PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v C*, 2019 NSPC 82

Date: 2019-11-19
Docket: 8309178-81
Registry: Pictou

Between:

Her Majesty the Queen

v.

SMNC

LIBRARY SHEET

Restriction on Publication: Any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W. Atwood
Heard:	2019: 31October, 19 November in Pictou, Nova Scotia
Charge:	Paragraphs 162(5)(a) and 348(1)(b) *Criminal Code of Canada*
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Stephen Robertson for SMNC

Subject: Criminal law—punishment, fine, forfeiture—break and enter

Criminal law—punishment, fine, forfeiture—voyeurism

Summary: An 18-year-old male with no record broke into the homes of two female classmates and recorded images of their feet while they slept. While the victims were not injured physically, there was a high level of psychological impact. The prosecution sought a 2-year federal term; defence counsel sought a suspended sentence with probation.

Issues: Is a purely community-based sentence appropriate?

Result: A two-year suspended sentence was imposed.

THIS INFORMATION SHEET DOES NOT FORM PART OF THE DECISION OF THE COURT. QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v C*, 2019 NSPC 82

Date: 2019-11-19
Docket: 8309178-81
Registry: Pictou

Between:

Her Majesty the Queen

v.

SMNC

SENTENCING DECISION

Restriction on Publication: Any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way.

Judge:	The Honourable Judge Del W. Atwood
Heard:	2019: 31October, 19 November in Pictou, Nova Scotia
Charge:	Paragraphs 162(5)(a) and 348(1)(b) *Criminal Code of Canada*
Counsel:	Patrick Young for the Nova Scotia Public Prosecution Service Stephen Robertson for SMNC

WARNING

The presiding judge directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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 at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
(iii)REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
(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).
(2)In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
(a)at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
(b)on application made by the victim, the prosecutor or any such witness, make the order.
(2.1)Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2)In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall
(a)as soon as feasible, inform the victim of their right to make an application for the order; and
(b)on application of the victim or the prosecutor, make the order.
(3)In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.
(4)An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18.
486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.
(2)For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

By the Court:

[1] There is a § 486.4 order in effect in this case which prohibits the publication, broadcasting or transmission of any information that could identify any victim or witness in this case. Given the connection between those involved, I have randomized the nominal initials of the person charged before the court, and the sentencing reasons in this judgment will be abbreviated appropriately so as to exclude reference to identity-revealing information.

Circumstances of the offences and a precis of the resulting charges

[2] SMNC was 18 years old when he broke into the homes of two 18-year-old female classmates; with the use of a smartphone, he made video recordings of them while they slept in their bedrooms, focussing on their feet. One of the victims suspected someone had entered her home without permission, and, after some ingenious sleuthing, deduced correctly that it was SMNC who had done it. She and the other victim contacted SMNC, and he admitted eventually to what he had done. The victims told their parents, who, in turn, notified the authorities. Police arrested SMNC and seized his smartphone with the recordings.

[3] SMNC was charged in one information with two straight-indictable counts of dwelling break and enter with intent, contrary to ¶ 348(1)(a) of the *Criminal Code* (case numbers 8309178 and 8309180), and two prosecution-election indictable counts of voyeurism, contrary to ¶ 162(1)(a)-162(5)(a) of the *Code* (case numbers 8309179 and 8309181). SMNC chose to have his trial heard in this court, and pleaded guilty to all counts. After hearing a statement of facts in accordance with § 723-4 of the *Code*, I amended the ¶ 348(1)(a) counts to ¶ 348(1)(b) (break and enter and commit the indictable offence of voyeurism) to conform to the evidence as permitted in § 601(2); with the consent of counsel, I then stayed the ¶ 162(1)(a) counts conditionally, in accordance with *R v Kienapple*, [1975] 1 SCR 729.

Submissions of counsel

[4] The prosecution seeks a federal term of two-years' imprisonment, followed by a 12-month period of probation, along with a DNA-collection order. Defence counsel seeks a suspended sentence; there is no controversy over DNA collection.

