PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v Donovan, 2013 NSPC 83

Date:060713
Docket: 2367217
Registry: Sydney

Between:

Her Majesty the Queen

v.

Donald Bernard Donovan

SENTENCING DECISION

Judge:	The Honourable Judge Jean M. Whalen
Heard:	In Sydney, Nova Scotia
Oral Decision:	June 7, 2013
Written decision:	September 26, 2013
Charge:	Section 266(b) Criminal Code of Canada
Counsel:	Shane Russell, for the Crown Nash Brogan, for the Defence

By the Court:

I Introduction

[1] Mr. Donovan was found guilty after a trial of assault upon Paulette Nicholson. He slapped Ms. Nicholson once with an open right hand on the left side of her head. She screamed and leaned away to her right and rolled her wheelchair away from Mr. Donovan, *R. v Donovan*, 2012 N.S.P.C. 126).

[2] This matter was not reported immediately but when it became known to the supervisor / police, there is no evidence that Paulette Nicholson was examined by staff or a doctor. There are no photos or any description of observations of an injury.

II Victim Impact Statement

[3] There was no victim impact statement filed by Paulette Nicholson (she is severely mentally challenged) or Paulette Nicholson's family. Crown counsel did

tell the court Ms. Paulette Nicholson's sisters were present for the proceeding and are saddened and disappointed that a "trusted person" did this to their sister.

III Criminal Record

[4] In July 25, 2000 Mr. Donovan was sentenced on a s. 253(b) charge. He received a fine and a one year driving prohibition.

IV Pre-Sentence Report

[5] Ms. MacNeil of Correctional Services prepared a report for the court. Mr. Donovan is 57 years old and has four children, two with his previous wife and two with his current wife, Janis Donovan. His family is very supportive of him. Mrs. Donovan reported "she has never witnessed any acts of violence with her husband". She has no concerns with her husband and is of the opinion "the current situation is unfortunate".

[6] At the time the Pre-Sentence Report was prepared (January 22, 2013), Mr. Donovan was unemployed. His position as an L.P.N. at the Breton Ability Centre

(Braemar Home) was terminated due to the charge before the court. Mr. Brogan advised the court that Mr. Donovan has been refused fourteen or fifteen jobs because of this situation. Mr. Donovan has a history of gainful employment the last thirty years.

[7] Ms. Theresa MacLeod, Director of Community Relations and Support and the defendant's former supervisor, reported there had been some concerns with the Defendant's practices and procedures but support was given to Mr. Donovan to assist him. She described Mr. Donovan as "a troubled man with erratic behaviour", although it was not a constant issue.

[8] A previous co-worker, Ms. Cathy Williams who knew Mr. Donovan for eleven years described him as honest and easy-going; a good worker. "She has never known the offender to be violent or display anger issues."

[9] Mr. Donovan says he suffers from anxiety and was involved with mental health services in 1995. He was going through a divorce at the time. He weaned himself off the medications because he was of the opinion he did not need them. He is currently prescribed medication for his anxiety.

[10] Mr. Eric Cadegan, a friend and neighbour, describes the defendant as an "honest and caring individual". He reported "he has never witnessed the offender lose his temper or be violent".

[11] Regarding the assault, Mr. Donovan stated to the probation officer "if I had done it, I would have remorse". On the date of sentencing submissions Mr. Donovan apologized to Paulette Nicholson's sisters for "what they had to go through" but stated "in all good conscious I cannot admit to something I did not do". Mr. Donovan has denied the assault from the very beginning.

V Counsel Argument

[12] The crown seeks a period of custody (four to six months) followed by a period of probation. Mr. Russell argues that the court must consider the principle of general deterrence, particularly since Paulette Nicholson was a "vulnerable victim" and the defendant was in a "position of trust".

[13] Mr. Brogan argues that there is no need to put Mr. Donovan in jail for specific deterrence. There have been severe consequences already and "general deterrence is not diminished by refusing to imprison a person who should not be imprisoned". The court must consider all of the circumstances. The defendant seeks a period of probation and a conditional discharge.

