NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Keats*, 2018 NSCA 16

Date: 20180306
Docket: CAC 457306
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

James Duncan Keats

Respondent

Restriction on Publication: s. 486.4 of the Criminal Code

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	September 25, 2017, in Halifax, Nova Scotia
Subject:	concurrent versus consecutive sentences
Summary:	Mr. Keats was found guilty of two counts of sexual assault. Each count involved a different female complainant. Mr. Keats was sentenced to 30 months' incarceration—12 months' incarceration for the sexual assault of TH and 18 months' incarceration, to be served consecutively, for the sexual assault of ML. However, this 30-month term was to be served concurrent with a four-year term Mr. Keats was already serving for sexually assaulting another female, BW. All three assaults were committed while Mr. Keats was acting in his capacity as a paramedic. The offences took place over approximately five months and the assault which gave rise to the first conviction occurred after the assaults against TH and ML. The sequence of convictions played a role in the judge's

ordering of consecutive sentences. It was apparent that the judge thought that Mr. Keats being a first-time offender for purposes of the sentencing was a bar to a consecutive sentence being imposed.

The Crown sought leave to appeal against sentence. It argued the judge erred in principle and that imposing a concurrent sentence to the sentence which Mr. Keats was already serving resulted in an unfit sentence.

Mr. Keats also appealed his convictions. The conviction and sentence appeals were filed separately, but heard the same day. Mr. Keats' conviction appeal was dismissed (see *R. v. Keats*, 2018 NSCA 15).

Issues:

1. Should leave to appeal be granted?

2. Did the judge err in principle by failing to order consecutive time?

Result:

Leave is granted and appeal allowed. The judge was incorrect in holding the view that the timing of the offence involving BW was a bar or a constraint to ordering consecutive sentences. This error had a material impact on his reasoning as to whether to impose concurrent or consecutive sentences. There is no principled reason for there to be concurrent sentences on this record. Such an order trivializes these serious sexual assaults by a person in trust and does not adequately reflect Mr. Keats' moral blameworthiness. The 30-month sentence imposed (12 months' incarceration for TH and 18 months' incarceration for ML) shall be served consecutive to the four-year sentence Mr. Keats is currently serving. The ancillary orders made by the sentencing judge stand.

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Judges:	Fichaud, Farrar and Van den Eynden, JJ.A.
Appeal Heard:	September 25, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Van den Eynden, J.A.; Fichaud and Farrar, JJ.A. concurring
Counsel:	Jennifer MacLellan, Q.C., for the appellant Tara Smith, for the respondent

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 victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

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

Reasons for judgment:

Overview

[1] In December 2015, a jury found Mr. Keats guilty of two counts of sexual assault on a four-count Information. Each count under s. 271(1)(a) of the *Criminal Code* involved a different female complainant. The jury found Mr. Keats guilty of the counts involving the complainants TH and ML. He was acquitted on the other two counts.

[2] Mr. Keats was sentenced to 30 months' incarceration on October 20, 2016 by Justice Felix A. Cacchione—12 months' incarceration for the sexual assault of TH and 18 months incarceration, to be served consecutively, for the sexual assault of ML.

[3] Mr. Keats appealed his convictions. The Crown applied for leave to appeal against sentence. The conviction and sentence appeals were filed separately, but heard the same day by the same panel. Mr. Keats' conviction appeal was dismissed (see *R. v. Keats*, 2018 NSCA 15).

[4] At the time he was sentenced for these offences, Mr. Keats had previously been tried and convicted of sexually assaulting another female victim (BW). For the offence against BW, he was sentenced to a prison term of four years on October 26, 2015. Justice Cacchione ordered the 30-month sentence respecting TH and ML be served concurrent to the four-year term. The Crown took no issue with the length of the sentence imposed for the assaults against TH and ML; rather, it said the judge erred in making the sentence concurrent.

[5] For the reasons that follow, I would grant leave, allow the appeal and order the 30-month sentence be consecutive.

