NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Ellis*, 2023 NSCA 63

Date: 20230908
Docket: CAC 514110
Registry: Halifax

Between:

Kelsey Diane Ellis

Appellant

v.

His Majesty the King

Respondent

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	March 21, 2023, in Halifax, Nova Scotia
Subject:	Attempted abduction (s. 283(1) of *Criminal Code*); assault (s. 266(a) of the *Criminal Code*); unlawfully in a dwelling (s. 349(1) of the *Criminal Code*); unreasonable verdict, sentence appeal;
Summary:	Ms. Ellis appeals against conviction and sentence. She was convicted of attempted child abduction, unlawfully being in a dwelling house and assault. She was sentenced to two years in custody less 288 days remand time, followed by a period of probation. The judge also imposed a DNA order. She asserts the judge made several material errors and seeks to have the convictions set aside and acquittals entered, or, in the alterative, a reduced sentence.
Issues:	1. Is the attempted abduction verdict unreasonable? 2. Is the assault verdict unreasonable? 3. Did the judge err in imposing sentence?

Result: Appeal allowed in part. Assault conviction is set aside and an acquittal entered. Remaining convictions undisturbed. As a result of the judge's error in principle in convicting Ms. Ellis of assault and then using the assault as an aggravating factor in determining sentence, this Court conducted a fresh sentence assessment. The two-year custodial sentence imposed by the judge for attempted child abduction was reduced to 9 months less remand time.

Scanlan J.A. (dissenting on sentence only). A fit and proper sentence in these circumstances would be a shorter period of custody (30-90 days) plus probation or a conditional sentence with conditions.

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His Majesty the King

Respondent

Judges:	Bryson, Scanlan, Van den Eynden, JJ.A.
Appeal Heard:	March 21, 2023, in Halifax, Nova Scotia
Held:	Appeal allowed in part, per reasons for judgment of Van den Eynden J.A.; Bryson J.A. concurring and Scanlan J.A. concurring in part but dissenting on the sentence imposed
Counsel:	Zebedee Brown, for the appellant Timothy S. O'Leary, for the respondent

Reasons for judgment:

Overview

[1] The appellant (Ms. Ellis) was convicted of attempted child abduction (s. 283(1) of the *Criminal Code*), unlawfully being in a dwelling house (s. 349(1)) and assault (s. 266(a)). She was sentenced to two years in custody less 288 days remand time, followed by a period of probation. The judge also imposed a DNA order.

[2] The Crown proceeded by indictment on the above charges. Judge Diane McGrath of the Provincial Court of Nova Scotia presided over the trial and sentencing of Ms. Ellis. Both decisions, one on the convictions and the second on sentencing, were delivered orally and are unreported.

[3] Ms. Ellis appeals against conviction and sentence. She asserts the judge made several material errors and seeks to have the convictions set aside and acquittals entered, or, in the alterative, a reduced sentence.[1]

[4] For the following reasons, I would set aside the assault conviction and enter an acquittal but not disturb the convictions under s. 283(1) and s. 349(1). I would reduce the sentence imposed for the attempted abduction from 2 years to 9 months less remand time. The judge's probation order remains. I would not interfere with the DNA order.

Background

[5] Ms. Ellis was convicted of attempting to abduct her then four-year-old daughter who was in the care of the child's father, Justin Piercy (Mr. Piercy). Ms. Ellis and Mr. Piercy were former partners who co-parented their daughter before their estrangement. Ms. Ellis was also convicted of assaulting Mr. Piercy during the course of the attempted abduction and with unlawful entry into the home where Mr. Piercy and the child were residing. The offences occurred on October 29, 2020, in Cape Breton, Nova Scotia.

[6] Ms. Ellis was also charged with assaulting Mr. Piercy's grandmother (Judy Piercy) under s. 266(a) and possession of stolen property (a U-Haul vehicle) under s. 354(1)(a). In its closing submissions at trial, the Crown acknowledged it did not

[1] At the time the appeal was heard, Ms. Ellis was not in custody, having been earlier granted a conditional release.

adduce sufficient evidence to substantiate these charges. The Crown invited the judge to enter acquittals on these counts, which she did.

[7] Mr. Piercy and Ms. Ellis' relationship started breaking down in late 2019. They were living in New Brunswick at the time. Ms. Ellis eventually moved out of their shared apartment in February 2020. From then to October 2020, Ms. Ellis only saw her daughter once when she went to the apartment to retrieve some belongings.

[8] On June 14, 2020, Mr. Piercy abruptly moved to Nova Scotia to live with extended family. The move was spurred by threats he received and viewed as a risk to his and his daughter's safety. Also, as effectively a single parent and coping with his own health issues, he needed the support of his family.

[9] Mr. Piercy did not inform Ms. Ellis of his intended move. He explained that he had not seen Ms. Ellis for several months and did not know where she was.

[10] There was no court order in place at the time of the offence governing the parenting arrangements for the child. However, prior to the offence date, Mr. Piercy had applied to the Nova Scotia Supreme Court (Family Division) seeking a determination of their respective parental rights and obligations. He was unable to locate and serve Ms. Ellis with the application so the court proceedings remained in limbo at the time of the offence.[2]

[11] Ms. Ellis has a history of substance abuse. In cross-examination she acknowledged using "methamphetamines, cocaine, dilaudid, um, benzodiazepines, um, pretty much everything."

[12] She acknowledged using at the time of separating from Mr. Piercy in 2019 and that she continued to use into October 2020 and beyond. She denied using drugs on the day of the offence but acknowledged using the week prior. Ms. Ellis also ran into some difficulties with the criminal justice system during the time she was absent from her daughter's life.

[13] At the time of the offence, Mr. Piercy and the child were residing with Mr. Piercy's grandparents. Ms. Ellis' attendance at their home was unexpected as she had not seen her daughter since April 2020, nor had there been any recent contact between the parents. Ms. Ellis showed up unannounced at their door, having

[2] Section 282(1) of the *Criminal Code* pertains to abduction in violation of a court order. Section 283(1), under which Ms. Ellis was charged, deals with abduction when no court order is in place.

travelled from Fredericton, New Brunswick that day, in a U-Haul truck, driven by her then boyfriend, William Boyd.

[14] A brief Agreed Statement of Facts was tendered at the outset of the trial. The judge explained:

> [22] … A number of the elements of this charge [s. 283(1)] have been agreed to as stipulated in the Agreed Statement of Facts, filed with this Court as Exhibit Number 1. Specifically, date, jurisdiction, the identity of the Accused, Ms. Ellis, and that she is a parent of the child in question, who at the relevant time was under the age of 14.

[15] Parental abduction is an offence of specific intent. To ground a conviction, it is not enough for the Crown to prove Ms. Ellis took the child. Rather, the Crown must prove beyond a reasonable doubt Ms. Ellis took the child with the specific intent to defeat Mr. Piercy's parental rights. Ms. Ellis, who testified in her own defence, said she had no such intention, rather, she just wanted to visit her daughter.

[16] Ms. Ellis' version of what occurred on October 29 differs from that of Mr. Piercy and other trial witnesses present at the time.

[17] The following is a summary of Mr. Piercy's testimony respecting the events that unfolded on the afternoon of October 29, 2020:

- There was a knock on the front door of their home. Mr. Piercy went to see who was there. Before doing so, he had looked out a window. He saw a U-Haul truck parked across the street but did not see anyone. When he opened the door, he saw Ms. Ellis was standing off to the side. She told him "I want my kid".

- Mr. Piercy told her no, closed the glass outer door and went to find his grandmother who was in another part of the house. When he was doing so, Mr. Piercy heard his grandfather yelling, "she has her or she got her". Mr. Piercy immediately turned and saw two arms grab the child. He described the arms being covered in material which matched the colour of clothing Ms. Ellis was wearing that day. Mr. Piercy noted it was late October and their daughter was not dressed to go outside—having no shoes or sweater on.

- He described the panic that set in as he ran out the door towards the U-Haul where Ms. Ellis had taken the child. While running, he fell. His

grandmother, who was following on his heels, jumped over him, as she ran to the U-Haul. Mr. Piercy got up quickly and joined his grandmother at the U-Haul to retrieve the child.

- Ms. Ellis and the child were in the passenger seat of the U-Haul. The vehicle door was still open. The child's arms and legs were around Ms. Ellis and Ms. Ellis had her arms and legs firmly wrapped around the child. Mr. Piercy likened the hold she had on their daughter as a "bear grab". Mr. Piercy had his hands around the child's waist and was trying to pull her away but Ms. Ellis refused to release the child.

- As Mr. Piercy and his grandmother were trying to retrieve the child, some sort of an altercation occurred. He heard his grandmother say, "get her now Justin, get her now". At this point, Ms. Ellis had released her grip on the child. Mr. Piercy was able to pick up his daughter and he carried her back into his grandparents' residence.

- Once he had the child safely inside, Mr. Piercy went back outside because he saw Ms. Ellis was heading back to the residence. As he approached Ms. Ellis, he told her "you've got to go" this "isn't how you do it" but Ms. Ellis kept insisting "I want my kid". There was some brief physical contact between them which led to the assault charge.

- Around this time, Mr. Piercy heard his grandmother yell out, "What did he hit me with? I can't see. It's burning". Mr. Piercy observed an orange substance (which turned out to be mace) all over his grandmother's face. He did not see his grandmother get maced, but after she was sprayed he saw the male travelling with Ms. Ellis running back to the U-Haul.

- Next, Mr. Piercy hurried to get a cloth and help his grandmother wipe off the mace. Not long thereafter, the police were called and promptly arrived. Mr. Piercy understood a neighbour watching the events unfold called the police.

[18] Mr. Piercy's grandmother corroborated much of what Mr. Piercy said. She further explained that when at the passenger side of the U-Haul she reached into the vehicle and grabbed Ms. Ellis by the throat causing Ms. Ellis to release her grip on the child. This enabled Mr. Piercy to get the child out of the U-Haul and back into their residence.

[19] The grandmother further testified that after the child had been retrieved, Ms. Ellis got out of the U-Haul, and she tried to stop Ms. Ellis from going to the

residence. It was around this time the driver of the U-Haul sprayed the grandmother with mace.

[20] Mr. Piercy's grandfather testified that he too saw Ms. Ellis remove the child from the home. His evidence was not consistent as to whether she reached in through the door and grabbed the child or whether Ms. Ellis actually stepped into the home. The grandfather also quickly went outside to aid his grandson and his wife who were trying to retrieve the child. He explained that he tried to extract the male from the driver seat of the U-Haul and remove the keys which were in the ignition but was unsuccessful in doing either.

