PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. J.A.*, 2024 NSPC 5

Date: 20240111
Docket: 8549248
Registry: Kentville

Between:

His Majesty the King

v.

J.A.

Restriction on Publication:
Pursuant to s. 486.4 Criminal Code of Canada

Judge: The Honourable Judge Ronda van der Hoek

Heard: April 24 and May 10, 2023, in Kentville, Nova Scotia

Decision: January 11, 2024, in Kentville, Nova Scotia

Charge: Section 271 of the *Criminal Code of Canada*

Counsel: Richard Hartlen, for the Provincial Crown
Claire Levasseur, for the Defence

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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).

Mandatory order on application

(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.

REPORTING OF THIS PROCEEDING IN ANY MANNER THAT WOULD IDENTIFY THE NAME OF ANY INDIVIDUAL WHOSE NAME IS COVERED BY THE BAN IS STRICTLY PROHIBITED WITHOUT LEAVE OF THE COURT. THE INTENT OF THE FOREGOING IS TO PROTECT THE WELFARE OF ANY WITNESS OR VICTIMS REFERRED TO IN THE PROCEEDINGS, AND/OR TO AVOID PREJUDICE BY ANY PERSON FACING CRIMINAL CHARGES.

By the Court:

Introduction

[1] Following trial, the Court convicted J.A. of sexual assault of the complainant between February 1 and October 1, 2021, contrary to section 271(1)(a) of the *Criminal Code*. The Crown proceeded by indictment.

Positions of the Crown and Defence

[2] The Crown submits a fit and proper sentence for this offence is a federal period of incarceration. He asks the Court to give primary consideration to the sentencing principles of denunciation and deterrence and consider the aggravating factors including that the victim was a new mother, J.A. abused a position of trust as her partner and father of the child, and his actions had a significant impact upon the victim. The Crown notes sexual offences involving domestic partners should be treated as seriously as sexual assault committed upon strangers (*R. v. A.J.K.*, 2022 ONCA 487). He also highlights the victim was sleeping or drifting off to sleep at the time, recently described as a major sexual assault by the Saskatchewan Court of Appeal in *R. v. Merasty*, 2023 SKCA 33.

[3] The Crown Attorney also seeks the following ancillary orders: (1) a DNA order pursuant to section 487.051 of the *Cr. C.* (section 271 is a primary designated

offence); (2) a SOIRA order for 20 years pursuant to section 490.012 *Cr. C*. and (3) a s. 109 *Cr. C*. firearms Prohibition Order for 10 years.

[4] Defence Counsel seeks 24-months less a day incarceration to be served in the community on a conditional sentence order followed by 30 months of probation. She recognizes as statutorily aggravating that the offence occurred in the context of a domestic relationship, but notes J.A. is without a criminal record, young, and of previous good character. In addition, the PSR was positive, and while denunciation and deterrence are paramount, rehabilitation remains an important sentencing consideration. A conditional sentence order can achieve all three aims. J.A. is considered a low risk to reoffend, remorseful, not a danger to the community, fully employed, supports a partner, and financially assists his mother. Letters of support from an employer, a local politician, his current partner, and his mother all attest to his good character and strong work ethic. Defence counsel says a 30-month period of probation would address ongoing rehabilitation for J.A., and result in him being subject to court ordered sanctions for a total of five years.

[5] Defence counsel, in arguing J.A. need not serve a period of incarceration in a federal facility, notes it was clear from his allocution, his testimony at trial, and his comments in the presentence report, that he was at the time of the offence very immature and uneducated with respect to the seriousness of his actions. He has only a grade nine education and had been estranged and living away from his family since

he was 16 years old, and his father even longer. He has also demonstrated an ability to comply with court orders as he has been subject to conditions for a number of years without breach. Compliance also meant he has not seen his child since before the child's first birthday. This despite the ever-present ability to achieve access through a family court order. Defence counsel submits J.A.'s compliance demonstrates respect for the law and bodes well for his ability to comply with the terms of a conditional sentence order. Based on the letters of support, he has also bravely shared the folly of his choices with people in his life including a police officer and a local politician. Defence counsel agrees the offence requires a significant period of incarceration and 24 months less a day is appropriate, meets the objectives of sentencing, balances the aggravating and mitigating circumstances, and addresses J.A.'s rehabilitation needs. It also renders him eligible for a conditional sentence order. A period of federal incarceration would be unduly harsh for this youthful first offender.

