

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v. Gray*, 2018 NSPC 10

Date: January 11, 2018

Docket: 8088337, 8088339,
8088343, 8088345

Registry: Halifax

Between:

Her Majesty the Queen

v.

Leslie Burton Gray

**Restriction on Publication: Section 486.4- Order restricting publication-
Identity of Complainant**

DECISION ON SENTENCE

Judge: The Honourable Judge Elizabeth A. Buckle

Heard: November 27, December 1, 2017, Nova Scotia

Oral Decision: January 11, 2018

By the Court:

Background

[1] On November 27th, 2017, the date his trial was to start, Leslie Gray pleaded guilty to the following offences, all occurring between June 30th 2015 and October 20th, 2016:

1. knowingly advertising an offer to provide sexual services for consideration, contrary to Section 286.4 of the *Criminal Code*;
2. receiving a financial or other material benefit, knowing it was obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(1), contrary to Section 286.2(1) of the *Criminal Code*;
3. unlawfully receiving a financial or other material benefit knowing that it resulted from the commission of an offence under subsection 279.01(1), contrary to Section 279.02(1) of the *Criminal Code*; and,
4. unlawfully uttering a threat to J.O. to cause bodily harm or death to the said J.O., contrary to Section 264.1(1)(a) of the *Criminal Code*.

[2] Counsel provided me with cases in support of their respective positions, sentencing submissions were heard on December 1st, 2017 and I reserved my decision. These are my reasons for sentencing.

Position of the Parties

[3] The position of the Crown is that Mr. Gray should be sentenced globally to a custodial sentence of 48 months but with credit of 12 months for time served on remand for a global sentence of 36 months going forward.

[4] The position of the defence is that Mr. Gray should be sentenced globally to a custodial sentence of between 12 and 24 months with credit of 12 months for time served on remand for a global sentence of between time served and 12 months going forward plus probation.

[5] Counsel agree on various ancillary orders including: a prohibition order under s. 109(2) for a period of 10 years; an order to comply with the SOIRA for a period of 20 years; an order authorizing the taking of a sample of Mr. Gray's DNA for the DNA databank; and an order pursuant to s. 743.21 prohibiting contact with J.O. or A.S. (a witness) during his custody.

Circumstances of the Offence

[6] Mr. Gray has admitted the facts contained in the Agreed Statement of Fact. (*Exhibit 2*)

[7] In summary, J.O. met Mr. Gray on July 1, 2015. He was a friend of her boyfriend. Between July of 2015 and October of 2016, J.O. twice lived with Mr. Gray in the residence he shared with his mother. The first time, she lived there with her boyfriend for about one month. The second time, she moved in alone and stayed for approximately 5 months.

[8] At the time, J.O. and her boyfriend moved in to the Gray residence, she was 20 years old, addicted to drugs and a former sex trade worker who had been previously victimized by pimps.

[9] Once she and her boyfriend were living with him, Mr. Gray began advertising her as a sex trade worker on an online advertising site. Her services ranged from oral sex to full intercourse and with fees of \$140 for 30 minutes and \$180 for an hour. He set up appointments for her. She attended as many as 20 calls per day. She would go to the calls in a cab and when she returned to Mr. Gray's residence, she would turn over all of the money to him. During this time, J.O. contracted HIV.

[10] On August 16, 2015, after her boyfriend was incarcerated, J.O. moved out of the Gray residence and back in with her mother. She remained with her mother until May 11, 2016 when she was kicked out. She posted on Facebook that she

needed a place to stay and Mr. Gray advised her that she could stay with him and his mother if she went on social assistance and paid rent.

[11] Mr. Gray told her she wouldn't have to do calls. However, after she moved in this second time, he again posted an ad for her sexual services. Again, she would go to the calls and turn over all of the money to Mr. Gray. He told her that she had to do the calls "or else". J.O. stayed in the Gray residence the second time for approximately 5 month.

[12] During this period, she lived in the Gray residence without her boyfriend. She again gave all of her money to Mr. Gray. She was not provided with food so she resorted to stealing to feed herself. He told her the money she made was his, and on the few occasions when she tried to hold back money, he became angry and accused her of stealing "his money". During this 5 month period, she made over \$10,000 which she turned over to Mr. Gray.

