

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. M.W.*, 2026 NSCA 9

**Date:** 20260205

**Docket:** CAC 536605

**Registry:** Halifax

**Between:**

His Majesty the King

Appellant

v.

M.W.

Respondent

---

**Judges:** Bourgeois, Scanlan, Derrick, JJ.A.

**Appeal Heard:** November 27, 2025, in Halifax, Nova Scotia

**Facts:** The respondent was convicted of sexually assaulting his 13-year-old niece in 1982 while babysitting her and her siblings. The assault involved penetrative vaginal intercourse and occurred in the victim's home while her parents were out of province. The respondent was 29 years old at the time of the offence (paras [1-3](#)).

**Procedural History:**

- Supreme Court Justice Diane Rowe: Imposed a sentence of four years in prison followed by three years of probation, which was found to be illegal as probation cannot follow a sentence exceeding two years (para [2](#)).

**Parties' Submissions:**

- Appellant (Crown): Argued that the trial judge erred in law by imposing probation following a sentence

of over two years and that this resulted in a lower carceral sentence than appropriate. Recommended a carceral sentence of five to six years and reincarceration if the sentence is increased (paras [5-11](#)).

- Respondent: Acknowledged the illegality of the sentence but argued that the probation should be struck, leaving the four-year carceral sentence intact. Opposed reincarceration if the sentence is increased (paras [11-12](#)).

**Legal Issues:**

- Whether the trial judge erred in law by ordering probation following a sentence of over two years' imprisonment.

- Whether the illegal probation order resulted in a lower carceral sentence than the offender should have received.

- What is an appropriate carceral sentence for the respondent?

- Should the respondent be reincarcerated to serve the increased sentence?

**Disposition:**

- The appeal was allowed, and the sentence was varied to six years in prison. The respondent was ordered to be reincarcerated to serve the remaining portion of the sentence (headnotes, paras [38-39](#)).

**Reasons:**

Per Scanlan J.A. (Bourgeois J.A. concurring):

The original sentence was illegal as probation cannot follow a sentence exceeding two years. The error in sentencing impacted the carceral portion, warranting a fresh sentence. A six-year sentence was deemed appropriate, considering the seriousness of the offence, the respondent's moral culpability, and the principles of deterrence and denunciation. The respondent's age and health were considered but did not outweigh the need for reincarceration to uphold the integrity of the judicial system and the principles of sentencing (paras [6-37](#)).

Derrick J.A., dissenting on the issue of reincarceration:

While agreeing with the need for a fresh sentence, Derrick J.A. dissented on reincarcerating the respondent, citing his age, health, compliance with parole, engagement in rehabilitative programming, and the fact he was resentenced as a result of the illegal probation order. Derrick J.A. emphasized that reincarceration would not serve the interests of justice and would constitute an injustice given the circumstances, including the respondent's low risk of recidivism and the time already served. (paras [41-54](#)).

***This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 54 paragraphs.***

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. M.W.*, 2026 NSCA 9

**Date:** 20260205

**Docket:** CAC 536605

**Registry:** Halifax

**Between:**

His Majesty the King

Appellant

v.

M.W.

Respondent

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

**Judges:** Bourgeois, Scanlan, Derrick, J.J.A.

**Appeal Heard:** November 27, 2025, in Halifax, Nova Scotia

**Held:** Appeal allowed, per reasons for judgment of Scanlan, J.A.; Bourgeois J.A. concurring. Sentence of six years in prison, Derrick, J.A. concurring in sentence of six years but dissenting on the issue of reincarceration, would order a stay of reincarceration.

**Counsel:** Erica Koresawa, for the appellant  
Lee Seshagiri, for the respondent

### **Order restricting publication — sexual offences**

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

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

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

### **Mandatory order on application**

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

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

### **Victim under 18 — other offences**

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

### **Mandatory order on application**

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

- (a) as soon as feasible, inform the victim of their right to make an application for the order; and
- (b) on application of the victim or the prosecutor, make the order.

### **Limitation**

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

## **Reasons for judgment:**

### **Introduction**

[1] The respondent was convicted for having penetrative vaginal intercourse with his 13 year old niece. This occurred in her own home in 1982 while the respondent, her uncle, was entrusted with her care while her parents were out of province on a trip. The respondent was 29 years old at the time. The applicable section of the *Criminal Code* was section 144; having sexual intercourse with a female person who was not his wife.