[21] One of the police officers who testified described the contents he observed in the U-Haul. He noted the back compartment was cluttered with a lot of personal items, including a barbecue, clothing, bookbags. He also noted the presence of a child's car seat in the cab.

[22] The judge found Mr. Piercy to be a credible witness:

> [44] Mr. Piercy, throughout the totality of his testimony, presented as a very conscientious and credible witness. He was quick to admit to any weaknesses in his ability to observe and recollect, indicating the issues he has with his sight, specifically his peripheral vision. He was careful not to overstate things and displayed an honest attempt to be as precise and accurate as he could, as evidenced by his testimony on the issue of the arms entering the residence to remove the child. Despite having just been at the door and seeing Ms. Ellis, and only Ms. Ellis there, he did not testify that he saw Ms. Ellis reach in, but rather that he saw two arms reach in. He could not see the person at the door and readily admitted so. This is well light of the fact that moments later, Ms. Ellis was observed by him, carrying the child as she ran to the U-Haul, and no other person was outside in the area. He was careful not to make assumptions and only testified to what he actually saw. There was no attempt to embellish anything at all. If anything, he tended to minimize or downplay events throughout his recounting of the day. His evidence throughout was characterized by this type of attention to detail and accuracy.

[23] Turning to the testimony of Ms. Ellis, in summary:

- On the offence date, she met with William Boyd at a gas station in Fredericton, New Brunswick. He showed up in a U-Haul and the two of them drove to the Piercy residence in Cape Breton. She learned through a friend where Mr. Piercy was staying with their daughter and acknowledged she did not provide any advance notice of her arrival.

- She said her plan was to visit her daughter and she brought along a car seat just in case she was allowed to take her daughter for a drive. Given she had not seen her daughter for some time, she conceded that she would likely need permission from Mr. Piercy to see their daughter.

- She acknowledged her history of problematic drug use, including recent drug use, but claimed sobriety on the offence date and the week prior. Ms. Ellis could not provide an address where she had been living, attributing her memory loss to drug use.

- She acknowledged Mr. Piercy shut the door on her and walked away. Further, she knew from what he uttered he was concerned with her presence. She denied reaching in the home to remove their daughter. Initially she claimed the child opened the door, stepped outside, and asked her "What do you want?" or "What are you doing here?" and then jumped into her arms. On cross-examination that shifted to the child stepping out and jumping into Ms. Ellis' outstretched arms.

- Upon hearing screaming inside of the house, she got scared and impulsively ran towards the U-Haul with her daughter. She claimed her purpose was to have a few minutes with her child.

- She acknowledged hugging/holding on to her daughter while Mr. Piercy and his grandmother were pushing and shoving her trying to make her to let go. She finally did when the grandmother grabbed her by the neck.

- She exited the U-Haul after Mr. Piercy removed the child. The grandmother grabbed her by the shoulder and was pushing her. After returning his daughter to their residence, Mr. Piercy came back out and approached Ms. Ellis. She told him she just wanted to see her daughter. Mr. Piercy was rushing towards her. She thought he might put his hands on her or push her, so she put her hand out to try and stop him. Her fingers were spread, and he pushed into her hand.

- Around this time, she became aware of a commotion behind her with the grandmother. This was the macing incident but she did not see what happened.

[24] The judge did not find Ms. Ellis credible and provided detailed reasons why. The following excerpts summarize the judge's findings:

> [30] Quite simply, her evidence was clearly contrived and simply unbelievable. Generally, the only evidence proffered by Ms. Ellis, which this Court can lend any weight to, is evidence that has been corroborated or proven by other independent evidence, which this Court has accepted. ….
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> …
>
> [37] I want to pause here for a second to indicate that this Court's finding with respect to Ms. Ellis' credibility overall is only reinforced further, when one factors in the sparring that occurred between Ms. Ellis and Crown counsel on the issue of her criminal record. Without rehashing the details, it became quite clear through that exchange, that Ms. Ellis was trying to mislead the Court and hoping the Crown was not in a position to contradict her. Once she discovered the Crown was well-informed as to her past, she then tried to suggest that she thought the Crown's general question about whether she had a criminal record, in other words, had ever been convicted of a criminal offence applied to offences in Nova Scotia, and as her prior offences were in New Brunswick, she didn't think she had a criminal record here. Something which I find was nothing more than a blatant attempt to mislead the Court and attempt to portray herself in a more favourable light. An example of clearly manipulative behaviour on Ms. Ellis' part.
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> …
>
> [48] For these and all of the reasons stated previously, Ms. Ellis' account of the day in question is simply unbelievable and defies credulity. The totality of her evidence is simply unbelievable and incapable of raising any doubt. …

[25] The judge's credibility findings are not challenged on appeal.

[26] The judge was satisfied the Crown had established all the requisite elements beyond a reasonable doubt and found Ms. Ellis guilty of attempted child abduction under s. 283(1); unlawful entry in a dwelling house under s. 349(1); and assault under s. 266(a).

[27] I will elaborate on the judge's reasons for conviction of attempted abduction and assault in my analysis but note here the judge's proper observation respecting the s. 349(1) offence:

> [41] Section 350 of the Criminal Code states, "For the purposes of … [section] 349, a person enters as soon as any part of his body or any part of an instrument that he uses is within anything that is being entered." And then it goes onto deal with the issue of - of break and enter. Thus, if any part of Ms. Ellis' body entered the dwelling …, she is guilty of the offence, as charged, as there is nothing in the evidence to suggest she had permission, either express or implied, to enter the residence at any time, for any reason. In fact, the evidence is that she did not have any such permission, nor does any right to enter exist at law.

[28] As to sentence:

- The Crown requested two years' custody less remand time, followed by a period of two years' probation and a DNA order.
- Ms. Ellis asked for two years' probation and no further custodial period due to time spent on remand. However, in the event the judge determined a further period of custody was required, it should be limited to three months. Defence counsel did not make any submissions regarding the DNA order.

[29] The judge had the benefit of a presentence report. The report contains disclosures by Ms. Ellis of childhood trauma, her longstanding struggles with substance abuse and a number of mental health issues she faced over the years.

[30] The judge imposed a custodial sentence of two years less remand credit of 288 days, followed by a period of probation. The judge also imposed a DNA order.

[31] The sentence imposed was global. Nowhere in her decision or in her exchanges with counsel during oral submissions did the judge indicate what the individual sentence was for each of the three offences. Further, counsel made no submissions on whether any sentence imposed for the respective offences should be served concurrently or consecutively nor did the judge address this in her sentencing decision.

[32] It is clear from the record the events leading up to the charges transpired over a very short period of time. Read together, the endorsed Information and Warrant of Committal indicate the following individual sentences were imposed and to be served concurrently:

- 442 days and 2 years' probation for the s. 283(1)(a) offence – attempted abduction;
- 12 months, 2 years' probation and DNA order for the s. 349(1) offence – unlawfully being in a dwelling; and
- 60 days, 2 years' probation and DNA for the s. 266(a) offence – assault.

[33] In her Notice of Appeal, Ms. Ellis specified she is only challenging the s. 283(1) and s. 266(a) convictions and related sentences.

[34] Although Ms. Ellis did not appeal the s. 349(1) conviction or the sentence imposed for this offence, she explains in her factum that if successful in overturning the attempted abduction charge the s. 349(1) conviction must be set aside. That is because this charge – being unlawfully in a dwelling house – hinges on proof of intent to commit an indictable offence therein, which in this case was the attempted abduction.[3]

[35] The Crown agrees, explaining:

> 109. The Trial Judge did not rely on the presumption of s. 349 (2)[4] of the Code in finding that the Appellant had unlawfully entered the Piercy residence with the intent to commit an indictable offence. In effect, the Trial Judge found the indictable offence the Appellant had intended to commit was the abduction of [the child]. If it was unreasonable for the Trial Judge to find the Appellant had the intent to abduct [the child], the conviction under s. 349 of the Code should not stand.

Issues

[36] The issues on appeal can be succinctly framed as:

1. Is the attempted abduction verdict unreasonable?

2. Is the assault verdict unreasonable?

3. Did the judge err in imposing sentence?

Standard of Review

Attempted abduction offence

[37] For the attempted abduction offence, the Crown relied on circumstantial evidence to establish guilt. Given the reliance on such evidence, the judge's reasons are examined under the standard explained in *R. v. Villaroman*, 2016 SCC 33:

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[3] Given the sentence for the s. 349(1) offence is not under appeal, I make no comment on the propriety of the 12-month sentence imposed other than to say nothing herein should be taken as any endorsement of such sentence.
[4] Section 349(2) provides: For the purposes of proceedings under this section, evidence that an accused, without lawful excuse, entered or was in a dwelling-house is, in the absence of any evidence to the contrary, proof that he entered or was in the dwelling-house with intent to commit an indictable offence therein.

> [55] … Where the Crown's case depends on circumstantial evidence, the question becomes whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence: [citations omitted].

[38] As observed in *R. v. Coburn*, 2021 NSCA 1, deference is owed to the judge's determination that there was no reasonable inference other than the appellant's guilt:

> [26] In such cases, a trial judge's decision is entitled to considerable deference. As noted by Strathy, C.J.O. in *R. v. S.B.1,* 2018 ONCA 807:
>
> > [139] Consistent with the observations of Cromwell J. in *Villaroman*, the cases illustrate a high level of deference to a trial judge's conclusion that there are no reasonable alternative inferences other than guilt. In *R. v. Loor*, 2017 ONCA 696, this court observed, at para. 22, that, '[a]n appellate court is justified in interfering only if the trial judge's conclusion that the evidence excluded any reasonable alternative was itself unreasonable.'
>
> These comments were adopted by this Court in *R. v. Roberts*, 2020 NSCA 20 at para. 57.

Assault offence

[39] Assessment of Ms. Ellis' complaint of an unreasonable verdict is viewed through the lens of (1) whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered; and (2) whether the judge drew an inference or made a finding of fact essential to the verdict that is plainly contradicted by the supporting evidence, or is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the judge. (See *R. v. C.P.*, 2021 SCC 19 at paras. 28-30 and *R. v. Bou-Daher*, 2015 NSCA 97 at para. 30).

[40] As explained by the majority in *R. v. R.P.*, 2012 SCC 22:

> [10] Whereas the question whether a verdict is reasonable is one of law, whether a witness is credible is a question of fact. A court of appeal that reviews a trial court's assessments of credibility in order to determine, for example, whether the verdict is reasonable cannot interfere with those assessments unless it is established that they "cannot be supported on any reasonable view of the evidence" (*R. v. Burke*, [1996] 1 S.C.R. 474, at para. 7).

