advising the complainant that the continuation of her cross-examination would include emails she had disclosed to the Crown?

(3) Did the trial judge err in law in assessing inconsistencies the appellant said were found in the complainant's testimony?

(4) Did the trial judge reach an unreasonable verdict?

(5) Was a text from the complainant to the appellant after the incident relied on by the trial judge to find credibility through repetition, causing him to commit an error of law?

(6) Did the trial judge err by not imposing a community-based sentence?

Result: The appeal from conviction is dismissed. Leave to appeal sentence is granted but the appeal against sentence is dismissed. Having balanced the factors in s. 276(3) of the *Criminal Code*, the trial judge made no error in determining the questions that could be put to the complainant in cross-examination. The right of cross-examination is not absolute and not without limitation in the context of questions concerning a complainant's sexual activity, in this case, her post-incident use of a dating app. The judge made no error in ensuring the complainant understood the continuation of her cross-examination would include the emails she had disclosed to the Crown. He skilfully navigated the issue of ensuring the trial process was fair to the appellant and the complainant. Substantial deference is owed to the judge's assessment of credibility, absent error of law. He carefully examined and dismissed what the appellant said were inconsistencies in the complainant's testimony. The judge did not misapprehend the evidence on material issues and his determinations were well-supported in the record. He did not rely on the post-incident text message from the complainant to the appellant in assessing the complainant's credibility. He made reference to it only at the end of his reasons by which time he had already made his credibility determination and found the appellant guilty. A high degree of deference is accorded to the judge's

decision to impose a custodial sentence of twelve months. He made no errors of law or principle in sentencing the appellant for what he characterized as a serious sexual assault.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 26 pages.

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Judges:	Farrar, Van den Eynden, and Derrick, JJ.A.
Appeal Heard:	October 13, 2021, in Halifax, Nova Scotia
Final Written Submissions:	January 20, 2022
Held:	Appeal against conviction dismissed; leave to appeal sentence granted, appeal against sentence dismissed, per reasons for judgment of Derrick, J.A.; Farrar and Van den Eynden, JJ.A. concurring.
Counsel:	Thomas J. Singleton and Leora Lawson, for the appellant Erica Koresawa, 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 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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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.

Reasons for judgment:

Introduction

[1] On February 7th, 2020, Danzel Lapierre was convicted in the Provincial Court of Nova Scotia of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. Judge Daniel MacRury imposed a one-year sentence of imprisonment with thirty months' probation and twenty years' mandatory registration under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10. Mr. Lapierre is appealing his conviction and his sentence. He is seeking a new trial.

[2] The appellant did not testify at his trial. His counsel argued the sexual contact with the complainant, A.G., on August 8th, 2018, was consensual. At sentencing he sought a community-based sentence that emphasized rehabilitation.

[3] The appellant argues the judge committed various errors of law. He says the judge improperly restricted cross-examination of A.G.; unfairly informed A.G. what to expect when her cross-examination continued; made errors in assessing inconsistencies in A.G.'s evidence; reached an unreasonable verdict; and failed to properly consider a community-based sentence.

[4] As the reasons that follow explain, I find the judge did not make the alleged errors. There is no basis for appellate intervention. I would dismiss the appeals against conviction and sentence.

Overview of the Trial

[5] A.G. and the appellant met on-line approximately ten months before the incident in August. She acknowledged on cross-examination it was possible they did not meet in person until March 2018.

[6] The trial commenced on April 24th, 2019 with A.G. testifying under direct and cross-examination. When asked by the Crown to tell the court what happened on August 8th, 2018, she described a meeting with the appellant at 11:30 p.m. during his break from work. They had been texting earlier; the appellant was angry with A.G. and she proposed talking in person as she was tired of texting back and forth.

[7] Upon A.G.'s arrival at the appellant's workplace he got into her car. She testified he immediately told her how good she looked and, putting his hand down the front of her dress, touched her breasts. She told him to stop, she was not there for sex, she was only there to talk. The appellant did not want to be in full view of his workmates so A.G. moved her car.

[8] A.G. testified she drove behind a nearby recycling depot and parked. The appellant put his hand down her dress again and used the flashlight on his phone to "get a good look". He became angry when A.G. told him to stop and repeated she was only there to talk. The appellant complained she was trying to make his life hard and he got out of the car saying his back hurt.

[9] A.G. also got out of the car. She said she was then subjected to the appellant putting his hands up her dress and turning her around to bend her over. She told him to stop and again emphasized she was there to talk. She testified the appellant became really angry and was yelling at her, saying he hated her and "needed a stress reliever".

[10] A.G. testified she felt bad for the appellant who was saying how stressed he was. At his request, she hugged him and kissed him. He pushed her against the car and continued to put his hands up her dress, pulled down the shorts she was wearing and his own clothing. She said: "I could feel him on my thigh". He was trying "really hard" to put his "hand and his fingers" inside her.

[11] A.G. said the appellant was not deterred by her continuing to tell him she was there only to talk, not for sex. She described what happened next:

> He bent down and tried really hard to pull my legs apart. It didn't work because I kept my legs really tight together. So he started kissing me again and then pushing his penis in between my legs. And he started to thrust and he kept asking me if it was in. And I said no, I wasn't there for sex.

[12] A.G.'s reaction made the appellant angry. He pulled up his pants and told her to take him back to work. She said the encounter had left her in a state of "complete shock". She dropped the appellant off at his workplace.

[13] The next day A.G. sent the appellant a text. Neither Crown nor defence objected to her evidence about its content or to the text being entered as an exhibit.

[14] Asked by the Crown to go into aspects of the encounter with the appellant in more precise detail, A.G. described feeling the appellant's penis against her thigh

when he had pulled his boxer shorts down. He had grabbed her hand and put it on his erect penis and told her to touch it. A.G. testified: “And I did. But I stopped”.

[15] When asked by the Crown what part of her body the appellant had been trying to thrust into with his erect penis, A.G. said it was her vagina. She was not asked if the appellant actually penetrated her.

