SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Taweel*, 2014 NSSC 310

Date: 20140814
Docket: CRH No. 410910
Registry: Halifax

Between:

Her Majesty the Queen

v.

Stephen Nicholas Taweel

SENTENCING DECISION

Restriction on Publication:
Pursuant to s. 486 of the *Criminal Code of Canada*

Editorial Notice:	Identifying information has been removed from this electronic version of the judgment.
Judge:	The Honourable Justice Patrick J. Murray
Heard:	August 14, 2014, in Halifax, Nova Scotia
Oral Decision:	August 14, 2014
Written Decision:	August 27, 2014
Counsel:	Scott Morrison, Esq., for the Provincial Crown Mark Knox, Q.C., for the Offender

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or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 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).

BY THE COURT (ORALLY):

INTRODUCTION:

[1] Let me begin by acknowledging what both Defence and Crown counsel have said. Sentencing is probably one of the more difficult, if not the most difficult roles that a judge has. It is an art, so to speak. In part, at least, and not something which a cookie-cutter approach can be taken toward. This is obviously a difficult situation when you have a man of Mr. Taweel's age and a man of his character facing this very serious offence under the ***Criminal Code of Canada***, R.S.C., c. C-46 (as amended).

[2] Mr. Stephen Nicholas Taweel is 55 years of age. He resides in Charlottetown, Prince Edward Island. In February 2014, Mr. Taweel was found guilty of sexual assault contrary to section 271 of the ***Criminal Code***. These events took place in Dartmouth, Nova Scotia, in 1991, 23 years ago. The victim, Ms. SL, was 14 years of age at the time of the offence.

THE CHARGE:

[3] The offence which Mr. Taweel was convicted reads as follows on the Indictment:

> Stephen Nicholas Taweel of Charlottetown, in the County of Queens, Province of Prince Edward Island stands charged
>
> 1) That he between the 1st day of July, 1991 and the 31st day of October, 1991 at, or near Dartmouth, in the County of Halifax in the Province of Nova Scotia, did unlawfully commit a sexual assault on [SL], contrary to Section 271(1)(a) of the ***Criminal Code***.

Mr. Taweel comes before the Court today to be sentenced on this charge of sexual assault for which he was found guilty by myself with a conviction being entered against him.

ADMISSION OF FACT:

[4] At trial, Mr. Taweel, through his Defence counsel, admitted to having contact with Ms. SL in 1991. The admission at trial read:

> Pursuant to section 655 of the *Criminal Code*, Stephen Nicholas Taweel admits the following facts for the purpose of dispensing with proof thereof at trial:'
>
> 1) Defence admits date for the purposes of this proceeding – there was contact and communication between [SL] and Stephen Taweel in 1991;
>
> Dated this 18 day of November, 2013 at Halifax, Nova Scotia.

[5] While Mr. Tweel did admit contact in 1991with the victim, he denied there was any sexual contact in Nova Scotia. At trial I found otherwise in my decision.

FINDINGS AT TRIAL:

[6] In concluding that the Crown met it's burden, I found that Mr. Taweel did have sexual relations on three separate occasions with the victim in Dartmouth, Nova Scotia in the Fall of 1991, each involving intercourse. Mr. Taweel was almost 20 years senior in age to the victim in this matter.

PRELIMINARY COMMENTS ON PRE-SENTENCE REPORT AND SEXUAL OFFENDER RISK ASSESSMENT REPORT :

[7] For the purpose of imposing a fit and proper sentence I ordered that a Pre-Sentence Report be prepared in respect of Mr. Taweel. The Court has received same and is aware of his background and individual circumstances. While I will comment more on this later, it is generally quite positive for Mr. Taweel. The Pre-Sentence Report states that Mr. Taweel could serve a sentence in the community as an option for the Court to consider.

[8] I also ordered that an assessment be completed to assess Mr. Taweel's risk of reoffending. I ordered this on the submissions of Mr. Taweel's Defence counsel, Mr. Knox and, as well, representations from the Crown, Mr. Morrison. That assessment has been completed. I have read and reviewed this lengthy document. It concludes that Mr. Taweel is a low risk to reoffend.

CIRCUMSTANCES OF THE OFFENDER:

[9] Mr. Taweel is 55 years of age, he is soon to be 56 I believe. He is a professional engineer. He resides in Charlottetown where he was born and raised. He is unmarried and without children. He is a successful businessman having worked internationally in the Middle East. He has been an engineer for 30 plus

years since graduating in 1981 from the University of New Brunswick. Mr. Taweel is involved in the business community in Prince Edward Island.

[10] He was predeceased by his father in 2008. His mother and, out of respect I acknowledge her presence here today, his older sister, Jeannette Taweel, and other siblings provided information to Probation Services for the purpose of the Pre-Sentence Report.

[11] Mr. Taweel has no prior criminal record.

CIRCUMSTANCES OF THE OFFENCE:

[12] Mr. Taweel's sister owned a property at 22 Ancona Place in Dartmouth where the assaults took place. As stated, the complainant, was 14 years of age at the time. She and Mr. Taweel met at Standhope Beach in Prince Edward Island and began a relationship. He was older and outgoing. She was, according to her evidence, shy and lacking in social skills.

[13] The evidence, which I accepted, confirmed that Mr. Taweel was persistent in meeting her and having her meet him. The relationship started in Prince Edward Island in the Summer and, in the Fall, he showed up in Nova Scotia at her school.