[13] Andre Gray, Leslie Gray's brother, was released from prison and was sometimes at the Gray residence. In her presence, the two brothers discussed how they could throw her body into the river and that no one would care. They also made reference to a movie called the Purge – a 2013 horror movie with a plot involving decriminalizing all illegal acts for a 12 hour period – telling her that if

the movie plot ever became reality, she would be the first person they would kill. They then spoke in a brutal way about how they would kill her and dispose of the body. This discussion frightened her.

[14] During the last month that she was there, J.O. attended calls for sexual services where the callers were actually members of the Halifax Regional Police. The officers gave her brochures on getting out of the sex trade. Mr. Gray found these brochures and told her she was useless and if she came forward to police, she would be dead.

[15] On October 19, 2016, J.O., who was now on methadone, missed her dose so went to hospital for medication. Upon release, she went back to live with her mother and reported matters to police.

Mr. Gray's Circumstances

[16] Mr. Gray has been in custody since his arrest in late March of 2017.

[17] No pre-sentence report was requested. Mr. Gray's criminal record was filed (*Exhibit 3*) and other information about his background has been provided by counsel.

[18] Mr. Gray was born on October 18, 1992. So, during the offence period, he was 22 – 23 years old and is now 25 years old.

[19] His criminal record contains 23 prior offences between May of 2009 when he was a youth to his most recent conviction in August of 2017. He has no convictions for violent offences as an adult and his only conviction for a similar offence was a conviction for uttering a threat in 2010 when he was a youth. He has previously been sentenced to custody but his longest sentence appears to have been 20 days.

[20] I am advised by defence counsel that Mr. Gray has one child who is in the custody of his girlfriend and mother. He continues to have the support of both his girlfriend and his mother who were both present in court for sentencing submissions.

[21] Prior to his incarceration, he was working full-time for his uncle and that employment will be available to him when he is released from custody.

[22] I am advised that Mr. Gray has learning challenges which impact his ability to read and that he has had addiction issues.

[23] Finally, counsel advises that Mr. Gray had a difficult upbringing and witnessed a lot of violence in his youth so has a distorted view of how to treat others. He is hoping to raise his child differently than how he was raised and to surround himself with people who treat him well.

Sentencing Principles and Analysis

General

[24] In sentencing Mr. Gray, I must apply the sentencing provisions in 718, 718.1 and 718.2 of the *Criminal Code* and the common law.

[25] These provide me with the general principles as well as the factors I should consider.

[26] The ultimate objectives of sentencing are protection of the public and to contribute to respect for the law and the maintenance of a safe society. Section 718 instructs that this is to be done by imposing just sanctions that have, as their goal, one or more of the following: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion

of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

[27] Section 718.1 says that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[28] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender, the principles of parity and proportionality, that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders.

[29] The overarching goal of long-term protection of the public informs how I balance the principles and purposes of sentencing and apply them to the facts to arrive at a fit sentence. The common law provides me with guidance as to how I should interpret and balance these principles and how they should be applied to different categories of offence. However, the best means of addressing the principles and attaining the ultimate objective will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that

sentencing is a delicate and inherently individualized process (*R. v. LaCasse*, 2015 SCC 64 at para. 1 and *R. v. M. (C.A.)*, [1996] 1 S.C.R at para 91-92).

Denunciation and Deterrence

[30] The objective of denunciation is the means by which a sentence communicates society's condemnation of particular conduct. As Justice Lamer said in *R. v. C.A.M.* “a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.” (*R. v. C.A.M.* [1996] 1 S.C.R. 500, at para. 81)

[31] The offence under s. 279.02 is now part of the general scheme of laws directed at “trafficking in persons” and the offences under s. 286.4 and 286.2 are categorized under the heading “commodification of sexual services”. These specific offences and their categorization within the *Criminal Code* may be relatively new but the underlying conduct and the criminalization of that conduct is not. The offences, previously referred to using phrases such as “procuring” and “living off the avails of prostitution”, and Mr. Gray’s role in those offences are not new. Simply put, Mr. Gray was a pimp.

