

CANADA / JUDGMENT

R. v. Brush

2022 BCSC 1194

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Supreme Court of British Columbia

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2022 BCSC 1194 R. v. Brush

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brush,

2022 BCSC 1194

Date: 20220411

Docket: 109072-3

Registry: Kamloops

Regina

v.

Dawn Marie Brush

Before: The Honourable Madam Justice Donegan

Oral Reasons for Sentence

Counsel for Crown:

L.A. Drake

(as agent for T. Livingston)

Counsel appearing as Amicus Curiae:

C.E. Johnson

Appearing on her own behalf:

D. Brush

Place and Date of Hearing:

Kamloops, B.C.

November 23 & 24, 2021

April 5, 2022

Place and Date of Judgment:

Kamloops, B.C.

April 11, 2022

- [1] THE COURT: On March 9, 2021, Dawn Marie Brush entered a guilty plea to the offence of failing to provide the necessities of life to Jeannette Rositch, endangering her life, contrary to s. 215(2)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. She is here today to be sentenced.
- [2] My task is to determine a proportionate sentence in accordance with the purpose, principles and objectives set out in s. 718 of the Code. I am to balance all of the relevant factors in order to meet the objectives pursued in sentencing. Fundamental to this task is to ensure the sentence is proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. Proportionality must take into consideration both of these perspectives and cannot focus more attention on one concept over the other.
- [3] The Crown submits that a proportionate sentence in this case is 18 months imprisonment followed by a period of probation of 12-18 months. Mr. Johnson, appearing as a friend of the court assisting Ms. Brush, takes the position that a proportionate sentence is less than that period, perhaps in the range of 12 months incarceration, but to be served in the community under a conditional sentence order followed by probation.

Circumstances of the Offence

- [4] I turn now to the circumstances of the offence. When this sentencing hearing commenced on November 23, 2021, Ms. Brush formally admitted certain facts for the purpose of these sentencing proceedings. The Crown sought to prove additional facts as aggravating factors on sentence, so I held what is commonly referred to as a Gardiner hearing. After hearing evidence and submissions, I delivered reasons, indexed at 2021 BCSC 2389 the following day, wherein I made those findings of fact. I do not intend to repeat those reasons here, and will only highlight, as the Crown did in its submissions, certain important aspects of the circumstances. These reasons for judgment today are to be read in conjunction with my earlier reasons for judgment.
- [5] The victim in this case, Jeannette Rositch, is in her early 70s. She has significant physical and cognitive challenges such that she requires 24-hour care. Ms. Rositch was under the care of Ms. Brush for 13 years as contracted through Thompson Community Services ("TCS"). Ms.

Rositch lived in her home. Ms. Brush was responsible for all of Ms. Rositch's care and was paid to provide that care. Her responsibilities included ensuring that Ms. Rositch attended medical appointments, that she received her prescribed medications, that she was properly fed, clothed, bathed, and housed; in other words, all aspects of her care.

- [6] Dr. Wiltshire has been Ms. Rositch's family physician since 2009. Dr. Wiltshire saw Ms. Rositch on a regular basis until 2017. In May of 2019, having not seen Ms. Rositch in over two years, Dr. Wiltshire had his office call Ms. Brush to make an appointment to bring Ms. Rositch in to see him. Ms. Brush brought Ms. Rositch to Dr. Wiltshire's office on May 6, 2019. Dr. Wiltshire immediately noticed that Ms. Rositch was cachectic. She had lost muscle mass to the point where she was, in Dr. Wiltshire's words, "just almost bone, to be honest".
- [7] During that appointment Ms. Brush told the doctor that Ms. Rositch's weight was down but that she was still eating well. She also told the doctor that Ms. Rositch was regularly receiving her prescribed medications. I found that those statements were not true. Because of Ms. Rositch's physical condition, Dr. Wiltshire recommended that she be taken to Royal Inland Hospital ("RIH") immediately. Dr. Wiltshire opined that Ms. Rositch would have died of malnutrition if no interventions were taken, which they fortunately were. Ms. Brush ensured that Ms. Rositch did go to RIH that same day. She weighed 72 pounds on admission. As the Crown observes, she was noted to have crust on her eyes, a white film on her lips, and smelled strongly of urine. The admitting doctor noted that Ms. Brush told emergency room staff that Ms. Rositch had always been thin, as thin as she presented on admission that day, and had been regularly taking her medications. Again I found this statement was not true.
- [8] The initial assessment of Ms. Rositch at RIH was consistent with Dr. Wiltshire's assessment. In addition to being emaciated, Ms. Rositch had unkempt and matted hair, overgrown nails, and a pressure sore on her right hip and buttock area, as well as a sore on her head area. When a thermometer was put in her mouth, she sucked on it as a baby would a bottle. Ms. Rositch received good care during her stay at RIH. She was placed on a high calorie diet. She remained in hospital until July 3, 2019, when she was transferred to a home where she currently resides. By September 10, 2019, Ms. Rositch's weight was up to 109 pounds. Ms. Rositch is currently thriving. She is living in an assisted living facility in Kamloops and being well cared for.
- [9] The police investigation in this matter commenced on approximately May 10, 2019. On May 14, 2019, three officers executed a search warrant on the Brush residence. Medical administration record sheets were seized from different locations in the residence. They were initialled by Ms. Brush to indicate that she had been giving Ms. Rositch her prescribed medications. In fact, this was not true. No prescriptions had been filled for Ms. Rositch since July 2017, and I found that Ms. Brush knew the documents were altered when she initialled them.