[14] There was little discussion. She was throughout confused, bewildered, not sure what to do. It seemed surreal, she said, but she knew it was real. Each time she said he said to tell no one or she would get into trouble. She gave evidence he disguised his voice when he called to make himself sound younger. He took her to his sisters and on each occasion had intercourse with her in a bedroom in the basement. There was one brief incident of oral sex, as well, on the second occasion. He told her to tell her mother she was playing with a friend. When asked about the relationship at trial, Ms. SL replied, "what type of relationship could we have, he was 20 years my senior," or words to that effect.

SENTENCING PRINCIPLES:

[15] Under section 271 of the ***Criminal Code*** the maximum penalty for an indictable offence of sexual assault is ten years.

[16] This penalty demonstrates the seriousness of this type of offence. In the case before me, the Crown proceeded by way of Indictment.

[17] 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 781 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.

[18] It should be pointed out, as it has been by the Crown, that these provisions were not present or codified in 1991. The Crown says that they were already embodied in the case law. This is not an issue in dispute before me today and I do accept that.

[19] There are additional considerations and those considerations involve aggravating factors 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.

[20] As stated, many of the principles of sentencing are now codified under the ***Criminal Code*** in section 718.2 The Crown has pointed out that certain of them were not so during the period of the offence that is currently before me. One which is now codified at 718.2(a)(iii) and that is evidence that the offender abused

a position of trust or authority in relation to the victim. In which case it shall be deemed to be an aggravating circumstance. Further, as already stated, a sentence should be similar to sentence imposed on similar offenders for similar offences in similar circumstances. This is in section 718.2(b). As mentioned, an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in all available sanctions other than imprisonment that are reasonable in the circumstances, should be considered for all offenders.

[21] 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.

[22] These objectives are particularly relevant here as I am, based on the submissions, being asked to choose between a period of incarceration in an institution and a sentence served conditionally in the community.

[23] 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. Mr. Taweel is a first offender, having not been before the Courts.

[24] There is, as well, the need to account for individual circumstances. I am not intending to make an exhaustive list at this time but refer to those which may apply here.

[25] In terms of a conditional sentence, the case of ***R. v. Proulx***, [2000] 2 S.C.R. 61, illustrates that a conditional sentence can provide significant deterrence and denunciation. The more serious the offence, the longer and more serious the conditions, with house arrest often being imposed. I have been asked by Defence to closely consider ***Proulx***, *supra*, and that a conditional sentence be considered based on all the facts and circumstances for Mr. Taweel.

[26] I note in ***R. v. W.(L.F.)***, [2000] 1 S.C.R. 132, the Supreme Court of Canada found that a conditional sentence can provide significant denunciation and deterrence, particularly when onerous conditions are imposed.

[27] I had earlier referred to the term, 'moral blameworthiness'. I will take a brief moment to explain what that means. Essentially it means 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.

MITIGATING FACTORS SUBMITTED BY THE DEFENCE:

[28] Mr. Taweel is 55 years old and is without any record. The relationship did not involve a position of authority; the relationship did not involve a person, Mr. Taweel, who held a position of trust; unlike other cases, Mr. Taweel did not supply the complainant with drugs or alcohol; the relationship did not involve him taking advantage of a family or familial relationship; Mr. Taweel has been on release conditions without difficulties for three years since August, 2011; Mr. Taweel's counsel submits that Mr. Taweel has suffered an adverse effect due to the media attention this case has received; and, the matter occurred over 20 years ago and there has been no incidents or offences since that time.

[29] The Crown acknowledges that there are some mitigating circumstances for Mr. Taweel. Essentially those are that he is a first time offender, while they say that does not mean he should not be punished accordingly. They acknowledge that he was not in a position of trust. They acknowledge that he is indeed a low risk to reoffend and that he is a person of good character.

[30] I am going to expand on the mitigating factors as they have been by Mr. Knox this morning for the Defence, so as to give this the full flavour of the Defence's position.

[31] Mr. Knox says that Mr. Taweel has an astounding Pre-Sentence Report. An outstanding Pre-Sentence Report. One that is rarely seen; not usually seen before the Courts. He refers to the 28 reference letters which I have read and reviewed and they are impressive. That he has suffered greatly for the shame and embarrassment that has been brought upon him. That his risk to reoffend is low. The only thing, says Mr. Knox, is the lack of a long-term relationship referenced in the Risk Assessment Report. What is absent, he says, from the cases referred to by

the Crown, is a position of trust or authority and he makes the argument that that distinguishes this particular case.

[32] He goes on further to say that this was not forced. That the intercourse lacked violence and this should be considered, to some degree, as a mitigating factor. There are no horrific circumstances; no pregnancy, no drugs or alcohol. There is no victim impact statement. But, I will say, we do have the evidence at trial which I did accept that may be referred to.

[33] It is significant as well, points out Mr. Knox, that the complainant here was of the age of consent, while many of the cases referred to children who were not of the age of consent. That, he says, makes a difference.

[34] I found in the evidence that she was a young victim and I found, as well, there was an absence of consent.

[35] Mr. Knox says further that this victim is unlike many others. That she acquiesced. And, again, I make the point the finding at trial was the complainant in this matter did not consent.

AGGRAVATING FACTORS:

[36] The Crown has submitted that there are a number of aggravating factors. First, Mr. Taweel's persistence with the victim. Second, in offering a threat or inducement – "don't tell anyone." Third, she found these words to be menacing. Fourth, the level of invasiveness is high involving intercourse; and, again, the victim was young at 14 years of age. Also, Ms. SL was particularly vulnerable and socially inept.

