PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Hood*, 2016 NSPC 78

Date: 2016-12-14
Docket: 2692944-2692949
Registry: Pictou

Between:

Her Majesty the Queen

v.

Carolyn Amy Hood

Sentencing Decision

Restriction on Publication: Any information that could identify the complainants in this matter shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W. Atwood
Heard:	14 December 2016
Charge:	Sections 151, 153, and 172.1 of the Criminal Code
Counsel:	T. William Gorman, for the Nova Scotia Public Prosecution Service Joel E. Pink QC and Nicola Watson, for Carolyn Amy Hood

By the Court:

[1] This is a sentencing decision. There is an order in effect in this proceeding which directs that any information that could identify the complainants in this matter shall not be published in any document or broadcast or transmitted in any way.

History of proceedings

[2] In 2016 NSPC 19, I found Carolyn Amy Hood criminally responsible for her actions and guilty of the following indictable counts:

- Luring G., a person under the age of eighteen years, by means of telecommunication for the purposes of committing the offence of sexual exploitation contrary to para. 172.1(2)(a) of the *Criminal Code*—case 2692944;
- Sexually exploiting G. contrary to para. 153(1.1)(a)—case 2692945;
- Touching L. for a sexual purpose contrary to para. 151(a)—case 2692947;

- Luring L., a person under the age of sixteen years, by means of telecommunication, for the purposes of committing an offence under s. 151, contrary to para. 172.1(2)(a)—case 2692948.

Penalties under the Criminal Code at the time the offences were committed

[3] At the time of the commission of the offences, section 151 penalized sexual interference as follows:

> Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year;
>
> . . . .

[4] The *Code* prescribed the following penalty for a para. 153(1.1)(a) offence:

> Every person who commits an offence under subsection (1)
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year;
>
> . . . .

[5] Para. 172.1(2)(a) imposed a penalty identical to the preceding two:

> (2) Every person who commits an offence under subsection (1)
>
> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year;
>
> . . . .

[6] All three of these penalties were amended by the *Tougher Penalties for Child Predators Act* to increase the maximum indictable penalty to fourteen years;[1] however, as those amendments came into effect after the commission of these offences, they have no bearing on this case.

Constitutional challenge

[7] Defence counsel asserts that the one-year mandatory minimum sentences for the offences of sexual interference, sexual exploitation and luring, when prosecuted indictably, offend s. 12 of the *Charter*, which declares as a basic law of Canada that everyone has the right not to be subjected to any cruel and unusual treatment or punishment. In making this application, defence counsel provided appropriate notice to the Nova Scotia Public Prosecution Service; counsel also notified the federal Department of Justice, which did not participate in this proceeding.

[8] In evaluating the merits of this argument, it is useful to examine how other mandatory-minimum-penalty provisions have fared in constitutional-grounds challenges.

[1] S.C. 2015, c. 23, ss. 2, 4 and 11; in force 17 July 2015 in virtue of SI/2015-68.

[9] The Supreme Court of Canada has struck down a number of mandatory-minimum penalties fixed in the *Code* and in other laws after having found that they offended the guarantees constitutionalized in s. 12. These include:

- Mandatory-minimum sentence of one year of imprisonment for trafficking or possession for the purpose of trafficking, in cases when the offender has a record for any drug offence (except possession) within the previous 10 years; [2]
- Mandatory-minimum term of imprisonment for possession of prohibited or restricted firearms;[3]
- Mandatory-minimum sentence of seven-years for importation of a narcotic under the *Narcotic Control Act*.[4]
- The Court has stated also that mandatory minimum-sentences are subject to being reduced below the *minima* to take into account pre-trial detention.[5]

[10] It has also upheld some:

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[2] *R. v. Lloyd*, 2016 SCC 13.
[3] *R. v. Nur*, 2015 SCC 15.
[4] *R. v. Smith*, [1987] 1 S.C.R. 1045.
[5] *R. v. Arthurs*, 2000 SCC 19; *R. v. Wust*, 2000 SCC 18.

- Mandatory-minimum four-year sentence for manslaughter with a firearm;[6]

- Mandatory-minimum sentence of life imprisonment with no chance of parole for a minimum of 10 years for second-degree murder;[7]

- Mandatory-minimum four-year sentence for criminal negligence causing death with a firearm;[8]

- Mandatory-minimum 7-day sentence for driving while prohibited as a charge under a provincial highway-traffic statute.[9]

[11] In *R. v. Deyoung*, I found unconstitutional the mandatory one-year minimum penalty for indictable sexual assault of a minor under 16 years of age.[10]

[12] A number of analytical principles emerge from these cases that direct me in my s. 12 *Charter* analysis.

[13] A penalty provision in a statute would infringe s. 12 if it were found to be grossly disproportionate to the appropriate punishment, having regard to the

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[6] *R. v. Ferguson*, 2008 SCC 6.
[7] *R. v. Latimer*, 2001 SCC 1.
[8] *R. v. Morrisey*, 2000 SCC 39.
[9] *R. v. Goltz*, [1991] 3 S.C.R. 485.
[10] 2016 NSPC 67; *see also R. v. S.J.P.*, 2016 NSPC 50. *See also R. v. E.R.D.R.*, 2016 BCSC 684 and 2016 BCSC 1759.

seriousness of the offence and the circumstances of the individual offender who is before the court seeking relief from the mandatory sentence; accordingly, such a penalty would violate s. 12 if it were to impose a grossly disproportionate sentence on the individual before the court, or if its reasonably foreseeable applications would impose grossly disproportionate sentences on others.[11]

[14] There is a high threshold that must be surmounted by an applicant before a court might find that a sentence would represent a cruel and unusual punishment. To be grossly disproportionate, a mandatory-minimum sentence must be found to be more than merely excessive: rather, it must be "so excessive as to outrage standards of decency" and be "abhorrent or intolerable" to society.[12]

[15] As described by Arbour J. in her minority concurring opinion in *R. v. Morrissey*, a mandatory-minimum sentence works to impose an inflationary floor which exerts an upward pressure on all sentences for the offence to which the mandatory minimum is applicable. This creates a constitutional problem only when the statutory impossibility of going below the minimum would be

[11] *Lloyd, supra*, note 2, at para. 22.
[12] *Id*., at para. 24.

offensive to s. 12 of the *Charter*, as would be the case when the mandatory-minimum penalty would require the imposition of a sentence that would not merely be unfit—which is constitutionally permissible—but also grossly disproportionate to what an appropriate punishment should be, which is constitutionally impermissible.[13]

[16] Consequently, the first question I must address is whether the imposition of the mandatory-minimum penalties in this case, given the circumstances of Ms. Hood and the circumstances of her offences, would be a grossly disproportionate punishment?

[17] In my view, the answer to that question is in the affirmative. Thus, it will not be necessary for me to decide the hypothetical issue of whether reasonably foreseeable applications of the minimum penalties engaged in this case would impose grossly disproportionate sentences on others. This is just as well, as a statutory court ought to venture into the area of hypothetical analysis only if it might have an impact on the case to be decided.[14]

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[13] *Morrissey*, *supra*, note 8 at para. 69.
[14] *Lloyd*, *supra*, note 2 at para. 18.

