
CANADA / JUDGMENT

R. v. Armstrong

2021 BCSC 2377

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2377 R. v. Armstrong

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Armstrong,

2021 BCSC 2377

Date: 20211115

Docket: 42255-2

Registry: Courtenay

Her Majesty The Queen

v.

Clinton George Armstrong

Before: The Honourable Mr. Justice A. Saunders

Oral Reasons for Sentence

Counsel for the Crown:

R. B. Richardson

Counsel for the Accused,

appearing by teleconference:

B. Movassaghi

Place and Date of Hearing:

Courtenay, B.C.

October 15, 2021

Place and Date of Judgment:

Courtenay, B.C.

November 15, 2021

- [1] THE COURT: On August 6, 2021, following a six-day trial, I convicted Clinton George Armstrong of multiple counts in respect of acts of physical violence against his now former common law spouse, Taura Leith:
- a) in respect of an incident on December 28, 2019, one count of common assault, contrary to s. 266 of the Criminal Code, R.S.C., 1985, c. C-46;
 - b) in respect of an incident on February 10, 2020, after he and Ms. Leith had separated:
 - i. aggravated assault, contrary to s. 268(2);
 - ii. assault with a weapon, contrary to s. 267(a);
 - iii. forcible confinement, contrary to s. 279(2);
 - iv. uttering threats, contrary to s. 264.1(1);
 - v. breaking and entering for the purpose of committing an offence, contrary to s. 348(1)(b);
 - vi. mischief, contrary to s. 430(3); and
 - vii. two counts of failing to comply with conditions of an undertaking, contrary to s. 145(4)(a).

I acquitted Mr. Armstrong on a charge of attempted murder, under Count 3 of the indictment.

- [2] For context, I note that an aggravated assault as defined in the Criminal Code is an assault in which the perpetrator "wounds, maims, disfigures or endangers the life of the complainant".
- [3] The background facts are described in full within my oral reasons for convicting Mr. Armstrong. In brief, on December 28, 2019, Mr. Armstrong and Ms. Leith had been living together in her home in Comox, but had agreed that they would separate and that Mr. Armstrong would move out as of January 1st. On the evening of December 28th they had an argument. Mr. Armstrong had been drinking. Ms. Leith said she would go to stay with her father. Mr. Armstrong threatened to damage Ms. Leith's home if she left and Ms. Leith telephoned the police. As the argument continued, Mr. Armstrong slapped her on the face and pushed her on the chest. The police attended and arrested Mr. Armstrong. He entered into an undertaking that included conditions that he not communicate with Ms. Leith, and not go to the trailer park where she resided. At trial Mr. Armstrong continued to deny that he slapped Ms. Leith.
- [4] THE ACCUSED (BY TELECONFERENCE): I didn't slap her.

- [5] THE COURT: Mr. Armstrong, you will be quiet, please.
- [6] For the next several weeks, Mr. Armstrong was homeless. During that period of time, as he testified at trial, he was himself the victim of an assault. Medical records reviewed in a presentence psychological report prepared for the Court by a psychologist, Dr. Dugbartey, of Forensic Psychiatric Services, referred to him having been admitted to an intensive care unit during that time period. He was assessed by a specialist in addiction medicine who diagnosed him with "opiate use disorder - severe" and "possible alcohol use disorder".
- [7] Ms. Leith was left shaken by the December 28th assault. On February 6, 2020, she provided a victim impact statement to Crown counsel in which she described herself as being unable to sleep and worried over whether he was going to show up. She felt herself always looking over her shoulder, and had to be more aware of her surroundings.
- [8] Four days after she gave that statement, on the afternoon of February 10, 2020, Mr. Armstrong, in breach of the terms of his undertaking, returned to Ms. Leith's home. He smashed through a window and broke in. He then proceeded to viciously attack her with a boxcutter-type tool. Ms. Leith called 9-1-1 as soon as she heard the noise of her home being broken into and, though she dropped the handset, the line remained open and recording of the call continued, capturing Ms. Leith's terrified screams and cries for help. A neighbour heard Ms. Leith screaming and, on responding, saw her and Mr. Armstrong struggling through her living room window.
- [9] Mr. Armstrong backed Ms. Leith up into the living room area and proceeded to slash her face, head, and torso repeatedly. She described her injuries at trial and they were documented by a forensic nurse examiner. Mr. Armstrong inflicted a very deep, 16-centimetre gash from the level of her temple down through her left cheek, leaving a scar that is still apparent; and 11-centimetre-long wound from below her right ear lobe to her right jaw; and a five-centimetre-long wound along her right cheek, as well as numerous other gashes, abrasions, and puncture wounds to her face and neck. As they struggled, Mr. Armstrong inflicted more superficial cuts across her chest, down and across her abdomen, and also on her back, across her right shoulder blade. All told, the forensic nurse documented more than a dozen injuries to Ms. Leith's face and head and a similar number to her torso. Ms. Leith also sustained apparent defensive wounds to her arms and hands, including a deep cut across the tip of her right thumb that took five stitches.
- [10] Throughout the first phase of the attack, which lasted about a minute and a half as they struggled in the living room, Mr. Armstrong said repeatedly that he intended to kill Ms. Leith and then kill himself, yelling, "You're dying", "I'm gonna cut your throat", and "You're gonna die like I'm gonna die." He made it clear that this attack was in retaliation for her having called the police during the December assault and, he said, falsely accusing him of assault. Ms. Leith testified that he was very angry, that he looked "like a mad man" and seemed "dead in the eyes".