[5] For the reasons that follow, I suspend the passing of sentence, and place SMNC on probation for a term of two years. There will be a primary-designated-offence DNA order.

Psychological evidence called by defence

[6] Defence counsel called as a witness at the sentencing hearing Dr Brad Kelln; Dr Kelln serves as a clinical psychologist on staff at the East Coast Forensic Hospital, and is an assistant professor in the Department of Psychiatry at Dalhousie University. Following a *voir dire*—conducted in accordance with *R v Mohan*, [1994] 2 SCR 9 at ¶ 17—that addressed the criteria for expertise, necessity, relevance, impartiality and efficiency, the court permitted Dr Kelln to provide opinion evidence in the following fields:

- Violence risk assessment;
- Sex-offending risk assessment;
- The assessment, treatment and management of offender risk;
- The diagnosis of mental-health and psychiatric disorders and the connection between them and criminal offending.

[7] Dr Kelln understood clearly his duty to the court to provide impartial advice and not to act as an advocate for SMNC. This accords with the criteria in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23 at ¶ 46-50 (*White Burgess*), and *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at ¶ 106; see also *R v Vassel*, 2018 ONCA 721 at ¶ 85. While an inquiry into an expert's appreciation of the need for impartiality ought not sidetrack a qualificational *voir dire*, it remains an essential piece, much as, say, proof of date of birth in an age-critical trial, or proof that situates a transaction within the territorial jurisdiction of the court— quickly covered, but necessary. As decided in *White Burgess*:

> 47 Imposing this additional threshold requirement is not intended to and should not result in trials becoming longer or more complex. As Prof. Paciocco aptly observed, "if inquiries about bias or partiality become routine during *Mohan voir dires*, trial testimony will become nothing more than an inefficient reprise of the admissibility hearing": "Unplugging Jukebox Testimony in an Adversarial System: Strategies for Changing the Tune on Partial Experts" (2009), 34 Queen's L.J. 565 ("Jukebox?), at p. 597. While I would not go so far as to hold that the expert's independence and impartiality should be presumed absent challenge, my view is that *absent such challenge, the expert's attestation or testimony recognizing and accepting the duty will generally be sufficient to establish that this threshold is met.*
>
> [Emphasis added.]

[8] Risk of reoffending is implicated in every sentencing hearing—the greater the risk, the greater the need for specific deterrence, and for separation from

society if the hazard created by the risk is serious enough: ¶ 718(c) of the *Code* and see *R v LM*, 2008 SCC 31 at ¶ 30-31.

[9] Dr Kelln's evidence addressed this risk-related issue. He completed a risk-assessment instrument with SMNC; he found SMNC to be open and transparent through the process, which led to reliabile assessment results.

[10] Dr Kelln's opinion was that SMNC meets the criteria for autism-spectrum disorder; he described persons with this condition as demonstrating

- verbal and social deficits;
- difficulties in interpersonal relationships; and
- compulsive preoccupation with certain phenomena and subject matter.

[11] Dr Kelln assessed SMNC's conduct covered by the charges before the court as characteristic of autism. Further, while he believed initially that SMNC's fixation on the victims' feet was a fetish—that is, a disorder of sexual arousal—he came to conclude that it was an obsessive motivation associated more with sour smells and did not involve sexualized fantasizing.

[12] Dr Kelln assessed SMNC's level of psychopathy as low, with a low-to-almost-no risk of reoffending.

[13] Dr Kelln raised concerns about SMNC being placed in custody, either in a forensic hospital or a penal institution, as those environments would expose him harmfully to persons with antisocial traits. He reiterated this on cross examination, and stated that SMNC would be vulnerable to being exploited and becoming a victim of crime.

[14] An opinion coming from a witness with expertise should be assessed rationally and not be rejected out of hand: *R v DAH*, 2016 ONCJ 585; *R v Sualim*, 2017 ONCA 178, at ¶37. However, experts do not operate as substitute forensic decision makers, and their evidence is not received with presumed credibility or accuracy; a court must weigh carefully the opinion of an expert, and may accept it—or reject it—in whole or in part: *Keresturi v Keresturi*, 2017 ONCA 162 at ¶ 7.