[32] A person who chooses to be employed in the sex trade may be doing just that – making a choice over his or her own body and employment. However, the reality is that in most situations the relationship between the pimp and the prostitute does not involve any real choice or true employment for the prostitute. The pimp forces or coerces the prostitute to use his or her body with little or no compensation. In those circumstances, the relationship cannot be viewed as employment in the sex trade, it is exploitation. As a result, that relationship has been described, correctly in my view, as a form of slavery. (See for example: *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code* [1990] S.C.J. No. 52, at para. 95). Viewed in that way, it is entirely appropriate to categorize some aspects of “pimping” as human trafficking.

[33] Courts have repeatedly and consistently commented on the parasitic and exploitive nature of the relationship between pimp and prostitute. The judgement of Justice Hill in *Miller* ([1997] O.J. No. 3911 (OCJ)) summarizes much of the judicial commentary that came before. For example, in *Reference re ss. 193 and 195.1(1)(c)*, Justice Dickson described the reality of contemporary prostitution as involving “the exploitation, degradation and subordination of women.” (at para. 2). In *The Queen v. Downey and Reynolds* (1992), 72 C.C.C. (3d) 1 (S.C.C.), Cory J. described the pimp as the person who “lives parasitically off a prostitute’s

earnings”. (para. 40). In *Regina v. Grilo* (1991), 64 C.C.C. (3d) 53 (Ont. C.A.) at para. 27, the court stated:

“The true parasite whom s. 212(1)(j) seeks to punish is someone the prostitute is not otherwise legally or morally obliged to support. . . . Living on the avails is directed at the idle parasite who reaps the benefits of prostitution without any legal or moral claim to support from the person who happens to be a prostitute.”

[34] In *Miller*, Justice Hill went on to say:

“The relationship between pimp and prostitute is almost inevitably inherently coercive and exploitative. The degrading domination of the pimp perpetuates the prostitute's lack of self-esteem and self-worth. Street pimps promulgate violence as their primary control mechanism. Other pimps, particularly those administering adult entertainment or escort service operations, employ more subtle pressure including preying upon the economic dependency of the prostitutes employed. In other words, the demonstration of domination varies from case to case.”

[35] These are offences that cry out for denunciation.

[36] The goal of deterrence is to impose a sentence that discourages the offender (specific deterrence) and others (general deterrence) from similar conduct in the future.

[37] It has also been recognized that in sentencing for living off the avails of prostitution, the objectives of general and specific deterrence are paramount. (see: *R. v. Murray* (1995), 165 A.R. 394 (C.A.) and *Miller (Supra.)*).

Rehabilitation

[38] Rehabilitation continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized. This was recently confirmed by the Supreme Court of Canada in *Lacasse (supra)* where, in the context of a sentence appeal for the offence of dangerous driving causing death, Wagner, J., writing for a majority, said:

“One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.” (at para. 4)

[39] I have very little information about Mr. Gray so as to make an informed assessment of whether he is a good candidate for rehabilitation. However, I do know that he is only 25 years old. As such he is still relatively youthful. The rehabilitative objective of sentencing is even more important when dealing with youthful offenders.

Proportionality

[40] The principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender requires me to first consider the gravity of the offence.

[41] Mr. Gray has pleaded guilty to offences relating to prostitution and human trafficking in the prostitution context.

[42] He has not pleaded guilty to the actual “trafficking in persons” offence under s. 279.01 and it is important to recognize that I am not sentencing him for conduct which constitutes that offence. However, he has admitted receiving a financial benefit that he knew resulted from conduct that is captured by that provision. So, he has admitted knowing that J.O. was a person who had been “trafficked” – exploited and transported, held, or controlled for that purpose – and that the money he received from her was a result of that conduct. He has also admitted to advertising J.O.’s sexual services for sale, financially benefitting from those services, and using threats to ensure she did not go to the authorities and that had the effect of ensuring her continuing compliance.

[43] The offences under ss. 286.2(1) and 279.02(1) are very serious offences. This is reflected in the fact that Parliament has determined that they must be proceeded with by Indictment and set the maximum sentence at 10 years.

