SUPREME COURT OF NOVA SCOTIA
Citation: *R v. K.M.*, 2020 NSSC 278

Date: 20200703
Docket: Syd. No. 483534
Registry: Sydney

Between:

Her Majesty the Queen

v.

K.M.

Defendant

Restriction on Publication: 486.4

LIBRARY HEADING

Judge:	The Honourable Justice Patrick J. Murray
Heard:	June 26 and July 2, 2020, in Sydney, Nova Scotia
Oral Sentencing Decision:	July 3, 2020
Subject:	Criminal Law - Sentencing
Summary:	Accused found guilty with sexual assault contrary to s. 271. Facts involving level of aggression and physical violence. Complainant 15 years old at the time of offence and unknown to the Defendant prior to the date of the assault. Crown sought a period of incarceration of 7 - 8 years relying on the Supreme Court of Canada case, ***R v. Friesen***. Defence sought a period of incarceration of 6 months, plus the 14 months the Accused remained on remand, plus 2 years of probation. Defence sought credit for the Accused being incarcerated through Covid-19. Crown argued the Accused should not receive any credit for being incarcerated through the Covid-19 pandemic.

Result:	Court sentenced Mr. M. to 5 years federal custody. Mr. M. received 14.72 months credit for remand time he served. Mr. M. also received 60 days credit for being incarcerated during Covid-19. Balance of sentence to be served was 3 years and 7 months and 8 days.
Caselaw:	***R v. Friesen***, 2020 SCC 9; ***R v. F.H.***, 2015 NSSC 43; ***R v. Lemoine***, 2014 NSPC 49; ***R v. Woodward***, 2011 ONCA 610; ***R v. J. J. W.***, 2012 NSCA 96; ***R v. Rancourt***, 2017 NSSC 158; ***R v. Burton***, 2017 NSSC 181; ***R v. Kasokeo***, 2009 SKCA 48; ***R v. Arcand***, 2010 ABCA 363; ***R v. Olawale***, 2013 ONSC 4458; ***R v. Menicoche***, 2016 YKCA 7; ***R v. W.H.A.***, 2011 NSSC 246 ***R v. Kleykens***, 2020 NSCA 49; ***R v. Leclair***, 2020 ONCJ 260; ***R v. M.W.***, 2020 ONSC 3513.

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Counsel:	Glenn Gouthro for the Crown Darlene McRury, for K.M.

Section 486.4 - Order restricting publication — sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16

and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the Criminal Code, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

Child pornography

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

Limitation

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.

By the Court (Orally):

Introduction

[1] The facts as set out in the Crown's brief (Part II) reflect my findings on the evidence at trial. I accept these for the purpose of this sentencing hearing. The Accused was convicted of sexual assault contrary to section 271 of the *Criminal Code*. The offence took place on March 31, 2018.

[2] The circumstances of this sexual assault were particularly aggravated. It was an aggressive and violent sexual assault. There was an evident power imbalance, as discussed in ***R v. Friesen***, 2020 SCC 9. The victim was 15 years old. The older and stronger offender, Mr. M. flung the Complainant down on a mattress. Her arm and her head struck the hardwood floor, stunning her and causing her to lose her breath. There was a struggle with her clothing. The offender kneeled on her. She attempted to refuse and pleaded. He ordered her to be quiet, in an aggressive voice and in a threatening manner.

[3] The level of invasion of the Complainant's bodily integrity was full, involving penetration. Again, in ***Friesen***, the Supreme Court of Canada spoke of the vulnerability of girls and young women, as well as the inherent wrongfulness of sexual violence, being an invasion of the victim's bodily integrity. This assault was clearly an affront on M.W.'s personal autonomy and dignity.

[4] The Supreme Court of Canada has clearly said (most recently in ***Friesen*)** that intentionally applying force to a child carries a high degree of moral blameworthiness due to children's inherent vulnerability. Further, they stated that physical sexual assault is a form of psychological violence, and this must be recognized in assessing the gravity of the offence. The Court spoke of the harmfulness of these offences to children. As well as actual harm, the courts must recognize the potential harm that flows from such offences. The long term harms caused by sexual violence illustrate the seriousness of these offences.

