PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R v Percy*, 2019 NSPC 12

Date: 2019-05-02
Docket: 8173520, 8173521
Registry: Halifax

Between:

Her Majesty the Queen

v.

Matthew Albert Percy

Restriction on Publication:
s. 486.4: Ban under this section directs that any information that will identify the complainant shall not be published in any document or broadcast or transmitted in any way

DECISION ON SENTENCE

Judge: The Honourable Judge Elizabeth Buckle

Heard: March 26, 2019, in Halifax, Nova Scotia

Decision: May 2, 2019

Charges: Sections 271 and 162(1)(c) of the *Criminal Code*

Counsel: Rick Woodburn for the Crown
Brad Sarson for the Defence

By the Court:

Introduction

[1] I found Matthew Percy guilty after trial of sexual assault contrary to s. 271 of the *Criminal Code* and voyeurism contrary to s. 162(1)(c) of the *Criminal Code.*

[2] Those convictions resulted from my finding that Mr. Percy made two recordings of sexual activity with the victim, T.J, without her knowledge or consent. In the second recording, he was having sexual intercourse with her while she was not conscious and, therefore, not consenting or capable of consenting.

[3] I now have to determine a fit and proper sentence for Mr. Percy.

Position of the Parties

[4] The Crown submits that an appropriate total sentence for Mr. Percy is a custodial sentence of 4 years; 3 years for the sexual assault and 1 year for the voyeurism. In doing so, the Crown emphasises deterrence and denunciation and relies on the aggravating factors, including that the offence involved intercourse with an unconscious victim, in her own home and Mr. Percy recorded that act.

[5] The defence submits that an appropriate total sentence is a custodial sentence in the range of 12 - 18 months. In doing so, the defence emphasises rehabilitation and relies on the mitigating factors, including lack of a prior criminal record and Mr. Percy's positive pre-sentence report, as well as the absence of aggravating factors such as extrinsic or gratuitous violence.

[6] The Crown and defence agree that Mr. Percy should be given credit for the time he has spent in custody pending trial and sentence. With the normal enhanced

credit, he has now served the equivalent of 768 days or approximately 2 years and one month in custody.

[7] They also agree on the imposition of various ancillary orders.

Circumstances of the Offence

[8] My factual findings are set out in detail in my trial decision. In summary, Mr. Percy and Ms. J. were friendly acquaintances when they ran into each other in a bar in Halifax. Prior to meeting Mr. Percy, Ms. J. had consumed a large quantity of alcohol. Mr. Percy had also consumed alcohol but a smaller quantity. They walked back to her residence and were there together for approximately one hour. During that time, they engaged in sexual activity. Ms. J. was significantly impaired by alcohol. Neither absence of consent nor lack of capacity to consent was proven for the initial sexual activity. However, later, for approximately 90 seconds, Ms. J. was unconscious while Mr. Percy had vaginal intercourse with her. I use the term "unconscious" in this decision to refer simply to the absence of consciousness and not as the term might be used in a medical context. No medical evidence was called so I cannot say whether she was medically unconscious, "passed out" from consumption of alcohol or in a deep sleep, or, if those states are medically different. What is clear is that during that period, Ms. J. was not moving, not responding to external stimuli and could not consent.

[9] Mr. Percy used his phone to make two video recordings of their sexual activity. The first recording captures Ms. J. performing oral sex on him. The second recording captures him having vaginal intercourse with her while she is unconscious. She did not consent to either recording and was not aware that the recordings were

being made. Mr. Percy intended her to remain unaware. This was particularly apparent in the second recording in which he began recording after she was unconscious and put the phone down when she started to wake up. Mr. Percy made the recordings for his own subsequent use and there is no evidence that he intended to share them. His phone was turned over to police shortly after the incident, so the victim is spared the fear that the videos have been disseminated and knows that they will be destroyed upon expiry of any appeal periods.