Appeal against sentence

[41] Sentencing decisions are accorded a high degree of deference. Appellate intervention is only warranted where (1) the sentencing judge committed an error in principle that impacted the sentence or, (2) the sentence is demonstrably unfit.

[42] Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The assessment of whether a sentence is demonstrably unfit focuses on whether the sentence is proportionate to the gravity of the offence and the degree of the offender's responsibility. (See *R. v. Cromwell*, 2021 NSCA 36 at para. 53 and *R. v. Friesen*, 2020 SCC 9 at paras. 25 and 26).

[43] One of Ms. Ellis' sentencing complaints involves the imposition of a DNA order which is a discretionary decision. In *R. v. Desmond*, 2020 NSCA 1, this Court addressed the applicable standard of review for DNA orders:

> [28] The standard of review for an appellate court reviewing a lower court decision respecting a DNA order is laid out in *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.) and was followed by this Court in *R. v. Clancey*, 2003 NSCA 62 at para. 6:
>
> > 6 The standard of review in this case is as outlined by the Ontario Court of Appeal in *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.) at ¶ 8 as follows:
> >
> > > The options available and the factors that the trial judge must weigh in determining whether to make a DNA order are more limited than in making a sentencing decision. However, as Weiler J.A. said in *Briggs*, the standard of review of orders under s. 487.051(1)(b) and s. 487.052 should be the standard applied to the review of such discretionary orders. Accordingly, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a decision to either make or refuse to make a DNA data bank order if the decision was clearly unreasonable.

Analysis

Was the attempted abduction verdict unreasonable?

[44] Section 283(1) of the *Criminal Code* provides:

Abduction

283 (1) Everyone who, being the parent, guardian or person having the lawful care or charge of a child under the age of 14 years, takes, entices away, conceals, detains, receives or harbours that child, whether or not there is an order referred to in subsection 282(1) in respect of the child, with intent to deprive a parent, guardian or any other person who has the lawful care or charge of that child, of the possession of that child, is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years;
or
(b) an offence punishable on summary conviction.

[45] As a general statement, the abduction provisions in the *Criminal Code* are to protect children and not to punish parents who act unreasonably toward each other in the parenting of their children. The provisions seek to hold a parent to account when their actions reveal an intention to abduct a child. A prosecution under s. 283(1) requires the prior approval of the Attorney General. That pre-condition has been satisfied in this proceeding.

[46] As noted, offences under s. 283 require the specific intent to deprive a parent of the possession of the child. The Supreme Court of Canada addressed the meaning of "deprive" in *R. v. Dawson*, [1996] 3 S.C.R. 783:

> 17 Indeed, to "deprive" a person of something means, among other things, to keep that person from that which he or she would otherwise have: *Oxford English Dictionary, supra, vol.* IV, at p. 490. … This suggests that the accused would have the requisite intent if he or she intended to keep the other parent from having a possession to which he or she would otherwise be entitled.
>
> 18 Moreover, this Court considered the meaning of the phrase "with intent to deprive ... of the possession" under s. 281 of the *Criminal Code*, in *R. v. Chartrand*, [1994] 2 S.C.R. 864, and observed that "possession" is not limited to circumstances in which the deprived parent is actually in physical control of the child at the time of the taking, but extends to the ability to exercise control over the child. Consequently, the intent to deprive of possession will exist whenever "the taker knows or foresees that his or her actions would be certain or substantially certain to result in the parents (guardians, etc.) being deprived of the ability to exercise control over the child": *Chartrand*, at p. 889. There is nothing in this *mens rea* to suggest that the *actus reus* requires anything more than preventing a parent, guardian, or other person having lawful care or charge of the child, from exercising control over that child.

[47] The intended deprivation of possession under s. 283(1) does not have to be permanent nor for any lengthy period of time. Rather, it is sufficient if the accused intended to put the child temporarily beyond the reach of the control or custody of the other parent. (See *R. v. M. E-H.*, 2015 BCCA 54 at para. 56; *R. v. Giovanni Corda*, 2019 ONSC 5947 at para. 13 and *R. v. Chartrand*, [1994] 2 S.C.R. 864 at paras. 52-53). Such intent will be proven where the circumstances establish an accused knew or would foresee that their actions would be certain, or substantially certain, to result in a parent being deprived of the ability to exercise control over the child. (*M. E-H.*, at para. 56; *Giovanni Corda*, at para. 14).

[48] As noted, the Agreed Statement of Facts established the elements of: offence date, jurisdiction, the identity of the accused (Ms. Ellis) and that she is a parent of the child in question, who at the relevant time was under the age of 14.

[49] The judge explained the remaining element to be determined was whether Ms. Ellis unlawfully took or enticed the child to go with her, with the intention of depriving Mr. Piercy of possession of the child:

> [23] What remains to be considered is whether she unlawfully took or enticed the child to go with her, with the intention of depriving Mr. Piercy of possession of the child. There can be no question that Mr. Piercy was an individual who had lawful care or charge of his daughter, their daughter, at the time. There was no court order in place at the relevant time, although this Court received evidence, which it accepts, in the form of copies of Family Court documentation, that Mr. Piercy was seeking a custody order for the child in question. Those documents, for whatever reason, had not yet been served on Ms. Ellis, at the time of the incident in question.
>
> …
>
> [25] With respect to whether or not the child was taken or caused to be taken, the evidence is uncontradicted, and indeed, confirmed by Ms. Ellis, herself, that she physically removed the child from the property of Mr. Piercy. The evidence of the Piercys is that she grabbed the child and ran, while, Ms. Ellis maintains the child jumped into her arms, and she then turned and ran to the U-Haul with her. Under either scenario, the child was taken from the Piercy property by Ms. Ellis.
>
> [26] The question that remains to be decided, is whether or not Ms. Ellis took the child with the intent to deprive Mr. Piercy of possession, or simply, as she maintains, for the purpose of having a visit with her. Ms. Ellis testified that on October 2020, she was still involved in drug use, but that for the week before the events in question, she had not been using drugs. She testified that she made arrangements for her then boyfriend, Mr. Boyd, to pick her up and drive her to Cape Breton, in the hopes of having a visit with her daughter, who she believed

> was living with her ex-boyfriend, the child's father, in Glace Bay at his grandparents ' residence. A place she had visited with him in the past.

[50] Ms. Ellis says we should set aside her conviction for attempted abduction because, in her view, the circumstantial evidence the judge relied upon was scant and ambiguous and the judge's conclusion that she intended to flee was pure speculation. Furthermore, Ms. Ellis asserts there were other reasonable inferences available to the judge which were consistent with the absence of any criminal intent. Ms. Ellis put it this way in her factum:

> 30. Reasonable inferences consistent with the circumstantial evidence include:
>
> (a) The Appellant was moving to Glace Bay to be near her daughter.
>
> (b) The Appellant's reunion with her child was emotional and overwhelming and she reacted instinctively with no clear plan of what she would do immediately after finding her daughter.
>
> (c) The Appellant intended to have a visit with her daughter and return her to Mr. Piercy's care.
>
> (d) The Appellant intended to assert her right to share custody of her daughter.
>
> (e) The Appellant was moving elsewhere and went to Glace Bay to see her daughter before going away.
>
> 31. These inferences are consistent with the circumstantial evidence, but, like the trial judge's conjecture that the Appellant intended to flee, they are speculative. Viewed through the lens of logic and human experience, the circumstantial evidence is too thin and too ambiguous to prove anything beyond a reasonable doubt. There was no objective reason to prefer an interpretation of the circumstantial evidence that cast the Appellant as a criminal, rather than an interpretation consistent with her seeking to re-establish the type of co-parenting arrangement that had existed between her and Mr. Piercy before he vanished from New Brunswick.

[51] The Crown contends, on this record, the cumulative effect of the circumstantial evidence clearly supports the conclusion the judge drew—being the only reasonable inference to be drawn is Ms. Ellis intended to deprive Mr. Piercy of having possession of their daughter. The Crown's factum provides:

> 69. The Trial Judge recognized that for this charge there was only one live issue. Whether the Crown had proven the Appellant had the requisite mens rea, the required intent, to be found guilty.
>
> …

> 77. The Trial Judge was aware that the only evidence with respect to the issue of intention was the Appellant's testimony and the "surrounding circumstances". Having completely rejected the Appellant's evidence, the Trial Judge was alive to the test to be applied when deciding if an element of an offence has been proven by circumstantial evidence. In finding the Appellant guilty, the Trial Judge adopted the wording set out in *R. v. Villaroman*, 2016 SCC 33. The Trial Judge found that there was only one reasonable inference that could be drawn from the totality of the surrounding circumstances.
>
> …
>
> 99. In the circumstances of this case, it was reasonable for the Trial Judge to find that the only reasonable inference to be made was that the Appellant intended to deprive Justin Piercy of having possession of [the child]. It was reasonable for the Trial Judge to find the Appellant guilty of an offence under s. 283 of the Code.

[52] The following excerpts from the judge's decision illustrate how she dealt with the evidence and describe her reasoning path for drawing the inferences/findings of fact that she made:

> [30] … The uncontradicted evidence, is that she [Ms. Ellis] drove six to seven hours in a U-Haul full of personal belongings, including a child's car seat, to the residence, where her daughter, whom she had not seen in numerous months was residing. She did not call ahead, despite indicating she had been to the residence before and knew where it was and who lived there. She did not engage any legal services to facilitate access, if she thought she would be denied access. She simply showed up.
>
> [31] By her own admission, when her presence was confirmed as being unwelcomed, she, having the child in her arms, ran toward the U-Haul with the child. She claims it was to have or extend the visit with her child, to have a few more minutes with her. There was much made about whether or not the U-Haul was running and which direction it was facing. I find those facts, while interesting, to have little bearing on the ultimate determination of whether or not Ms. Ellis intended to flee with the child. It is clear that by the time Ms. Ellis reached the seat of the U-Haul with the child, Mr. Piercy and his grandmother, with whom he was living, had reached the open door. Ms. Ellis had not yet had an opportunity to either remain seated with the door open, or to get her body fully into the U-Haul, close, and lock the doors.
>
> [32] What her intention was, cannot be gleaned from her position in the vehicle alone. As I've indicated, the question is not what Ms. Ellis actually did, but what her intention was. Her intention, this Court finds, is easily discernible from consideration of the surrounding circumstances. There is only one reasonable inference that can be drawn from the totality of the surrounding circumstances.