Issues

[6] The issues raised on appeal are framed as:

1. Should leave to appeal be granted?
2. Did the judge err in principle by failing to order consecutive time?

[7] To obtain leave, the Crown's grounds of appeal must raise an arguable issue. That threshold has been met. I would grant leave.

Standard of review

[8] The standard of review for sentence appeals is deferential.

[9] When determining a sentence, a judge is exercising discretion authorized under s. 718.3(1) of the *Criminal Code*. Judges have a broad discretion to impose the sentence they deem appropriate within the limits established by law. The decision to order concurrent or consecutive sentences is treated with the same deference owed by appellate courts to sentencing judges concerning the length of sentences ordered. In the absence of an error of principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, appellate courts are not to overturn a sentence unless it is demonstrably unfit (see *R. v. Adams*, 2010 NSCA 42; *R. v. Banfield*, 2012 NSCA 98; *R. v. Lacasse*, 2015 SCC 64; *R. v. Shropshire*, [1995] 4 S.C.R. 227).

Background

Circumstances of the assaults

[10] Mr. Keats is a paramedic. He was in a position of trust and acting in his capacity as a responding paramedic when he sexually assaulted his victims TH, ML and BW. The three offences shared no nexus in time or place. Although the assault against BW occurred after those of TH and ML, the conviction for the assault on BW was first in time. As I will later explain, the sequence of convictions played a role in the judge's perception of constraint respecting his ability to order consecutive sentences.

[11] I summarised the circumstances of the assaults against TH and ML in the decision dismissing Mr. Keats' appeal from conviction (2018 NSCA 15). For convenience, I will repeat some of that background. I will also briefly review the circumstances respecting the assault on BW.

[12] The incident involving TH happened in January 2013. She suffered a leg injury and was taken to a nearby rural hospital. Attending medical professionals referred her to Halifax for surgery. Transport by ambulance was required. Mr. Keats was one of two attending paramedics. He rode in the back of the ambulance with TH. The other paramedic drove.

[13] Shortly after transport got underway, Mr. Keats told TH he was going to check her vitals. She was strapped into a gurney. TH testified that Mr. Keats put

his stethoscope under her shirt and moved it back and forth across her breasts. Then he put the stethoscope down her pants, inside her underwear and moved it across her pubic hair. TH said Mr. Keats assaulted her again in a similar manner just prior to their arrival in Halifax.

[14] The incident involving ML happened on April 21, 2013. ML had a history of mental and physical health challenges. She was in distress when a 911 call was made on April 21, 2013. Mr. Keats was one of two paramedics who responded to the 911 call. She was transported to the hospital by ambulance due to her mental health state. Mr. Keats was scheduled to drive the ambulance; however, he convinced his partner to swap roles on the pretext he had an interest in mental health and had recent training in this area. ML was reportedly expressing suicidal ideation at the time and was in a vulnerable state. She also suffered from endometriosis and was holding her stomach due to pressure from this medical condition. She further told Mr. Keats she had a sore breast.

[15] While alone with ML in the back of the ambulance, Mr. Keats told her he wanted to check her breathing. She was on the gurney and strapped in. ML said Mr. Keats asked her to lift her bra and shirt, and he then fondled her breasts. He then asked about her abdominal pain and requested that she pull down her pants and underwear. She started to and he asked her to pull them down further. She did to the point her crotch area was completely exposed. She said he palpated her stomach and kept moving his hands downward until he touched her vagina. He was not wearing gloves. ML had not complained about her stomach pain extending to her vaginal area. She said this interaction left her humiliated, embarrassed and scared.