[10] The evidence did not establish that Ms. J. was unconscious when the intercourse began. The recording does not show the start of the sexual intercourse and Ms. J.'s recollections are sporadic and unreliable. Therefore, Mr. Percy will be sentenced on the basis that Ms. J. was conscious when he began having intercourse with her, but became unconscious and he failed to stop. The evidence establishes that Mr. Percy used a condom during the intercourse and there is no evidence of any gratuitous violence or threats. When Ms. J. began to wake up, Mr. Percy asked her if she was ok, if she wanted to stop and then stopped when she appeared to be distressed.

Impact on Victim

[11] In her testimony at trial, Ms. J. described what she recalled of the offence and its aftermath. In her victim impact statement, she described the emotional, psychological and practical impact on her.

[12] She woke to find Mr. Percy in her bed with only vague recollections of intercourse with him. She was still intoxicated and disoriented. After she reported it, she was taken to hospital where the sexual assault examination was performed.

That involved an intimate and intrusive examination. She had to consider the risk of pregnancy and communicable disease and was given medication to prevent those possibilities. She was exhausted and nauseous. In the days and weeks following, she experienced anxiety, depression and feeling unsafe in her home. Not surprisingly, this impacted her ability to go about her normal life.

[13] Then, two months after the offence, she learned of the existence of the recordings. She describes being "blindsided" by this. It is hard to imagine how that would feel. However, it is not difficult to understand that the feelings evoked by the sexual assault, feelings of degradation, humiliation, violation and embarrassment, would be exacerbated by the realization that it had been recorded. She reports feeling anger which may be the healthiest possible emotion she could have felt.

Mr. Percy's Circumstances

[14] Information about Mr. Percy's background and current circumstances has been provided through a pre-sentence report and submissions of counsel.

[15] He has just turned 36 years old. He has no criminal record. There is nothing remarkable about his background. He had the benefit of a stable childhood without abuse or neglect. His family was not wealthy, but there is no indication that he ever wanted for the necessities. He describes his upbringing as "really good". He completed high school and went to community college. He has been in pre-trial custody in a provincial institution since December 15th, 2017. Before that, he was consistently employed and financially stable. He is not married and has no children. He has had several long-term romantic relationships. He has no mental or physical health concerns and no addictions.

[16] Mr. Percy's uncle and father, who were interviewed for the pre-sentence report, were both shocked by the offences. They are both close to him and continue to be supportive, despite recognizing the seriousness of the offences. His uncle reports that Mr. Percy has a strong character and qualities he respects. He believes he will participate in any available programming. His mother suffers from early onset Alzheimer's disease, so her comments were not available.

Sentencing Principles

[17] In sentencing Mr. Percy, I must apply the purpose and principles of sentencing set out in 718, 718.1 and 718.2 of the *Criminal Code*. Guidance as to how I should interpret and balance these principles and how they should be applied to different types of offence comes from the common law. The best means of addressing the principles and attaining the ultimate objective will always depend on the unique circumstances of the case. Because of that, it has been consistently recognized that sentencing is a delicate and inherently individualized process (*R. v. LaCasse,* 2015 SCC 64 at para. 1 and *R. v. M. (C.A.),* [1996] 1 S.C.R. 500 at paras. 91-92).

Objectives of Sentencing

[18] The purpose of sentencing is protection of the public and to contribute to respect for the law and the maintenance of a safe society. Section 718 instructs that this purpose is to be accomplished by imposing just sanctions that have one or more of the following objectives: denunciation; general and specific deterrence; separation from society where necessary; rehabilitation of the offender; promotion of responsibility in offenders; and acknowledgment of the harm done to victims and to the community.

Denunciation and Deterrence

[19] Denunciation is the means by which a sentence communicates society's condemnation of conduct. As Justice Lamer said in *R. v. C.A.M.* "a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law." (*R. v. C.A.M.* [1996] 1 S.C.R. 500, at para. 81). The goal of general deterrence is to discourage others from committing similar offences.