> [33] This Court can reach no other conclusion on a totality of the evidence, the uncontradicted evidence, the evidence that Ms. Ellis, herself, admits. Other than that Ms. Ellis ‘ intention was to take the child, thus depriving Mr. Piercy of lawful possession. Ms. Ellis would have this Court believe that she drove six to seven hours in a U-Haul, full of personal belongings, including a child’s car seat, on the off chance she could see her child, with no plan as to where she was going to go after. Yet she would return to New Brunswick, even though she had no idea where she lived in New Brunswick, or where she was returning to, although she believes she talked to her parents and they were going to let her live there, when she returned. She would further have this Court believe that when she ran toward the U-Haul, which was loaded with personal possessions, with the child in her arms, it was an attempt to extend the time she could spend with her, despite the father’s and grandmother’s pursuing her to the vehicle. None of that evidence makes any sense. It is simply not believable, nor is it capable of raising even the slightest doubt, let alone a reasonable one. The evidence of the U-Haul’s contents was proven by police witnesses, who seized the U-Haul, at the time in question. Their evidence was consistent, credible, and uncontradicted.
>
> [34] The evidence of Ms. Ellis fleeing with the child to the U-Haul was testified to by Justin Piercy, Judy Piercy, Martin Piercy, as well as being confirmed by Ms. Ellis, herself. There are no inconsistencies in any of the relevant evidence on this aspect, internally or externally.
>
> [35] Nor is the evidence contradicted in any way, whatsoever. Even Ms. Ellis’ evidence is confirmatory on these aspects. The only evidence with respect to the issue of intention, comes from Ms. Ellis’ testimony, which I have completely rejected and the surrounding circumstances, which I find can credibly lead to only one conclusion, that Ms. Ellis intended to take the child and flee, thus depriving Justin Piercy of lawful possession of the child.
>
> [36] Based on the totality of the uncontradicted evidence, which I find to be credible and consistent, both internally and externally, and drawing the only reasonable inference that is available to be drawn from the surrounding circumstances and evidence, in relation to the 283(1)(a) charge, I find that the Crown has proven the offence beyond a reasonable doubt and I am entering a finding of guilt.

[53] It is clear from the judge’s decision that she recognized the assessment of credibility would be a core issue and she would have to apply the test in *R. v. W.(D).* The judge stated:

> [19] … because Ms. Ellis chose to testify, I must also consider the case of *R. v. W. (D.)*, [1991], Supreme Court Judgment No. 26. Under the law as set out in *R. v. W. (D.)*, I must acquit Ms. Ellis, if I believe her evidence. If I do not believe her evidence, but it raises a reasonable doubt, or if after considering the whole of the

> evidence, I have a reasonable doubt, even though I don't believe the evidence of Ms. Ellis.

[54] The judge determined Ms. Ellis was not a credible witness (a finding undoubtedly open to the judge on this record) and concluded Ms. Ellis' stated intention of being at the Piercy residence merely to visit her daughter defied common sense and reason. Having rejected Ms. Ellis' evidence on the element of intent, the judge was alive to the test to be applied when deciding if an element of an offence has been proven by circumstantial evidence as set out in *Villaroman*.

[55] Circumstantial evidence does not have to totally exclude other conceivable inferences. As the Supreme Court of Canada said in *Villaroman*:

> [56] The governing principle was nicely summarized by the Alberta Court of Appeal in *Dipnarine*, at para. 22. The court noted that "[c]ircumstantial evidence does not have to totally exclude other conceivable inferences" and that a verdict is not unreasonable simply because "the alternatives do not raise a doubt" in the jury's mind. Most importantly, "[i]t is still fundamentally for the trier [of] fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt."

[56] When assessing the reasonableness of the verdict, the judge's reasons must be read as a whole in the context of the evidence, the issues, and the arguments advanced at trial (*Villaroman* at para. 15). As the challenged conviction is based upon circumstantial evidence, our focus is on whether the inferences drawn by the judge, having regard to the standard of proof, were reasonably open to her. Each piece of circumstantial evidence on its own may not establish the offence elements. However, each piece of evidence can be a link in a chain—it is the cumulative effect of all the evidence taken together that must be considered in deciding if an element of an offence has been proven beyond a reasonable doubt. (See *R. v. Gibson*, 2021 ONCA 530, at paras. 75-79.)

[57] I am not persuaded by Ms. Ellis' argument that the verdict was unreasonable. There is nothing speculative about the judge's finding that the only reasonable inference to be drawn is Ms. Ellis intended to deprive Mr. Piercy of having possession of their daughter. The judge's determination is well supported on this record. I would dismiss this ground of appeal.

[58] In light of this determination, and for the reasons stated in paras. 34 and 35 above, I need not address the conviction under s. 349(1)—being unlawfully in a dwelling. In other words, the judge did not err in finding that Ms. Ellis entered a

dwelling house (the Piercy residence) with the intent to commit an indictable offence therein (attempted adduction).

Was the assault verdict unreasonable?

[59] Ms. Ellis argues the assault verdict was unreasonable because the judge disregarded or misunderstood Mr. Piercy's testimony.

[60] In finding Ms. Ellis guilty of assault the judge reasoned:

> [50] Justin Piercy testified that as he approached Ms. Ellis, she grabbed him by the throat. Ms. Ellis' version was that Mr. Piercy was advancing on her and she raised her hand to stop him from hurting or hitting her. Defence submitted that Mr. Piercy accepted this version on cross-examination.
>
> [51] I reviewed the evidence in this regard and find the evidence to not be quite that straight forward. On cross-examination, Mr. Piercy maintained and reiterated that Ms. Ellis grabbed him by the throat . He never denied that or indicated he was mistaken about that. Later on, an exchange took place about her raising her hand and him, perhaps, walking into it. How that fits with, or related to the grab throat, was never clarified. In fact, it was never linked to the throat grabbing and thus there remains a lot of questions in my mind about whether or not that is even the same incident. …
>
> [52] … [Mr. Piercy] was quite precise as to what happened, how, and when. Given his clear testimony that he was grabbed by the throat by an irate Accused, screaming about wanting her daughter, I have no hesitation in concluding beyond a reasonable doubt that this occurred. The attempt to cloud or muddy the waters by Defence in this regard, well, they may make me question whether or not something else may have occurred, does nothing to dissuade me from accepting beyond a reasonable doubt that the grab, as testified to, by Justin Piercy in fact, happened and happened as he originally testified. Once, again, for the reasons already stated, I am rejecting the evidence of Ms. Ellis, finding it incapable of raising a doubt, and entering a finding of guilt based on the accepted evidence of Justin Piercy.

[61] The entirety of Mr. Piercy's direct evidence respecting the assault charge was as follows:

> Q. Okay. Now did you, um, other than your hand, did you receive any other injuries as part of this incident?
>
> A. Injuries, no, but I did approach Ms. Ellis, and as a result, she did grab my throat, but it wasn't – it wasn't an injury by any means.
>
> Q. When did that happen?

> A. After I got [the child] back inside, I was just approaching her, to be like, "You need to leave. You've got to go. This isn't how you do it. You've gotta go." And then she's like, "I want my kid," and then I did, for the purpose of the record, I did stare her in the face and I did say, "First, show me your track marks."

[62] On cross-examination, Mr. Piercy expanded on what happened and readily acknowledged it was he who may well have walked into Ms. Ellis' outstretched arm and hand:

> Q. So, but when in that interaction, did she supposedly try to grab you by the neck?
>
> A. When I was approaching her, she was approaching me, like, with her hand out, and she did grab me right here, but there was no injury.
>
> Q. She held her hand out with her fingers spread apart?
>
> A. Just as if to hold me back, yes.
>
> Q. So, you were approaching her and she was – I presume she has normal.…
>
> Crown counsel: Sorry. The witness didn't speak for the record. He just nodded his head. Sorry.
>
> Defence counsel: Good point. The witness nodded, "Yes."
>
> Q. So – so, she held her hand out, basically, at – at arm's length with her fingers spread, basically to – to maybe shield herself from your approach to her?
>
> A. It could have been a possibility, yes.
>
> Q. Well, how close did you get to her?
>
> A. Close enough for her to grab me.
>
> Q. And be – and – and so, was she – what was she doing before you approached her?
>
> A. I can't recall. I was focused on my grand – on – on my grandfather, at that time.
>
> Q. Okay.
>
> A. Because like I said previously, I can only see what I am directly looking at.
>
> Q. So, you walk up to her, and you basically walk into her hand?
>
> A. Yes. That's why I said there was no injury.
>
> Q. And then you backed off, or did something else happen?
>
> A. I backed off.

[63] At trial, defence counsel made these submissions to the judge:

> … And Justin stated in Court, Kelsey grabbed – when he – under – under direct, he said, "Kelsey grabbed my throat, after I came back out of the house." But under cross-examination, he clarified and stated that when they were outside in – somewhere between the U-Haul and the house, that he approached her and he admitted that she held up her hand with her fingers spread, to shield herself from himself. That is very similar to Kelsey Ellis' version of the alleged assault between – against Mr. Justin Piercy. Kelsey Ellis state – stated he pressed against her extended arm, hand and arm, right in her face. And she gave this motion of her arm being squished into her body, presumably because he's pressing his body against her hand. She was either on the street or the sidewalk, she states. It was not Kelsey Ellis who was intentionally applying unconsensual physical force against Mr. Piercy at that time. It's simply clear, quite clear, that I think that in – for this allegation of assault, that there's no *actus reus* of 266(B) by Kelsey Ellis. And for Mr. Piercy to say that she grabbed him by the neck, when he's pushing into her hand, is a distortion of events or an exaggeration, at least. Shielding herself, does not equal being grabbed by the throat …

[64] Crown counsel made this submission to the judge:

> With respect to the evidence on the common assault, certainly we're dealing with common assault, the essential elements with respect to that offence, would be an intent – an intentional application of force, where there's no consent. You certainly heard Justin Piercy's evidence, as recounted by my friend. You've heard the con – contradictory evidence that was heard or that Kels – Kelsey Ellis testified to in Court. It would certainly be up to the Court to assess the evidence, as proffered, on that particular offence. However, I will just note that certainly Mr. Justin Piercy was cross-examined as to Ms. Kelsey Ellis' version. I don't believe and it's not my recollection that Justin Piercy adopted that version. Just because it's put to Mr. Piercy, does not mean he's accepting it.

[65] And in reply, defence counsel noted:

> [A]s for my friend stated that there was no evidence that – that when Justin Piercy testified that there was no evidence that he did anything to her, but he – Justin Piercy testified that he approached her and that she shielded – that she put her hand up to shield herself from him. And – and she indicated, again, that her hand was being pushed into her body, her – her elbow became angled, so, that is doing something to her. … but my – my friend's comment that he didn't do anything to her, I think based on his own testimony is not correct.