[11] After this first phase of the assault, Mr. Armstrong seemed to slow down and he and Ms. Leith collapsed onto chairs in the living room, where they remained for about three minutes. He continued to utter threats to her life, but then said:

I'm not gonna kill ya, I'm just gonna maim ya. I'm killin' myself.

He then reached across and slashed her across the lower abdomen. The forensic nurse recorded three incised wounds in that area, the longest being eight and a half centimetres.

[12] Ms. Leith then attempted to escape. Mr. Armstrong tried to kick her, but she was able to knock him off balance and she lunged for the door. He caught up with her and grappled with her at the doorway for about another minute. He repeatedly told her, "Fight for your life", taunting her and terrorizing her. The two of them again collapsed on the living room chairs.

[13] This time, Ms. Leith was able to swing his knees to the side, get up, and to escape through the door. She ran to her neighbour's house. Mr. Armstrong followed her out the door, coming after her for a short distance. He then stopped, turned, and walked towards Ms. Leith's car parked in her driveway and scraped the rear quarter panel, roof, and hood. He then went back inside Ms. Leith's house. The audio recording through the 9-1-1 operator continued and sounds of crashing can be heard.

[14] The police then arrived on the scene and one officer engaged Mr. Armstrong in conversation through a blocked but partially open door for several minutes, before finally being able to subdue him with a directed energy weapon. During that time, Mr. Armstrong appears to have used a large kitchen knife with a 12-inch blade to inflict deep cuts along both his inside forearms. He also trashed the interior, breaking furniture, damaging the television, and pulling over the refrigerator, spilling its contents onto the kitchen floor.

[15] The walls, flooring, and furniture in the living room area were covered in blood. Repair and replacement of the structure and contents cost approximately \$29,000 and Ms. Leith had to live elsewhere for five months while repairs were undertaken. Repairing the damage to her vehicle cost another \$3,000.

[16] Ms. Leith was treated at the hospital for her wounds and a concussion, and was discharged the same day. She was off work for several weeks. In a victim impact statement she provided in June 2021, she describes experiencing waves of emotion daily since the attack: feelings of anxiousness, fear, worry, and restlessness; as well as flashbacks of the incident, and an inability to have relationships with men. She has a difficult time trusting people and fears for her safety when Mr. Armstrong's jail time is done.

[17] Although he entered not guilty pleas to all counts, at trial Mr. Armstrong only seriously contested the counts of attempted murder - for which, as I have noted, he was acquitted -, forcible confinement, and the common assault of December 28, 2019. He professes to have no memory of the February 10, 2020, incident. He says he is not a violent person and professes to be extremely remorseful.

- [18] The Crown seeks an effective sentence - that is, before giving Mr. Armstrong credit for time served - of 10 to 11 years. The Crown submits that a sentence in that range is appropriate on the count of breaking and entering, with a sentence of eight years to be served concurrently on the count of aggravated assault, and then with lesser sentences, also concurrent, in respect of the other, less serious, counts on which Mr. Armstrong was convicted.
- [19] The defence submits an appropriate global effective sentence would be in the range of four and a half years, again with that being the sentence for the breaking and entering, with concurrent sentences for the other offences, including 18 months on the aggravated assault.
- [20] Mr. Armstrong has been in custody since February 10, 2020, a total of 645 days. I digress briefly here to explain the significance of an additional submission made by the defence in respect of sentencing. As explained by the decision of the Supreme Court of Canada in *R. v. Summers*, 2014 SCC 26, because a sentence begins when it is imposed and because the rules for parole eligibility do not take pretrial detention time into account, we guard against an offender being prejudiced by crediting pretrial detention at a rate higher than 1:1. Using a ratio of 1.5:1 results in offenders who are released after serving two-thirds of their sentence serving the same amount of jail time whether or not they were detained before trial.
- [21] Using a ratio of 1.5, Mr. Armstrong is entitled to credit for 967 days, which amounts to about two years and eight months.
- [22] Were I therefore to accept the defence's position on sentencing, Mr. Armstrong's resulting sentence, after applying credit, would be one year, 10 months. Then, being a sentence of less than two years, he would be eligible for a period of probation, and the defendant submits that a three-year probation order with strict conditions would be appropriate.
- [23] I have referred to sentences on the various counts being concurrent as opposed to being served consecutively. Let me explain that briefly.
- [24] Where acts constituting criminal offences are "part of a linked series of acts within a single endeavour" - and that is a quote from *R. v. W.(G.P.)* (1998), 106 B.C.A.C. 239 at para. 35 - the sentences will be served all at the same time or concurrently. Here, the offences of February 10, 2020, were so linked together that the sentences for all those offences will be concurrent.
- [25] I will begin my review and application of the law of sentencing with a few general observations. First, these are, of course, very serious offences. Offences involving direct personal violence are among the most serious that our courts have to deal with, and this is reflected in the maximum sentences that can be imposed for these crimes. A conviction for aggravated assault carries a sentence of up to 14 years' imprisonment, while convictions for assault with a weapon, forcible confinement, and breaking and entering all carry liability for sentences of up to 10 years. Sentences at the maximum prescribed by the Code are not necessarily reserved for the worst offences by the worst offenders in the worst circumstances, but "[a] maximum penalty of any kind will by its very nature be imposed only rarely": *R. v. L.M.*, 2008 SCC 31 at para. 18. In the context of a case such as the present