[16] Mr. Keats sexually assaulted BW on May 26, 2013. The sexual assaults against TH and ML occurred earlier in 2013. BW was an elderly senior. Her encounter with Mr. Keats happened after she made a 911 call because her ill husband suffered a fall. Mr. Keats was one of two paramedics who responded. As the other paramedic attended to BW's husband, Mr. Keats suggested that BW accompany him to her bedroom so that he could examine her. Reportedly, she was distressed and suffering chest pains after her husband's fall. Once alone with her in her bedroom, he touched her breast, penetrated her vagina with his fingers, licked her clitoris, attempted oral sex and anal sex, and eventually had sexual intercourse without BW's consent. Mr. Keats was found guilty and received a sentence of four years' incarceration. Mr. Keats unsuccessfully appealed this

conviction (see *R. v. Keats,* 2016 NSCA 94). He did not appeal his four-year sentence.

The trial judge's decision on sentencing

[17] Following submissions, Justice Cacchione rendered an oral sentencing decision on October 20, 2016. Although subsequently released in written form on October 24, 2016 to the parties, it remains unreported.

[18] It is apparent from his sentencing decision and exchanges with counsel that the judge thought his sentencing options were limited. Specifically, when sentencing Mr. Keats, he was of the belief that he did not have the option of ordering the 30-month sentence be served consecutively to the four-year sentence Mr. Keats was serving.

[19] In the following exchange between the judge and Crown counsel, the judge's views on his perceived constraint first surface:

> **MR. MCCARROLL:** [. . .] But furthermore, and I suppose most importantly to the discussion on concurrent versus consecutive, is the principle of totality, and that is what we really need to consider. And the Crown's position is that, when looked at, a global sentence of three years is certainly not excessive. It's directly in line with the cases submitted by the Crown, and it is fitting with regards to the significant moral blameworthiness that is present in this case because of the breach of trust and because of the vulnerability of these victims.
>
> Now, these offences predate the offence for which her [*sic*] was sentenced to four years for sexual assault in Windsor, Nova Scotia.
>
> **THE COURT:** You're getting to the point where I was going to ask you the question about that.
>
> **THE COURT:** [. . .] **And the question that I have**, and I will ask Mr. North to respond during his submissions, **is whether** it—whether **the court can or should make whatever sentence is imposed today consecutive or concurrent to the sentence that he is presently serving, given that, at the time of the commission of these offences, that the May 26th, 2013, offence did not exist**. [. . .]
>
> [Emphasis added]

[20] Unfortunately, Crown counsel did not respond to the direct issue the judge identified that he was struggling with. It was left hanging. The Crown continued submissions and proceeded to reiterate that there was no nexus between offences, the circumstances required consecutive sentences, and the global sentence was

warranted given Mr. Keats' level of blameworthiness and aggravating breach of trust. Although the judge said he would ask defence counsel the same question, he did not. Nor did defence counsel, on his own initiative, address during submissions what the judge perceived as a constraint on his discretion (i.e., to order the sentence for TH and ML be consecutive to the four-year sentence).

[21] The following reasons in the judge's sentencing decision crystalize his view on his perceived constraint:

> [76] **As I indicated earlier**, [during oral submissions noted above] **the difficulty that I have had with respect to this sentencing and the submission that any sentence imposed here should be consecutive to a sentence that Mr. Keats is presently serving is the fact that the sentence he is serving is for an offence which occurred after the offences for which he is being sentenced this morning**. So in essence, Mr. Keats is a first offender for purposes of this sentencing.
>
> [77] With respect to the offence regarding (TH), I am sentencing you to a period of 12 months incarceration. With respect to the offence regarding (ML), I am sentencing you to a period of 18 months incarceration to be served consecutively to the 12 months sentence, for a total sentence of 30 months on these two counts. I am ordering that the 30-month sentence be concurrent to his present four-year term; **and I say that because the four-year sentence, as I have indicated was imposed in relation to an offence that had not occurred when these two offences took place; that Mr. Keats was a first offender for purposes of the sentencing; and there really was a significant gap between offences**.
>
> [Emphasis added]

[22] It is apparent that the judge thought that Mr. Keats being a first-time offender for purposes of the sentencing was a bar to a consecutive sentence being imposed. As I will explain, the timing of the offence involving BW is neither a bar nor a constraint. The judge was incorrect in holding this view and this view undoubtedly had a material impact on his reasoning as to whether to impose concurrent or consecutive sentences.