[44] I have already spoken about the gravity of the offences in general but now I have to speak about the gravity of Mr. Gray’s specific behaviour. The offences he has pleaded guilty to capture a wide range of behaviour. My comments do not

detract at all from what I have already said – the conduct that constitutes these offences is despicable – but part of my task is to place Mr. Gray’s conduct on the continuum of conduct that can constitute these offences.

[45] In that task, I am assisted by the work of judges and academics who have already grappled with this. Many of the cases refer to a guideline for categorizing the offence of “living off the avails of prostitution” which was created by Dr. D.A. Thomas in *Principles of Sentencing* (2nd ed. (1970) at pp. 130-3), and has been cited in a number of Canadian cases including, *R. v. Miller*, at para. 39 and *R. v. Tang*, [1997] A.J. No. 460 (C.A.) at para. 5. In my view, while these categories provide some assistance in assessing the seriousness of the conduct, that assistance is limited. The quantum of sentence Dr. Thomas references for each category is based on English cases decided before 1970 which is when the text was published. The Canadian statutory context for sentencing is different than the English context and has changed a great deal since 1970. Further, I don’t agree that the factors highlighted in his categories are necessarily the significant factors that Canadian courts have relied on to determine quantum of sentence. For example, a factor that is highlighted in his 2nd category is whether the offender relies on the earnings of the woman as his main source of income. While the amount of money an offender receives from the offence is a relevant consideration in sentencing in Canada, it is

one of many and not, according to my review of the recent cases, of particular significance.

[46] Dr. Thomas' three categories are:

1. Sentences within the bracket of four to five years are usually approved where the offender has coerced the woman concerned into becoming or remaining a prostitute, and has exercised a significant degree of control over her activities.
2. Where the element of coercion is lacking but the offender relies on the earnings of the woman as his main source of income, the appropriate sentence is more likely to be within the range of two or three years imprisonment.
3. Sentences in the lowest bracket, between twelve and eighteen months imprisonment, are likely to be found where the offender receives money from the woman concerned but the relationship cannot be characterized as one of exploitation.

[47] The crown argues that Mr. Gray is in the top bracket because he used coercion to ensure that J.O. remained a prostitute and exerted a significant amount of control over her. The defence argues that he is in the lowest bracket because of the lack of evidence of coercion and control and because he did not rely on her earnings as his main source of income.

[48] In my view, he does not fit cleanly into any of these brackets. For example, I agree that based on the evidence before me, it is unlikely that J.O.'s earnings were his main source of income. This would place him below the middle category.

However, in my view there was coercion, threats and control which contributed to her continuing to be a prostitute which would put him in the top bracket. I find it more useful to consider Mr. Gray's conduct using the factors identified in *Tang* and *Miller*. Those factors provide a more nuanced framework to assess the gravity of a particular offender's conduct. The *Tang* factors were identified in the context of a case involving victims who were under the age of 18. However, they have since been used in cases such as the one before me where the victim is over 18 (see: *Miller* and *Finestone*, 2017 ONCJ 22) and counsel agree they are relevant to my analysis. I will address each of those factors.

1. The degree of coercion or control imposed by the pimp on the prostitute's activities;

[49] The agreed statement of facts state that during both time periods when J.O. resided in the Gray residence, Mr. Gray posted ads for her sexual services, set up appointments and received the money when she returned from calls. There is no information to indicate that he used force to make her do this, set the price, or told her what services she had to offer. She left the residence to meet customers and after each call, returned to the Gray residence.

[50] The agreed statement of facts does not refer to any coercion, explicit threats or violence by Mr. Gray either prior to or during the initial 30 day period when J.O. was in his home. The agreed statement of facts says that J.O.'s "boyfriend" was present with her in the home during that period. I cannot imagine that he didn't know what was going on but I have no information about his role in her life beyond the use of the term "boyfriend". At the end of that initial period, her boyfriend was arrested and she left the Gray residence. There is no indication that Mr. Gray did anything to prevent her from leaving and no indication that he tried to contact her during the 8 month period when she was out of his residence. I accept that J.O.'s life circumstances during that 30 day period – addicted to drugs, living in Mr. Gray's home, without a source of income – may have left her feeling like she had few choices. However, based on the agreed facts, I cannot say that Mr. Gray coerced J.O. or exercised any control over her during this period.