[15] I accept Dr Kelln's opinion regarding SMNC meeting the diagnostic criteria for autism-spectrum disorder, and that SMNC's actions were not a sexual-arousal fetish. However, I find as a fact that there was a gender-based motive in SMNC's actions, as I consider it significant that both victims were female; further, while SMNC's obsession might have been primarily olfactory, the fact that he made video recordings of the victims would indicate that there was an element that was visually appealing to him as well.

[16] Nevertheless, I find Dr Kelln's assessment of SMNC being at a very low risk of reoffending to be supported amply by the absence of any prior record, as well as by the presence of a solid inventory of pro-social traits as set out in the presentence report. I will have more to say about the report later.

Statutory range of penalty

[17] Paragraph 348(1)(b) of the *Code* carries a maximum term of imprisonment of life (in cases involving dwellings), to which might be added a fine (§ 734), or a period of probation (¶ 731(1)(b)), provided any period of imposed imprisonment not exceed two years. It is not eligible for a conditional sentence, given ¶ 742.1(c), nor is it eligible for a discharge, given § 730 of the *Code*. However, it is eligible for a number of purely non-custodial sentences: a fine alone (§ 734); a suspended sentence (¶ 731(1)(a)); a fine and probation (¶ 731(1)(b)). It is a primary-designated offence under § 487.04 for the purposes of DNA collection.

Sentencing principles

[18] In *R v MacDonald*, 2018 NSPC 25 at ¶¶ 7-15, aff'd 2019 NSCA 5 (*MacDonald*) I reviewed those general principles of sentencing that are always engaged in hearings to determine penalty, and it is not necessary to repeat them

in detail here. I will refer to *MacDonald* again when I review parity cases in detail.

[19] Suffice it to say that proportionality is the primary principle of sentencing: a sentence must be directly proportionate to the gravity of the offence and the degree of responsibility of the person who committed it—§ 718.1; further, parity requires that similar offenders who commit similar offences in similar circumstances should receive similar sentences—§ 718.2. Parity is symmetrical with proportionality, as like levels of offence seriousness and moral responsibility ought clearly to result in like sentences: *R v Ipeelee*, 2012 SCC 13 at ¶ 78. In putting these principles into practice, sentencing is about putting people and cases into groups. To be sure, each case and each person being sentenced is unique; however, each sentencing case will have a number of characteristics in common with others, and groups with similar event-and-personal-trait qualities should share similar sentencing outcomes.

[20] I would make the following additional observations of the status of the law.

[21] Although breaking into someone's home is a major class of offence, as it carries a maximum penalty of life imprisonment, the principle of proportionality remains applicable to this case. The court must measure of the seriousness of the

offence and the degree of responsibility of the person who committed it. This means that the court must avoid any analysis that would treat a particular type of offence as inherently aggravating; otherwise, every such offence would be aggravating, thus nullifying the mandate for proportionality: *R v Johnston*, 2011 NLCA 56 at ¶ 18-20.

[22] Further, it does not seem to be in accordance with the law of this province that the circumstances of an offence or an offender necessarily be found exceptional to warrant a departure from a prescriptive range of sentencing; this was underscored by the majority opinion in *R v Scott*, 2013 NSCA 28 at ¶ 53. *Scott* was an appeal by the prosecution from a conditional sentence imposed in a low-level-cocaine trafficking-case. As the majority held:

> [53] There is no question that this Court has long stressed the need to emphasize deterrence and denunciation for those that traffic in cocaine, and depending on the circumstances of the offence and of the offender, may well mean that a sentence of federal incarceration is called for. With all due respect, what I cannot accept is that these or any other cases make a federal prison term mandatory - to be avoided only if an offender can demonstrate "exceptional circumstances".

[23] This makes sense. After all, what sort of metric is an "exceptional circumstance", and what conditions should be considered in deciding whether the circumstance is satisfied? Employment? Reputation? Status? Age? Wellness? Or something else that fits within the scope of being "exceptional"? It seems to me that the application of a nebulous and imprecise criterion—such as whether a case

exhibits an "exceptional circumstance"—gives rise to the risk of two-tiered justice, and, because of that, ought to be regarded with caution.