[16] Asked how the incident had affected her, A.G. said she was “scared of men, of sex. I don’t sleep. I moved. I changed my number.”

[17] A.G.’s response led to the defence making an application under s. 276 of the *Code*. This eventually led to further cross-examination of A.G. on October 4th, 2019.

[18] The s. 276 application focused on A.G.’s claim that she had experienced a sexual assault and was traumatized about intimacy with men as a result. The defence argued this claim was contradicted by A.G. maintaining a dating site profile. The Crown opposed the application.

[19] A *voir dire* under s. 276 was conducted on dates between May 31st and September 6th, 2019. The judge ruled A.G. could be cross-examined about her profile on the Bumble dating website.

[20] During the hiatus before A.G.’s cross-examination resumed, she provided the Crown with three emails she had sent to Bumble. She directed Bumble to block the appellant from her profile indicating: “Made me uncomfortable. He’s my ex-boyfriend, and he assaulted and raped me”. She said she was not trying to get the appellant into trouble with Bumble, she just didn’t want him to be able to view her profile.

[21] On September 13th, 2019, when A.G.’s cross-examination on her Bumble profile was to occur, the defence sought permission to also cross-examine her on the emails. The trial judge granted the defence motion. He adjourned A.G.’s cross-examination, telling her he was allowing cross-examination on the three emails she had sent to the Crown “because they [the defence] didn’t get a chance to cross-examine those when the cross-examination concluded”.

[22] The judge explained to A.G. that cross-examination was being put over to October 4th, 2019 “in fairness to you” citing his concern she was under the

impression she would just be cross-examined on her Bumble profile. He said he wanted "to give people time to know what everybody is facing."

[23] The cross-examination of A.G. on October 4th included questions about her Bumble profile allowed by the judge as a result of the s. 276 application. He permitted the questions proposed by the defence with one exception: she could not be asked if she had connected with any men on the Bumble site since the incident with the appellant.[1] Defence counsel said she was looking for nothing more than a "yes" or "no" response. She argued if A.G. answered "yes" this would be inconsistent with her testimony that the encounter with the appellant left her afraid of men and afraid of sex.

[24] The judge held a response to the question was not necessary to allow the appellant to make full answer and defence, had the potential to distract the truth-seeking function of the trial, and would undermine A.G.'s privacy and equality rights.

[25] On cross-examination A.G. testified she had not intended the Bumble profile to lead to a sexual relationship as she was not ready for that.

[26] On October 4th, defence counsel was permitted to cross-examine A.G. about the emails to Bumble. A.G. testified she had "never really been in this situation before and [was] completely going at this alone". She said "when someone puts their body parts in someone unwillingly, then I would consider rape but…" She was asked if she was now suggesting the appellant had put his penis inside her. She responded:

> A. Yeah, just as I testified.
>
> Q. Not that he tried to, but that he actually did.
>
> A. Yes.

The Judge's Trial Decision

[27] The judge rendered his verdict on February 7th, 2020. He reviewed A.G.'s evidence and the applicable law on reasonable doubt and the presumption of innocence. He noted the ultimate issue in a criminal trial is not credibility but

[1] The judge gave a bottom-line decision on September 6, 2019 and provided oral reasons on February 14, 2020. They are unreported.

reasonable doubt. He articulated the legal principles to be applied to the assessment of credibility, instructing himself in accordance with this Court's decision in *R. v. D.D.S.*[2]:

> [77] Experience tells us that one of the best tools to determine credibility and reliability is the painstaking, careful and repeated testing of the evidence to see how it stacks up. How does the witness's account stand in harmony with the other evidence pertaining to it, while applying the appropriate standard of proof in a civil or a criminal case?

[28] The judge noted that, in determining the ultimate issue of whether the Crown had proven guilt beyond a reasonable doubt, he was required to consider all the evidence and not pieces of it in isolation.

[29] In his review of the positions of the parties and the evidence, the judge considered what the defence alleged were inconsistencies in A.G.'s testimony and found none of consequence. He went on to reject the arguments of defence counsel that reasonable doubt was raised by A.G.'s behaviour, including certain decisions:

- to go and meet with the appellant late at night to sort out what she had said was a ridiculous conflict over her decision to delete him from Snapchat;
- to park in a remote location after she said the appellant touched her sexually without her consent; and,
- to not leave after the appellant got out of the car, but instead to get out of the car herself when she could have just driven away.

[30] Following a review of the law on the issue of avoiding impermissible inferences about how a sexual assault complainant should behave, the judge found:

> In situations people react differently. In my view, it is wrong for a trial judge to find reasonable doubt because a complainant did not exhibit predictable avoidant behaviour.

[31] The judge noted A.G. had described some consensual sexual contact. He held consent to some sexual contact did not constitute consent to all the sexual contact she had alleged. He found on the totality of the evidence A.G. "did not consent to all sexual conduct with [the appellant]".

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[2] 2006 NSCA 34.

[32] As for the defence argument the physical contact described by A.G. was not reflected by evidence of any bruises or marks, the judge accepted her evidence that she did not bruise easily.

[33] Noting that A.G. had been subjected to a cross-examination he characterized as "vigorous…focused, forceful, pressing at times, and thorough", the judge found "there was no major or significant inconsistency in her evidence that would undermine her credibility and reliability". He was satisfied A.G. gave genuine responses to questions, and any inability or difficulty remembering certain details was not an attempt to be evasive or non-responsive.

[34] The judge found the appellant guilty of sexually assaulting A.G. by touching her "repeatedly on her breasts, her legs, outside and inside of her vagina, and he tried to penetrate her vagina with his fingers and penis". He held:

> It is clear from the totality of the evidence that A.G. repeatedly told [the appellant] no, stop, she wasn't there for sex, and she was only there to talk. A.G. was not consenting to [the appellant's] repeated and ongoing sexual contact when she made these comments.

The Judge's Sentencing Decision

[35] At sentencing the Crown sought two to three years' incarceration. The appellant argued the judge should impose a suspended sentence with probation of two to three years.