- [10] In addition I found that the condition of the Brush residence on May 14, 2019, when police arrived was comparable to how it was when Ms. Rositch was living there until May 6, 2019. I found that it was unsanitary and not a proper place for Ms. Rositch to have received the care that she required.

Victim Impact

- [11] Ms. Rositch is non-verbal and unable to provide a victim impact statement directly, but I have seen the photographs taken of Ms. Rositch in hospital depicting her emaciated state, her sores and her hair loss. I have seen the evidence about her weight of 72 pounds, the crust on her eyes, the white film on her lips, and all of the other aspects of her physical condition I have already described. There is no doubt that Ms. Rositch suffered terribly as a result of Ms. Brush's offence.
- [12] I also have very valuable and thoughtful information about the impact this crime has had upon Ms. Rositch and her family from those who love her and are able to understand Ms. Rositch's wants, needs and emotions through other forms of communication. Her siblings and nearest relatives have provided a written victim impact statement, which Mr. Livingston on behalf of the Crown read at the sentencing hearing last week. I can understand how difficult it must have been for the family to put the physical, psychological, and emotional impact this crime had on Ms. Rositch and them into words.
- [13] Ms. Rositch's family trusted Ms. Brush with her care. Through reports from the health and social agencies employing Ms. Brush, their own intermittent visits and regular updates and photographs from Ms. Brush, the family felt Ms. Rositch was well cared for and well loved. The betrayal they felt once they learned of the true state of affairs comes through in the words that they used. When they first saw Ms. Rositch upon her admittance to hospital, they found her condition "gut-wrenching". Their observations of her perilous physical condition are consistent with the photographs before the court. The family described Ms. Rositch's physical and emotional condition in these words:

She was coiled in a fetal position in the hospital bed, incredibly emaciated. She seemed dazed but she recognized and responded to us. Emotionally, she was overwrought, crying, confused and agitated. She was continually scratching her face and neck and rubbing her fist on her head so extensively she wore away her hair. We could see how distraught she was - we suspected inconsolable grief. Physically, when she was transported in a sling from her bed to a wheelchair, she looked to us like a little bird with no feathers - all bones and no flesh. We couldn't imagine what had happened to turn her from a lively and sometimes feisty woman to this crying skeleton, or how she felt - with no one she was able to tell what was going on, no one able to help. We did not know if she would survive.

At least one of us spent time with Jeanette every day while she was in the hospital, bringing her favourite treats as well as giving her the care and attention she needed and deserved. Her hospital roommates told us that Jeanette would cry for hours at a time every day. On one of the

earlier days, when Sherry thought this might be the last day to see her alive, she put her face up to Jeanette's, looked her in the eyes and said strongly to her, "If you eat everything and do your exercises, we will get you out of here and we will find you a home where you are safe and cared for, and you can eat everything you want!" Sherry cried all the way home, but the next day there was a huge change; Jeanette had perked up considerably. She responded to requests to exercise, as well as eat everything she was given. She had the cognitive ability to know that she had been given a chance at happiness and she showed us her will to live. From then on, we constantly reinforced that promise to her during our visits, saying "Bye Bye!" and she would respond with an excited and loud response, "Bye Bye! Bye Bye!."

[14] Ms. Rositch is clearly the direct victim of this crime. She suffered significant physical, emotional and psychological harm during the period where Ms. Brush failed to provide her with the necessities of life. That she has now recovered and is thriving is a testament to the medical professionals and caregivers that stepped in. Ms. Rositch's family members are also victims of this crime and have been negatively impacted as well. They describe what occurred as an incredible tragedy, one that will weigh on them for the rest of their lives.