[6] Defence counsel agrees the ancillary orders sought by the Crown are appropriate in the circumstances.

The Circumstances of the Offence

[7] At trial I found J.A. guilty of one count of sexually assaulting the victim, between dates, following the birth of their child. Most occurred while she slept or

drifted off to sleep. To summarize, the first consisted of vaginal touching when they were medically advised not to engage in intercourse. She awoke, he stopped, and she told him not to do this again. The pattern continued with him stopping when she awoke. The second incident involved penile penetration after she fell asleep to him rubbing her back. She moved and he pulled out and tried to pretend he was sleeping. A third incident involved penile penetration and insertion of a finger in the victim's anus. She awoke in pain, moved, he pulled everything out, and moved away. A fourth incident occurred when she was awake, and J.A. woke up, pulled his pants down, started rubbing her, and had sex with her. They got into an argument. Overall, the victim believes she was sexually touched a minimum of ten times when she awoke, and he stopped.

[8] It was clear during J.A.'s cross examination testimony that he gained an awakening understanding of the law of sexual assault. The Crown, Richard Hartlen, skillfully brought him there, as demonstrated in the following exchange:

> Q: In all your responses you did not talk about communications, but I took it you would stop when she said no, but you have to communicate, if she dozed off when her back was being rubbed it is not appropriate to touch her vagina?
>
> A: At that time, I did not understand the magnitude of what I was doing. That is my truth.
>
> Q: And the use of your thumb, without advance permission.
>
> A: No, I did not get advance permission.

[9] J.A. also agreed with the Crown's proposition that he went too far, adding "I will not lie about what I can recollect".

[10] It was clear J.A. had a tenuous grasp on the law of sexual assault, did not appreciate that one cannot sexually assault a partner to determine whether she is interested in having sex - that constitutes sexual assault. In my decision to convict, I also pointed out that the Court appreciates societal norms evolve over time and some people do not appreciate that the law has changed. It is no longer lawful for a partner to sexually touch the other without consent - the nature of the relationship simply does not matter. Ultimately, J.A.'s answers on cross examination evinced a young man who was at the time not fully appreciative that his actions crossed the line into criminality. I am satisfied that he now has a crystal, clear understanding of the law.

Victim Impact Statement

[11] The victim read her impact statement remotely via Teams because she could not find a babysitter. She was devastated by the assaults and has struggled with anxiety and depression ever since. She is on medication and has been seeing a counsellor. She is now an unemployed single mother, unable to continue schooling, and has left her family home because she does not want to live in the house where the assaults occurred. She has experienced difficulty sleeping and flashbacks, and says she is fearful for her safety, that of her parents, and her child.

Contents of the Pre-Sentence Report

[12] J.A. is currently 22 years old. At the time of the offence he was 19 years old with a grade nine education, and residing with the victim in her family's home since shortly after the relationship started when he was sixteen years old. His parents separated when he was 12 years old, and that relationship was marked by drinking on the part of his father and both physical and verbal arguments between the two. He and his younger sister have been in the care of his mother since they relocated to Nova Scotia with his grandparents when J.A. was 11 years old. J.A. says as a youth he began to associate with the wrong crowd and experienced resultant difficulties, but says he learned from those experiences. He has neither a prior criminal record nor a history of *Youth Criminal Justice Act* dispositions.

[13] Following the breakdown of his relationship with the victim J.A.'s mother took him in, and they reconciled their own relationship. Today they are very close, he resides on her property in a fifth wheel, and provides her financial assistance. He also reported that he now also shares a good relationship with his father who remained in British Columbia.