one, maximums, however, may be signposts as to the relative gravity of various offences and inform the court's application of principles of proportionality and fairness.

[26] As Mr. Justice Wagner, now Chief Justice of Canada, said in *R. v. Lacasse*, 2015 SCC 64 at para. 58:

The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision

[27] Judges do not have unlimited discretion to pronounce any sentence within the maximums prescribed by the Criminal Code. The Code sets out specific principles and objectives that guide the Court in that exercise. Section 718 provides that the fundamental purpose of sentencing is to contribute to respect of the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions that meet one or more of several stated objectives. These objectives include: the denunciation of unlawful conduct; the specific deterrence of the offender and the general deterrence of other persons from committing offences; the separation of offenders from society where necessary, the rehabilitation of offenders, the making of reparations to the victim and to society, and the promotion in the offender of a sense of responsibility and acknowledgment of the harm done to victims and to the community.

[28] Section 718.1 of the Code sets out the fundamental principle that a sentence must be proportionate to the gravity of the offence and degree of responsibility of the offender.

[29] Section 718.2 of the Code prescribes further sentencing principles. Those that are relevant to the present case include the need to impose a sentence similar to those imposed upon similar offenders for similar offences in similar circumstances, known as the principle of parity, and the recognition of aggravating and mitigating factors. I will say more momentarily about the aggravating and mitigating factors that are present in this case.

[30] In a decision rendered just last Friday, *R. v. Parranto*, 2021 SCC 46 [Parranto], the majority decision of the Supreme Court of Canada emphasized that though proportionality is the primary consideration, it exists in harmony with the principle of parity. The Court stated:

[9] This Court has repeatedly expressed that sentencing is "one of the most delicate stages of the criminal justice process in Canada" (*R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 1). More of an art than a science, sentencing requires judges to consider and balance a multiplicity of factors. While the sentencing process is governed by the clearly defined objectives and principles in Part XXIII of the Criminal Code, it remains a discretionary exercise for sentencing courts in balancing all relevant factors to meet the basic objectives of sentencing (*Lacasse*, at para. 1).

[10] The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. Unlike other principles of sentencing set out in the Criminal Code, proportionality stands alone following the heading "Fundamental principle" (s. 718.1).

Accordingly, "[a]ll sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (R. v. Friesen, 2020 SCC 9, at para. 30). The principles of parity and individualization, while important, are secondary principles.

- [11] Despite what would appear to be an inherent tension among these sentencing principles, this Court explained in Friesen that parity and proportionality are not at odds with each other. To impose the same sentence on unlike cases furthers neither principle, while consistent application of proportionality will result in parity (para. 32). This is because parity, as an expression of proportionality, will assist courts in fixing on a proportionate sentence (para. 32). Courts cannot arrive at a proportionate sentence based solely on first principles, but rather must "calibrate the demands of proportionality by reference to the sentences imposed in other cases" (para. 33).
- [12] As to the relationship of individualization to proportionality and parity, this Court in Lacasse aptly observed:

Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. [para. 53]

Individualization is central to the proportionality assessment. Whereas the gravity of a particular offence may be relatively constant, each offence is "committed in unique circumstances by an offender with a unique profile" (para. 58). This is why proportionality sometimes demands a sentence that has never been imposed in the past for a similar offence. The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case (para. 58).