Analysis of constitutional question

[18] In deciding the constitutional question, I must start out with a customary sentencing analysis and do so in some detail. Proportionality is the starting point.

[19] Assessing the constitutionality of a penalty with reference to the main criterion of gross disproportionality takes into account the fact that proportionality is a fundamental principle of sentencing.

[20] Consequently, sentencing must be regarded as a highly individualized process: *R. v. Ipeelee*.[15]

[21] In determining a fit sentence, a sentencing court ought to consider any relevant aggravating or mitigating circumstances; that is prescribed by para. 718.2(a) of the *Criminal Code*. The court must consider also objective and subjective factors related to the offender's personal circumstances and the facts pertaining to the particular case: *R. v. Pham*.[16]

[22] Assessing an offender's moral culpability is an extremely important function in the determination of any sentence. This is because a sentence must be

[15] 2012 SCC 13 at para. 38.
[16] 2013 SCC 15 at para 8.

proportionate to the gravity of the offence and the degree of responsibility of the offender; that fundamental principle is set out in s. 718.1 of the *Criminal Code*.

[23] In *Ipeelee*, the Supreme Court of Canada noted that proportionality is tied closely to the objective of denunciation.[17] Proportionality promotes justice for victims and it seeks to ensure that the public will have confidence in the justice system.

[24] In *R. v. Lacasse*, the Supreme Court of Canada confirmed that proportionality is a primary principle in considering the fitness of a sentence.[18] The severity of a sentence depends upon the seriousness of the consequences of a crime and the moral blameworthiness of the individual offender. The Court recognized that determining proportionality is a delicate exercise, because both overly lenient and overly harsh sentences imposed upon an offender might have the effect of undermining public confidence in the administration of penal justice.

[25] In determining an appropriate sentence, the court is required to consider, pursuant to para. 718.2(b) of the *Code*, that a sentence should be similar to

[17] Note 15, *supra*, at para. 37.
[18] 2015 SCC 64 at para. 12.

sentences imposed on similar offenders for similar offences, committed in similar circumstances. This is the principle of sentencing parity. Parity promotes the principle of equal justice, and allows rational decision makers who contemplate illegality to make intelligent risk assessments before they engage in illegal conduct.

[26] The court must apply the principle that an offender not be deprived of liberty if less restrictive sanctions might be appropriate in the circumstances; furthermore, the court must consider all available sanctions other than imprisonment that are reasonable in the circumstances. These important principles of restraint are set out in paras. 718.2(d) and (e) of the *Code*. In *R. v. Gladue*, the Supreme Court of Canada stated that this statutory requirement—that sentencing courts consider all available sanctions other than imprisonment—was more than merely a codification of existing law; rather, the provision was to be seen as a remedy whereby imprisonment was to be a sanction of last resort.[19]

[19] [1999] S.C.J. No. 19 at paras. 31-33 and 36.

[27] I must not lose sight of the fact that the victims in this case were minors; it was admitted that Ms. Hood stood in a trust relationship with them. Section 718.01 of the *Code* provides that:

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[28] Section 718.2 confirms that offences against minors, particularly when committed by those who stand in a position of trust over them, are very serious crimes:

> A court that imposes a sentence shall also take into consideration the following principles:
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> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> . . .
>
> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> shall be deemed to be aggravating circumstances;
>
> . . . .

[29] These provisions serve to reaffirm in statute what courts in this country have followed for generations. Campbell J.P.C. (as he then was) expressed this principle clearly in *R. v. E.M.W.*:

> Society reserves its strongest sense of revulsion for those who cross the legal and moral boundary into treating children as objects of sexual gratification. The treatment of a child in this way is an attempt to deny [his] basic human dignity. In the eyes of the adult the child is reduced to being a nameless "thing". [He] is robbed of [his] childhood and [his] innocence. [He] has no choice in the matter. [He] is simply used. [He] has becomes a means to an end.[20]

[30] I must now apply these principles to the facts found at trial. Pursuant to s. 655 of the *Code*, defence and the prosecution admitted at the trial stage a number of facts, and consented to the admission of several records; these admissions and records were bound comprehensively in Exhibits Nos. 1, 2 and 2A; here is a summary of the admissions:

- Ms. Hood's date of birth is 26 May 1976;
- At the time of the alleged offences she lived in Pictou County with her husband and their three pre-teenaged children;
- Ms. Hood and her husband are separated;
- Between 1 February 2013 and 17 October 2013, Ms. Hood was employed as an elementary school teacher by the Chignecto Central Regional School Board and taught at [identifying information redacted]; she had taught grade six at that school for approximately eight years before being relieved of duties;

[20] 2009 NSPC 65 *aff'd*. 2011 NSCA 87.

- Prior to the alleged offences, Ms. Hood had a good work-employment record and was a respected teacher at [identifying information redacted], with an excellent professional reputation;

- Ms. Hood was in a position of trust or authority in relation to G. and L. at all material times;

- Ms. Hood does not have a criminal record;

- On 7 November 2013, Dr. T. Vienneau, a physician practising in the specialty field of psychiatry, diagnosed Ms. Hood on a preliminary basis as suffering from Bipolar Mood Disorder-Type 1;

- Prior to this diagnosis, Ms. Hood had had no known history of any mental illness, and had never received psychiatric treatment or hospital admission;

- G. is a male, and was born on [identifying information redacted]; G. was 17 years of age at the time of the alleged offences, attending grade 11 at [identifying information redacted], Nova Scotia;

- Ms. Hood had been G's grade six teacher, which was 5 years prior to the alleged offences;

- The admissions made by Ms. Hood included extensive transcripts of text-messages she exchanged with G. between 1 February 2013 to 10 December 2013; defence counsel admitted the authenticity of these transcripts as an accurate record of text messages exchanged between Ms. Hood and G.;

- The text messaging was initially friendly; however, the messages became sexually charged and explicit, and ventured into Ms. Hood inviting G. to engage in sexual acts with her in terms that left little to the imagination;

- Ms. Hood forwarded sexually explicit photographs of herself to G. between March and September 2013; four of those photographs were included in Exhibit No. 1;

- After Ms. Hood sent G. the sexually explicit photographs, G. sent Ms. Hood text messages in reply, and their messages continued for a period of time;

- There was no physical sexual contact between Ms. Hood and G.;

- L. was born on [identifying information redacted];

- At the time of the alleged offences, L. was 15 years of age and a grade [identifying information redacted] student at [identifying information redacted];

- Ms. Hood had been L.'s grade 6 teacher three years prior to the offences;

- The admissions made by Ms. Hood included extensive transcripts of text messages she exchanged with L. between 1 February 2013 to 30 May 2013; defence counsel admitted the authenticity of the transcripts as an accurate record of text messages exchanged between Ms. Hood and L.; the messages became sexually charged and explicit, and ventured into Ms. Hood inviting L. to engage in sexual acts with her in terms, much as her texting with G., that were highly descriptive and sexually explicit;

- L. asked Ms. Hood to send him sexually explicit photographs of herself;

