SUPREME COURT OF NOVA SCOTIA
Citation: R. v. W. H. A., 2011 NSSC 246

Date: 20110621
Docket: CRAT 336695
Registry: Antigonish

Between:

Her Majesty The Queen

v.

W. H. A.

SENTENCING DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Restriction on publication: Section 486.4 of the *Criminal Code*

Judge: The Honourable Justice Peter P. Rosinski.

Oral Decision: June 17, 2011, in Antigonish, Nova Scotia

Written Decision: June 21, 2011

Counsel: Catherine Ashley and Darlene Oko,
for the Provincial Crown
Coline Morrow, for the Accused

By the Court:

Background

[1] After a jury trial beginning April 26, and ending May 5, 2011, Mr. A. was found guilty of the two offences with which he had been charged:

> 1. Between the 21st day of January 2010, and the 22 day of January 2010 at or near Antigonish, Antigonish County , Nova Scotia, did commit a sexual assault on K.F. contrary to s. 271(1)(a) of the *Criminal Code*.
>
> 2. And furthermore, on the same date and place, did commit a sexual assault on K.F. contrary to s. 271(1)(a) of the *Criminal Code*.

[2] Count #1 related in evidence to a groping incident which happened in the kitchen of Mr. A.'s home on January 21; Count #2 related to an incident of "rape" which occurred in the early morning hours of January 22, 2010, in Mr. A.'s home. While I use the descriptor "rape", I do so only for convenience, and because it is understood by members of the public more readily than non-consensual sexual intercourse or similar lengthier descriptors.

[3] K.F., who was 17 years old at the time, did not report the incident to the police until January 24, 2010. On January 25, 2010, Mr. A. was arrested and has been in custody since that time. On January 27, 2010, he was sentenced to nine months custody and 18 months probation for an assault causing bodily harm contrary to s. 267(b) of the *Criminal Code* which had occurred July 1, 2008. He was denied bail on July 15, 2010.

[4] On May 5, 2011, Mr. A. was further remanded pending sentencing and a pre-sentence report was ordered. The pre-sentence report has been received by this Court. It is dated May 30, 2011.

[5] The trial was scheduled to end on May 2, 2011. As a result of the many legal issues raised during this trial, the jury did not begin its deliberations until May 5. Approximately 20 seconds after the jury rendered its verdict, Mr. A., while still present in the courtroom, completely lost control and became very violent upsetting a court table and attempting to throw a chair. It took 4 to 5 Sheriff's Deputies a significant time period to bring Mr. A. under control. At that time he

was not shackled. Mr. A. appears to be a man of approximately 6 feet in height and 230 pounds.

[6] I mention this because typically, I would personally attend in the jury room and thank the jurors for their service. As a result of that disruption, I lost the opportunity to do so. I wish at this time to thank the jurors who struggled with the delays in this case, which I know affected their personal schedules and caused them to be unable to attend to family commitments, among other things. I want them to know that I personally, and on behalf of the community of which they are part, thank them for having done their duty faithfully in this case.

[7] It is now my duty to sentence Mr. A. to a fit and just sentence. The sentence should reflect an application of the law to the circumstances of the offences and of the offender. After consideration of the facts, the jury was satisfied that Mr. A. was guilty beyond a reasonable doubt of both these offences. Juries however, do not give reasons for their decision to find an accused guilty. Therefore to sentence Mr. A. I must in some respects take the role of a juror, and decide what are the facts in this case, having observed the entire trial along with the jury.

[8] My authority for doing so is found in s. 724(2) of the *Criminal Code*:

> (2) Where the court is composed of a judge and jury, the court
>
> > (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
> >
> > (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

Circumstances of the offence

[9] The jury was satisfied that K.F. (born September * , 1992) was honest and reliable beyond a reasonable doubt in her description of the offences for which Mr. A. was convicted. While they need not have accepted all of her evidence, only her evidence was available to them to determine the facts in this case as Mr. A. did not testify, and he was the only other person present during the offences.

[10] Having had the opportunity to observe K.F.'s testimony, the manner, and the content of, her answers, her gestures, and responses to vigorous and detailed cross examination, I have no difficulty in stating that I found her to be an honest,

reliable, and therefore credible witness. I find therefore, that it is appropriate for me to conclude that the facts herein are, as found by the jury, and as testified to by K.F. and are **generally** as follows:

> K.F. lives in * y, Nova Scotia, with her mother, younger brother, and mother's boyfriend.
>
> On January 21, 2010, K.F. attended at the residence of the offender, Mr. A.. The offender is married to K.F.'s cousin, C. W.A.. At the time, K.F. was 17 years old and in grade 12. She is of slight build. On this date, K.F. had an argument with her mother, was angry, and stormed off from the family home. It was then that K.F. remembered receiving an email on Facebook from her cousin C. wherein C. told K.F. that should K.F. ever need a safe place to stay and/or someone to talk to, she could stay with C.. Accordingly, K.F. attended at C. house to ask if she could stay the night.
>
> When K.F. arrived, she was greeted at the door by Mr. A. and he invited her inside. Mr. A. was alone at the residence when K.F. arrived. K.F. proceeded to make herself something to eat. Mr. A. asked K.F. if he could have a hug. K.F. gave Mr. A. permission to hug her. While hugging her, Mr. A. pulled K.F. close to his body and thrust his pelvis against her body. K.F. described the hug as "very close, too close", and that it made her feel uncomfortable. K.F. said that the hug lasted 10 seconds and ended only when she pulled away.
>
> Mr. A. then said to K.F. "I will be checking up on you later". K.F. testified that she did not understand what Mr. A. was talking about when he said this.
>
> K.F. and Mr. A. then went downstairs in the residence to smoke a cigarette, and possibly some marijuana. While they were down there Mr. A. asked K.F. if she "got her first piece of cock before?" and told her that he got his "first piece of pussy before." K.F. did not respond to Mr. A.’s question.

Mr. A. then exposed his penis and asked K.F. if she wanted to "do oral." K.F. told him, "no" she "did not". K.F. testified that she was wearing jeans at that time and Mr. A. leaned over and tried to undo her pants. K.F. did her pants back up and physically moved herself away from him.