[23] Later, I will review additional excerpts from the judge's decision when determining what a fit and proper sentence should be.

Law and analysis

[24] The Crown argues the decision to make these sentences consecutive to each other, but concurrent to the sentence being served at the time, was grounded in legal error. I agree.

[25] The Crown points out that although the judge stated at ¶ 72 that he "considered, in arriving at the sentence to be imposed, the provisions of ss. 718 to 722 of the *Criminal Code*," he made no other reference to these sections, including s. 718.3(4), which is specific to Mr. Keats' sentencing. Section 718.3(4) provides:

> 718.3 (4) The court that sentences an accused **shall consider directing**
>
> (a) that the term of imprisonment that it imposes **be served consecutively to a sentence of imprisonment to which the accused is subject at the time of sentencing;** and
>
> (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively, including when
>
> (i) the offences do not arise out of the same event or series of events,
>
> (ii) one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or
>
> (iii) one of the offences was committed while the accused was fleeing from a peace officer.
>
> [Emphasis added]

[26] This section authorizes the judge to impose a new sentence consecutive to one already being served. Section 718.3(4) makes no mention of the relevancy of offence dates. Rather, under s. 718.3(4)(a), it is the date the sentence is imposed that is relevant—**not** the dates on which the underlying offences occurred. As was evident in the judge's reasoning, his focus was incorrectly on the dates of the offences.

[27] The Crown contended that neither the wording of s. 718.3(4)(a) nor legal precedent supports the proposition that the time being served must be for a prior offence in order for a consecutive sentence to be ordered. The Crown argues the fact that Mr. Keats was a first-time offender for purposes of the sentencing was no

bar to a consecutive sentence being imposed. I agree. This is a correct reflection of the law.

[28] In *R. v. Johnson* (1998), 131 C.C.C. (3d) 274, the British Columbia Court of Appeal determined that while a subsequent offence cannot be treated as a prior record, there is nothing preventing the sentence for a prior offence from being served consecutively. Although *Johnson* addressed a prior iteration of s. 718.3(4), the principle remains sound. In *Johnson*, the Court said:

> [21] This submission finds some support in the authorities to which I have referred at para. 14 of these reasons. In those cases, however, the question before the court was whether, in determining the length of sentence to be imposed for a particular offence, a sentencing judge could treat convictions for offences which were committed prior to the offence in question as a prior record. As earlier noted, the answer to this question is "no". That is a different question, however, from the question of how the sentences should be served once the appropriate length of sentence for the particular offence has been determined. At that point, the sentencing judge must consider whether the sentences should be served concurrently or consecutively. In the former situation, the relevant date for the purpose of determining the length of sentence to be imposed for the particular offence is the date the offence is committed; in the latter situation, the relevant date for determining whether the sentence should be consecutive or concurrent is the date that sentence is imposed.
>
> [emphasis in original]

[29] In *R. v. Johnson (J.A.)* (1999), 173 N.S.R. (2d) 37, this Court made the same point when interpreting an earlier version of s. 718.3(4). Justice Bateman said:

> [10] . . . Pursuant to s. 718.3(4) we now have the power to make a sentence consecutive to any sentence that Mr. Johnson is serving whether it relates to an offence committed before or after the sentence on appeal.

[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.

[31] I turn to address Mr. Keats' position respecting the Crown's appeal.

[32] Mr. Keats' position is that the judge had wide discretion to fashion a proper sentence. Mr. Keats agreed that it was open to the judge to impose a consecutive sentence where an offender, such as Mr. Keats, is serving a sentence for a subsequent offence, but there is no requirement to do so. He noted that s. 718.3(4) only requires that the option be considered during sentencing. Mr. Keats says the judge made no error in the exercise of his discretion, nor was he overly influenced by the need to treat him as a first-time offender.