[2] For this offence, Supreme Court Justice Diane Rowe imposed a sentence of 4 years in prison followed by 3 years probation. There were also a number of ancillary orders (firearms prohibition, SOIRA order, a DNA order and orders under ss.161 and 743.21(1). I am satisfied the ancillary orders should remain in place, but the sentence of four years in prison followed by 3 years probation was not a legal sentence. Probation was not available as the carceral sentence exceeded two years (*Criminal Code*, ss 731(1)(b), 732.2(1)(b)). The error in sentencing was an error in law and this court is entitled to vary the sentence pursuant to s. 687(1)(a) of the *Code*.

[3] For the reasons below, I am satisfied an appropriate sentence is six years in prison. I am also satisfied the respondent should be reincarcerated to serve the sentence now imposed. As I have noted above, the ancillary orders will remain in place.

### **Leave**

[4] As a preliminary matter, pursuant to *Criminal Code* s. 676(1)(d) the appellant must be granted leave before being permitted to appeal a sentence. The appellant has met the requirement to show there is an arguable issue here: “a clear error of law” (see *R. v. Tamoikin*, 2020 NSCA 43, *R. v. DeYoung*, 2017 NSCA 13, *R. v. Johnston*, 2014 NSCA 78).

### **Grounds of appeal**

[5] The Notice of Appeal sets out the following grounds of appeal:

1. That the learned Trial Judge erred in law in ordering an order of probation to follow a sentence of over two years’ imprisonment; and

2. That the learned Trial Judge's order of probation resulted in a lower carceral sentence than the offender should have otherwise received.

### **Analysis**

[6] With respect to the first ground of appeal, the parties agree the sentence imposed was contrary to the provisions in the *Criminal Code*. A four year sentence of imprisonment could not be followed by a period of probation. To impose such a sentence was an error in law. As the following discussion highlights, the real issue in contention is what remedy ought to flow from that error in law. That engages the second ground of appeal. The appellant argues the imposition of the illegal probation order caused the sentencing judge to set a carceral sentence lower than she would have otherwise set. The respondent argues this Court should not accept that proposition, and instead should strike out the probation order, leaving the four year carceral sentence.

[7] I am satisfied the error had an impact on the carceral portion of the sentence. In *R. v. Deitz*, 2022 ABCA 380 at para. 10, and in *R. v. Sutton*, 1988 Carswell BC 1230, [1988] B.C.W.L.D 849, the courts considered the terms of probation orders in an effort to ascertain whether the probation was focused on rehabilitation or if it had punitive aspects. While the order in this case mentioned counselling and programs, the focus of the order was to impose further restrictions, suggesting the sentencing judge viewed it as undertaking a more punitive role. In my view this suggests the sentencing judge would have imposed an increased carceral sentence but for the probation order.

[8] The error in sentencing was contrary to the law, one which permits this court to resentence, imposing what this Court determines is an appropriate sentence, taking into account the circumstances of the offence, the offender and all other considerations relevant to sentencing in this case. At this stage no deference is owed to the original sentence although the sentencing judge's findings of fact are to be respected, to the extent they are not tainted by the error.

[9] Here, sentencing afresh involves sub-issues that I will address below:

1. What is an appropriate carceral sentence?
2. Should the respondent be reincarcerated?

### **Fresh evidence**

[10] The respondent has made a motion to introduce fresh evidence. Much of the evidence did not exist at the time of the original sentencing. It provides an update as to circumstances of the respondent including his health and programming he has engaged in since the original sentence was imposed. Specifically it includes a “Program Performance Report” detailing the respondent’s involvement in a program identified as “Sex Offender Moderate Intensity Program”. In addition there is information about the respondent’s health since the original sentencing. The parties in this appeal both agreed the evidence is relevant to the issues now before the Court and it should be admitted. I agree.