[20] Denunciation and general deterrence are the paramount considerations in sentencing offenders for both offences (For example, see: *R. v. Thurairaja*, 2008 ONCA 91, para. 41; *R. v G. (T.V.)*, 133 N.S.R. (2d) 299 (NSSC), para. 4; *R. v. J.B.* 2018 ONSC 4726; and, *R. v. Cassells*, 2013 MBPC 47, para. 57). Emphasizing these objectives reflects society's condemnation for the behaviour and acknowledges the tremendous harm it causes.

[21] The goal of specific deterrence is to discourage Mr. Percy from committing further offences. The Crown candidly acknowledges that it is not clear whether Mr. Percy is at risk to reoffend. There is nothing about his background that would lead me to believe that there is a need for specific deterrence. However, the circumstances of the offences are troubling. Mr. Percy may hold beliefs or have underlying issues that, if not addressed, would create a risk of future offending. As I will discuss in a moment, that type of concern is best addressed through the rehabilitative goals of counselling and sexual offender programming rather than through a punitive sentence.

[22] Pre-sentence or extra-judicial consequences can also have a collateral denunciatory and deterrent impact. Mr. Percy has experienced significant punitive consequences as a result of this process. He has lost his job, been incarcerated pending sentence and experienced public humiliation through extensive media coverage of this case

Rehabilitation

[23] Rehabilitation contributes to the long-term protection of society. It continues to be a relevant objective, even in cases requiring that denunciation and deterrence be emphasized (*Lacasse*, at para. 4).

[24] In sexual assault cases, rehabilitative efforts usually involve counselling or specific sexual offender programming. That programming can help offenders understand their own thinking related to sexual violence and the impact of sexual violence on victims. It can provide offenders with coping strategies, help them manage their harmful behaviour, their emotions and their risk factors and can promote the importance of healthy relationships. In many cases, ensuring offenders have access to that kind of education is crucial to the long-term protection of society.

[25] I believe Mr. Percy requires this kind of programming, or at least to be assessed by a professional to determine his needs. His actions demonstrate a sense of entitlement over Ms. J.'s body and a disregard for her right to make choices. His recording of the sexual activity is concerning, particularly recording the sexual assault. His desire to preserve that for future viewing is disturbing and requires professional assessment.

[26] The kind of programming that might benefit Mr. Percy has not been available to him while he was in custody awaiting trial or sentence. However, he has participated in the programs that were available and has been involved in employment opportunities in the institution. That is some indication that he would willingly participate in programming in the future.

[27] In speaking with the author of the pre-sentence report, Mr. Percy expressed some remorse and took responsibility for his actions. He is reported as saying that he understood the verdict, is embarrassed about the offences, is "sorry that it happened" and wishes he had not gone home with the victim that night.

[28] The available information causes me to believe that Mr. Percy is a good candidate for rehabilitation in general but also for rehabilitation in respect of sexual offending. He has no prior criminal record, has led a productive and pro-social lifestyle, has family support, appears willing to participate in programming and capable of benefitting from that programming.

Proportionality

[29] Section 718.1 says that the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. It requires that a sentence not be more severe than what is just and appropriate given the seriousness of the offence and the moral blameworthiness of Mr. Percy. It also requires that the sentence be severe enough to condemn his actions and hold him responsible for what he's done and the harm he has caused (*Lacasse,* at para. 12; *R. v. R. v. Nasogaluak*, 2010 SCC 6, at para. 42).

[30] Assessing the gravity of the offence requires me to consider both the gravity of these offences in general and the gravity of Mr. Percy's specific offending behaviour.

[31] Sexual assault, in general, is viewed as a very serious offence. This is reflected in the fact that Parliament has set the maximum sentence when the Crown proceeds by indictment at 10 years in custody and removed the offence from consideration for a conditional sentence order.