- Ms. Hood sent L. sexually explicit photographs and videos of herself via text messaging and Snapchat between 1 February 2013 and 30 May 2013 (L. explained to me when he testified that Snapchat is a messaging application that can be installed on mobile devices; it allows users to exchange texts and photographs; it comes with a built-in privacy feature:

messages—including attached photography—are deleted automatically by the application from a recipient's mobile device within a few seconds of being read unless the recipient captures a screenshot very quickly after opening them.);

- In April 2013, L. went to Ms. Hood's classroom at Thorburn Consolidated School at the end of the school day and requested a ride home;
- L. explained his request by telling Ms. Hood that if he took the school bus he would be late for work;
- Ms. Hood agreed to drive L. home;
- Ms. Hood picked up 3 other students at Thorburn Consolidated School and dropped them off at a nearby convenience store as they had requested her to do; Ms. Hood then continued to drive L. home, and parked in the driveway; there was no one inside the home;
- While still inside Ms. Hood's vehicle, L. asked Ms. Hood to give him a "blow job" ;
- Ms. Hood agreed; she put her mouth on L.'s penis; L. ejaculated into Ms. Hood's mouth;
- Ms. Hood did not remove any of her clothing;

- This was the only physical sexual encounter between L. and Ms. Hood;

- Prior to this sexual encounter, Ms. Hood had attended a few of L's hockey and soccer games, and had spent time "hanging around" him and other students;

- After the sexual encounter, Ms. Hood continued to send sexually explicit text messages to L.

[31] Formal admissions are to be treated by the court as conclusive of the facts that have been acknowledged as true.[21]

[32] After the admissions were filed with the court, defence counsel conceded that the evidence established a *prima facie* case for the prosecution with respect to each count.

[33] The court is not locked into considering only the facts established at trial. I must also take into account evidence which I received at the sentencing hearing; this is made up of :

- Ms. Hood's presentence report prepared 12 July 2016;

[21] *R. v. Castellani*, [1970] S.C.R. 310 at 317; *R. v. Curry* (1980), 38 N.S.R. (2d) 575 at para. 26 (N.S.C.A.); *R. v. Falconer*, 2016 NSCA 22 at para. 45.

- a Comprehensive Forensic Sexual Behaviour Presentence Assessment, dated 15 July 2016, prepared by Angela Connors, Ph.D., clinical leader of the Provincial Forensic Sexual Behaviour Program;

- Ms. Hood's allocution made pursuant to s. 726 of the *Code*.

[34] Having made an appropriate inquiry under s. 722.2 of the *Code*, I am advised that neither victim requests the opportunity to submit a victim-impact statement. This is confirmed at page 6 of the presentence report.

Seriousness of offending conduct

[35] Proportionality requires the court to situate the seriousness of Ms. Hood's criminal conduct. In *R. v. S.C.C.*, my colleague Tufts A.C.J.P.C. listed several factors correlative to those set out in the *Code* which I find useful in assessing the level of seriousness of cases involving child sexual abuse:

- the degree of invasiveness or the nature of the assaults and the variety of the acts;

- the presence of other forms of physical violence beyond the abuse itself;

- the presence of threats or other psychological forms of manipulation;

- the ages of the victims;
- other forms of vulnerability of the victims besides any trust relationship that existed at the time of the offences;
- the number of incidents and the period of time over which the abuse occurred;
- the impact on the victims;
- the risk of reoffending.

Invasiveness

[36] Any form of sexual abuse or exploitation of a minor is bound to be serious. Nevertheless, seriousness remains a criterion of degree. Ms. Hood's misconduct toward G. involved sending him a significant volume of sexually-explicit text messages as well as a number of sexually provocative photographs of herself. Police conducted what was referred to as a forensic examination of G.'s cell phone; that examination led to the discovery of photographs of Ms. Hood that were both innocuous, as well as sexualized: two photos taken in a mirror showing Ms. Hood back-to while wearing a tank top and thong; one photo taken in a mirror in which Ms. Hood was depicted touching her genital

area with her hand; and one macro level photograph of Ms. Hood touching her vagina with her right hand.

[37] The first text messages Ms. Hood sent to G. were to express her concern about what she understood to be his drug use and other risk-taking behavior. As Ms. Hood's text messaging became sexualized, G. appeared to invite Ms. Hood to offer more: at one point, he asked her for pictures of "good stretches"; at another, for a "rly good one". Still, it was Ms. Hood who inaugurated the sexual innuendo, proposing eventually to G. that they might "wrestle" and "rub" after using cannabis, which would suggest that her initial altruistic concern about G. had, by that point, been sidelined.

[38] However, it remains significant that at no point did Ms. Hood engage in physical sexual activity with G. She certainly had the opportunity to do so when, according to their log of text exchanges, they went ahead and used cannabis while alone with each other.

[39] Ms. Hood's contact with L. began with in-school help with assignments and innocuous text-messaging on how to deal with peer pressure. Over time, it escalated to the sharing of secrets, and then to sexual dialogue, including the exchanging of pictures with nudity.

[40] Although Ms. Hood appeared to have had frequent contact with L., she sexually abused him physically on a single occasion. This was described by L. at trial, and is repeated in Dr. Connors' assessment:[22] L. came to Ms. Hood's classroom and requested a drive home; after arriving at L.'s home, L. asked Ms. Hood for a "blow job" and Ms. Hood complied. No evidence was presented to me that would allow me to conclude that Ms. Hood premeditated upon this encounter. Ms. Hood's acted as she did because of access and spontaneous opportunity.

[41] I was unable to discern in the evidence presented to the court conduct by Ms. Hood that might be characterized categorically as grooming. It is well within the common experience of courts that practiced and calculating child sexual abusers will launch an array of strategies to ensnare their vulnerable victims. This includes employing tactics to separate or alienate victims from their families or friends, contriving opportunities to get their victims alone (frequently in remote and unsupervised locations), fostering loyalty or dependency by lavishing gifts and rewards, propagandizing the abuse by describing it as normal human intimacy—or by shaming the victim by implicating that she or he is equally complicit. This sort of manipulation was

[22] Comprehensive Forensic Sexual Behaviour Presentence Assessment (Report), at 19 and 24.

not evident in Ms. Hood's interaction with L. or G.: the text messages which were exhibited at trial make clear that she did not want their parents to find out what was going on, to be sure. However, Ms. Hood spoke often of L. and G.'s parents in positive terms; she encouraged G. to spend time with his girlfriend, and expressed concern intermittently about his substance use. Yes, Ms. Hood shared cannabis with G. on one occasion; however, it is not clear to me that she was the one who supplied it. Her single physical sexual encounter with L. was spontaneous and unplanned. This is a far distance from what the court has dealt with in the past as grooming behavior.