[51] The second time period is somewhat different. I have no information to suggest that Mr. Gray did anything to entice, coerce or threaten her to return. However, the facts state that she was told she could return if she went on welfare and paid rent and she was explicitly told she would not have to go on calls. That changed. Mr. Gray again posted ads and told her she had to go on the calls "or else". J.O., correctly in my view, interpreted this as a threat. I have no

information to suggest that Mr. Gray controlled her movements or access to the outside world. She left the residence regularly to go on calls and then returned. There is nothing to suggest he prevented her from having a telephone, contacting family or friends etc. or explicitly threatened to harm her if she left. However, the agreed statement of facts refers to explicit and implicit threats during this time period. Further, she was alone in the residence without her boyfriend (and whatever protection he may have offered her), Mr. Gray's brother was sometimes there and was part of the threatening conversation, she apparently felt she had nowhere to go, and Mr. Gray took all of the money she earned. Toward the end of the period, he told her that if she "came forward", meaning reported him to police, she would be dead.

[52] Based on this information, I conclude that during the second time period there were explicit threats and coercion which was related directly to her continued work as a prostitute. Further, while there was no direct control over her movements, Mr. Gray controlled her by taking all of her money from her.

2. The amount of money received by the pimp and the extent to which the pimp allowed the prostitutes to retain their earnings;

[53] The agreed statement of facts is clear that Mr. Gray did not permit J.O. to retain any of her earnings. The agreed statement of facts states that during the first 30 days she went on as many as 20 calls per day, charging either \$140 or \$160 per call. Even at 10 calls per day for 30 days, her earnings would have been over \$40,000 in one month. During the second time period, which was 5 months, she estimated that she earned over \$10,000. All of this money went to Mr. Gray. There is a significant difference in the numbers between the two time periods. Even one call a day at \$150 for 5 months (150 days) would amount to over \$20,000. The agreed statement of facts does not provide an explanation for this. In my view, the actual amount is not as significant as the fact that she was not permitted to retain any of it. By keeping her money, Mr. Gray ensured continuing control over her.

3. The age of the prostitutes and their numbers;

[54] J.O. was 20 years old when she first met Mr. Gray. She is the only victim in the case before me.

4. Any special vulnerability on the part of the prostitutes;

[55] J.O. was an addict. It is reasonable to infer that Mr. Gray knew this. She was living in his residence and was on methadone, at least for some of the time, so would have had to go daily to the pharmacy to get her methadone. Further, Mr. Gray knew when she came to live in his residence the second time, that she had no place to live. These factors made her vulnerable.

5. The working conditions in which the prostitutes were expected or encouraged to operate, including their physical surroundings in terms of soliciting customers and servicing customers, and safety concerns, in addition to whether appropriate health safeguards were taken;

[56] The agreed statement of facts states that J.O. contracted HIV during the first 30 day period. The agreed facts don't explicitly state that she contracted HIV through sexual activity. However, I assume that if there was another potential source of the infection, such as IV drug use, that would have been part of the agreed facts. It seems reasonable to infer from this that appropriate health safeguards were not taken. She attended calls alone in hotel rooms and I have no information to suggest that any thought was given to her safety.

6. The degree of planning and sophistication, including whether the pimp was working in concert with others;

[57] There is no indication that Mr. Gray worked with anyone else. There were other people around – J.O.'s boyfriend, Mr. Gray's mother and brother – however, the agreed facts don't address whether they benefitted or participated in the offence except as I've already stated with respect to Andre Gray's threats.

7. The size of the pimp's operations, including the numbers of customers the prostitutes were expected to service;

[58] I have addressed this when discussing factor 2. If the agreed statement of facts is correct, J.O. serviced many more customers during the first 30 day period – as many as 20 per day. Assuming the prices stayed the same, during the second time period, she would have serviced approximately 70 customers over 5 months.

8. The duration of the pimp's exploitative conduct;

[59] J.O. was exploited for approximately 6 months.

9. The degree of violence, if any, apart from that inherent in the pimp's parasitic activities;

[60] According to the agreed statement of facts, no actual violence was used. However, there were implicit and explicit threats.