[32] A sexual assault involving intercourse is recognized as a serious act of violence, even when no extrinsic or gratuitous violence is used (*R. v. McCraw*, [1991] 3 S.C.R. 72, at pp. 83 - 85). In *R. v. Arcand* (2010 ABCA 363), the Alberta Court of Appeal commented on the harms caused by "major sexual assaults", a category which includes non-consensual intercourse (p. 176 & 177):

- Harm can be inferred from the very nature of the assault;
- The harm is to both the victim and society;
- A major sexual assault is a serious violation of a person's body, sexual autonomy and freedom of choice and a breach of the person's physical integrity, privacy, and dignity;
- There is also a likelihood of psychological and emotional harm that "includes fear, humiliation, degradation, sleeplessness, a sense of defilement, shame and embarrassment, inability to trust, inability to form personal or intimate relationships in adulthood with other socialization problems and the risk of self-harm or even suicide; and,
- These psychological and emotional harms may not be obvious or even ascertainable at the time of sentencing.

[33] The offence of voyeurism is objectively viewed by Parliament as less serious than sexual assault as reflected in the lower maximum sentence of 5 years in custody. However, it is recognized as a serious intrusion on the privacy and sexual integrity of its victims (*R. v. Jarvis*, paras. 124 - 127). Despite that it does not involve physical harm to the victim, it has a significant psychological impact, causing feelings of humiliation, objectification, exploitation, shame and self-esteem (*Jarvis*, para. 127).

[34] These offences capture a wide range of behaviour. Mr. Percy's conduct and moral culpability must be placed on the continuum of behaviour that could constitute these offences.

[35] The fact that the sexual assault involved intercourse places his conduct in the category of sexual assault that is commonly referred to as a "major sexual assault". The fact that the victim was unconscious increases the gravity of the offence and moves his conduct up on the continuum. Unlike in some cases, there was no extrinsic violence or threats used to overcome resistance and there was no gratuitous violence.

[36] The conduct that constitutes the voyeurism offence is more serious than that present in many of the cases. The recording captures Ms. J. naked and unconscious while a virtual stranger is having intercourse with her. There are very few more vulnerable states a person could be in and very few more intrusive invasions of privacy.

[37] Assessing the gravity of Mr. Percy's specific behaviour also requires me to examine Mr. Percy's moral responsibility. This includes his level of responsibility

at the time of the commission of the offence but also broader factors that might affect his general culpability (*Arcand*, at para. 58).

[38] Mr. Percy is solely responsible for the offence. Any impact his consumption of alcohol might have had on his judgment would have been marginal given the quantity he consumed, and I am not aware of any other factors that would diminish his responsibility at the time of the offences. Mr. Percy's level of responsibility is also impacted by the level of harm he intended (*Arcand*, at para. 58). He did not contribute to Ms. J. becoming impaired and there is no evidence that he targeted her because of it. However, he knew she was impaired when he saw her on the street with her shirt unbuttoned. The evidence reveals that she became progressively more impaired as time went on, culminating with her "passing out". I did not find that she was unconscious when he started having intercourse with her, so it is not proven that he began with that intent. However, he continued for almost 2 minutes after it was apparent that she was unconscious. He also chose to record himself having intercourse with her, knowing she was unconscious. He took advantage of her while she was in that state, both by continuing intercourse with her and by recording it.

[39] His broader culpability is not mitigated by youth and I am not aware of anything in his background or personal circumstances that would reduce it.

Aggravating and Mitigating Factors

[40] Section 718.2 requires that I consider the aggravating and mitigating factors relating to the offence and the offender. I have already referred to many of these:

Aggravating Factors

- The sexual offence involved intercourse;

- The offences took place in the victim's home where she was entitled to feel safe and secure;
- The victim was unconscious during the intercourse; and,
- The voyeurism offence involved two recordings, both of sexual activity. Both take place in what should be a private and secure space. In the recording of intercourse, the victim is unconscious and naked so vulnerable and exposed.

Mitigating factors:

- Mr. Percy has no criminal record;
- He has good family support;
- He accepts responsibility for his actions and has expressed some remorse and regret;
- He appears willing to participate in rehabilitative programming; and,
- He has skills and an employment history that will make his transition back into the community easier.

There is an absence of other potential aggravating factors. Mr. Percy used a condom, so the intercourse was not unprotected. There were no threats, extrinsic violence or gratuitous violence. Mr. Percy did not contribute to Ms. J.'s intoxication. There is no evidence that Mr. Percy intended to share the videos.