[36] Defence counsel pointed to the appellant's suitability for a sentence served in the community under probationary conditions. He had no criminal record and a positive pre-sentence report. His employer had provided very supportive comments. He had no substance abuse issues. The defence argued the facts found by the judge fell at the lower end "on the continuum of sexual assaults". It was not a breach of trust situation and A.G. received no physical injuries.

[37] The judge viewed the appellant's offence as "a serious sexual assault". He emphasized the need for denunciation and specific and general deterrence but found the sentence required "a rehabilitative aspect". He observed the appellant was "a youthful offender with no prior record, a positive work history, and a positive PSR [pre-sentence report]". He decided a sentence of twelve months' incarceration followed by thirty months on probation properly balanced the applicable sentencing principles, including the principle of restraint.

Issues

[38] The appellant has raised five issues. These were described in his factum as follows: (1) Did the trial judge err in law by restricting the cross-examination of A.G. by trial counsel? (2) Did the trial judge err in law when he provided an instruction to A.G. advising her of the substance of intended cross-examination? (3) Did the trial judge err in law in considering and assessing inconsistencies in A.G.'s evidence; (4) Did the trial judge err in law by reaching a verdict that was not supported by the evidence? and (5) Did the trial judge err in law by not properly considering a community-based sentence?

[39] I will restate the issues as follows: (1) Did the trial judge err, in ruling pursuant to a s. 276 application, that trial counsel could not ask a particular question on cross-examination? (2) Did the trial judge err in law by advising A.G. that the continuation of her cross-examination would include emails she had disclosed to the Crown? (3) Did the trial judge err in law in assessing inconsistencies the appellant said were to be found in A.G.'s testimony? (4) Did the trial judge reach an unreasonable verdict? and (5) Did the trial judge err by not imposing a community-based sentence? I will address the applicable standard of review under each issue.

Analysis

Issue #1 Did the trial judge err in ruling, pursuant to a s. 276 application, that trial counsel could not ask a particular question on cross-examination?

[40] When the cross-examination of A.G. continued on October 4th, 2019, she was asked questions the judge had approved following the s. 276 application. The questions focused on her Bumble profile. A.G. acknowledged she knew the website offered the potential of meeting men and she had used it for that purpose prior to the encounter with the appellant. The defence was able to have A.G. confirm her profile was still up on the website and that she had edited it since the appellant's application pursuant to s. 276 to cross-examine her on it.

[41] The appellant complains the judge prohibited him from asking A.G. a further question: whether she had connected with any men on Bumble since the August encounter with him. In his submission, the answer "yes" would have undermined A.G.'s credibility as it would be in stark contrast to her claim that after their

encounter she was afraid of men and of sex. This was the question the judge ruled the defence could not ask, referred to by him in his reasons as "the last question".

[42] Section 278.97 of the *Criminal Code* establishes a judge's determination of the admissibility of evidence of a complainant's sexual activity is a question of law. Questions of law are reviewable on a standard of correctness. Deference is owed to a trial judge's determination of relevance and the assessment of prejudicial effect versus probative value.[3]

[43] The judge made no error in prohibiting the defence from asking A.G. the question about connecting with men on Bumble. The right of cross-examination is not absolute, and it is not without limitation in the context of questions concerning a complainant's sexual activity.[4] As stated in the majority reasons of the Supreme Court of Canada in *R. v. R.V.*:

> [1] Sexual assault trials raise unique challenges in protecting the integrity of the trial and balancing the societal interests of both the accused and the complainant. Parliament and the courts have responded to these challenges by setting out rules of evidence tailored to this context.

[44] As stated in *R.V.*, "Determining the boundaries of permissible cross-examination will always be a challenging and fact-specific task".[5]

[45] The judge had to decide the scope of permissible cross-examination of A.G. and in doing so, balanced the appellant's and A.G.'s rights. He was required to consider the factors set out in s. 276(3) of the *Code*. These factors include, but are not limited to, the accused's right to make full answer and defence.[6] The judge also had to take into account: society's interest in encouraging the reporting of sexual assault offences; whether there is a reasonable prospect the evidence will assist in arriving at a just determination in the case; the need to remove from the fact-finding process any discriminatory belief or bias; the risk (in a jury trial) of arousing sentiments of prejudice, sympathy or hostility; the potential prejudice to the complainant's personal dignity and privacy rights; and the right of the complainant to personal security and to the full protection and benefit of the law.[7]

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[3] *R. v. Graham*, 2019 SKCA 63 at para. 69.
[4] *R. v. R.V.*, 2019 SCC 41 at para. 40.
[5] *Supra*, at para. 69
[6] s. 276(3)(a).
[7] s. 276(3)(b) through (g).

[46] Section 276(3),

> …requires judges to determine the permissible scope of cross-examination in light of the competing rights of the accused and the complainant and the other interests set out in s. 276(3). Where the right to full answer and defence requires some cross-examination, judges should tailor their rulings to best safeguard the other interests protected by s. 276(3).[8]

[47] The judge balanced the s. 276(3) factors as mandated. They had been thoroughly aired in argument before him. He held that, with the exception of the last question, the cross-examination the appellant wished to conduct was necessary to allow him to make full answer and defence. He went on to hold:

> In relation to the last question, I find that, that question is not necessary to allow the defendant to make full answer in [*sic*] defence. My concern with that question has to do with the potential to distract the truth-seeking function of the trial, and therefore with respect to that question I will not allow it. In my view, the privacy and equality rights are paramount with respect to that question, and therefore that question, in my view, does not add anything to the accused's ability to make full answer and defence and therefore will not be allowed.

[48] The cross-examination allowed by the judge elicited evidence that A.G. had updated her Bumble profile and had previously used the profile to meet men. A.G. had not testified she had abandoned or deleted her Bumble profile or was no longer meeting men. She simply said the incident with the appellant left her feeling fearful.

[49] Evidence of A.G.'s continued presence on Bumble provided the basis for the inference the appellant wanted the judge to draw that A.G. was not, as she had claimed, afraid of men and sex. The evidence the appellant wanted to use had already been elicited by the permitted questions. The last question was superfluous.