[66] Ms. Ellis explained her view of the judge's misapprehension of the evidence as follows:

> 38. Mr. Piercy was plainly discussing the throat-grabbing incident when he answered questions in cross-examination. The questions posed to him were not an

> "attempt to cloud or muddy the waters"; they were in the nature of ordinary cross-examination, suggesting clarifications and further details which Mr. Piercy adopted either as facts or possibilities. The trial judge's conclusion, that Mr. Piercy's concessions related to another incident, reflect a misunderstanding of the evidence.
>
> 39. Mr. Piercy's admission that the Appellant had her hand raised with fingers outstretched, possibly as though to shield herself from him, and that he basically walked into her hand, raises a reasonable doubt about whether she assaulted him.

[67] The Crown suggests Mr. Piercy's evidence was confusing and even if the judge misunderstood the evidence, this may not have played an essential role in the guilty verdict. The Crown says:

> 102. It was understandable why the Trial Judge had questions. During cross examination, there was a portion of Justin Piercy's evidence that was confusing. He seemed to indicate he came out of the Piercy residence once when the Appellant was approaching him. Then went back in to get a cloth for his grandmother who had been maced and came out again. As a result, it is possible the Trial Judge believed the Appellant had approached Justin Piercy on two separate occasions. On one occasion, she grabbed Justin Piercy by the throat and, on the other occasion, she merely raised her arm and Justin possibly walked into it.
>
> 103. However, based on his evidence during his direct examination and his evidence during cross examination, it appears the Appellant grabbed Justin Piercy by his throat shortly after he had asked the Appellant to show him her "track marks". That was the interaction Justin Piercy referred to during his cross examination when he gave evidence it was possible the Appellant held her arm out to shield herself, just as if to hold him back.
>
> 104. For the verdict to be unreasonable for the assault charge, the Trial Judge's misunderstanding or misapprehension of the evidence needs to have played an essential role in her finding the Appellant guilty.
>
> 105. It is possible for this Court to find the Trial Judge's misunderstanding of the evidence did not play an essential role in her finding the Appellant guilty of assaulting Justin Piercy.

[68] I do not accept the Crown's submissions. I am satisfied the judge misapprehended critical evidence related to the assault allegation. In my view, the record is clear that (1) both Mr. Piercy and Ms. Ellis are testifying to the same encounter, and (2) Mr. Piercy conceded it was indeed possible he walked into Ms. Ellis' outstretched hand and then backed away. Even if the judge rejected Ms. Ellis' testimony, Mr. Piercy's evidence alone establishes a reasonable doubt and

the assault conviction cannot stand on this record. I would allow this ground of appeal, set the assault conviction aside, and enter an acquittal.

[69] As evident in my analysis of the remaining issue, this error weighs heavily on the assessment of whether the length of the custodial period imposed by the judge can stand.

Did the judge err in imposing sentence?

[70] Ms. Ellis claims the judge made these discrete errors in principle when imposing sentence:

> (1) The judge referred to the ten-year maximum sentence for abduction under s. 283(1). However, the offence was particularized and proved as an attempt, thus the maximum sentence was five years (s. 463(b)). Further, the judge made no reference to the distinction between an attempt and a completed offence when assessing the seriousness of the offence and applying sentencing principles.
>
> (2) The judge did not determine the sentences to be imposed for each offence. Rather, she pronounced a blanket sentence for the three convictions. Thus, she said nothing about imposing consecutive or concurrent sentences nor the principle of totality. This is contrary to the clear direction of this Court in *R. v. Adams*, 2010 NSCA 42 which directs a sentencing judge to determine a fit sentence for each offence and determine which should be consecutive and which should be concurrent. Then, take a final look at the total aggregate sentence and make adjustments if it exceeds an appropriate sentence.
>
> (3) The judge did not give reasons for granting a DNA order as was required s. 487.051(3) of the *Criminal Code*.

[71] Ms. Ellis says these errors in principle warrant our intervention. Further, the sentence imposed is manifestly unfit because:

> 49. The incident lasted only a few minutes and there was little actual risk of the Appellant successfully escaping with [the child] from Cape Breton in the U-Haul vehicle. Her entry into Mr. Piercy's home was a de minimis home invasion. Her physical contact with Mr. Piercy was inconsequential and it appears to have been triggered by him walking into her hand.
>
> 50. A fit sentence would have been time served and probation. A DNA order was not warranted; as noted, the two offences eligible for a DNA order — home invasion. and assault — were not serious and their "nature and circumstances" do not engage any of the rationales for keeping a record of the Appellant's DNA so as to justify the intrusion on her privacy.

[72] The Crown argues that if the judge made any errors in principle, which is not acknowledged, they had no material impact on the sentence imposed. In summary, the Crown contends:

- The judge was aware Ms. Ellis was to be sentenced for three offences. She said so in her oral decision.
- It is apparent from the record, trial counsel and the judge considered the three offences to be part of one criminal venture warranting concurrent sentences. The focus of the sentencing hearing was on the more serious offence of attempted abduction and neither Crown or defence counsel made submissions about whether sentences should be served concurrently or consecutively.
- The judge did not issue a blanket sentence for the three offences. As reflected in the endorsed Information and Warrant of Committal before she was *functus*, the judge assigned an individual sentence for each offence and determined they were to be served concurrently.
- Even if the judge did not strictly follow the direction in *Adams*, it did not impact the sentence for attempted abduction because the principle of totality was not engaged. The judge did not first impose sentences for being unlawfully in a dwelling house and the assault and these offences were a single criminal venture that called for concurrent sentences.
- The judge's reference to the ten-year maximum sentence for abduction under s. 283(1) was not an error. The judge correctly observed this maximum sentence was for an abduction. However, the judge was plainly aware she was sentencing Ms. Ellis for an attempted abduction. Judges are presumed to know the law. Accordingly, the judge knew the maximum sentence for attempted abduction would be half of the maximum sentence of the completed offence as per s. 463(b) of the *Criminal Code*.
- Although the judge did not provide focused reasons for the imposed DNA order, she did not err in granting it. The offence of being unlawfully in a dwelling house is a secondary designated offence[5] under s. 487.04 and although the section provides that a judge shall give reasons when deciding whether to impose a DNA order, context is relevant. The judge gave an oral sentencing decision in a busy provincial court and whether the DNA order

[5] The Crown noted both the s. 349(1) (unlawfully in a dwelling) and the s. 266(a) (assault) offences were secondary offences. However, I only reference the s. 349(1) as I would overturn the assault charge.

should be granted was not a live issue. The Crown had requested one and defence counsel made no opposing submissions.

- In the event the judge erred in principle by not providing sufficient reasons for granting the DNA order, this Court is entitled to give fresh consideration to whether such an order should be granted (*R. v. Knezacek*, 2007 SKCA 116 at para. 6). Given: Ms. Ellis' criminal record (which includes serious offences of break and enter, identity fraud and procuring or possessing false identity documents); the serious nature of the offences which are the subject of this appeal; extraction of a DNA sample is minimally invasive due to the techniques used to obtain samples and the procedural safeguards on the use and dissemination of the information that is gathered, it would be in the best interests of the administration of justice for this Court to grant a DNA order.

- The sentence was not demonstrably unfit. Ms. Ellis' moral culpability or degree of responsibility was high. The judge found Ms. Ellis premeditated and planned to abduct her daughter and, had it not been for the quick actions of the Piercys, she would have fled with the child.

- Consideration should be given to *Friesen* as the Court stated the principles established therein can also be drawn upon when imposing sentences for child abduction (para. 44). In particular, the sentences must reflect the life altering consequences that can and often do follow from these offences. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm that flows from them; and (3) the actual harm that results. As a result, upward departures from prior precedents and sentencing ranges may be required to impose proportionate sentences (*Friesen*, paras. 74, 75, 76 & 107).

[73] Returning to Ms. Ellis' complaints of error, the judge should have specifically addressed the individual sentence for each offence and whether they were to be served concurrently or consecutively in her oral decision. Had she done so the sentence she imposed, and whether the totality principle was engaged, would have been clear to the parties and assisted with appellate review.

[74] That said, I am satisfied the record reveals the judge turned her mind to these issues albeit late but before she was *functus*. In the context of this case, there is no doubt the judge and trial counsel were all of the view the offences were part of one criminal transaction and any sentence imposed for individual offences would be served concurrently.

[75] Respecting the judge's reference to the maximum sentence for abduction, it may not be as innocuous as the Crown suggests. Neither defence nor Crown counsel referenced the maximum sentence for abduction or attempted abduction in their sentencing submissions. Nothing turns on that; however, the manner in which the judge solely referenced the maximum sentence for abduction raises confusion. The judge said:

> [1] Ms. Ellis comes before this Court for a sentencing in relation to three charges for which she was found guilty by this Court at the trial. Those charges are…and further, being the parent of [the child], **did attempt to take** [the child], a person under the age of 14 years old, with the intent to deprive Justin Piercy, a parent of [the child], of having possession of the child, contrary to Section 283 (1) (a) of the *Criminal Code of Canada.*
>
> [2] **The Crown proceeded indictable on all charges. The maximum punishment for abduction, when proceeded by indictment, is ten years' incarceration.** The maximum punishment for assault by an indictment is five years' incarceration. And the maximum punishment for the offence of unlawfully in a dwelling, is likewise, ten years' incarceration.
>
> [3] As just mentioned, **these are offences for which Ms. Ellis was found guilty after a trial on the merits.** The facts are as were found by this Court in the Decision rendered on January 14th, 2022.
>
> [emphasis added]

[76] Section 463(b) of the *Criminal Code* provides:

> **463** Except where otherwise expressly provided by law, the following provisions apply in respect of persons who attempt to commit or are accessories after the fact to the commission of offences:
>
> > **(b)** every one who attempts to commit or is an accessory after the fact to the commission of an indictable offence for which, on conviction, an accused is liable to imprisonment for fourteen years or less is guilty of an indictable offence and liable to imprisonment for a term that is one-half of the longest term to which a person who is guilty of that offence is liable;
> > …

[77] The judge correctly referred to an attempted abduction in para. 1. However, immediately after referring to the offence of abduction and its attendant maximum sentence in para. 2, (as well as the other offences), in the next para. she said, "**these are offences** for which Ms. Ellis was found guilty". I agree with the Crown's submission that a judge is deemed to know the law but the judge's comments in

paras. 2 and 3 call into question whether she was alive to the maximum sentence for the particularized offence of attempted abduction being only five years.

[78] In any event, notwithstanding the foregoing concern, the sentence imposed must be revisited in light of my determination that the assault conviction must be set aside.