[14] J.A.'s mother and grandparents were present in court to support him during the sentencing hearing. They have never met the baby.

[15] J.A. has a disabled partner who resides with him. That relationship began in August 2022, and he described it as extremely supportive. The author of the presentence report spoke to his new partner who advised that she is fully aware of J.A.'s conviction, has no concerns with respect to him, is aware he attended counselling in the past, and believes he would like to attend again. Those latter comments appear related to his occasional use of marijuana and alcohol. She explained that he needs to find a way to cope with the stress in his life, notes he is the main breadwinner, and worries about how a criminal record will impact his employability in the future. She says she will stay with him regardless of the outcome of sentencing.

[16] J.A. completed grade 9, after failing grade 7 when his interest in school declined. He reported being suspended for fighting and arguing, and says he struggled at school and did not enjoy attending. He left after grade 9 and worked full-time for approximately 5 to 6 years in a restaurant where he received promotions and employee of the month awards. He would like to complete grade 12 and the author of the presentence report provided him some support to assist him achieving that goal from.

[17] J.A. has a solid work history and appears to be a hard-working individual. A letter from his employer explained that he "comes early and works hard". The Court

also recalls his testimony at trial, J.A. indicated that he was working and saving money to buy a house for his family.

[18] J.A. reported good physical health and does not take prescription medications. He is a daily smoker who has suffered with anxiety and depression over the years and currently experiences stress with respect to court, work, finances, and not having access to his child. A year ago, he self-referred for mental health counselling through virtual appointments.

[19] In the presentence report, J.A. described his relationship with the victim as manipulative, toxic, and unhealthy. He said the relationship was often verbally abusive and on one occasion the victim became physical. That of course was chronicled in her evidence at trial where she said she pulled a knife on J.A. and told him not to touch her again or she would kill him. J.A. also attributes his estrangement from his family to the victim not allowing him to have contact with them. He says after the relationship was over, he looked back and could understand that it was not a healthy relationship. The Court did not take these comments as victim blaming, but merely comments on the nature of the relationship that started when these two were very young children living together as though married in the victim's parents' house.

[20] J.A. also frankly admitted that when he was younger and associating with a negative peer group, he experimented with street drugs. He has not done so in over

four years, stopped that use before becoming addicted, and attended counselling at Mental Health.

[21] His recreational activities include music and songwriting.

[22] The author of the presentence report interviewed a character reference, his previous employer, who described J.A. as polite, respectful, and considerate. She says he was very conscious of proper behaviour toward customers and staff and was wonderful with elderly customers and children. He was well-liked by the staff and customers.

[23] The author of the report described J.A. as polite, forthcoming, and cooperative during the interview process. Just as he did at trial, J.A. explained to the author of the presentence report that he was unaware his actions were that of a sexual assault. He also acknowledged that ignorance of the law is no excuse. He reported being arrested in his workplace which he says resulted in his reputation "being instantly destroyed" and shortly thereafter he left that employment and contacted his mother for the first time in two years and moved back home. He advised the author of the presentence report that he is extremely regretful and remorseful for committing the offence, and stated there was no one else to blame for the incident before the court. He does not have any contact with the victim based on the no contact condition and that, of course, has made it impossible for him to parent his son.

[24] The writer of the report indicated that a comprehensive sexual offender assessment would have to be completed in order to determine J.A.'s risk level, and recommended he make a self referral to the appropriate agencies with respect to assessment and counselling.

[25] In addition to the various letters of support, defence also filed with the Court J.A.'s completion certificate for Healthy Relationships, a relevant course of study.

Allocution

[26] J.A. accepted the opportunity to allocute, expressed remorse for his actions, and apologized to the victim. J.A. advised that he is also seeing a psychiatrist. He wept during the reading of the victim impact statement, and supported his mother who also did so when she heard, in the background, baby noises of a grandchild she has never met.