[37] There is no victim impact statement that has been given before me, but as I have mentioned there is evidence at trial which I accepted beyond a reasonable doubt which suggests the following:

1. Ms. SL was a vulnerable person;
2. Her life was adversely affected by what happened;
3. She described it as surreal as if it was happening to someone else;
4. Testifying at trial was a significant event and ordeal for her, but something she needed to do to face her past and move ahead with her life. She is now 33 years of age.

5. There were three incidents of sexual intercourse that occurred over a short period of time. Two weekends in September and in October, 1991. Mr. Taweel is sentenced on these events only. There are no other convictions or offences relating to any other matters concerning Mr. Taweel before the Court.

6. Given his age, advancement in education and business and her challenges and lack of development socially, he was to some extent in a position of authority over her when he engaged in sexual intercourse with her. I made that finding, as I earlier indicated, in my decision.

7. Ms. SL sought therapy but encountered further difficulties with respect to her treatment and, in particular, with the therapist. This is not an aggravating factor as far as Mr. Taweel's case is concerned, necessarily.

8. Ms. SL spoke intelligently and was informed of her circumstances. No medical evidence was brought forward as to how these incidents affected her throughout her life but it can be said it was not positive for her based on the evidence at trial.

PRE-SENTENCE REPORT:

[38] I concur with Defence counsel that Mr. Taweel's Pre-Sentence Report is a positive one. He has an impressive work record and has the support of his family. He had made contributions to his community, particularly the business community where he was recently, in 2013, made chair of the Charlottetown Downtown Residents Association where he is also a member of the Chamber of Commerce.

[39] Mr. Taweel supports his mother financially and in other ways. She has expressed concern for her financial situation if Mr. Taweel is no longer able to provide for her due to his circumstances before the Court.

[40] Mr. Taweel has been described as a caring, committed individual and, indeed, he comes by his business acumen through his family honestly as his parents ran a grocery store in Charlottetown for 40 years from 1959 to 1989. His parents were obviously hard working people and from the report well-liked and respected in the community. Undoubtedly, this incident has brought about a certain amount of shame, not only for Mr. Taweel but his entire family. This is acknowledged by Mr. Taweel himself in the report.

[41] Mr. Taweel is well educated. He attended schools in Charlottetown and then obtained an engineering degree from University of New Brunswick where he also took certain leadership roles at the University. He has worked and travelled abroad. He was born and raised in Prince Edward Island and is of Lebanese decent. He for a time, five years, was employed in the United Arab Emirates as a Project Engineer.

[42] He is described by his mother as a "good son." He is closest to his sister, Jeanette, who is currently the primary caregiver for his mother. He is close to his mother also.

[43] Mr. Taweel has been described as loyal by his former employer, The Daniels Corporation of Toronto, and a person having a high degree of integrity. He was a Project Manager for Daniels for five years.

[44] There appear to be no financial concerns at present for Mr. Taweel. He owns an investment commercial rental plaza as well as a heritage home which he refurbished.

[45] The author of the Pre-Sentence Report, Ms. Kathy Campbell, states that Mr. Taweel was cooperative and presented in an intelligent manner. He provide numerous character references and employment letters. I have referred to these.

[46] The Pre-Sentence Report states that Mr. Taweel accepted no responsibility for the offence. The author did not gain any sense or expression of remorse from him. His counsel points out, however, that Mr. Taweel did state that he empathizes or that he empathized with the victim and the difficulties that she has suffered.

[47] The case law and the jurisprudence on sentencing indicates that an accused is entitled to maintain his or her innocence. I accept that that is Mr. Taweel's right and that any lack of remorse is not an aggravating factor in this respect. I note also, as I did this morning, the Sexual Deviance Assessment/Treatment Program Assessment Report prepared by Ms. Affleck, it was noted at page 10 by Mr. Taweel that after seeing the complainant at the trial he recognized that she is hurt and that he contributed to this hurt.

[48] I, therefore, have no reason to dispute the statement by his counsel that he empathized with the victim and I accept that he made such a statement. This indicates, to some extent, a measure of remorse.

[49] I did take note of some health difficulties which Mr. Taweel has had, including two heart attacks for which he is being treated by a physician with prescribed medication and other treatments. The author of the Pre-Sentence Report, Ms. Kathy Campbell, Probation Services of Prince Edward Island, concludes by stating that a period of probation is an option and may be beneficial with conditions related to assessment counselling and treatment, in allowing Mr. Taweel to gain some insight into his behaviours and their impact on the victim. In short, the report does suggest that Mr. Taweel can be supervised in his community and that would not be a concern.

[50] With respect to the Sexual Deviance Assessment/Treatment Program Assessment, a very lengthy and detailed assessment report was provided in respect of Mr. Taweel. Primarily its purpose was to assess the risk of whether Mr. Taweel will re-offend. I note, again, that 28 character letters have been provided and addressed to myself concerning Mr. Taweel.

[51] There are many comments and statements in this report. I have made mention of some. I shall focus my views to the purpose of the report and the conclusions drawn by it dealing with risk assessment. It states, and I quote:

> In the case of Mr. Taweel, his current risk and needs assessment does not suggest he requires a high level of intervention and treatment. Rather his relatively low risk suggests providing a treatment program will likely not be significantly associated with reduced recidivism.