- [31] I have described the offences. They are grave in nature.
- [32] The next factor to be considered, in determining what a just, proportionate sentence would be, is the circumstances of the offender, Mr. Armstrong.
- [33] I have the benefit of a presentence report authored by Probation Officer Fountain, based on interviews with Mr. Armstrong, Ms. Leith, and Mr. Armstrong's former probation officer, and also the aforementioned psychological report.
- [34] Mr. Armstrong was 50 years old at the time of these offences. He is father to two young men from a previous long-term relationship with a Ms. Kennedy. He entered the workforce after ninth grade and since then has been steadily employed in various fields, including logging, tugboat operation, and construction. He was in a relationship with Ms. Leith for 13 years during which there was no physical violence.

- [35] The prior absence of violence in their relationship, to be clear, does not mitigate the seriousness of these crimes. It is, however, significant in respect of distinguishing this case from the many sentencing cases dealing with aggravated assault as a form of intimate partner violence ("IPV") in which there is a history of abuse within the relationship, and in which that history is rightly taken into account.
- [36] Mr. Armstrong does have a significant history of alcohol abuse and a lengthy period of opiate dependency. In 1990 and again in 1992, he was convicted of impaired driving charges.
- [37] His additional engagements with the justice system illustrate the risk he poses to intimate partners. In 2004, he was placed under a Recognizance After Allegation in respect of fear of injury and damage to property. The dates and circumstances are unclear, and that Recognizance may be what Officer Fountain refers to in her report as a January 2005 restraining order obtained by Ms. Kennedy prohibiting him from harassing her or their sons or communicating with them, except by telephone. Mr. Armstrong acknowledges that Ms. Kennedy obtained that order because of his verbal abuse.
- [38] That same month, he assaulted another woman he was in a relationship with. He pleaded guilty in March 2005 and received a suspended sentence. Over the following months, he committed two breaches of his probation order. Despite his guilty plea, he now denies responsibility for that assault. In April 2007, he was found guilty of breach of undertaking. His previous probation officer noted that he was difficult to supervise.
- [39] Dr. Dugbartey conducted psychometric testing of Mr. Armstrong. Dr. Dugbartey interpreted the validity score on the Personality Assessment Inventory ("PAI") as "suggesting a motivated evasiveness and/or very limited introspective skills and mental self awareness". The scores on the PAI overall, he said, "indicate that he has a quick temper and he has difficulty controlling the expression of his anger. This is a man in need of anger management treatment."
- [40] A risk assessment focused on IPV demonstrated significant risk management concerns with the risk markers including "extreme minimization, denial of IPV, as well as victim blaming."
- [41] Dr. Dugbartey concludes:

Mr. Armstrong presents with high risk for violence in intimate partner relationships. This risk would remain elevated in the medium term and with particular focus upon Ms. Leith. His intimate partner violence risk in general would be especially high when the object of his romantic intimate partner decides to end the relationship. In my formulation, control in intimate relationships is a significant area of problem for this man.

- [42] With respect to the objectives of sentencing under s. 718 of the Criminal Code, denunciation and deterrence must be emphasized. Mr. Armstrong's lack of insight and his pattern of behaviour of unwillingness to take responsibility do not point to him having good prospects for rehabilitation, and that objective is therefore given less weight. The need to separate Mr. Armstrong from society, given his risk of reoffending and Ms. Leith's justified fears for her long-term safety, is also a factor that must be considered.
- [43] This psychological evidence also assists in assessing Mr. Armstrong's moral blameworthiness. I risk stating the obvious to say that his blameworthiness is at the high end of the scale. As I have said, there was no history of physical abuse in this relationship and the events of February 10th seem, on the evidence, to have been out of character. Further, Mr. Armstrong's personal circumstances in the weeks leading up to the events of February 10th were obviously very difficult. But he alone is responsible for having decided to channel his bitterness and rage into a vicious and potentially deadly attack on his defenceless former spouse.
- [44] These factors point to a substantial term of imprisonment being appropriate.
- [45] The aggravating factors in respect of the aggravated assault are as follows:
- a) There was, I find, at least some degree of premeditation. I am satisfied of that beyond a reasonable doubt. Mr. Armstrong testified to his last memory being of walking in downtown Courtenay on 5th Street. Ms. Leith's residence was a considerable distance from there and Mr. Armstrong would have had to travel on foot. There must have been a purpose to him doing so. Further, from the very, very brief delay between Ms. Leith hearing the noise of Mr. Armstrong breaking in and him coming around the corner at her, it can be inferred that he had brought the boxcutter with him. It was suggested by the defence alternatively that Mr. Armstrong may have entered a storage room in Ms. Leith's home and retrieved the boxcutter from there, but if that was so, for that to have happened, he would have had to move to retrieve that weapon very quickly and intentionally after breaking in. Moreover, he clearly said to Ms. Leith repeatedly why he was there: to kill her or to maim her. This was not an impulsive act.
 - b) The assault was committed while Mr. Armstrong was on undertakings that had been put in place for her protection.
 - c) The assault involving breaking and entering, violating the peace and security Ms. Leith was entitled to in her own home, and forcible confinement within her home.
 - d) It was a very violent crime, with grievous injuries, and psychological terrorization through his uttering death threats.
 - e) Ms. Leith had been Mr. Armstrong's intimate partner.

