PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R v Turple*, 2019 NSPC 52

Date: 2019-08-28
Docket: 8164308
Registry: Pictou

Between:

Her Majesty the Queen

v.

Justin Evan Turple

SENTENCING DECISION

Restriction on Publication: Any information that might identify the complainant shall not be broadcast or transmitted in any way—s. 486.4 *Criminal Code*

Judge:	The Honourable Judge Del W. Atwood
Heard:	2019: 3 June, 28 August in Pictou, Nova Scotia
Charge:	Section 151 *Criminal Code of Canada*
Counsel:	T William Gorman for the Nova Scotia Public Prosecution Service H Edward Patterson for Justin Even Turple

PUBLISHERS OF THIS CASE PLEASE TAKE NOTE THAT s. 486.4 OF THE CRIMINAL CODE APPLIES AND MAY REQUIRE EDITING OF THIS JUDGMENT OR ITS HEADING BEFORE PUBLICATION.

Order restricting publication—sexual offences

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

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

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

By the Court:

Synopsis

[1] Justin Evan Turple elected trial in this court and pleaded guilty to an indictable count of sexual interference, which is an offence under ¶ 151(a) of the *Criminal Code*. The victim was a 12-year-old female. The prosecution seeks a sentence of 15-months' imprisonment followed by probation. Defence counsel urges the court to consider a suspended sentence, or, in the alternative, a prison term of 90 days or less (which would allow intermittent service) followed by probation. Defence counsel did not contest applications by the prosecution for SOIRA, DNA-collection, weapon-prohibition and minor/victim-protection orders.

[2] In my view, a fit and proper sentence is a term of 90-days' imprisonment along with a 36-month term of probation; the ancillary orders sought by the prosecution will be granted.

Circumstances of the offence

[3] The prosecution read into the record a statement of fact in accordance with § 723-4 of the *Code*. The single controversial point raised by defence counsel in reply was whether Mr Turple had confined the victim unlawfully. The prosecution declined to prove this potentially aggravating factor; in fact, at the time of Mr

Turple's guilty plea, the prosecution offered no evidence on a charge of unlawful confinement. Defence counsel did not contest any of the remaining facts.

[4] Accordingly, the court is able to make the following factual findings.

[5] On 26 October 2017, the then-12-year-old victim and a friend were in behind a pizzeria in Westville; they were looking for cigarette butts. It was getting dark and cold, and the victim felt she needed a sweater; she was acquainted with Mr Turple, who lived in an apartment above the pizzeria. She called Mr Turple; he invited the victim and her friend to visit him.

[6] Both young girls went to Mr Turple's apartment door; they knocked, and he let them inside. Mr Turple and the victim began engaging in what was described by the prosecution as "flirtatious behaviour". Mr Turple tried to unhook the clasp of the victim's bra and grab her breasts. The victim told Mr Turple to stop. Mr Turple grabbed the victim's buttocks, and pulled her hips toward him. Mr Turple and the victim appeared to begin kissing.

[7] All of this made the victim's friend uncomfortable, and she left the apartment, with the victim close behind. After walking away some distance, the victim decided to return to Mr Turple's apartment and asked him if he just wanted to hang out.

[8] At some point, Mr Turple and the victim ended up lying down on Mr Turple's bed. The prosecution and defence admit that, however this might have happened, Mr Turple did nothing to confine the victim unlawfully.

[9] Mr Turple placed one of his hands under the victim's shirt and bra; he touched her breasts. The victim told Mr Turple to stop.

[10] Mr Turple then placed his hand down the front of the victim's pants and penetrated her vagina digitally.

[11] The incident on the bed lasted five to ten minutes.

[12] The victim was upset by what Mr Turple had done to her. She kicked him in the testicles and fled the apartment. She called her mother for a drive home. The victim was interviewed by a police investigator; she described being sexually violated by Mr Turple.

[13] Mr Turple was arrested. He gave a statement to police. He told an investigator that he had begun communicating with the victim through social media; he knew she was only 12 years old. Mr Turple admitted what had happened, but denied touching the victim with his penis. He said he was ashamed of himself.

Circumstances of Mr Turple

[14] The court received information from the following sources pertaining to the biography of Mr Turple:

- A presentence report dated 9 April 2019;
- A forensic sexual behaviour presentence assessment completed by the Nova Scotia Health Authority and the Forensic Sexual Behaviour Program, dated 18 March 2019; this was prepared at the request of defence counsel;
- Testimony of Acting Deputy Chief of Police for the Town of Westville.