[50] Not only did the last question add nothing, it had the potential of inviting stereotypical reasoning about a complainant's post-incident conduct: that a woman who continues to meet men after what she says was a sexual assault that made her fearful of men is less worthy of belief or more likely to be lying.

[51] The appellant's full answer and defence was not hampered by the prohibition on "the last question". Closing submissions by the defence confirms this. Defence counsel argued A.G.'s evidence of maintaining a Bumble dating

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[8] *R.V.* at para 45.

profile after the incident, editing and updating it, and using it previously to meet men was a significant inconsistency with her testimony that the encounter with the appellant had rendered her afraid of men and sex.

[52] The judge's balancing of the interests and factors he was required to consider in determining what questions could be put to A.G. about her Bumble profile is entitled to deference.[9] I would dismiss this ground of appeal.

Issue #2 Did the trial judge err in law by advising A.G. that the continuation of her cross-examination would include emails she had disclosed to the Crown?

[53] This ground of appeal engages the question of whether the judge committed a procedural error that affected the fairness of the trial. Trial fairness is a question of law, reviewable on a standard of correctness.[10]

[54] Trial fairness involves balancing the rights and interests of both the accused and the complainant and does not concern only the interests of the accused. It requires that justice be done "to all the parties".[11] By ensuring A.G. understood what to expect from the impending cross-examination, the judge was appropriately taking account of her right to be informed about the trial process. On September 6th, 2019 he had been very explicit in his ruling on what A.G.'s cross-examination would include. He had said: "It will only be in relation to the Bumble website". When the emails came into play, the judge was aware A.G. would be expecting only to be cross-examined about her Bumble profile.

[55] The judge told counsel what he intended to do:

> And my view is there has to be a balancing here and I'm in my view being fair to everybody…I'm going to explain to the witness that…as she knows, last week I ordered this, and that Defence have made a motion to cross-examine on materials that came forward. Because I only became aware of it today, we're going to set another time for cross-examination…"

[56] He proceeded with care, providing A.G. with only limited notice of what her continued cross-examination would include. He spoke in broad and general terms:

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[9] *R. v. M.T.*, 2012 ONCA 511 at para. 54; *R. v. Graham*, 2019 SKCA 63 at para. 69; *R. v. Catellier*, 2018 MBCA 107 at para. 2; *R. v. Darrach*, 2000 SCC 46 at para. 71.
[10] 2020 ABCA 294 at para. 18.
[11] *R. v. Darrach*, 2000 SCC 46 at para. 70.

> …as you're aware, last week I granted the motion for cross-examination…in relation to the Bumble profile. Today in your absence there was a motion made for further cross-examination on materials…that you sent to the Crown…I think there was [*sic*] three sets of e-mails that you sent to Ms. Kidd. And I am granting the motion to allow Defence to cross-examine on those because they didn't get a chance to cross-examine those when the cross-examination concluded.

[57] The judge went on to indicate the continuation of A.G.'s cross-examination would not start immediately but was being adjourned "to give people time to know what everybody is facing". When her cross-examination resumed, A.G. was not asked what she had done, if anything, to prepare for it or even if she had reviewed the emails before returning to court.

[58] It was appropriate for the judge to have informed A.G. that her continued cross-examination would include the emails. He skilfully navigated the issue of ensuring the trial process was fair to the appellant and the complainant. He found the right balance that avoided A.G. being taken by surprise and stopped short of making any suggestion as to the nature of the questions she might be asked. He did exactly enough and not too much. I would dismiss this ground of appeal.

Issue #3 Did the trial judge err in law in assessing inconsistencies the appellant said were found in A.G.'s testimony?

[59] It is well-established that credibility is a factual determination. A trial judge's findings on credibility are entitled to significant deference on appeal unless palpable and overriding error can be shown.[12] Appellate intervention will be rare.[13] A trial judge's assessment of credibility is not to be interfered with unless it is established that it cannot be supported on any reasonable review of the evidence.[14]

[60] The appellant pressed the judge to view A.G.'s credibility in a negative light as a consequence of what he argued were inconsistencies in her testimony. The judge undertook a thorough examination of all the evidence and provided cogent reasons for concluding that A.G. was a credible and reliable witness. His credibility assessment is entitled to deference.

[61] The appellant identified seven purported inconsistencies in A.G.'s evidence. The judge dealt with each one carefully.

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[12] *R. v. G.F.*, 2021 SCC 20 at para. 100; *R. v. Gagnon*, 2006 SCC 17 at paras. 10-11.
[13] *R. v. Dinardo*, 2008 SCC 24 at para. 26.
[14] *R. v. Delmas*, 2020 ABCA 152 at para. 5; upheld 2020 SCC 39.

[62] A.G.'s testimony about how long she had known the appellant – A.G. testified in her direct examination that she had probably known the appellant for ten months before the incident on August 8th, 2018. On cross-examination she agreed this would mean she had met him in the latter part of 2017, around October. Defence counsel showed A.G. a text message from March 2018 that indicated she and the appellant had yet to meet. A.G. did not remember sending the text but acknowledged it was possible she had done so. She testified that she could not be "a hundred percent sure" when she and the appellant actually met in person.

[63] The judge found A.G. to be "very honest" in acknowledging the March 2018 text. He regarded her uncertainty about when she had met the appellant to be inconsequential. That was a reasonable determination. This detail was not material.

[64] Whether A.G. used the dating platform, Tinder – When first cross-examined, A.G. testified she did not know if she had met the appellant via Bumble or Tinder, as she had profiles on both sites. When her cross-examination resumed, A.G. said she did not really use Tinder.

[65] The judge noted A.G. had been clear in her direct evidence that she was unsure which dating platform was the site where she "met" the appellant in October 2017. He referred to her saying she did not use Tinder[15] and found her to have been "candid with the Court, that she wasn't sure which site she used". He found any inconsistency in A.G.'s testimony about where she met the appellant, that is, on which dating platform, was "minor and peripheral" to the charge before him. He dismissed the defence suggestion that A.G.'s overall credibility and reliability had been damaged.