Circumstances of the Offender

- [15] Through a pre-sentence report prepared by a probation officer, a report prepared by a forensic psychologist, the submissions of Mr. Johnson, and Ms. Brush's remarks to me at the hearing, I have a great deal of information about Ms. Brush's circumstances.
- [16] Ms. Brush is 55 years old. As a child she was raised by her mother and stepfather who adopted her. The family moved numerous times within Canada when she was younger as a result of her father's employment. Despite the disruption that the moves caused, she reports being close with her family. Ms. Brush has no history of violence, substance misuse or criminal behaviour. She graduated from high school in Kamloops, did not complete her post-secondary studies, but has been gainfully employed throughout her life.
- [17] Although her father passed away some time ago, she has close relationships with other family members, including her twin older brothers and younger sister. She has been married to her husband since 2004. They were living together before that. They currently live together with Ms. Brush's 29-year-old son from a prior relationship. She also has a 32-year-old stepdaughter who lives on her own with her own four children. Ms. Brush reports having a large social and family support network available to her.
- [18] Ms. Brush worked for TCS for 32 years. Prior to providing live-in care for Ms. Rositch for 13 years, she worked in assisted living facilities. Since she was terminated from her employment with TCS in 2019, she has found employment first with Rocky Mountaineer, then with Molly Maid, and she is currently a housekeeper for the Phoenix Centre. She was hired by the Phoenix Centre on December 31, 2020, as a part-time housekeeper working seven hours per week. Her employer describes her as reliable, hardworking, and a friendly employee who is always willing to help out. This conviction puts her at risk of losing her

employment because under the Community Care and Assisted Living Act, S.B.C. 2002 c. 75, the Phoenix Centre cannot employ persons with convictions related to vulnerable populations.

- [19] Ms. Brush has no prior criminal history. She reports having a gambling addiction that started in 1991. In 2010, her addiction resulted in the loss of her home, their trailer was repossessed, and they almost lost their vehicle. Ms. Brush reported starting a 12-step program for gambling thereafter. She reports being able to manage this addiction until 2017 when she started playing internet games that cost money. Finding it to be a "stress release", she reports spending about four hours a day on the computer playing these games, and reports spending about \$50 per day, seven days a week. She currently spends much less than that on gambling. She reports \$50 per week. Her husband believes she stopped gambling in 2013.
- [20] Ms. Brush has some physical medical issues and reports experiencing symptoms of depression, including lack of sleep, fatigue, and symptoms arising from menopause from approximately 2015 onward. In September 2019, she attempted suicide by eating food that she knew would cause a serious adverse physical reaction to her. She spent time in hospital. She has been taking prescribed medications to manage her mood and her mental health. The psychologist who prepared the report before me noted the mental health symptoms reported by Ms. Brush are associated with a diagnosis of major depressive disorder with anxious distress with moderate severity. The doctor noted that her prescribed medications have likely attenuated those symptoms. As the doctor finds that she presently rates as a moderate to high risk for suicide or self-harm, she discussed with Ms. Brush whether Ms. Brush had a safety plan in place to reduce and manage her level of risk. Ms. Brush told her that she did, that she had a strong social support network around her, and that she has been seeing counsellors who helped her complete a safety plan. The psychologist advised her to keep a copy of the plan with her to revisit and modify it with her counsellor as necessary.
- [21] Dr. Kreklewetz, the psychologist who prepared the report, consulted with a Forensic Psychiatric Services psychiatrist, Dr. Nicola Hodelet, about Ms. Brush on January 31, 2022. Based on Dr. Hodelet's file review and the information provided to her by Dr. Kreklewetz, the two doctors arrived at a mutual decision that an additional psychiatric pre-sentence evaluation was not warranted at this time. Ms. Brush did not display or report any symptoms of thought disorder or other symptoms of psychosis, nor did she exhibit any indications of mania. Ms. Brush further advised that her psychiatric medications were currently addressing her mental health symptoms without any undue side effects, and that she had been under the care of various mental health counsellors for approximately two years. I have no reason to question the opinion of these two experts that a pre-sentence psychiatric report would not assist with sentencing in these circumstances.
- [22] In March of 2020, Ms. Brush started therapy sessions with a counsellor. At first they were weekly, then biweekly and then monthly. They are now again biweekly.