### **Position of the parties re appropriate sentence**

[11] At the original hearing the Crown recommended a sentence of 8 to 10 years. On appeal the Crown (appellant) recommends a carceral sentence of 5 to 6 years, saying that if the carceral sentence is increased the respondent should be reincarcerated. The defense (respondent) recommended a conditional sentence of two years less a day followed by probation. The respondent agrees that with a carceral sentence of four years plus probation was not available to the sentencing judge. He argues that while the probation should be struck, this Court should not interfere with the carceral sentence of four years. Further the respondent says, if the sentence is increased, the respondent should not be reincarcerated.

### **What is an appropriate sentence?**

[12] While the sentence imposed was illegal, there were findings of fact in the court below which are relevant to the sentence to be imposed. Those findings establish the factual guardrails I use in crafting a lawful sentence.

[13] Let me begin my analysis by reviewing what I consider some of the most important facts as determined by the sentencing judge in her sentencing decision. M.W is the respondent, K.V. is the victim:

[3] The Court found that M.W. sexually assaulted K.V. one day when she was 13 years old, at her home in [\*\*\* \*\*\*], while he was babysitting her and her siblings for a week in the spring of 1982. M.W. is the victim’s maternal uncle, and he and his then wife were taking care of his niece and nephews while their parents travelled out of province.

[4] [...] Her uncle and his then-wife were staying at her home. M.W.’s wife was at work during the daytime.

[5] K.V. had come home from school, sick, one day that week. Not long after she came home, she was sexually assaulted by M.W. The assault occurred in her parent's bedroom. She remembered M.W. had penetrative vaginal sex with her on the bed.

[6] Not long after her parents came home from their trip, she told a sibling about the assault. They then spoke with her mother. Her mother's reaction was to go to the local police station to inform them, but in 1982 this did not result in an immediate further police investigation.

[7] After many years passed, K.V. reported the assault to the police, when she was an adult. The law's response now upon an allegation of sexual assault of a child is quite different.

[8] The Court received a Pre-Sentence Report ("P.S.R"), prepared by Correctional Services, dated January 25, 2024 concerning M.W.

[9] M.W. was 71 at the time of the PSR, and is retired. He described a happy childhood with all of his needs being met, no violence or substance abuse and a positive relationship with his parents. He disclosed to the writer that although he has four children born in the course of prior relationships, he has had no contact with them for at least the past 20 years.

...

[13] The PSR writer notes that M.W. does not accept responsibility for the offences and denies any wrongdoing.

[14] The denial is inconsistent with the fresh evidence proffered by the respondent. I reference tab 2 of the respondent's fresh evidence affidavit dated July 4, 2024. That tab is titled a "Program Performance Report Final" referencing a "Sex Offender Moderate Intensity Program" the respondent participated in, between February 25 and July 22, 2025. Although I will return to that Report later, I note here, the author of the report stated of the offence now before the Court:

The victim was his niece who was 13 years old at the time. M.W. was unemployed at the time of the offence. He and his wife were babysitting his niece while her parents were away for the week. The victim's school called for him to pick her up as she was sick. Once at home, she went to sleep in the master bedroom. He stated that he went to check on her and noticed she was "only wearing panties and a tank top". He decided he wanted to feel what her skin felt like and proceeded to touch her. He reported he was thinking that it would not cause any harm, and she would probably not wake up. When he was attempting to have intercourse with her, she woke up and he quickly left the room without a word. He later pretended nothing had happened. The victim only came forward years later.

...

... During the Non-Intake SO Primer, M.W. ... was denying his offences and insisted he was innocent. Then on 2025-01-13, M.W.'s PO, A. Amato, communicated with this writer to inform her that he had admitted to the offence, as he "suddenly" remembered. Later that day, during the program, he confirm (sic) this to this writer.

M.W. Has continued to minimize the harm caused to the victim, her family and others.

[15] Returning to the sentencing judge's decision, I note it referenced the Comprehensive Forensic Sexual Behaviour Assessment, dated June 9, 2024, page 24 which stated:

[17] [...] "Based on M.W.'s offending history, it appears that his behaviors were, at least in part, motivated by deviant sexual interests". In addition it notes "Another implicit theory that M.W. seemingly subscribes to is the 'nature of harm', which is a belief that his offending behaviours were not harmful to the victim. These implicit theories are considered to have been disinhibitors to his behaviour."