[15] Mr Turple was given the opportunity to make an allocution to the court in accordance with § 726 of the *Code*; he exercised his right to remain silent.

Presentence report

[16] The presentence report informs the court that Mr Turple is 20 years old; he was 19 at the time of the offence. His parents have been separated for the past 15 years, and his father moved out west. He enjoys a good relationship with both parents, who speak of his character in very positive terms. He moved away from his mother's home in 2018 when he signed a lease for his own apartment.

[17] Mr Turple completed Grade 12 at a local high school, and earned marks in the 70-percent range. He planned to attend a carpentry program at NSCC, but has not moved ahead with this idea.

[18] Mr Turple worked while in high school; he lost his last job due to tardiness, which he attributed to auditory loss and the inability to hear his morning alarm. He feels that his money-management skills are poor.

[19] Mr Turple's health appears to be good, although he reports having been born "hard of hearing".

[20] Although Mr Turple's mental health is unremarkable, he has experienced chronic stress over his involvement in the criminal-justice system. He reports no substance-use issues.

[21] Mr Turple enjoys video gaming.

[22] Mr Turple expressed to the author of the presentence report his profound remorse for this offence: "[I] never made such a big mistake before."

[23] Mr Turple does not have a criminal record.

Forensic sexual behaviour presentence assessment

[24] The forensic-sexual-behaviour presentence assessment describes Mr Turple as lacking in coping strategies (p 17); he ruminates a lot (p 16), and is prone to overreacting to life events (*id*). He alternates between being agreeable and cooperative, then becoming sulky and non-compliant; he is highly sensitive to rejection (p 16). Mr Turple is designated as being a dependent personality type, one who lacks ambition and is submissive (p 27).

[25] According to the author of the assessment, Mr Turple demonstrated his strongest sexual arousal toward adult females and post-pubescent teens (pp 17, 22, 24, 29). However, he displayed also a strong arousal to pre-pubescent child stimuli of both genders, relatively stronger in females (*id*); he produced sexual responses to male stimuli when that stimuli included explicit sexual content (p 17). His arousal was weaker, but not inhibited fully, when the stimuli were coercive (*id*).

[26] Mr Turple is attracted primarily to physically immature females, but may be aroused by sexual content generally, even when that content is age or consent inappropriate; once aroused, Mr Turple might have difficulty redirecting his sexual urges (p 18).

[27] The assessment included an evaluation with Mr Turple's risk of reoffending:

> Based on a combination of actuarial risk assessment and structured professional judgement, Mr. Turple's risk for sexual recidivism is similar to that of the "average" person convicted of crossing legal sexual boundaries. Further, risk for non-sexual violence is considered low, and less likely than sexual reoffence if Mr. Turple were to recidivate. Given this assessed level of risk, Mr. Turple is an appropriate candidate for low-to-moderate intensity treatment for sexual offending. Based on his personality profile and his manner during the current assessment, it is expected that Mr. Turple would be compliant with direction in treatment. However, where he admittedly hides his emotions and may be fearful not only of revealing them to others but of facing them himself, he may be slow to make progress and will likely require a firm but supportive therapeutic approach in order to assist him with the same.

[28] The assessment presents a guardedly optimistic prognosis: although Mr Turple's potential for change might be low, a firm and supportive therapeutic approach would enable him to make progress toward becoming more autonomous and able to challenge maladaptive thinking and attitudes (pp 14, 29, 33).

[29] The assessment concluded with a number of sentencing recommendations:

> 1. Treatment: It is recommended that Mr. Turple attend, participate in, and successfully complete a specialized treatment program for sexual offending, delivered at a low-to-moderate level of intensity by professionals specifically trained in this field, and followed by maintenance sessions unless recommended otherwise by his treatment providers.
>
> At his assessed level of risk, Mr. Turple would be an appropriate candidate for the community-based treatment group offered by the FSBP. If appropriate to the terms of his sentence, a referral would be sent by the supervisory officer to Dr. Angela Connors, FSBP Program Lead. *Treatment might be available within the federal correctional system, but to the knowledge of this writer, treatment resources within that system are currently focussed on high-intensity treatment, which is not the appropriate match in intensity for Mr. Turple. Treatment of any intensity is not currently available within the provincial jail system of Nova Scotia.*