[5] ***Friesen*** indicates that sexual offences against children should generally be treated more severely then sexual offences against adults. The Court must consider an upward departure from prior precedents, given the contemporary understanding of the harm caused by sexual violence against children, and given Parliament's intent in increasing the maximum sentences for such crimes, including sexual assault. The maximum penalty for sexual assault contrary to s. 271 is now fourteen (14) years. The sentencing court must, of course, consider any relevant aggravating or mitigating factors arising from the conduct or personal circumstances of the offender.

[6] The Crown's recommendation of 7 to 8 years represents an upward departure from the precedents it provided.

The Offence - s. 271

[7] Mr. M. committed a sexual assault on M.W., who was 15 years old, and who he had just met through a mutual friend. He asked her to join him upstairs, telling her he had a question for her. M.W. went reluctantly, thinking it concerned a person she knew. Once they were upstairs and seated on the couch, Mr. M. became aggressive and began kissing her. She tried to rebuff him, and then he told her he was going to "fuck her", to use his own words. He threw her down on the mattress, and kneeled on her shins. When thrown down she hit her head on the wood floor, and her right elbow between the mattress and the couch. The resulting marks or bruises were visible in photographs that were in evidence. There was a struggle with her clothes, as M.W. tried to keep them up, and the offender pulled them down. Mr. M. then penetrated M.W., while telling her aggressively to stay quiet. M.W. stated that she was terrified throughout.

The Offender

[8] Mr. M. is now 21 years of age. He has an adult criminal record, since this offence, and a youth criminal record. He has been incarcerated for the past 9 months or so on these charges.

[9] Mr. M. had some difficulties growing up. He was under psychiatric counselling (at IWK) for a time between the ages of 15 and 19 years. The presentence report indicates the purpose of this was to deal with his mental health, impulsivity, as well as addiction. Mr. M. has a history of substance abuse, beginning at an early age, with marijuana at 12 and alcohol at 13. This escalated to more serious drugs at 16 years. In his late teens he had been drinking daily and taking pills without treatment.

[10] Sgt. Baker stated that K.M. has a history of committing violent acts, while subject to court-imposed conditions. According to the presentence report, he reported to his Probation Officer in an acceptable manner, when under supervision in the community.

[11] In the pre-sentence report, Patricia Bates MacDonald stated quite clearly, that Mr. M. will need to take his substance abuse disorder very seriously to put his life in order. He needs consistent mental health and addiction support.

[12] Mr. M. has also been diagnosed with ADHD from an early age. He has had few positive experiences in his life. He has stated his impulsivity tends to cause trouble for him.

[13] Mr. M. adamantly denies responsibility for this offence, as is his right.

Positions of Crown and Defence

[14] The Crown submits that the principles of denunciation, general and specific deterrence, and the need to separate offenders from society must take precedence over the other recognized objectives of sentencing in s. 718 of the *Criminal Code* in this case. The Crown refers to s. 718.01, which makes the objectives of denunciation and deterrence the primary consideration when sentencing a person for abuse of a person under the age of eighteen years. As well, under

s. 718.2(ii.1), evidence that the offender abused a victim under the age of 18 is an aggravating factor, and under s. 718.2(iii.1) evidence of a significant impact on the victim considering their age or other personal circumstances, including their health and financial situation is also an aggravating factor. Overall, the Crown points to the following aggravating factors:

1. The fact that the victim was a 15-year-old child and K.M. was an adult.
2. This was a serious sexual assault involving unwanted touching; serious physical violence in addition to the violent sexual act itself; and non-consensual, unprotected sexual intercourse which violated the physical and psychological integrity of the victim.
3. The degrading act of masturbating and ejaculating on M.W.'s body after K.M. stopped the vaginal intercourse.
4. The violent and threatening comments ordering M.W. to be quiet while K.M. was sexually assaulting her.
5. The fact that K.M. planned this sexual assault and carried it out after telling an obviously terrified M.W. what he was going to do to her.
6. The fact that K.M. was a stranger to M.W., they only having met each other for 10-20 minutes before K.M. sexually assaulted M.W.
7. The significant physical, psychological and social impact of K.M.'s actions on M.W.
8. K.M. has a lengthy adult and youth criminal record and was on probation at the time of this offence.