K.F. then testified that Mr. A. stood up in front of her, took out his penis and started masturbating. K.F. said she was in shock when Mr. A. started doing this, and that she could not understand why he was doing this.

K.F. testified that Mr. A. tried to get her to watch him as he masturbated. K.F. told Mr. A. that she did not want to. K.F. said that she repeatedly told Mr. A. "no". Eventually, Mr. A. ejaculated into a red bandana, and threw the bandana into the laundry room. K.F. testified that this incident in the basement lasted 10 - 15 minutes.

K.F. then testified that she left the residence to go home and get her overnight bag. K.F. said that it was her hope that C. would be home by the time she returned. K.F. said that at that time she was under a lot of stress and that she needed someone to talk to - in particular, her cousin C.. K.F. thought that she would be safe once C. was home.

When K.F. returned to her cousin's house, in direct examination she testified that Mr. A. was still the only one home, but in cross examination conceded she had her timeline a bit mixed up. Mr. A. then began winking at K.F., as well as licking his lips. Around suppertime, C. arrived home with the couple's three children.

K.F. testified that C. offered her supper, but that she did not want anything to eat as she did not have an appetite. When K.F. and Mr. A. were alone in the kitchen, the offender came up behind K.F. and took his hand and brushed it between her legs from her vagina all the way back to her buttocks. K.F. testified that this was not an activity that she wanted to happen and that it made her feel uncomfortable.

K.F. testified that after the children went to bed, she, C. and Mr. A. went to the basement where they consumed several joints of marijuana provided by Mr. A.. K.F. said Mr. A. was drinking Cold Shot beer, and that he offered her one, and she accepted it and drank it. While in the basement, KF, C. and Mr. A. talked

about the argument K.F. had with her mother, and K.F. said that C. and Mr. A. were being sympathetic towards her. When the three decided to go to sleep for the night, K.F. testified that she decided to sleep on the couch in the basement as she wanted some time by herself so that she could think. K.F. also testified that she wanted to be as far away from Mr. A. as possible. It was K.F.'s understanding that Mr. A. would be sleeping on the top level of the three level duplex.

K.F. testified that some time later after she went to sleep, she was woken up by Mr. A. coming down the stairs wearing only his underwear. K.F. indicated that Mr. A. said to her "I told you I would be checking on you later." K.F. said she was lying on her side, and that Mr. A. approached her and tried to remove her pajama pants. K.F. was physically holding her pants up and repeatedly said to Mr. A., "don't, I don't want to." K.F. testified that Mr. A. refused to take “no” for an answer. K.F. testified that Mr. A. was eventually successful in turning her onto her back and then removed both her underwear and her pajama pants. K.F. testified that Mr. A. pulled his underwear down, but that he did not remove them entirely.

KF testified that Mr. A. lifted up her right leg up onto the couch, and at the same time, held her left leg down. K.F. indicated that when Mr. A. lifted up her right leg, she said to him "please don't do it." K.F. said that when she uttered these words, Mr. A. put his finger to her lip and said “shush”. K.F. testified that she told Mr. A. at least 10 times "don't do this." I am satisfied that she repeatedly communicated to Mr. A. by her words and actions that she was not consenting to the sexual activity.

K.F. testified that the offender ignored her pleas and that he inserted his penis into her vagina and that he was "thrusting like really rapidly, like really hard, and it hurt." He did not use a condom. K.F. said that this incident lasted 2 - 3 minutes. When the offender was done he went upstairs. K.F. testified that she could not believe what had just happened and that she cried herself to sleep.

K.F. testified that she was really scared and uncomfortable, and that she was ashamed of herself for not doing more to avoid the situation.

K.F. testified that she went upstairs the next morning to get ready for school. While she was using the mirror in the living room putting her hair in a ponytail,

she looked back in the mirror and Mr. A. started licking his lips and winking at her. Mr. A. then took his finger and made a motion shaping the outline of her body.

K.F. said she went to school and wrote an exam which she did not pass because she was experiencing too much stress and she could not concentrate. K.F. indicated that she was unable to write the remainder of her exams at that time because she was too overwhelmed by what had happened.

K.F. testified that the incident was reported to the R.C.M.P. on Sunday, January 24, 2010. It was on this date that K.F. went to the Antigonish R.C.M.P. detachment and provided a statement to the police. K.F. advised that she brought with her to the detachment the bag of clothes that she wore to the A. household.

K.F. testified that after this statement she attended at the hospital where she was examined and underwent what she called a "rape test". In evidence K.F. identified several photographs taken by the S.A.N.E. nurses. K.F. described the bruises reflected in the photographs as "fingerprint bruises" on her upper right leg. It was K.F.'s belief that those bruises were caused by the offender when he held her leg up while he was having non-consensual intercourse with her.

[11] I keep in mind as well, s. 724(1):

In determining a sentence, a Court may accept as proved any information disclosed at the trial or at the sentence proceedings and any facts agreed on by the prosecutor and the offender.

[12] Furthermore, s. 724(3) reads:

> Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> > (a) The Court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
> >
> > (b) The party wishing to rely on a relevant fact, including a fact contained in a pre-sentence report, has the burden of proving it;
> >
> > (c) Either party may cross examine any witness called by the other party;
> >
> > (d) Subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
> >
> > (e) The prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[13] In relation to the submissions of counsel, I also have considered ss. 723 and 726.1 of the *Criminal Code*.

Circumstances of the offender

[14] Mr. A. was born July *, 1974. The pre-sentence report, in conjunction with his criminal record, are the main sources of information regarding his background and circumstances.

[15] According to the pre-sentence report, when Mr. A. was born, his mother was 14 years and his father was 24 years old. This might explain why since birth he resided with his maternal grandparents, W. and A. D. in *, Nova Scotia. He lived there until at age 13 he relocated with his mother to * in Halifax. In spite of his mother's efforts, he began to associate with a negative peer group and "quickly got into trouble with the law". By the age of 18, he had been involved in an armed robbery for which he received a three year period of custody in a Federal institution.