> 2. Access to minors: Given the nature of Mr. Turple's offence and his PPG assessment results, it is considered prudent for Mr. Turple to not have unsupervised contact with children under age 16 years, which would preclude him from working for or volunteering with organizations that hire or provide services to children or adolescents. Given his young age, the undersigned does not view this as applicable in a lifetime fashion at this point, but as an appropriate safeguard for the duration of his sentence, in order to give him an opportunity to complete treatment (see recommendation #1), after which need for longer-term safeguards respecting contact with children should be revisited by his treatment providers in light of the offence dynamics that emerge during the therapy process. Moreover, as risk to strangers is not specifically predicted, this recommendation does not refer to incidental contact with strangers in public, but to situations where Mr. Turple may specifically interact with a minor.
>
> 3. Employment/Education: Although not related to sexual recidivism risk in Mr. Turple's case, in the interest of both increasing the degree of structure in his life and progressing him toward an adult life adjustment, it is recommended that Mr. Turple strive to establish and maintain full-time employment and/or educational activities.
>
> 4. General mental health: To the extent that poor coping and low self-confidence may have contributed to the index offence, and in a more general sense may be interfering with Mr. Turple transitioning into an adult phase of life, he may benefit from seeking counselling via general mental health services in order to increase assertiveness and autonomy, and to build more adaptive coping skills. Note that the treatment listed in recommendation #1 would include these topics, but not to the depth that Mr. Turple may be able to access via Community Mental Health.
>
> [Emphasis added.]

Testimony of Acting Deputy Chief of Police for the Town of Westville

[30] Defence counsel called the acting deputy chief of police for the Town of Westville. The acting deputy chief made clear that he was not under subpoena, but was volunteering to give evidence for Mr Turple. It was he who had interviewed Mr Turple in the course of the investigation which led to the laying of the charge before the court.

[31] The acting deputy chief has known Mr Turple since Mr Turple was a child in school; Mr Turple has been involved in programs with the police department. The officer described Mr Turple as "normally quite a quiet young man"; "I've never known him to be any issue to anybody"; "he seems to be a pretty easy-going, jovial young man . . . just a bit socially awkward . . . but he's never been a threat to anybody in the community whatsoever." More to the point, the acting deputy chief offered this observation:

> Well, previous … probably the past year, I had conversation with his defence, yourself, and asking much the same questions. And, you know, I think I wanted to really pass on to you at that point was that he probably wouldn't understand the complexities of the court, and that he would have to take further time to be able to explain some of the terminologies and that. Those type of conversations would normally be a challenge to the young man.

[32] The acting deputy chief was cross-examined by the prosecution on this point:

> Q. In your experience as 39 plus years as a police officer, it's not uncommon a circumstance where, due to a lack in judgment, a person commits a serious significant and a heinous crime, correct?
>
> A. That is correct.

[33] I am unable to assign much weight to this evidence, for two reasons. First, the officer's estimation of Mr Turple's good character is counterbalanced by the fact that many people charged with these sorts of criminal offences against children are persons of good character. Indeed, it is often that reputational sheen

that works as a means of obtaining opportunity or deploying a camouflage in child-sexual-abuse cases: *R v Akumu*, 2017 BCSC 1502 at ¶ 91; *R v CL*, [1998] BCJ No 61 (SC) at ¶ 15.

[34] Second, the officer was not qualified in my view to render an opinion regarding Mr Turple's level of self-regulation or executive judgment. In fact, the forensic sexual behaviour presentence assessment seems to conclude that Mr Turple had good judgment; unfortunately, he chose to ignore it when he sexually abused the victim (p 24).

[35] The court has no control over policing operations. Nevertheless, I feel compelled to observe that it was, at the very least, improvident that it was the acting deputy chief—who knew Mr Turple well and had a very good estimation of him—who conducted the investigative interview of Mr Turple. A great deal hinged on that interview, as the facts that were put before the court—especially on the point of whether Mr Turple had confined the victim unlawfully—were based, in part, on Mr Turple's version of what had happened. It might have been better to have had Mr Turple interrogated by someone not as much inclined to the view that Mr Turple "has never been a threat to anybody in the community whatsoever." The facts of this case would support a somewhat less generous threat assessment.

Statutory range of sentence

[36] Paragraph 151(a) of the *Code* states:

> 151 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 14 years and to a minimum punishment of imprisonment for a term of one year;
>
> . . . .