[15] The Defence submits that K.M. is a young man of 21 who has spent most of the last three years incarcerated. He has a hyperactivity disorder that affects his ability to concentrate and causes him to act impulsively. The Defence says he has a proven ability to be a good worker to learn and apply skills, when he can properly channel his energy. The Defence emphasizes rehabilitation, along with denunciation and deterrence. The Defence says the offender risks being institutionalized should he be sentenced to a further significant period of custody, and claims that serving a sentence for sexual assault would make him a target in prison. The Defence submits that given the accumulated remand credit, a term of custody in the range of 6 months, plus 24 months' probation, is an appropriate sentence.

[16] The Defence further submits this case is far removed from the exploitation of young children by older adults, which was "at the heart" of ***Friesen***. Further the Defence argues that ***Friesen*** maintains the proportionality principle, requiring "just and appropriate sentences and nothing more". Consequently, the mitigating qualities which favour Mr. M. ought to be considered in his ultimate sentence. These include his strong family support and work ethic. (See paragraph 91 of ***Friesen***)

[17] The Defence also argues that the level of violence here is not comparable to those cases submitted by the Crown, referring to evidence at trial that nothing appeared to be abnormal.

Sentencing principles

[18] The following sentencing principles were set out in ***R v. F.H.***, 2015 NSSC 43:

> [60] The underlying consideration for the Court is set out in section 718.1 of the *Criminal Code* which is referred to as the fundamental principle of sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In plain words, it must be a fit and proper sentence. In determining that, I must look at and consider the fundamental purpose of sentencing and the objectives which are also set out in the *Criminal Code*. There are six of them. Section 718 of the *Code* reads:
>
> 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.
>
> …
>
> [62] There are additional considerations and those considerations involve aggravating and mitigating factors. A sentence should be increased or reduced to account for aggravating or mitigating circumstances relating to the offence or to the offender. Also, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. There are others which I will not refer to verbatim, but one of those reflects a consideration that incarceration and deprivation of liberty would be a last resort.
>
> [63] The case law has clearly stated through the years that the objectives of denunciation and deterrence should be a primary consideration when the victims are children. As such, a sentence must properly reflect the moral blameworthiness of the particular offender. Denunciation requires that a sentence should communicate society's condemnation of the offender's conduct. Deterrence is another objective and it refers to a sentence that will specifically deter the offender from committing further offences as well as deter other like-minded individuals from offending.
>
> [64] These objectives are particularly relevant here.
>
> [65] These, however, are not the only objectives. For example, rehabilitation is an important factor in establishing any sentence and is of particular importance when dealing with young people and first offenders. …
>
> [66] There is, as well, the need to account for individual circumstances. I am not intending to this as an exhaustive list but have referred to those which may apply here.

> [67] I had earlier referred to the term, 'moral blameworthiness'. I will take a brief moment to explain what that means. Essentially it has to do with choosing right from wrong. I refer to the decision of Rosinski, J. at para 12 in ***R. v. Morine***, 2011 N.S.S.C. 46, who in turn referred to the Supreme Court of Canada in ***R. v. Ruzic***, [2001] 1 S.C.R. 687, referring to ***R. v. Chaulk***, [1990] 3 S.C.R. 1303.
>
> > 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.

[19] I have considered the relevant sentencing provisions of the *Criminal Code* as contained in ss. 718, 718.01, 718.1, and 718.2.

Analysis

[20] This was a terrifying ordeal for the victim M.W. This was evident in the reading of the Victim Impact Statement by the victim's mother on her behalf. This incident has had a profound impact on her. Her appearance in Court to give evidence was extremely traumatic for her. She stated that her teenage years were taken from her, that she has night terrors several times per week and never feels safe, wanting her parents around her at all times. She has been diagnosed with post traumatic stress disorder (PTSD) for which multiple medications prescribed for her have been ineffective.

