PROVINCIAL COURT OF NOVA SCOTIA
Citation: ***R. v. Lemoine***, 2014 NSPC 49

Date: 2014/02/25
Docket: 2326100, 2326102
Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Cody Charles Lemoine

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Judge:	The Honourable Judge Theodore K. Tax, J.P.C.
Heard:	February 25, 2014, in Dartmouth, Nova Scotia
Decision	February 25, 2014
Charges:	271(1)(a), 264.1(1)(a) and 279(2) of the Criminal Code
Counsel:	Alex Keaveny, for the Crown Karen Endres, for the Defence

By the Court:

INTRODUCTION:

[1] On October 1, 2013, Mr. Cody Lemoine entered guilty pleas to charges of committing a sexual assault contrary to section 271(1)(a) of the **Criminal Code** and an unlawful confinement contrary to section 279(2) of the **Criminal Code** on June 12, 2011 at or near Dartmouth, Nova Scotia. The Crown had proceeded by way of indictment and Mr. Lemoine elected to have this matter proceed in the Provincial Court. The issue for the Court to determine is a fit and proper sentence in all the circumstances of the offences and this particular offender.

POSITIONS OF THE PARTIES:

[2] During their submissions, both Counsel referred to the fact that Mr. Lemoine has been held in custody since he turned himself in at the police station on June 14, 2011. When Counsel made their sentencing submissions on January 20, 2014, they agreed that Mr. Lemoine had spent a total of 952 days in pre-sentence custody. As of today's date, Mr. Lemoine has now spent a total of 988 days in pre-sentence custody.

[3] The Crown Attorney submits that the appropriate range of sentence for charges involving a serious assault and the confinement of the victim which occurred in this case, is a period of five to seven years of imprisonment in a federal penitentiary. As a result, it is the position of the Crown that, regardless of whether the Court was to take into account enhanced credit for Mr. Lemoine's pre-sentence custody in determining the appropriate sentence to be imposed, the Crown Attorney recommends that Mr. Lemoine be sentenced to three years in a federal penitentiary on a go-forward basis. The Crown also seeks the ancillary orders which include a mandatory section 109(2) **Criminal Code** firearms order, a 20 year **Sex Offender Information Registration Act** (SOIRA), S. C. 2004, c. 10 order pursuant to sections 490.012 and 490.013 of the **Criminal Code** and a mandatory DNA order for a primary designated offence under section 487.051(1) of the **Criminal Code.**

[4] The Crown Attorney does not oppose Mr. Lemoine's request that the Court take into account the time that he has spent in custody in determining the sentence to be imposed with a credit of one day for each day spent in pre-sentence custody pursuant to section 719(3) of the **Criminal Code.** However, the Crown Attorney is opposed to Mr. Lemoine's receiving any enhanced credit for that pre-sentence custody pursuant to section 719(3.1) of the **Criminal Code.**

[5] Defence Counsel submits that the Court ought to take into account, at a minimum, all of Mr. Lemoine's pre-sentence custody at the time in determining the sentence to be imposed on a one to one day credit for each of the 952 days spent in custody pursuant to section 719(3.1) of the **Criminal Code**, Mr. Lemoine's circumstances "justify" an enhanced credit of one and a half days for each day spent in pre-sentence custody since June 14, 2011 or in the alternative, the Court ought to consider an enhanced credit for certain parts of that pre-sentence custody.

[6] It is the position of the Defence that the appropriate range of sentence for the circumstances of these offences and this offender would be between two and a half and three and a half years in a federal penitentiary. Counsel submits that Mr. Lemoine has spent a total of 952 days or approximately 31 ½ months of pre-sentence custody which ought to be taken into account by the Court in determining the sentence to be imposed. However, if the Court was to conclude that "the circumstances justify" an enhanced credit for the full period of pre-sentence custody then her client would have already served 1428 days or the equivalent of 47 ½ months. Given the range of sentence which is recommended by the Defence Counsel, it is her submission that regardless of whether Mr. Lemoine receives an enhanced credit for his pre-sentence custody, he is in a "time served" situation. As

such, Counsel recommends that Mr. Lemoine be sentenced to a further period of one day of custody which would be deemed served by his presence in Court followed by a period of three years under terms of probation with status updates to be scheduled with the Court. Defence Counsel does not oppose any of the Crown's ancillary orders.

CIRCUMSTANCES OF THE OFFENCES:

[7] On June 12, 2011, shortly after 8 p.m. as the sun was beginning to set, Ms. C. who was then 19 years old was jogging through Shubenacadie Park in Dartmouth, Nova Scotia. At that time, the victim ran by the accused. She had seen him in the park on previous occasions. She continued jogging for another five minutes and as she was approaching an intersection in the path, she saw the accused running up behind her. She did not know why he began running behind her, so she started running faster and continued over a bridge by the baseball field. At that point, the victim heard the accused running behind her again, and then he grabbed her, putting one hand over her mouth, the other hand on her stomach and he dragged her to the side of the path and into the woods.

[8] While the accused was holding her down, the victim tried to pull away and was screaming at the accused to leave her alone. The accused told her to be quiet

and when she continued screaming and trying to pull away, the accused said "shut up or I'll slit your throat". The accused told her that he was a "just a horny 19-year-old guy" and that he would not hurt her if she was quiet. The accused then put his tongue down her throat, and thereafter, he took his penis out and placed the victim's hand on it and directed her to touch his genitals. Then, he pulled up her shirt and told her that she was beautiful and that he loved her and added: "I don't believe in rape; I think people should have sex on impulse".