VI. What is an appropriate sentence for this defendant?

[14] Ruby, 6th Ed. at para 2.1 states:

> It is a basic theory of punishment that the sentence imposed bear a direct relationship to the offence committed. It must be a fit sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender deserves the punishment received and feel confidence and fairness in the rationality of the system. To be just, the sentence imposed must also be commensurate with the moral blameworthiness of the offender. A sentence that is not just and appropriate produces only disrespect for the law. These common-law principles have been codified in sections 718, 718.1 and 718.2 of the *Criminal Code.*

[15] Parliament has codified a number of other important values to help sentencing judges give effect to the fundamental principles of proportionality. The articulated principles however, are general in form, and moreover they provide no mechanism for resolving the inevitable conflicts that arise between

these various principles in individual cases. Sentencing judges are simply told to weigh and balance the competing principles and fashion an appropriate sentence.

[16] In crafting the appropriate sentence the Court must have regard to the factors set out in the *Code* as well as the nature of the offence committed and the personal circumstances of the offender. According to the Supreme Court of Canada, the appropriate sentence will also depend on the circumstances of the community in which the offence took place.

> "It must be remembered that in many offences there are varying degrees of guilty and it remains the function of the sentencing process to adjust the punishment of each individual offender accordingly.
>
> The appropriate sentence for the specific offender and the offence is there fore determined, having regard to the compendium of aggravating and mitigating factors present in the case. It is the weight attached to the aggravating and mitigating factors which shape and determine the sentence imposed and this is an individual process. In each case the court must impose a fit sentence for this offence in this community.
>
> The nature and gravity of the offence is properly the central factor in sentencing. It is and must be the first rule that prompts the court. The concern behind this consideration is that there should be a just proportion between the offence committed and the sentence imposed. Our basic notion of fairness demands that every sentence be primarily and essentially appropriate to the offence committed having regard to the nature of the crime and the particular circumstances in which it was committed." *Sentencing*, Ruby, 6th Ed.

[17] Other common law principles of sentencing must also be appropriately applied. In the end, the punishment must be proportionate to the moral blameworthiness of the offender. The public must be satisfied that the offender deserved the punishment received and must feel a confidence and fairness and rationality of the sentence. This principle of proportionality is fundamentally connected to the general principle of criminal liability which holds that the criminal sanction may be imposed only on those who possess a moral culpable state of mind. The cardinal principle is that the punishment shall fit the crime.

[18] s. 718.2(e) of the *Criminal Code* requires a judge to consider all available sanctions that are reasonable. That is jail, probation, fine or some combination.

[19] s. 718.2(a) now entrenches the common-law by requiring judges to increase or reduce a sentence by taking into account aggravating or mitigating circumstances relevant to the offence or the offender and, in particular, s. 718.2(a)(iii) states evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim must be considered.

[20] I am also mindful of the defendant's lack of remorse. In *R. v Hawkins*, 265 C.C.C. (3d) 513 (N.S.C.A), J. Beveridge states at para 33:

> "Where an offender has plead not guilty, a lack of remorse cannot be considered an aggravating factor except in very unusual and exceptional circumstances (see *R. v Valentini (1999), 43 O.R. (3d) 178)*.

[21] Then at para 34 J. Beveridge cites J. Robertson in *R. v. Nash, 2009 N.B.C.A 7* at para 31:

> "It is important to distinguish between cases in which the offender has plead guilty and those in which the offender is convicted of an offence. The law is clear when it comes to cases falling within the latter category. The failure to express remorse following a conviction is not an aggravating factor. The expression of sincere remorse is a mitigating one."

VII <u>Mitigating Factors</u>

[22] i) Letters of support from former co-workers, family friends, neighbours and community volunteers stating this is "out of character". That they have never witnessed any acts of aggression or violence by the defendant. He has been described as caring, compassionate, honest, respectful and empathetic.

ii) Employment: defendant has a history of gainful employment (thirty years). Despite supervisor's comments on page four of the pre-sentence report the defendant continued to be employed until this incident.

iii) Collateral consequences: emotional strain on defendant and family. The defendant continues to be unemployed (in profession of choice). However, *"Collateral Consequence"* - "[this] is so inevitably linked to the offence that they seem to be part of punishment and cannot be considered mitigating*...indirect consequences must be viewed in light of the offence itself" (page 37, MANSON, *The Law of Sentencing*).

VIII <u>Aggravating Factors</u>

[23] i) Position of trust, 718.2(a)(iii).

ii) Vulnerable person.

iii) Nature of assault - unprovoked.

iv) Previous though unrelated criminal record.