Other forms of physical violence

[42] There was no other violence inflicted upon the victims other than the abuse itself. However, it is important that I be mindful that the fact that, while Ms. Hood's victims might have assented notionally to her conduct, their participation is not a mitigating factor. Indeed, courts have rejected consistently arguments minimizing the seriousness of sexually exploitive offences when victims acquiesced in the criminal conduct or appeared to be willing participants. I adopt what was stated by the Alberta Court of Appeal in *R v Pritchard*:

> While there may well be a difference in degree between a perpetrator who uses force, as opposed to persuasion, on an underage victim to accomplish his objective, the fact remains that the end result is the same - a sexual assault on someone who cannot, in law, give consent. Put simply, a young [person's] willing participation is not a mitigating factor.[23]

Threats or other psychological forms of manipulation

[43] Ms. Hood did not employ threats against the victims. While Ms. Hood's explicit texts might have led the victims to continue their contact with her, I am unable, as I stated earlier, to regard Ms. Hood's persistent messaging as grooming or psychological manipulation. Rather, I find that Ms. Hood's mental state caused her to pursue risk-taking activity because of the thrill and exhilaration it fed her. This was not a calculation by Ms. Hood; rather, it was a reckless adventure. This is in sharp distinction to a case of a cunning abuser of vulnerable youth, as in *R. v. Stewart*.[24] Stewart preyed on youth in state care with promises of alcohol and drugs and was bereft of conscience.

Ages of the victims

[44] L. was 15 years of age, and G. 17 at the times of the offences.

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[23] 2005 ABCA 240 at para. 7.
[24] 2013 NSPC 64, *varied* 2016 NSCA 12.

Other forms of vulnerability

[45] There was no evidence put before the court other than the existence of a former-teacher/student relationship between Ms. Hood and her victims. Furthermore, as observed in *R. v. Audet*,[25] trust is not a binary yes-no circumstance, but a condition of degree. At the time of these offences, Ms. Hood had not served as L. or G.'s teacher for a number of years. I find that this reduces the level of trust or authority exercised by Ms. Hood over her victims.

Number of incidents and interval of time

[46] Ms. Hood's offending texts exchanged with L. and G., while voluminous, occurred over a fairly abbreviated period of time, from April to September of 2013. Ms. Hood committed only one act of physical sexual abuse, inflicted on L.

Victim impact

[47] Neither L. nor G. wished to file victim-impact statements. Conscious of the direction of our Court of Appeal in *R. v. C.N.T. [B.M.S.]*[26] pertaining to application of rules of evidence regarding the assessment of victim impact, I

[25] [1996] 2 SCR 171.
[26] 2016 NSCA 35 at paras. 14-15.

find that it would be unsafe for me to draw inferences about the level of victim impact in this case.

[48] My review of these factors lead me to situate Ms. Hood's offending conduct as being sited at the lower end of the range of gravity of a serious classification of offence.

Moral culpability

[49] In assessing Ms. Hood's moral culpability, I take into account the fact that Ms. Hood's reputation and professional conduct prior to 2013 were exemplary. She had been the teacher most parents would wish to have educating their children. She was regarded highly by her peers, was a dedicated educator, and took her responsibilities to her pupils and her school very seriously.

[50] Ms. Hood does not have a criminal record.

[51] Although Ms. Hood contested her criminal responsibility at trial—an issue of real and not imaginary controversy—she admitted to the historical fact of the allegations against her, reducing significantly the exposure of her victims to the forensic process.

[52] Although I found Ms. Hood not to have discharged the burden of proving that she suffered from a mental disorder so as to negative criminal

responsibility at the time she committed the acts which gave rise to the charges against her, I find that I am persuaded by the thorough and detailed report prepared by Dr. Connors that Ms. Hood experienced Bipolar Disorder Type 1, and she was symptomatic at the time of her offending.[27]

[53] As I stated in *R. v. I.M.L.*, mental illnesses do not lead inevitably to the people experiencing them committing criminal offences.[28] Although there is abundant research supporting this conclusion,[29] I need not and do not rely on it as this is something I know from judicial experience.

[54] However, that is not to say that there never exist links between mental illness and criminal-liability issues. The interconnections are often very complex, and cannot be reduced to easy axioms or slogans. Consider the mentally ill person whose symptomatic—but completely benign and innocent—behaviour gets misinterpreted as dangerous due to the sorts of prejudicial and stereotypical beliefs that target unjustly those who might be suffering from mental illness. Consider as well the case of someone struggling with addiction who is rendered vulnerable to exploitation. The examples are myriad. What

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[27] Report at 38.
[28] 2015 NSPC 60 at para. 20.
[29] *See, e.g.,* Jillian K. Peterson, Jennifer Skeem, Patrick Kennealy, Beth Bray & Andrea Zvonkovic, "How often and how consistently do symptoms directly precede criminal behavior among offenders with mental illness?" (2014), 38 Law and Human Behaviour 439.

remains clear is that the court must not jump to unfounded conclusions about the impact of mental illness on human behaviour; instead, the court must examine the evidence before it—factual and expert—and try to reach reasonable conclusions based upon it.

[55] I find persuasive Dr. Connors' conclusion that Ms. Hood's symptoms have a nexus with her crimes, in that her mania rendered her profoundly disinhibited and prone to risk taking,[30] elevated by a sense of invincibility,[31] and impaired by defective insight and inhibition;[32] Ms. Hood regarded herself as a peer of her victims, and looked to them for approval and acceptance.[33] Furthermore, it is not clear at all to me that Ms. Hood sought to groom G. and L. for sexual encounters, and I found particularly insightful Dr. Connors' observation:

> She was certainly persistent with respect to [G] and marijuana, which raises the question as to why she would not have been more active/assertive/aggressive in creating an opportunity for sexual contact rather than failing to inhibit herself when such an opportunity arose in the form of [L] asking for a blow job.[34]

[56] This supports a conclusion that Ms. Hood's actions were more crimes of spontaneous opportunity rather than malicious acts of calculation, grooming and planning.

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[30] Report p. 33.
[31] *Id*., p. 31.
[32] *Id*, p. 28.
[33] *Id*., p. 23.
[34] Id., p. 24.

[57] I adopt what was stated by the Ontario Court of Appeal in *R. v. Prioriello*:

> 11 In order for a mental illness to be considered as a mitigating factor in sentencing, the offender must show a causal link between his illness and his criminal conduct, that is, the illness is an underlying reason for his aberrant conduct: *R. v. Robinson*, [1974] O.J. No. 545 (C.A.).

[58] I am satisfied that such a link exists in this case, and operates as a mitigating factor.

[59] I would situate Ms. Hood's moral culpability at the lower end of a serious category of offence.

Effect of publicity

[60] Defence counsel argues that the media attention that was generated by this case has had a significant deterrent and penalizing effect upon Ms. Hood. Defence counsel singled out coverage in *Frank Magazine* as particularly disparaging of Ms. Hood's reputation.