[21] Section 718.1 states in these circumstances the Court must emphasize or give primary consideration to objectives of denunciation and deterrence in regard to the conduct that forms the basis of the offence.

[22] The Court has already addressed the considerations mandated in ***Friesen***, to some degree. The sentences in the cases put forward by the Crown, range from 4.5 years (***R v. Lemoine***, 2014 NSPC 49) for a similar offence to 6 years in ***Friesen***, involving a 4-year old child where unspeakable harms were inflicted. The third case, ***R v. Woodward***, 2011 ONCA 610, involved a 12 year old victim, with oral sex and vaginal intercourse. The accused was age 30 but pretended to between 18 and 20 years old. In that case the court also described the predominant sentencing considerations as denunciation and deterrence, noting the need to separate such offenders from society and the protection of children from the life-altering consequences that can flow from such offences. The sentence was 5 years imprisonment for sexual assault.

[23] In ***Woodward***, the court stated that the "typical range of sentence for similar conduct should be mid to upper level single digit penitentiary sentence". That was a decision of the Ontario Court of Appeal given in 2011. In ***Friesen***, the SCC did not set a starting point or a particular sentencing range, preferring to leave this to the provincial appellate courts.

[24] In Nova Scotia, a starting point approach has not been adopted. Rather the focus remains on the principles of sentencing. Each case must be decided on its own facts having regard to the circumstances of the offence and the offender, while properly applying the

principles of sentencing (see ***R v. F.H.***). In ***Lemoine*** the Honourable Judge Theodore Tax made reference to the "fairly wide range of sentence for a sexual assault". Referring to ***R v. J. J. W.***, 2012 NSCA 96, he stated:

> [45] In my view, the cases provided by counsel would indicate a fairly wide range of sentence for a sexual assault committed by a similar offender in similar circumstances. Recently, in **R. v. J.J.W.**, 2012 NSCA 96, a case which involved a serious sexual assault on the offender's spouse, our Court of Appeal declined to order a three-year "starting point" sentence for a serious sexual assault. The Court observed that several other provincial Courts of Appeal [Alberta, Saskatchewan and Newfoundland and Labrador] have adopted that three-year "starting point" for a serious sexual assault involving non-consensual vaginal intercourse which may be increased or decreased depending on the circumstances of the offender. However, the Nova Scotia Court of Appeal concluded that the trial Judge's analysis should be individualized and remain focused on the principles of sentencing set out in the **Criminal Code** by the Supreme Court of Canada.

Caselaw submitted by the Defence

[25] The Defence relies on several cases. In ***R v. Rancourt***, 2017 NSSC 158, the offender pleaded guilty to sexual assault arising from several incidents of sexual intercourse with the victim, aged 15. The accused had no previous record and was sentenced to two years' custody and two years' probation.

[26] In ***R v. Burton***, 2017 NSSC 181, the accused sexually assaulted RP while she was sleeping and under the influence of sleeping pills. RP woke to find the accused had removed her clothing, had propped her up and was having unprotected vaginal intercourse with her. The accused was sentenced to a two-year federal sentence and three years' probation.

[27] In ***R v. Kasokeo***, 2009 SKCA 48, the female complainant felt intoxicated at a house party, lay down on a bed, and fell asleep. She awoke with her pants and underwear at her ankles and accused behind her engaged in sexual act with her. The 24-year old accused was sentenced to 15 months' imprisonment, increased to 30 months on appeal.

[28] In ***R v. Arcand***, 2010 ABCA 363, an 18-year-old sexually assaulted the complainant while she was unconscious. Both were intoxicated. The sentencing judge accepted the defence proposal of 90 days imprisonment, served intermittently, plus three years' probation. The sentence was varied on appeal to two years' imprisonment less a day and two years' probation.