IX The Law

[24] When the subject of punishment for any criminal offence is mentioned many people think of imprisonment. However, jail is but one form of punishment that can be imposed as a consequence of a conviction for a criminal offence. "The ultimate goal of our judicial system is not uniform sentences, for that is impossible. What is needed is a uniform approach to sentencing" [Ruby, 6th Ed.]

[25] Here the crown and defence are at different ends of the spectrum. The crown seeks a period of custody followed by a period of probation. Defence counsel seeks a conditional discharge.

[26] Regarding the latter, the seminal case is *R. v. Fallofield,* 13 C.C.C. (2d) 450. C.J. Farris states at para 21:

> 21. From this review of the authorities and my own view of the meaning of s. 662.1 I draw the following conclusions, subject, of course, to what I have said above as to the exercise of discretion:
>
> (1) The section may be used in respect of any offence other than an offence for which a minimum punishment is prescribed by law or the offence is punishable by imprisonment for 14 years or for life or by death.
>
> (2) The section contemplates the commission of an offence. There is nothing in the language that limits it to a technical or trivial violation.

(3) Of the two conditions precedent to the exercise of the jurisdiction, the first is that the court must consider that it is in the best interests of the accused that he should be discharged either absolutely or upon condition. If it is not in the best interests of the accused, that, of course, is the end of the matter. If it is decided that it is in the best interests of the accused, then that brings the next consideration into operation.

(4) The second condition precedent is that the court must consider that a grant of discharge is not contrary to the public interest.

(5) Generally, the first condition would presuppose that the accused is a person of good character, without previous conviction, that it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions.

(6) In the context of the second condition, the public interest in the deterrence of others, while it must be given due weight, does not preclude the judicious use of the discharge provisions.

(7) The powers given by s. 662.1 should not be exercised as an alternative to probation or suspended sen-tence.

(8) Section 662.1 should not be applied routinely to any particular offence. This may result in an apparent lack of uniformity in the application of the discharge provisions. This lack will be more apparent than real and will stem from the differences in the circumstances of cases.

[27] (a) Discharges

MANSON, *The Law of Sentencing* at page 211:

"Enacted in 1972, the discharge provisions gave courts the power to relieve against both the fact and stigma of a criminal conviction...The only offences excluded from the discharge provisions are those

> requiring a minimum penalty or those punishable by life or fourteen years imprisonment. There are no strict pre-requisites except that a discharge must be in the offender's best interest and not contrary to the public interest. While one would assume that a discharge would always be beneficial to the offender, this has been interpreted as requiring a finding that the case presents no concern about individual deterrence and the offender appears to be a person of good character. In other words, 'it is not necessary to enter a conviction against him in order to deter him from future offences or to rehabilitate him'...A common reason for requesting a discharge is the desire to avoid specific consequences of a conviction, often relating to immigration status, professional qualifications or other employment issues."

Later at page 212:

> "The role of the public interest is difficult to define...The genesis for the discharge sanction was the concern that the negative consequences of a conviction, whether immediate or potential, would outweigh any value to be gained from the formal stigmatization of the offender as a convicted person. Accordingly, it should be the individual consequence which is evaluated in the circumstances of the offence. There is no need to show that the public interest would be promoted or enhanced by a discharge. The test is simply whether permitting the offender to avoid the stigma of a conviction undermines the public interest in some definable way."

Ruby, *Sentencing*, 6th Ed. at page 350, para 9.7 addresses the "Best Interests of the Accused":

> "...The Ontario Court of Appeal has said that this means
>
> > ...that deterrence of the offender himself is not a relevant consideration, in the circumstances, except to the extent required by conditions in a probation order. Nor is his

> rehabilitation through correctional or treatment centres, except to the same extent. Normally he will be a person of good character, or at least of such character that the entry of a conviction against him have significant repercussions.

If it is not in the best interests of the accused, then that is the end of the matter so far as the discharge is concerned."

Later at para 9.8:

"It is the total picture that must be examined."

Later at para 9.10:

"Evidence of a direct and immediate impact on employment is not necessary; an adverse effect would be sufficient in terms of an adverse impression on an employer, or a diminishing ability to travel abroad, or the chances of obtaining promotion."