[61] Modern expressions of publicity—particularly in the unregulated social media—have escalated public shaming to levels that have invited legislative response to the more harmful aspects of internet-broadcast notoriety. Sentencing courts recognize that adverse publicity may work as a strong deterrent against reoffending. However, the effect of public attention upon a

person who is to be sentenced for a crime is unquantifiable, unlike, say, pre-trial detention, which is determinate. Common sense informs me that the effect of publicity will be in direct proportion to the level of circulation and currency of the reporting that gives rise to it. There is no evidence before me on how widely read the coverage of Ms. Hood's story might have been, so I have no metric with which to measure effect. This is why it is important not to inflate the effect of publicity. I endorse what was stated in the decision of the Alberta Court of Appeal in *R. v. Zentner*:

> 49 There is a grave danger that the suggestion that publicity replaces punishment, will degenerate into lower sentences for the prominent, the successful, and those holding public office. Or those whose personality or crime or name is unusual enough to make it newsworthy because it is novel. Not to mention those arrested on a slow news day, or in the presence of television cameras. That would be both unjust and quite outside established sentencing principles. Sometimes such sentencing is totally backwards because the very factors which make the case newsworthy are those (such as abuse of trust or authority) which the *Criminal Code* and precedent say enable and aggravate the crime.[35]

[62] Furthermore, it is not the function of this court to review the literary quality of media content. Defence counsel presented to the court an article from *Frank Magazine*. The facts laid out in the article appeared to me to represent accurately the evidence which I heard during Ms. Hood's trial; the article was

[35] 2012 ABCA 332.

accompanied by additional commentary and photography which Ms. Hood doubtlessly found embarrassing to see exposed in the public domain. In a free and democratic society which protects constitutionally in para. 2(b) of the *Charter* the fundamental freedom of the press, uncomfortable and embarrassing speech is to be expected—and should be expected—by those in positions of public trust when their conduct violates the law.

[63] Finally, I would note that the hurtful effects of publicity in a print medium are likely to pale into insignificance in comparison to the toxic and dehumanizing social-media shaming that can erupt sometimes when these types of cases come to public notice. The defence sentencing brief referred to some of this material. As with conventional reporting, it is impossible to quantify the effect of what might be described as twenty-first century vigilantism. Due process exists to deal with criminal, tortious, slanderous and libellous words; I am not persuaded that a sentencing court is the best venue for seeking a remedy by someone who has been called out—even if excessively—for having committed a crime. This is not to say that a sentencing court need be presented with a precise *Raccolta* which would assign an exact remission of penalty to each extra-judicial ordeal; all I am saying in this case is that the adverse effect

of publicity upon Ms. Hood is too indeterminate to have a bearing on the sentencing outcome.

Effect of restrictive bail

[64] Ms. Hood has been subject to stringent terms of bail for close to two years. It has placed restrictions on her mobility, and has required her to report twice per week to police. While not as restrictive as house arrest, Ms. Hood's bail has restricted her liberty to a moderate extent. The penalizing effect of bail should be taken into account by a sentencing court, and I adopt the analysis of the Ontario Court of Appeal on this point.[36] While it might not be possible to quantify precisely the punitive effect of conditional release—unlike remand time following bail denial, which is susceptible to an exact diurnal measurement[37]--satisfactory compliance with pre-trial conditional release operates as a strong assurance of the likelihood of compliance with community-based sentencing.

Sentencing parity

[65] Sentencing parity is integral to the determination of a proportionate sentence. This is because proportionality and certainty are key components of

[36] *R. v. L.P.*, [2003] O.J. No. 251 at para. 26, and *R. v. Spencer*, [2004] O.J. No. 3262 at para. 43.
[37] *See especially R. v. Stewart*, 2016 NSCA 12, *var'g* 2013 NSPC 64.

the principle of legality. Not only must the public know the scope of criminality of anti-social conduct; they must know the range penalties that will flow from it. Deterrence is predicated on rational decision makers selecting informed choices based on assessments of defined consequences.

[66] What have been the consequences imposed upon offenders in cases similar to Ms. Hood's?

[67] Defence counsel provided the court with a number of useful authorities:

[68] *R. v. Careen*.[38] The offender was a teacher who had exchanged a series of sexually explicit text messages with one of his female students. No sexual contact occurred. The prosecution sought nine-to-12-months' imprisonment plus two-years' probation for a single indictable count of s. 153, which, at the time, carried a mandatory minimum sentence of 45-days' incarceration. Defence countered with an intermittent sentence of approximately 45-days' imprisonment. The offender had no prior record and enjoyed strong support in the school community. Schultes J. imposed a term of 60-days' intermittent imprisonment, followed by a twelve-month term of probation. There was a high level of trust violated by the offender, as the victim was one of his students

[38] 2012 BCSC 918.

at the time of the illegal texting. The sentencing judge made this assessment of the seriousness of the offence:

> 30 In assessing the proportionality of a sentence here for the purposes of s. 718.2, I conclude first that the offence, while serious by definition because of the potential harm that I have described, was in this case towards the lower end of the range of seriousness. I say this because the invitations to sexual activity were distant, both physically and temporally, from any actual ability to carry them out and were not especially predatory beyond the degree that is represented by the essential elements of the offence.
>
> . . . .
>
> 33 . . . . As I have said, I think the nature and seriousness of the offence of communicating for a sexual purpose, whether under s. 152 or s. 153 is aggravated in a fundamental way when the offender successfully brings about sexual contact in respect of which he communicated. The luring cases cited also involve more protracted and overt attempts to bring about what the offenders believed would be consummated sexual contact than was found in Mr. Careen's text messages. In any event, ranges of sentences are meant to be guidelines, rather than straitjackets, and the appropriate sentence must ultimately be conditioned by the particular circumstances of the offence and offender and the goals of sentencing that require the greatest emphasis based on those circumstances.

[69] *R. v. O.R.*[39] The 18-year-old victim's step father fondled the victim's vagina while the victim stroked the offender's penis to the point of ejaculation; the offender had no record; a psychological assessment revealed the offender to have depressive and anxiety symptoms which the sentencing judge believed were related to the legal proceedings; the offender was assessed a low risk to re-offend. The court imposed a 90-day intermittent sentence for a s. 153 offence,

[39] 2016 BCPC 223.

and one day for a bail violation. The sentencing judge made these observations about the seriousness of the offence:

> 36 While this court is aware of the submission indicating there was a flirtatious relationship between the victim and the offender, the offender who was older and in a position of trust, had the duty to resist. This is reflective of social policy wherein the older person who holds all of the power must and should decline. In *R. v. Audet*, [1996] 2 SCR 171, the court stated at paragraph 23:
>
> > Clearly, Parliament wanted to afford greater protection to young persons. It chose harsher means by criminalizing the activity itself, regardless of whether it is consensual (s. 150.1(1) of the *Code*), in so far as it involves a person who is in a position or relationship referred to in s. 153(1) with respect to the young person. As Woolridge J. eloquently stated in *Hann (No. 2)*, [1990] N.J. No. 342 supra, at p. 36:
> >
> > > The implication from the wording of s. 153 is that notwithstanding the consent, desire or wishes of the young person, it is the adult in the position of trust who has the responsibility to decline having any sexual contact whatsoever with that young person.