Governing sentencing principles

[27] The fundamental purpose of sentencing, expressed in section 718 of the *Criminal Code*, is to protect society and contribute to respect for the law, the maintenance of a just, peaceful and safe society by imposing just sanctions which have one or more of the objectives of denunciation, deterrence, separating offenders from society where necessary, assisting in the rehabilitation of offenders, providing reparation for harm done to victims or to the community, and promoting a sense of

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

[28] The fundamental principle of sentencing, expressed in section 718 of the *Code*, directs punishment should be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[29] As the Supreme Court of Canada said in *R. v. Lacasse,* 2015 SCC 64 at para 1:

> Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the *Criminal Code*, R.S.C. 1985, c. C-46, and although the objectives set out in those sections guide the courts and are clearly defined, it nonetheless involves, by definition, the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.

[30] I appreciated my brother Russell PCJ.'s comments on sentencing in *R. v. MacKinnon*, 2022 NSPC 12 at paragraph 26:

> [26] Judges are required to craft a sentence which is proportionate to the gravity of the offence and the degree of responsibility of the offender. What is a just sentence? A just sentence is one which never exceeds what is appropriate having regard to the moral blameworthiness of the offender and the gravity of the offence. In order for sentencing to be just it must be an individualized process. When it comes to crafting the appropriate sentence for Mr. Mackinnon, I remain guided by these principles. I will outline some of the cases I have read and used to guide the sentencing process in this case:
>
> > ***R v. Nasogaluak***, 2010 SCC 6 at paragraph 43:
> >
> > [43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. 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 (R. v. Lyons, 1987 CanLII 25 (SCC), [1987] 2 S.C.R. 309; M. (C.A.); R. v. Hamilton (2004), 2004 CanLII 5549 (ON CA), 72 O.R. (3d) 1 (C.A.)). 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 the 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.

R. v. Lacasse**,** 2015 SCC 64 at paragraph 12:

[12] ... proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. . .

R. v. Hamilton, [2004] CanLII 5549 ONCA [2004] O.J. No. 3252 at paragraphs 92 -95:

[92] In R. v. Priest (1996) 1996 CanLII 1381 (ON CA), 30 O.R. (3d) 538, 110 C.C.C. (3d) 289 (C.A.) at pp. 546-47 O.R., pp. 297-98 C.C.C., Rosenberg J.A. described the proportionality requirement in this way:

The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this offender is not unjustly dealt with for the sake of the common good.

[93] Fixing a sentence that is consistent with s. 718.1 is particularly difficult where the gravity of the offence points strongly in one sentencing direction and the culpability of the individual offender points strongly in a very different sentencing direction. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account. As indicated in Priest, supra, factors which may accentuate the gravity of the crime cannot blind the trial judge to factors mitigating personal responsibility. Equally, factors

mitigating personal responsibility cannot justify a disposition that unduly minimizes the seriousness of the crime committed.

[94] In some circumstances, one side of the proportionality inquiry will figure more prominently in the ultimate disposition than the other. For example, where a young first offender is being sentenced for a number of relatively serious property offences, the sentence imposed will tend to emphasize the features which mitigate the offender's personal culpability rather than those which highlight the gravity of the crimes: R. v. Priest, supra. If, however, that same young offender commits a crime involving serious personal injury to the victim, the "gravity of the offence" component of the proportionality inquiry will be given prominence in determining the ultimate disposition.

[95] Proportionality is the fundamental principle of sentencing, but it is not the only principle to be considered. Parity, totality, and restraint are also principles which must be engaged when determining the appropriate sentence: Criminal Code, s. 718.2(b)-(e). The restraint principle is of particular importance where incarceration is a potential disposition. That principle is reflected in s. 718.2(d) and (e):

(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 should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

***R. v. Fifield*,** [1978] N.S.J. No. 42 at paragraph 11:

[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.

R v. C.A.M. 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500 at paragraphs 91 & 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. See Mellstrom, Morrissette and Baldhead. 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.