Later at para 9.13:

PUBLIC INTEREST

"The court must consider whether or not a discharge would be contrary to the public interest, and it is not sufficient to ask whether a discharge would be in the best interests of the community."

Later at paragraph 9:15:

"Discharges may be refused where the court finds that it is in the public interest to see that future or potential employers or social

> organizations know of the criminal activity and have a chance evaluate it."

[28] Finally, it s commonly assumed that a discharge does not produce a criminal record. That is not quite correct. It does produce a record of a "criminal conviction" and a record of a discharge.

[29] This is not a joint recommendation and since s. 718(2)(E) requires me to consider all available sanctions, I will also turn my mind to the possibility of a jail sentence to be served in the community pursuant to s. 742.1 of *C.C.C.*

[30] Judge Derrick sets out the principles to be considered in R. v. Lee [2011] N.S.P.C. 81 at para 56 to 61:

> 56 As I noted in my reasons in *Naugler*:
>
> > **87** Promoting respect for the law is a fundamental purpose of sentencing. Conditional sentencing has struggled to satisfy this objective although its effectiveness in this regard has been, in my opinion, undermined by a general misunderstanding on the part of the public and also a deliberate misrepresentating of its role as a legitimate, punitive sentencing option. Conditional sentencing was intended to reflect a new emphasis on the goals of restorative justice (*Proulx, paragraph 19*) Parliament had "mandated that expanded use be made of restorative principles in sentencing as a

> result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society." (*Proulx, paragraph 20*) A conditional sentence is a hybrid:
>
> > ... [it] incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and the promotion of a sense of responsibility in the offender. However it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence ... (*Proulx, paragraph 22*)

57 I went on in *Naugler* to make the following comments that are relevant to repeat in this sentencing:

> > **88** The Supreme Court of Canada discussing conditional sentencing in *Proulx* recognized that "Inadequate sanctions undermine respect for the law" and fail to provide sufficient denunciation and deterrence. The Court understood that if a conditional sentence is not distinguished from probation, it will not be accepted by the public as a legitimate sanction. (*Proulx, paragraph 30)*
> >
> > **89** The punitive effect of a conditional sentence is to be achieved through the use of punitive conditions, such as strict house arrest, to constrain the offender's liberty. (*Proulx, paragraph 36*) Another feature of

> conditional sentencing is its ready conversion to a sentence in a jail cell. As noted by the Supreme Court of Canada in *Proulx:* "... where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender will serve the remainder of his or her sentence in jail." (*Proulx, paragraph 39*)

58 The Supreme Court of Canada's authoritative findings in *Proulx* that conditional sentences are not lenient sentences and with strict conditions can satisfy the sentencing imperatives of denunciation and deterrence and be sufficiently punitive and stigmatizing is still good law. Despite a sustained political campaign against conditional sentences and much public misunderstanding about their suitability as a sentencing option, there is no reasoned basis for challenging the continued legitimacy of the Court's statements. However, *Proulx* must be carefully read to fully appreciate what it is saying.

59 *Proulx* held that there is no presumption in favour of conditional sentences: the fact that the prerequisites for a conditional sentence have been met, as they have been here, does not presume that a conditional sentence is consistent with the fundamental purpose and principles of sentencing. "The particular circumstances of the offender and the offence must be considered in each case." (*Proulx*, *paragraph 85*)

60 Two main objectives underpinned the sentencing amendments that produced the conditional sentencing regime: (1) reducing reliance on incarceration as a sanction, and (2) amplifying the role for restorative justice in sentencing as exemplified by the objectives of rehabilitation, reparation to the victim and the community, and the promotion of a sense of responsibility in the offender. (Proulx, paragraph 98) The Supreme Court of Canada described how the conditional sentencing option can "facilitate the achievement" of these objectives:

> 99 ... It affords the sentencing judge the opportunity to craft a sentence with appropriate conditions that can lead to the rehabilitation of the offender, reparations to the community, and the promotion of a sense of responsibility in ways that jail cannot ...
>
> 100 Thus, a conditional sentence can achieve both punitive and restorative objectives. To the extent that both punitive and restorative objectives can be achieved in a given case, a conditional sentence is likely a better sanction than incarceration. Where the need for punishment is particularly pressing, and there is little opportunity to achieve any restorative objectives, incarceration will likely be the more attractive sanction. However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