[70] *R. v. Roberts*.[40] The offender engaged in sexual relationship with a 17-year-old who worked at a restaurant owner by the offender's parents; mitigating factors identified by the sentencing judge included a guilty plea, remorse, absence of criminal record, good character, stable employment history, family support and obligations, pursuit of counselling, and cooperation with authorities. The court considered as aggravating the frequency and duration of offending conduct (which included multiple acts of intercourse and oral sex), the age difference between the offender and the victim, the victim's exposure

[40] 2015 BCPC 266.

to potential harm, the vulnerability of the victim, and the objective seriousness of offence. The charge was prosecuted summarily, and, at the time, carried a minimum term of imprisonment of 90 days. The court imposed a term of six - months' imprisonment for a single count of s. 153, a two-year term of probation, a DNA-collection order and a 10-year SOIRA order.

[71] *R. v. J.J.O.*[41] The 25-year-old offender was a coach at the cheerleading gym attended by the 16-year-old victim. The offender presented himself as just wanting to be helpful, and used his position of trust to establish a sexual relationship with the victim that began with explicit messages and photographs, and then progressed to at least four incidents of sexual contact, including fellatio and sexual intercourse. The victim was vulnerable as she was having a difficult time in her home life and at school, had a history of depression and was cutting herself; her mother had just been diagnosed with terminal cancer. The cheerleading gym was the only place from which the victim received any enjoyment at that time. The offender continued to live at home, had a very supportive family; he had no criminal record, or issues with substance abuse or mental illness. The offender expressed great remorse and willingness to comply with any court order. The offender presented very positive character references.

[41] 2016 ONCJ 549.

The pre-sentence report found the offender a suitable candidate for community supervision. The victim had ongoing nightmares and trust issues because of the offender's conduct. The prosecution sought six-to-nine- months' imprisonment and three-years' probation; defence sought a 90-day intermittent sentence and three years' probation. The prosecution proceeded summarily, so that the mandatory minimum was 90-days' imprisonment, and the maximum sentence was 18-months' imprisonment. The court imposed a six-month jail sentence, followed by a three-year term of probation.

[72] Of the cases cited by the prosecution, I found most pertinent *R. v. Elder*.[42] The offender was a high school teacher and the victim was enrolled in his classes. The offender and the student had sexual relations; the relationship continued after the victim turned 18. They lived together for various periods of time. The offender did not contest the cancellation of his teaching certificate after he had been found out. His wife divorced him. At the time of sentencing, the offender was unemployed and lived on a small disability pension. Gabrielson J. sentenced the offender to 18-months' imprisonment followed by 12 months of probation. Aggravating circumstances included: the breach of trust involved; the age differential between the offender, 46, and the victim, 17;

[42] 2010 SKQB 120.

the devastating impact on the victim and her family. Mitigating circumstances identified by the court were that the offender did not have criminal record; he had a positive employment and personal history; he had a diagnosed medical condition of depression at the time; and he apologized in court to the victim and her family. The accused was a low risk to reoffend. The victim was still traumatized by the accused's actions. At the time of the offence, there was no mandatory sentence of imprisonment. The court found that community would not be endangered by permitting the offender to serve his sentence in the community. However, a conditional sentence would not be consistent with the fundamental purposes and principles of sentencing.

[73] I consider highly apposite the decision of *R. v. Jones.*[43] The offender, a teacher, began an inappropriate relationship with a 16-year old female who was his pupil; he began his grooming of her by sending her flattering and endearing text messages and e-mails. The offender's conduct escalated to fondling, mutual oral sex, then full sexual intercourse. After having been exploited by the offender for approximately one year, the victim disclosed the abuse to her parents. The offender's guilt was established firmly by DNA analysis of a semen stain left on a garment that had been worn by the victim. Tax J.P.C.

[43] (10 June 2009), case number 1900942 (N.S.P.C.).

imposed a jointly recommended four-month sentence, followed by a three-year term of probation. This case was not raised by either counsel; this is understandable as it was unreported.

[74] I would observe that all of these cases involved male offenders.

Mandatory minimums grossly disproportionate in Ms. Hood's circumstances

[75] Based on my review of the authorities, the mandatory minimum one-year terms of imprisonment statutorily prescribed for Ms. Hood's offences would be grossly disproportionate to the seriousness of her crimes and her degree of responsibility. Sentences in the range of three-to-nine months would, in my view, operate as lawful sentences for each count. Accordingly, I find that defence counsel has discharged the burden of proving that the mandatory minimum penalties applicable in this case violate the constitutional protection against cruel and unusual treatment or punishment.

Section 1 of the Charter?

[76] Are the mandatory one-year minimum sentences engaged in this case saved by s. 1 of the *Charter*? In other words, is the constitutional infringement of Ms. Hood's right not to be subjected to any cruel or unusual punishment—an infringement which I find in this case to have been created in virtue of the

mandatory-minimum sentences in paras. 151(a), 153(1.1)(a) and 172.1(2)(a) of the *Code*—cured as being a reasonable limit, prescribed by law, imposed on a constitutional right as can be demonstrably justified in a free and democratic society? In my view, the answer is "no". *R. v. Oakes* sets out the analytical framework.[44]

[77] Parliament's purpose in enacting the mandatory *minima* in paras. 151(a), 153(1.1)(a) and 172.1(2)(a) —to denounce and deter the sexual abuse of young persons—is a very important public-policy objective.

[78] The problem with the mandatory-minimum penalties prescribed in paras. 151(a), 153(1.1)(a) and 172.1(2)(a) is that they do not impair minimally those rights guaranteed under s. 12 of the *Charter*. The mandatory *minima* catch a broad swath of conduct of varying degrees of seriousness and moral blameworthiness, and admit of no exceptions—unlike, say, the mandatory minimum sentence in clause 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* for trafficking with a prior record for a designated offence, which, in fact, admitted of an exception under sub-s. 10(5) of the *CDSA*; this provision exempted from the mandatory-minimum two-year penitentiary term

[44] *R. v. Oakes*, [1986] 1 S.C.R. 103, at 141.

prescribed by the statute those traffickers who had completed a drug-treatment program. Significantly, even with that exception, the Supreme Court of Canada struck down clause 5(3)(a)(i)(D) in *Lloyd*.[45]

[79] Constitutional difficulties arise when offences with broad elements, capturing criminality of vast ranges—yes, the serious, but ranging down to the relatively minor—are subjected to substantial and unyielding mandatory-minimum sentencing. Section 1 of the *Charter* will not rescue these mandatory-minimum penalties.

[80] Accordingly, I find that Ms. Hood is not subject to any mandatory-minimum sentences for her crimes.

Conditional sentencing

[81] At the time of the commission of these offences, the conditional-sentencing provisions of the *Code* provided as follows:

> 742.1 If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
>
> > (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent

[45] Note 2, *supra*.

with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;

(b) the offence is not an offence punishable by a minimum term of imprisonment;

(c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;

(d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;

(e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

(i) resulted in bodily harm,

(ii) involved the import, export, trafficking or production of drugs, or

(iii) involved the use of a weapon; and

(f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:

(i) section 144 (prison breach),

(ii) section 264 (criminal harassment),

(iii) section 271 (sexual assault),

(iv) section 279 (kidnapping),

(v) section 279.02 (trafficking in persons - material benefit),

(vi) section 281 (abduction of person under fourteen),

(vii) section 333.1 (motor vehicle theft),

(viii) paragraph 334(a) (theft over $5000),

(ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),

(x) section 349 (being unlawfully in a dwelling-house), and

(xi) section 435 (arson for fraudulent purpose).

