

**PROVINCIAL COURT OF NOVA SCOTIA**

**Citation:** *R. v. Marchand*, 2020 NSPC 19

**Date:** 20200304

**Docket:** 8280561

**Registry:** Truro

**Between:**

Her Majesty The Queen

v.

Joseph Glen Marchand

<b>Restriction on Publication: 486.4 CC</b>
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<b>Judge:</b>	The Honourable Judge Alain J. Bégin,
<b>Heard:</b>	March 4, 2020, in Truro, Nova Scotia
<b>Decision</b>	March 4, 2020
<b>Charge:</b>	271, Criminal Code of Canada
<b>Counsel:</b>	Christopher Nicholson, for the Crown Attorney David Mahoney, for the Defendant

**By the Court:**

[1] This is the sentencing of Joseph Glen Marchand, who was found guilty after trial of committing a sexual assault on Y.G. on August 25, 2018.

[2] Mr. Marchand maintains his innocence, as is his right.

[3] The substantive act was taking Y.G.'s hand and placing it on his penis while he was lying in bed. Y.G. was simply going to give him a good night hug. This was not an accidental touching that went too far.

[4] Counsel for Mr. Marchand stated in their brief that there was "absolutely no unwanted touching prior to the incident," but this is incorrect as earlier on the day in question that Mr. Marchand had placed his head between Y.G.'s breasts and had made a slurping sound.

[5] As noted in her Victim Impact Statement, the incident has had a profound impact on YG

[6] Crown counsel is seeking a jail term of three to six months, followed by a lengthy period of probation of three years. Crown relies on the prior conviction for sexual assault by Mr. Marchand where he received a sentence of four weeks in 1991. Crown counsel also relies on what it calls the "not positive" Pre-Sentence

Report comments, the breach of trust by Mr. Marchand towards Y.G. and the effects of Mr. Marchand's criminal sexual behaviour on Y.G.

[7] Defence counsel initially sought a Conditional Discharge or a Suspended Sentence but then requested that if any jail time is ordered by this Court that it form part of a Conditional Sentence Order.

### **Sentencing Principles**

[8] As confirmed by the Supreme Court of Canada in the case of **R v Nasogaluak** 2010 SCC 6, at paragraph 39-45, sentencing judges are required to consider s. 718 of the Criminal Code:

[39] ... **Judges are now directed in s. 718 to consider the fundamental purpose of sentencing as that of contributing, along with crime prevention measures, to “respect for the law and the maintenance of a just, peaceful and safe society”. This purpose is met by the imposition of “just sanctions” that reflect the usual array of sentencing objectives, as set out in the same provision: denunciation, general and specific deterrence, separation of offenders, rehabilitation, reparation, and a recent addition: the promotion of a sense of responsibility in the offender and acknowledgement of the harm caused to the victim and to the community.**

[42] **For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the “just deserts” philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused... Whatever the rationale for**

**proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.**

**[43] ... The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case... No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on a particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.**

[44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentencings for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the **Code**. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. **Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.**

[9] Section 718 of the Criminal Code explains the principles and purposes of sentencing:

#### Purpose

718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law

and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community;  
and
- (f) to promote a sense of responsibility in offenders, and  
acknowledgement of the harm done to victims and to the community.

[10] Section 718.1 of the **Criminal Code** states that “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

[11] In **R. v. Hamilton (2004) 186 CCC (3d) (ONCA)**, the Ontario Court of Appeal stated that proportionality is a fundamental principle of sentencing. It takes into account the gravity of the offence and degree of responsibility of the offender. In other words, the severity of the sanction for a crime should reflect the seriousness of the criminal conduct. A disproportionate sanction can never be a just sanction. Aggravating and mitigating factors and the principles of parity,

totality and restraint are also important principles that must be engaged in the sentencing process.

[12] The **Criminal Code** views imprisonment as a sentence of last resort. A defendant should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[13] Section 718.2 states the other principles that the sentencing court is mandated to take into consideration, which for the purposes of this case are:

Other sentencing principles

718.2 A court that imposes a sentence shall 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) evidence that the offender, in committing the offence, abused the offender's intimate partner or member of the victim or offender's family,

( 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.

- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; [that doesn't apply to us]
- (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...

[14] With regard to the overall sentencing process, I note the words of Chief

Justice Lamer in **R v C.A.M.**, [1996] SCJ No. 28, paras. 91 and 92:

[91] ... The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[92] ... It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred...

[15] In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. There is no easy test that a judge can

apply and weigh in these factors. Much will depend on the judgement and wisdom of sentencing judges and (inaudible) is best to have considerable discretion in making these determinations pursuant to s. 718.3.