- [46] The latter factor, their relationship, is a mandatory aggravating factor under s. 718.2(a)(ii) of the Criminal Code. That subsection, first enacted in 1996, originally was limited to situations involving abuse of a spouse, common law partner, or child. As explained by Professor Isabel Grant, it was enacted "in response to a growing recognition that violence within intimate relationships was historically trivialized by the courts" (*The Role of Section 718.2(a)(ii) in Sentencing for Male Intimate Partner Violence against Women*, (2018), *Canadian Bar Review*, Volume 96, p. 158-159). Courts responded to this legislation, including by recognizing that violence against a former spouse is equally worthy of attention given that the risk of violence increases when an intimate partner tries to leave the relationship: see for example, *R. v. Cuthbert*, 2007 BCCA 585 at para. 57, and *R. v. Evans*, 1997 ABCA 165 at para. 12. In 2019, the Criminal Code was amended to include abuse of intimate partners and family members. At the same time, the Code's definition of intimate partner was amended to include both current and former spouses, common law partners, and dating partners.
- [47] Sadly, 25 years after this section was enacted, IPV perpetrated by men against women remains a profound social problem. As recently stated by Madam Justice Griffin in *R. v. Somers*, 2021 BCCA 205 at para. 67:

Despite the enactment of s. 718.2(a)(ii) in 1996, these crimes are still occurring and there remains a strong need to publicly denounce and deter intimate partner abuse in the sentencing of these types of offenders.

- [48] I have listed the significant aggravating factors. There is little that can be said for Mr. Armstrong in the way of mitigating factors. I do recognize that he only seriously contested the counts of attempted murder, which he was acquitted of, forcible confinement, and the common assault of December 28, 2019. He effectively did not contest the other charges, and the defence submits that in respect of mitigation that should be viewed as tantamount to a guilty plea. Given Mr. Armstrong's lack of insight and failure to accept personal responsibility, this factor has only very slight weight.
- [49] I turn then to the parity principle, which, as I have explained, requires me to situate the present cases against those involving similar circumstances. In comparing these cases, I am mindful of the guidance given by Madam Justice D. Smith in *R. v. MacDonald*, 2012 BCCA 155 [MacDonald], where she said this at para. 52:

With respect, there is nothing in the jurisprudence to support his submission that the extent of the injuries to a victim of an aggravated assault is determinative of where in the range of sentences the appropriate sentence should fall. While the extent of a victim's injuries is undoubtedly a relevant factor, it is the circumstances of the assault, including whether the attack was unprovoked, planned or spontaneous, or involved a weapon, that are most relevant to where in the range a particular sentence should fall. Thereafter, additional aggravating or mitigating factors may increase or decrease the sentence. Fundamental to this balancing process is the overarching principle that a sentence should be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [50] The principle of parity requires me to look first to whether there has been guidance provided by the Court of Appeal as to the usual range of sentences for the offences Mr. Armstrong has been convicted of. There is such appellate guidance in respect of the offence of aggravated assault.
- [51] In *R. v. Biln*, 1999 BCCA 369 [Biln], Chief Justice McEachern referred to a "global range, apart from the circumstances of the offender" of "probably from two years (less one day) to six years depending in part upon the degree of violence used in the commission of the offence, although it could be more than that in some extreme cases." He continued:
- [25] In this respect, however, it must be remembered that there will usually be several ranges for any particular offence, depending upon the degree of violence, the relationship between the offender and the victim, if any, the personal circumstances of the offender and other aggravating or mitigating circumstances.
- [52] In *R. v. Craig*, 2005 BCCA 484 [Craig], Madam Justice Kirkpatrick cited that range provided in *Biln*, although she referred to a number of cases in which the lower end of the range was said to be 16 months. Citing *R. v. Willier*, 2005 BCCA 404, and *R. v. Johnson* (1998), 131 C.C.C. (3d) 274, she said:

In determining an appropriate sentence within this broad range, an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end.

- [53] In *R. v. Larose*, 2013 BCCA 450 [Larose], the Court of Appeal noted a number of decisions where a sentence in excess of six years was pronounced. Madam Justice Saunders remarked at para. 17 that:

... it is to be remembered that the circumstances of aggravated assault are variable and difficult to organize into categories. As shown in the cases referred to, the range may be broader, depending on the circumstances of the offence.