[9] As the sexual assault continued, the accused placed the victim on her knees and made her perform oral sex on him. Then, he pulled her shirt and bra up and pulled her pants and underwear down so that she was naked from the waist down. While still on her knees, the accused had unprotected sexual intercourse with the victim for several minutes, stopped and then inserted his fingers into her vagina. A few moments later, the accused penetrated the victim for a second time while she was still kneeling on the ground and again had unprotected sexual intercourse which culminated with the accused ejaculating in the victim's vagina. Throughout the attack, the accused kissed and licked the victim all over her body and told her that he loved her.

[10] During this sexual assault, while the victim was on her knees in the woods, a person who was walking their dog, passed nearby. At that point, the accused told

her to be quiet and not scream and threatened to put a tree branch down her throat if she did scream. The sexual assault ended abruptly when the accused said, "I am done" and handed the victim her clothing. At the same time, he warned her not to tell anyone what had happened and then ran off.

[11] After the accused left her, the victim met a couple in the park, used their cell phone to call her father and immediately went to the hospital for a sexual assault examination. The victim had several scrapes and scratches on her back and knees as well as bug bites. An examination at the hospital revealed that there was semen on the victim's shirt, shorts and in her vagina, which was later confirmed to be from the accused by DNA analysis. Two days later, on June 14, 2011, Mr. Lemoine turned himself in at the police station and provided an inculpatory statement to the police.

VICTIM IMPACT STATEMENT:

[12] In the victim impact statement which was read into the record by the Crown Attorney, the victim who is now a 22-year-old woman indicated that she has not had a happy or steady intimate relationship since June 12, 2011. She has suffered several anxiety attacks and has seen two psychiatrists to address those issues. She now has trouble trusting strangers to any extent and if a stranger is walking closely

behind her, she becomes very anxious. Recently, someone stole her bag, but the thought of having to report the incident to the police resulted in her crying and screaming hysterically because she did not want to have to give descriptions to them again. Small triggers such as that "can throw me into a dark and terrible place". Since being attacked, even attending at her doctor's office for certain routine procedures has caused anxiety attacks, and as a result, she now avoids them as she fears how she may react.

[13] The victim stated that she now has to live with a fear of people that she never had before and added that : "Having my pride stripped from me against my will in such a horrid manner is something that I think about daily, even more than two years later". Recovering has become a long and very confusing process, and although she is not sure whether she will ever be completely over what happened, she does note there has been some progress.

CIRCUMSTANCES OF THE OFFENDER:

[14] Mr. Lemoine is presently 21 years old; he was 19 years old when the two offences were committed on June 12, 2011. He does not have any prior adult criminal record or any **Youth Criminal Justice Act** dispositions.

[15] In the Pre-Sentence Report, the Probation Officer states that Mr. Lemoine's parents were in a 23 year common-law relationship which ended when he was 18 years old. Mr. Lemoine described having eating disorders as a young teen and being particularly defiant with his parents between the ages of 12 and 15 years. His parents believed that he had a mood disorder in his younger years, and they sought the assistance of a psychiatrist. However, Mr. Lemoine advised the Probation Officer that he refused to see the psychiatrist, because he did not trust them.

[16] Mr. Lemoine advised the Probation Officer that he lived with an aunt when he was 12 and 13 years old and again when he was 17 years old. He was kicked out of the family home when he was 18 years old and lived on the street for one year.

[17] Mr. Lemoine's father confirmed that his son had a serious eating disorder when he was 11 years old and that he refused to take medication at that time. He also indicated that his son had anger management issues between the ages of 12 and 16 years, which were largely directed towards his parents. With respect to the offences before the Court, his father indicated that he was shocked to hear about them and added that he had been with his son a few days before the offences and that Cody Lemoine was particularly "quiet and paranoid".

[18] Mr. Lemoine's mother stated that she has visited her son twice a week while he has been held in custody. She confirmed that her son had an eating disorder and that he was kicked out of the family home because he was not working and was giving her a "hard time". At that time, she suspected that something was wrong, but did not know what it was. She was shocked to hear about the current offences before the Court and advised the Probation Officer that her son was very sick at that time, but she has noticed a significant improvement in her son's mental health since medication was introduced.

[19] The Probation Officer also contacted Mr. Lemoine's aunt for her comments. She has maintained a close relationship with Cody Lemoine over the years and advised the Probation Officer that he has been mentally ill for a number of years. In terms of the offences presently before the Court, she indicated that she was "stunned" and that she did not understand it "other than he just isn't well".

[20] Mr. Lemoine completed his grade 9 education in 2006 with average grades. After one semester of grade 10, he quit school due to poor attendance caused by mental health issues. He would like to take a plumbing course in the future.

[21] Mr. Lemoine is presently unemployed. In the past, however, he worked in a drugstore for approximately four months in 2011, but left that position due to

mental health issues. Prior to that, he was employed as a landscaper for about 18 months.

[22] In terms of health and lifestyle, Mr. Lemoine advised the Probation Officer that he was diagnosed with mild asthma at age 13, but otherwise is physically healthy. In his formative years, he was diagnosed with anorexia nervosa, depression and a defiant disorder. In 2012, he was diagnosed with paranoid schizophrenia, and since then he has been followed by a psychiatrist, has taken his medications on a regular basis and says that his mental health has significantly improved. Mr. Lemoine does not drink alcohol, but he told the Probation Officer that he did use marijuana for a couple of years. He had experimented with other illicit substances, but stopped using them as it affected his weightlifting routine.

SENTENCING PRINCIPLES:

[23] In all sentencing decisions, determining a fit and proper sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the particular circumstances of the specific offender. On this point, the Supreme Court of Canada stated in **R. v. M. (C.A.)**, [1996] 1 S.C.R. 500 at paras. 91 and 92, that the determination of a just and appropriate sentence requires the trial judge to do a careful balancing of the

societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence while at the same time taking into account the victim or victims and the needs of and current conditions in the community.