R. v. Grady, [1971] N.S.J No. 93, at paragraphs 5 and 7:

[5] It has been the practice of this court to give primary consideration to protection of the public, and then to consider whether this primary objective could best be attained by (a) deterrence, or (b) reformation and rehabilitation of the offender, or (c) both deterrence and rehabilitation.

[7] It would be a grave mistake, it appears to me, to follow rigid rules for determining the type and length of sentence in order to secure a measure of uniformity, for almost invariably different circumstances are present in the case of each offender. There is not only the offence committed but the method and manner of committing, the presence or absence of remorse, the age and circumstances of the offender, and many other related factors. For these reasons, it may appear at times that lesser sentences are given for more serious offences and vice versa, but the court must consider each individual case, on its own merits, even if the different factors involved are not apparent to those who know only of the offence charged and the penalty imposed.

R. v. E.M.W., [2011] N.S.J. No. 513, the Nova Scotia Court of Appeal affirmed the words of Judge Campbell (as he then was) at paragraph 18:

18 The judge discussed retribution, which he distinguished from vengeance:

> 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.

Parity

[31] A sentence should also be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, as embodied in the concept of parity.

[32] In *R. v. L.P.*, 2022 NSPC 23 Tax PCJ. considered and adopted the following sentencing range for sexual assault on sleeping victims:

> [43] In ***R. v. M.R.***, 2018 ONSC 583, at para. 32, Boswell J reviewed a number of cases involving sexual assault on unconscious or sleeping victims. He adopted comments of a colleague in an earlier case that found the usual range for an offender who has committed an invasive sexual assault on a sleeping or unconscious victim is between an upper reformatory and a penitentiary term of imprisonment, that is, 18 months to three years. In the ***M.R.*** case, the court imposed a sentence of 14 months in custody.

[33] It is always difficult to find cases that are similar to one another. This situation is no different. That said the Crown Attorney asked the Court to consider a number of sentencing decisions.

[34] In *R. v. Merasty*, *supra*: The Saskatchewan Court of Appeal granted a sentence appeal from a sentence of six months imprisonment followed by a one-year probation order. The sleeping victim awoke to attempted sexual intercourse, which stopped at her command. Following trial, the Crown sought upwards of 30 months and the defence sought a 90-day intermittent sentence followed by a lengthy period of probation for the first offender with Gladue factors. In granting the appeal, the court substituted a term of imprisonment of 20 months, followed by 12 months probation, and ancillary orders. That court concluded the range for sleeping victim

cases would normally be between two- and three-years' incarceration, noting restorative justice principles supported a term of imprisonment below the range of two to three years to allow for a probationary period.

[35] *R. v. DeYoung*, 2020 NSSC 242: The trial judge accepted a jointly recommended sentence of two years incarceration in a case involving an attempt at anal penetration on a sleeping victim, which ceased upon her waking. At paragraph 12 the court accepted the range for such an offence to be somewhere between 14 months and three years.

[36] *R. v Kolola*, 2020 NUCJ 38: The victim awoke to find Koala, who was known to her but never invited to her home, penetrating her vagina with his penis. His criminal record spanned ten years, he had served prior periods of incarceration, and after considering *Gladue* factors, was sentenced to 30 months incarceration. In considering range, the court, "suggest[ed] that the proper range of sentences for penetrative vaginal sexual assault of a vulnerable sleeping or unconscious victim which leaves the victim susceptible to disease, emotional harm, and pregnancy is between 36 and 60 months in a penitentiary, depending on the age and criminal record of the offender and the unique circumstances of the case" (para. 69)

[37] *R. v. E.S.*, 2019 NLSC 199: The victim woke to penile penetrative intercourse. The parties sought a sentence of between 2-3 years, and the court imposed a 36-month sentence.

[38] *R. v. B.B.*, 2022 NLSC 18: The Court applied the range in Newfoundland and Labrador said to be between 36 and 48 months for sexual assault on a sleeping victim and imposed a sentence of 30 months incarceration.

[39] Defence counsel distinguishes the cases referenced by the Crown, noting J.A. is without a criminal record, there were no other acts of violence or charges arising from the incidents, and he is of otherwise good character.