[24] The prosecution observes correctly that the Nova Scotia Court of Appeal has prescribed a benchmark sentence of three-years' imprisonment for the offence of break and enter: *R v McAllister*, 2008 NSCA 103 at ¶ 38; *R v Adams*, 2010 NSCA 42 at ¶ 29; the common origin being *R v Zong*, [1986] NSJ No. 207 (CA). Appellate tribunals hold leading and binding roles in helping identify for sentencing courts ranges of sentences that bring penal legislative measures into line with informed social consensus about proportionality principles applicable to particular crimes.

[25] However, appellate-level benchmarks, starting points, and prescriptive sentencing ranges are to be regarded by front-line sentencing courts as guidelines—not as statutory substitutes or court-imposed mandatory minimums: *R v Nasogaluak*, 2010 SCC 6 at ¶ 44.

[26] Further, it is crucial that sentencing courts take account of a significant change in the statutory organizing principles of sentencing that occurred after *Zong* was decided. This requires necessarily that the court consider the effect of the modification of Part XXIII of the *Code* in SC 1995, c 22, § 6, in force 3 Sept 1996

in virtue of SI/96-79, introduced originally in the House of Commons as Bill C-41. This amendment carried into effect, among other provisions, s 718.2, particularly ¶¶ (c)-(e):

> (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[27] These values of restraint, as explained in *R v Gladue*, [1999] 1 SCR 688 at ¶ 39 and 48, were part of the first significant reform of sentencing principles in the history of Canadian criminal law. This remedial provision helped carry into effect Parliament's intention to reduce the use of prisons for non-violent persons, and its resolve to expand the use of restorative-justice principles in sentencing. See also, *R v Proulx*, 2000 SCC 5 at ¶ 15, and particularly ¶ 16, where the Court held unanimously:

> 16 Bill C-41 is in large part a response to the problem of overincarceration in Canada. It was noted in *Gladue*, at para. 52, that Canada's incarceration rate of approximately 130 inmates per 100,000 population places it second or third highest among industrialized democracies. In their reasons, Cory and Iacobucci JJ. reviewed numerous studies that uniformly concluded that incarceration is costly, frequently unduly harsh and "ineffective, not only in relation to its purported rehabilitative goals, but also in relation to its broader public goals"

> (para. 54). ... Prison has been characterized by some as a finishing school for criminals and as ill-preparing them for reintegration into society... iv. In *Gladue*, at para. 57, Cory and Iacobucci JJ. held:
>
>> Thus, it may be seen that although imprisonment is intended to serve the traditional sentencing goals of separation, deterrence, denunciation, and rehabilitation, there is widespread consensus that imprisonment has not been successful in achieving some of these goals. Overincarceration is a long-standing problem that has been many times publicly acknowledged but never addressed in a systematic manner by Parliament. In recent years, compared to other countries, sentences of imprisonment in Canada have increased at an alarming rate. *The 1996 sentencing reforms embodied in Part XXIII, and s. 718.2(e) in particular, must be understood as a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions*. [Emphasis by Lamer C.J.]
>
> 17 Parliament has sought to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(d) and (e). Section 718.2(d) provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", while s. 718.2(e) provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". Further evidence of Parliament's desire to lower the rate of incarceration comes from other provisions of Bill C-41: s. 718(c) qualifies the sentencing objective of separating offenders from society with the words "where necessary", thereby indicating that caution be exercised in sentencing offenders to prison . . . .

[28] Where Parliament has created a statutory remedy, one that is more than merely a codification of existing common-law principles, sentencing courts must give effect to that remedy and must recognize, necessarily, the effect the modernisation of the law will have had on the precedential weight of appellate penal benchmarks or ranges that predated it. Stated simply, a statutory revision may overtake what had been a binding common-law principle.

