

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. Percy*, 2021 NSSC 353

**Date:** 20211221

**Docket:** *Hfx*, No. 482952

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

Matthew Albert Percy

**Sentencing Decision**

**Restriction on Publication**

*Criminal Code* 486.4:

By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the person described in this decision as the complainant may not be published, broadcasted or transmitted in any manner.

**Judge:** The Honourable Justice Christa M. Brothers

**Heard:** December 21, 2021, in Halifax, Nova Scotia

**Counsel:** Eric R. Woodburn and Carla Ball for the Crown  
Michelle James, for the Defendant

**By the Court:**

**Overview**

[1] Matthew Albert Percy was originally charged in a three-count indictment as follows:

1. that he between the 28<sup>th</sup> day of November, and the 1<sup>st</sup> day of December, 2013, at, or near Halifax, in the County of Halifax, in the Province of Nova Scotia, did in committing a sexual assault on [AB], cause bodily harm to her, contrary to Section 272(1)(c) of the *Criminal Code*.
2. AND FURTHER that he at the same time and place aforesaid, did with intent to enable himself to commit the indictable offense of sexual assault did attempt to choke by using his forearm, contrary to Section 246(a) of the *Criminal Code*.
3. AND FURTHER that he at the same time and place aforesaid, did unlawfully assault [AB], contrary to section 266 of the *Criminal Code*.

[2] At trial, Mr. Percy pleaded guilty to a charge of sexual assault pursuant to s. 271 of the *Criminal Code*.

[3] The Crown and Defence are jointly presenting a recommendation for a sentence of imprisonment of five years in a federal penitentiary consecutive to the time Mr. Percy is currently serving in relation to another sexual offence. In addition, the following ancillary orders are proposed as part of this joint submission:

- A Firearms prohibition (Section 109(3)) for life;
- DNA Order (Section 487.051);
- SOIRA Order (Section 490.011(1)(a) designates the offence of 271, and 490.013(4) indicates it is for life if a prior SOIRA was imposed. He is currently bound by a SOIRA order); and
- A Non-Communication Order with [A.B.] (Section 743.21)

[4] The Crown and Defence are both satisfied this proposed sentence is appropriate.

## Facts

[5] The facts on sentencing are as agreed to by the Defence during the taking of the plea on November 17, 2021. The defence agrees that Mr. Percy sexually assaulted A.B, who was a long-time friend of his. They met at work in 1998 and continued a close friendship until the assault which is said to have occurred between the 28th day of November, and the 1st day of December, 2013. A.B. described Mr. Percy to be a close, dear friend, and to be one of her best friends.

[6] Between the 28th day of November, and the 1st day of December, 2013, A.B. and Mr. Percy got together at her home to talk and catch up. Aside from [redacted], they were the only two in the home. A.B. had a vivid recollection of the wine, bread, and cheese Mr. Percy brought to her home that evening. He drank more than she did. She had one glass and he poured her another, but she did not drink much of it.

[7] It was a usual night, and nothing seemed out of the ordinary. A.B. described Mr. Percy as upbeat, talking and laughing, and said nothing seemed out of the ordinary. They sat on the floor of A.B.'s living room and ate, talked and had wine. He was drinking faster than she was. They chatted for about two hours. They decided to watch a movie. A.B. put a DVD on and sat on the couch next to Mr. Percy. He sat on the left side of the couch while she sat on the right. She put the movie in, and the start-up menu appeared. She did not have an opportunity to press play before Mr. Percy lunged on top of her with quite a bit of force.

[8] Mr. Percy pinned A.B. down on the couch, forced her arm down with his left elbow, and held his arm across her clavicle area, by her throat. His arm was at a 90-degree angle. She was pinned, with her head pushed into the side of the couch. She could not free herself from underneath him. A.B. tried to pull herself up but could not get up. She ripped the couch cushions trying to get from underneath him. She was struggling to breathe under his weight. Mr. Percy then pulled down A.B.'s yoga pants, unbuckled his pants, and pushed her underwear to the side, tearing it. He then penetrated her vaginally. He thrust into her for a period of time. She could not say for how long.

[9] When Mr. Percy lifted his arm, A.B. asked him "what are you doing?" He did not say anything, but hit her across the face, with an open-handed slap. It was forceful and her tooth cut into her lip. She suffered a swollen lip. He then nestled his head into her upper left arm and was "ripping" and squeezing her breast with his left hand. He then bit A.B. in her left upper arm.