[40] Defence counsel also presented case law for my review.

[41] *R. v. J.J.W.*, 2012 NSCA, commencing at paragraph 21, the court reminds sentencing judges that, "Nova Scotia has not adopted a starting point approach. Rather, this court has chosen to remain focused on the principles of sentencing as set out in the *Criminal Code…* since sentencing is such an individualized process and done in the context of the particular circumstances of each case, it is notoriously difficult to find cases that are factually similar".

[42] *R. v. A.J.K., 2022 ONCA 487 at paragraph 82:*

> the principle of individualization is yet another tool designed to help calibrate proportionate sentences. Individualization is central to the assessment of proportionality in that it demands focus upon the individual circumstances of each offender, at para. 12; Lacasse, at para. 58.

[43] *R. v. Dixon*, 2023 ONSC 2776: for penetrative sexual assault on a domestic partner, the offender was sentenced to two years less a day to be served as a conditional sentence, followed by two years of probation. He entered a guilty plea and the couple had two children under the age of five.

[44] I have also considered the decision of Buckle PCJ., in *R. v. Percy*, 2019 NSPC 12, where she concluded 18 months to four years represents the range across the country. So, after my review, I conclude parity for sexual assaults involving a sleeping or unconscious victim generally requires an upper reformatory to federal reformatory sentence.

Restraint

[45] The Supreme Court of Canada addressed restraint in *R. v. Proulx*, [2000] SCC 5 at para. 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...

Rehabilitation

[46] Of course, it is also necessary for a sentencing judge to consider the restorative goals of repairing the harms suffered by victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused by an offender, while attempting to rehabilitate or heal the offender. And, although

rehabilitation is a secondary consideration behind denunciation and deterrence, it remains a relevant factor on sentence. It cannot be ignored that the family unit was destroyed as a result of the offence. A child is without a father and paternal family contact. That relationship will inevitably be reconciled, and it is important for the good of society that this young, motivated father receive appropriate rehabilitative support in the interests of the child and his mother.

Decision

[47] Denunciation as well as specific and general deterrence are the relevant purposes when sentencing sexual offences. Of course, given J.A. is a youthful first offender of otherwise good character, sentencing should also consider his rehabilitative needs and promote a sense of responsibility in him, as well as acknowledging the harm done to the victim.

[48] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. I found J.A. violated the sexual integrity of his partner when she was vulnerable and unconscious. The impact, as expressed by her in the victim impact statement, has been significant and she continues to experience the effects today. The victim told him not to touch her and yet he continued to do so over the course of time. She was vulnerable having just given birth and asleep or

falling asleep at the time of the commission of the majority of the touching. Of course, there is also the sexual contact when she was not asleep for which he also did not seek consent. The gravity of the offence is certainly high.

[49] In considering J.A.'s moral blameworthiness for the offence, I find he bears a somewhat high degree of responsibility attenuated somewhat by his personal circumstances. His level of education is low, he did not benefit from being under the guidance of a father or mother due to divorce and a cross Canada relocation and was estranged from his parents during crucial formative years. In addition, the Court cannot ignore his obvious naivety, immaturity, and lack of education with respect to the law of sexual assault.

[50] It is also required to consider any aggravating or mitigating factors, and that relates to the offence as well as the offender. I find as follows:

Aggravating

1. J.A. was at the time the intimate partner of the victim – statutorily aggravating factor s. 718.2(a)(ii) Cr. C.
2. The first incident of touching occurred when the victim was medically unable to engage in sexual intercourse, following the birth of their baby.
3. The offence occurred in her parents' home where the couple resided with the new baby.
4. The victim confided in J.A. her particular weaknesses and vulnerabilities and made clear her boundaries after the first sexual touching without consent.
5. The offence occurred over a number of months.

6. The offence has had a significant impact on the victim considering her personal circumstances (section 718.2(a) (iii.1) Cr. C.