[33] I reject this argument. It does not accord with what the sentencing judge said. With respect, he incorrectly saw the timing of the May 26, 2013 offence respecting BW as a restriction. The judge raised this point with counsel during oral submissions. Then, in his decision, he expressly stated this wrongly perceived limiting factor as a reason for making the decision he did.

[34] In the alternative, Mr. Keats argues that if the judge did get it wrong, the sentence should be saved by the totality principle—for to do otherwise would impose a disproportionate sentence that is unduly long and harsh.

[35] During oral submissions on appeal, counsel for Mr. Keats acknowledged that aspects of the judge's reasoning were difficult to understand; however, she suggested that, in effect, his decision to render a consecutive sentence for TH and ML, but made concurrent to the sentence for BW, was done with the view of totality in mind. The problem with this argument, and why I also reject it, is that the judge said nothing about totality. He was clear in his reasons when he said, "I am ordering that the 30-month sentence be concurrent to his present four-year term; and I say that **because** the four-year sentence, as I have indicated was imposed in relation to an offence that had not occurred when these two offences took place." The principle of totality was not on the radar for the purpose suggested by Mr. Keats.

[36] The sentencing judge was correct in not treating the subsequent conviction for the sexual assault of BW as a prior record for aggravating purposes. However,

in my view, he was wrong to have otherwise disregarded it. It was a factor clearly relevant to the exercise of his discretion to impose jail time, whether consecutive or concurrent to the time Mr. Keats was currently serving.

[37] I am satisfied that the judge was unduly influenced by the need to treat Mr. Keats as a first-time offender for purposes of the sentencing—to the point he perceived this as a bar to making the 30-month sentence consecutive to the four-year sentence Mr. Keats was serving. Put another way, he wrongly perceived that his discretion to impose consecutive sentences was curtailed by the timing of BW's offence.

[38] In my view, this was an error in principle that materially impacted the sentence imposed—to the point that ordering the sentence imposed for the assaults against TH and ML to be served concurrently with the sentence for the assault against BW was demonstrably unfit. Appellate intervention is warranted.

[39] This Court can determine a fit and proper sentence, as the record is complete.

What is a fit and proper sentence?

[40] Not surprisingly, the submissions from the Crown and Mr. Keats differ on the remedy should this Court find the judge erred in principle. Mr. Keats acknowledged that the 30-month sentence was reasonable. Where he parts ways with the Crown's position is in his suggestion that it should remain concurrent. As noted, he argues that to do otherwise would impose a disproportionate sentence that is unduly long and harsh.

[41] Mr. Keats asserts there is a reasonable nexus between the offences. The problem with this statement is the sentencing judge thought otherwise. He specifically found at ¶ 77 "there really was a significant gap between offences." That conclusion by the sentencing judge is solidly reflected in the record. The following supports the absence of any nexus between the assaults: 1) the offences were committed against different victims; 2) the offences were committed at different times; 3) the offences took place over approximately five months and were not one continuous transaction; 4) a new criminal impulse was formed on each occasion; and, 5) the nature of the sexual assaults escalated.

[42] The Crown argues that imposing a concurrent sentence to the sentence which Mr. Keats was already serving resulted in an unfit sentence, particularly

where denunciation and general and specific deterrence are concerned. Further, the significant gap between offences favours a consecutive sentence, and anything other than consecutive sentences trivializes the crime of sexual assault by essentially imposing no sentence for the sexual assaults on TH and ML. In other words, Mr. Keats would go unpunished. This sentence would do nothing to denounce Mr. Keats' conduct or to deter offenders like him who may wish to take advantage of their position of trust and authority.

[43] Given the nature of the offences committed, the breach of trust involved and Mr. Keats' moral blameworthiness, the Crown argues it would be just and not excessive to order the 30-month sentence be concurrent to the four-year sentence.

[44] In my view, there is no principled reason for there to be concurrent sentences. Such an order trivializes these serious sexual assaults by a person in a position of trust and does not adequately reflect Mr. Keats' moral blameworthiness.