[24] Given the circumstances of the offence, I agree with both Counsel that denunciation of the unlawful conduct and specific and general deterrence are important purposes of sentencing in section 718 of the **Criminal Code** which must be considered in the context of this sexual assault and confinement which I regard as being a serious crime of violence. In this case, given Mr. Lemoine's age, lack of any prior criminal record and his present circumstances which include the issues in relation to his mental health, I find that the sentencing decision should also focus on efforts to rehabilitate him, promote a sense of responsibility in him and acknowledge harm done to the victim.

[25] In the sentencing decision, the Court must also consider the fundamental sentencing principles found in section 718.1 of the **Criminal Code** which reminds judges that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Given the violence that was involved in confining the victim and then committing the sexual assault on her which included non-consensual sexual intercourse, I find that this was a serious sexual assault which was a gross violation of her physical and psychological integrity as well as

her self-esteem. The Victim Impact Statement provides first-hand information relating to the significant psychological and psychiatric impacts on the victim. As a result, I find that the gravity of the offence is at the higher end of a continuum of sexual assaults.

[26] In terms of the issue of moral blameworthiness, Defence Counsel submits that Mr. Lemoine's degree of responsibility may be somewhat attenuated by the fact that, at the time of these offences, his was likely suffering from some mental illness which may have impacted his cognitive processes. Defence Counsel raised this issue, not as an excuse for Mr. Lemoine's actions, but rather to explain them, in order to possibly mitigate his degree of responsibility. However, Defence Counsel also acknowledges that Mr. Lemoine did not seek to contest whether any of those illnesses are or were sufficient to establish that he was suffering from a mental disorder on June 12, 2011, by which a finding could be made that Mr. Lemoine was not criminally responsible for his actions pursuant to section 16 of the **Criminal Code**. In this regard, Defence Counsel reiterated that Mr. Lemoine voluntarily entered guilty pleas to the charges before the Court and, in so doing, he has accepted responsibility for his actions.

[27] Considering all of the facts and circumstances of the case, I find that Mr. Lemoine's degree of responsibility or moral blameworthiness for his actions in

confining the victim and then sexual assaulting her to be high. The facts disclose that Mr. Lemoine's actions were certainly pre-mediated in his selection of the victim for the attack and then following her, subduing her and violently committing a serious sexual assault on a complete stranger who happened to be running through the park on a nice summer evening.

[28] In terms of other sentencing principles which are to be considered by the Court in imposing a sentence, section 718.2(a) of the **Criminal Code** mandates that a sentencing court must take into consideration any relevant aggravating or mitigating circumstances relating to the offence or to the offender in considering whether or not the sentence should be increased or reduced. It is the Crown's submission that in addition to any other aggravating or mitigating factors, given the circumstances of this offence, the Court should consider section 718.2(a)(iii.1) of the **Criminal Code**, which relates to the evidence that the offence has had a significant impact on the victim, considering her age and other personal circumstances, including her health and financial situation.

[29] Section 718.2(b) of the **Criminal Code** stipulates that the judge imposing a sentence should consider the so-called "parity" principle which reminds judges that the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. On this point, I note that it is

often difficult to find those similar cases, as the sentencing process is highly individualized and it is based upon the circumstances of the offence and on the circumstances of the particular offender.

[30] With respect to the other principles of sentencing which are relevant in the circumstances of this case, I note that, in section 718.2(c) of the **Criminal Code,** where consecutive sentences are imposed, the Judge is reminded that the combined sentence should not be unduly long or harsh. In addition, by virtue of sections 718.2(d) and (e) of the **Criminal Code,** Parliament has reminded sentencing judges that an offender should not be deprived of liberty, if a less restrictive sanction may be appropriate in the circumstances. Furthermore, the sentencing Judge is required to consider all available sanctions other than imprisonment that are reasonable in the circumstance, with particular attention to the circumstances of aboriginal offenders.

AGGRAVATING AND MITIGATING FACTORS:

[31] With respect to the aggravating factors, I find that they are as follows:

1. This is a serious sexual assault which was prolonged in nature and included several sexual acts, the most serious of which involved Mr. Lemoine on two separate occasions having non-consensual,

unprotected sexual intercourse which violated the physical and psychological integrity of the victim;

2. The confinement of the victim involved physical force to control her movements as well as threatening her with physical violence;

3. Mr. Lemoine entered the park with the intention of committing the offence and then followed the victim and committed the offence because he found her to be particularly attractive [based on information related to the Court by the Crown in describing the circumstances of the offences and on comments made to the Probation Officer during the preparation of the Pre-Sentence Report];

4. The sexual assault and confinement were perpetrated by the accused on a complete stranger in a public place which has an impact on the safety and security of the community;

5. The evidence that the offence has had a significant impact on the victim which has resulted in long-term physical and psychological injuries suffered by the victim as a result of the sexual assault. I find that this is deemed to be an aggravating circumstance by virtue of section 718.2(a)(iii.1) of the **Criminal Code**.

[32] There are also several mitigating circumstances which I find to be:

1. Mr. Lemoine was 19 years old at the time of this offence and had no prior criminal record of any nature. As such, Mr. Lemoine, who is now 21 years old, is a youthful, first time adult offender;

2. Although Mr. Lemoine had entered not guilty pleas and a trial date was set, he entered guilty pleas well before that trial date. In so doing, Mr. Lemoine spared the victim from having to come to the Court to provide trial testimony and having to relive the circumstances of her confinement and the sexual assault on June 12, 2011;

3. Mr. Lemoine has, through his guilty pleas and his statements in Court fully acknowledged his responsibility for these offences;

4. Mr. Lemoine voluntarily surrendered himself to the police within two days after the sexual assault and fully cooperated with the police after arrest;

5. Mr. Lemoine has expressed his unequivocal and complete remorse for the physical and psychological harm which his actions have caused his victim, which remorse was expressed by his counsel, through his comments made to the Probation Officer in preparing the Pre-

Sentence Report and in his letter which was read into the record by Mr. Lemoine himself;

6. Mr. Lemoine has served 988 days on remand, primarily at the East Coast Forensic Hospital where he has received medical and psychiatric treatment relating to his fitness to stand trial and to address his mental health issues.