Once again, the report states:

> In Mr. Taweel's case, risk would be managed by a less intensive form of intervention such as a limited number of individual counselling sessions… Mr. Taweel's overall estimate of risk and needs also suggests his risk can be managed with a low level of supervision.

[52] The recommendations in the report are twofold. (1) that Mr. Taweel participate in a limited number of one-to-one counselling sessions in a clinic or facility such as that which of the author is employed by or at; and, (2) that any contact between Mr. Taweel and unrelated pubescent females be supervised by someone who is aware of his offence.

CASE LAW:

[53] Counsel have spent considerable time referring to the case law. I have read carefully and considered the authorities provided to me by both Crown counsel and Defence counsel, as well as other cases. It must be said that sentencing is a very individualized process. I will refer to these cases for guidance knowing full well I must decide what is a fit and proper sentence based on the facts before me having regard to the sentencing principles as they apply to these circumstances. All the while I have it foremost in my mind the fundamental principles of sentencing. That the sentence be proportionate to the gravity of the offence and degree of responsibility of the offender, Mr. Taweel.

[54] That is the overarching principle among the others that apply. As well, certain objectives of sentencing take a more prominent role depending on the circumstances. The common law is clear as is now the ***Criminal Code*** provisions, certain sections which came after these offences. Where abuse of young persons is involved, the primary objectives of sentence are denunciation and deterrence when arriving at an appropriate sentence.

[55] To illustrate that principle, I shall first refer to a recent case of ***R. v. H.S.***, 2014 ONCA 323, decided in April of 2014 by the Ontario Court of Appeal. Justice Epstein succinctly summarized the law and these principles at paras. 41 and 42 stating:

> 41 It is of paramount importance that children be protected from seducers and predators through sentences that emphasize the principles of denunciation and deterrence: *R. v. D.D.* (2002), 58 O.R. (3d) 788 (C.A.), at para. 34.
>
> 42 Mid-to-upper single digit penitentiary sentences are appropriate where an adult in a position of trust sexually abuses a young child on a regular basis over a substantial period of time: See *D.D.*, at para. 44.

[56] In Nova Scotia, the Nova Scotia Court of Appeal has repeatedly recognized these principles. As recent as 2011 the Nova Scotia Court of Appeal affirmed the trial judge's decision, Judge Campbell, in a leading case, that being ***R. v E.(M.W.)***, 2009 NSPC 65, 2011 NSCA 87, where Fichaud J.A. stated at para 23:

> 23 This Court repeatedly has emphasized denunciation and deterrence in sentencing for sexual assaults against children.

[57] Referring to ***R. v. Oliver***, 2007 NSCA 15, a case submitted by the Crown, the Nova Scotia Court of Appeal stated, Saunders, J.A. speaking for the Court:

> Given the age of the complainant and the circumstances surrounding the offence it was -- as the judge said -- a case that called for very strong denunciation with an emphasis on deterrence. … Denunciation and deterrence are given the highest ranking among all of the principles of sentencing in cases involving the abuse of children.

[58] The ***Criminal Code*** states that abuse of a person under 18 is an aggravating factor in sentencing (718.2(a)(ii.1)) as is evidence that the offender abused a position of trust or authority in relation to the victim (718.2(a)(iii)) as is evidence that the offender had a significant impact on the victim, considering their age and other personal circumstances (s. 718.2(a)(iii.1)).

[59] It is my view that some or all of these are relevant in the case before me. I repeat, even if the codification of these came following the offence in 1991, as these principles were, in effect, confirm the state of the jurisprudence prior to their being encoded in the ***Criminal Code of Canada***.

[60] I have stated and wish also to repeat that these are not the only principles and that rehabilitation is an important principle as is the principle which requires that an offender not be deprived of liberty if less restrictive sanctions may be appropriate and that all available sanctions other than imprisonment that are reasonable should be considered in all offences.

[61] These objectives are relevant here as I am being asked by the Defence to consider a conditional sentence to be served in the community and the Crown is submitting a period of incarceration in a federal institution, that is, the imposition of a lengthy custodial sentence for Mr. Taweel is warranted.

[62] I remind myself and counsel that these are not principles which demand strict adherence in all cases, regardless of the circumstances and that depending on the circumstances a flexible approach may be required to ensure a balance with all other considerations which are to be properly taken into account (*R. v.* ***Gordon***, 1984 CanLII 2564)

RANGE OF SENTENCE:

[63] In ***R. v E.(M.W.)***, *supra*, the Court discussed the meaning of range of sentence as not being the minimum or maximum possibilities for the offence but, instead, is narrowed by the context of the offence committed and the circumstances of the offender. Referring that similar sentences are imposed for similar offences for similar offenders in similar circumstances. The actual sentence will vary on a continuum taking into account aggravating and mitigating factors, the remedial focus for the offender and the need to protect the public. This creates the range of sentence. (Reference to: Bateman, J.A. in ***R. v. Cromwell***, 2005 NSCA 137)

CROWN CASE LAW SUBMISSIONS

[64] While I have no sentencing brief from the Crown *per se* I have been given a series of cases relied upon by Mr. Morrison for the Crown.