[66] The judge made a reasonable assessment that any inconsistency in A.G.'s testimony was insignificant. A.G. had given evidence she had a profile on Tinder. Indeed, there was no inconsistency in her having a Tinder profile and not really using it.

[67] A.G.'s testimony concerning the direction she was facing when the appellant bent her over – A.G. testified in direct examination that when the appellant attempted to bend her over she was facing away from the car. On cross-examination, A.G. was told she had said in her police statement the appellant had pulled her away from the car a little bit and tried to bend her over. She was asked, "Are you next to the car and he's pulling you because he's standing away from the

[15] A.G. testified on cross-examination that "I don't really use Tinder".

car, or are you in the reverse order?" A.G. responded: "I don't really remember what direction we were in".

[68] The judge agreed there was an inconsistency between A.G.'s testimony and what she had told police. He found when this was put to her in cross-examination she responded candidly by stating she was unsure of the direction she had been facing. The judge did not accept the inconsistency negatively affected A.G.'s "overall credibility or reliability".

[69] The judge's assessment of this evidence was reasonable. In cross-examination, immediately after being told about what was in her police statement A.G. had been asked to clarify what direction she had been facing when the appellant tried to bend her over. She could not do so, no longer being able to remember.

[70] <u>The cause of the bruise on A.G's breast</u> – Asked in direct examination whether she had received any injuries as a result of the encounter with the appellant, A.G. said she "just had a small bruise" on her breast. When cross-examined, A.G. testified she was not sure the bruise was caused by the appellant. She gave this answer when it was put to her the police had not photographed the bruise. A.G. responded: "No. I wasn't completely sure what it was from". She confirmed this was what she had told police.

[71] The judge found A.G.'s responses in direct and cross-examination did not constitute "a major inconsistency". He described her testimony that she was uncertain about the origin of the bruise as "honest". His finding is entitled to deference.

[72] <u>A.G.'s testimony about touching the appellant's penis</u> – In direct examination, A.G. testified the appellant had grabbed her hand, placed it on his erect penis and told her to touch it. She continued: "And I did. But I stopped". The defence argued that on cross-examination she gave inconsistent evidence by saying the appellant had asked her to touch his penis and she had agreed.

[73] The judge found there was no inconsistency. He recounted A.G.'s cross-examination on the issue:

> On cross-examination she was asked:
>
> Question, "He asked you to touch his penis, and you agreed to that. Correct?
>
> Yes, and I stopped within a couple seconds [*sic*].

He went on to find:

> I do not find the answers inconsistent. The witness was responding to the question posed to her by Defence. The witness was not challenged by the Defence about whether or not [the appellant] grabbed her hand and put it on his penis.

[74] A.G. responded to penis-touching questions in cross-examination in the context of being asked about sexual contact she consented to:

> Q. He comes over to your side [of the car] and leans up against the car as well. Is that correct?
>
> A. Yes.
>
> Q. So he's back-to the car?
>
> A. Yes.
>
> Q. And then he puts his arm around you and sort of pulls you in front of him.
>
> A. Yes.
>
> Q. And then what happens from that point forward is you're making out. Is that fair?
>
> A. Yes.
>
> Q. He had asked you to kiss him, and you agreed.
>
> A. Yes.
>
> Q. Correct? At some point through all this he asks you to rub his back, and you agree to that. Correct?
>
> A. Yes.
>
> Q. He asks you to touch his penis, and you agree to that. Correct?
>
> A. Yes, and I stopped within a couple seconds [*sic*].

[75] Later in the cross-examination A.G. was questioned about the sequence of the sexual contact she alleged. Asked whether the penis-touching happened when the appellant pulled his pants and boxers down, A.G. responded: "He asked me to and I did it for a couple of seconds". Defence counsel put it to her that the appellant had asked her to touch his penis and she had agreed. A.G. said: "I did and I stopped and I said I wasn't there for sex".

[76] As noted by the judge, A.G. was never asked in cross-examination whether the appellant had grabbed her hand and placed it on his penis. A.G. consistently

described a brief touching of the appellant's penis, including in direct examination where she said, "And I did. But I stopped". It was reasonable of the judge to have been satisfied A.G.'s answers to questions about the penis-touching in direct and cross-examination were not inconsistent.

[77] A.G.'s evidence of being "scared of men, of sex" and her use of Bumble – As indicated previously in these reasons, the defence argued A.G.'s claim she had been subject to a traumatizing sexual assault by the appellant was thrown into question by the fact of her maintaining a profile on Bumble. The judge noted A.G.'s evidence about her Bumble profile: it was still up on the site when she testified on October 4th, she had edited and updated it, she acknowledged it could be used to meet men and she had used it for this purpose in the past.

[78] The judge found nothing inconsistent or contradictory about A.G.'s statement and her active Bumble account. He accepted the Crown's submission that A.G.'s fear and her keeping a profile on Bumble could reasonably co-exist:

> AG's testimony that she is afraid of men, not interested in sex is not contradicted by the existence of her Bumble profile. I agree with the Crown's argument on this point. AG can be afraid of men, not interested in sex, but want to use Bumble because she would like to get to the point in the future where she could have a relationship. AG can be afraid of men and not interested in sex but still use the social media application to try and start and have a relationship despite her fears.

[79] Judges can draw common-sense inferences as long as they arise from the evidence.[16] The judge did so here, making an inference from A.G.'s evidence, which he accepted, that she could be afraid of men and uninterested in sex but still want to maintain a dating profile. This conclusion attracts deference on appeal.

[80] Whether the appellant penetrated A.G. with his penis – When A.G. testified in direct examination on April 24th, 2019, she said the appellant had an erection and was thrusting his penis between her legs asking her if "it" was "in". When asked what part of her body the appellant "was trying to put his penis in", A.G. said: "My vagina".

[81] On October 4th when A.G.'s cross-examination resumed she was asked about her emails to Bumble concerning the appellant: "Made me uncomfortable.