ANALYSIS:

[33] Section 718 of the **Criminal Code** provides that 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". Those "just sanctions" should have one or more of the following objectives: denunciation of the unlawful conduct; deterrence of the offender or like-minded individuals from committing offences; separation of offenders from society where it is necessary; assist in rehabilitating offenders; providing reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and acknowledgement for the harm done to victims and the community.

[34] In reviewing those purposes, it is important to keep in mind the comments of the Supreme Court of Canada in **R. v. M.(C.A.)**, [1996] 1 S.C.R. 500 at para 82, that the relative weight and importance of those objectives will vary depending on the nature of the crime and the circumstances of the offender.

[35] Moreover, as indicated previously, it is clear from section 718.1 and 718.2 of the **Criminal Code** that the sentencing Judge is also expected to examine and carefully consider all of the relevant principles of sentencing to determine what is just and appropriate and reflect the gravity of the offence committed and the moral blameworthiness of the offender.

[36] In addition, in imposing a "just sanction", the sentencing Judge must also consider the parity principle which is stated in section 718.2(b) of the **Criminal Code** which requires the sentencing Judge to take into consideration the principle that the sentence imposed on Mr. Lemoine today should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[37] In order to establish a range of sentences where similar offenders were sentenced by the Court for similar offences committed in similar circumstances, the Crown Attorney and Defence Counsel referred several cases to the Court. As

indicated previously, it is the position of the Crown that the appropriate range for a serious sexual assault where the victim is also confined by the offender, is five to seven years of imprisonment in a federal penitentiary. On the other hand, the position of Defence Counsel was that the appropriate range of sentence for the offences committed by Mr. Lemoine was two and a half years to three and a half years of imprisonment, less time for pre-sentence custody.

[38] The Crown Attorney provided 10 cases to support his sentencing range, however, I will only provide detailed comments on the following cases:

1. **R. v. Richard**, 1994 CarswellNS 283 (NSCA) – the victim was followed out of the cabaret at 3 a.m. by the offender who grabbed her by the neck and pulled a significant distance while constantly making threats to kill her. He pulled her to the ground, restrained her hands and then forcibly performed both vaginal intercourse and fellatio on her. The offender had a long prior record and given the prolonged and vicious nature of the attack, the Court of Appeal dismissed the appeal in holding that denunciation and deterrence were to be emphasized and that the seven year sentence imposed by the trial Judge stood;
2. **R. v. White**, 1989 CarswellNS, 275 (NSCA) – the offender was sentenced for committing an assault with a weapon on one victim and also a sexual assault with a weapon and forcibly confining a second victim two weeks later. During the sexual assault with a weapon, the offender grabbed the victim and put a knife to her throat then took her to his car where she was sexually assaulted on two occasions before she was allowed to leave. The offender was 31 years old with prior convictions for two robberies and two thefts. A psychiatric assessment indicated that the offender had a mild antisocial orientation, a drug abuse problem and a high level of sexual curiosity and desire. The trial Judge imposed a sentence of one year for the assault with a weapon and two concurrent three-year terms for the

sexual assault with the a weapon and confinement, which were to be served consecutive to the one year sentence.

The Court of Appeal granted the Crown appeal and increased the sentence for the first assault to two years and for the sexual assault with a weapon and confinement charges, that sentence was increased to five years consecutive for a total sentence of seven years of imprisonment. The Court of Appeal noted, at para. 12 that "Although one may feel some sympathy for Mr. White because of his psychological problems, the stark fact that emerges from the record is that he is a danger to the public, particularly to women." The Court concluded, at para. 13, that "The present case involves attacks on women on public streets. That type of conduct must be deterred by severe sentences."

3. **R. v. Thompson a.k.a. Downey**, 2012 NSSC 263 – during the early morning hours, the victim was walking down a public street when she was approached by the offender who was a complete stranger to her. He grabbed her arms and pulled her behind a shed, undid her pants and touched her vagina. The victim got away from the offender, but he followed her into a building where he removed her pants and penetrated her vagina. He did not use a condom but did not ejaculate. The offender had been drinking all day.

   The offender was 47 years old, gainfully employed with full family support. Although he had a criminal record, it was not extensive, nor did it include any sexual offences, but there was a prior domestic assault conviction. The Court viewed the gravity of the offence as being on the more severe end of the scale because the offender was a stranger to the victim, he had pursued her and deprived her of her liberty in committing the assaults, which caused psychological harm to the victim. The Court ordered a three year sentence in a federal penitentiary less a credit of 135 days for pre-sentence custody;

4. **R v. Cook**, 2013 CarswellMan 12, 2013 MBQB 100 – in the early morning hours, the victim was walking down a public street using crutches and one arm in a cast. The offender, who was a complete stranger to the victim, grabbed her by the neck, dragged her a short distance to the house where he was staying and forced vaginal intercourse, fellatio and attempted anal intercourse while choking her. After two unsuccessful attempts to escape, the victim escaped when

the offender fell asleep. The offender, who was in his 40's, had a prior record for crimes of violence but no prior sexual offences, choking or kidnapping charges. The offender was intoxicated at the time of the offences, his criminal activity was not planned and he suffered from a disadvantaged aboriginal background as well as alcohol abuse.