[79] The judge viewed the timing and circumstances of the assault to be an aggravating factor when sentencing Ms. Ellis for the attempted abduction. Unequivocally, this view impacted the sentence she imposed. The judge said:

> [4] In summary, what this Court found was that Ms. Ellis and her then boyfriend, William Boyd, drove from Fredericton, New Brunswick, in a U-Haul, loaded with personal belongings, and a child's car seat to Glace Bay, Nova Scotia. Once Ms. Ellis arrived, unannounced, at the residence where Mr. Piercy was staying with their daughter, Ms. Ellis reached into the house, grabbed the child, and ran to the U-Haul. She was pursued by Mr. Piercy, and his grandmother, and the child recovered from the vehicle. **Ms. Ellis, later, exited the U-Haul and advanced on Mr. Piercy, screaming for their daughter, and assaulted Mr. Piercy in the process.** Police arrived on scene and Ms. Ellis was arrested.
>
> …
>
> [6] **Aggravating with respect to the assault is the prior relationship between the parties. They are the natural parents of the child in question, and former domestic partners. A statutorily aggravating factor. The timing and circumstances of the assault are further evidence of Ms. Ellis' determination to execute her plan to take the child, occurring as it did, after Mr. Piercy had recovered the child, and safely deposited her back inside the home.**
>
> …
>
> [19] When this Court stops to consider the offences for which Ms. Ellis is to be sentenced here today, and the manner, and circumstances in which they were committed, it is clear that the overriding principals for consideration are denunciation and deterrence. This Court found that Ms. Ellis, in a planned and pre-meditated manner, snatched, for lack of a better word, her child from the home, in which that child was residing with her father, without warning or notice, and attempted to flee. It was only the quick and immediate reaction of Mr. Piercy and his grandmother that prevented the child from being whisked away. Ms. Ellis drove an excess of six hours in a loaded U-Haul to carryout her plan. **Even after the child was safely recovered, Ms. Ellis still persisted in attempting to reach her, resulting in a subsequent assault on Mr. Piercy.**
>
> [20] **These are incredibly aggravating circumstances and the result in sentence must reflect the true nature of these offences.** Based on the facts, as

> found by this Court, considering the aggravating factors and lack of mitigating factors, this Court finds that a fit and appropriate custodial sentence in all of the circumstances, of both the offences and this offender, would be a sentence of two years in a federal institution, minus remand time, in addition to a period of probation.
>
> [emphasis added]

[80] As the foregoing illustrates, the judge regarded the timing and circumstances of the assault as among the "**incredibly** aggravating circumstances" and viewed the assault as further evidence of Ms. Ellis' intention to abduct the child and willingness to continue in that intention even when initially thwarted. In turn, this finding increased the judge's assessment of Ms. Ellis' culpability and resulted in a harsher sentence.

[81] As determined earlier, the evidence did not establish there was an assault. Thus, the judge should not have treated the assault allegation, its timing and circumstances as an aggravating factor in the sentencing of the attempted abduction offence. This error in principle clearly had a material impact on the sentence imposed. We must therefore perform our own sentencing analysis. (See *Friesen*, at paras. 26-27 and *R. v. Lacasse*, 2015 SCC 64, at para. 43.)

[82] As the Supreme Court of Canada made clear in *Friesen*:

> [28] … in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position …

[83] Other than the error of treating the timing and circumstances of the assault as an aggravating factor and the concern with possible misapprehension of a maximum sentence, I see no further material error in the judge's sentencing decision. She correctly identified the legal principles that must guide her sentencing determination. I defer to her identification of other aggravating and mitigating factors. There is no need to rehash them as there is no challenge to her analysis of these factors.

[84] The judge also had the benefit of a victim impact statement. She explained:

> [11] This Court has also had the benefit of a Victim Impact Statement filed by Justin Piercy, on behalf of himself and the child who is the victim of the

> abduction charge. … The Victim Impact Statement details the trauma suffered by both Mr. Piercy and their daughter. Not just as a result of what Ms. Ellis did on that day, the grabbing and running with the child, whom moments before had been sitting in front of the TV, eating her lunch, as she did most days, but the ongoing trauma of being unable to see her mother, as a result of her mother' s actions, and the effect that is having on her, on a daily basis. When coupled with the child' s ongoing fear of being grabbed and carried off again, as detailed in the Victim Impact Statement, it is clear that these offences, have had a profound and lasting effect on both Mr. Piercy and the party's *(sic)* young daughter.

[85] The judge was mindful of the status of Ms. Ellis' criminal record. She observed:

> [10] Ms. Ellis comes before this Court today with a criminal record. Prior to the commission of these offences, she had been charged with, but not yet found guilty, of impaired driving, and two counts of breach of release conditions. Subsequent to the date of these offences, but prior to the findings of guilt being entered, she was charged and convicted of theft, break - a theft, break and enter, three breaches of release conditions, two counts of resisting arrest, identity fraud, for the purpose of avoiding arrest or perverting the course of justice, public mischief, and procuring or possessing false identity documents.

[86] The judge was well aware that a sentence must be proportional to the gravity of the offence and the degree of the offender's responsibility. She stated:

> [12] While there are certain statutory considerations that must be considered and applied by judges in sentencing offenders, as outlined in Sections 718, 718.1, 718.2, and 718.3 of the *Criminal Code*, it must be kept in mind that sentencing is a very individualized process. Any sentence that is ultimately imposed, must reflect the circumstances about the offender and the offences in question.
>
> [...]
>
> [14] The blame worthiness of the offender must be acknowledged and where appropriate, restraint, exercised by the sentencing judge. While principals *(sic)* of sentencing require emphasis and greater consideration than others, will be dictated by the - which - pardon me - which principals *(sic)* of sentencing require emphasis and greater consideration than others, will be dictated by the circumstances of the offence, as well as the particular offender's circumstances.

[87] The judge turned her mind to Ms. Ellis' presentence report and in particular, her stated history of a traumatic childhood experience, her longstanding struggle with substance abuse, her mental health issues and that she has a supportive family. The judge remarked on Ms. Ellis' stated awareness and willingness to address her challenges and this, together with family support, boded well for her rehabilitation.

However, the judge explained all this did not detract from the seriousness of the offences nor did she find Ms. Ellis' apologetic expression during oral sentencing submissions mitigating. The judge said:

> [7] … While family support and acknowledgment of issues that may need to be addressed and a willingness to work on those issues may bode well for rehabilitation, they do not diminish or mitigate the seriousness of these offences.
>
> [8] Particularly in this instance, when the comments from both Ms. Ellis and her mother, as contained in the Pre-Sentence Report, that Mr. Piercy was just trying to get her in trouble and that the charges were exaggerated, indicate a complete lack of insight into the seriousness of Ms. Ellis' actions and the harm and trauma experienced by the multiple victims of these offences.
>
> [9] Ms. Ellis is entitled to maintain her innocence. That cannot and will not be held against her. It is not an aggravating factor, but likewise, a half-hearted acceptance of responsibility and a profundity expression of remorse will not be considered a mitigating factor.

[88] The judge received detailed submissions from trial counsel respecting the range of sentences imposed for offences under s. 283(1). It is fair to say that finding parity between abduction cases is a challenging task as is evident by counsels' submissions at trial and on appeal. That is because the facts in abduction cases, including the mitigating and aggravating factors, tend to be quite unique,[6] which the judge took note of in her sentencing decision when reviewing relevant jurisprudence. The judge observed:

> [15] Such is the case in this instance. This Court has received a number of cases from both Defence Counsel in advocating for a sentence of time served and probation. And Crown Counsel, in recommending a sentence of two years' less remand time, and two years' probation, in addition to a secondary DNA order. As a guide to consider in arriving at a fit and appropriate sentence for these offences.
>
> [16] I've carefully reviewed and considered the cases provided. While they are of some assistance in identifying the overriding considerations in imposing sentence with respect to these types of offences, they are all distinguishable on their facts. In a number of the cases, such as *Irviola (ph)*, *Backish (ph)*, and *Neundorf*, there was serious mitigating considerations, which ultimate - pardon me - serious immigration considerations, which ultimately would effect the child at issue, as well as the offenders. Most had a hugely mitigating factor of guilty

[6] For example, see *R. v. Al Aazawi*, 2022 ABCA 361, *R. v. R.M.*, 2022 ONSC 6662, *R. v. Rodrigues*, 2019 ONSC 2752, *R. v. Li*, 2017 ONCA 509, *R. v. Levin*, 2014 SKCA 66, *R. v. Melville*, 2011 ONSC 5697, *R. v. Urbiola*, 2006 BCPC 551, *R. v. Butler* (1998), 165 N.S.R. (2d) 39, *R. v. Rocha*, 25 R.F.L. (4th) 315, *R. v. Malik*, [2004] OJ No 764 (QL), aff'd *R. v. A.M.*, [2005] O.J. No 1829 (QL).

> pleas, such as *Irviola (ph), Lewis (ph),* and *Jacome* . There was an element of impulsivity in *Backish (ph)*. There was the lack of a criminal record in *Neundorf, Backish (ph),* and *Irviola (ph),* and an *(sic)* NDP, the accused was found to have been acting on a misapprehension that the child in question was in danger in the environment from which they had been removed.
>
> [17] The closest case on the facts was the *Rodriguez (ph)* case, where the accused admitted to performing the Actus Reus of the offence and the matter proceeded only on the question of criminal responsibility, given the accused's acknowledged mental health issues.
>
> [18] While the *Singh (ph)* case provided by the Crown was as well very similar, it is also very dated, being a 1990 case from British Columbia. The *McBeef (ph)* case, also provided by the Crown appears to be much more aggravating with respect to the assault that occurred as well as the unlawful entry into the dwelling, but also gave rise to consideration of *Gladue* factors. In that 2014 case, also from the British Columbia Court of Appeal, the original sentence of 36-months' custody for abduction, unlawfully in a dwelling, and assault causing bodily harm, was reduced on appeal to a total of 34 months, less one day custody, with remand credit of 12 months, resulting in a sentence of two years, less one day, followed by three-years' probation.[7]

[89] However, in light of the judge's error in principle, the sentence she imposed warrants a reduction. As explained earlier, the judge placed considerable weight on what has turned out to be an erroneous aggravating circumstance. That said, the circumstances of this case remain serious.