Sentencing principles—Offence gravity

[29] SMNC broke into two homes and captured, surreptitiously, images of the feet of two young women who were asleep. This violation of their privacy was profound. Further, that sense of violation is enduring. The mother of one of them described in a victim-impact statement her daughter's continuing high levels of anxiety and stress, which I consider to be completely authentic in this sort of case.

[30] In considering the victim-impact factor, I found particularly insightful the doctoral dissertation of Alexandra Dodge, Punishing 'Revenge Porn': Legal Interpretations of and Responses to Non-Consensual Intimate Image Distribution in Canada (PHD Thesis, Carleton University, Department of Law and Legal Studies), online at: https://curve.carleton.ca/be3e5b96-7c82-414e-bfab-b6decbfb4bc5. The author notes the potential for an outsized impact upon victims when private images of them are captured without consent on smart devices; this arises because of the scalability and replicability of digital files (pp 53-64). The effect is amplified by the permanency of digital memory (p 64). Even if police intervention occurs, victims will experience the anxiety of not knowing whether images of them will get deleted completely and taken out of circulation (p 204). In cases such as this—in which the victims and SMNC

were acquainted with each other—victims may experience stress as they might not wish to criminalise their peers (p 208). Dr Dodge's analysis matches up exactly with the type of victim-impact evidence that the court hears consistently in these sorts of case.

[31] Accordingly, these kinds of offenses will result almost inevitably in high levels of victim impact. Although SMNC's actions are not home-invasion cases as defined in § 348.1 of the *Code*—which requires proof of violence or threats of violence—there is sufficient evidence before the court allowing me to infer reasonably a high level of victim impact; this is an aggravating factor under ¶ 718.2(a)(iii.1) of the *Code*.

[32] But there is a caveat.

Sentencing principles—Moral responsibility and personal circumstances of SMNC

[33] As I discussed earlier, restraint is an organizing principle of sentencing law in Canada. This is reinforced in the necessity that sentencing courts consider not just the seriousness of an offence—significant in this case given the elevated level of victim impact—but also the moral responsibility of the person who committed the offence (which I adjudge in this case to be low: a young adult with no prior record, whose developmental disorder is implicated

significantly in his actions, and whose risk of reoffending is very slight). Sentencing courts must be cautious not to overweigh offence seriousness, because it may skew the assessment of moral responsibility. As decided in *R v Proulx*, 2000 SCC 5 at ¶ 83:

> My difficulty with the suggestion that the proportionality principle presumptively excludes certain offences from the conditional sentencing regime is that such an approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the principle. Proportionality requires that full consideration be given to both factors. As s. 718.1 provides:
>
> > *A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.*
> >
> > [Emphasis in original.]

[34] Restraint must receive additional effect in this case for a very important reason: SMNC was 18 years of age when he committed his acts. Indeed, had he done what he did two months earlier, he would have been before the court as a young person, and in circumstances that would have rendered the legality of a custodial sentence the subject of legitimate controversy, given the limitations on the imposition of custodial sentences in § 39 of the *Youth Criminal Justice Act (YCJA)*. The law recognises the diminished moral responsibility of young persons in proceedings under the *YCJA*: *R v DB*, 2008 SCC 25 at ¶ 1; *R v CNT [BMS]*, 2016 NSCA 35 at ¶ 29; *R v BP*, 2015 NSPC 38 at ¶ 8. I believe it

would be a simplism to believe that, once a young person breaks the close into adulthood, some sort of heterochronic gene is going to kick in at once and suddenly instill adult judgment into what remains essentially an adolescent human mind. The law recognizes the jump principle in individual cases, which would see sentences for the repetition of criminal conduct increasing gradually, rather than in large leaps: *R v Mauger*, 2018 NSCA 41 at ¶ 66. It seems to me that the jump principle is at work in the larger sentencing project, and the transitioning from youth to adult should not witness big spikes in penal liability, and ought not crush the prospects of rehabilitation: *R v Cater*, 2012 NSPC 38 at ¶ 47.