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[16] *R. v. J.C.*, 2021 ONCA 131 at para. 61.

He's my ex-boyfriend, and he assaulted and raped me". Defence counsel continued:

> Q. You understand the meaning of that word "raped", yes?
>
> A. No, I've never really been in this situation before and completely going at this alone. That's what I assumed had happened to me.
>
> Q. You assumed that you'd been raped.
>
> A. Well, when someone puts their body parts in someone unwillingly, that's what I would consider rape but…
>
> Q. Is that what you're suggesting now that [the appellant] had done, that he'd put body parts inside of you?
>
> A. Yeah, just as I testified.
>
> Q. Not that he tried to, but that he actually did.
>
> A. Yes.
>
> …
>
> Q. And you weren't exaggerating.
>
> A. No.

[82] The judge found A.G. was not inconsistent. He disagreed with the Crown's "concession" in oral argument that she was. He explained why he concluded otherwise, carefully reviewing the evidence in doing so, and noted it was only in those concluding questions on cross-examination that she was asked, for the first time, if there had been penetration.

[83] The judge looked closely at A.G.'s testimony in response to the Crown's questions in direct examination. He noted in particular A.G.'s description of what she experienced, which I am quoting more extensively below:

> …He continued to put his hands up my dress and in my spandex shorts that I was wearing under my dress. I told him I wasn't there for sex, I was only there to talk. Pulled down my shorts and then he undid his belt and pulled his boxers down. I could feel him on my thigh. He was putting his hand and his fingers between my leg, trying really hard to put them inside of me. I told him that's not what I was here for, I wasn't there for sex. He bent down and tried really hard to pull my legs apart. It didn't work because I kept my legs really tight together. So he started kissing me again and then pushing his penis in between my legs. And he started to thrust and he kept asking me if it was in. And I said no, I wasn't there for sex.

[84] The judge referred to A.G. identifying her vagina as the target of the appellant's efforts and what she said in cross-examination:

> Q. And you told him, I would suggest to you, no to penetration, to his penis penetrating you, and when you told him that, I'd suggest to you he stopped and backed off. Correct?
>
> A. Yeah, he backed off to get angry and yell and tell me he hated me.
>
> Q. Right, but he stopped. Correct?
>
> A. At that time, yes.

[85] As the judge noted, on re-examination A.G. was asked to clarify her evidence about the appellant backing off "at that time". She testified: "I said yes, he stopped at that time. He continued after that, though". A.G. described the interval before the appellant "continued" as: "Very small. Maybe a minute or two".

[86] The judge was asked to assess A.G.'s evidence for lack of consistency, that she had said one thing in her direct examination on April 24th – the appellant tried to penetrate her – and then made a contradictory statement in her October 4th cross-examination on the Bumble emails – the appellant had actually penetrated her. At this stage in his reasons he was not determining whether penetration had been proven beyond a reasonable doubt. He was looking for evidence A.G. had testified to there being no penetration. Focused on the defence argument about inconsistency, he found it was "not clear" A.G. had given inconsistent evidence. He assessed her testimony that "…he started to thrust and he kept asking me if it was in, and I said no, I wasn't there for sex" as ambiguous: "It is not clear if the witness said, No, there was no penetration, or, No, I'm not there for sex".

[87] The judge concluded there "may be reasonable doubt on the factual finding of penetration" but he was not persuaded A.G. had given inconsistent evidence. The issue of whether the appellant's penis actually went inside A.G.'s vagina was never clarified by the Crown. A.G. was throughout answering the questions put to her. The judge found her to be a credible witness, a determination to which we owe deference.

[88] A.G. gave consistent descriptions that: the appellant tried to penetrate her; she repeatedly told him "no", she was not there for sex; and he "stopped", "backed off", "at this time". On re-examination she testified, "He continued after that, though".

[89] Context and nuance play a critical role in a trial judge's assessment of credibility.[17] It was the judge who heard A.G. testify. He was not persuaded that in her direct examination A.G. had said there was no penetration. He did a careful job of considering all of her testimony in arriving at his conclusion there was no clear inconsistency. It is not for this Court to wade in and try to re-interpret the evidence to find otherwise.

[90] The judge did not ultimately explain if he found reasonable doubt in relation to the issue of penetration. He described the sexual assault as the appellant repeatedly touching A.G. "on her breasts, her legs, outside and inside of her vagina".[18] He continued by saying "and he tried to penetrate her vagina with his fingers and penis". That language suggests he had a reasonable doubt about penetration. The sentence he imposed suggests this as well.

[91] The judge did not proceed to find the Crown had met its burden of proof until he had considered all the evidence from the trial. He had "no difficulty" accepting A.G.'s evidence, describing her as "…a very compelling and persuasive witness…very clear, succinct, and consistent throughout her evidence…she struck me as having a good memory of most of the details…" of her allegations. A.G.'s evidence, considered in its totality, satisfied the judge the Crown had proven the sexual assault charge beyond a reasonable doubt. He found her evidence to be without "significant gaps" and described it as "reasonable and consistent". In his words:

> It was clear when she consented to actions of [the appellant] and it was clear when she did not. In this case, I found AG credible and reliable. Overall, in my view, her evidence was internally consistent in her descriptions of what [the appellant] said and did, and what he said and did in response never changed. The evidence was clear that AG repeatedly told [the appellant] no, stop, she wasn't there for sex, and she was only there to talk.
>
> Her evidence was clear that [the appellant] continued his sexual advances toward her in an increasingly aggressive manner.

[92] The judge gave robust consideration to the defence submissions that A.G.'s evidence was unreliable and should not be believed. His assessment to the contrary warrants deference on appeal. I would dismiss this ground of appeal.

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[17] *R. v. Percy*, 2020 NSCA 11 at para. 133.

[18] A review of the record indicates this was language used by the Crown in its trial brief. The judge never found beyond a reasonable doubt that there was touching by the appellant's penis inside A.G.'s vagina.

Issue #4 Did the trial judge reach an unreasonable verdict?