Parity / Range of Sentences

[41] Section 718.2 also requires consideration of the principle of parity. Within reason, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This requires an examination of the range of sentences imposed for each of the two offences. Sentencing ranges are important. They are intended to encourage greater consistency between

sentences and respect for the principle of parity. However, ultimately, each sentence has to reflect the unique circumstances of that offence and that offender.

[42] Unlike some other provincial appellate courts, the Nova Scotia Court of Appeal has not endorsed a starting point approach to sentencing, nor has it established a fixed sentencing range for sexual assault. Instead, it has focussed on the principles of sentencing, recognizing that the range for any offence "moves sympathetically with the circumstances, and is proportionate to the *Code*'s sentencing principles that include fundamentally the offence's gravity and the offender's culpability." (*R. v. A.N.*, 2011 NSCA 21).

[43] Starting points or sentencing ranges for sexual assault involving intercourse or similarly severe conduct from other provincial appellate courts include: a starting point of three years in custody (Alberta - *Arcand*, Saskatchewan - *R. v. Iron*, 2005 SKCA 84); a range of three to five years in custody with acknowledgement that the lower part of the range could extend to 18 months in some circumstances (Newfoundland/Labrador - *R. v. Vokey*, 2000 NFCA 14; *R. v. Squires*, 2012 NLCA 20, para. 77); a range of two to six years in custody (British Columbia - *R. v. G.M.*, 2015 BCCA 165); and, a range of 21 months to four years (Ontario - *R. v. Smith*, 2011 ONCA 564, *R. v Thurairajah*, 2008 ONCA 91, para. 48; and, *R. v. Garrett*, 2014 ONCA 734). Unfortunately, intercourse with sleeping or unconscious women is common enough that some courts have identified a range for that specific activity as being between 18 months and 3 years in custody (*R. v. Smith* 2015 ONSC 4304 at para. 32).

[44] The Crown and defence have each provided cases to support their respective positions. The Crown argues that the range for sexual assault in circumstances

similar to this case is two to three years. In support of that position, the Crown has provided the following cases: *R. v. Simpson* (2017 NSPC 25); *R. v. G. (T.V.)*, (1994) 133 N.S.R. (2d) 299 (NSSC); *Arcand*; *R. v. W. (J.J.)*, 2012 NSCA 96; *Thurairajah*; *R. v. Ouellet*, 2014 ONSC 5387; *R. v. Law*, 2007 ABCA 203; *R. v. Stankovic*, 2015 ONSC 6246; and, *R. v. K. (S.J.)*, 2000 NWTSC 41.

[45] The defence argues that the range for sexual assault is broad, including custodial sentences of between 9 months and several years, but also emphasizes that ranges are intended to provide guidelines and do not establish strict parameters. In support of its position, the defence provided the following cases: *R. v. Burton*, 2017 NSSC 181; *R. v. J.A.M.*, 2018 NSSC 285; *R. v. Cepic*, 2018 ONSC 3346*; R. v. J.F.*, 2015 ONSC 5763; *R. v. Grant* 2018 BCSC 1362*; R. v. Sanclemente*, 2019 ONSC 695; *R. v. M.D.*, 2018 ONSC 2792; *R. v. Casilimas*, 2013 ONCJ 211; *R. v. White*, 2008 YKSC 34; *R. v. Yamelst*, 2013 BCSC 1689; and, *R. v. Garrett*, 2014 ONCA 734.

[46] I have reviewed these decisions and they have informed my decision. These cases suggest that the range, across Canada, for sexual assault involving intercourse is from 18 months to four years, even where the accused has no prior criminal record. Cases at the lower end generally include mitigating factors such as a guilty plea and genuine remorse. Aggravating factors such as the use of violence or threats to overcome resistance or having intercourse with an unconscious person generally moves the accused up within the range.

[47] The defence has provided some cases where sentences below that range were imposed. However, in my view, they can be distinguished on their facts or are outliers. For example, in *M.D.*, the offender was sentenced to 9 months in custody,

however, the sexual assault did not include intercourse. In *Casilimas*, the court stated that a 15-month custodial sentence plus probation was appropriate. The judge described the case as unusual and identified the range as 15 to 18 months which appears inconsistent with the range generally recognized by the Ontario Court of Appeal.