[65] In ***R. v. W. (J.J.)***, 2012 NSCA 96, the Nova Scotia Court of Appeal held that a five month sentence for a sexual assault was demonstrably unfit. The lowest sentence sexual assault in the case summaries provided by the Crown in that case, ***R. v. W. (J.J.)***, *supra*, was two years less a day. The case involved the accused's spouse and the summaries submitted involved either an accused's spouse, former spouse or common law spouse or wives. The Court noted that in Newfoundland the range for serious sexual assault with intercourse is three to five years. Further, the Court noted that in Nova Scotia a starting point approach has not been adopted with the focus remaining on the principles of sentencing, referring to the individualized process of sentencing and that is it is to be done in the context of the particular circumstances of each case.

[66] In ***R. v. Weaver***, 120 N.S.R. (2d) 66, the Court sentenced a 69 year old accused to four years for sexual intercourse with a female under 14 and four years concurrent for sexual assault. The primary considerations were deterrence and protection of the public. The accused was considered a continuing danger and in poor health. However, his health was not so poor that a fit sentence could not be imposed.

[67] In ***R. v. A. (W.H.)***, 2011 NSSC 246, the accused, 36 years old, was sentenced to five years imprisonment for sexual assault of a 17 year old complainant. Alcohol and marihuana were provided to the complainant. The accused's record was a highly aggravating factor as it included a prior sexual

offence as well as the complainant's young age and her vulnerability and the accused's persistence.

[68] In ***R. v. Oliver***, *supra*, one of the cases relied upon today by the Crown which I have previously referred to, Saunders, J.A. upheld a sentence of two years for a sexual assault of a 12 year old. The accused was 19 years of age and the victim became pregnant. The accused was a substantial risk to the community. The sentencing judge was said to be entitled to give more weight to deterrence and denunciation than to rehabilitation.

[69] In ***R. v. Pomerleau***, 2009 ONCJ 189, the accused received a total sentence of 6.5 years, involving a number of victims, being minor children and teenagers entrusted to his care over a four year period. The accused spanned in age between 18 and 22 during the offences. The Court found for a single act of forced vaginal intercourse the punishment would be three to five year. I note that this case is instructive on the issue of conditional sentences, reference at para. 49 to the overwhelming direction from the Ontario Court of Appeal that a conditional sentence should rarely be imposed in cases involving sexual touching by adults, particularly where sexual violation is of a vulnerable victim by a person in a position of trust. The Court ultimately rejected a conditional sentence at para. 92 by reason of the nature and extent of the sexual violence on five victims, the duration of the wrongdoing and the harm caused which continued.

[70] In ***R. v. Bradley***, 2008 ONCA 179, the Ontario Court of Appeal reduced a sentence of four years to three years, involving a police officer and the complainant who met during a high school co-op placement. The acts involved vaginal intercourse and other behaviours. The Court held that a sentence at the low end of the range was fit. The sentence was for a single count of sexual assault, There was no violence and the accused had no criminal record. There was evidence the accused had good character and was a good father.

[71] In ***R. v. F. (G.C.)***, [2004] O.J. No. 3177, (ONCA), a 31 year old accused was an assistant superintendent in an apartment building where the complainant lived. Over a two year period the accused engaged in sexual acts including intercourse with the complainant and her friend who were 13 years old. The accused was given a 12 month conditional sentence at trial but this was overturned on appeal to a sentence of two years less a day. The Court noted throughout that the principle of denunciation weighs particularly heavy in cases of offences against children by adults in positions of trust.

[72] I acknowledge in the case before me the Defence's position that Mr. Taweel did not hold a position of trust toward the complainant. In ***R. v. F. (G.C.)***, *supra*, the Court of Appeal stated the sentence was warranted as this was a case of serious sexual abuse by an adult in a position of trust over an extended period of time. Unlike here, there were victim impact statements which showed the effect on the victims to be serious.

[73] The Crown today relies on these cases in support of the sentence which it is requesting, which is a term of imprisonment in the range of three to four years.

DEFENCE CASE LAW SUBMISSIONS:

[74] In terms of the case law submitted by the Defence I have read and considered these. In the Defence brief, the Defence submits the jurisprudence in Nova Scotia, the Maritimes and, indeed, across Canada is that a conditional sentence for Mr. Taweel is possible on facts such as those before me. I will take this opportunity to review them.

[75] Beginning in Nova Scotia there is the case of the Honourable Justice C.E. Haliburton in 1998 of ***R. v. C.K.H***, [1998] N.S.J. No. 520, where a conditional sentence was imposed for as many as seven incidences of touching when the victim was four and again when the victim was between nine and eleven. The conduct included digital penetration and other unsavoury behaviour. Justice Haliburton noted that strict conditions may be for a longer period than normally imposed for an institutional or traditional custody sentence and there is no ability for early remission or release with a conditional sentence.

[76] In ***R. v. Winters***, [1999] N.S.J. No. 49, the Nova Scotia Court of Appeal upheld a conditional sentence involving various sexual acts over a period of a month. The accused was a 33 year old female and the complainant was her friend's 12-year-old son. The abuse included intercourse, touching and oral sexual activities. The Court referred to the clear statement of Mandell, J.A. in ***R. v. (W.) L.F.***, *supra*, of the Newfoundland Court of Appeal in rejecting the argument that sex offenders merit incarceration except in rare and exceptional circumstances.

[77] The aforementioned Newfoundland case of ***R. v. (W.) L.F.,*** *supra*, was ultimately heard by the Supreme Court of Canada. Once again, in ***R. v. (W.) L.F.***, *supra*, the Court dismissed as untenable any notion that denunciation and deterrence cannot be achieved through a conditional sentence.