- [54] In *Parranto*, the majority judgment delivered by Justices Brown and Martin reminds us of the limitations of sentencing ranges. At para. 125, they said:

- [125] Sentencing ranges can assist sentencing judges when considering all the relevant circumstances of the offence and the offender to arrive at a fit sentence. They are not "averages", "hard and fast rules", or "binding" (Lacasse, at para. 57; Friesen, at para. 37). The usual range of sentences imposed for an offence may be a useful tool at the disposal of sentencing judges as it "gives some sense [to] proportionality and parity" (A. Manson, *The Law of Sentencing* (2001), at p. 65). But sentencing judges are not obliged to have regard to ranges or to begin the sentencing exercise at the range. Their fundamental duty is to impose a sentence that is "proportionate to the gravity of the offence and the degree of responsibility of the offender" (s. 718.1 of the Criminal Code). Conversely, sentencing within a range is not determinative of fitness

[55] The Court then quotes from the translation of the decision of the Quebec Court of Appeal in *Calderon v. R.*, 2015 QCCA 1573 at para. 30, where it was said:

[I]t should be borne in mind that ranges are only indications. Care must be taken not to apply them categorically. Although they constitute a useful reference tool for a judge, they do not exempt him or her from analyzing the particular circumstances of each case, as the focus of the sentencing process continues to be on the individual. This is why offenders sometimes receive different sentences for the same offence.

[56] Apart from the broad consideration of ranges, the parity principle also requires that I consider specific similar cases. Sentences for similar aggravated assaults not involving intimate partners provide some guidance. *R. v. Kim*, 2010 BCCA 590, is a case of an offender with no criminal record attacking homeless people on the streets of Downtown Vancouver on four separate occasions without provocation, slashing them with a boxcutter. The sentencing judge imposed four consecutive seven-year sentences, but then reduced the sentence to 13 years on the basis of the totality principle. The offender's appeal from sentence was dismissed.

[57] *Larose* was a case of the offender attacking strangers in an altercation, inflicting life-threatening stabbing and slashing wounds on two men. The attack was not premeditated, though the offender was carrying a 20-centimetre-long knife in contravention of a probation order. The Court of Appeal upheld sentences of seven years on each of the two aggravated assaults. I acknowledge that in that case, the offender, despite being only 20 years old at the time of the offences, had a criminal record which demonstrated persistent antisocial behaviour, and the offender's use of aggression to impose his will on others.

[58] *Craig* was also an IPV case. Justice Kirkpatrick summarized the facts as follows at paragraph 2, and as they bear some similarity to the present case, I will quote. She said:

[2] ... Approximately two weeks after separating from a woman with whom he had lived for 23 years, the respondent approached her on the veranda of an inn where she was sitting with her daughter and a friend. Armed with a knife he had retrieved from a fishing tackle box in his truck, the respondent put his arm around her shoulder and took a firm grasp of her left arm. He bent down as if to whisper something to her and then commenced to stab her in the lower abdomen. He stabbed her at least three times and inflicted cuts to her hands before he was pulled away from her. The attack was without provocation or warning such that the victim was completely unsuspecting and defenceless. Her injuries were severe. She required emergency surgery and blood transfusions. Her abdominal wounds have been slow to heal and she has impaired function in her hands. Her injuries have significantly impacted her ability to do her work and to participate in her recreational activity.

[59] As in the present case, the offender had been charged with attempted murder but was acquitted. He admitted to stabbing the victim three times and to having done so with the intent to maim her. Justice Kirkpatrick remarked:

It appears that he was always willing to plead guilty to the offence of which he was convicted.

At trial, the Crown submitted that the appropriate sentence was somewhere in the range of two years, after being given 12 months' credit for time served. The sentence imposed by the trial judge was one year of imprisonment, followed by two years probation. The Court of Appeal found that not to be a fit sentence. Instead, an effective sentence of three years was imposed, i.e., two years less after credit for time served. The Court, however, noted that but for the position taken by the Crown on the original sentencing hearing, an effective sentence of four years would have been justified.

[60] I note that in contrast to the present case, Craig did not involve the aggravating factors of breach of bail terms or breaking and entering. Those distinctions would suggest a longer term of imprisonment may be appropriate in the present case.

[61] Before me, the Crown cited several cases where lengthy sentences of up to nine or 10 years were imposed for breaking and entering in the course of home invasions with assaults, aggravated assault, robbery, or firearms offences occurring. The cases include *R. v. Vigneault*, 2021 BCSC 1049; *R. v. Steinhauer*, 2016 BCSC 1322; *R. v. Smith*, 2020 BCCA 87, and its companion case, *R. v. James*, 2019 BCSC 886; and *R. v. Chudley*, 2016 BCCA 90. In general, there are too many points of dissimilarity, for example in the severity of the violence the victims were subjected to or the criminal records of the offenders, for these to be treated as comparator cases in respect of the principles of parity and proportionality. At best, they provide some guidance in considering the application of ranges. *R. v. Wishlow*, 2013 MBCA 34, also cited by the Crown, did involve an attack on an intimate partner. The resulting sentence was eight years, but the attack involved prolonged, sickening, sadistic violence, much more severe than in the present case.