The Court regarded this as a very serious series of offences in stating at para. 21 that "it is hard to imagine a more chilling scenario for a woman then to be dragged off a street, held and raped and choked until she is able to escape half naked. It is a vile, sordid assault that must be clearly condemned". The Court ordered nine years of imprisonment for the kidnapping charge, seven and a half years concurrent for the sexual assault charge and one and a half years consecutive to the sexual assault charge for the choking charge, but concurrent to the kidnapping charge. The total sentence imposed was nine years less time served in custody on remand, for a go-forward sentence of seven years and eight months.

5. **R. v. Billyboy**, 2011 CarswellBC 713, 2011 BCSC 366 – following a trial the offender was found guilty of robbery, unlawful confinement, uttering threats and sexual assault. The victim was a stranger to the offender, but they both happened to be in a convenience store at the same time. After leaving the store, the victim walked by a park where was grabbed from behind, dragged into the park and money was demanded. She was held against her will, threatened and then sexually assaulted by the offender. At the time of the offences, the offender was 18 years old, had a grade nine education and was a single, aboriginal person who was involved in a local gang. His prior adult convictions included a few property offences and breaches of court orders, but no prior sexual offences.

In its sentence, the Court noted that the offender had not taken responsibility for his actions and a risk assessment indicated that he was a high risk to re-offend for sexual violence. The assessment also indicated that he was a poor candidate for sexual offender therapy. The Court ordered a sentence of five years imprisonment, but granted a 2:1 credit for the 13 ½ months of pre-sentence custody.

6. **R v. Tocher,** 2002 CarswellOnt 4074 (Ont. C.J.) – the victim was attacked during her morning run at a park. The offender, who was a

complete stranger to the victim, appeared from the bushes, tackled her to the ground and started punching her. The victim resisted and screamed and at one point the offender started choking her. When the victim stopped resisting, the offender directed her to get on her hands and knees, pulled her shorts down and raped her. The victim was allowed to leave when other people entered the area.

The Court had the benefit of a psychiatric report which indicated that the offender had a diagnosis of antisocial personality, a history of depression and a possible "courtship disorder". Since there was no history of violence or past sexual offences or anything to suggest that the accused has any sexual deviation, the psychiatrist concluded that the rape was a random, impulsive act by an individual who had his inhibitions lowered through the use of crack cocaine. The Court regarded this sexual assault as a "terrible and vicious crime". The Court sentenced the offender to four and a half years in jail less a credit for pre-sentence custody because of the mitigating factors present—early guilty pleas, remorse, consumption of crack cocaine, this was his first jail sentence, the absence of any prior sexual deviance and his surrender to the police and full cooperation with them after arrest.

[39] Defence counsel referred to the following sentencing precedents to the Court:

1. **R. v. P.G.,** [1994] O.J. No. 4079 (Ont. C.J.-Gen. Div.) – PG was found guilty of a sexual assault following a trial. PG and the victim had been at a party together. The victim became very intoxicated and passed out on a bed. Witnesses saw PG doing up his pants and leaving the bedroom and when they entered, they saw the victim naked and still unconscious. PG admitted to having unprotected intercourse with the victim but claimed it was consensual. The victim stated that her life had been deeply affected by the incident and needed therapy. PG was 22 years old and had a youth record, but no adult record. There was a favourable pre-sentence report that indicated his actions were out of character.

   The Court found that the offender had been stalking the victim throughout the evening and that his exploitation of the victim was

contemplated over a period of time and not the result of an impulsive, spontaneous action. Given the offender's lack of remorse and the gravity of the offence, the Court sentenced PG to 27 months in prison.

2. **R. v. Glassford**, [1988] O.J. No. 359; 27 OAC 194 – the offender was convicted following a trial. The victim and the offender had met each other at a party that evening. The victim was intoxicated and had smoked hashish with one of the offender's friends, who believed that the victim might have consensual sex with him. However, when the victim decided to leave, the offender followed her out of the hotel, grabbed her and dragged her into a garden. She tried to pull away, but he pushed her to the ground, pulled down her pants and punched her three or four times in the face until she blacked out. When she regained consciousness, her pants were down, but she did not know whether the offender had sexual intercourse with her. Medical evidence was inconclusive.

   The offender was 22 years old, unemployed with a grade 12 education. He had a supportive family and coached soccer in the public school system. The Court noted that the offender was drunk and under the influence of drugs at the time of the offence and found that he acted impulsively and spontaneously.

   The Court of Appeal held that the trial Judge did not give sufficient weight to the elements of the general deterrence. The brutality of the attack and the offender's callousness in leaving the victim beaten, unconscious and partially clothed required a substantial term of imprisonment. The Crown's appeal was granted and the Court increased the 90 day intermittent sentence and one year probation to two years less one day with the year of probation to follow. The Court held that a sentence of more than two years would have been a fit one, notwithstanding the fact that the offender had no prior record and a favourable pre-sentence report. Although the offender had already served part of his sentence, the Court held that the "ends of justice" required an increased sentence, but recognized the additional hardship of him having to return to prison in increasing his sentence to two years less one day;

3. **R. v. Corson**, 2003 BCCA 430 – the offender appealed his sentence of 30 months incarceration for the sexual assault of a 16-year-old girl. The offender was 30 years old when the assault took place on New Year's Eve. The offender and the victim were guests at a party,

however, they had never met before that night. During the evening, the offender had made several sexual advances towards the victim, but she kept telling him to stop. The victim had consumed a lot of alcohol and was lying on a bed when the offender came in the room straddled her and began to kiss and fondle her. The victim told the offender to leave her alone on several occasions, but he removed her skirt, pantyhose and underwear and then performed oral sex on her. Despite the victim's repeated efforts to resist the offender, he had intercourse with her and then left the room.