[16] The Supreme Court of Canada in **R v Lloyd, 2016 SCC 13** confirmed that a Provincial Court judge's determination of the appropriate sentence is entitled to deference. The Supreme Court also stated in **Lloyd** that appellate courts cannot alter a trial judge's sentence unless it is demonstrably unfit and that an appellate court may not intervene simply because it would have weighed the relevant factors considered by the sentencing judge differently.

[17] As noted in **R v Suter, 2018 SCC 34**, trial judges have a broad discretion to impose a sentence they consider appropriate within the limits established by law. As well, in **R v Lacasse, 2015 SCC 64**, the Supreme Court of Canada commented on the deference that is to be given to a trial judge's discretion in determining the appropriate sentence by noting at para. 48:

... First, the trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions. Second, the sentencing judge is usually familiar with the circumstances in the district where he or she sits and therefore with the particular needs of the community in which the crime was committed...



[18] Denunciation is the communication of society's condemnation of the offender's conduct. A sentence with a denunciatory element represents a symbolic collective statement that the offender's conduct should be punished for encroaching on society's basic code of values as enshrined within our substantial criminal law. Society, through the courts, must show its abhorrence of particular types of crime and the only way in which the court can show this is by the sentences that they pass.

[19] The criminal sexual behaviour by Mr. Marchand on YG for his own deviant sexual gratification is the type of crime that society abhors and that needs to be strongly denounced.

[20] I acknowledge that the sexual abuse by Mr. Marchand on Y.G. was not a lengthy period of abuse on repeated occasions. However, likely opportunistic sexual predators currently in our society who are engaging in such behaviour, or considering engaging in such behaviour, may be put on notice that whenever their actions come to light, that they will be punished.

[21] It is clear from the Victim Impact Statement by Y.G. that Mr. Marchand's criminal sexual behaviour on Y.G. continue to trouble and torment YG to this day. Her Victim Impact Statement is very clear.

[22] In **R v E.M.W., 2011 NSCA 87** our Court of Appeal affirmed the words of Judge Campbell when discussing the difference between retribution and vengeance at para. 18:

Retribution is punishment. It is objective, measured and reasoned. Vengeance and anger have no place in sentencing. When reason and objectivity give way to expressions of righteous indignation or revenge, a sentence is no longer an expression of a system of values. It has then become an emotional act and not a rational one. It is then not measured or restrained. Justice can be and sometimes should be hard. It must, however, be thoughtfully so. It is important to treat the offender in a way that reflects his level of moral culpability. Simply put, the punishment, and punishment it is, should fit the crime and the person who committed it.

[23] It is also noted by the Court of Appeal in **R v E.M.W.** rehabilitation is a much greater consideration for a sentencing judge when the offender has accepted responsibility. Mr. Marchand is **not** accepting responsibility and he shows no remorse.

[24] At Page 7 of the Pre-Sentence Report, Mr. Marchand states that he “is not even capable” of committing such an offence. I have found otherwise. Mr. Marchand was also convicted of a sexual assault in 1991. Mr. Marchand is clearly very capable of committing such a crime. He now has two convictions for such a crime. Unfortunately, contrary to the comments by Ms. Lentz at Page 6 of the Pre-Sentence Report, this is not behaviour that is out of character for Mr. Marchand.

[25] At Page 7 of the Pre-Sentence Report, Mr. Marchand engages in victim blaming where he states that Y.G. is “very ill and in need of counselling.”

[26] A Court must exercise caution in placing too much weight on deterrence when choosing a sentence, especially incarceration. This caution arises from empirical research which would suggest that the deterrent effect of incarceration is uncertain.

[27] I am mindful of the principles of sentencing as outlined in **R v Grady (1973) 5 NSR (2d) 264 (NSCA)** by our Court of Appeal in 1973, where the Court confirmed that the primary focus is on the protection of the public and how best to achieve that, whether through deterrence or rehabilitation, or both. The protection of the public includes both the protection of society from the particular offender as well as the protection of society from this particular type of offence.

[28] The same Court in **R v Fifield, [1978] NSJ No. 42** stated at para. 11, “We must constantly remind ourselves that sentencing to be an effective social instrument must be flexible and imaginative. We must guard against using ... the cookie-cutter approach.”

### **Victim Impact Statement**

[29] I have already referred to the comments by Y.G. in her Victim Impact Statement. The effects of Mr. Marchand's criminal sexual behaviour on Y.G. had been profound.

### **Aggravating Factors**

[30] Mr. Marchand sexually assaulted a quasi-family member. This is statutorily aggravating.

[31] Mr. Marchand would have been in a position of quasi-trust, given the relationship between himself and Y.G. Y.G. was a guest in his home.