10. The extent to which inducements such as drugs or alcohol were employed by the pimp;

There is nothing in explicit in the agreed statement of facts concerning any inducements. J.O. needed a place to stay and Mr. Gray gave her one.

11.The effect on the victim of the pimp's exploitation;

[61] I have no victim impact statement from J.O.. However, I know from the agreed statement of facts that J.O. contracted HIV. Even with advancements in treatment of HIV, this will have a lifelong impact on her.

12. The extent to which the pimp demanded or compelled sexual favours for himself from the victims;

[62] There is no indication that Mr. Gray engaged in any sexual acts with J.O.

[63] Justice Hill, in *Miller* added the following additional factors:

1. The age of the customers attracted to the bawdy-house operation;
2. Steps taken by the accused to evade detection by the authorities; and,
3. Attempts by the accused to prevent a prostitute from leaving his employ.

[64] I have no information about the age of the customers. Mr. Gray threatened to kill J.O. if she came forward to authorities. There is no indication that Mr. Gray tried to prevent J.O. from leaving.

[65] The other aspect of proportionality is the degree of responsibility and moral culpability of the offender. Mr. Gray's brother, Andre Gray, was jointly charged with the offences for which I am sentencing Leslie Gray. However, he pleaded guilty to only one count of threatening. J.O. I accept that his presence and the threatening discussion he was involved in would have added to J.O.'s fear. However, I have no evidence that he threatened her for the purpose of assisting Leslie Gray in his criminal conduct or that he benefited financially or otherwise from J.O.'s work. Therefore, there is no indication that anyone else was involved in the offences that Leslie Gray has pleaded guilty so I conclude that he is solely responsible for these offences.

[66] I was advised by counsel that Mr. Gray has had difficulties with substance abuse but was not provided with any information to suggest that his addictions contributed to the offences. I am advised that he was otherwise healthy and was, in fact, employed prior to his incarceration so capable of earning a living without resorting to living off J.O.'s work in the sex trade. Further, I am advised by

counsel that he did not rely solely on her for his livelihood. So, it appears he was motivated by greed rather than need or desperation.

As a result, I conclude that his level of moral blameworthiness is high.

Aggravating and Mitigating Factors

[67] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender.

Aggravating Factors

- J.O. was vulnerable due to her addiction and background;
- There were explicit and implicit threats both relating to J.O.'s continued work and to prevent her from reporting Mr. Gray;
- Mr. Gray took all of the money J.O earned from prostitution and became angry when she withheld any which increased his control over her;
- The time period – 6 months – is relatively long although I accept that the first 30 day period did not include threats or coercion;
- Mr. Gray has a previous record which includes offences as an adult and a youth.

Mitigating factors:

- Mr. Gray is a relatively youthful offender – he was 22-23 during the time period of the offence;
- He pleaded guilty. The Crown argues that this factor is to be given less weight because it occurred on the first day of trial. However, I do not agree. He pleaded guilty to only 4 of the 8 offences with which he was charged. I have no information as to whether that resolution was previously available to him. Further, in this type of case, a guilty plea is of tremendous benefit to the Crown in that it means that a vulnerable witness does not have to testify;
- His record is limited and generally unrelated;
- He has had challenges in life including substance abuse, learning challenges and exposure to violence as a child;
- He has family support from his girlfriend and his mother, though I note that his mother apparently resided in the home while these offences were occurring; and,
- He was employed prior to his arrest and has the ability to return to that employment after he is released from custody.

[68] I do not see mitigating facts relating to the offence; however, there is an absence of other potential aggravating factors such as: presence or use of weapons; assaultive behaviour; Mr. Gray did not prevent her from accessing the outside world; and, did not engage in sexual activity with her himself.

Parity / Range of Sentences

[69] Section 718.2 also requires consideration of the principles of parity. This requires an examination of the range of sentences imposed for this type of offence.

There is a wide range for these types of offences. This is a reflection of the almost limitless combinations of aggravating and mitigating factors. Counsel for the crown and defence have provided me with a number of cases which I will review briefly.