The offender had a lengthy criminal record, comprised mainly of property offences. He had two prior assault convictions and had previously served a sentence of six months in prison. For sexually assaulting the 16-year-odl girl, the offender was sentenced to 30 months incarceration. The Court of Appeal dismissed the appeal in view of the fact that deterrence and denunciation were the key factors to be emphasized in this case, and that a 30-year-old male took advantage of an intoxicated 16-year-old female and had non-consensual intercourse with her.

4. **R. v. Alkenbrack,** 2011 BCPC 424 (CanLII) – the accused entered guilty pleas to two counts of sexual assault and one count of assault. On the first sexual assault, the accused grabbed the complainant on the street then grabbed her chest and got his hand down her pants before she punched him and screamed. He fled. The next month, the accused tackled a different victim at a bus stop, had forcible vaginal intercourse with her and attempted anal intercourse. The accused then began pinching her vagina and said he would stop if she performed fellatio on him. She did and he ejaculated in her mouth. The following month the accused assaulted his mother by shoving her during an argument over money.

The accused was a 22-year-old aboriginal person with no prior criminal record. He was beaten by his parents when he was young, spent time in foster care and was traumatized by his father's death. The accused expressed remorse for his offences and wanted treatment.

The Court noted that the offences were very serious and that the accused required intensive programming before being reintegrated into society in order to reduce his risk of re-offending. The sentencing Judge also noted that it was important for the offender to have treatment for sexual offending and that it should be completed

> before he was allowed to reintegrated into society. Despite a favourable Gladue Report, the Court held that the serious nature of the sexual offences, which had occurred on public streets, required even a youthful, first-time adult offender to be separated from society. The Court ordered a three year sentence on the first sexual assault, a five year concurrent sentence on the second sexual assault and two months consecutive for assaulting his mother, less a credit of 20.5 months for pre-sentence custody, which resulted in a total sentence, going forward, of 41.5 months of imprisonment.

[40] As I indicated previously, sentencing is an individualized process which is done in the context of the particular circumstances of each case and the particular circumstances of the individual offender. As a result, when the Court considers the parity principle which is found in section 718.2(b) of the **Criminal Code**, it is often very difficult to find cases that are factually similar. Looking at similar offences committed by similar offenders, I find that the parity principle would have regard to a very serious sexual assault committed by an offender who was also a youthful, adult offender who had no prior criminal record.

[41] I find that those cases dealing with a premeditated attack on a complete stranger in a location such as a public park or on a public street where the offender violated the victim's physical and psychological integrity in engaging in unprotected, non-consensual vaginal intercourse would be closest to the factual circumstances of the offences which were committed by Mr. Lemoine. In these circumstances, I find that this was a very serious sexual assault perpetrated on a

victim who was completely unknown to the offender in a public place, and as such, that attack not only had a profound impact on the victim herself, but also on this community generally.

[42] At the same time, the Court must also consider the proportionality principle found in section 718.1 of the **Criminal Code** in imposing the sentence, which requires the Court to impose a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender. In this case, I find that Mr. Lemoine committed a very serious sexual assault which included two separate incidents of unprotected, non-consensual vaginal intercourse during which he confined the victim. Given the facts which have been related to the Court, I find that Mr. Lemoine initially followed and stalked the victim in the public park. Then, because he found her to be attractive, he assaulted her, confined her and threatened her in order to facilitate the sexual assault in several vile and disgusting ways for his own sexual gratification. While there was some evidence that Mr. Lemoine had mental health issues at the time of the sexual assault, I find that the sexual assault and confinement of the victim was not a spur of the moment decision, but rather it was something that Mr. Lemoine had thought about that evening as he stalked the victim and ultimately attacked her. As such, I find that this was a planned and premeditated attack on a complete stranger who had every

reason to believe that she would be safe and secure going for an early evening run at a nearby park in our community. In these circumstances, I find that Mr. Lemoine's actions reflect a high degree of moral blameworthiness.

[43] Further, given the fact that Mr. Lemoine has accepted full responsibility for his actions and there is no finding that he was not criminally responsible under section 16 of the **Criminal Code**, I find that when he committed the confinement and sexual assault of the victim, I find that the reference to Mr. Lemoine's "mental health issues" could cover a very broad range of behaviours, and in my view that does not, by itself, absolve or necessarily lessen the offender's degree of responsibility for the offences unless, of course, he was to be found not criminally responsible under section 16 of the **Criminal Code**.

[44] In imposing the sentence today, my duty is to give effect to all of the relevant purposes and principles of sentencing contained in sections 718, 718.1 and 718.2 of the **Criminal Code**. In this case, I find that the primary objectives in imposing "just sanctions" require me to emphasize denunciation of Mr. Lemoine's unlawful conduct, specific deterrence of the offender and general deterrence of other like- minded individuals who may commit similar offences. Looking at all of the aggravating and mitigating circumstances in this case, as well as taking into account the principles of the parity and proportionality, I find that the sentence

imposed today is one where it is necessary to separate the offender from society. In addition, given the presence of several mitigating circumstances, the sentence imposed today upon Mr. Lemoine should also assist in his rehabilitation and in promoting a sense of responsibility.