[10] At the time of the assault, A.B. was 130 pounds. Mr. Percy was six feet tall and weighed over 200 pounds. He was physically much larger and stronger than she was. She could not free herself from him.

[11] Mr. Percy said nothing during this sexual assault. A.B. was afraid, trapped, and in shock. She did not want the sexual contact, and never consented to it.

[12] After the assault, A.B. had fingertip bruising on her breasts, a swollen lip, and a bite mark on her arm. She had bruising on her right upper arm, right breast, and inner thighs. The pain and bruising subsided over the course of a few days to a few weeks. Mr. Percy did not use a condom. Consequently, A.B. obtained medication to prevent pregnancy.

[13] Throughout the sexual assault, A.B. was concerned [redacted]. She had no way to get help or to stop the assault and resigned herself to the fact it was going to occur. She could not call out for fear [redacted].

[14] When the assault was over, Mr. Percy got up, did up his pants, and walked toward the door. He then turned to A.B. and said, “Don’t I get a hug goodbye?”. He said this in a flippant, sarcastic, smug manner. A.B. stared at him not knowing how to respond. He put on his coat and left.

[15] A.B. testified that her mind was racing, and that she did not know what to do or how to process what occurred. She did not tell anyone except a doctor she sought treatment from. She did not report the assault at the time. She did have a text exchange with Mr. Percy, where he said something to the effect of: “Sorry, hope you’re not mad at me”.

[16] In May or June of 2018, A.B. read a news article and decided to come forward to the Halifax Regional Police.

### **Victim Impact Statement**

[17] A.B. provided a Victim Impact Statement. Her succinct statement provides a very vivid overview of how this sexual assault has impacted her. I will not attempt to summarize the statement as I am concerned I would do so inadequately. Given its length, I will quote the statement in its entirety here.

I struggle with how to summarize this impact that night had on me. It is difficult to verbalize the extent to which it has changed me. I have trouble trusting people or opening myself up to be vulnerable. As a consequence, I have not been able to

maintain an intimate relationship with a partner. I have shut myself off to others and share very little of myself, even with friends and family. Eight years have passed and I am still no closer to being the person I was before being physically and emotionally violated. Thankfully, the physical reminders of that night have long gone. On an emotional level, however, something broke inside me that night and I don't know how to heal it. Sometimes I think it's a wound that will never heal completely. One that only falls dormant, until all the feelings rise to the surface again. Fear, sadness, anxiety, anger, betrayal: those are just some of the emotions I cycle through. I never know what will draw them to the surface and sometimes they seem to bubble up without provocation. Sleep mostly consists of nightmares in which I'm being chased or attacked and can't get away; I awake with the familiar feeling of being alone, afraid and trapped. If only I could go back in time and be the old me again. She was pretty great – she laughed easily, accepted kindness from others without question and trusted without hesitation. Instead, I will continue navigating the day to day struggle of healing, learning how I am now and becoming stronger everyday.

[18] In this Victim Impact Statement, A.B. effectively communicates the ongoing sequelae of this sexual assault. It brings into sharp focus the ongoing impact she suffers and how it has changed her as a person. A.B. has suffered physical, emotional, and psychological harm. This has had a profound impact on A.B.'s ability to have normal, trusting relationships.

### **Circumstances of the Offender - Matthew Percy**

#### **Comprehensive Forensic Sexual Behaviour Presentence Assessment**

[19] Dr. Angela Connors prepared a Comprehensive Forensic Sexual Behaviour Presentence Assessment respecting Mr. Percy on September 28, 2020. This assessment was before the Honourable Justice Joshua Arnold during a previous sentencing hearing for Mr. Percy. The Crown and defence agreed that a more up-to-date report was not required for the purpose of this sentencing hearing, and that this report should be considered in relation to this sentencing.

[20] I will not review all aspects of this report, as much of it is focused on offences other than the one for which I am sentencing Mr. Percy. However, the conclusions and recommendations of Dr. Connors are relevant, and bear repeating here:

Overall, a combination of the static and dynamic risk variables applicable to Mr. Percy suggest that while Mr. Percy's overall risk for recidivism (including violent recidivism that is nonsexual in nature) is lower, his risk for sexual reoffence specifically is higher in the moderate to moderate-high range; Risk Level IVa. As previously mentioned, Risk Level IVa reflects double the risk of the average individual convicted of sexually motivated crimes for sexual recidivism.