...

[18] At page 23 of the Forensic Report, it also indicates that M.W. continues to hold these implicit theories that are supportive of sexual recidivism (i.e. viewing children as sexual beings; nature of harm), as referenced before.

[16] At paragraph 21 of her decision the sentencing judge said:

The conclusion of the Forensic Assessment is that M.W. was adjudicated as "very low" risk for crossing legal sexual boundaries. It is noted that if he were to reoffend sexually, that may be a contact sexual offence against a pubescent aged female with whom he has access and opportunity (pg.29 ).

[17] The judge also referenced principles of sentencing set out in *R. v. Friesen*, 2020 SCC 9, paragraph 114, in which the Supreme Court of Canada held "... that mid-single digit penitentiary terms for sexual offences against children are normal and that upper single-digit and double-digit terms should be neither unusual nor reserved for rare or exceptional circumstances..." She also referenced the factors set out in *Friesen* to be considered when sentencing for these types of offences: the likelihood of reoffending, the abuse of a position of trust, duration and frequency of the abuse, the age of the victim and the degree of physical interference, victim participation, and the offender's moral blameworthiness.

[18] The judge identified a number of aggravating factors applicable to this case: Penetrative vaginal intercourse with his niece, a pubescent child, during a time she

was in his care. The degree of interference was described as very high, and the victim did not participate. The judge said: “There is no factor in mitigation that the Court can find in regard to an expression of remorse or an assumption of responsibility for the offence. M.W. does not accept that he harmed this victim.”

[19] I have already referenced the fresh evidence wherein the respondent in the “Program Performance Report Final” “suddenly” remembered the incident. The respondent references that acceptance of responsibility, and his new found appreciation of the harm to victims as a positive factor, not present at the original sentencing. I have reviewed the entire report and appreciate there has been some improvement in some relevant areas. That said, the report has several concerning aspects, notably:

M.W. continues to have cognitive distortions regarding teenagers and sex. He stated that teenagers dress provocatively and sometimes flirt. It is this writer’s opinion that he is not convinced that a minor cannot consent because of some of his statements.

[...]

M.W. was inconsistent when he explained how he would manage his risk factors and other times, he stated he did not understand the skills and tools. In addition, he continues to engage in cognitive distortions regarding sex, females and boundaries. In class during a group discussion, he stated if girls did not want attention, they should not dress to attract it. When asked to challenge this thinking, he could not understand how this statement was problematic and genuinely surprised that it was inappropriate.

M.. has successfully completed the program; however **the gains he has made are just the beginning. ...**

[Emphasis added]

[20] The sentencing judge described the respondent as having a high degree of moral culpability, having abused his position of trust ... a 29 year old man having intercourse with a 13 year old child entrusted to his care.

[21] The sentence I would impose is guided by the circumstances of this case. The Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9 has made it clear—sentences for the type of offence we are dealing with here must reflect the seriousness of the impact these offences have on victims. I pause to quote portions of what the Court said in *Friesen*:

[1] ... This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.

...

[5] ... we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. ...

...

[66] Children are most vulnerable and at risk at home and among those they trust (*Citations omitted*). More than 74 percent of police-reported sexual offences against children and youth took place in a private residence in 2012 and 88 percent of such offences were committed by individuals known to the victim (*citations omitted*).

[22] There should be no discount for the passage of time between the offence and sentencing (see: *R. v. Stuckless*, 2019 ONCA 504). A six year sentence would properly account for all of the factors present in this case, including the age and health of the respondent and his new found recollection of the fact he committed the crime for which he was convicted. In saying a sentence of six years is appropriate, without repeating everything said by the sentencing judge, I say I have taken into account those factors as enumerated by her as well as the fresh evidence.

[23] The fact the complainant, some 40 years plus since the offence, was still prepared to endure the ordeal of revisiting this crime, speaks volumes as to the harm done. The crime perpetrated upon a 13 year old child had an enduring impact.

[24] In finding a six year carceral sentence is appropriate I also consider the principle of parity. The appellant referenced a number of cases. Like most cases referenced in sentencing hearings there are some distinctions:

*R. v. M.S.*, 2024 ONSC 1776: A seven year sentence for two acts of sexual assault on a stepdaughter. The assaults included one attempted sexual assault when the victim was in grade 9 and a second involving forced sexual intercourse when the victim was 16 or 17.