[82] As noted in paras. 3-5 of my decision, at the time of these offences, the maximum punishment for each was a term of imprisonment of 10 years.

Accordingly, none of the offences before the court is excluded from the conditional-sentencing regime, now that the minimum terms of imprisonment are no longer in play.

[83] The written brief which I received from defence counsel did not advocate for a specific duration of sentence; however, as defence argued in favour of a conditional sentence, I shall assume that what was being sought was a sentence less than two years in length, in line with the durational limit in s. 742.1 of the *Code*.

[84] In my view, a sentence of less than two years is appropriate for Ms. Hood, given the factors which I reviewed earlier. I am unable to find support for the range recommended by the prosecution at para. 47 of its sentencing brief: a total term of four years in jail. It is a recommendation that does not comport with parity cases, does not account for restraint, and does not appear to accord appropriate weight to the principles of totality and concurrency.

[85] As the charges before the court are conditional-sentence eligible, it is necessary that I consider the appropriateness of that form of community-based sentence.

[86] In my view, Ms. Hood would be an excellent candidate for a community based sentence. The pre-sentence report confirms the evidence which I heard during Ms. Hood's trial: she enjoys the strong support of her family; Ms. Hood's encounter with criminal justice has alerted her family to her need for backup and monitoring, and Ms. Hood's mother and her siblings have taken on these responsibilities earnestly.

[87] The Comprehensive Forensic Sexual Behaviour Presentence Assessment has provided the court with a wealth of insightful information on Ms. Hood's progress and prognosis. Dr. Connors described Ms. Hood as a forthright and consistent respondent who made a positive impression in interview.[46] Ms. Hood has developed realistic plans for vocational training, and is committed to obtaining full-time and sustainable employment.[47] She is working toward having greater access to her children, and she has a good concept of her responsibility to provide for them.[48] The children remain closely bonded to both parents, despite what has happened since 2013.[49]

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[46] Report, note 23 *supra*, p. 4.
[47] *Id.*, pp. 9-10 and 41.
[48] *Id.*
[49] *Id.*, p. 14.

[88] Ms. Hood has entered into what appears to be a stable and supportive relationship with a male twenty years her senior.

[89] Ms. Hood has a realistic self-concept—particularly pertaining to the effect her actions had on her victims;[50] she exhibited what I considered to be exemplary empathy for them and their families in her s. 736 sentencing allocution to the court.

[90] However, I note with concern Ms. Hood's tendency to shift responsibility for her actions to her victims.[51] While it is true that certain of Ms. Hood's more egregious instances of misconduct were preceded by requests that she do them, the fact is that it was she alone who was the responsible adult who had a duty to say "no". Furthermore, she ought to have known that L. and G. would have seen her as a moral navigator, and would have followed her lead.

[91] Still, Ms. Hood has demonstrated a strong commitment to her treatment regimen;[52] the support of her family and her current partner, her contact with

[50] *Id.*, pp. 17, 32, 34 and 35.
[51] *Id.*, p. 29.
[52] *Id.*, p. 18.

her children, and her pursuit of employment are the sorts of structures of stability that may allow her to rebuild her life .[53]

[92] Dr. Connors' report provides the court with some assurance that Ms. Hood's choice of mid-teen males was due to access and opportunity, more than a sexual interest in physically immature males, and so not indicative of a paraphilia.[54] I conclude inferentially from this part of the assessment that placing limits on Ms. Hood's ability to have unsupervised contact with juvenile males—something that the court has the jurisdiction to do—would attenuate significantly the risk of her re-offending in the event of a relapse.

[93] Dr. Connors' assessment included the evaluation of actuarial-based risk-assessment tools: the Psychopathy Checklist-Revised, the Level of Service Inventory-Revised, and the Historical Clinical Risk Management 20 instruments. In summarizing the results of these evaluations, Dr. Connors stated:

> As noted above, by virtue of being a female sexual offender the statistics suggest that Ms. Hood is highly unlikely to reoffend in a sexual manner again. The few risk instruments that we have for female offenders confirm a lower risk for re-offense in general, specific to Ms. Hood and her circumstances. Despite the facts of the index matters Ms. Hood does not present the profile of a predatory offender

[53] *Id*., p. 17.
[54] Id., p. 35.

> exclusively targeting underage males, and is not anticipated to be a risk for sexual recidivism particularly in a stable state devoid of bipolar symptomatology.[55]

[94] The cautionary note to conditional-sentence offenders delivered by the Supreme Court of Canada in *R. v. Proulx* emphasises the fact that a conditional sentence is authentically punitive. It places substantial restrictions on the liberty of the person serving the sentence; the consequences of breaching an order are typically swift, severe and certain: arrest with reverse-onus bail, an accelerated breach hearing requiring balance-of-probability proof only, and a presumption of full collapse of the conditional sentence with conversion to real custody should a violation be proven. Furthermore, a conditional sentence order must be served to the order-expiry date; a person subject to a conditional sentence is not entitled to earned remission or parole.[56]

[95] I believe that to impose a conditional-sentence order in this case would not endanger community safety, as Ms. Hood's risk to the public is readily manageable with appropriate rehabilitative measures in place. It would be consistent with the fundamental purposes and principles of sentencing, as the duration I comprehend would reflect proportionality and parity, and as the need

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[55] *Id*., p. 3.
[56] 2000 SCC 5 at paras. 41-45

for denunciation and deterrence would be reflected in the punitive characteristics of a conditional sentence.

[96] The court imposes the following sentence.

[97] There will be indictable-tariff victim-surcharge amounts of $200.00 imposed for each count, and the court will allow Ms. Hood one year for payment.

[98] There will be a primary-designated-offence DNA collection order made in relation to all counts.

[99] There will be a lifetime SOIRA order imposed in relation to all counts, pursuant to sub-s. 490.013(2.1) of the *Code*, as Ms. Hood has been convicted of more than one designated offence as referred to in para. 490.011(1)(a).

[100] I adopt the reasoning of Gorman J.P.C. in *R. v. L.H.*,[57] and of the New Brunswick Court of Appeal in *R. v. Bossé*:[58] sexual crimes against minors are inherently violent, even when the offender employs no form of coercion or force other than the sexual acts which constitute the criminal conduct. Accordingly, the court imposes a s. 109 order upon Ms. Hood, commencing immediately. That order prohibits Ms. Hood from possessing any firearm,

[57] [2002] N.J. No. 59 at paras. 50-57.
[58] 2005 NBCA 72.

other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition and explosive substance during the period that begins today and expires 10 (ten) years after the expiration of her conditional-sentence order; it shall provide also that Ms. Hood be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.

[101] The court is satisfied that it is in the interests of justice that Ms. Hood be subject to an order in relation to case nos. 2692947 and 2692948 pursuant to sub-s. 161(1) of the *Code*. That order shall commence immediately and run for a term of ten (10) years and shall prohibit Ms. Hood from:

- attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre, unless in the continuous presence of an adult who is not subject to court-ordered restrictions on access to or communication with minors;
- being within two kilometres of any dwelling-house where L. or G. ordinarily reside;

- seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

- except for Ms. Hood's own children, having any contact - including communicating by any means - with a person who is under the age of 16 years, unless a parent or guardian of that person is present; and

- using a computer, internet enabled cellular telephone, or any device capable of accessing the internet or other digital network, except for employment or educational purposes, and only when supervised personally by an adult who is not subject to court-ordered restrictions on access to or communication with minors.