[37] Defence counsel made application for a declaration that the mandatory-minimum punishment in ¶ 151(a) be found in contravention of the *Canadian Charter of Rights and Freedoms*, s 12, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11. Section 12 of the *Charter* states:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[38] Defence counsel served notice on counsel for the Minister of Justice (Canada) who declines to be heard.

[39] This court is a statutory court, and does not have the jurisdiction to grant declaratory relief, but may find unconstitutional legislation invalid, not in allowing any sort of prerogative remedy, but in enforcing that principle of fundamental

justice that an accused person not be punished under an invalid law: *R v Big M Drug Mart*, [1985] SCJ No 17 at ¶¶ 33-47; a statutory court may do this as part of the decision-making process in the case: *R v Lloyd*, 2016 SCC 13 at ¶ 18. Furthermore, this court is bound by higher authority.

[40] The prosecution has conceded the s 12-*Charter*-violation point; this is a fair and just concession, given earlier findings of unconstitutionality in *R v Deyoung*, 2016 NSPC 67, leave to appeal refused, 2017 NSCA 13 (*Deyoung*); and in *R v Hood*, 2016 NSPC 78, aff'd 2018 NSCA 18 at ¶¶ 141-156 (*Hood*).

[41] Accordingly, I find the mandatory-minimum punishment prescribed in ¶ 151(a) of the *Code* of no force or effect for the purposes of this sentencing hearing. The maximum penalty is 14-years' imprisonment.

[42] As a result of excising the mandatory-minimum punishment, the charge becomes eligible for a number of community-based sentencing outcomes under the *Code*:

- A suspended sentence: ¶ 731(1)(a);
- A fine alone: § 734;
- A fine and probation: ¶ 731(1)(b).

[43] However, custody remains as a legal option:

- Imprisonment up to 14 years: §§ 718.3, 787;
- Prison not exceeding two years and probation: ¶ 731(1)(b);
- Prison and a fine: § 734;
- An intermittent sentence of up to 90 days, along with probation: § 732(1).

[44] As the prosecution proceeded indictably, so that the maximum punishment is 14-years' imprisonment, the charge is not eligible for a conditional-sentence order: ¶ 742.1(b); nor is it eligible for a discharge: § 730.

[45] Indictable § 151 offences are primary-designated-DNA-collection offences under § 487.04 of the *Code*, designated-sex-offender-information offences under § 490.011 of the *Code* (of 20-years' duration, under ¶ 490.013(2)(b)), prohibition-order eligible under ¶ 161(1.1)(a) of the *Code*, and require § 109 prohibition orders to run for 10 years/life.

Seriousness of the offence

[46] The accused placed his fingers inside of the vagina of the 12-year-old victim. The digital penetration of the vagina of a 12-year-old child by an adult is a major sexual assault: *R v Arcand*, 2010 ABCA 363 at ¶ 176 (*Arcand*). In *R v Watson*, 1994 ABCA 234, the Court held at ¶ 2:

> In cases with children of this age, where there is digital penetration of any kind, it is prima facie a serious violation of the sexual integrity of the victim and constitutes a major sexual assault. In the case of a charge of sexual touching where the circumstances amount to a serious violation of the sexual integrity of the child victim, the sentence will be treated at least as seriously as in the case of a sexual assault, bearing in mind that the maximum penalty for sexual assault and sexual touching is the same, namely, ten years.

[47] In line with *Arcand* at ¶ 171, I reject the proposition that the court regard sexual-assault cases as an anatomically correct dart board, with points assigned based on the part of a victim's body that has been touched, or the part of an assailant's body that did the touching. One might comprehend easily a case of a violent sexual attack getting thwarted because of victim resistance or resilience, or because of bystander intervention; the fact that no part of a victim's body might have gotten touched would not lessen the seriousness of the attack. Further, extreme sexual violence can occur without any touching whatsoever, as in threatened sexual violence: *R v McCraw*, [1991] 3 SCR 72. Voyeurism and distribution of intimate images, criminalised in ss 162 and 162.1 of the *Code*, comprehend acts of serious sexual violence that might be done with the perpetrator

not even in the same country as the victim. Seriousness is a compilation of factors, and its assessment in sex-offence cases should not focus narrowly on body parts.

[48] The *Code* treats the sexual violation of children as aggravating. Section 718.01 states:

> 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.