[70] *Tang (supra.)* is a 1997 decision from the Alberta Court of Appeal. The accused in that case had been involved in a sophisticated brothel business. The victims were young girls, age 13 and 14. They were given drugs and alcohol. Mr. Tang had no prior record and was primarily employed outside the brothel. In sentencing Mr. Tang to 5 years in custody, the court stressed the importance of deterrence and listed the factors to consider. The crown concedes that this case is distinguishable on its facts.

[71] In *N.A. 2017 ONCJ 665*, the victim was over 18 but was vulnerable due to drug addiction. The accused was found guilty after trial of assault, human trafficking contrary to s. 279.01 and receiving a financial benefit under s. 279.02. The use of violence and actual human trafficking are aggravating factors that are not present in the case before me. The accused also did not have the benefit of having pleaded guilty. However, he was not found guilty of prostitution related offences which the sentencing judge viewed as significant. He was 25, had no

criminal record and was described as having been a good student until a few years before the offences. He was sentenced to 18 months in custody.

[72] *Miller (supra.)* is a 1997 decision of the Ontario Court of Justice. The accused pled guilty to three counts of keeping a bawdy house, two counts of living off the avails of prostitution, assault and assault with a weapon. The operation was lengthy, relatively large and sophisticated. The accused was motivated by greed and profited greatly from his criminal activity. He had a lengthy criminal record including convictions for violence. He was sentenced globally to 3 years in custody.

[73] In *Barton* [1994] N.S.J. No. 122 (NSCA), the accused was convicted of sexual assault, living off the avails and uttering a threat. He had forced the victim to take up prostitution and sexually assaulted her when she threatened to quit. It was described as a cold-blooded demonstration of domination. He was sentenced to a global sentence of 6 years custody.

[74] In, *Shaw* 2016 NSSC 292, the accused pleaded guilty to living off avails the of prostitution of persons under 18, counselling to engage in prostitution and assault with a weapon. The victims were 14 and 15 years old. The accused coerced the victims, exercised control over their movements and assaulted one of

them with a weapon. The accused was 23, a single mother with mental health issues and a minor record. A pre-sentence report indicated some hope for rehabilitation. In the context of a two year mandatory minimum penalty, the accused was sentenced to 30 months custody.

[75] In *Tynes* 2010 QCCQ 11298, the accused was found guilty of procuring victims who were under 18. Drugs were used and the operation was well organized. However, there were no threats or violence, the victims were exploited for a relatively short period of time and were free to leave and come and go as they pleased. Each accused was sentenced to 34 months in custody.

[76] *Finestone*, 2017 ONCJ 22 and *Robitaille*, 2017 ONCJ 768 are related decisions. Mr. Finestone pleaded guilty to trafficking in a person under the age of 18 which had a mandatory minimum penalty (MMP) of 5 years. The court found that MMP of 5 years was disproportionate on a reasonable hypothetical and sentenced Mr. Finestone to just under 4 years. The victim was 14 year old. Mr. Finestone forced her into prostitution, controlled her, removed her means to contact the outside world, and he had some involvement with the exploitation of a second underage victim. The period of exploitation was relatively short – 6 days and there was no actual violence, forced her into prostitution but only 6 days so a

much shorter period. Mr. Finestone was a youthful first offender. He suffered from mental health issues and had taken steps to address them. The court found that his efforts to turn his life around after the offence amounted to exceptional circumstances.

[77] Ms Robitaille pleaded guilty to receiving a material benefit from the sexual services of a person under 18, an offence with a 2 year MMP. The period of exploitation was relatively short, the number of calls relatively few, there was minimal intimidation, minimal financial benefit to the accused, relatively good working conditions, and minimal risky behavior. The accused was a youthful first offender who had been the victim of childhood abuse and was a sex trade worker herself. The court found the MMP to be disproportionate and sentenced Ms Robitaille to 8 months in custody.

[78] In *Badali*, 2016 ONCA 686, the accused was found guilty after trial of living off the avails of prostitution of a person under the age of 18. The duration of the exploitation was relatively short. However, the accused had procured her into prostitution, used coercion and aggression, took a portion of her money and fined her, and had sex with her. Mr. Badali had a criminal record with convictions for

forcible confinement, extortion and threats. He was sentenced to 22 months plus 12 months consecutive for the sexual offence.