- [23] During her interview with the psychologist, Ms. Brush stated that she was unable to recall most of what happened during the two plus years where she neglected to care for Ms. Rositch. Ms. Brush expressed confusion and indicated the victim was like family and that she would never have hurt her purposely. When asked about falsifying medication administration records, Ms. Brush reported that she did not remember doing so and could not provide an explanation for doing so.
- [24] During the first part of her clinical interview with the psychologist, Ms. Brush expressed believing that her symptoms of menopause during the time impacted her cognitively. She also discussed a concussion she received from being hit with a ball. She stressed the significant impact of those symptoms and maintained that as a result her memory of the offence and understanding of her behaviour was compromised. However, the psychologist noted that at some point during her discussion of her offending behaviour Ms. Brush's explanations for that behaviour seemed to shift significantly. The doctor reported that Ms. Brush provided a great level of detail about all of the life stressors that were impacting her during this same timeframe including the death of family members and pets, her son's hospitalizations, her having to move, and other things. To Dr. Kreklewetz, the level of detail that she provided about these stressors stood in sharp contrast to her earlier reported memory gaps or foggiess. To the doctor the memory gaps and foggiess seemed to only pertain to her lack of care of Ms. Rositch and nothing else.
- [25] The psychologist also noted that while Ms. Brush became teary at times when discussing the offence, her expressed remorse seemed primarily linked to concern of how others perceived her as a bad person or a "monster". The doctor noted that she did not become emotional when discussing Ms. Rositch's condition involving extreme weight loss and hygienic conditions, extended periods without medication, and that she did not articulate remorse for her failure to provide adequate care.
- [26] With regard to risk assessment, the doctor employed the HCR-20 instrument and found that she rated as posing a low risk for future violence. However, she highlighted that these results should be interpreted with caution because it was difficult for her to reconstruct precisely Ms. Brush's motivation and intent. The doctor explained that this was due to Ms. Brush's vague description of her offending and claims of memory impairment regarding her offending behaviour. Dr. Kreklewetz wrote:

...an argument could be made that the neglect of her duties of care could have reflected emotional overwhelm due to personal stressors and/or possible exhaustion / caregiver burnout. However, the fact that Ms. Brush falsified the victim's medication administration records seems to indicate some degree of deliberation and wilful or purposeful action (whereas simply failing to complete the required entries in the medication records might provide a stronger argument for memory issues, or indication of overwhelm / exhaustion / caregiver burnout).

- [27] With regard to future offences, the doctor opined that Ms. Brush's risk appears to be most closely tied to her difficulties coping with multiple life stressors at the time. Although she reported memory impairments from a concussion and cognitive symptoms associated with menopause, the doctor noted again the inconsistency between her lack of recall about the index offence as compared to her considerable detailed recall of all other events during that same time period.
- [28] In the end, Dr. Kreklewetz made four recommendations, found at page 10 of her report. They are as follows:
1. Given Ms. Brush's expressed concerns with her memory and reported role in her behaviour during the index offence period, it is recommended that Ms. Brush be referred for a comprehensive neuropsychological assessment and evaluation of her current cognitive functioning. Such services should be conducted by a registered psychologist with specialized knowledge and training in neuropsychology and may be accessed within the [Greater] British Columbia region or via referral to BC Mental Health and Substance Use Services.
 2. It [is] respectfully recommended that Ms. Brush be prohibited from employment that places her in duty of care of vulnerable individuals (i.e., minors, those with physical, cognitive, and or psychological disabilities or concerns) for the foreseeable future.
 3. Ms. Brush should continue to take all psychiatric medication as prescribed by her general practitioner and attend all scheduled follow-up appointments.
 4. Finally, Ms. Brush is advised to continue to participate in individual counselling and psychotherapy as recommended by her current BCMHSUS counsellor. Future treatment goals may potentially include a focus on: 1) identifying negative and / or irrational thought patterns that perpetuate her mood symptoms, [2]) developing positive coping strategies and more adaptive responses to stress, [3]) emotional regulation and distress tolerance skills to manage her anxiety levels, [4]), processing the index offence and gaining greater insight into her offending behaviour, and [5]), monitoring risk for self-harm / suicide including regularly revisiting and modifying her safety plan as needed.
- [29] I note that the doctor does not recommend any services directly through the Forensic Psychiatric Services.

Crown and Defence Positions

- [30] The Crown submits that the gravity of this offence and Ms. Brush's moral blameworthiness in committing it are both high. The Crown argues that the only factor that attenuates the gravity of the offence is that Ms. Brush brought Ms. Rositch to see Dr. Wiltshire when asked, which allowed for medical interventions that ultimately saved her life.

- [31] Mr. Livingston submits that the objectives of denunciation and specific and general deterrence must be given primacy in this case and that a sentence of 18-months imprisonment, not served in the community, reflects those objectives, the gravity of the offence, as well as the aggravating and mitigating factors. He submits that a probation order to follow in the range of 12-18 months with terms to assist with Ms. Brush's mental health would adequately address the need for rehabilitation. Overall, the Crown opposes the imposition of a community based disposition and argues that Ms. Brush must be sentenced to a period of incarceration to both condemn her for breaching society's core values, and to send a message to other persons similarly situated that if they fail to provide necessities of life to people in their care, they will receive a significant sentence.
- [32] Mr. Johnson, appearing as a friend of the court, advocates for a conditional sentence order in the range of perhaps 12 months followed by a probationary period. He argues that Ms. Brush suffers from mental health concerns that diminish her moral culpability and reduce the gravity of the offence. While he recognizes that denunciation and deterrence are the primary sentencing objectives in a case like this, he urges the court not to lose sight of the need to consider the important objective of rehabilitation and of course the need to exercise restraint in the use of imprisonment. Mr. Johnson emphasizes that Ms. Brush is a first-time offender and pleaded guilty to this offence, that she is extremely remorseful, and still does not understand her offending behaviour. He argues that a conditional sentence order would adequately address denunciation and deterrence and would be a proportionate sentence. Ms. Brush addressed the court directly, and again expressed her remorse for what she has done.