[16] The pre-sentence report says: "He reported, upon his release, he relocated to * for a new start." I note that his criminal record indicates he was sentenced in Halifax in January 1994 to further custody, (2 months consecutive) and was also sentenced in March 1995 to further custody (2 months consecutive) in Kingston, Ontario. It appears these sentences arose while he was in Federal custody at the Joyceville Penitentiary. By January 1998, his criminal record indicates that he is in

jail in Regina (12 months custody). While in Saskatchewan, starting in 1998, he was sentenced for a number of offences and finally on August 8, 2001, to six months custody and two years probation.

[17] The pre-sentence report records that "... he chose to leave Regina to escape gangs, drugs, alcohol issues, and noted he was an active member of a * gang".

[18] He relocated to *, Nova Scotia, in approximately 2003. It would appear shortly thereafter, he began a relationship with C. W. and six months thereafter, they relocated to Antigonish, Nova Scotia. They married in May 2006, and have three children, a set of twins aged 6, and a 3 year old.

[19] Mr. A. also has a child aged 15 who resides with her mother in *, Nova Scotia, and a child aged 9 who resides with her mother in *.

[20] At present, Mr. A. and C. A. are separated.

[21] The recent employment record of Mr. A. is set out in the pre-sentence report. It appears he has worked in the woods shearing Christmas trees on a seasonal basis and had other employment sporadically.

[22] The pre-sentence report notes that his wife confirmed "her husband often used illicit drugs such as marijuana to help calm himself. She said she believed this was a good influence on him and did help him keep calm":

> "Mr. A. describes himself as an occasional drinker. With regard to illicit drug use, Mr. A. says he smokes marijuana daily, whenever available, and will smoke it until he dies. Mr. A. admitted to past issues with crack cocaine. He reports the majority of his criminal convictions are due to his past drug abuse. Presently, Mr. A. does not consider drugs to be a concern in his life as he has ceased use of any hard drugs, and only occasionally uses alcohol. Mr. A. also noted he completed several anger management programs and substance abuse programs while in Federal custody."

[23] Sgt. Brian Rehill of the Antigonish RCMP indicated in the report that Mr. A. "is very well known to local police, and described him as a serious threat to public safety as he is a violent individual with issues related to illicit drugs". While I appreciate police contact with Mr. A. would tend to involve, and be limited to criminal investigations, Mr. A.'s criminal record does bear that statement out.

[24] Regarding his criminal record, I noted the April 13, 2004 CPIC (Federal) printout suggests Mr. A. was sentenced to 6 months custody concurrent on each of two assault charges - s. 266 of the *Criminal Code*. The JEIN (Provincial) printout of his record suggests that he was sentenced to 14 days custody concurrent on each. I therefore inquired of the Crown what is the accurate information, and the Crown confirmed by letter, June 13, 2011, that Mr. A. was sentenced to 6 months custody concurrent on each assault charge (the victims being C. A. and S.J.) but because he received a pre-sentence custody credit of 166 days, he was sentenced to 14 days custody which was the maximum (180) days allowable.

[25] Mr. Greg Smith, Probation Officer, estimates that in relation to the sex offender counselling available in Federal institutions, "due to the volume of cases being processed, it is reasonable to expect assessment/treatment to take 2 to 3 years to complete from the date of referral".

[26] Mr. Smith concludes:

> Mr. W. H. A. is a 36 year old, repeat offender before the Court for two counts of sexual assault. Mr. A. has a history of committing violent offences, and has an extensive criminal history demonstrating significant disregard for Court orders. Mr. A. does not take any responsibility for the offences before the Court. The

> offender continues to re-offend including violence, breaching Court Orders, a previous sexual related conviction over the past number of years. Therefore, this writer would not consider Mr. A. suitable for a community-based disposition.

[27] In summary then, it seems to me that Mr. A. has had an unstable lifestyle since he moved to Halifax in his early teens. In Halifax, even before his first adult conviction for armed robbery and possession of a weapon and the consequent three year period of custody in a Federal institution, Mr. A. had accumulated, between 1988 and 1993, convictions for thefts, assaults with a weapon [2 charges] and an assault causing bodily harm which all resulted in periods of custody.

[28] His criminal activity has defined his life. It began with a conviction in September 1986 and continues up to today's date. In fairness, I will note that a number of his offences arising in * since 2003 have been dishonesty offences such as theft and fraud, while there were three assault, one assault causing bodily harm and an invitation to sexual touching, convictions.

[29] Rather than provide a detailed summary of his criminal record, I have his criminal record provided to me by the Crown [CPIC and Public Prosecution Service - Bail Report - JEIN Person ID 110448/FPS Number 237011C] as exhibit number 3 in this sentencing.

[30] I conclude that Mr. A.'s prospects for rehabilitation are not promising. In my view, he has shown no determined effort at rehabilitation even with the assistance of Court ordered or institutional rehabilitation programs. Not even the apparent stability of his family life in * has been sufficient to keep him from continued criminal activity. I note only as it is relevant as to the absence of a mitigating factor, that he denies responsibility for the offence herein.

[31] His counsel argued at trial, and Mr. A. appears to maintain in the pre-sentence report, that the acts constituting the sexual assaults herein, were consensual. His counsel also characterized this as him having "misread the situation". In relation to these suggestions that he has some level of remorse, I find this assertion is without merit. His opportunity to put forward that position was at the trial. I have no evidence that he "misread the situation". I found that there was no air of reality to the suggested "honest but mistaken belief in consent", and therefore the jury did not have to consider it.

Sentencing principles

[32] There are no minimum sentences for the sexual assaults in this case. The maximum sentence for each count is 10 years in prison. The maximum sentence for sexual assaults, causing bodily harm, or in which a weapon / or imitation thereof was used, or threats of bodily harm are uttered, is 14 years in prison - s. 272 of the *Criminal Code*. Parliament has therefore signalled that those aggravating factors in a sexual assault are sufficient to amount to a separate offence with a significantly higher maximum punishment. In the case at Bar, no weapon or threats were used. "Bodily harm" is defined in s. 2 of the *Criminal Code*. In *R v. McCraw* [1991] 3 SCR 72, a unanimous Court held that a threat to "rape" was, in the context of s. 264.1(1)(a) of the *Criminal Code*, a threat to cause "serious bodily harm". "Bodily harm" was then defined in s. 267(2) of the *Criminal Code*, and is virtually identical to the present definition in s. 2 of the *Criminal Code*. The Court held that therefore "**serious** bodily harm" is properly interpreted as:

> ...any hurt or injury, whether physical or psychological, that interferes in a substantial way with the integrity, health or well-being of the complainant - para. 23 per Cory, J.