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

[46] Looking at those principles and purposes of sentencing and the similar cases provided by Counsel, I find that the range of sentence for an offender who committed such a serious sexual assault which involved the non-consensual

vaginal intercourse of a complete stranger in a public place and at the same time, the confinement of the victim, would be between three and seven years of imprisonment in a federal institution. However, after having considered all of the facts and circumstances of this case, the relevant purposes and principles of sentencing as well as the aggravating and mitigating factors present in this case, I find that the just sanction is that Mr. Lemoine serve a sentence of four and a half years or 54 months in prison for the sexual assault charge, contrary to section 271 of the **Criminal Code** and 18 months concurrent on the unlawful confinement charge, contrary to section 279(2) of the **Criminal Code**.

CREDIT FOR PRE-SENTENCE CUSTODY:

[47] Mr. Lemoine has been held in custody since June 14, 2011, which amounted to 952 days of pre-sentence custody as of January 20, 2014. As of today's date, Mr. Lemoine has spent a total of 988 days or approximately 33 months in pre-sentence custody. Defence Counsel has asked the Court to credit her client with a minimum of one day of credit against the sentence imposed for each day spent in pre-sentence custody. The Crown Attorney has no opposition to the Court taking into account the time that Mr. Lemoine has spent in pre-sentence custody in determining the sentence to be imposed today with a credit being one day for each

day spent in pre-sentence custody pursuant to section 719(3) of the **Criminal Code**.

[48] I find that section 719(3) of the **Criminal Code** does not impose a mandatory requirement on the Court to take into account and give credit for any time pre-sentence custody spent by the person as a result of the offence. Rather, I find that Parliament has made it clear that the Court, in imposing sentence, has a discretion and "may take into account" a credit for any time spent in pre-sentence custody by the offender, but the Court shall limit any credit for that time to a maximum of one day for each day spent in custody. In this case, I am certainly prepared to grant Mr. Lemoine a one day credit for each day he has spent in custody in determining the sentence imposed by the Court on a go forward basis.

[49] Defence Counsel has asked the Court to also exercise its discretion and to order that Mr. Lemoine be granted an enhanced credit of one and a half days for each day spent in custody pursuant to section 719(3.1) of the **Criminal Code**. In her submissions, Defence Counsel relies upon the Nova Scotia Court of Appeal decision in **R. v. Carvery**, 2012 NSCA 107, which was recently taken on appeal and argued before the Supreme Court of Canada.

[50] After having carefully reviewed the decision in **Carvery** *supra*, I find that in the final analysis, our Court of Appeal concluded at para. 57 that the arrangement of subsections 719(3) and 719(3.1) of the **Criminal Code** and the language used in those subsections does not lead to a conclusion that Parliament intended judicial discretion would be limited to granting credit on a one and a half to one ratio only in exceptional cases. The same point was made by our Court of Appeal in **Carvery** *supra* at para. 67. I agree.

[51] However, since Bill C-25 "and act to amend the **Criminal Code** [limiting credit for time spent in pre-sentence custody]" which became S.C. 2009, chapter 29 and was proclaimed to be in force on February 22, 2010, there have been numerous reported trial and appellate decisions with respect to the interpretation of and interplay between subsections 719(3) and 719(3.1) of the **Criminal Code**.

[52] In my view, looking at the wording of those subsections in the context of section 719 of the **Criminal Code** and in their grammatical and ordinary sense, I find that a Court may order an enhanced credit for pre-sentence custody "if the circumstances justify it" and that the discretion to order that enhanced credit is not limited to only exceptional cases. However, I also find that the words "if the circumstances justify it" require the Court to conduct a qualitative analysis of the circumstances of the pre-sentence custody of the specific offender in order to

determine whether there is some evidence that those circumstances "justify" the Court exercising its discretion to order that enhanced credit.

[53] Of course, it should also be remembered that if the accused person was held in custody, after applying for judicial interim release, and the reasons for his or her continued detention were stated, on the record, to be because of a previous conviction (section 515(9.1) of the **Criminal Code**) or the person was detained in custody under section 524(4) or 524(8) of the **Criminal Code** then Parliament has dictated that the accused person would not be eligible for consideration of the enhanced credit for pre-sentence custody. Neither of those situations apply here.

[54] In this case, counsel agreed that, between mid-June 2011 and mid-February 2012, Mr. Lemoine was held, on remand, at the Central Nova Scotia Correctional Center. At that point in time, issues began to be raised with respect to his fitness to stand trial and whether he was, at the time of the commission of the alleged offences, suffering from a mental disorder so as to exempt him from criminal responsibility by virtue of subsection 16(1) of the **Criminal Code**. Since mid-February 2012, Mr. Lemoine has been held, on remand, at the East Coast Forensic Hospital to initially address and then maintain his fitness for trial, and at the same time, to evaluate and then provide treatment for his mental health issues.

[55] Initially, the reports received by the Court following its Assessment Order raised issues with respect to both aspects of the Court's Assessment Order. Therefore, Mr. Lemoine's continued detention in custody at the East Coast Forensic Hospital was ordered pursuant to section 672.16(1) of the **Criminal Code** in order to maintain fitness for trial and to continue the assessment and treatment of Mr. Lemoine. The Court was satisfied on the evidence of a medical practitioner that Mr. Lemoine's detention was necessary for those purposes and Mr. Lemoine, through his counsel, consented to continued custody at the East Coast Forensic Hospital. Following an initial assessment by a psychiatrist at the East Coast Forensic Hospital, the Crown sought a second opinion from another psychiatrist and during that period of time, Mr. Lemoine continued to be subject to the order of the Court to maintain his fitness and to continue his treatment for mental health issues.