[29] In ***R v. Olawale***, 2013 ONSC 4458, the 15-year-old victim went to a youth shelter but was unable to stay. The 29-year-old offered to take her to his home when he heard she had no place to stay, and sexually assaulted her there. The accused was sentenced to 26 months' imprisonment for sexual assault and sexual interference.

[30] In ***R v. Menicoche***, 2016 YKCA 7, the accused was 27 years old and the complainant was 15 when the accused had unprotected anal intercourse with the complainant while she was passed out. The accused did not know the complainant's age, but knew that she was under 18 years old and had been drinking before she passed out. The complainant woke up during the

assault and told him to stop, which the accused immediately did and apologized. The appeal court held that the sentence of 23 months did not properly reflect the accused's potential for rehabilitation, did not properly address the *Gladue* factors, and was not proportionate to sentences handed given to other offenders for similar offences. The appeal court reduced the sentence to 17 months.

[31] In ***R v. W.H.A.***, 2011 NSSC 246, Justice Peter Rosinski, had this to say about sentencing in sexual assault offences:

> [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.

[32] On the facts before me, K.M., does have a significant record, although not for sexual assault. This was his first offence as an adult, having turned 18, in October, 2017. The defence submits there are no violent offences but mostly property related offences. There are numerous convictions for failure to comply with court orders and breaches of probation. In addition, there was a degree of planning and pre-meditation.

[33] Having considered the cases submitted by the Defence, I find that, with the exception of ***W.H.A***. they are of limited assistance in view of the facts before me in the present case. In ***Rancourt,*** the accused entered a guilty plea and took responsibility for his actions. The sentence was a joint recommendation. In that case the victim not having to testify at trial was a significant mitigating factor.

[34] In ***Burton***, the accused and the victim were known to each other. The accused had no criminal record. The Crown sought a period of custody of three years. At sentence the accused had acknowledged his guilt and expressed remorse.

[35] In ***Arcand***, the victim was a 21 year old. The Crown sought a period of custody of 3 to 4 years, which was varied on Appeal to two years. The Court noted that the accused's age (18) was a mitigating factor and there were impulse control issues.

[36] In seeking a 7 or 8 year sentence, the Crown is adopting the instruction in ***Friesen*** that sentencing courts consider upward departure from prior precedents, particularly when sentencing for offences against children. It must be emphasized that the court also affirmed some generally applicable sentencing principles, particularly with regard to sentencing ranges serving as guides, and not hard and fast rules (paras. 36-39).

[37] The Crown submits there are no mitigating factors. While it may not be a mitigating factor in the true sense, the Accused's relative youth is a consideration on sentence. He was an adult and knew what he was doing, but there is some evidence of mental health counselling,

impulsive behaviour, ADHD, and a history of substance abuse. These are reflected in the presentence report as stated.

Disposition

[38] In this case there are many aggravating factors that warrant a lengthy term of imprisonment, in keeping with increased sentences for sexual violence involving children as set out in detail in ***Friesen***. These were physical acts of aggression meant to dominate and control. This type of violation of bodily integrity and personal dignity must be met with serious consequences if "just sanctions" is to be accorded its proper meaning.

[39] In this case the harm suffered was both physical and emotional. There was for example, the multiple bruising on her body, as well as the vaginal tearing. When thrown down, she hit her elbow and head on the hard floor, stunning her. In her victim impact statement, the victim stated, the entire process from completion of the medical kit to waiting for the results of testing related to sexually transmitted diseases and pregnancy, was gut wrenching.

[40] In addition, the court in ***Friesen*** set priorities in terms of the objectives. In these circumstances it is difficult to elevate the Accused's age as a mitigating factor to the same level as denunciation and deterrence.

[41] In ***Lemoine*** which bears some similarities to this case, the accused entered a guilty plea and had no criminal record. There are other differences in ***Lemoine*** that were aggravating. The accused had stalked the victim, there were two incidents of intercourse, continuous threats and oral sex. That said, I have been persuaded that the reasoning employed by his honour, Tax, J. is persuasive here given the youth of the accused. (See paragraph 44 of ***Lemoine***).