[49] This is reinforced in ¶ 718.2(a):

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (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,
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> …
>
> shall be deemed to be aggravating circumstances . . . .

[50] Mr Turple invited the victim into his apartment; he was 19 years old; she was only 12 years old and he knew it. This age difference coupled with the

invited-guest status placed Mr Turple in a position of trust: *R v Audet*, [1996] 2 SCR 171; as in *R v PS*, [1993] OJ No 704 (CJ) at ¶ 36:

> One needs to keep in mind that what is in question is not the specialized concept of the law of equity, called a "trust". What is in question is a broader social or societal relationship between two people, an adult and a young person. "Trust", according to the Concise Oxford Dictionary (8th ed.), is simply "a firm belief in the reliability or truth or strength of a person". Where the nature of the relationship between an adult and a young person is such that it creates an opportunity for all of the persuasive and influencing factors which adults hold over children and young persons to come into play, and the child or young person is particularly vulnerable to the sway of these factors, the adult is in a position where those concepts of reliability and truth and strength are put to the test. Taken together, all of these factors combine to create a "position of trust" towards the young person.

[51] “Position of trust” is not the binary black-and-white issue as proposed by defence counsel; rather, it is a matter of degree. This might not have been as elevated a position of trust as might exist between a child and a parent, guardian or teacher. However, the victim was a guest in Mr Turple’s home; she was subject to his control and direction as long as she was there; Mr Turple exercised that control abusively. That is an aggravating factor, as prescribed by the statute.

[52] While the victim declined to file a victim-impact statement, the victim’s grandmother described to the author of the presentence report her granddaughter becoming withdrawn and angry, but with recent improvement with the assistance of individual counselling. The victim was present in court for the sentencing hearing; it was clear to me that she has been affected profoundly by what Mr

Turple did to her. I find as a fact that Mr Turple's actions affected the victim deeply, and caused significant mental suffering. This harm may be inferred from the very nature of the assault: *Arcand* at ¶ 176. As observed by the sentencing judge in *R v Percy*, 2019 NSPC 12 at ¶32 (a case involving sexual intercourse with an unconscious victim):

> • Harm can be inferred from the very nature of the assault;
>
> • The harm is to both the victim and society;
>
> • A major sexual assault is a serious violation of a person's body, sexual autonomy and freedom of choice and a breach of the person's physical integrity, privacy, and dignity;
>
> • There is also a likelihood of psychological and emotional harm that "includes fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide; and,
>
> • These psychological and emotional harms may not be obvious or even ascertainable at the time of sentencing.

[53] Sexual interference under § 151 is not a statutorily graduated class of offence; compare the offence of sexual assault which, in order of increasing seriousness, begins with dual-procedure sexual assault under § 271 of the *Code*, ascends then to straight-indictable sexual assault with a weapon/threats to a third party/bodily harm under § 272, and ends with straight-indictable aggravated sexual

assault under § 273; at its most serious, there is murder in the commission of sexual assault first-degree murder under § 230 and ¶ 231(5)(b)-(d). It is my view that sexual interference is ungraduated as, unlike sexual assault, it covers exclusively offences that victimise children. Accordingly, it is a class of offence that is inherently highly harmful and very serious. In my view, in situating the seriousness of child sexual interference, it is not required that the court identify any sort of secondary harm or violence "beyond the abuse itself", as that phrase was used in *R v SCC*, 2004 NSPC 41 at ¶ 16: "the abuse itself" is serious enough. I accept as relevant to the determination of seriousness the fact that this was a single occurrence with no evidence of premeditation or planning.

Moral culpability of Mr Turple

[54] Mr Turple bears sole responsibility for his actions. In response to the argument that Mr Turple's culpability be regarded as lessened as there was some element of *de facto* consent, the legal fact is that consent is no defence in this case, either as a justification or excuse that might fend off legal liability, or as a factor that would reduce the seriousness of an offence or the moral responsibility of the person who committed it. As was stated in *R v Hajar*, 2016 ABCA 222 at ¶ 7, var'g 2014 ABQB 550:

> 7 This case illustrates the imperative need for a starting point for serious acts of sexual interference. It also reveals a disconnect in this area between changing the law and changing attitudes. Despite Parliament's decision to raise the age of consent, the attitude that the de facto consent of a 14- or 15-year-old child diminishes the overall degree of moral blameworthiness, that is the seriousness, of the criminal conduct seems to persist in some quarters. Judges are not immune from this attitude. It can be summed up in four words: "s/he asked for it". Clinging to this view demonstrates a fundamental misconception of what Parliament has done. As the record here shows, Parliament's decision to bring the age of consent in Canada into line with other rule of law nations was not mere moralism, though it had a normative basis. Parliament also recognized the reality that adolescent children, those under 16, are still children. As such, they are incapable of consenting to sexual activity with those not within the close-in-age exception and need to be protected from what even they may think is acceptable for them.