[93] This ground of appeal engages the question of whether the guilty verdict was reasonable in law, which is reviewable on a correctness standard, and concerns A.G.'s credibility, which is a question of fact. A judge's determination of facts is entitled to deference.[19]

[94] A verdict is reasonable if it is one a properly instructed jury or judge could reasonably have made. The assessment of this question on appeal considers whether the verdict,

> …was based on an inference or finding of fact that, (a) is plainly contradicted by the evidence relied on by the trial judge in support of that inference; or (b) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge. Furthermore, we do not interfere with credibility assessments unless it is established that they cannot be supported on any reasonable view of the evidence (see *R. v. Thompson*, 2015 NSCA 51).[20]

[95] I am satisfied the judge's factual determinations were logical and reasonable. He did not misapprehend the evidence on material issues. His credibility determinations were well-supported by the evidence and are entitled to deference. I would dismiss this ground of appeal.

A.G.'s Text of August 9th, 2019

[96] Before I proceed, I will address whether a text message from A.G. to the appellant tendered by the Crown as evidence was relied on by the trial judge in his assessment of A.G. as credible, causing him to commit an error of law.

[97] A.G. sent a text message to the appellant on August 9th, the day following their encounter. Early in her direct examination, A.G. was asked to read the text to the judge:

> Last night wasn't cool. You really went too far trying to force yourself into me. I don't care how much you want sex or you need to release your stress. No means no. It's been playing in my head all day, and I didn't sleep last night. I seriously feel violated.

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[19] *R. v. Thompson*, 2015 NSCA 5 at paras. 81.
[20] *R. v. Newman*, 2020 NSCA 24 at para. 29.

[98] After A.G. read the text, which was marked as an Exhibit, Crown counsel moved on with her questions. There was no further questioning of A.G. by the Crown about the content of the text message other than at the conclusion of direct examination where she noted A.G. had said she felt "seriously violated. She then asked A.G. how the incident with the appellant had affected her.

[99] The text was in play otherwise only during final submissions when both Crown and defence noted A.G. had castigated the appellant in the text for "trying" to force himself into her which they said was inconsistent with her subsequent email to Bumble. However, the Crown's written brief suggested the text supported the truthfulness of A.G.'s in-court testimony on the basis she was repeating what she had said previously: "A.G.'s accusations against [the appellant] have remained consistent from her initial text message to him the day after the offence, and throughout her contact with police and during the court proceedings".

[100] There is no dispute the text was inadmissible for this purpose. As stated by the British Columbia Court of Appeal in *R. v. Tso*[21]:

> [39] It is uncontroversial that a trial judge may not use a prior consistent statement to support the prohibited inference that a witness's testimony is more likely to be true because it has been repeated more than once. It is also clear that permissible uses include: (1) text messages sent by the accused as admissions against interest; (2) text messages sent by a complainant to provide context to the answers given by the accused; (3) text messages to rebut an allegation of recent fabrication; and (4) text messages used to show that they were exchanged, and the timing and circumstances of the exchange, used by the trier of fact in assessing the credibility and reliability of the witness's in-court testimony (the "narrative as circumstantial use" exception). The latest word on the proper use of text messages is the judgment of Chief Justice Bauman in R. v. Langan, 2019 BCCA 467 (approved 2020 SCC 33)…

[101] *R. v. Langan*, referred to in *Tso*, reaffirms the impermissible use of a prior consistent statement to find credibility through repetition.[22]

[102] In his decision, the trial judge referred to A.G.'s text in his review of the evidence, noting it was tendered as Exhibit 1. He did not mention it again until the concluding passages of his reasons, 47 pages of transcript later, where he said:

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[21] 2020 BCCA 358.
[22] 2019 BCCA 467 at para. 100, aff'd 2020 SCC 33 [*Langan*].

> The sexual nature of [the appellant's] conduct of [*sic*] AG is clear from the nature of his contact with AG and the areas of AG's body that were touched. It is clear from the totality of the evidence that AG repeatedly told [the appellant] no, stop, she wasn't there for sex, and she was only there to talk. AG was not consenting to [the appellant's] repeated and ongoing sexual contact when she made these comments.
>
> AG's text message the day after the incident makes it clear that she did not consent:
>
> > Last night was not cool. You really went too far trying in to force yourself into me. I don't care how much you want sex or you need to release your stress.. No means no. It's been playing in my head all day, and I didn't sleep last night. I seriously feel violated.
>
> AG is absolutely correct. No does mean no. She was touched by [the appellant] in a sexual nature without her consent. [The appellant] did not take reasonable steps to ascertain whether AG was consenting and continued with his persistent and increasing serious advances eight times. AG's evidence does not disclose an air of reality to the defence of honest but mistaken belief and [*sic*] consent to [the appellant's] repeated sexual touching.
>
> I find that based on the totality of the evidence, AG's evidence was credible and reliable. I find the Crown has proven beyond a reasonable doubt that [the appellant] sexually assaulted AG and I find [the appellant] guilty of the charge.

[103] At the point when the trial judge was summing up his reasons he had already determined A.G. to be credible on the issue of not having consented to most of the sexual contact with the appellant during their encounter on August 8th, a lack of consent she clearly and consistently expressed. The judge had found:

- A.G.'s consent to some sexual contact with the appellant on August 8th was not consent to all the sexual contact.
- A.G. was "a very compelling and persuasive witness". The judge had "no difficulty" accepting her evidence. He had "considered all the evidence adduced in this case, including the very able cross-examination…". A.G. was consistent in her evidence notwithstanding "a vigorous cross-examination".
- A.G. was "very clear, succinct and consistent throughout her evidence…" and had a "good memory" of most details of the encounter with the appellant.

- A.G.'s credibility and reliability were not undermined by any "major or significant inconsistency in her evidence".
- A.G.'s testimony was "reasonable and consistent" and without "any significant gaps". It was internally consistent.
- It was "clear" from A.G.'s evidence when she had consented to sexual contact with the appellant and when she had not.
- The evidence was "clear" that A.G. had repeatedly told the appellant to stop what he was doing, that she was there only to talk.
- A.G.'s lack of consent was "clear". She expressed it by "words and conduct".