...

Dynamic risk indicators suggest that Mr. Percy possesses a number of criminogenic variables that remain active and could benefit from the intensity of treatment offered by CSC, in order to develop effective management of this level of risk.

...

In contrast to this evidence of excellent self-control, Mr. Percy is now known to have committed contact sexual offenses against two young women in 2014 and 2017 (representing an offense cluster given that all charges post-date the 2017 offense). Both of the offenses in 2014 and 2017 post-date an early experience of Adult diversion for having engaged in voyeuristic behaviour in 2004, previous to moving out west. Voyeuristic behaviour was once again indulged in during his 2017 sexual assault of Ms. TJ suggesting an enduring paraphilic interest. Further, Mr. Percy went past the point of achieving sexual access in both 2014 and 2017 to engage in controlling behaviours that violated consent; the 2014 offense demonstrating more physically aggressive control in comparison to the form of control utilized in 2017. Controlling behaviour beyond that required for victim compliance to sexual access is suggestive of an additional paraphilic interest.

Once Mr. Percy graduated from noncontact offending in 2004 to contact offending in 2014, there is an indication of escalation given the short time frame between 2014 and 2017 in comparison to between 2004 and 2014. The graduation to contact offending was likely facilitated by Mr. Percy gaining confidence both socially and sexually with females, such that he approached both Ms. BW and Ms. TJ when they were leaving bars in an intoxicated state, and was able to ensure that they felt at ease with him to the extent that he returned to each of their homes where the sexual offending occurred. The deliberate creation of opportunities to offend is suggestive of predatory behaviour versus that which is opportunistic in nature.

Actuarial risk assessment of Mr. Percy reveals that his risk for sexual reoffense falls in Risk Level IVa ("above average risk") which reflects double the risk of the average individual convicted of sexually motivated crimes for sexual recidivism. Dynamic variables suggest that Mr. Percy possesses a number of criminogenic variables that remain active and could benefit from treatment, in order to effectively manage risk for sexual recidivism. At this level of risk Mr. Percy is best matched to the level of intensity of treatment programming offered by CSC. Mr. Percy possesses many strengths that he can draw upon to make use of treatment and address his sexual criminogenic variables, should he be able to overcome his guardedness and fully engage in the process of introspection and change.

## RECOMMENDATIONS

1. Treatment to Address Criminogenic Need — The best match of treatment intensity to Mr. Percy's risk level is provided through CSC, to address his criminogenic needs and effectively manage his risk for sexual reoffense. Should it be appropriate to sentencing, it is recommended that this report be released to CSC to facilitate treatment planning.

2. Future Concerns — Should Mr. Percy be convicted of further sexual offenses in the future, it is recommended that all of his convictions be considered in an assessment of the applicability of the Long Term Offender legislation to Mr. Percy's circumstances (which may or may not apply).

## **Presentence Report**

[21] A presentence report dated February 14, 2019, was prepared by Probation Officer Amber McDow in relation to Mr. Percy. There is nothing noteworthy with regards to Mr. Percy's upbringing. He had a positive childhood with supportive parents and siblings. His basic needs were met, although his mother raised the boys as a single mother, so finances seemed to be tight at times. Mr. Percy experienced positive and loving relationships with both parents. He had an unremarkable childhood in that respect. Mr. Percy appears to have continued family support which speaks to his prospects of rehabilitation. He has been a model inmate in the institution as evidenced by letters from Deputy Superintendent Landry and Case Management Officer Nash.

## **Aggravating Factors**

[22] The parties agree the aggravating factors to be considered in imposing sentence include the following:

### **1 The offence was a “major” sexual assault**

[23] While all sexual assaults are inherently violent and serious, it is well established in law that forced vaginal intercourse constitutes a “major” sexual assault.

- *R v Percy*, 2019 NSPC 12, para 32;
- *R v. J.J.W.*, 2012 NSCA 96, para 32;
- *R v Arcand*, 2010 ABCA 363, para 171;
- *R v T.J.S.* 2021 NSSC 328, para 12.