[35] These offences worked significant victim impact upon two young people who knew SMNC and felt a strong sense of betrayal and violation because of his breach of their privacy and dignity. However, SMNC's actions were not physically violent. It is said sometimes that the lack of an aggravating factor is not a mitigating one. While that might be true, it seems to me that it is beside the point. If proportionality requires an assessment of degrees of seriousness and degrees of responsibility, comparisons with lesser and greater cases are going to have to get made. I would suggest that it is beyond dispute that a non-

violent break-in would have to be assessed as less serious and less blameworthy than a violent one. This is hardwired into the *Code* at § 348.1:

> 348.1 If a person is convicted of an offence under section 98 or 98.1, subsection 279(2) or section 343, 346 or 348 in relation to a dwelling-house, the court imposing the sentence on the person shall consider as an aggravating circumstance the fact that the dwelling-house was occupied at the time of the commission of the offence and that the person, in committing the offence,
>
> (a) knew that or was reckless as to whether the dwelling-house was occupied; and
>
> (b) used violence or threats of violence to a person or property.

[36] Further, as I found earlier, based on the evidence of Dr Kelln, SMNC's autism is implicated significantly in his actions. Autism is not a moral-character flaw, but is a well recognized developmental disorder; as described by Dr Kelln, its complications can be attenuated with appropriate professional intervention. SMNC has been getting and will continue to get that kind of help. Imprisonment would work a destructive disruption of clinical intervention and would not serve to protect public safety in the long run.

[37] The opinion of Dr Kelln and the presentence report offer substantial proof that SMNC regrets his actions profoundly, evidenced circumstantially in his guilty plea; the prospects of his rehabilitation are excellent. The presentence report, dated 27 August 2019, adds other important biographical details:

- SMNC does not have a criminal record;
- He is motivated to succeed academically and is attending NSCC;
- He has found part-time employment at a local assisted-living facility;
- He continues to meet with his long-term therapist;
- He does not consume alcohol or use non-therapeutic drugs;
- His mother is a strong source of support; indeed, she has accompanied SMNC to all of his court appearances.

[38] I would situate SMNC's moral culpability toward the lower end of the spectrum.

Sentence parity

[39] In *MacDonald,* I sentenced an older male to a fine and a period of probation for a dwelling break-in. Mr MacDonald had developed an obsession for an adult female whom he hardly knew; without permission, he entered her unoccupied home, anticipating her return. Fortunately, the victim's adult son discovered the intrusion before his mother got back. Mr MacDonald did not have a record, pleaded guilty promptly, and, by the time of his sentencing, was obtaining appropriate counselling for a substance-use disorder. I find *MacDonald* to be a good comparator to SMNC's case.

[40] In *R v Barrons*, 2017 NSSC 216, the court imposed a three-year term of probation upon a youthful university student who had broken into the home of a former intimate partner where he assaulted a male guest. Mr Barrons had no record, pleaded guilty partway through his trial, had complied with stringent terms of bail, and was undergoing therapeutic counselling. The sentencing judge concluded that the imposition of a suspended sentence with rigorous conditions would be a fit sentence, as it would combine elements of denunciation and deterrence with appropriate emphasis on rehabilitation. Clearly, there were aggravating factors at play in *Barrons* (*ie*, home invasion and actual physical violence, along with elements of intimate-partner intimidation) not in evidence in SMNC's case. Proportionality and parity would suggest a lesser sentence for SMNC.

Sentence of the court

[41] In my view, proportionality and parity would support the following outcome:

- I suspend the passing of sentence and place SMNC on probation for a period of two years.

- In addition to conditions which are mandatory under § 732.1(2), there will be appropriate counselling and no-contact conditions, as well as conditions restricting the use of electronic devices. The precise conditions will not be included in the published judgment of the court to protect the privacy of the victims.

- There will be a primary-designated-offence DNA collection order applicable to both cases.

- No victim-surcharge amount is exigible in view of *R v Boudreault*, 2018 SCC 58, which found unconstitutional the victim-surcharge provisions of § 737 as were in effect at the time of the commission of these offences.

- Based on Dr Kelln's thoughtful opinion, I do not believe that a sex-offender assessment would be called for in this case.

[42] I wish to thank counsel for the high level of preparation they undertook in presenting sentencing submissions to the court.

JPC