[102] I impose conditional sentences as follows:

[103] Case number 2692944, luring G., a conditional sentence of six (6) months.

[104] Case number 2692945, sexual exploitation of G., a conditional sentence of six (6) months; however, as I consider that offence closely connected to case 2692944, this sentence shall be served concurrently to the first.

[105] Case number 2692947, touching L. for a sexual purpose, a conditional sentence of nine (9) months, to be served consecutively to the first two counts.

[106] Case number 2692948, luring L., a conditional sentence of six (6) months; as I consider that offence closely connected to 2692947, it is to be served concurrently to that count, but consecutively to case numbers 2692944 and 2692945.

[107] This results in a total conditional-sentence order of fifteen (15) months, with appropriate conditions. [Conditions redacted from decision]

[108] This will be followed by a probation order of twenty-four (24) months with appropriate conditions. [Conditions redacted from decision]

[109] I am alert to the fact that sentences of this nature will give rise to questions whether the outcome was based on gender. A legal sentence must be based on evidence admitted properly before the court, and it must be based on governing law. Appellate review can correct mistakes when sentences get imposed that are based on erroneous principles or a failure to appreciate the evidence; but an originating court should try to get things right the first time, and so should not be influenced by extraneous factors. This begs the question as to what is relevant and admissible and what is not.

[110] It is significant that this is the first case I can recall hearing in which the person charged with a sexual-related offence was female. Almost all of the sex-offence cases I have heard have been males accused of sexually assaulting females. This has some bearing in this case on the need for general deterrence. Although statistical information not in evidence has no bearing on my decision, it is of interest to that this locality is no different to the rest of Canada.[59]

[111] The *Corston Report* observed that in the United Kingdom penal justice has as its origin a system made by men, designed for men.[60] A creditable case can be made that penal justice even in developed Commonwealth nations—including Canada—impacts adversely and disproportionately women who come into conflict with the law.[61]

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[59] *See* Shannon Brennan and Andrea Taylor-Butts, *Sexual assault in Canada: Profile Series Statistics Canada Catalogue no. 85F0033M. No. 19* (Ottawa: Canadian Centre for Justice Statistics, 2008) online at <http://www.statcan.gc.ca/pub/85f0033m/85f0033m2008019-eng.htm>: the rate of police-reported sexual assault against females (68 per 100,000 population) was more than 10 times the rate for males (6 per 100,000 population), with females accounting for ninety-two percent of sexual-assault victims in Canada; overall rates of sexual assaults for female victims are significantly greater than males across each age group.

[60] *The Corston Report: A Report by Baroness Jean Corston of a Review of Women with Particular Vulnerabilities I the Criminal Justice System* (London: Home Office, 2007) at 2. *See also* Jill Annison, Jo Brayford, John Deering, *Women and Criminal Justice: From the Corston Report to Transforming Rehabilitation* (Bristol: Policy Press, 2015).

[61] *See, e.g.*, Vicki Chartrand, "Inalienable, Universal, and the Right to Punish: Women, Prison and the Practice of Freedom" in Jennifer M. Kilty, ed., Within the Confines: Women and the Law in Canada (Toronto: Women's Press, 2014) at 14-34; Canadian Association of Elizabeth Fry Societies, *Submission of the Canadian Association of Elizabeth Fry Societies to the Canadian Human Rights Commission for the Special Report on the Discrimination on the Basis of Sex, Race and Disability Faced by Federally Sentenced Women* (Ottawa: Canadian Association of Elizabeth Fry Societies, 2003), online at:< http://www.caefs.ca/wp-content/uploads/2013/04/CAEFS-Submission-to-the-Canadian-Human-Rights-Commission-for-the-Special-Report-on-the-Discrimination-on-the-Basis-of-Sex-Race-and-Disability-Faced-by-Federally-Sentenced-Women.pdf>; and Canadian Human Rights Commission, Protecting Their Rights: A Systemic Review of Human Rights in Correctional Services for Federally Sentenced Women

[112] In a penal system which recognizes the importance of individualized punishment, it is clear that equal justice does not mean identical justice. Gender, therefore, is not a neutral factor.

[113] There have been a number of international policy initiatives dealing with appropriate penal consequences for women in conflict with the law. Noteworthy among these are the *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)*.[62]

[114] Of significance to students of criminology in Canada is the fact that, while women account for only 15 per cent of overall admissions to correctional facilities in this country,[63] they represent the fastest-growing demographic of admissions.[64] I cannot imagine anyone believing that this is a good thing. The reasons behind it may have to do with incumbent legal principles and beliefs not keeping pace with that we know from integral research and critical analysis

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(Ottawa: Canadian Human Rights Commission, 2003), online at: <http://www.chrc-ccdp.ca/sites/default/files/fswen.pdf>.

[62] General Assembly Resolution 65/229, A /RES/65/229 (16 March 2011) available from undocs.orgA /RES/65/229.

[63] Correctional Service of Canada, "Adult correctional statistics in Canada, 2013/2014" (2015), *Juristat*, online: <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14163-eng.htm>.

[64] Kong, R., & AuCoin, K., " Female Offenders in Canada" (2008), online: < http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008001-eng.pdf>.

to be the measures most responsive of the needs of women in conflict with the law, their families and the communities in which they live.

[115] Although I have read this and other material, I recognize that it cannot inform the judgment of the court, as it is not in evidence before me.[65]

[116] Rather, there are two main factors that are determinative of the sentencing outcome in this case, neither one having to do with gender. First, Ms. Hood made the procedural decision to challenge the constitutionality of the mandatory-minimum sentences that placed her liberty in jeopardy. This is only the second constitutional-grounds challenge of a sentencing statute that has come before me; I heard the first one earlier this year. But for these two, counsel have never raised before me the issue of constitutional validity in any mandatory-minimum-penalty case.

[117] Second, Ms. Hood was charged with offences that became conditional-sentence eligible once the mandatory minimums were removed from the sentencing calculus.

[118] The criminal process is not—or at least should not be—a contest in which the court and the parties try to game the result; however, that does not mean that

[65] *See R. v. C.N.T.*, 2016 NSCA 35.

the process is blind to procedural choices. Choice has to do with agency and freedom of action in making decisions when one's liberty is at stake. Those choices matter. A person charged with an offence chooses to plead not guilty or guilty; chooses to place evidence before the court—or not; chooses to raise—or refrain from raising—certain arguments. These choices will have a bearing on the outcome; if it were otherwise, then the court might be said to have abandoned its duty to listen to the parties. In this case, Ms. Hood made strategic choices, advanced them effectively through her counsel; her choices were influential in my decision.

[119] I am indebted to counsel for the thorough and thoughtful submissions made in this case.

Atwood, JPC