### **2 A.B. was physically dominated by Mr. Percy;**

[24] The sexual assault in this case demonstrates significant violence. Mr. Percy was much bigger than A.B. in size and was very strong and fit. The violence of the assault is apparent in the following details:

- Mr. Percy lunged at A.B. unexpectedly;
- He pinned her down on the sofa;
- He used his body weight to control her movement, and she grabbed at the sewn on back sofa cushions in an unsuccessful attempt to gain leverage resulting in tearing;
- He used his forearm to press forcefully across her neck / clavicle area, which restricted her breathing and speech;
- He did not release this hold until he removed her pants, pulled her underwear to the side (causing them to rip), and thrust his penis into her vagina;
- He slapped her across the mouth when she was able to ask, “what are you doing?”, resulting in a cut and swollen lip;
- He bit her upper arm while he was penetrating her; and,
- He squeezed her breast ‘really hard’, “ripping” at her breasts.

[25] Sexual assaults are inherently violent:

- *R v Goldfinch*, 2019 SCC 38, para 37;
- *R v McCraw*, [1991] 3 S.C.R. 72, at para 83;
- *R v Simpson*, 2017 NSPC 25, at para 46; and,
- *R v G.(T.V.)*, (1994) 133 N.S.R. (2d) 299(S.C.).

[26] The presence of other physical violence beyond the assault itself is aggravating:

- *R v C. (S.C.)* 2004 NSPC 41, paras 30-33 (while factually this case relates to a child, the legal principles are applicable);
- *R v Arcand, supra*, paras 270-272; and,
- *R v T.J.S. supra*, para 17.

### **3 Mr. Percy restricted A.B.’s breathing**

[27] While Mr. Percy did not plead guilty to a section 246 offence, the Crown submits the ‘choking’ component was aggravating – “a moment’s reflection will



reveal the reason for that. Rendering a person unconscious, whether by choking, strangulation or suffocation, is an inherently dangerous act that is easily capable of causing death, or brain injury with devastating lifelong consequence.” (See: *R. v. Lemmon*, 2012 ABCA 103, at paras 24-37, see also *R v T.J.S.*, *supra*. Here A.B. was not choked but her breathing was restricted.

[28] I accept the Crown’s submission in relation to this aggravating factor. A.B. described the pressure across her clavicle and the difficulty it caused her. In pleading guilty to the s. 271 offence, Mr. Percy did accept those facts.

#### **4 A.B. was assaulted in her own home**

[29] Mr. Percy was in the home of his best friend. He had been invited there – at night – and there were no plans for others to attend. He knew that A.B. would be the only adult home. He knew that there were no other people around to whom she could turn for assistance.

#### **5 A.B. had an expectation of security**

[30] A.B. had been very close friends with the offender for over 15 years. They met through their work. They maintained a very close relationship in the years that followed. A.B. testified that Mr. Percy was a “dear friend”; they shared many personal things about their lives. They were extremely close and maintained contact despite the passage of time.

[31] Naturally, A.B. had an expectation of security being with Mr. Percy. Even though this scenario does not rise to the level of breach of trust, I accept that the circumstances are nonetheless aggravating.

#### **6 A.B.’s [redacted]**

[32] A.B.’s [redacted]. [Redacted]. Mr. Percy knew this. It goes without saying that had [Redacted]. [Redacted].

#### **7 There was significant harm to A.B. – physically and psychologically**

[33] The forced vaginal penetration caused AB physical pain and injuries for weeks:

- She experienced bruising on her inner thighs, arm, and breast;

- She had a cut and swollen lip; and,
- She suffered psychological and emotional damage – which is now a well-known and accepted consequence of an assault.

[34] The psychological trauma associated with sexual assault is long lasting (see: *R v Goldfinch, supra*, at para 37; see also *R v Percy*, 2021 NSSC 110, at para 36).

## **Mitigating Factors**

[35] The mitigating factors to be considered include the following:

### **1 The accused had no criminal record prior to this offence.**

[36] Mr. Percy has been convicted of various sexual offences (sexual assault, voyeurism, and sexual assault causing bodily harm, sentenced by Judge Buckle and Justice Arnold respectively). The convictions and sentences for those offences occurred after the date of this offence, but prior to his conviction in this matter.

[37] This creates a legal anomaly that dictates this court treat Mr. Percy as a first-time offender. That does not mean it cannot be considered in sentencing, but it cannot be taken to be an aggravating circumstance. It can go to the accused's character and future chances for rehabilitation (*R v Percy*, 2021 NSSC 110, at paras 74-76, citing *R. v. Keats*, 2018 NSCA 16.)