Mitigating factors include

1. Youthful first offender
2. Of otherwise good character
3. Grade nine education
4. Without criminal record
5. Employed
6. Remorseful and contrite during his allocution and apology to the victim.
7. Limited education or understanding of the nature of the offence.
8. Estranged from his family at the time of the offence.
9. Left home at a very young age, sixteen, to reside with the victim in her family home in a marriage-like relationship.
10. Letters of support from a range of community members.
11. Financially supports a partner and his mother with whom he has reconnected.
12. Complied with release conditions that resulted in not seeing his child since the date he was charged.
13. Accepted responsibility under cross-examination and expressed his lack of understanding. This was echoed in the presentence report.
14. Has completed a Healthy Relationship course.

Conclusions

[51] Having considered and balanced the sentencing factors, I find a period of incarceration is required in the circumstances. The question is what amount of time is necessary to achieve the purposes and principles of sentencing. While it is fair to say that sexual offences may garner sentences in the federal incarceration range, that is not always the case.

[52] I find a period of incarceration in a provincial institution a fit and proper sentence. Taking into account the mitigating circumstances, that I find outweigh the aggravating circumstances, including that J.A. is a youthful first offender who is about to be sentenced to a first period of incarceration, I cannot find that a sentence in the range of 24 to 30 months is appropriate, nor in line with sentence individualization principles. Rather, taking into account the principles of restraint, acknowledging that a first period of incarceration should be as low as possible to achieve the sentencing objectives, I find a period of incarceration of just under 24 months is a fit and proper sentence in the circumstances of this particular offender. Such a sentence takes into account his responsibility for the offence, his acknowledgement of the harm done to the victim, and the price that he has paid in having lost significant time parenting his only child. It also takes into account parity. It is not unusual for a person to receive a sentence of two years for sexual assault on a sleeping victim, but as I said the mitigating factors can reduce that 24-month period by a day thus qualifying him for consideration of a conditional sentence order.

[53] The test for a conditional sentence set out in the Supreme Court of Canada in *R. v. Proulx*, *supra*, requires the Court to first determine that the offence is not subject to a mandatory minimum sentence. It is not. Next the Court considers whether serving such a sentence in the community would endanger the safety of the community. It does not. I base this conclusion on the contents of the PSR and the

strong letters of support from employer, police officer, politician, and family members. In addition, he has abided by the Court's direction while on release, and had no contact with the victim, and the Court has no concern that he will continue to offend. His remorse and understanding gained over the course of trial and echoed in the comments in the presentence report, as well as his voluntary participation and completion of the Healthy Relationships course, satisfy the Court that J.A. has learned a harsh and significant lesson with respect to the law of consent in Canada. He is not a danger to the community.

[54] I also find a conditional sentence order is consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, as canvassed above. Conditional sentence orders are sentences of incarceration; served in the community instead of in a jail. They do not afford the opportunity for parole or early release. They are subject to strict conditions the breach of which can lead to incarceration. This young man, I am convinced will take this sentence very seriously and appreciate the need to structure his life around its terms. He will serve a period of 24 months less a day on a conditional sentence order with the conditions requested by the defence counsel, including house arrest for eighteen months with limited exceptions, counselling, and no contact with the victim except in accordance with a family court order, and a curfew for the remaining period.

[55] In addition, J.A. will be subject to a period of probation for 30 months. The probationary period is directed at his rehabilitation (education, employment, continuing understanding of limits in relationships) and also achieving no contact between the victim and J.A., except as may arise through a family court order. That will ensure she is not placed in a position where she must have contact should she not wish to do so, for a significant period of time, and likely until the child starts school. He will also perform 90 hours of community service work.

Ancillary Orders

[56] In addition, I also make the following ancillary orders: (1) a DNA order pursuant to section 487.051 of the *Cr. C.* (section 271 is a primary designated offence); (2) a SOIRA order for 20 years pursuant to section 490.012 *Cr. C.* and (3) a s. 110 *Cr. C.* firearms *Prohibition Order* for 10 years.

[57] Judgment accordingly.

van der Hoek PCJ