[33] Moreover, Cory, J. was emphatic:

> There can be no doubt that psychological harm may often be more pervasive and permanent in its effect than any physical harm. - para. 22.

[34] Therefore, “bodily harm” as defined in s. 2 of the *Criminal Code* includes psychological harm.

[35] “Bodily harm” is defined as:

> Means any hurt or injury to a person that interferes with the health or comfort of the person, and that is more than merely transient or trifling in nature.

[36] The upshot of all this is that if “psychological harm” that meets the definition of “bodily harm” in s. 2 of the *Criminal Code* can be proved beyond a reasonable doubt in a given sexual assault case, then that offender will have committed a sexual assault causing “bodily harm” and be subject to a maximum 14 years in prison rather than the maximum 10 years in prison for a simple sexual assault.

[37] In relation to an offence which only has a maximum, one is pressed to consider - when is the maximum sentence appropriate? In *R. v. LM* 2008 SCC 31

[2008] 2 SCR 163, the Supreme Court of Canada answered this question. At para. 18, the Court stated:

> This individualized sentencing process is part of a system in which Parliament has established a very broad range of sentences that can in some cases extend from a suspended sentence to life imprisonment. The Criminal Code provides for a maximum sentence for each offence. However, it seems that the maximum sentence is not always imposed where it could or should be, as judges are influenced by an idea or viewpoint to the effect that maximum sentences should be reserved for the worst cases involving the worst circumstances and the worst criminals. As can be seen in the case at bar, the influence of this notion is such that it sometimes leads judges to write horror stories that are always worse than the cases before them. As a result, maximum sentences become almost theoretical: . . ..

[38] And, at para. 22, the Court continued:

> Thus, the maximum sentence cannot be reserved for the abstract case of the worst crime committed in the worst circumstances. The trial judge's decision will continue to be dictated by the fundamental principle that a "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 of the Cr. C.). Proportionality will be achieved by means of a "complicated calculus" whose elements the trier of fact understands better than anyone. The trial judge's position in the sentencing process justifies the respect owed to the reasoned exercise of his or her discretion and a deferential approach that appellate courts should take in such matters.

[39] In the “big picture” context of criminal law, Justice Sopinka, in dissent, in *R. v. Daviault* [1994] 3 SCR 63, commented on the Court's consensus that:

> The first requirement of the principles of fundamental justice is that a blameworthy or culpable state of mind be an essential element of every criminal offence that is punishable by imprisonment. This principle reflects the fact that our criminal justice system refuses to condone the punishment of the morally innocent.
>
> . . .
>
> The second requirement of the principles of fundamental justice is that punishment must be proportionate to the moral blameworthiness of the offender.
>
> (At paras. 104 and 106)

[40] What is "moral blameworthiness"? In *R. v. Ruzic* [2001] 1 SCR 687, Justice LeBel for the Court, in discussing the defence of duress (not relevant in this case), framed the discussion as follows:

> As we will see below, this Court has recognized on a number of occasions that moral blameworthiness is an essential component of criminal liability which is protected under s.7 [of the Charter of Rights and Freedoms] as a "principle of fundamental justice". [at para. 32]

He continued:

> What underpins both these conceptions of voluntariness is the critical importance of autonomy in the attribution of criminal liability... The treatment of criminal offenders as rational, autonomous and choosing agents is a fundamental organizing principle of our criminal law. Its importance is reflected not only in the requirement that an act must be voluntary, but also in the condition that a

> wrongful act must be intentional to ground a conviction. Like voluntariness, the requirement of a guilty mind is rooted in respect for individual autonomy and free will and acknowledges the importance of those values to a free and democratic society: [Martineau, at pp. 645 to 46]. Criminal liability also depends on the capacity to choose - the ability to reason right from wrong. As McLachlin J. observed in Chaulk . . . at p. 1396, in the context of the insanity provisions of the Criminal Code, this assumption of the rationality and autonomy of human beings forms part of the essential premises of Canadian criminal law:
>
> > At the heart of our criminal law system is the cardinal assumption that human beings are rational and autonomous: . . . This is the fundamental condition upon which criminal responsibility reposes. Individuals have the capacity to reason right from wrong, and thus choose between right and wrong. Ferguson continues (at p. 140):
> >
> > > It is these dual capacities - reason and choice - which give moral justification to imposing criminal responsibility and punishment on offenders. If a person can reason right from wrong and has the ability to choose right or wrong, then attribution or responsibility and punishment is morally justified or deserved when that person consciously chooses wrong.

[41] The principles of sentencing have been codified and are set out in the following sections of the *Criminal Code*:

> 718. The fundamental purpose of sentencing is 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;

(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 acknowledgment of the harm done to victims and to the community.

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing

(i) evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor,

(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization, or

(v) evidence that the offence was a terrorism offence

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;

(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.

718.3 (4) The court or youth justice court that sentences an accused may direct that the terms of imprisonment that are imposed by the court or the youth justice court or that result from the operation of subsection 734(4) or 743.5(1) or (2) shall be served consecutively, when

(a) the accused is sentenced while under sentence for an offence, and a term of imprisonment, whether in default of payment of a fine or otherwise, is imposed;

(b) the accused is found guilty or convicted of an offence punishable with both a fine and imprisonment and both are imposed;

(c) the accused is found guilty or convicted of more than one offence, and

(i) more than one fine is imposed,

> (ii) terms of imprisonment for the respective offences are imposed, or
>
> (iii) a term of imprisonment is imposed in respect of one offence and a fine is imposed in respect of another offence; ...