[55] In *R v Oliver*, 2007 NSCA 15 at ¶ 32, the Court of Appeal made an analogous point:

> Very little can be said by way of mitigation. Mr. Oliver's timely guilty plea did save the complainant from painful court appearances. The appellant's intellectual deficits may, arguably, have prompted him to think that the incidents of sexual intercourse were "consensual" (when of course there was never "consent" here, as a matter of law, on account of her age). These features were obviously considered by the trial judge in deciding an appropriate sentence. The appellant has no prior criminal record, but sexual offenders often present in court with an otherwise good character. The appellant says there was no overt violence; however, I question how it could ever be said that multiple rapes of a 12 year old ought not to be characterized as "overtly violent."

[56] Mr Turple appears to be an immature, but otherwise normal 19 year old.

[57] This is his first encounter with the criminal-justice system.

[58] He pleaded guilty. Although this was not done at the first opportunity, I am satisfied from a review of the record that lapse of time from arraignment until

guilty plea was necessary for counsel to sort out constitutional and other legitimate plea-related issues.

Sentence parity

[59] I have considered the following sentencing decisions from Nova Scotia:

- *Deyoung*: 21-year-old male engaged in grooming and elaborate preparation to facilitate an opportunity to have sexual intercourse with a 14-year-old female. Mandatory-minimum sentence for § 271 found to be in violation of § 12 of the *Charter*. Accused had no record and suffered from mild intellectual disability. Sentence of 12-months' imprisonment and 24-month term of probation for a single indictable count of sexual assault; leave to appeal from sentence not granted.

- *R v. Fitzgerald*, 2014 NSPC 1: 2-year penitentiary term followed by 24-month term of probation for a single count of indictable § 151. Guilty plea. Householder, 38 years old, had sexual intercourse on one occasion with a vulnerable, 14-year-old female who had run away from home.

- *R v EMW*, 2011 NSCA 87, aff'g 2009 NSPC 65: Offender found guilty following trial of having fondled and digitally penetrated his daughter

when she was between 9 and 11 years of age. Two-year federal term for a single count of indictable § 271 upheld on appeal.

- *R v MacLean*, 2015 NSPC 70*:* Joint submission of two-years' imprisonment imposed for a single count of indictable § 151, sexual intercourse with a 14-year old female. The fact in support of the charge described the offence as "entirely an act of consensual intercourse".

- *R v Oliver*, 2007 NSCA 15: Two-year sentence upheld on appeal for an intellectually-challenged offender who had sexual intercourse on two occasions with a minor.

- *R v APSB*, 2016 NSSC 29: One-year term of imprisonment followed by 24-month term of probation for intellectually limited offender who pleaded guilty to a single indictable count of § 151; offender befriended a minor online and travelled to Nova Scotia for a brief but intense sexual relationship.

- *R v Gillis*, 2012 NSPC 122: Not-guilty plea; convicted following trial on one count of indictable § 271. One-year term of imprisonment, followed by 2-year term of probation for 57-year-old offender with extensive record and poor prospects for rehabilitation, who digitally penetrated a minor invited to his home for underage drinking.

- *R v Lawther*, 2016 NSCA 48: Offender convicted of one count of sexual interference following jury trial and sentenced to six-months' imprisonment. Offence occurred during a sleepover at a church event where he was the pastor; the victim described the offender rubbing her back while she was seated in a church pew and then sliding his hand down the back of her pajama pants. Appeal from conviction dismissed; the sentence was not appealed.

- *R v Prosper*, 2017 NSSC 173: A 20-year-old First-Nations offender with no record pleaded guilty to sexual assault following a single incident involving a 16-year-old female. The offence occurred in the victim's home; the offender followed her to her bedroom, sat next to her on the bed and began touching her buttocks and attempted to take her shorts off; the victim pulled her shorts back up, but the offender moved the crotch area of the shorts aside and inserted his fingers into her vagina. He also tried to lick her vagina. A Gladue report described a background of poverty, domestic violence and substance abuse. The prosecution sought a 2-year federal term; defence sought 90 days in prison, served intermittently. The Court imposed a 4-month prison term, 18-months' probation and ancillary orders. The Court accepted the mitigating factors of the guilty plea, the lack of a prior

record, the acceptance of responsibility and expressions of remorse. The Court was also mindful of the accused's Aboriginal status and that the case did not involve a position of trust and the victim was not a child (and thus no mandatory minimum.