[62] I cannot find on the authorities justification for a sentence or sentences as long as those contended for by the Crown in the circumstances of the present case.

[63] The defence replied to the Crown's authorities with a number of decisions, relying principally on *MacDonald*, and *R. v. Costello*, 2020 BCSC 1206 [Costello]. These are both IPV cases.

[64] In *MacDonald*, the offender terrorized his wife from whom he had separated with a two-month-long campaign of stalking, harassment, and threats against her and her new partner, leading to him violently assaulting her by throwing her onto a bed, punching her in the head, and choking her to the point of unconsciousness, threatening to kill her or finish her off because "if I can't have you, no one can." He was arrested and allowed bail on terms that included no-contact and no-go provisions. Then, several weeks later, he entered her apartment in the dead of night, crept into the bedroom where she and her new partner were sleeping, and then beat them both with a baseball bat, repeatedly striking their heads and bodies.

- [65] In sentencing Mr. MacDonald, the Provincial Court judge found mitigating factors, including the lack of a criminal record, the offender's excellent work record and relationships with employees, the loving support of family and friends, and his guilty pleas and expression of remorse. These were weighed against the significant aggravating factors, and in the result he was sentenced to five years concurrent on each of the two aggravated assaults against his estranged wife and her new partner, short concurrent sentences of uttering threats, the earlier assault in the bedroom, and some breach matters, and short consecutive sentences totalling six months for the breach of his no-contact and no-go bail conditions. In total, a sentence of five and a half years. Mr. MacDonald appealed on the grounds that the trial judge had erred in imposing a sentence towards the high end of the 16-month to six-year range suggested by the case law, and that five-year sentence on the aggravated assault convictions were excessive. The Crown did not appeal seeking a higher sentence. The Court of Appeal declined to find any error of principle or reasoning on the part of the trial judge and dismissed the appeal, so the sentence of five and a half years was upheld. The defence urges me to view MacDonald as a more serious case than the present one. However, the Court of Appeal's affirmation of the sentencing judge's decision as not being inordinately high says nothing about whether a longer sentence may also have been fit.
- [66] In Costello, the offender and his partner, with his partner's child, went camping. They made their way separately to the campground because the officer was under a probation order under which he was to have had no contact with his partner, having previously been convicted of assaulting her and sentenced to three months' imprisonment and 18 months' probation. They resumed their relationship about five months before the probation order expired. While camping, they got into an argument that escalated. Mr. Costello struck his partner once on the side of her face. The blow caused a three-centimetre laceration and undisplaced fractures of the facial bone. He was sentenced to three and a half years. In distinction to the present case, there was no breaking and entering, there was no uttering of threats or unlawful confinement, there was no weapon, and there was no premeditation, although that distinction is blunted somewhat by the offender's history of violence.
- [67] The defence also cites *R. v. Vukaj*, 2013 BCSC 79 [Vukaj], in which the offender was sentenced to 14 years for the attempted murder of his separated wife, having gone to her home, forced his way in when she opened the door, and then struck her repeatedly with a metal stick. He was sentenced concurrently to five years in respect of the count of break and enter. The defence submits that Mr. Armstrong's breaking and entering into Ms. Leith's residence was no more morally culpable. Reasoning that Mr. Armstrong's breaking and entering conviction calls for a greater sentence than the aggravated assault conviction, the defence says that placed beside Vukaj Mr. Armstrong's effective sentence should be no more than five years. I do agree with the Crown, however, that the sentence in Vukaj appears not to have been the focus of the sentencing judge's considerations and that it was very much in the shadow of the attempted murder count. I also note that Vukaj is distinguishable, in that the trial judge declined to find that there had been premeditation: see the trial judgment at para. 72.

[68] Other cases cited by the defence that do not involve IPV included *R. v. Powers*, 2016 BCSC 2585; *R. v. Stark*, 2018 BCSC 2149; *R. v. Doczi*, 2021 BCPC 38; and *R. v. Dragani*, 2018 BCCA 225.

[69] On reviewing the cases I have referred to, I am led to the following impressions:

- a) The upper end of the typical range in aggravated assault, as pronounced or endorsed in *Biln* and *Craig*, appears to have increased from six years, possibly to a usual upper end of seven years or more, but again subject to all of the caveats that go along with considering and applying sentencing ranges.
- b) The sentencing range used in the cases has been a global range, cited both in cases involving IPV and violence against strangers or others. Those sentencing decisions that do involve IPV seldom, if ever, articulate how the aggravating factor of s. 718.2(a)(ii) impacts the sentencing decision. This tendency was noted by Professor Grant in her above-quoted article at page 161. In surveying trial decisions, she found:

... the reasons in the trial level sentencing decisions citing s. 718.2(a)(ii) were often brief and only made passing reference to [the subsection] and thus did not lend themselves to general observations.