[45] Before setting out my view on sentence, I will review some of the expert evidence the judge referred to in his sentencing decision, as well as mitigating and aggravating factors. I refer to these aspects of his decision:

> [42] Ms. Evans found that an analysis of the first two sexual assaults; that is, against TH and ML, have similarities in that they both involve inappropriate contact in the breast and vaginal/groin areas on more than one occasion during his time in the back of an ambulance with both of these women. That contact was more intrusive in the second offence where Mr. Keats touched the complainant's vaginal lips and clitoral hood piercing. The third offence, for which Mr. Keats has already been sentenced, illustrates an escalation in behaviour. The reason for a progression in his sexually-abusive behaviour is unclear, but may suggest increasing confidence in the absence of a detection of his previous offence behaviour and/or the need to further push boundaries for satisfaction. Ms. Evans states that such behaviour may reflect elements of power and control which are gratifying for some individuals, typically those who are passive in other aspects of their lives, as in the case of Mr. Keats in his marriage which is corroborated by his wife. Such behaviour also suggests the presence of an implicit belief that sexualizes women. Support for such a pattern of thinking comes from Mr. Keats' acknowledgement that his extramarital encounters were purely sexually motivated and he denied any emotional connection with his sexual partners.
>
> [43] Ms. Evans also noted a further common factor in each offence being the vulnerability of the victims which Mr. Keats used to his advantage. Mr. Keats appeared undeterred by the possibility that his inappropriate actions would be

challenged by the victims, likely relying on their distressed state and dependency at the time of the occurrences. Ms. Evans stated in her report:

> ...Given his apparent single-mindedness to abuse these women it is unlikely that he felt guilt or empathy toward them, suggestive of his use of the word sorry as a further manipulative tactic...

[. . .]

[46] According to Ms. Evans' assessment, the offences indicate or illustrate a clear pattern of offending in that Mr. Keats targeted adult females unknown to him, but to whom he had access through his job as a paramedic. In each case he used the vulnerability of the women to cross boundaries under the guise of his profession. She states in her report:

> ...While the selection of victim does seem opportunistic, in two of the three cases Mr. Keats manipulated the situation in order to gain time alone with the women to facilitate his sexual offences. These actions demonstrate a deliberate and planned component to his sexual offending. Of concern is the absence of discrimination in the ages of the victims suggesting a huge pool of potential victims should Mr. Keats reoffend.

[47] Ms. Evans' report goes on to state that the recommendations which she advanced in her report of October 2015 are still considered appropriate. She states in that report:

> ...Access and opportunity appear to be primary factors in Mr. Keats' offending, which were facilitated by his job and professional status. It is unknown if these determinants are relevant to his risk of reoffence outside of his employment. As previously indicated, Mr. Keats' personality profile does not indicate a positive prognosis for intervention. The approach - explicit nature of his offending does not involve deficits in the ability to self-regulate behaviour, rather it involves a belief system and attitudes that support sexual aggression as a means of sexual gratification. As a result, individuals intentionally plan to offend and implement explicit strategies for achieving the behavioural goal. Hence external restrictions and supervision are considered the most applicable with management recommended with regard to access to vulnerable individuals.

[. . .]

[50] The prosecution filed a brief on April the 18th of this year. It argues as it did this morning, that this case involves a significant breach of trust which should be viewed as a substantial aggravating factor when determining a fit and proper sentence. It references s.718.2 (iii) of the *Criminal Code* which reads as follows:

> A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to

> the offence or the offender, and, without limiting the generality of the foregoing,
>
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim.
>
> shall be deemed to be aggravating circumstances.

[51] It is argued that Mr. Keats' moral blameworthiness is exceptional and that members of society need to be able to trust that when they are in a time of need and at their most vulnerable, they will not be taken advantage of.

[. . .]