[42] I conclude that the sentence proposed by the Defence is insufficient to meet the need for denunciation and deterrence in this case. On the other hand the sentence should not be so crushing as to eliminate the possibility of rehabilitation for the Accused, who at the age of 21 has been incarcerated for the equivalent of 14 months, according to the Crown's calculation. Mr. M. had just reached the age of 18 years at the time of the offence. A seven or eight-year term of imprisonment would result in incarceration approaching a decade, starting from the age of 19 or 20. The offender, according to his pre-sentence report, is losing or has lost hope, feeling his life is ruined. He has told the court while proclaiming his innocence that he has made mistakes and that before he was charged with this offence his life had been starting on a better path. He stated he wants to live a healthy and sober lifestyle. That said, he committed a horrendous crime.

[43] This offence involved the use of physical force, which the victim resisted by words and actions. She was 15 and terrified. Her bodily integrity and personal dignity were overcome by the will and strength of K.M. Sexual violence of this kind calls for an emphasis on denunciation and deterrence and generally results in a lengthy term of incarceration. Even cases where there have been guilty pleas or joint recommendations have resulted in federal terms of incarceration, even without a prior criminal record.

[44] In ***Friesen*** the Court referred to the following factors in providing guidance for sentencing judges: a) likelihood to re-offend; b)abuse of trust and authority; c)duration and frequency; d) age of the victim; e) degree of physical interference; f) victim participation (See paras. 122, 125,131,134,137.)

[45] Given the Accused's record, the likelihood to re-offend is a concern. Mr. M. was not in a position of trust but given the age difference was in a position to exercise authority over her. In terms of duration and frequency, there was a single incident, but they had only just met. I have mentioned that the age of the victim and degree of physical interference are significant aggravating factors. There was no participation by the victim except her efforts to refuse, which went unheeded.

[46] I wish to add some concluding words about ***Friesen*** that will add context to my ultimate decision in this case. I offer them only because I understand this may be one of the initial cases to be decided since ***Friesen*** was decided in April, 2020. I hasten to add most respectfully that in rendering my decision I have tried to follow the direction given by Canada's highest court.

[47] My interpretation is that **Friesen** is not intended to disturb or interfere with the overarching principle of proportionality, the fundamental principle of sentencing. The "new direction" referred to by the Crown is grounded in fit and proper sentences being rendered. ***Friesen*** informs sentencing judges that they should not feel constrained by precedent and should *generally* be punishing crimes against children more severely. In addition judges are instructed to respect and adhere to Parliament's intent in raising the maximum penalty for crimes of assault involving children. Therefore an upward movement from those precedents *that did not render a proportionate* sentence is warranted. In paragraph 5 of **Friesen** the Court stated:

> 5 Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. **Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender**, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large. [Emphasis added]

[48] Read closely, ***Friesen*** serves to remind sentencing courts of the inherent wrongfulness and harmfulness of sexual offences against children when considering the gravity of the offence and the degree of responsibility of the offender, emphasizing that in both cases it is of a high degree and therefore should result in a an upward movement in sentences, where those factors may not have been previously given sufficient weight. The point is not to mandate more severe sentences in every case. It is not, and should not be, automatic. Sentencing still depends on the individual facts of each case. ***Friesen***, in my view has not set aside the principle that sentencing is a very individualized process.

[49] ***Friesen*** has provided specific guidance to sentencing judges on "increases", confirming that a victim's age is a significant aggravating factor. The Court stated that "courts must also be particularly careful to impose proportionate sentences where the victim is an adolescent." (see para. 136) I note the court's comments on sentencing objectives at paragraphs 102 -105:

> 102 The text of s. 718.01 indicates that Parliament intended to focus the attention of sentencing judges on the relative importance of sentencing objectives for cases involving the abuse of children. The words "primary consideration" in s. 718.01 prescribe a relative ordering of sentencing objectives that is absent from the general list of six objectives in s. 718(a) through (f) of the *Criminal Code* (Renaud, at § 8.8-8.9). As Kasirer J.A. reasoned in *Rayo*, the word "primary" in the English text of s. 718.01 [TRANSLATION] "evokes an ordering of the objectives ... that is ... relevant in the [judge's exercise of discretion]" (para. 103). This ordering of the sentencing objectives reflects Parliament's intention for sentences to "better reflect the seriousness of the offence" (*House of Commons Debates*, vol. 140, No. 7, 1st Sess., 38th Parl., October 13, 2004, at p. 322 (Hon. Paul Harold Macklin)). As Saunders J.A. recognized in *W. (D.R.)*, Parliament thus attempted to "re-set the approach of the criminal justice system to offences against children" by enacting s. 718.01 (para. 32).
>
> 103 Section 718.01 should not be interpreted as limiting sentencing objectives, notably separation from society, which reinforce deterrence or denunciation. The objective of separation from society is closely related to deterrence and denunciation for sexual offences against children (*Woodward*, at para. 76). When appropriate, as discussed below, separation from society can be the means to reinforce and give practical effect to deterrence and denunciation.
>
> 104 Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. Where Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority (*Rayo*, at paras. 103 and 107-8). **However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *.Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see *R. c. Bergeron*, 2013 QCCA 7 (C.A. Que.), at para. 37).** (Emphasis Added)
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> 105 Parliament's choice to prioritize denunciation and deterrence for sexual offences against children is a reasoned response to the wrongfulness of these offences and the serious harm they cause. The sentencing objective of denunciation embodies the communicative and educative role of law (*R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 (S.C.C.), at para. 102). It reflects the fact that Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values"; it "instills the basic set of communal values shared by all Canadians" (*M. (C.A.)*, at para. 81). The protection of children is one of the most basic values of Canadian society (*L. (J.-J.)*, at p. 250; *Rayo*, at para. 104). As L'Heureux-Dubé J. reasoned in *L.F.W.*, "sexual assault of a child is a crime that is abhorrent to Canadian society and society's condemnation of those who commit such offences must be communicated in the clearest of terms" (para. 31, quoting *L.F.W. (C.A.)*, at para. 117, per Cameron J.A.).

[50] Having considered the principles of sentencing, including proportionality principle and parity, the sentencing objectives under 718.01, as well as the age of the victim and the foreseeable long-term emotional impact on her, and the circumstances of the offence and the offender, I conclude that an appropriate sentence, given the gravity, the high degree of moral blameworthiness, is **a sentence of five years incarceration**.

[51] The Accused will receive credit for the time he has served on remand which now equals 294.5 days, times 1.5 which totals 441 days (14.72 months), leaving a balance of the sentence to be served at 45.28 months, or 3 years and 9 months, and 8 days remaining on his sentence.

Covid 19

[52] The Court heard evidence from Case Management Officer, Lewis MacKenzie of the North East Nova Correctional Facility where Mr. M. has been housed since March/April, 2020, having transferred from the Cape Breton Correctional Facility at his own request.

[53] Mr. MacKenzie gave evidence that programs have been reduced, since Covid 19 restrictions went into place and as well the inmates have been restricted to their units. At North East there are eight units, each with individual cells, with two beds per cell. The larger units have 40 cells, the smaller units have 20 cells. Inmates are normally housed with two inmates per cell.

[54] Each unit has its own common area and an airing room (a small outside area where inmates may get fresh air). Mr. MacKenzie further testified that due to Covid 19 inmates were not permitted to access the larger area and outdoor area where there is a basketball net and gym equipment.

[55] Mr. M. testified he arrived at North East two weeks prior to the restrictions, so he has been there for the entire pandemic period, to date. He was moved from his unit, in protective custody with other inmates convicted for sex offences to another unit with no sex offenders. He stated for his own safety he remained in his cell for 23 hours per day for about a month to a month and a half. As a result, he was able to leave his cell for one hour in the morning to shower and make a phone call.

[56] He testified when he did leave his cell, after encouragement to do so, he was assaulted and had to seek medical attention, receiving several staples to his head after being struck with a broom by other inmates.