[32] Deeply aggravating is that Mr. Marchand has a prior conviction for a sexual assault in 1991. He was sentenced to four weeks in jail and one year's probation. Mr. Marchand would have been acutely aware of the consequences of another sexual assault conviction. He had to know that he would be very likely looking at further jail time and further probation.

[33] I accept the "gap principle" as noted by counsel for Mr. Marchand where an offender can be given 'a break' if there are long gaps in the offender's record but this must be weighed against the 'step principle' where an offender can expect an increased subsequent sentence if the offender commits the very same crime. I do

not accept Defence counsel's submission that the 'gap principle' takes priority over the 'step principle'.

[34] Clearly, Mr. Marchand has sexual deviancy issues that need to be addressed.

### **Mitigating Factors**

[35] Mr. Marchand had the right to have this matter go to trial but he loses out on the entering of a guilty plea being a mitigating factor, as Y.G. had to relive the sexual assault by testifying.

### **Range of Sentence**

[36] The Crown proceeded by way of summary conviction, so the maximum sentence is 18 months. The range of sentence for a sexual assault is from an absolute discharge to 18 months in jail.

[37] I cannot accept that it would **not** be contrary to the public interest for someone convicted of a second sexual assault to receive a discharge, except in the most exceptional of cases. Mr. Marchand does not fall into this category of offender.

[38] Defence counsel submitted several cases for my consideration, with an emphasis on the principle of “parity”. In **R v Lacasse**, which I previously referred to, the Supreme Court of Canada stated at para. 2:

“For this purpose, the courts have developed tools over the years to ensure that similar sentences are imposed on similar offenders for similar offences committed in similar circumstances – the principle of parity of sentences – and that sentences are proportionate by guiding the exercise of that discretion, and to prevent any substantial and marked disparities in the sentences imposed on offenders for similar crimes committed in similar circumstances. For example, in Quebec and other provinces, the courts have adopted a system of sentencing ranges and categories designed to achieve these objectives”.

[39] At para. 54 of **Lacasse**, the Court stated that parity of sentence is secondary to proportionality.

[40] In **R v Sahota, 2015 ONCA 336 (O.C.A.)** the Ontario Court of Appeal noted at para. 6:

“Section 718.2(b) of the **Criminal Code** requires a sentencing judge to take into account the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This principle is one of parity, not of equivalence. It does not require equivalent sentences. Nor does it forbid disparate sanctions for persons involved in the same offence. Were that so, it would run afoul with the fundamental principle of sentencing in s. 718.1, that of proportionality.”

[41] I have reviewed the cases submitted by Mr. Marchand’s counsel. I make the following brief notes from those cases [all emphasis added]:

**R v B.R.E., [2012] NSJ No. 378.** This was a spousal situation where the husband grabs his estranged wife in their basement by touching her breast and putting his hand on her genitals. The accused received an absolute discharge. This case is **silent as to any prior record** for the accused.

[42] **R v Tanner, [2010] NSJ No. 114.** The accused touched a store clerk's breast. The accused received a sentence of one year's probation. This **was a joint recommendation sentence**, so it is of limited assistance to this Court.

[43] **R v J.W., [2010] NSJ No. 379.** The accused was a **youthful offender**, aged 18 years old. **No prior record, the accused accepted responsibility and was remorseful.** He was looking to get into the military and a criminal record would have hampered this. He received a Conditional Discharge after 15 months.

[44] **R v Berseth, [2019] OJ No. 2372.** The accused was 22 years old with no prior record. The accused touched a stranger on the dance floor by touching her vagina over her clothes, described by the Court as a "brief touching over clothes." **The accused showed genuine remorse, apologized to the victim and accepted responsibility for his actions.** The accused received a Conditional Discharge.

[45] Of note from the **Berseth** case where the Court's comments on discharge is at paras. 43 and 44, which are as follows:

[43] In terms of the first prong, **it presupposes that specific deterrence is not a relevant consideration**, except to the extent required in a probation order, nor is the offender's rehabilitation through correctional or treatment centres required, except to the same extent. Normally, **the offender is a person of good character, without previous conviction, it is not necessary to enter a conviction to deter him or her from future offences or to rehabilitate them and, while not essential, that the entry of a conviction may have significant adverse repercussions...**

[44] ... However, **if there is a necessity for a sentence that will deter others**, it is a factor telling against a discharge.

[46] Also, a note from the **Berseth** case are comments on parity contained at para. 79:

Harkening back to cases referenced earlier, parity is but one factor in assessing the fitness of a sentence. As noted above, parity is secondary to proportionality. Even assuming one could find identical facts with an identical offender, the direction in s. 718.2(b) that similar offenders who commit similar offences in similar circumstances should receive similar sentences does not mean the sentences have to be identical ... On every sentencing there is a range of appropriate sentences.