[90] As the judge said:

> [5] … **The offences for which Ms. Ellis has been convicted, involve a degree of pre-meditation and planning,** as evidenced by her arrival in a U-Haul, loaded with personal possessions, and a child's car seat for the child. The drive from where Ms. Ellis was residing at the time to her destination in Glace Bay, is in excess of a six-hour drive. There was plenty of time for Ms. Ellis to reconsider her plan. As pointed out by the Crown, Ms. Ellis did not show up along *(sic)*, but brought assistance. She enlisted the aide of her then boyfriend. Further evidence of the planning and pre-meditation.
>
> …
>
> [19] When this Court stops to consider the offences for which Ms. Ellis is to be sentenced here today, and the manner, and circumstances in which they were committed, it is clear that **the overriding principals for consideration are denunciation and deterrence. This Court found that Ms. Ellis, in a planned**

[7] As noted, the judge's decision was delivered orally and the transcriber's use of "*ph*" (initialism of phonetically) indicates the case name is spelled as it was pronounced.

> **and pre-meditated manner, snatched, for lack of a better word, her child from the home, in which that child was residing with her father, without warning or notice, and attempted to flee. It was only the quick and immediate reaction of Mr. Piercy and his grandmother that prevented the child from being whisked away.** Ms. Ellis drove an excess of six hours in a loaded U-Haul to carryout her plan. Even after the child was safely recovered, Ms. Ellis still persisted in attempting to reach her, resulting in a subsequent assault on Mr. Piercy.
>
> [emphasis added]

[91] Although the assault is to be disregarded, it cannot be overlooked that Ms. Ellis chose not to leave after her daughter had been taken safely back into the Piercy residence. Rather, she got out of the U-Haul, continued to be disruptive and walked toward the Piercy residence. In other words, aggravating elements of her behaviour remain apart from any unproven assault. Further, without question, the attempted abduction had a harmful effect on the child and Mr. Piercy as is evident in the noted Victim Impact Statement.

[92] Ms. Ellis had been absent from her child's life for months. She arrived unexpected and would or should have known that her actions that day were frightening and harmful to her daughter. The judge correctly observed the offence "had a profound and lasting effect" on both Mr. Piercy and the parties' young daughter. Attempted child abduction and unlawful entry into a person's private residence are serious offences. Parents are not to engage in such self-help remedies as Ms. Ellis.

[93] As a result of the judge's error in principle, I would reduce the custodial sentence imposed for the attempted abduction from 2 years to 9 months less remand time. Applying enhanced credit of 1.5 days, the judge calculated Ms. Ellis' remand time to be 288 days. Effectively, the sentence I would impose has been served by the time Ms. Ellis spent on remand. The judge's probation order remains. In my view, this reflects a fit and proper sentence for the committed offence of attempted abduction.

[94] As explained in his dissenting reasons, my colleague Justice Scanlan disagrees with the majority's fresh assessment on sentence and relies heavily on this Court's recent decision in *R. v. R.B.W.*, 2023 NSCA 58. With respect, the focus on *R.B.W.* is misplaced because the circumstances of Ms. Ellis' case are substantively different.

[95] Finally, I would not interfere with the DNA order. As noted, the judge's decision to impose a DNA order is discretionary and unless the imposition is clearly unreasonable, it should stand.

[96] Section 487.051(3) of the *Criminal Code* provides that on application by the Crown, a sentencing judge may grant a DNA order in respect of a secondary designated offence if satisfied "that it is in the best interests of the administration of justice to do so". The section also requires a judge to provide reasons for issuing the DNA order and mandates a judge to consider the offender's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on their privacy and security interests.[8]

[97] There is no question that the judge's express reasons for imposing a DNA order are very lean. Providing clear reasons, which demonstrate consideration of the mandatory factors, is always preferrable. That recognized, I must read the judge's reasons as a whole. In doing so, I am satisfied she addressed the required factors and her reasons demonstrate why it was in the interests of justice to grant a DNA order.

[98] Had this not been the case, the record would have permitted this Court to conduct the required analysis which would lead me to the same conclusion—weighing the statutory factors, it is in the interests of justice to impose a DNA order upon Ms. Ellis.

Conclusion

[99] For the foregoing reasons, I would set aside the assault conviction and enter an acquittal but not disturb the convictions under s. 283(1) and s. 349(1). As a result of setting aside the assault conviction and upon conducting a fresh sentence assessment, I would reduce the sentence imposed for the attempted abduction from 2 years to 9 months less remand time. I would not interfere with the DNA order. The judge's probation order remains.

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[8] On appeal, Ms. Ellis' conviction under s. 349(1) was undisturbed. As per s. 487.04(a.1)(x) this offence is a secondary designated offence for the purpose of a DNA order. For primary designated offences, the public interest is presumed to outweigh privacy interests.

Van den Eynden J.A.

Concurred in:

Bryson J.A.

Dissenting Reasons (Scanlan J.A.):

[100] I have the benefit of reading my colleague's decision. I agree the trial judge erred in convicting the appellant of assault. There was no evidence which could reasonably support that conviction. As noted by my colleague, for the trial judge the assault was an important factor in the sentencing of the appellant. To sentence the appellant while influenced by a conviction that cannot be sustained is an error in law. It is for this Court to now craft an appropriate sentence and no deference is owed to the trial judge. Based on the record this Court can impose an appropriate sentence. This is all set out in my colleague's decision.

[101] There was no appeal of the conviction or sentence on the home invasion charge, other than the appellant saying if the attempted abduction falls then so must the home invasion. As such there is no basis upon which this court can address a 12-month sentence imposed on that charge. Although I refer to it as a home invasion, it was little more than a mother reaching beyond the threshold of the door to reach her child, then taking her to a vehicle parked across the street. It was not what we would think of as a home invasion in most cases where an offender breaks into, or barges into a home, committing a violent crime therein.

[102] This dissent deals solely with the issue of what an appropriate sentence should be for the attempted abduction offence. I disagree with my colleague as to what an appropriate sentence is in the circumstances of this case and this offender. Respectfully, I believe a sentence of imprisonment of nine months is inappropriately harsh. Because of the precedent value of cases I am satisfied that, even though the sentence has long since been served, it is important that this court set out what an appropriate sentence would be in these circumstances.

[103] I am satisfied that at a maximum, on the attempted abduction aspect of this case, the circumstances of the offence and the offender justify the imposition of a short sharp period of incarceration and probation, or a conditional sentence with conditions directed at treatment and rehabilitation of the offender. Let me explain.

[104] Section 718 of the *Criminal Code* obliges a sentencing judge to impose a sentence proportionate to the gravity of the offence and the degree of responsibility of the offender. In my comments I refer mainly to the attempted abduction. The other conviction, while related, is more of a background circumstance. In other words, reaching over the threshold was part of the attempted abduction, a circumstance to consider. It would be wrong to punish the appellant a second time for that offence, the trial judge having already sentenced the appellant to one year for that aspect of the offence.

[105] The attempted abduction was ill-fated from the beginning. Perhaps the fog of her drug addiction caused the appellant not to appreciate the folly of her plan. The appellant did not secret her child away in the middle of the night, or during an access visit. This offence occurred in broad daylight, with the appellant clearly identifiable and known to the family. Her getaway car was a U-Haul cube van. Had she succeeded in getting away, the van with its full sided lettering saying "U-Haul" would be easily recognizable. U-Haul vans can hardly be described as Ferrari class getaway cars; there would be no high-speed pursuit.

[106] As attempted abductions go, this one was at the extreme low end in terms of chance of success and duration. The child was in the appellant's control for a matter of minutes as she ran across the street to the waiting vehicle and got into the passenger seat. The father and grandmother reacted swiftly and the grandmother choked the appellant in the vehicle. This choking allowed the father an opportunity to retrieve the child. He then returned with the child to the house.

[107] In addition to the particulars of the incident itself I want to refer to facts peculiar to this case, and this appellant.

The appellant's personal circumstances:

[108] The appellant was the child's mother. There was no court order granting either parent custody or denying the appellant access to the child. While not often prosecuted, I would suggest that, in the absence of Court orders, it is not uncommon for one parent to attempt to remove a child from another parent. Most are not prosecuted even when the removal denies the other parent access. (Section

283(2) makes the consent of the Attorney General a prerequisite to a prosecution under s. 283.) Here the father said he had filed documents to obtain a custody order but was not able to have the appellant served, so the application sat in limbo.

[109] The appellant had a tragic personal history. At the young age of 12 she was sexually abused. As with many such incidents, it went unreported, but it was proximate to the beginning of the appellant's experimenting with intoxicating substances. The trajectory following abuse was almost predictable even without the benefit of a Gladue or IRCA type report: sexually abused at 12, drinking alcohol at 13, soon every weekend or every other weekend. She started smoking marijuana in junior high, which would have been proximate to the sexual abuse. She started drinking daily at the age of 19 for one year and stated, "I spent every day at the bar." She started using narcotics at the age of 20 and did not like using both (alcohol and drugs) at once, so she shifted to just using drugs. After one year, she was using "dilaudid, hydros, oxy, morphine, cocaine, and heroine." She started using drugs "more heavily" after she had a miscarriage in September 2019. She said she was using speed regularly, but "accidentally" snorted methamphetamine one day and was hooked immediately. She said she used cocaine intravenously but asserted her last time using was April 7, 2021.

[110] The miscarriage was in 2019 and she lost her and Mr. Piercy's son. She indicated things began to spiral after the miscarriage as she had returned to drug use. At that time not only was she co-parenting their daughter, but she was four months away from graduating from the Child and Youth Care program at Eastern College in Fredericton. She stopped school because of her miscarriage. The fact she was able to temporarily stop using drugs should not be lost in terms of sentencing considerations.

[111] She reported that she started seeing a psychiatrist named Dr. Mystery, four months after the birth of her daughter due to postpartum depression. She also reported that "she has been prescribed several different medications through the years to find the correct balance."

[112] In addition to the addictions issues, a few years ago she was diagnosed with schizophrenia, post-traumatic stress disorder (PTSD), borderline personality disorder, obsessive-compulsive disorder (OCD), generalized anxiety, major depressive disorder, and bipolar disorder. Dr. Mystery first diagnosed Ms. Ellis.

[113] The record does not disclose her receiving any meaningful drug treatment. Certainly, the time she spent in jail was of no benefit. What little drug therapy

there would have been available in jail was substantially interrupted by COVID lockdowns in the institution. She had to resort to self-help reading as therapy.

[114] The offences are serious on their face, and I do not diminish the responsibility of the appellant in any way. The fact that a third party, who had accompanied the appellant sprayed mace on the child's grandmother is extremely aggravating, but it was not the appellant who did this.

[115] The *Criminal Code* and common law include many principles that guide judges in sentencing. Even with the benefit of those guiding principles sentencing is more of an art than a science as is evidenced by the divergent opinions in this appeal. In my search for an appropriate sentence, I am guided by some over-reaching principles.