[42] In *R v. Adams* 2010 NSCA 3 at para. 27, Justice Bateman stated:

> 27 In *R. v. A.T.S.*, 2004 NLCA 1, Rowe, J.A., writing for the Court, discussed these different approaches. He concluded that, where a judge gives effect to totality by first fixing the global sentence and then assigning the individual sentences to fit within the whole, s/he is more likely to pass a sentence which is problematic. As he observes, this formulation leads to confusion about the appropriate sentence for the individual convictions, had they been committed alone. It creates further difficulties where some but not all of the convictions are successfully appealed. In that instance, there is no guidance for the appellate court as to the appropriate sentence for the remaining offences. I would agree.

[43] She goes on to say:

> 23 In sentencing multiple offences, this Court has almost without exception endorsed an approach to the totality principle consistent with the methodology set out in C.A.M. ...
>
> The judge is to fix a fit sentence for each offence and determine which should be consecutive and which, if any, concurrent. The judge then takes a final look at the aggregate sentence. Only if concluding that the total exceeds what would be a just and appropriate sentence is the overall sentence reduced...

> This Court has addressed and rejected any approach that would suggest that, when sentenced for a collection of offences, the aggregate sentence may not exceed the "normal level" for the most serious of the offences.

Position of Crown

[44] The Crown submits that a sentence of six years custody is appropriate. It would accord 21 months and 16 days pre-sentence custody credit leaving a sentence of 51 months yet to be served. The Crown assumes Mr. A. would have served at least six months of his nine month sentence of January 27, 2010, resulting in a release date of July 27, 2010 - this would result in Mr. A. serving 10 months, 23 days on remand on these charges.

[45] The Crown also seeks an order under s. 109(1)(a), and a DNA Order under s. 487.051 and an Order under s. 490.012 requiring compliance with the *Sex Offender Information Registration Act*.

Position of Defence

[46] In its brief, Defence argues "a sentence of three years, with an additional amount in the six month range in light of his past criminal record, is very

significant and appropriate... A sentence in the range of three and a half years with an Order pursuant to the *Sex Offender Information Registry Act* meets all the principles sentencing".

[47] The Defence would argue for a sentence of 42 months, less 28 months pre-sentence custody credit leaving 14 months custody to be served in a Provincial institution, to be followed by a period of probation.

The Aggravating and Mitigating Factors in this case

Mitigating Factors

[48] There are no significant mitigating factors. There is no remorse here by Mr. A. which would otherwise indicate mitigation of sentence is appropriate. In his sentencing brief, Mr. A. noted that "he is remorseful that he misread the situation". These words are the palest form of genuine remorse, and worthy of very little weight in mitigation of sentence.

[49] At this point I should confirm that any references by Mr. A. that he is considering appealing the conviction (or for that matter, the sentence) is not a matter that should be included in a pre-sentence report, and I will not let those comments affect my decision in any way.

Aggravating Factors

[50] Let me firstly say that Mr. A.'s violent outburst in the courtroom after the jury had rendered its verdict also will in no way influence my decision here today. He did apologize shortly thereafter in court.

[51] Aggravating factors may generally be said to be those factors which would tend to increase the severity of the punishment otherwise appropriate.

[52] It is an aggravating factor that Mr. A. was 36 years old, and K.F. was less than 18 years old - s. 718.01 of the *Criminal Code*.

[53] Section 718.01 of the *Criminal Code* contains a statutory aggravating factor:

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[54] K.F. came to the home of Mr. A. exclusively because his wife C. A., is a cousin of K.F., and she had made it known to K.F. that if she needed a refuge in situations when she was fighting with her mother, she should consider C. A.'s home open to her.

[55] It is in that context that K.F. went to Mr. A.'s home on January 21, 2010. She was angry at her mother, and stubbornly resistant to returning home. Realistically, she had no other place to stay overnight. She had only met Mr. A. several times in the last five years before the incident. She discussed her situation with Mr. A., informing him that she could not go home, and he appeared to be sympathetic.

[56] Although Mr. A. may not have strictly been in a position of trust in this case, in the sense of an ongoing responsibility *vis-à-vis* K.F. and as referred to by the Majority in *R v. RAR* [2001] 1 SCR 163 at para. 32 and see also *R v. Powderface* (1992) 73 CCC (3d) 530 (Alta, CA), nevertheless, from K.F.'s perspective, her

expectation was that she would be safe in C. A.'s home. His actions have also created an ongoing division in the family, which he continues to blame on K.F.

[57] Mr. A. deliberately and persistently sexualized the situation between himself and K.F., before his wife C. A. returned home, and even thereafter. I find that he gave K.F. a hug and ground his pelvis into her very shortly after her arrival. Throughout the afternoon and evening he licked his lips, winked at her, made gestures with his hands, committed the groping sexual assault in the kitchen, and engaged her in conversation designed to encourage her to perform oral sex upon him while they were in the basement. Being unsuccessful in those attempts, he masturbated to ejaculation in her presence after trying to undo her pants and touch her. When she indicated she was going for a shower, he commented "I'll join you".

[58] He did all these things knowing that K.F. really had nowhere else to go. K.F. testified that in the afternoon she may have smoked marijuana with him, and certainly he did make available to her alcohol and marijuana in the evening when his wife C. A. was present, just before they all went to bed. The provision of these substances is also an aggravating factor.

[59] Not only did K.F. not have anywhere else to go, but she couldn't tell C. A., who was pregnant with Mr. A.'s child.

[60] Mr. A.'s criminal record is generally a highly aggravating factor. Significantly, he has a prior conviction for s. 152 of the *Criminal Code* offence [invitation to sexual touching - person under the age of 16 years], for which he received 2 months in jail consecutive, and 30 months probation (in conjunction with other offences) and a *Sex Offender Information Registration Act* Order.

[61] When he committed these sexual assaults, he was pending sentence on January 27, 2010 for assault causing bodily harm in which he broke the victim's jaw in two places according to the information - Exhibit No. 1. On January 21, 2010, he was on an undertaking on that charge to keep the peace and be of good behaviour and not to be in the possession of or consume any alcoholic beverages. I have severed two s. 145(3) *Criminal Code* charges (which are based on alleged breaches by Mr. A. of those conditions) from the indictment originally filed in this case - written Decision April 21, 2011. Presented with a separate indictment containing those two charges today, I will sentence Mr. A. on the one count to

which he plead guilty (i.e. having possession of alcohol and drugs) pursuant to s. 725(1)(b) of the *Criminal Code*. The maximum sentence for that offence is two years in jail. He was also on a probation order, which had to contain the statutory condition "keep the peace and be of good behaviour", from a fraud conviction and breach of probation sentencing January 20, 2009, for which he received seven months custody and 12 months probation.