[48] Cases with similar circumstances to those in the case before me have been useful in narrowing the applicable range. I will briefly review some of those cases:

- *J.A.M.* (2018 NSSC 285) - a custodial sentence of 2 years. The offender was 39 years old with a prior unrelated record. He had unprotected vaginal and anal intercourse with the victim while she was asleep or unconscious;

- *Burton* (2017 NSSC 181) - a custodial sentence of two years plus three years probation. The offender was 50 years old with no prior adult record. He had unprotected vaginal intercourse with the victim and engaged in other sexual acts while she was asleep or unconscious. After the verdict, he came to accept responsibility for the offence and expressed remorse. It appears from the reasons that the custodial sentence might have been higher but for the sentencing judge's belief that the public would be better served by a sentence that would allow for a period of probation;

- *Arcand* (2010 ABCA 363) - a custodial sentence of two years less a day plus probation. The Court of Appeal agreed that a downward departure from the usual three-year starting point was warranted. The offender and the complainant were both intoxicated, and he began having intercourse with her after she passed out. He was 18 years old and had no criminal record;

- *Ouellet* (2014 ONSC 5387) - a custodial sentence of 30 months. The offender was 53 years old and had a dated unrelated criminal record. He had sexual intercourse with the

> victim while she was significantly incapacitated by drugs and/or alcohol;
>
> - *J.F.* (2015 ONSC 5763) - a custodial sentence of 18 months followed by two years. The offender and the victim had been friends. After drinking together, he had intercourse with her while she was sleeping. He was 25 years old, had no criminal record, and had expressed remorse.

[49] In each of these cases, the offenders were found guilty of sexual assault after trial so did not have the mitigating impact of a guilty plea, the sexual assault included intercourse or other severe conduct, there was significant impact on the victim and the accused had little or no previous criminal record. Of these, I am most influenced by the decisions in *Burton* and *J.A.M.* No two cases are the same, but these are both from Nova Scotia and have similar features to the case I am dealing with. I recognize that in *Burton,* there were aggravating features such as the additional sexual acts. However, the reasons also reflect that the sentence would have been higher but for the desire to impose probation.

[50] The sentencing range for voyeurism has been identified as broad and includes sentences from discharges to two years imprisonment (*R. v. Russell*, 2019 BCCA 51). Sentences on the lower end are often the result of emotional or mental health challenges which reduced the offender's moral blameworthiness (*R. v. F.G.***,** 308 Nfld. & P.E.I.R. 59). I have no evidence of that here.

[51] Where the activity being recorded is sexual, custodial sentences are generally imposed. For example:

> - *Truong* (2013 ABCA 373) - a custodial sentence of 4 months was upheld on appeal. The sentence was part of a larger sentence involving multiple offences. The offender had been in an intimate partner relationship with the victim and

recorded sexual activity with her, including sexual activity which constituted sexual assault;

- *Berry* (2015 BCCA 210) - the court of appeal upheld a custodial sentence of nine months for voyeurism consecutive to two years for a related sexual assault. The offender had an unrelated record. The victim of the sexual assaults was his common law wife. The assaults involved repeated and prolonged digital penetration while she was asleep or unconscious. He surreptitiously recorded that activity as well as other consensual sexual activity. The offences were viewed as a breach of trust; and,

- *Kennedy* (2017 N.J. No. 162) - a custodial sentence of 60 days for voyeurism. Mr. Kennedy had an unrelated record. He had intercourse with a 16 years old girl who was intoxicated. He recorded some of that activity and later refused to delete it.

[52] The decision in *Cassels*, which was provided by the Crown is helpful in setting out general principles, but the facts are significantly more aggravating that the case before me. A suspended sentence was imposed in *R. v. S.M.* (2010 ONCJ 347) and *R. v. Trinchi* (2016 ONSC 6585). In *S.M.*, the offender photographed consensual sexual activity with the victim without her knowledge. In *Trinchi*, the accused recorded sexually explicit video conversations with the victim without her knowledge or consent. Both cases involved unusual circumstances and are distinguishable.