[73] In the present case, I find the aggravating factors to be as follows:

> 1. Mr. Keats was in a position of trust akin to that of a doctor-patient relationship relative to both TH and ML - this aggravates his moral blameworthiness.
>
> 2. Mr. Keats' actions were planned and deliberate - they occurred in the rear of the ambulance where there was less likelihood of detection. Evidence of this planning and deliberation comes from the evidence of Mr. Sanford who was to be the attending paramedic on the ML file; however, was convinced by Mr. Keats to become the driver in that instance because Mr. Keats had taken a course on suicidal intervention.
>
> 3. Mr. Keats was in a position of power and responsibility over both TH and ML. He did not exercise that power or those responsibilities for the good of his patients and in their best interests, but rather for his own self-gratification.
>
> 4. TH and ML were vulnerable and completely trusted Mr. Keats as a healthcare provider. Mr. Keats took advantage of this trust. He showed no remorse. The sexual assault of a patient by a healthcare provider is not only in my view, but in the view of the jurisprudence a highly-aggravating factor.
>
> 5. Mr. Keats has shown no remorse for any of these offences. Instead, he has chosen to blame the complainants.

[74] As mitigating factors, I consider the following:

> 1. Mr. Keats appears to be in a committed relationship with his wife and one child. His family remains supportive. Mr. Keats has lost his employment and most likely will never work again in his chosen field.
>
> 2. Mr. Keats has also been the subject of extensive negative publicity which in my view is a source of denunciation.
>
> 3. Mr. Keats, as well has the support of some members of his community.

[46] Both Crown and respondent counsel noted that the judge's reference to a lack of remorse as an aggravating factor could be viewed as a potential further error. Except in unusual and exceptional circumstances, where an offender has plead not guilty, a lack of remorse is not to be considered an aggravating factor (see *R. v. Hawkins*, 2011 NSCA 7 ¶ 33). In *Hawkins*, Justice Beveridge referred to *R. v. Valentini* (1999), 43 O.R. (3d) 178 (Ont. C.A.) where the court said:

> In my view, a court must be very careful in treating lack of remorse as an aggravating circumstance. A sincere expression of remorse can be an important mitigating factor and can reduce the sentence that might otherwise be imposed. Lack of remorse is not, ordinarily, an aggravating circumstance. It should only be considered aggravating in very unusual circumstances such as where the accused's attitude toward the crime demonstrates a substantial likelihood of future dangerousness. Even then the trial judge must be careful not to increase the sentence beyond what is proportionate having regard to the circumstances of the particular offence.

[47] Mr. Keats points out that the sentencing judge did not make an express finding of unusual and exceptional circumstances. From the Crown's perspective that is not necessary as Mr. Keats' circumstances, as otherwise set out in the sentencing decision, could fall within that framework. Alternatively, if this is an error, the Crown says it did not impact the sentence because the other prevailing aggravating factors far outweigh the mitigating factors. I agree with the Crown on both points.

[48] In assessing a proper sentence, I am mindful of the principle of totality. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender (s. 718.1). Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[49] If the sentence is made concurrent, Mr. Keats' sentence, in total, for the three separate assaults, would be six-and-a-half years. Mr. Keats' conduct was egregious and harmful to the victims. I have reviewed and taken into consideration all the relevant principles of sentencing as required by ss. 718-722 of the *Criminal Code*. I have also reviewed the record and considered the sentencing submissions made to the judge and the authorities referenced by the parties on range of sentence. These authorities were also summarized in the trial judge's sentencing decision at ¶ 59-71.

[50] In my view, the 30-month sentence should be served consecutive to the four-year sentence. It is not unduly long or harsh; rather, it is proportionate to the

gravity of the offences and reflective of Mr. Keats' overall moral blameworthiness and breach of trust.

Conclusion

[51] I would grant leave and allow the appeal. I would order the 30-month sentence imposed (12 months' incarceration for TH and 18 months' incarceration for ML) be served consecutive to the four-year sentence Mr. Keats is currently serving. The ancillary orders made by the sentencing judge stand.

Van den Eynden, J.A.

Concurred in:

Fichaud, J.A.

Farrar, J.A.