[62] Since Mr. A.'s DNA was present on the crotch of K.F.'s underwear, the only reasonable conclusion is that this was from his ejaculate. The evidence was clear that he did not use a condom during the rape. Thus, not only was K.F. not given a chance to choose Mr. A. as her sexual partner, but neither was she given the opportunity to choose the sexual activity, nor the means of contraception. Thus without her consent, she was exposed to the dangers of sexually transmitted diseases and possible pregnancy - see the comments of the Court in *R v. Hutchinson* 2010 NSCA 3 per Bateman, JA, and Cory, J. in *R v. McCraw* [1991] 3 SCR 72 at paras. 29 - 32.

[63] The Victim Impact Statement of K.F. attributes in part, her decline in grades in grade 12 to this incident. She took a year off of school. She was not accepted

into the school of her choice because her marks were too low. She sought counselling, as she found herself withdrawn from her own family and friends, felt depressed, ashamed, and full of anger. As she put it: “I was always told by my family and friends that I am a good person and I believe this is true. I felt assaulted and abused. I didn’t deserve this to happen to me”.

[64] Those are the effects on K.F. as of June 2011. She is not yet 19 years of age. While one cannot be certain of the exact consequences on K.F. of Mr. A.’s treatment of her on January 21 - 22, 2010, the likelihood of significant psychological trauma is to be expected. In *R v. Saccary* (1995) 144 NSR (2d) 363 (CA), Flinn, JA. stated for the Court, in dismissing an appeal of a sentence of nine years custody for sexual assault with a weapon [rape]:

> The psychological and emotional injuries to the victim are precisely those kinds of injuries of which the Supreme Court of Canada has recently taken judicial notice. In *R v. McCraw* (1992) 66 CCC (3d) 517, Mr Justice Cory writing for a unanimous Court said at page 527:
>
> > The psychological trauma suffered by rape victims has been well documented. It involves symptoms of depression, sleeplessness, a sense of defilement, the loss of sexual desire, fear and distrust of others, strong feelings of guilt, shame and loss of self-esteem. It is a crime committed against women which has a dramatic, traumatic impact... To ignore the fact that rape frequently results in serious

> psychological harm to the victim would be a retrograde step, contrary to any concept of sensitivity in the application of the law.

[65] To similar effect, Matthews, JA. stated in *R v. PRP* (1993) 119 NSR (2d) 446 (CA):

> Rape is a particularly violent act. With deference, the fact that there was no beating or bruising, fails to take into consideration the disastrous effect this offence has, in most instances, upon the victim.

[66] Moreover, what is extremely important is that K.F. needs to realize that she should not blame herself for what happened to her. These incidents are solely Mr. A.'s responsibility. He was a mature adult, married, with a pregnant wife and children dependant on him. He violated K.F. and split a family; his own family, and K.F.'s family. Having complete freedom of choice, he deliberately decided over an extended period of time to commit these offences. The rape was not an impulsive decision, based on the evidence. His level of moral blameworthiness is very high in the circumstances of the case at Bar. K.F. bears no blame for these incidents.

The Range of Sentence

[67] In an effort to maintain some consistency among sentences for offences, Courts refer to what is the appropriate “range of sentence”.

[68] The “range” is shorthand for what are the lower and higher limits in terms of punishment that Courts historically have tended to impose for the offences in question [including some adjustment for the circumstances of the offender and offences - see the comments of Bateman, JA in *R v. Cromwell* 2005 NSCA 137 at para. 26]. I have concluded that sentences tend to hover around the three-year jail mark, for what the Alberta Court of Appeal called a “major sexual assault” in *Sandercock* supra.

[69] In this case, the Defence says six years in jail is too high and outside the range, but that 3 ½ years is within the range. The Defence cites no case that is unusually similar to the case at Bar. The Defence relies on cases whose sentences are higher than 3 ½ years. It argues that if such higher sentences were meted out in the more serious circumstances of those cases, then here a proportionately less punitive sentence is appropriate.

[70] To support its argument the Defence relies upon the following cases:

1. *R v. Blackburn* [1986] NSJ No. 317 [CA] - six years - 25 year old with a record of break and enters, plead guilty to break and enter and attempted sexual intercourse on an elderly woman / was remorseful;

2. *R v. AN* 2011 NSCA 211 - eight years jail - after trial; found guilty of sexual assaults and intercourse on his adopted and biological daughter over 10 years;

3. *R v. S* 2009 NSSC 221 - five years jail - a 68 year old man who in a historical sexual assault context, had raped his two daughters and had no criminal record;

4. *R v. Crane* (1978) 23 NSR (2d) 37 (CA) - four years - in the context of a gang rape [however, there was very little detail recorded in the decision];

5. *R v. Amero* (1978) 23 NSR (2d) 646 (CA) - four years - 17 year old offender with a criminal record, but not for violence, who "technically raped her" and used a broken pop bottle as a weapon to threaten the victim, although no bodily harm was suffered - the Defence cites this case for the notion that the Nova Scotia Court of Appeal "found that a six year sentence for

> rape is normally only imposed if there are grave aggravating circumstances. It is submitted this is still the case today".

[71] The Crown suggest that the "range" is difficult to precisely identify because the facts of the offender and offences are always so different - see also the comments of Chipman, JA in *R v. Doyle* (1991) 108 NSR (2d) 1 (CA) at para. 10. The Crown therefore suggests as an alternative to a range, a starting point for sentences from which the actual sentence in any case can be adjusted to reflect the circumstances of the offender and offences - see comments of Sopinka, J. in *R v. McDonnell* [1997] 1 SCR 948 at paras. 24 and 43.

[72] Although the Crown places some reliance on it, the three year starting point for a "major sexual assault" as defined in *R v. Sandercock* (1985) 22 CCC (3d) 79 (Alta CA) has not been expressly accepted in Nova Scotia.