*R. v. K.E.R.*, 2021 ABQB 976: A six year sentence for two acts of sexual interference on an eight or nine year old granddaughter. First forced cunnilingus the second, touching the victim's vaginal area over her clothes. The court stated the offenders age (76 when sentencing) was a factor in reducing the sentence from eight to six years.

*R. v. B.J.R.*, 2021 NSSC 26: a three year sentence for one sexual assault on a 16 year old stepdaughter. **There the offender pleaded guilty and accepted responsibility and expressed remorse.**

[25] I am satisfied a sentence of six years in prison is consistent with the cases cited above. A lesser sentence would detract from future cases dealing with these types of offences. *Friesen* has made clear that sentences for these types of offences must reflect the harm done to victim. I repeat, this was penetrative vaginal intercourse by the uncle of a 13 year old girl, in her parent's bed, while the victim was in his care.

### **Reincarceration**

[26] The respondent has asked that the court not reincarcerate him if the carceral sentence is increased. I acknowledge the Court has the power to stay the remaining portion of the custodial sentence. As noted in *R. v. J.E.D.*, 2018 MBCA 123 at para. 143, the burden is on the offender to show why a fit sentence should not be enforced. The decision to reincarcerate is highly contextual. At the end of the day, the issue is whether the interests of justice weigh in favor of the offender not being re-incarcerated.

[27] In *R. v. Veysey*, 2006 NBCA 55 the court set out four factors that could be reasonably considered in determining whether a sentence should be stayed. The court said there may be other pertinent factors but in the context of that case considered: (1) the seriousness of the offence; (2) the elapsed time since the offender gained his freedom and the date the appellate court hears and decides the sentence on appeal; (3) whether any delay is attributable to one of the parties; (4) the impact of reincarceration on the rehabilitation of the offender.

[28] In *Veysey* the offence involved the theft of \$3,800 and he received a sentence of seven months in jail. The seriousness of the convictions do not compare. Appellate courts should be reluctant to stay sentences in sexual assault cases because it undermines the sentencing goals of denunciation and deterrence.

[29] As I mentioned above, the fact the victim came forward again after approximately forty years speaks to the enduring impact this offence had on her. She reported the offence almost immediately; first to her sibling, then to her parents, and then to the police, all at the time of the offence. Nothing was done.

[30] The respondent has been convicted and, as noted in *R. v. Sheppard*, 2025 SCC 29 at para. 117, the principles of denunciation and deterrence are especially pressing when considering the reincarceration for sexual offences against children.

[31] The respondent was sentenced on August 14, 2024. He was released on day parole on August 14, 2025. This Court has now decided the sentence imposed was not a legal sentence and the term of incarceration should be longer than imposed by the sentencing judge.

[32] It goes without saying, any incarceration will have a hardship for any offender (see: *R. v. Dufour*, 2015 ONCA 426). That is the very nature of imprisonment. I am satisfied the respondent should be reincarcerated to serve, what I am satisfied is an appropriate sentence.

[33] For this Court to impose a longer sentence and then say the offender is shielded from the consequences would ring hollow in terms of denunciation and deterrence. It would also send the wrong message to the victim and the public. To say on the one hand that denunciation and deterrence are especially pressing for sexual offences against children, and then say the sentence does not have to be served is confusing at best. For this victim, and for the public in general, a declaration that the sentence was inappropriately low is not enough. To impose the sentence without consequence for the offender undermines confidence in the judicial system.

[34] I have now had the opportunity to read my colleague's dissent on the issue of reincarceration. In concurrence as to the appropriate sentence my colleague implicitly acknowledges all relevant sentencing principles justify a sentence of six years. Yet in dissent the impact of a stay would effectively reduce that sentence to four years. The six year sentence focuses largely on deterrence and denunciation while taking into account the circumstances of the respondent. Deterrence is both general and specific. Denunciation speaks to a broad audience. The error by the sentencing judge should in no way be utilized to diminish the statement a six year sentence makes in terms of deterrence and denunciation. To direct a stay would do just that.