61 *Proulx* determined that the need for denunciation, one of the sentencing objectives to be achieved by an offender's sentence, may in some cases be "so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct." (*Proulx, paragraph 106*) Likewise, *Proulx* acknowledged that "there may be circumstances in which the need for deterrence will warrant incarceration" depending "in part" on whether there is the prospect of incarceration being likely to have a "real deterrent effect." (*Proulx, paragraph 107*) In *R. v. Wismayer*, *[1997] O.J. No. 1380*, Rosenberg, J. for the Ontario Court of Appeal

regarded the general deterrence issue in the context of conditional sentencing as follows:

> General deterrence, as the principal objective animating the refusal to impose a conditional sentence, should be reserved for those offences that are likely to be affected by a general deterrent effect. Large scale well-planned fraud by persons in positions of trust ... would seem to be one of those offences. *(paragraph 50*)

And later at paragraph 63, 64, 65:

63 The Supreme Court of Canada in *Proulx* recognized the deterrence issue expressly in the context of that case, which involved dangerous and impaired driving causing death. These offences were described as "often committed by otherwise law-abiding persons, with good employment records and families." Such persons, it was suggested by the Court, "are the ones most likely to be deterred by the threat of severe penalties." (*Proulx, paragraph 129*) Offenders in fraud cases are likewise not oblivious to the consequences of their choices. As noted by the Ontario Court of Appeal:

> ... there are few crimes where the aspect of deterrence is more significant. It is not a crime of impulse and is of a type that is normally committed by a person who is knowledgeable and should be aware of the consequences. That awareness comes from the sentences given to others. *R. v. Gray, [1995] O.J. No. 92, paragraph 32, (Ont. C.A.))*

64 What conditional sentences are best at accomplishing is an effective balancing of the sentencing objectives of denunciation and deterrence with the objectives of rehabilitation, reparation and promotion of a sense of responsibility. Where those restorative objectives can be realistically achieved, "a conditional sentence will likely be the appropriate sanction ...", provided that denunciation and deterrence are not left out of the calculus. (*Proulx, paragraph 109*) In

Proulx, the Supreme Court of Canada delineated the approach to be taken in deciding what type of sentence is the appropriate option:

> 113 ... In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the Code). This list is not exhaustive.

65 Determining a fit and proper sentence requires that the sentencing judge assess "which sentencing objectives figure most prominently in the factual circumstances of the particular case before them." (*Proulx, paragraph 113*)

X Analysis

[31] When considering a discharge, the Court must conclude that the order would be in the best interests of the accused and not contrary to the public interest. The first part usually requires the accused to be a person of good character without previous conviction.

[32] Mr. Donovan has a prior conviction for impaired driving and thus I find he is not eligible for a conditional discharge. As well, given the Defendant’s career

and the fact this happened at his place of work I find it is contrary to the public interest to hide his record from those who would have concerns.

[33] The offence of assault that Mr. Donovan has been convicted of is serious because of the circumstances in which it occurred. The maximum penalty is six months in jail. "The purpose of sentencing is to protect the public from criminal conduct. In formulating a sentence, the court must concern itself with deterrence, both [specific] and general...[the former] to deter the present offender from any such future activity and general, to deter others" *R. v. Butler*, [1998] N.S.J. No. 56).

[34] Judges should not allow pure emotion caused by moral indignation to result in overly severe sentences for any type of offence.

[35] When dealing with specific deterrence the court is concerned with whether or not the defendant would commit further offences. Mr. Brogan says "whatever happened here was an aberration", "whatever happened that day wasn't him". Some of the letters of support say this is "out of character" and others say they have never witnessed any violence or aggression by the Defendant.

[36] What happened is Mr. Donovan slapped Paulette Nicholson in the side of the head. He continues to deny he did it. "...The mystery shrouding the motivation for [this assault] leaves unanswered the question of whether the Defendant is capable of perpetrating such violence again" *R. v. Tarr,* [2009] N.S.J., No. 25.

[37] This assault was not planned or premeditated. Based on the evidence, although it was deliberate, I find it was "[a] rash and terribly wrong decision" for some unknown reason, made by Mr. Donovan. Although I cannot say with certainty what Mr. Donovan may do in future, I can say that a person's past behaviour can at times be indicative of future behaviour.

[38] There is no evidence before the court that prior to this assault Mr. Donovan was violent or aggressive toward any other individual.