[56] In **R. v. Stonefish**, [2012] M.J. No. 420, 2012 MBCA 116, the Manitoba Court of Appeal noted that where Courts held that an enhanced credit was "justified" pursuant to section 719(3.1) of the **Criminal Code**, the Court conducted some qualitative analysis dealing with specific issues relating to pre-sentence custody such as conditions in remand facilities, a lack of programming or counselling or the offender spent a significant amount of time in solitary

confinement for his own protection and not because of the behaviour within the institution. Other circumstances which "justified" an enhanced credit were harsh conditions in the remand facility such as long periods of double bunking, sleeping on the floor due to insufficient beds or no access to visitors while in pre-sentence custody. Courts have also found that an enhanced pre-sentence custody was "justified" where there was post-trial delay which was not attributable to the accused person, including delays caused by the Court due to request for further submissions or time spent drafting reasons or the need to obtain a pre-sentence report or Glaude report or a psychiatric assessment or any delays in the sentencing hearing which were attributable to the Crown. Several other cases have determined that the pre-sentence custody results in a loss of earned remission which delays parole eligibility and results in a longer sentence being served after the Court has imposed sentence, as compared to a similarly situated accused person who was released on bail to the point where he or she was sentenced to a period of imprisonment.

[57] In this case, Mr. Lemoine has been held at the East Coast Forensic Hospital or a hospital unit at the correctional center for the last 24 months. During that time, there is no doubt that Mr. Lemoine had received treatment and programming while he was being held on remand pending the trial or disposition of these

matters. Given that treatment and programming was provided to Mr. Lemoine throughout that period and moreover, given the fact that I have no evidence that the housing conditions in the Forensic Hospital or in the Mentally Ill Offender Unit were harsh, I do not have any other qualitative evidence from which I could conclude that the conditions themselves would "justify" exercising my discretion to provide an enhanced credit for that period of pre-sentence custody.

[58] As indicated previously, on October 1, 2013, Mr. Lemoine entered a change of plea to guilty to the charges of sexually assaulting and unlawfully confining the victim on June 12, 2011. Once Mr. Lemoine's guilty pleas were confirmed with him, the Court ordered a Pre-Sentence Report which was prepared by the Probation Officer on November 28, 2013. Due to the Court's previously scheduled matters and the contested nature of the sentencing hearing, the submissions of Counsel had to be scheduled for January 20, 2014. Following both Counsel's vigorous and very thorough sentencing submissions, the Court reserved its decision until today's date to prepare these reasons for judgment. As a result, Mr. Lemoine's sentencing decision had to be postponed for a period of essentially five months, and in these circumstances, I find that an enhanced of one and a half to one day of pre-sentence custody is "justified" for the five-month period from October 1, 2013 until today's

date. Therefore, I am prepared to credit Mr. Lemoine with a total of seven and a half months of remand credit for that period of time.

[59] Considering all of the relevant sentencing purposes and principles, the facts and circumstances as well as the aggravating and mitigating factors, I have concluded that the appropriate sentence in this case is one of 4 ½ years or 54 months of imprisonment. However, I am also prepared to credit Mr. Lemoine with time served on a pre-sentence custody since he was taken into custody on June 14, 2011 until today's date. As indicated previously, I find that Mr. Lemoine is entitled to be credited with pre-sentence custody on a one-to-one basis for the period since June 14, 2011 to today's date, which essentially equals 33 months of pre-sentence custody. In addition, I have also found that Mr. Lemoine's circumstances "justify" an enhanced credit for five of those 33 months on a one point five to one basis for each of those months served in pre-sentence custody. Therefore, taking into account the total of 35.5 months of pre-sentence custody credit that Mr. Lemoine has served on the 54 month sentence that I have ordered, I hereby sentence him to serve a further period of 18.5 months of imprisonment on a go-forward basis.

[60] While in prison, I find that it would be imperative that Mr. Lemoine be provided with a complete psychiatric and psychological assessment with respect to

the need for counselling, treatment or programming with respect to sexual offending. In this case, there were opinions prepared with respect to Mr. Lemoine's criminal responsibility at the time that these offences were committed; however, the Court did not receive any information about Mr. Lemoine's risk of re-offending and whether he requires intensive programming before he is allowed to reintegrate into society. As a result, I strongly recommend to the prison authorities that Mr. Lemoine receive that psychiatric and psychological assessment with respect to sexual offending in order to assess the risk of re-offending and to take steps to assist him in making a successful reintegration into society.

[61] In order to facilitate his reintegration into society and also to protect the public, upon his release from prison, I hereby order Mr. Lemoine to be subject to a period of 24 months under the terms of a probation order which will include the following terms and conditions:

1. Keep the peace and be of good behaviour;

2. Appear before the Court as and when required to do so by the Court;

3. Notify the Court or probation officer, in advance of any change of name, address, employment or occupation;

4. Notify the Court or probation officer at 277 Pleasant Street, Dartmouth, Nova Scotia within three days of your release from imprisonment and thereafter as directed by the probation officer;

5. Not to possess, take or consume any controlled substance as defined in the **Controlled Drugs and Substances Act** except in accordance with a physician's prescription for you or a legal authorization;

6. Not to have in your possession any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition or explosive substance;

7. Not to have any direct or indirect contact or communication with Ms. H.C.;

8. Not to be on or within 10 meters of any premises known as the residence or any place of employment of Ms. H.C.;

9. Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer;

10. Attend for mental health assessment and counselling as directed by the probation officer;

11. Attend for assessment, counselling or program generally as directed by your probation officer; and

12. Participate in and cooperate with any assessment, counselling or program that may be directed by your probation officer.

[62] Finally, Mr. Lemoine, in addition to ordering that you be bound by the terms of the probation order, I am also ordering that you be subject to the mandatory firearms prohibition order under section 109(2) of the **Criminal Code** for a period of 10 years, a 20 year **SOIRA** order under section 490.012 and 490.013 of the **Criminal Code** and the mandatory DNA order for a primary designated offence under section 487.051(1) of the **Criminal Code**.

Theodore K. Tax, JPC