Legal Framework and Principles

- [33] The maximum penalty for this offence is five years imprisonment when the Crown proceeds by indictment, which is the case here. There is no minimum penalty prescribed. Prior to November 1, 2005, the maximum penalty for this offence had been two years imprisonment.
- [34] The determination of a just and proportionate sentence is a highly individualized exercise. Many courts have recognized that imposing a just and proportionate sentence in serious cases like this is among the most challenging responsibilities a judge can have. It involves a careful balancing of a variety of factors in the context of a particular set of circumstances in respect of a particular offender. This balancing process is to occur within a legislative framework, informed by common law principles. That legislative framework is set out in s. 718 of the Code.
- [35] Section 718 of the Code provides that the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions. This is to be achieved by imposing sentences that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[36] Section 718.04 of the Code requires that the objectives of denunciation and deterrence are to be given primacy when the court is imposing a sentence for an offence that involved abuse of a person who is vulnerable because of personal circumstance, which is the case here. I recognize that this provision was not enacted at the time of Ms. Brush's offending, but the jurisprudence supports a finding that those considerations apply in the absence of statutory codification: *R. v. Peterson*, (2005), 201 C.C.C. (3d) 220, 34 C.R. (6th) 120 at para 57 (O.N.C.A.); *R. v. Davy*, [2015] O.J. No. 939 (Ont. S.C.J.) at para. 126.

[37] Parliament's choice in 2019 to enact s. 718.04 of the Code to prioritize denunciation and deterrence for offences involving abuse of persons who are vulnerable because of personal circumstance is consistent with the jurisprudence and is a reasoned response to the wrongfulness of these type of offences and the serious harm they cause to those most vulnerable in our community. The sentencing objective of denunciation embodies the communicative and educative role of law: *R. v. Proulx*, 2000 SCC 5 at para. 102. It reflects that the fact that the Canadian criminal law is a "system of values". A sentence that expresses denunciation thus condemns the offender "for encroaching on our society's basic code of values". It "instills the basic set of communal values shared by all Canadians": *R. v. M.* (C.A.), 1996 SCC 230 at para.81. The protection of vulnerable people like the elderly and those with disabilities is one of the most basic values of Canadian society.

[38] The objectives of sentencing are given sharper focus in s. 718.1 which mandates that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. This proportionality principle is fundamental in Canadian law. Thus, whatever weight I may wish to accord to the objectives listed in s. 718, the resulting sentence must respect the fundamental principle of proportionality: *R. v. Nasogaluak*, 2010 SCC 6 at para. 40.

- [39] Section 718.2 provides a non-exhaustive list of secondary sentencing principles including the consideration of aggravating and mitigating circumstances (s-s. (a)); the principles of parity and totality (s-ss. (b) and (c)); the instruction that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances (s-s. (d)); and to consider "all available sanctions, other than imprisonment, that are reasonable in the circumstances" (s-s. (e)): Nasogaluak at para. 40.
- [40] With respect to the deemed aggravating factors set out in s. 718.2(a), s-ss. (iii) and (iii.1) are relevant in this case in that Ms. Brush abused a position of trust or authority in relation to Ms. Rositch, and the offence clearly had a significant impact on Ms. Rositch's health. I am satisfied the Crown has proven both of these factors beyond a reasonable doubt.
- [41] Regarding the principle of parity found in s. 718.2(b), while it is important to respect this principle, I am mindful that I am not to lose sight of the individualized nature of the assessment that requires me to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case and the offender: Nasogaluak at para. 43.
- [42] Subsection 718.2(d) and (e) emphasize the need for me to exercise restraint in the use of imprisonment. These provisions require that an offender not be deprived of liberty if less restrictive sanctions are appropriate in the circumstances and that all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or the community should be considered for all offenders, with particular attention to the circumstances of Indigenous offenders. Ms. Brush is not an Indigenous offender.
- [43] Again, the proportionality principle in s. 718.1 is fundamental to all of this. This principle and its interplay with the sentencing objectives and other principles was explained by the court in *R. v. Ipeelee*, 2012 SCC 13:
- [37] The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing -- the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the Code, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. As Wilson J. expressed in her concurring judgment in *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at p. 533:

It is basic to any theory of punishment that the sentence imposed bear some relationship to the offence; it must be a "fit" sentence proportionate to the seriousness of the offence. Only if this is so can the public be satisfied that the offender "deserved" the punishment he received and feel a confidence in the fairness and rationality of the system.

Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

- [44] The Supreme Court emphasized this again in *R. v. Lacasse*, 2015 SCC 64, instructing sentencing courts that proportionality is to be determined both on an individual basis, that is in relation to the offender herself, and to the offence committed by that offender and by comparison with sentences imposed for similar offences committed in similar circumstances. The concepts of "individualization and parity of sentence must be reconciled for a sentence to be proportionate": para. 53.
- [45] Maximum sentences are one of the tools to determine the gravity of the offence and thus the proportionate sentence. The gravity of the offence includes both subjective gravity, namely the circumstances that surround the commission of the offence, and objective gravity. The maximum sentence the Code "provides for offences determines objective gravity by indicating the 'relative severity of each crime': *R. v. Friesen*, 2020 SCC 9 at para. 96.
- [46] Again, in this case, until November of 2005, the maximum sentence for this offence had been two years imprisonment. Therefore, when Parliament chose to increase the maximum sentence to five years, it demonstrates that Parliament wants such offences to be punished more harshly and "should thus be understood as shifting the distribution of proportionate sentences for an offence": *Friesen* at para. 97.
- [47] Counsel have provided me with a few authorities in support of their positions for an appropriate range of sentence in this case. Mr. Livingston relies on *R. v. Lis*, 2020 ONCA 551, *Davy*, and *Peterson*. Mr. Johnson also relies on *Peterson*, as well as the authorities referred to by the court in *R. v. Guimond*, 2010 MBPC 33 and *R. v. Nanfo*, 2008 ONCJ 313.
- [48] In *Peterson*, the offender appealed his six-month jail sentence for failing to provide his elderly father suffering from dementia with the necessities of life. The circumstances were that the victim lived in the offender's home and was dependent entirely on him. When police found the victim in June of 2000, his living conditions were appalling, unsafe, and unhygienic. He was very thin and unclean. At the time the maximum sentence for this offence was two years imprisonment.
- [49] Weiler J.A., writing for the majority in that case, dismissed the appeal. In doing so, the court set out the range of sentence for this offence as four to eight months' imprisonment. Again, I note the maximum sentence at the time was only two years' imprisonment. The court found that general deterrence and denunciation were paramount objectives:
- [57] In addition, the importance of general deterrence and denunciation is highlighted in this case by the indifference of the appellant to the criminal nature of his offence. The sentence must bring home to other like-minded persons that abuse of elderly helpless parents in their

care will not be tolerated. The imposition of a term of imprisonment has a denunciatory component in that it not only condemns the particular offender's conduct, but, communicates and reinforces a shared set of values. It reinforces the point that the conduct in this case was criminal and not an accident or a mere error in judgment. While a conditional sentence can convey deterrence and denunciation, the need to ensure that this offence carries the required stigma would not be met by a conditional sentence in this case.

[50] Of course, this decision was rendered prior to the increase in the maximum sentence.

[51] In Davy, a more recent case, the offenders were convicted after a trial of failing to provide the necessities of life to their mother who suffered from severe dementia and lived in their home over a three-year period. The victim was incapable of looking after herself. The offenders took steps to avoid detection, including moving houses. Their neglect to their mother was found when police responded to a 9-1-1 call. The court described what the officers found at para. 5 of the decision, where I observe that the descriptions of the residence and the victim bear similarity to the case at bar. The court wrote:

[5] On May 26th, 2011, the paramedics and O.P.P. received a call to attend 12 Lankin Boulevard, unit 19 to assist an elderly person, namely, Viola Simonds. What the first responders found upon attending that call has remained indelibly imprinted on their memories. The overpowering smell of cat urine. The presence of filth and feces. The place in complete squalor. The condition of the premises was described by the attending O.P.P. Sergeant as amongst the worst he had ever seen in over 30 years of his career as a police officer. This was only a prelude to what they were to find when they went upstairs to Ms. Simonds' bedroom. There, they found Ms. Simonds naked on a bare mattress in a room with blacked out windows, covered in her own vomit and in a filthy condition. The O.P.P. Sergeant described by Ms. Simonds' emaciated appearance. She appeared "like a skeleton covered with skin". There was no muscle tone whatever. Her appearance reminded of him of a "World War II concentration camp survivor".

[52] Unfortunately, and unlike the case at bar, the victim in Davy eventually died after she was discharged from hospital and placed in a long term care facility.