[78] The Defence submitted additional authorities from Ontario and Saskatchewan. In ***R. v. A.C.***, 2011 ONSC 4389, the Ontario Superior Court granted a conditional sentence of two years less a day for one count of sexual assault which occurred for a period of over one year. At para. 33, Justice Thorburn noted it was a serious offence. The accused assaulted a teenage girl. The Court did not find, however, that there was any sexual intercourse. He found also that the victim was having difficulty getting on with her life. There were ten to twelve instances of forced masturbation and fellatio while the complainant was between six and twelve years of age.

[79] In ***R. v. MacLachlin***, 2013 SKQB 332, the accused was found guilty of sexual exploitation. The accused was a female teacher and the complainant was a 15-year-old student. The range for this offence was identified in the case to be fourteen months to two years less a day. There was no evidence the victim had been severely damaged by the offence. An eighteen month conditional sentence was approved with twelve months of probation.

[80] In ***R. v. Mehanmal***, 2012 ONCJ 681, the Ontario Court reviewed extensively numerous cases as to the availability of a conditional sentence in the context of charges which pre-dated or occurred prior to the conditional sentence provisions being implemented in the ***Criminal Code***. This was pursuant to section 11(i) of the ***Canadian Charter of Rights and Freedoms***, 1982, R.S.C. 1985 which allowed for the availability of the lesser punishment. I confirm that the Crown and Defence here have agreed that the conditional sentence may be sought subject to the merits, of course, and the ***Criminal Code*** provisions.

[81] The ***Mahanmal*** case itself involved sexual offences against children by an accused who was now 54 years of age. In 1986 he sexually touched and groped two sisters. He received a twelve month conditional sentence and twelve month of probation.

[82] The Defence has referred to the Nova Scotia case of ***R. v. S.C.C.***, 2004 NSPC 41, where the Honourable Judge Alan Tufts discussed the seriousness of the crime of sexual assault against children. The charge involved the accused's 11-year-old stepson and occurred over several months. The Defence requested a conditional sentence of two years less a day. The Crown sought a two year sentence. Touching, masturbation and other acts were involved. The Court refused a conditional sentence because the only sentence that in his opinion

fulfilled the objective of deterrence and denunciation was a term of custody of two years in a federal institution.

[83] The Defence has argued that in Mr. Taweel's case there was no position of trust and therefore a sentence of less than two years is available.

[84] There are additional cases in Nova Scotia where a conditional sentence has been rendered, including house arrest. One example is ***R. v. P.E.S.***, [2000] N.S.J. No. 341. There are others where a lesser term of imprisonment, five months has been given. *R. v. Nowe,* 2004 NSCA 137. There are others such as ***R. v. G.A.L.,*** 2001 NSCA 29, where the Nova Scotia Court of Appeal reinstated a period of incarceration because a conditional sentence would not have adequately reflected the principles of denunciation and deterrence. The facts in ***R. v. G.A.L.***, *supra*, involved a sexual assault while the victim was asleep.

[85] These cases illustrate how other courts and rulings have pronounced sentences in regard to these objectives. I hasten to add as I have said that each case is different and must be decided on its own facts and circumstances. There are different approaches to sentencing depending on each case.

CONDITIONAL SENTENCE CONSIDERATIONS:

[86] The Defence has made application for a conditional sentence pursuant to section 742.1 of the ***Criminal Code*** and suggests that two years less a day is appropriate in these circumstances. In his submission, Mr. Knox says although the offence date is prior to the enactment of the amendments to the ***Criminal Code*** a conditional sentence is available. I repeat myself. By virtue of section 11(i) of the ***Charter*** which states that an accused who is found guilty of an offence for which punishment is varied between commission and sentencing is entitled to the benefit of the lesser punishment. The Crown concurs with this.

[87] The leading case on conditional sentences is ***R. v. Proulx***, *supra*. Prior to discussing ***Proulx***, *supra*, the ***Criminal Code*** states that one of the principles to be taken into account in sentencing is that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.

[88] The proper procedure as defined in ***Proulx***, *supra,* was summarized by the Nova Scotia Court of Appeal in ***R. v E.(M.W.),*** *supra,* at para. 31. In that case Fichaud, J.A. stated at para. 38:

> 38 …The conditional sentencing regime under s. 742.1 of the Code requires the judge to decide first whether a conditional sentence is available -- because the appropriate term of incarceration is under two years -- before considering whether a conditional sentence is appropriate. The initial determination depends on the sentencing principles in ss. 718-718.2 of the *Code*. Only if the judge decides, based on those sentencing principles, that federal incarceration is unwarranted does the judge turn to whether it is appropriate that the offender should serve his term conditionally in the community…

[89] As further stated in ***R. v. S.C.C.,*** *supra*, if after considering these principles, it is determined that a sentence of less than two years is appropriate, the Court must determine if the community would be endangered. There is a third criteria in the first step and that is determining that there is not a mandatory sentence. When the prerequisites of section 742.1 have been met, the Court must then proceed to consider whether a conditional sentence is consistent with the fundamental purpose and principles of sentencing, as I have said, in section 718 to 718.2.

[90] The key consideration under the initial determination is whether federal incarceration (two years or more) is warranted based on the sentencing principles.

[91] The direction in section 718.1 requires the Court to have regard to the seriousness of the offence and the offender's degree of responsibility.