[53] There is agreement that the sentences I impose should be consecutive to each other. This is in part because the voyeurism conviction relates to two recordings, only one of which involved the same activity as the sexual assault conviction. Consecutive sentences are also warranted to reflect that the offences are focussed on protecting somewhat different societal interests (*Berry*; *Cassells*).

Restraint

[54] Finally, s. 718.2 requires me to consider that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, that all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, and consecutive sentences should not be unduly long or harsh.

[55] This principle of restraint, that the punishment should be the least that would be appropriate in the circumstances, applies even when sentencing for crimes of violence and is particularly important when sentencing a first offender (*R. v. Colley, [1991] N.S.J. No. 62*; *R. v. Priest, [1996] O.J. No. 3369*); *R. v. Best, [2005] N.S.J. No. 347 (S.C.),* para. 25).

[56] In this case, proportionality and the objectives of denunciation and general deterrence require a custodial sentence. The principles of parity, restraint and the goal of rehabilitation inform how long that sentence should be.

Conclusion

[57] In conclusion, Mr. Percy's conduct in having intercourse with a woman when she was unconscious must be strongly denounced and the sentence must reflect society's intolerance for this behaviour. As I have stated, in my view the range of sentence for sexual assault involving intercourse is 18 months to 4 years. Mr. Percy does not have the benefit of a guilty plea and the fact that the victim was unconscious is significantly aggravating. Therefore, despite the positive pre-sentence report and the absence of a criminal record, a custodial sentence of 2 years is required for the sexual assault.

[58] In sentencing Mr. Percy for the voyeurism offence, denunciation and deterrence must also be emphasised. There were two recordings, both of sexual acts. Therefore, those principles require a custodial sentence. I am satisfied that, given the absence of a of criminal record and good prospects for rehabilitation, a consecutive custodial sentence of 6 months (which for sentence calculation purposes I will refer to as 182 days) adequately addresses the principles and purpose of sentencing.

[59] That would result in a total sentence, prior to credit for pre-trial custody, of 2 and a half years (912 days). I have considered the principle of totality and, in my view, that sentence is not unduly long or harsh given all the circumstances.

[60] Mr. Percy has already served the equivalent of 768 days in custody. He will be given credit for that, leaving a go forward sentence of 144 days which is just under 5 months.

[61] Because the sentence, going forward, is less that two years I am permitted to impose probation (*Criminal Code*, s. 731; *R. v. Mathieu*, 2008 SCC 21, at para. 5 - 6; *R. v. Denny*, 2016 NSSC 76, at para. 236).

[62] As I said previously, the combined circumstances of these offences are disturbing and give rise to a concern that Mr. Percy may have inappropriate attitudes or beliefs about women and/or sexual conduct. This needs to be assessed by a professional and, if necessary, treated through specific sexual offender programming. This is necessary to his rehabilitation and for the long-term protection of the public. Therefore, in addition to the custodial sentence, I will place Mr. Percy on probation for three years with the following conditions:

- Keep the peace and be of good behaviour
- Have no contact or communication, direct or indirect, with Ms. J.
- Appear before the court as and when required
- Notify the court or probation in advance of any change of name or address and promptly notify the court or probation officer of any change of employment or occupation
- Report to a probation officer within two working days of the expiry of the custodial portion of your sentence and thereafter as directed by your probation officer
- Attend for, participate in and complete any assessment, counselling or treatment as directed by probation, including sex offender assessment and treatment and mental health counselling

[63] There will also be the following Ancillary Orders:

- DNA order (s. 487.051);
- SOIRA Order for a period of 20 years (s. 490.013(2)(b));
- A firearms prohibition for a period of 10 years (s. 110);
- A prohibition on contact with the victim during any custodial portion of the sentence (s. 743.21); and,
- That the videos should be removed from Mr. Percy's phone prior to its return.

Elizabeth Buckle, JPC.