[53] As Mr. Livingston points out, the court in Davy rejected the defence attempt to characterize the offence as one of misjudgment. The court wrote:

[121] This Court further rejects any characterization that the conduct of Ms. and Mr. Davy was only a misjudgement as opposed to criminal conduct. In convicting the Davys, the jury was absolutely clear that their failure to provide the necessities of life to [the victim] was, in fact, criminal conduct. The submission on behalf of Mr. Davy that the conduct here was not assaultive but negligent is a distinction without a difference as in the end, the result was the same - [the victim's] life was endangered and the conduct of the Davys caused or was likely to cause permanent injury to her health.

[54] The court in *Davy* found that denunciation and deterrence were the paramount sentencing considerations. The court held at paras. 126-128:

[126] This is a case of elder abuse. Denunciation and deterrence are the paramount sentencing considerations in elder abuse sentencing particularly in a case such as this where [the victim] suffered from severe dementia and was vulnerable. In *R. v. Foubert* Justice McKinnon addressed elder abuse as a growing problem in our society that must be seriously addressed. At para. 30, Justice McKinnon states:

Caregivers of the elderly, particularly those suffering from Alzheimer's disease and dementia, owe tremendous power. That power cannot be abused.

[127] He goes on to state at para. 31:

Caregivers must know that if they abuse their position of trust and authority over vulnerable individuals, the court will deal with them harshly. Caregivers often work in environments where witnesses are not present. As such, they must deal with those entrusted to their care in the utmost good faith.

[128] At para. 32 he goes on to state:

"In my view the only way to ensure that this bond of trust remains intact is for the courts to determine that caregivers who breach that trust will be sent to jail. In my view, incarceration is the only reasonable alternative to ensure a safe and secure environment for those extremely vulnerable individuals who are at the mercy of their caregivers".

[55] I agree with those comments, but would add that it is unclear to me whether the court in *Davy*, in relying on *Peterson*, took into account that the maximum sentence available at the time of that decision was two years imprisonment. The court in *Davy* sentenced each offender to 12 months imprisonment, followed by two years probation. The court found that a conditional sentence order was not proportionate to the gravity of the offence.

[56] In *Lis*, the Ontario Court of Appeal allowed the Crown's sentence appeal from a sentence of one day incarceration, reflecting 17 months of pre-sentence custody, and substituted a sentence of three years incarceration in circumstances where the offender failed to provide the necessities of life to her developmentally delayed nine-year-old child who had cerebral palsy. The child weighed 31 pounds and died as a result of complications of malnutrition and dehydration. The Court found the sentencing judge failed to give primary effect to the principles of denunciation and deterrence:

[55] Parliament's choice to prioritize denunciation and deterrence as the sentencing objectives for offences involving the abuse of children reflects a reasoned response to the inherent wrongfulness of these offences, the enhanced moral blameworthiness, and the serious harm that these offences cause to the most vulnerable in our community. A sentence that expresses denunciation condemns the offender for encroaching on our society's basic code of values: *R. v. M.* (C.A.), 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 81. As an

objective of sentencing, deterrence refers to the imposition of a sentence for the purpose of discouraging the offender and others from engaging in criminal conduct. When general deterrence is factored into the determination of a fit sentence, an offender is punished more severely. Not necessarily because she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity: *R. v. P. (B.W.)*, 2006 SCC 27, [2006] 1 S.C.R. 941, at para. 2.

- [57] Although the facts of that case are clearly distinguishable, I find these observations of the Court applicable to the case at bar.
- [58] In allowing the appeal, the Court in *Lis* also noted that the sentencing court elevated the principle of rehabilitation over denunciation and deterrence, that the offence was not a momentary lapse in judgment, and that the sentencing court failed to take into account the increased maximum sentence under s. 21: para. 99.
- [59] Mr. Johnson has referred me to *Guimond*, not for its similarity to the case at bar, but rather for the court's overview of 11 sentencing authorities identified in the decision. Mr. Johnson did not highlight any of the summarized authorities specifically. I have looked at them. Of them, leaving aside *Peterson*, which counsel provided to me directly, and *Nanfo*, which Mr. Johnson provided to me directly and I will summarize in a moment, only three of those decisions involved the offence of failing to provide the necessities of life. These three are summarized by the court at paras. 16, 21 and 22:
- [16] In *R. v. Campbell*, [2005] O.J. No. 3642 (Ont. S.C.J.), a case of failing to provide the necessities of life contrary to section 215 of the Criminal Code, punishable at the time to a maximum of 2 years imprisonment, a father left his young son unattended in the apartment. The 18 month old fell from a third floor window, was rendered a paraplegic and died. Campbell was sentenced to a one year conditional sentence order followed by one year of supervised probation.
- ...
- [21] *R. v. Chittamath*, 2008 CarswellOnt 5618, (ONCJ) is a case where a mother left her son's multiple and serious injuries untreated until he died of them. The offender pleaded guilty to failing to provide the necessities of life and was sentenced to 6 months of custody followed by 3 years of supervised probation. On appeal, the Court of Appeal commented that an 18 month custodial sentence under the pre-2005 regime would have been appropriate. It declined however to intervene given that the offender had already served her sentence. The Court of Appeal also declined to comment on what an appropriate sentence would have been under the current legislative scheme.