**R v T.J.H.** case, [2012] ECJ No. 849. This case was involving an accused that touched his friend's fiancé on her genitals outside of her clothing. The Court described the accused as a "unique offender in unique circumstances." The **accused had pled guilty and accepted responsibility and "he has always acknowledged and agreed that he done something he ought not to have done."** The Court noted the accused, "I think he has learned his lesson."



[47] Of note from para. 7 of **T.J.H.** are the Court's comments on the importance of a guilty plea when sentencing, when the Court noted at para. 7:

So, he has acknowledged that also by his guilty plea and not required the complainant to testify or anyone else to testify in court, so it spared them that additional victimization and also spared the Court time that would have been taken. Those are factors that the Court always takes into consideration when deciding what the appropriate sentence will be.

[48] **R v Gilmour, [2005] AJ No. 555.** The accused was **a 71-year old first-time offender**. He pressed his groin into a store clerk. The offender was going through health issues at the time of the offence. He received a Conditional Discharge after six months' probation.

[49] **R v J.L.B., [2017] BCJ No. 195.** The offender was a 52-year old first-time offender. The victim was his employee. The accused had taken sex offender training at his own expense prior to sentencing. **The accused was a permanent resident who faced deportation with a conviction.** He received a Conditional Discharge after 18 months' probation.

[50] **R v Burton, [2012] OJ No. 5187.** The accused had put his hand up the skirt of a stranger on the bus. The accused was a first-time offender and he pleaded guilty. The accused received an Absolute Discharge. **The reviewing judge indicated in that case that they would not have granted a discharge.**

[51] **R v Bakhshi, [2019] AJ No. 921.** The accused, who had **no prior record**, was a photographer who attempted to hug the victim after she had put her clothes back on after a nude photo shoot. **The accused entered a guilty plea to the lesser offence of assault and was not sentenced for sexual assault.** The accused received a Conditional Discharge after 12 months' probation.

[52] **R v Calnen, [2007] NSJ No. 617.** The accused was found guilty of unsolicited touching the buttocks of a young boy in public while he was very intoxicated. The Court noted the accused did not put his hands under the victim's clothing, that it was done in public versus in a private area. **The Court was also uncertain if the accused had a sexual motivation for his actions.** The accused had served a federal term in jail for a sexual assault 17 years prior. He received a four-month Conditional Sentence followed by 18 months' probation.

[53] In **R v J.P., [2017] NSJ No. 402**, the accused was a 51-year old with **no prior record. He pleaded guilty, expressed remorse and apologized to the victim.** The accused received an eight-month Conditional Sentence as incarceration would have jeopardized his employment.

### **Decision**

[54] I am making a DNA Order and mandatory s. 110 10-year Firearms Prohibition Order and a lifetime SOIRA Order.

[55] Mr. Marchand, you sexually assaulted Y.G. for your own sexual gratification. Your actions have had a profound impact on Y.G. Such behaviour must be denounced and deterred, so that like-minded individuals do not engage in such behaviour. I need to find a sentence that balances punishment and rehabilitation, one that specifically deters you due to your repeated offences.

[56] I am sentencing you to 90 days in jail to be followed by three years' probation. This sentence can be served intermittently at the North Nova Institute commencing this Friday at 6 p.m. to Sunday at 6 p.m. and this will continue until such time as your 90 days are deemed served.

[57] You're also being placed on a period of probation for a period of three years to help you with your sexual deviance issues and to help protect members of the public from your sexual urges. The terms of your probation are as follows:

- Keep the peace and be of good behaviour;
- Appear before the Court when required to do by the Court;

- Notify the Court or Probation Officer in advance of any change of name or address and promptly notify the Court or Probation Officer of any change of employment or occupation;
- You are to report to the probation office today and thereafter when required and in the manner directed by your Probation Officer;
- You are to undergo and successfully complete any psychiatric, psychological or mental health counselling as directed by your Probation Officer;
- You are to undergo and successfully complete any counselling directed by your Probation Officer regarding sexual deviance;
- Do not contact or communicate with or attempt to contact or communicate, directly or indirectly, Y.G.;
- Do not go or be within 100 metres of the residential property or premises of Y.G.
- And do not go to or enter onto Lucasville Road, located in Sackville, Nova Scotia;
- Do not beset, watch or follow from place to place, Y.G.;

- Do not have in your possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, explosive substance;
- Do not have in your possession any weapon as defined in the **Criminal Code**; namely, anything used or intended for use in causing death or injury to any person or for the purpose of threatening or intimidating any person;
- Sign all consents required by service providers to release information on your participation in any assessment, counselling or programs to permit the probation service to monitor your progress; and
- You are to complete the forensic sexual behaviour assessment and program within the first 30 months of your probation.

Alain J. Bégin, JPC