[57] He found it very difficult, he said, to remain in his cell during this time.

[58] Mr. M. said he was enrolled to take further courses .Mr. MacKenzie stated some courses where outside persons were brought in were affected by Covid 19 (dog program, church program, AA). Other programs such as music and art were set up in each unit to assist inmates during the restrictions.

[59] Both Mr. MacKenzie and Mr. M. testified that the gym and common areas remain closed, and that personal visits have been postponed. Mr. M. said the move to the facility would not have prevented his family from visiting. Video or virtual visits have recently been instituted, but Mr. M. had not requested same. Inmates have also been given $20. per month to pay toward additional phone calls.

[60] Mr. M. confirms that basics such as food, clothing and health are still being provided and have not ceased as a result of Covid 19.

[61] In ***R v. Kleykens***, 2020 NSCA 49, Saunders, J.A. accepted that Covid 19, when viewed in light of the circumstances of the particular offence and the particular offender can be a factor in determining whether an accused should be reincarcerated to complete a sentence.

[62] The cases clearly suggest the onus is on the Accused to establish that a reduction in sentence, or appropriate credit is granted for harsh conditions. In ***R v. Leclair***, 2020 ONCJ 260, the court stated at paragraphs 95 and 104 as follows:

> 95. While also acknowledging the health of the offender and how that health might be impacted by Covid 19, the justice commented, as had been echoed in other cases including Justice Pomerance's comments in ***R v. Hearns***, 2020 ONSC 2365, that the existence of the pandemic does not justify a sentence that is drastically outside the accepted sentencing range.
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> …
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> 104. Covid 19 is a factor that the court considers in determining whether any further diminution in sentence should occur. The diminution of sentence, the Court of Appeal has directed, is a discretionary remedy of the sentencing judge that should not result in a sentence that is outside the accepted sentencing range.

[63] In this case, there is no evidence that Mr. M. suffers from any health risks that makes him susceptible. He is young and there is no evidence that he is not in good health. In addition, there are no reported cases of Covid 19 at the North East Nova Correctional Facility, which has taken steps to reduce the population. It continues to make available what programs it can institute, i.e. music and art, in place of the reduction in programs and the restriction on attending the larger common area and outdoor area where there is a basketball court and a gym area. Mr. M. stated he had enrolled in the available programs and is attempting to complete his GED.

[64] That said Mr. M. testified he was moved due to Covid 19 restrictions and that evidence is essentially uncontradicted. He stated he was moved from his unit to allow for one inmate per cell as part of the Covid 19 restrictions. It was during this time he ended up spending time in his cell alone for what he perceived were safety reasons. It appears his concerns were well founded given the incident that occurred upon him venturing out into the unit.

[65] In conclusion, although the threshold is high, I believe there is some merit in the Court making a reduction in the sentence to be served. Although it was done to lower the risk of the virus, the impact on the Accused is still a consideration. Accordingly, and exercising my

discretion, I am going to grant a credit of 2 months or 60 days to Mr. M. This will not in my view result in a sentence that is outside an acceptable range. (***R v. M.W.***, 2020 ONSC 3513)

[66] Mr. M. has been given full credit for the time he has served on remand. The evidence is that on four occasions he pled guilty to breaches of his release orders resulting in a return to incarceration.

[67] With this reduction, the Accused will have remaining on his sentence a period of 43.28 months to serve in custody or 3 years and 7 months and 8 days.

Ancillary Orders

[68] Finally, in terms of the ancillary orders that are sought, including the SOIRA Order of 20 years; the DNA Order; the s. 109 firearms prohibition, pursuant to s. 109(3); and a s. 161 Prohibition Order. The terms of the s. 161 order are not to be within 2 kilometers of any dwelling house where the victim in this case ordinarily resides (s. 161(1) (a.1)) and from having any contact including communicating by any means with the victim in this case (s. 161(1)(c)).

[69] I will impose those orders and sign them when they are presented to me.

Murray, J.