[39] Considerable time has elapsed between the commission of the offence and a final disposition. Mr. Donovan, to the court's knowledge, has not gotten into any further difficulties.

[40] General deterrence is concerned with "sending a message" to others that actions by a defendant will not be tolerated.

[41] In *R. v Harrison,* [1977] Carswell, B.C. 445, Chief J. Farris of the B.C.C.A. considered the above principal on an appeal by the Defendant who was sentenced for robbery times three, and received a suspended sentence with probation (plus conditions). At para 6 he stated:

> "...the question of whether there is a need to order a prison sentence as a general deterrent in a case where imprisonment is apparently not warranted for the specific deterrence of the offender before the court...
>
> ...It is my view that general deterrence is a by-product of the whole system of justice and not necessarily an aim of any particular sentence.
>
> It is the moral sense of the community which substantially achieves the objective of the prevention of crime...Prevention is achieved substantially through the educative effect of all parts of the administration of justice...Every sentence need not have as its objective the deterrence of others. The effectiveness of the principle of general deterrence...is not diminished by refusing to imprison a person who should not be imprisoned."
>
> I must be mindful of the rehabilitation of the offender.

[42] Mr. Donovan denied the assault when being interviewed by police, at trial and in his comments to me and comments made to the probation officer. He did apologize to Paulette Nicholson's sisters "for all they have gone through" but Mr. Donovan is not remorseful because in his words "If I had done it, I would have remorse".

[43] Mr. Donovan's apology to Paulette Nicholson's sisters is sufficient to "suggest that the objectives of rehabilitation, reparation and promotion of responsibility can be achieved...". Effective rehabilitation is underpinned by an acknowledgement of responsibility and an appreciation of harm caused." *R. v Lee*, 2011 N.S.P.C. 81 para 83).

[44] Mr. Brogan argued that I should impose a condition for counselling because it would be good for Mr. Donovan's rehabilitation and insight. Some would argue that "leniency is not justified where an offender resolutely denies responsibility even though such a denial does not constitute an aggravating factor" *R v Lee,* (supra), at para 43).

[45] Ms. Paulette Nicholson, a resident of Braemar Home was slapped in the side of the head by Mr. Donovan. She was dependant on him and others for all the necessities of life; he was in a position of trust. Fortunately there is no evidence of any lasting injury, nor did Paulette Nicholson receive any medical treatment.

[46] *R. v Foubert,* [2009] O.J. No. 5024 has two similarities to the case at bar: (1) the Defendant was in a position of trust (and) (2) the Defendant was charged with assaulting the residents, at para 31:

> ...[caregivers]...must deal with those entrusted to their care in the utmost good faith...AND within the bounds of the law.
>
> "Parliament has set forth certain principles of sentencing which the court must be mindful of when formulating a sentence. They are: an offender must not be deprived of liberty if less restrictive sanctions can be appropriate in the circumstances and all available sanctions, other than imprisonment that are reasonable in the circumstances should be considered for all offenders. The law recognizes we should separate the violent and dangerous offenders. In all other cases we must look at the offender and the offence before we impose a period of incarceration. [*R. v. Butler*, [1998] N.S.J. No. 56].

[47] I am mindful of the reasons why the Crown is seeking incarceration. I am also mindful of the feelings of Paulette Nicholson's sister and Paulette Nicholson's reaction to the assault (since she cannot tell us). Harm has been done,

but I do not think it is irreparable. I do not think it is necessary to send Mr. Donovan to jail to hold him accountable and this in no way minimizes the Defendant's actions. This is a first offence of this nature. There are other options available to the court which will comply with all the principles of sentencing, including general deterrence, which sets forth the seriousness of the offence.

[48] There is no evidence that this type of offence is prevalent in the area and that is "must be deterred to bring it under control". Save and accept the impaired charge Mr. Donovan has been a productive citizen, well accepted in his community. "Sufficient deterrence should arise from the Defendant's apprehension, arrest, trial and the public disgrace and jeopardy they occasion". Rehabilitation of the offender, where achievable, is key to public protection.

[49] Therefore, based on all of the circumstances before the court I will suspend the passing of sentence and place the defendant on probation for eighteen months.

Dated at Sydney, Nova Scotia this 26th day of September, A.D. 2013.

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Jean M. Whalen, J.P.C.