[92] Section 718 states the fundamental purpose of sentencing is to contribute along with crime prevention initiatives to respect for the law and maintenance of a just, peaceful and safe society by imposing just sanctions. I refer again as I have previously said, from (a) to (f), the objectives.

[93] The parties here do not agree on an appropriate range of sentence for this offence for this offender.

MITIGATING CIRCUMSTANCES:

[94] In terms of mitigating circumstances in the discussion of Mr. Taweel's case, this is a serious offence. While the Defence submits no violence was shown, sexual assault has been held by its very nature to be a violent offence. Unlike other cases, however, there is no evidence of violent behaviour by Mr. Taweel here. The Crown says this is not a mitigating factor because sexual assault is inherently violent. The Crown, however, submitted the case of ***Bradley***, *supra*, which at

para. 18 did recognize a lack of violence as a factor in the sentence they imposed. I find that, to a degree, it is as well a mitigating factor here for Mr. Taweel.

[95] Mr. Taweel is a first time offender. This is a mitigating factor and one in which is generally supportive of rehabilitation or a lesser punishment. This along with his excellent work history and standing in the community are valid mitigating circumstances subject to a qualification which I will later refer to.

[96] Indeed, the Court has been provided with many letters from family, friends and community members vouching for Mr. Taweel's high integrity and good character. He also has the strong support of his family and there are those, his mother in particular, who are depending on him financially and in other ways. Mr. Taweel has been on release conditions without difficulty since August, 2011. This suggests that he is able and willing to abide by conditions if imposed as part of a conditional sentence. Mr. Taweel has suffered, so says the Defence, from public embarrassment and shame of having been convicted. He is now branded a sex offender. He has suffered adversely from the media attention his case has received.

[97] The Pre-Sentence Report and the reference letters describe and confirm the adverse impact his being charged and convicted has had on him, his health, his reputation, that of his family, his standing in the community and so on.

[98] The Defence further submits that it has been over 20 years, 23 years in fact, since this incident. The jurisprudence tells us that this factor, lapse of time, does not render inapplicable the principles of general deterrence and denunciation but, rather, individual deterrence and rehabilitation. The need to denounce offences of this kind is not diminished by the passage of time. The Crown has said this and I refer to the case of ***R. v. H.S.***, *supra*.

[99] There are additional mitigating factors referred to by Mr. Taweel's Defence counsel. Importantly, his relationship with the complainant did not involve a position of trust. His relationship did not involve a position of authority. He supplied no drugs or alcohol to the complainant. Their relationship did not involve him taking advantage of a familial relationship. Defence counsel has pointed out that many of the cases the Crown supplied did involve a position of trust.

[100] I concur that there was no position of trust or family relationship that Mr. Taweel took advantage of. I did, however, find in my decision that Mr. Taweel did exercise a form of authority over the complainant due to her being intimidated. I

accepted her evidence that his words were menacing to her and found that this amounted to coercion and the exercise of authority over her (reference para. 255 of the trial decision ***R. v. Taweel***, 2014 NSSC 103).

[101] Mr. Taweel is a low risk to re-offend as is confirmed by the assessment earlier referred to. the Pre-Sentence Report suggests that he would cooperate with any counselling offered which would be at a low level due to his minimal risk. As such, Mr. Taweel is not a danger to the community. This is a further mitigating factor for Mr. Taweel.

AGGRAVATING CIRCUMSTANCES:

[102] I turn to discuss the aggravating factors and analyze them. It may be said in assessing Mr. Taweel's circumstances that he has led an exemplary life since the commission of this offence and that the mitigating factors support a sentence of less than a penitentiary or federal term. The cases I have referred to suggest that some period of custody is appropriate on these facts.

[103] It can be also said, however, that when one looks at the circumstances of the offence, they are less than exemplary and are, in fact, aggravating for the following reasons.

[104] While Mr. Taweel did not hold a position of trust, he abused a youthful victim. He used the complainant for his sexual gratification. The victim was very young, at 14 years of age. He was much older at 32 or 33. He used his age to his advantage and exercised his authority in the manner I have described. Mr. Taweel befriended the complainant and then posed threats or inducements to her. He warned her not to tell. He made up an excuse for her, so as to keep away those who cared for her.

[105] The complainant was not only young but particularly vulnerable. The tenure of her evidence displayed that these events had a profound impact on her in my view, notwithstanding there is no victim impact statement. Here I refer to several paragraphs of my trial decision: paras. 188, 192, 193, 212, 226 and 238.

[106] Then there is the level of invasiveness. The case law informs us that the degree of invasiveness or nature of the assault are important features in determining a range of sentence. The acts here were most invasive involving intercourse and a brief encounter of oral sex.

[107] I will pause here to say that these aggravating factors weigh heavily in favour of the imposition of a federal term of imprisonment.

[108] I will now take a moment to discuss the case of ***R. v. Winters***, *supra*, which was extensively referred to by Mr. Knox on behalf of Mr. Taweel. I have once again reviewed this case. The Crown states that ***Winters*** stands alone and is dated. I agree with the Crown that ***Winters*** appears to stand alone. Although ***Winters*** stands alone, it still stands as a decision of our Court of Appeal. Although it is dated, in 1999, that does not of itself diminish its authority. This offence is dated.

[109] I hesitate to distinguish it because, as has been said, practically all cases can be distinguished and are hardly ever on all fours. Sentencing is an individualized process. In reviewing ***Winters*** I find, however, there are a couple of significant aspects to it. At para. 6 the Court of Appeal discussed the trial judge's assessment of the Pre-Sentence Report of the accused, a mother of two children and age 35. The report stated that she had been seeing mental health professionals since she was 16 years of age and so she had mental health issues, for almost 20 years. The Court obviously considered that to be an important feature.