[104] Following the appeal hearing, counsel for the parties were asked to respond in writing to two questions about the text message:

1) Was the judge's reference to the text in his reasons an error?
2) Is there a basis in the record for finding the judge took the text into account in his credibility determination?

[105] The appellant argues the trial judge relied on A.G.'s text message in assessing her credibility. He notes the trial judge stated at the start of his reasons that he had considered all the evidence from the trial: "In my decision I will make references to the evidence which was led at the trial, but even if I do not make specific reference to it I've considered all the evidence in coming to my decision". He made several references in his reasons to having considered "the totality of the evidence" and "all of the evidence". The appellant says these statements should be taken as indicating the judge used A.G.'s text message to satisfy himself of her credibility because of its consistency with her trial testimony, impermissibly finding credibility through repetition.

[106] The trial judge's reasons do not support this argument. Suggesting the judge improperly used the text message is speculation. As the judges in *Langan* agreed,

speculation has no place in an assessment of a trial judge's reasons. "We must review the reasons as they are written, with the benefit of the record for context".[23]

[107] The trial judge's reasons disclose no indication he resorted to the text in his assessment of A.G.'s credibility. For error to be found, reliance on the text would have to be apparent in his reasons. Other than his very generic statements that he considered all the evidence, the judge made no mention at all of the text in his careful examination of A.G.'s credibility.

[108] It is presumed the trial judge knew the law.[24] He did not refer to A.G.'s text when he was assessing the issue of reasonable doubt and whether he found her to be a credible witness. He made his credibility determination after a thorough and detail-focused examination of the evidence without any mention of the text. His reference to the text came at the very end of his decision, past the point where he had already decided A.G. was credible. He had dealt with the central issue of reasonable doubt and found none. He had dealt with the challenges to A.G.'s credibility and concluded that he believed her.

[109] Mentioning the text was unnecessary. Although the trial judge said the text made "it clear that she did not consent", this was a statement of no significance as he had already found A.G. had not consented to much of the sexual contact. Just before mentioning the text the judge said: "It is clear from the totality of the evidence that AG repeatedly told [the appellant] no, stop, she wasn't there for sex, and she was only there to talk". His subsequent reference to the text focused on a sentence that had a special resonance. "AG is absolutely correct. No does mean no". With this statement he emphasized the messaging about consent: that consent to sexual contact is only obtained from a willing participant, not someone who has said no.[25]

[110] The purpose of the August 9th text as evidence should have been clearly established by the Crown during A.G.'s direct examination. Introducing a text message as a narrative exception to the prior consistent statement rule for the

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[23] *Langan, supra* note 16 (BCCA), at para. 54. (In this passage, the majority reasons indicate agreement on this point amongst all the judges on the appeal, which included Chief Justice Bauman in dissent who was subsequently upheld by the Supreme Court of Canada. The appeal panel had been unanimous on the law relating to the use of prior consistent statements, but not its application to the text messages in the case.)

[24] *R. v. Burns*, [1994] 1 S.C.R. 656 at para. 18.

[25] *R. v. Goldfinch*, 2019 SCC 38 at para. 74: "No means no, and only yes means yes: even in the context of an established relationship, even part way through a sexual encounter, and even if the act is one the complainant has routinely consented to in the past".

purpose of helping a trial judge "understand how the complainant's story was initially disclosed" is an allowable use.[26] Relying on A.G.'s text, as the Crown did in its final written submissions, to bolster her credibility through evidence of repetition was not. This could have led the judge into reversible error had he found A.G. was credible because her testimony was consistent with what she said the following day.[27] However, he did not refer to it for this impermissible purpose.

[111] The issue of the text message does not require further examination. There is nothing in the trial judge's reasons to indicate he used it for a prohibited purpose. I am satisfied he made no error when he referred to it in the concluding paragraphs of his decision.

Issue #5 Did the trial judge err by not imposing a community-based sentence?

[112] Sentencing decisions are accorded a high degree of deference on appeal. Appellate intervention is warranted only if the sentencing judge has committed an error in principle that impacted the sentence or the sentence is demonstrably unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" (*R. v. Friesen*, 2020 SCC 9, at para. 26; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, at para. 34).

[113] I find the judge made no errors of law or principle in imposing twelve months' custody followed by thirty months of probation for what he found to be a serious sexual assault. The sentence was proportionate to the gravity of the offence and the moral culpability of the appellant.

[114] The judge used his factual findings at trial as the basis for sentencing. In making those findings he referred to the "increasingly aggressive manner" of the appellant's "sexual advances". He noted what a difficult sentencing it was, involving – a "serious sexual assault that has had a profound effect on the victim…" and "a youthful offender with no prior record, a positive work history, and a positive PSR". He reviewed the pre-sentence report in detail. He recited the purpose and principles of sentencing from ss. 718, 718.1 and 718.2 of the *Code* and expressly considered the principle of restraint reflected in ss. 718.2(e) and (f) noting: "offenders should not be deprived of liberty if the least restrictive sanctions may be appropriate in the circumstances; all available sanctions other than

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[26] *R. v. Dinardo*, 2008 SCC 24 at para. 37.
[27] *R. v. Laing*, 2017 NSCA 69.

imprisonment that are reasonable in the circumstances should be considered…" He concluded the sentence needed to send "a strong message" of denunciation to the community and the appellant.

[115] The judge obviously did not accept a community-based sentence (the defence was asking for a suspended sentence) would be appropriate. He did however impose a sentence that was considerably less than had been sought by the Crown. His ultimate determination that the serious offence committed by the appellant warranted a jail sentence to be tempered by restraint is to be accorded deference. There is no justification for appellate intervention.

Disposition

[116] I would dismiss the appeal from conviction. I would grant leave to appeal sentence but dismiss the appeal.

Derrick, J.A.

Concurred in:

Farrar, J.A.

Van den Eynden, J.A.