[73] Notably however, the Alberta Court of Appeal intended that starting point to be applicable to offenders "of previous good character with no previous criminal record, who committed a non-premeditated sexual assault". In *Sandercock*, the offender had a prior conviction for sexual assault and a record for minor offences,

was 26 years old and had a good work record. For his sexual assault [intercourse] on a 16 year old, the Court accordingly increased his sentence to 4.5 years in jail.

[74] I've also located some cases:

1. *R v. Murray* (1986) 31 CCC(3d) 323 (NSSCAD) - sentence four years, nine months after being found guilty of a rape of an 18 year old victim - 21 year old male with an inconsequential record;

2. *R v. Fickes* (1994) 132 NSR (2d) 314 (NSCA) - a rape of short duration by an 18 year old male on the teenage girl - male had young offender record including jail and no remorse - 2.5 years in jail upheld;

3. *R v. PRP* (1993) 119 NSR (2d) 117 (NSCA) - one time rape by 29 year old uncle, a 15 year old female niece - historical sexual assault - no criminal record - pled guilty upon complaint and

charge being laid - $10,000 fine and probation varied by the Court of Appeal to 9 months jail;

4. *R v. Marshall* 2008 NSSC 132 - 3 years jail - 39 year old with a criminal record including mischief, uttering threats, flight from police, and escaping lawful custody, had sexual intercourse with a 20 year old female who he encouraged to drink alcohol to excess. When she passed out, he had sexual intercourse with her. He was found guilty by a jury.

[75] In summary, it is very difficult to set out the "range of sentences" that would be appropriate in a case of similar offences and a similar offender, due to the great differences that make up the facts of each case. Determining a fit sentence is a "complicated calculus" and should not be seen as a simple numbers game. Nevertheless, in the category of sexual assault, previously known as a "rape", it does appear to be the case that, in the absence of exceptional circumstances, an offender with no significant criminal record, who has committed a non-premeditated rape, will receive a sentence around three years in jail.

Conclusion on Appropriate Sentence

[76] In the case at Bar, the aggravating factors are many and completely overwhelm any arguable mitigating factors. The most prominent aggravating factors are: Mr. A.'s prior criminal record; his level of persistence at sexualizing the atmosphere, which is suggestive of pre-meditation; the young age and vulnerability of K.F. who was seeking a place of refuge; Mr. A.'s giving of alcohol and marijuana to K.F.; and the nature and gravity of these offences and their consequences.

[77] It is the responsibility of this Court to impose sentences that respect the principles of sentencing in the context of the circumstances of the offences and the offender. In this case, denunciation and deterrence, specific and general, are paramount. By the sentence I will impose, I am expressing our society's collective condemnation of what happened to K.F. in this case.

[78] Given those aggravating factors, I find that an appropriate sentence for the sexual assault I have referred to as "rape", is five years in jail, with three months in jail consecutive for the groping incident in the kitchen and three months

consecutive for the breach of undertaking. As required, to respect the principle of totality such that a combined sentence is not unduly harsh after having separately assessed the proper sentences for each offence, I turn to examine the totality of the separately assigned sentences and adjust them to a five year sentence in total in accordance with the instruction of Bateman, JA as set out in *R v. Adams* 2010 NSCA 42 at paras. 19 - 30 and 65 - 69.

Credit for Pre-sentence Remand

[79] Mr. A. was in custody from January 25 to June 17, 2011. On January 27, 2010, he received a nine month sentence. If he served the mandatory two-thirds or six months thereof, his earliest date of release would have been July 27, 2010. This means he will have served approximately 11 more months on pre-sentence remand on these offences.

[80] Until February 22, 2010, the previous s. 719(3) of the *Criminal Code* governed pre-sentence custody credit and read:

> (1) a sentence commences when it is imposed, except where a relevant enactment otherwise provides.

> (2) any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this act does not count as part of any term of imprisonment imposed on the person.
>
> (3) in determining the sentence to be imposed on a person convicted of an offence, the court may take into account any time spent in custody by the person as a result of the offence.
>
> (4) notwithstanding subsection (1), a term of imprisonment, whether imposed by a trial court or the court appeal to, commences or shall be deemed to be resumed, as the case may be, on the day on which the convicted person is arrested and taken into custody under the sentence.

[81] After February 22, 2010, as a result of Bill C-25, known as the "*Truth In Sentencing Act*", those same sections of s. 719 read as follows:

> [1] a sentence commences when it is imposed, except where a relevant enactment otherwise provides.
>
> [2] any time during which a convicted persons unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this act does not count as part of any term of imprisonment imposed on the person.
>
> [3] in determining the sentence to be imposed on a person convicted of an offence, the court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
>
> [3.1] despite subsection (3), if the circumstances justify it, the maximum is 1 ½ days for each day spent in custody unless the reason for detaining the person in

> custody was stated in the record under subsection 515[9.1] or the person was detained in custody under subsection 524[4] or [8].
>
> [3.2] the court shall give reasons for any credit granted and shall cause those reasons to be stated in the record.
>
> [3.3] the court shall cause to be stated in the record and on the warrant of committal the offence, the amount of time spent in custody, the term of imprisonment that would have been imposed before any credit was granted, the amount of time credited, if any, and the sentence imposed.
>
> [3.4] failure to comply with subsection (3.2) or (3.3) does not affect the validity of the sentence imposed by the court.

[82] In *R v. A.N.* 2011 NSCA 21 Fichaud, JA stated:

> Though 2 for 1 credit has been the norm, there is no strict formula and the calculation of credit for remand is a matter of judicial discretion... But, as the Crown acknowledges, a judge who departs from the practice should give reasons to explain the departure... - para. 41

[83] The rationale for enhanced credit greater than 1 for 1 credit is captured by Duncan, J. at para. 57 in *R v. Belisle-Taylor* 2011 NSSC 159:

> Prior to the implementation of now section 719(3) of the Code, which creates a presumptive credit of no more than 1 to 1, it was a generally accepted starting point that an offender would get the benefit of a 2 to 1 credit. Typically this was seen as an appropriate response to the following conditions for remanded prisoners:

> i) little or no access to rehabilitative programming;
>
> ii) substantial periods of lockdown for 22 to 23 1/2 hours per day;
>
> iii) more crowded housing conditions;
>
> iv) no credit of remand time is applicable to parole eligibility calculations.