[38] The Crown argues that Mr. Percy's pattern and risk assessment show he is at a moderate to high risk to reoffend, which can be considered with respect to prospects of rehabilitation.

### **2 Acceptance of responsibility**

[39] Mr. Percy pleaded guilty. This is obviously a mitigating factor, although his guilty plea occurred in the middle of trial and after the complainant completed her direct examination. However, A.B. was not subject to cross-examination.

[40] Early guilty pleas are mitigating, as they spare the complainants from having to testify and they spare the community the expense of a trial (*R v Johnston and Tremayne*, [1970] 4 CCC 64 (Ont C.A.)) The Crown submits that while the guilty plea demonstrates an acceptance of responsibility that cannot be overlooked, Mr. Percy does not stand to gain the mitigation that was contemplated by the common law. However, I conclude that by pleading guilty on the second day of trial, Mr.

Percy did spare A.B. from going through what would have likely been a lengthy and difficult cross-examination. He did accept responsibility on the second day of trial.

[41] Mr. Percy has also recognized the seriousness of this offence.

### **Law and Analysis**

[42] Section 271 of the *Criminal Code* describes the punishment for sexual assault:

271 Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years or, if the complainant is under the age of 16 years, to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year;

[43] I start by reviewing the general principles of sentencing. The general purpose and principles of sentencing are found in s. 718 of the *Criminal Code*, which states:

718. The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions that have one or more of the following objectives:

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

[44] I have considered s. 718 with regards to denunciation, deterrence, and rehabilitation, and I refer to section 718.1, which provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the Offender. Section 718.2 identifies specific sentencing principles which must be considered, including the following:

1. The sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender (s. 718.2(a));
2. The sentence should be similar to sentences imposed on similar offenders for similar offences, committed in similar circumstances (s. 718.2(b));
3. An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances (s. 718.2(d)); and,
4. 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 (s. 718.2(e)).

[45] Any sentencing hearing requires a careful consideration of the unique circumstances of each offender and the offence. It requires the balancing of sentencing objectives.

[46] In considering this joint recommendation, I have also considered the principles set forth in *R. v. Anthony Cook*, 2016 SCC 43. I am mindful that a trial judge should not depart from a joint recommendation unless the proposed sentence would bring the administration of justice into disrepute or if the sentence would be viewed by reasonable and informed persons as a break down in the proper functioning of the justice system.

[47] Counsel is obliged to give a full description of the facts and circumstances of the offence and the offender and explain why the proposed sentence is not contrary to the public interest. Counsel has done so today. There must be a thorough justification of the sentence put on the record so that justice may be seen to be done. The justice system benefits from appropriate joint recommendations in terms of use of resources and certainty of outcomes in cases where the result following trial is unclear. In particular I quote from *R. v. Anthony-Cook, supra*:

32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

34 In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint

submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold — and for good reason, as I shall explain.

...

42 Hence, the importance of trial judges exhibiting restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty.

44 Finally, I note that a high threshold for departing from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (Martin Committee Report, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, Law Society of British Columbia, Code of Professional Conduct for British Columbia (online), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (Martin Committee Report, at p. 287).

[48] Given the nature of the offence before the court, the purposes of denunciation, deterrence (both general and specific), and the separation of the offender from society should be considered paramount. Mr. Percy's moral blameworthiness and degree of responsibility for this offence is extremely high.

### **Specific Deterrence**

[49] The offence before the court was perpetrated by A.B.'s "dear friend". Mr. Percy dominated her in a situation when she invited him into the safety of her home.

[50] Mr. Percy's acts demonstrated an extreme sense of entitlement and a disregard and contempt for his friend's safety, security, and bodily integrity. Mr. Percy must be specifically deterred from committing further such crimes.

[51] Dr. Connors was very clear that the type of sex-offender treatment program Mr. Percy needs can only be found in a federal institution. It cannot be found in a provincial institution in Nova Scotia, nor can it be found in the community in this province. She said that Mr. Percy needs comprehensive treatment for his paraphilias, as he otherwise has good social skills and good self-control. Mr. Percy obviously requires this type of treatment and programming as outlined by Dr. Connors and these treatments and programming are important to rehabilitation prospects.