[110] Second, at paras. 11 and 16, it is clear the Crown did not dispute the quantum of sentence. This was obviously important to the Court. At para. 16 the Court said:

> 16 Since the trial judge fixed a period of 18 months imprisonment as the appropriate sentence here (and the Crown takes no objection with that quantum), the provisions of s. 742.1 of the *Code* come into play

[111] In the case before me the quantum of the sentence is very much in dispute. I find in the present case ***Winters*** to be of less assistance than some of the other authorities that have been mentioned. The Defence has said, to your credit, that the circumstances in ***Winters*** are not as egregious and that there was not a denunciation in ***Winters***.

[112] Further, in ***E. (M.W.),*** *supra*, Fichaud, J.A. stated that for crimes of this nature, a prior clear record is not to be accorded undue significance and stated further that one sees incarceration sometimes more and sometimes less than two years, depending on the severity of the circumstances for sexual assaults on children, without intercourse.

[113] In this province we have seen in ***R. v. Oliver,*** *supra,* a federal sentence of two years upheld; similarly, two years in ***R. v. S.C.C.***, *supra*; and, similarly in ***R. v. E.(M.W.),*** *supra,* two years. In ***Oliver*** a conditional sentence was refused. In ***E.(M.W.)*** Fichaud, J.A. stated that an accused's term of incarceration cannot be reduced down simply to enable a conditional sentence. At para. 37 it was his view from the authorities that two years' incarceration is available in appropriate circumstances for midrange sexual offences, without intercourse.

[114] Therefore, notwithstanding the many positive attributes and other mitigating factors for the offender, Mr. Taweel, I am unable to conclude that a term of imprisonment of less than two years is appropriate. Thus, I have concluded that a conditional sentence should not be imposed under section 742.1 for Mr. Taweel.

DECISION:

[115] I turn now to my decision and my determination of what is a fit and proper sentence for Mr. Taweel in these circumstances.

[116] Mr. Taweel is 55 years of age, soon to be 56. I have found the seriousness of the offence and his degree of responsibility warrants a federal term of imprisonment. In such crimes the law is clear, emphasis is to be placed on denouncing the crime and deterring the accused and others from committing similar offences. This does not always mean incarceration will be the result, but it makes it more likely and, in this case, that is the sentence I have chosen.

[117] I accept, however, that Mr. Taweel has already suffered, as has the victim, by the events leading up to the sentencing today. A skillful sentencing judgment must balance, as best it can, all of the relevant factors in arriving at a fit and proper sentence; a just and a fair sentence.

[118] In that regard I will consider what I believe to be factors relevant to the final disposition. The principles I have emphasized are not the only principles in arriving at an appropriate sentence. I will not necessarily repeat the mitigating and aggravating factors already referred to, but I have taken them into account.

[119] Where rehabilitative measures can be achieved, that is an important factor in establishing any sentence. Mr. Taweel has been determined a low risk to re-offend. That the risk is low is in Mr. Taweel's favour. It is, however, still a risk and Mr. Taweel could benefit in future from some one-on-one counselling as suggested in the reports.

[120] In terms of the offence, Mr. Taweel has shown some remorse by acknowledging the hurt of the complainant and his statement of empathy for her difficulties.

[121] While the offence was serious it was not prolonged but was of short duration. This is in no way to detract from the harm done. He was also persistent toward the complainant and to some extent, at least, planned the contact with her.

[122] Mr. Taweel obviously has strong characteristics that would suggest that there is not a need to separate him from society for a lengthy period beyond two years. He has the strong support of his family and he is connected to his community. Mr. Taweel is well-educated, successful in business and has proven cooperative in his dealings. I believe these are relative factors in determining the length of sentence and in keeping with those objectives set out in section 718 of the ***Criminal Code***.

[123] For someone of Mr. Taweel's age and standing in life, that is , never before the law, a federal term of imprisonment will be significant for him to say the least and will send a strong message of general deterrence. It will also sufficiently denounce the crime and have strong repercussions for him beyond the institution.

[124] The Crown is seeking a federal term of imprisonment of three to four years. I must balance the impact on the victim, circumstances of the accused and the public interest in line with the factors I have already mentioned. I have considered the case law authorities provided to me and other jurisprudence. Without relying entirely on them but rather on the circumstances of Mr. Taweel, I note in ***R. v. F.(G.C.),*** *supra,* while the Court overturned the conditional sentence it imposed a sentence of two years less one day. In ***R. v. H.S.,*** *supra,* the Appeal Court overturned a two year sentence and substituted three years. I note in that case a position of trust was held.

[125] For the reasons I have given I believe a sentence at the low end of the federal range is appropriate for Mr. Taweel, given his circumstances and taking all relevant matters into account including the circumstances of the offence. There was no position of trust.

[126] Exercising my discretion and having weighed and considered the matter thoroughly, I sentence Mr. Taweel to a term of two years and four months, that is 28 months imprisonment on the offence of sexual assault pursuant to section 271 of the ***Criminal Code***. I concur that these were three distinct, selfish acts

deserving of the Court's condemnation in accordance with the principles I must emphasize. I will also grant the three orders presented to the Court and which have been consented to and agreed upon by Crown and Defence.

Murray, J.