[79] A victim who is under the age of 18 is a significant aggravating factor. This is reflected in the fact that Parliament chose to impose MMPs in those cases. This makes those decisions involving underage victims less helpful in arriving at an appropriate sentence for an offence that does not involve underage victims.

Reasonable Alternatives to Custody

[80] Finally, s. 718.2 requires me to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders.

[81] So, I am required to consider alternatives to imprisonment and impose an alternative if it is reasonable in all the circumstances.

[82] Given the gravity of the offence and proper application of the objectives of denunciation and deterrence, there is no reasonable alternative to custody in this case. The question is how long.

Time in Custody on Remand

[83] It was agreed that, as of December 1, 2017, Mr. Gray should be credited with 12 months in custody. With enhanced credit for the time served since then, he now has an additional 63 days so I will credit him with having served 423 days in custody which is approximately 14 months.

Conclusion

[84] In summary, Mr. Gray's exploitation of the victim took place over two time-periods of one month and 5 months. She was not underage but was vulnerable due to her drug addiction and circumstances. During the second time period, he used threats to ensure she went on calls and to prevent her from going to the authorities. He did not minutely control her movements or actions but maintained control over her generally by taking all of the money she earned. He provided her with a place to live but did not provide her with food. He did not engage in sexual activity with her, there is no indication of use or presence of weapons and he did not use violence on her.

[85] Mr. Gray is a youthful offender with a criminal record that is for the most part unrelated to his conduct in this case. He pleaded guilty, which, in this type of

case, is significantly mitigating. I have no other indication of remorse from Mr. Gray. He has family support and is employable.

[86] No two cases are identical. The case before me shares some features with *N.A.* in that the victims in both cases were over 18 and addicted to drugs. The accused in *N.A.* used actual violence, was found guilty of actual human trafficking and did not have the mitigating benefit of a guilty plea. However, in *N.A.*, the victim was not forced to work as a prostitute, the context was strip clubs and the accused's circumstances and background were more mitigating. *N.A.* received a sentence of 18 months in custody.

[87] The case before me shares more features with *Shaw*, a recent NS case, in that there was coercion and control in the prostitution context. I recognize that the victims in *Shaw* were under 18 and the accused used actual violence but Ms. Shaw's background and circumstances were more mitigating. Ms. Shaw was sentenced to 30 months in custody.

[88] In my view, a fit sentence globally is 30 months in custody but with credit for 14 months for the time that he has already served, for a sentence going forward of 16 months. That will be broken down as follows:

1. Receiving a benefit, knowing it was obtained by the commission of a prostitution offence, contrary to s. 286.2(1) – 24 months less 14 months credit = 10 months going forward
2. Receiving a benefit knowing it resulted from the commission of an offence involving human trafficking, contrary to s. 279.02(1) – 24 months less 14 months credit, concurrent = 10 months concurrent going forward
3. unlawfully utter a threat to J.O. to cause bodily harm or death to the said J.O., contrary to Section 264.1(1)(a) of the *Criminal Code* – 6 months consecutive going forward
4. knowingly advertise an offer to provide sexual services for consideration, contrary to Section 286.4 of the *Criminal Code* – 4 months concurrent

[89] While in custody, he is ordered, pursuant to s. 743.21 to have no contact or communication, direct or indirect, with J.O. and A.S.

[90] That will be followed by probation for 24 months on all counts. The conditions of probation are as follows:

1. Statutory conditions,
2. Report to a probation officer within 2 days of release from custody and thereafter as directed
3. Not possess or consume a controlled substance as defined in the *Controlled Drugs and Substances Act* except in accordance with a physician's prescription for you or a legal authorization
4. Attend for, participate in and complete any assessment, counselling or treatment as directed by probation, including mental health counselling and substance abuse counselling

5. Have no contact or communication, direct or indirect, with J.O. and A.S..
6. Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer

[91] There will also be the following Ancillary Orders:

1. Mandatory Victim Fine Surcharges - \$800
2. S. 109 firearm/weapon prohibition for 10 years
3. SOIRA for 20 years on the s. 279.02(1) offence
4. DNA Order for databank on the s. 279.02 offence

Elizabeth Buckle, JPC.