[52] According to Dr. Connors, Mr. Percy's likelihood to reoffend is moderate to moderately high. By her assessment Mr. Percy is twice as likely as the average sex offender to reoffend. While the court can not take into account his other convictions for sexual assault, given that they came later in time to this assault, the Crown and Defence agree that I can take the subsequent convictions into account in considering Dr. Connors' opinion that Mr. Percy is a moderate to moderately high risk to reoffend.

[53] In *R. v. Keats*, 2018 NSCA 16, Van den Eynden J.A. explained, for the court, how to deal with this type of situation:

[30] Subsequent offences are relevant for the purposes of sentencing. In *R. v. J.(H.J.)*, [1989] B.C.J. No. 1542, the Court of Appeal stated:

[8] The fact that a person convicted of an offence has since the date of that offence committed similar offences cannot be regarded as irrelevant to the sentencing process. Other similar offences, whether committed before or after that for which an accused is being sentenced, may well be of considerable importance in determining the character of the accused, the extent, if any, to which there has been rehabilitation, the likelihood of rehabilitation in the future, the extent to which the accused is likely to be deterred by the fact of conviction, brief incarceration or a term of probation and — to some extent a factor related to all of these — the extent to which imprisonment is appropriate for the protection of the public against the commission of further similar offences by the accused. ...

[10] But in the light of the evidence which was properly before the court at his trial, and of the unchallenged findings of fact of the trial judge, it would, in my view, be wrong that he be treated in the way a first offender might normally be.

[54] Mr. Percy's actions demonstrate a complete disregard for A.B.'s sexual integrity and demonstrates his sense of entitlement to her body.

### **General Deterrence**

[55] Sexual assaults, at any end of the spectrum, are a serious social problem that the courts of Nova Scotia, and all other provinces, are grappling with regularly. Canadians have the expectation that they will be protected from sexual assaults as they go about their daily lives. They should know that actions like those of Mr. Percy will not be tolerated and will result in incarceration. No one is ever simply entitled to any sexual act they desire from any individual they choose.

[56] The range of sentences for sexual assault offences varies widely in Nova Scotia and throughout the country. Each case is fact-specific and person-specific. What acts constitute a sexual assault vary widely, along with the circumstances and ages of the parties involved. Our courts specifically state we do not have a 'starting point' for sexual assaults, though, we still rely on the approximate 'ranges' as set in previous cases. The Nova Scotia Court of Appeal considered the range of sentencing in sexual assaults in *R v J.J.W.*, *supra* at para 21 and 22.

### **ANALOGOUS CASES**

[57] As noted above, the task of finding factually analogous cases in the context of sexual assault is a difficult task. While the range of sentence provided by counsel is of some assistance to me in determining the appropriate disposition for Mr. Percy, any proposed range is merely a guideline. Any sentence must be individualized. The parties have relied upon several cases to support their joint recommendation. I will review those cases briefly.

[58] In *R v T.J.S.*, *supra*, the court imposed a four-year sentence after trial. The facts are fairly similar to those in this case and outlined in summary at paragraph 5 of the sentencing decision.

[59] In *R. v. Percy*, 2021 NSSC 10, the court imposed a sentence of five years for an aggressive sexual assault involving anal penetration and bruising.

[60] In *R. v. Alas*, 2019 NSSC 68, Mr. Alas received seven years after he pleaded guilty to sexual assault causing bodily harm (s. 272(1)(c)) and uttering a threat to cause bodily harm or death (s. 264.1(1)(a)). The charges stemmed from an incident where Mr. Alas attacked an escort in her home. He punched and choked her and

forcibly removed her clothes. He forced her to perform fellatio. He continued punching her, threatened to kill her, and forced vaginal and anal intercourse. Justice Gabriel wrote that sentences for similar offences generally fall in the range of five to nine years imprisonment. Mr. Alas was sentenced to seven years based on a joint recommendation: seven years for the 272(l)(c) offence and three years for uttering threats, to be served concurrently.

[61] In *R. v. Blake*, 2020 ONSC 5658, the court imposed a sentence of six years. This involved a sexual assault that included choking and the use of a knife.

[62] In *R. v. Clase*, 2017 ONSC 2484, the offender was sentenced to five years for an aggressive attack with vaginal penetration that involved choking.

[63] In *R. v. Budd*, 2020 NSSC 103, the court sentenced Mr. Budd to 7.5 years for four sexual assaults and an assault. Mr. Budd was remorseful, youthful, and pled guilty to the charges at the earliest possible time.