[116] First s. 718.2(d) of the *Code* provides that offenders should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victim or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[117] While not an aboriginal offender, the circumstances of the appellant and the offence are of great import here. The intergenerational impacts of an offender's background have been recognized by this Court (*R. v. Anderson*, 2021 NSCA 62 [*Anderson*], and more recently in *R. v. R.B.W.*, 2023 NSCA 58 [*R.B.W.*]). The provisions of s. 718.2 are not exclusive to Aboriginal or African Nova Scotia offenders. All offenders are entitled to the benefit of less restrictive sanctions when appropriate. In the case of the appellant who identifies as Caucasian, her tragic circumstances are worthy of particular attention. Is there a link between the sexual abuse she endured, her drug addiction, her medical problems, her lack of insight – poor judgment, and this offence? When it comes to sexual abuse, perpetrators are colour blind, as are the consequences.

[118] Courts have made it clear that sentencing judges must consider the offender's circumstances in a meaningful way for Aboriginal offenders. This has been acknowledged in *R. v. Ipeelee*, 2012 SCC 13 [*Ipeelee*]. I am satisfied that meaningful consideration is not exclusive to any one group but to all offenders who have circumstances relevant to an offence.

[119] In this case, there was no equivalent to a Gladue report or an IRCA report. While courts have commented on the usefulness of such reports, an offender's background should not be excluded from consideration because such a report has not been submitted. In Nunavut, courts seldom see Gladue reports as the adverse impact of Inuit history is presumed in almost every case involving Inuit persons. There are many possible explanations for no such reports, not the least of which may be financial considerations. As a non-aboriginal, non-african Nova Scotian, those types of reports are non-applicable in any event. Instead, I look to the materials in the file to inform me as to the appellant's relevant circumstances. Here the presentence report spoke of the appellant's background and that was not challenged by the prosecution.

[120] One does not have to look far to see the pattern of tragic impact of sexual abuse on young persons, no matter what their gender identity, and regardless of their DNA. The pattern of substance abuse, addiction and mental health problems stemming from sexual abuse at a young age is undeniable and ubiquitous.

[121] The appellant identifies as Caucasian, but she still is entitled to the benefit of the provisions of s. 718.2:

> Section 718.2
>
> […]
>
> (d) of the *Code* provides that offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victim or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[122] I also consider other cases that deal with s. 283 or its related ss. 280 & 282 of the *Code.*

[123] In *R. v. Urbiola*, 2006 BCPC 551, an **attempted abduction** resulting in a conviction under s. 282 of the *Code* attracted a **conditional discharge**, community service and the offender was required to pay court costs. Without obtaining the consent of the child's father, the mother purchased plane tickets to Mexico for herself and the child and proceeded to the airport for the purpose of travelling to Mexico with the child. However, they were intercepted by police at the airport.

The mother admitted that it was her intention to be in Mexico with the child for approximately one month. However, there was also evidence suggesting the mother made arrangements to have her household items shipped to her parents' home in Mexico. The removal was in breach of a very explicit "No removal" order.

[124] As I noted above, there was no court order awarding either parent custody in this case. We have no evidence as to what the parties may be able to agree to in the family court context. We do know the parties did co-parent at one time prior to the addictions and medical problems encountered by the appellant.

[125] In *R. v. Butler* (1998), 165 N.S.R. (2d) 39, **a completed abduction attracted a conditional discharge** followed by one year of probation, 240 hours of community service, and the offender was required to make a charitable donation. **At the end of her access period with the child, without warning the mother took the child with her to the airport.** They travelled to Texas and were not heard from again until the mother was arrested and returned to Nova Scotia **17 years later**.

[126] **The judge in that case noted the offence was not a prevalent offence in that area** (at para. 18). Similarly, in this case there is no evidence the offence is prevalent in the area where the child or Ms. Ellis live.

[127] In *R. v. Melville*, 2011 ONSC 5697, **a completed abduction** resulting in a conviction under s. 282 of the *Code* attracted **a sentence of six months** imprisonment followed by two years of probation and 120 hours of community service. **The father abducted the child and moved to the United States with the child for 12 years.** There was a court order in place at the time under which the mother had custody of the child and the father had access on alternating weekends. The family court had also ordered that neither parent could remove the child from Toronto without the consent of the other parent. The judge stated that **"given the nature, duration and consequences of this abduction, an actual custodial sentence [was] required."** (at para. 29)

[128] In the case of Ms. Ellis, she had the child for less than 12 minutes. This cannot compare to an abduction which continued for 12 years.

[129] In *R. v. R.M.*, 2022 ONSC 6662, an attempted abduction resulting in a conviction under s. 280(1) of the *Code* warranted a sentence of 12 months in custody, less credit for time already served, followed by probation for three years.

A father attempted to abduct his son from outside of his son's school. He grabbed his son and attempted to draw him to a car before bystanders intervened to separate the two.

[130] In *R. v. Rodrigues*, 2019 ONSC 2752, a completed abduction resulting in a conviction under section 283(1) of the *Code* attracted a sentence of 15 months in custody and house arrest (with enhanced credit) and a three-year probationary period. However, the father was also convicted of other offences arising from the total series of events and his sentence was not divided up among the different convictions. The father abducted his daughter from the mother's house in the middle of the night after breaking in and assaulting the mother. He fled with the daughter in his car and eventually ended up in a high-speed car accident, causing injuries to both him and his daughter.

[131] The break-in, the violence, the high-speed chase, and consequent injuries clearly distinguish Ms. Ellis' case from *Rodrigues*.

[132] Because there are so few cases available to assess the issue of parity in relation to Ms. Ellis, I am satisfied that it is important to consider other recent cases dealing with sentencing to see if they offer any guidance in sentencing this appellant. Here I draw heavily on the decision in *R.B.W.* I do so because it is current and in that case it was not just the offence, but the circumstances of the offender which had a substantial impact on sentencing in a serious case.

[133] Proportionality is a cardinal principle that must guide appellate courts, and trial judges, in sentencing. At the appellate level the fitness of a sentence is reviewed through a lens that focuses on the seriousness of the crime and its consequences. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier one would expect the sentence to be. The gravity and seriousness of an offence are not attenuated by the personal circumstances of the accused. This was pointed out in *R. v. Neary*, 2017 SKCA 29 at para. 39.

[134] In *R.B.W.* the sentence for incest is set at a maximum of 14 years. The maximum sentence for attempted abduction is set at five years. As noted in *R. v. Sharma*, 2022 SCC 39, the "maximum sentence *is* a suitable proxy for [the] seriousness" of an offence (at para. 105 [Emphasis added]).

[135] Applying that principle to the present case, the appellant was dealing with an offence that was less serious than in *R.B.W.* In the present appeal the duration of

the offence was a matter of minutes. My colleague will have the appellant and others like her serve 9 months in jail while in *R.B.W.* the majority ruled that the appellant could serve his 24-month conditional sentence in the community followed by 24 months' probation.

[136] Recall that in the present case the trial judge originally sentenced the appellant to two years in prison, it did not allow the sentence to be served in the community. This was based on an assault that did not occur and a home invasion that had technically occurred but factually barely constituted a home invasion.

[137] I look to *R.B.W.* as a gauge because sometimes it is useful to compare apples and oranges to really appreciate the apple or the orange for what it is. The comparison to *R.B.W.* is useful in this case because it is recent, and the offenders in each case come with tragic beginnings. For each the sentence should reflect their tragic beginnings. I add to that one caveat; for the most serious offences, in the most egregious circumstances, an offender's background is of diminished consequence when it comes to sentencing.

[138] Let me now discuss the comparison in greater detail.

[139] In *R.B.W.* the offender fathered a child with his daughter, having had unprotected sexual intercourse with her on more than one occasion. Both the offender and his daughter had intellectual challenges and were of African Nova Scotia heritage. After the child was born, a geneticist at the hospital identified the possibility of incestuous relationship and police investigated.

[140] It is clear the consequences going forward will be inter-generational, with many suffering the stigma of what has been described as: unacceptable, incomprehensible, and repugnant to the vast majority of people and has been for centuries in many cultures and countries (See: *R. v. R.P.F.*, 1996 NSCA 72, 149 N.S.R. (2d) 91 at para. 24).

[141] In *R.B.W.* the family and the community were impacted in several ways. The child was placed in permanent foster care because the intellectual limitations of the mother prevented her from caring for the child. No doubt the child, the family, the local and larger community will, on a go-forward basis, suffer from inter-generational stigma. The larger community will also shoulder the burden of having to care for this child who is severely impaired.

[142] In *R.B.W.* there was evidence that the daughter was intellectually impaired. Her intellectual impairment may have rendered her more vulnerable. Children are especially vulnerable in abduction type cases. In terms of specific and general deterrence vulnerable victims usually need more protection than others. More severe sentences are intended to provide more deterrence when vulnerable victims are involved.

[143] The child born of that relationship had no say in the occurrence. That is not unlike children in broken families with parents struggling for custody, using self-help remedies.

[144] For this appellant I consider the link we so often see between sexual abuse and drug addiction, a circumstance which must be considered in relation to Ms. Ellis as she was making irrational decisions in an attempt to recover her daughter whom she had not seen for months.

[145] When considering the principles and objectives of sentencing I ask; for this case, what is achieved by a nine-month sentence that cannot be achieved by 30 or 90 days in jail? Institutionalization of offenders should be a last option, not a "go to" position. Society and this family would be better protected if the appellant could be successfully treated, not excessively jailed.

[146] In terms of parity, cases dealing with ss. 280, 282 and 283 don't offer much guidance. For various reasons courts have handed out sentences where abductions succeeded and parents and children separated for years in different countries, sometimes in contravention of court orders yet the outcome is often on par or less harsh than the sentence suggested by my colleague in this case. *R.B.W.*, while admittedly a different charge, is a yardstick useful in measuring the appropriateness of a sentence in a substantially less serious case where the circumstances of an offender are a meaningful consideration.

[147] A short sharp jail sentence should act as a significant specific deterrent. As far as general deterrence is concerned, the fact that any offender spends time in jail for having momentarily absconded with her daughter should send a message as to how seriously this type of offence will be treated.

[148] The fact that she was in jail for the equivalent of 288 days without any effective drug treatment suggests jail is not the place to get addictions or mental health treatment.

[149] As a dissenting judge I say that a sentence of 30 – 90 days, followed by probation which included directed treatment programs for addictions, would have been appropriate considering the circumstances of the appellant.

[150] Alternatively, given the appellate standard of review, I would also have deferred to the sentencing discretion of a trial judge had the sentence been a conditional sentence that included treatment provisions. With the greatest respect to my colleague, any jail time should be limited to a short sharp sentence or even no jail at all.

Scanlan J.A.