I reflect back on the fact that in *Biln*, Chief Justice McEachern noted that there will usually be a variety of ranges for any particular offence, dictated in part by the relationship between the offender and the victim. Given that intimate relationships between offender and victim are now mandated to be viewed as an aggravating factor in sentencing, I question whether, in view of the seriousness of the problem of IPV, and the persistence of the problem, our sentencing paradigms are now at the point when a distinct and higher range of sentencing should be articulated for cases when that aggravating factor is present.

- c) Unless or until a distinct range is formulated for IPV cases, in my respectful view the importance of the subsection as a mandatory aggravating factor is such that in respect of any conventional range of aggravated assault sentences, premeditated IPV leading to serious personal injury may appropriately be situated at or towards the upper end of the range.

[70] Again, the question for me is not so much what the range is as what the appropriate sentence is for Mr. Armstrong as an individual, given all the circumstances I have described. As I have said, this was a grave crime with a high degree of moral culpability.

[71] Having regard to the case authorities and the Code provisions, I find that the just sentence for the aggravated assault against Ms. Leith is seven years.

[72] As I have noted, both the Crown and the defence approach sentencing from the perspective of the break and enter conviction carrying a higher penalty. Had Mr. Armstrong's criminal conduct upon breaking into the house been limited to the aggravated assault against Ms. Leith's person, I would have pronounced the same seven-year sentence to be served concurrently on the breaking and entering count, recognizing that I have already treated it,

and the forcible confinement of Ms. Leith and uttering threats, as aggravating factors on the aggravated assault sentence. However, in view of the other offences effected through the breaking and entering - the wanton destruction of Ms. Leith's property on re-entering her residence after she made her escape - the sentence on the breaking and entering charge will be eight years served concurrently with the sentence for aggravated assault.

[73] The other charges stemming from February 10, 2020, will also be served concurrently.

[74] Mr. Armstrong, you are listening carefully? I am about to pass sentence. If you were present in the courtroom, I would ask you to stand at this point.

[75] THE ACCUSED: I'm standing.

[76] THE COURT: Clinton George Armstrong, on the counts on which you have been convicted, I sentence you as follows:

[77] On Count 1, the assault of December 28, 2019, the effective sentence before giving credit for time served would be one day. Giving credit, the sentence is of time served.

[78] On Count 2, breaking and entering, the effective sentence before giving credit for time served would be eight years. Giving credit for 965 days' time served, you are sentenced to a term of imprisonment of five years, 128 days.

[79] On Count 4, unlawful confinement, the effective sentence before giving credit for time served would be one year concurrent to Count 2. Giving credit, the sentence is of time served.

[80] Under Count 5, assault with a weapon, the effective sentence before giving credit for time served would be two years concurrently. Giving credit, the sentence is time served.

[81] Under Count 6, aggravated assault, the effective sentence before giving credit for time served would be seven years. Giving credit for time served, the term of imprisonment is four years, 128 days, concurrent with Count 2.

[82] Under Count 7, uttering threats, the effective sentence before giving credit for time served would be 60 days. Giving credit, the sentence is time served.

[83] Under Count 8, mischief, the effective sentence before giving credit for time served would be 90 days. Giving credit, the sentence is time served.

[84] Under Count 10, breach of bail, communication, the effective sentence before giving credit for time served would be 30 days. Giving credit, the sentence is time served.

[85] Under Count 11, breach of bail, no go, the effective sentence before giving credit for time served would be 30 days. Giving credit, the sentence is time served.

[86] I also pronounce the following ancillary orders:

- a) under s. 487.051, Mr. Armstrong, you shall provide samples of bodily substances for DNA analysis;
- b) you are subject to a ten-year mandatory weapons prohibition under s. 109(2);
- c) under s. 743.21, you are prohibited from communicating, directly or indirectly, with Taura Leith during your period of imprisonment; and
- d) there will be a forfeiture order in respect of the boxcutter.

[87] If you are standing, Mr. Armstrong, you may be seated.

[88] Counsel, are there any further matters to deal with?

[DISCUSSIONS WITH COUNSEL]

[89] THE COURT: I will waive the victim surcharge, yes, in view of the length of imprisonment.

[90] CNSL B. MOVASSAGHI: Thank you, My Lord.

[91] THE COURT: I thank counsel for their submissions. We are concluded.

"A. Saunders, J."

The Honourable Mr. Justice A. Saunders

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