- *R v Pettipas*, 2016 NSPC 62: Conviction following trial for one summary count of § 271. Ninety-day conditional sentence order for summary-offence sexual assault imposed upon 49-year-old male offender who exposed his penis and placed his hand over the clothing of the 29-year-old female victim's vaginal area while driver her home; victim was intellectually challenged, and trusted the offender as a family friend.

Sentencing decision

[60] I would situate this offence as being factually similar in offence seriousness to *Deyoung*, *Gillis, Prosper* and *Pettipas*; however, Mr Turple's moral culpability would significantly lesser than in *Gillis* and *Pettipas*, as he admitted his offence to police, pleaded guilty, has no record, and appears to be a good candidate for rehabilitative counselling. Further, there is no evidence of the sort of extensive grooming and preparation that was evident in *Deyoung*.

[61] I do not believe that a purely community-based sentence would achieve the objectives of punishment, denunciation and general deterrence in a case involving the sexual victimisation of a child.

[62] As Mr Turple is a young adult with good prospects for rehabilitation, I apply the principle that, if the need to protect society might be well served by a shorter sentence as by a longer one, the shorter ought to be preferred: *R v Colley*, [1991], NSJ No 62 (AD).

[63] Restraint, as codified in ¶ 718.2(d)-(e), is particularly important when dealing with first offenders. Someone who does not have a history of criminal conduct is more likely to hold pro-social values than someone with an established record of offending behaviour, and would be more likely to respond well to rehabilitative sentencing. A court should consider a period of custody for a first offender only if the offence were to be of such gravity that no other sentence would be fit and proper: *R v Stein*, [1974] OJ No 93 at para 4 (CA). In *R v Priest*, [1996] OJ No 3369 (CA) at para 20, the Court held:

> The duty to explore other dispositions for a first offender before imposing a custodial sentence is not an empty formalism which can be avoided merely by invoking the objective of general deterrence. It should be clear from the record of the proceedings, preferably in the trial judge's reasons, why the circumstances of this particular case require that this first offender must receive a sentence of imprisonment.

[64] See also *R v Leblanc*, 2012 NSSC 447 at ¶ 9, which emphasises this principle appropriately in cases involving youthful, first-time offenders. Further, terms of probation with substantial rehabilitative terms can operate secondarily as authentic deterrence: *R v Barrons*, 2017 NSSC 216 at ¶ 39-46.

[65] Still, restraint is not to be exercised at all costs: *R v Proulx*, 2000 SCC 5 at ¶ 96. All principles and objectives of sentencing must be considered by a sentencing court in arriving at a fit sentence: *R v Howell*, 2013 NSCA 67 at ¶ 16.

[66] For these reasons, I find that a fit sentence in this case is a term of 90-days' imprisonment, served intermittently.

[67] There will be a 36-month term of probation beginning immediately with the following terms:

- Keep the peace and be of good behaviour.
- Report to court when required.
- Report to the Community Corrections office in New Glasgow no later than 16h00 30 August 2019 and thereafter as required.
- Attend for mental health counselling.
- Attend for counselling with the forensic sexual behaviour program.

- Attend for any other assessment and counselling directed by your probation officer.

- Stay away from the person, home and place of work or education of the complainant and must have no contact or communication with her, directly or indirectly; this includes, but is not limited to, a total prohibition against contact by word of mouth, gesture, printed word, telephone, smartphone or other electronic communication, texting, any form of social media, or any communication done anonymously or through a third party, even if invited, no exceptions.

- Participate in and co-operate with any assessment, counselling or program directed by the probation officer, according to the terms as directed by your probation officer; you must immediately report to your probation officer any missed assessment or counselling appointments.

- Sign immediately all consents to release of information required by your probation officer to arrange services provided for in this order.

[68] There will be SOIRA, DNA and § 109 orders as sought by the prosecution, and a § 161 order of prohibition to run for a period of 20 years, to match the term of SOIRA reporting.

JPC