[64] In *R. v. Simpson, supra*, (overturned for other reasons – principles still hold) The Honorable Judge Tax sentenced Mr. Simpson to three years incarceration after trial. This case involved a female victim who went on a date and had consensual oral sex but was clear that she did not want to have vaginal sex. Despite objections, the accused had unprotected sex with her. The Court said the range for this type of offence is two-to-three years but sentences at the lower end of the range have significant mitigating factors, such as an early guilty plea. There was also no additional violence – sexual assaults in and of themselves are inherently violent.

[65] In *R. v. Wournell*, 2014 NSSC 305 the court ordered a sentence of three years custody for a sexual assault involving forced intercourse in a public park. The victim was a sixteen-year-old virtual stranger. The offender had a prior retainable record for violent offences.

[66] In *R. v. Rand*, 2012 ONCA 73, the court imposed a four-year sentence for sexual assault involving forced oral sex, vaginal and anal intercourse. The victim suffered injuries to her anus, vaginal area, arm and back. The offender had a record dating back to 2004, which included convictions for violent offences.

[67] In *R. v. Diabas*, 2018 ONSC 7500, upheld on appeal at 2020 ONCA 283 the court described “separate incidents of different types of sexual violence” resulting in a seven-year total sentence, as matters were consecutive.



[68] Judge Buckle's decision in *R. v. Percy*, 2019 NSPC 12, is also instructive.

## Conclusion

[69] As the court stated in *R. v. Goldfinch, supra*

[37] ... As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens. .... Throughout their lives, survivors may experience a constellation of physical and psychological symptoms including: high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm and suicidal behaviour. A recent Department of Justice study estimated the costs of sexual assault at approximately \$4.8 billion in 2009, an astonishing \$4.6 billion of which related to survivors' medical costs, lost productivity (due in large part to mental health disability), and costs from pain and suffering. The harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victorian era.

[70] Mr. Percy violated the sexual integrity of A.B. A.B. invited him, her friend, into her home, where she had every right to be safe and secure. We know that sexual assaults can have devastating effects on a victim's personal autonomy, bodily integrity, and sexual integrity (*R. v. McCraw*, [1991] 3 S.C.R. 72.)

[71] Mr. Percy imposed his will upon A.B through the use of force, in her home while [redacted]. While her bruises and the physical impacts of the sexual assault have faded and disappeared, the emotional and psychological harm he caused to A.B. continue.

[72] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Major J. explained how a sexual assault harms the very core of human dignity, autonomy, and physical integrity:

28 The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the Code expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": see Blackstone's Commentaries on the Laws of England (4th ed. 1770), Book III, at p. 120. It follows that any intentional but unwanted touching is criminal.

[73] Mr. Percy's moral blameworthiness for this offence is high. He exploited A.B. and her trust in him. He took what he wanted from her with no regard to her personal autonomy. She did not consent to any of the physical interaction that night. Then, his objectification and lack of any consideration for her personal and sexual autonomy was further communicated when he smugly asked for a hug after he violated A.B. in her home [redacted]. His conduct must be strongly denounced, and the sentence must be reflective of society's absolutely intolerance to such conduct.

[74] Protection of the Public is the ultimate goal of the criminal justice system . Given the report of Dr. Connors and the facts of this case, in order to be true to all of the principles of sentencing, I must accept the joint recommendation presented.

[75] Mr. Percy you will have the opportunity to take courses to get to the root of your underlying lack of impulse control and the commission of this violent act. For your sake and the sake of our community you need to engage in those courses and treatments in a sincere and honest way. You must apply yourself to see to it that no other member of our community is victimized by you again. You have family supports and access to treatment. Take advantage of these positive relationships and programming. If you reoffend once you are released back into the community, after this term of incarceration is served, you may be facing a harsher sentence and possibly one of indeterminate length.

[76] I sentence Mr. Percy to a period of incarceration of five (5) years consecutive to the time he is serving on another sexual offence. He will have the following ancillary orders imposed:

- A Firearms prohibition (Section 109(3)) for life;
- DNA Order (Section 487.051);
- SOIRA Order (Section 490.011(1)(a) designates the offence of 271, and 490.013(4) indicates it is for life if a prior SOIRA was imposed. He is currently bound by a SOIRA order); and
- A Non-Communication Order with [A.B.] (Section 743.21)

Brothers, J.