[35] The parole eligibility dates are calculated based on the length of the sentence imposed. The sentence of six years, increased from four, will result in a recalculation of parole eligibility for the respondent. In considering whether the respondent should be reincarcerated I take into account many factors. His age and health, while presenting a challenge, are manageable. The judge referenced ongoing medical monitoring of his heart and kidneys and the fact that he was in a stable condition. Even now there is no indication he needs urgent medical support or intervention.

[36] I also consider the rehabilitation of the offender. The most recent reports suggest that there are improvements for the respondent. He says he is now beginning to recognize the harm done to young children by this type of offence. That same report says the "...gains he has made are just the beginning..." This alone is enough to suggest to me that, for this offender, full, or even substantial, rehabilitation is a long way off. I am not convinced his counselling and treatment will be adversely impacted by reincarceration. He could continue with treatment upon his new release.

[37] To date he has not served an inordinate amount of time in prison. Reincarceration will not be contrary to the principles of sentencing. Both the sentence and reincarceration in this case send a clear message that courts are serious when they pronounce the need for higher sentences for these types of offences.

### **Disposition**

[38] Leave is granted.

[39] The respondent is sentenced to a period of six years in prison. He shall surrender himself to authorities to serve the remaining portion of his sentence so that his parole is calculated based on a sentence of six years instead of four years.

[40] The ancillary orders attached to the original sentence will remain in place, except for the probation order.

Scanlan, J.A.

Concurred in:

Bourgeois, J.A.

**Derrick, J.A. in dissent on the issue of reincarceration:**

[41] While I concur with my colleagues on the primary issue in this appeal – that the sentencing judge committed an error of law warranting appellate intervention and a fresh sentence, I hold a minority position on reincarceration. Accepting that staying a sentence imposed on appeal should be the exception, not the rule (*R. v. Kleykens*, 2020 NSCA 49 at para. 86), I am satisfied M.W.’s case falls outside the rule. Fundamentally the question is whether reincarceration will serve the interests of justice. I have concluded the answer is no.

[42] This Court in *R. v. Kleykens* (2020 NSCA 49 at para. 87) provided a non-exhaustive list of “factors typically taken into account” in applying the “interests of justice” test to the question of whether to reincarcerate following a resentencing on appeal. The factors listed were:

- the passage of time since the arrest and whether the offender has served their original sentence, either entirely or in part;
- the extent to which incarceration will adversely affect the stability of the offender’s current circumstances and ultimate rehabilitation;
- whether the offender has been compliant with the conditions of their release and the extent to which they have been law-abiding since conviction;
- whether the principles of denunciation and deterrence can be adequately served without reincarceration.

[43] It is my view that M.W. should not be reincarcerated. The circumstances of this case require consideration of a broad set of factors in addition to denunciation and deterrence. M.W. has had his original sentence set aside on the basis it was an illegal sentence. He has served eighteen months of the carceral portion of that sentence. He is now on parole; undertook rehabilitative programming in prison and in the community. He is not subject to any allegations of non-compliance with parole conditions. His original sentence of four years was imposed to serve the principles of denunciation and deterrence: it is not as though he was subject to an entirely inadequate sentence in the first instance.

[44] M.W. was sentenced on August 14, 2024, just over two weeks after his sentencing hearing. When the judge delivered her oral decision neither the Crown nor defence interjected to remind her she could not add a probation order to a four-year penitentiary term. The error of doing so led to this appeal and M.W. being resentenced. The appeal focused on the error, addressing two issues: (1) the sentencing judge erred in ordering probation to follow a term of imprisonment over two years; and (2) the trial judge's probation order resulted in a reduced term of imprisonment that the offender otherwise would have received. I note that at the hearing of the appeal, in response to a question from the panel, the appellant said the four year penitentiary sentence was not manifestly unfit. This suggests there would have been no appeal but for the error.