[84] Although the new s. 719(3.1) does appear to restrict the discretion of sentencing judges, some courts have interpreted the words "if the circumstances justify it" as including the loss of remission and delayed parole eligibility which would in turn justify a credit enhancement beyond the maximum of 1:1. Therefore on a proper reading of the amendments, they argue that the s. 719 credit provisions were intended to compensate only for these **quantitative** considerations. Claims of **qualitative** deprivation or onerousness related to the condition of pre-sentence custody, were to be addressed as part of the mitigating considerations. Therefore, for situations where the common law has long recognized enhanced credit disqualification, a ratio in excess of 1:1, and ordinarily 1.5 to 1, was fair and appropriate in every remand offender sentencing case warranting compensation for the loss of remission. As stated by Judge Green in *R v. Johnson* 2011 ONCJ 77 at para. 189:

> The Court of Appeal's recent re-affirmation in Monje of the continuing "reality" of pre-trial detention leads me to conclude that pre-sentence custodial hardship remains a proper consideration on sentencing. Wed to the reasoning in Nasogaluak, I am of the view that a claim of arduous or oppressive remand conditions, if judicially acknowledged, forms part of the mix of mitigating and aggravating factors that contribute to the crafting of a fit sentence rather than a component of any extra-mural compensatory credit regime.

[85] In the case at Bar, Mr. A. has been in custody in the Antigonish Correctional Facility since his arrest. He has therefore been a short distance from his family and home. I have heard from Captain Stephen MacDonald, Acting Deputy of the Antigonish Correctional Facility. Based on his testimony, I do not believe there are any significant periods of lockdown at that jail. Moreover, the housing conditions are generally not over crowded, although there has been little or no access to rehabilitative programs until recently. Certainly there is no credit given for remand time in parole eligibility calculations. In general, the remand prisoners have much the same existence as do the sentenced prisoners.

[86] Ultimately, I need not express my opinion on the reasoning in the *Johnson* case regarding those amendments. However, given their effect and that these offences occurred before February 22, 2010, I am inclined to see the amendments as substantive rather than procedural, and therefore they could be seen to be an

aspect of the "punishment for the offence" as referred to in s. 11(i) of the *Charter of Rights*, and therefore Mr. A. should be given the benefit of the lesser punishment, that being the pre-February 22, 2010 s. 719 *Criminal Code* provisions.

[87] I will assess a 1.5 day for every one day on remand credit in Mr. A.'s case. Therefore, his 11 months custody are the equivalent of 16.5 months already served. His six months sentence served as if "on remand" will be credited on a 1:1 ratio since it was a sentence simultaneously being served. That will count as a further six months. Deducting 22.5 months from his 60 month sentence leaves 37.5 months of sentence left to be served as of today's date.

[88] The sentence break down on the warrant of committal will therefore be:

> 37.5 months jail on the "rape"; and 3 months concurrent on the "groping" incident and 3 months concurrent on the breach of undertaking.

[89] I have made a miscalculation in the oral outline of my decision rendered June 17, 2011 as shown in the preceding sentences. I will now explain that

miscalculation. The Crown argues that Mr. A. should receive the following credits:

- January 25 - July 27, 2010 - no credit since Mr. A. was serving a sentence (save for January 25 and 26).

- July 28, 2010 to June 17, 2011 - 2:1 credit for each day on remand;

[90] Therefore for those 11 months (10 months and 16 days) the Crown argues the credit should be in total - 22 months.

[91] The Defence has argued that Mr. A. should get 2:1 credit for the entire time period of January 25, 2010 to June 17, 2011 because effectively he was “on remand” the entire time, even though serving a sentence for 6 of the 9 months of his January 27, 2010 sentence. The Defence argued he should receive 28 months credit in total.

[92] At the hearing in my oral summary of this Decision, I suggested Mr. A. should receive:

- For January 27 to July 27, 2010 - 6 months credit at a 1:1 credit (the Crown had suggested 2:1 credit for the 3 months of that 9 month sentence giving a 6 month credit. I confused their calculation with my intended calculation);

- For July 28, 2010 to June 17, 2011 - 11 months at a 1.5:1 credit or 16.5 months;

- Total is 22.5 months credit.

[93] I was mistaken in giving any credit for the time served under sentence, while also on remand - i.e. January 27 - July 27, 2010. Such sentences served should receive zero credit when they overlap with remand pre-sentence custody.

[94] Had I correctly stated my intention, Mr. A. would have received only 16.5 months credit and not 22.5 months.

[95] However, I will not resile from what I said in my oral Decision summary, which was that I was factoring in Mr. A.'s favour a 22.5 month pre-sentence custody credit, leaving 37.5 months of sentence to serve - see *R v. Thompson* 2010 ONCA 463 as to when a judge can give supplementary reasons as opposed to being *functus officio* - at paras. 19 - 25.

[96] The Warrant of Committal also reflects that only 37.5 months are left to be served, and I intend to leave the endorsements as they are.

Other Orders Consequent to Convictions

[97] Pursuant to s. 109(3) of the *Criminal Code*, Mr. A. will be prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for life on the sexual assaults.

[98] Pursuant to s. 487.051 of the *Criminal Code*, I make an order in form 5.03 authorizing the taking of the number of samples of bodily substance that is reasonably required for the purpose of forensic DNA analysis from Mr. A. who has been convicted of a primary designated offence (sexual assaults) within the meaning of para. (a) of s. 487.04 of the *Criminal Code*.

[99] Pursuant to s. 490.012 and 490.013(2)(b) of the *Criminal Code*, I make an order in form 52 requiring Mr. A. to comply with the *Sex Offender Information Registration Act* for a period that ends 20 years from today's date.

Recommendations

[100] I very strongly recommend that Mr. A. be given the opportunity to, and actually, take part in, the full range of sexual offender assessment treatment and maintenance options available in Federal custody, and thereafter if he is on conditional release.

[101] I should add that I would expect Mr. A. to not be permitted to have any contact, directly or indirectly with K.F. or her mother while he is under sentence.

J.