[45] It is now approximately 18 months since M.W. was sentenced and six months since he was released on day parole. Presumably he is now on full parole. Full parole is available once an offender has served a third of their sentence. Day parole is typically granted by the National Parole Board six months or so prior to full parole. Even if M.W. had received a six year penitentiary sentence on August 14, 2024, he would now be eligible for day parole and in short order, full parole. This is recognized as a factor to be considered on the issue of whether reincarceration serves the interests of justice (*R. v. J.E.D.*, 2018 MBCA 123 at para. 115; see also: *R. v. Partridge*, 2005 NSCA 159 at para. 23). Reincarceration in these circumstances, particularly where M.W. is being resentenced because of a clear and avoidable error, does not, in my opinion, align with the interests of justice and would constitute an injustice.

[46] With respect, I do not agree with my colleagues' singular focus on denunciation and deterrence. Appellant counsel's acknowledgment that the four year sentence is not manifestly unfit indicates the original carceral sentence cannot be said to have wholly failed to give effect to denunciation and deterrence notwithstanding the gravity of his offence.

[47] M.W. will be 74 in June. His warrant expiry on the six year sentence will be in 2030 when he will be 78. Medical information provided to the sentencing judge in July 2024 detailed a number of conditions including coronary artery disease, probable hyperparathyroidism which once confirmed will require surgery, a hernia requiring surgery, and cataracts that needed to be removed.

[48] The sentencing judge noted that M.W.'s age and health were a concern but "not a determinative factor". She observed that the evidence indicated that M.W.

was “stable”, his health issues were being monitored “and have not required interventions that can not be addressed in an institutional setting”. (I will note there was no evidence before the judge on how M.W.’s health issues would be managed in prison.) The medical information provided for sentencing included the opinion of M.W.’s internal medicine specialist that “from a cardiac perspective he is stable”. However, he also indicated the surgical interventions that would be required to address M.W.’s various medical issues.

[49] While I do not have information about what medical treatment M.W. has received since being sentenced, his medical conditions will not have spontaneously resolved. The sentencing judge recognized this, saying that serving time in a penitentiary would “not be easy for M.W., given his age, and the expected and ongoing difficulties with his health that are reflective of his age”. While his age and health are not dispositive of the reincarceration issue, they are relevant to the “interests of justice” analysis. Reincarceration would likely adversely affect any medical treatment M.W. is receiving for his various health conditions and therefore the stability of his current circumstances. It would serve as punishment without any rehabilitative benefit.

[50] There is no evidence M.W. has been in violation of his parole. His counsel advised at the appeal that since being released on day parole, M.W. engaged in the Correctional Service of Canada’s community maintenance program for sex offenders. When his factum was filed in late October 2025, he had completed five weekly program sessions with seven to go. By my calculations he should have finished the program in mid-December 2025. Furthermore, the June 2024 Comprehensive Forensic Sexual Behaviour Presentence Assessment Report prepared for his sentencing concluded M.W. was a “very low risk” for sexual recidivism with a “risk rate” that was “indistinguishable from the rates of spontaneous offending among non-offenders (young males)”. This assessment was made before M.W. underwent the programming in prison and on release.

[51] M.W. has been open to rehabilitative programming and compliant with it, while incarcerated and when returned to the community. During his incarceration and since his release, M.W. has shown commitment to his rehabilitation. This is to be credited. The report from the Sex Offender Moderate Intensity Program, filed for the appeal, indicates M.W. took his work assignments seriously. “He needed additional help and was always willing to work outside of class hours so he could have extra clarifications and explanations”. He was described in the report as interested in the program “and what it could teach him. He seemed to try his best

and mostly completed his work to the best of his ability”. The report concluded that while “the gains he has made are just the beginning”, he was “motivated and eager to learn”.

[52] The information filed for M.W.’s sentencing discloses why he would have required additional help in the sex offender programming: he has a Grade 8 education and described himself in the Comprehensive Forensic Sexual Behaviour Presentence Assessment as a “slow learner” who had had to repeat Grade 6 twice.

[53] While I have nothing before me to indicate specific rehabilitative programs would be disrupted by reincarceration, this does not justify returning M.W. to prison. Unlike the offender in *Sheppard*, M.W. is not being sentenced for a “pattern of abusing children while in a position of power” (para. 117) such that denunciation and deterrence compel reincarceration.

[54] Taking account of all the factors I have discussed, I conclude reincarceration will not serve the ends of justice. I would stay the six-year sentence.

Derrick, J.A.