- [22] R. v. Grant, [2009] N.B.J. No. 89 (NB.P.C.) is the case of an offender who failed to provide the necessities to his mother. She was found in a chair she had been left in for months, sitting in her own urine and feces and suffering from malnourishment and gangrene. The Court found that this failure contributed to her mother's death. The Court sentenced her to 4 years of imprisonment.
- [60] In Nanfo, the offender pleaded guilty to failing to provide the necessities of life to a person under her charge, her elderly mother who suffered from dementia and required 24-hour care and supervision. The offender failed to provide the most basic hygiene, failed to provide basic safety and supervision, and failed to provide her mother with healthcare. The two lived together. The area where the victim lived in the home was found to be absolutely appalling and filthy. The victim in the end died from a heart attack which could not be linked to the neglect, but at the time of her death, the court found that the victim's weight had fallen dramatically over the two-year period, that she had minor abrasions and a bed sore, and that she was covered in fecal matter. The court found the offender was clearly aware of the deplorable conditions in which she kept her mother and that she waited at least for 24 hours after her mother died to call police and the coroner so a cleanup could be attempted. The court found the offender's conduct difficult to fathom, particularly because she bore no malice toward her mother.
- [61] The court ultimately concluded that a period of imprisonment of 12 months incarceration, to be served in the community, was a proportionate sentence in that case. I note that the sentencing judge relied on Peterson, but it does not appear that the court considered that Peterson was decided before the maximum sentence for the offence was increased.

Discussion

- [62] The circumstances, the legislation, and the authorities all demand that denunciation and general and specific deterrence are the primary sentencing objectives in this case. A fit sentence must reflect the inherent wrongfulness and harm caused by Ms. Brush towards this vulnerable victim whom her family and her employer entrusted to her care. At the same time, Ms. Brush's personal circumstances, including her willingness to engage in rehabilitation, and the other mitigating factors including her remorse, must also be considered. Rehabilitation is an important, albeit of lesser importance, objective in this case. Also, I do not lose sight of the necessity to show restraint in the use of imprisonment.
- [63] I am to impose a proportionate sentence that reflects the gravity of Ms. Brush's offence, as well as her degree of responsibility.
- [64] As I said earlier, the gravity of an offence has subjective and objective elements. The subjective gravity is determined through an examination of the circumstances surrounding the commission of the offence. Elements such as the offender's likelihood to re-offend, the abuse of position of trust or authority, the nature, duration and frequency of the abuse, the circumstances of the victim, all must be considered. The objective gravity is determined

though a consideration of relevant Code provisions. Parliament's decision to increase the maximum punishment for this offence in 2005, and recently to prioritize denunciation and deterrence for the abuse of vulnerable people, as the courts have done for years, reflects society's increasing recognition of the seriousness of offences involving the abuse of vulnerable people and the need to impose more severe sanctions.

- [65] Ms. Brush's offence is subjectively and objectively grave. She severely neglected Ms. Rositch, the most vulnerable of victims, over a lengthy period of time. This was not an accident or some error in judgment. Ms. Rositch was so malnourished as a result of this neglect that had Dr. Wiltshire not phoned to enquire about Ms. Rositch she would have surely died. As her family has eloquently described, Ms. Rositch's suffering was incredible. Not only did she suffer, she could not communicate that she was suffering. Not only did Ms. Brush fail to provide Ms. Rositch with proper nutrition, she failed to administer her prescribed medications for about two years. Although there is no evidence to suggest that the lack of medications exacerbated Ms. Rositch's condition, it does demonstrate a lengthy period of neglect. As well, the conditions that Ms. Brush allowed Ms. Rositch to live in, at least close in time to her leaving Ms. Brush's care, were appalling, as I have described in my factual findings. I also find that the steps taken by Ms. Brush to actively conceal aspects of the neglect also increase the gravity of the offence. She falsely recorded many times, hundreds of times, that Ms. Rositch received her prescribed medications when she did not. Also, when the TCS employees visited her residence on May 2, 2019, Ms. Rositch was covered in a blanket and was wearing a cap. This hid her emaciated body, her hair loss, and her lesions.
- [66] The only factor that diminishes the gravity of the offence is that Ms. Brush actually listened to Dr. Wiltshire's office and brought Ms. Rositch to see Dr. Wiltshire. Had she not done so, there would have been no medical intervention.
- [67] Ms. Brush's moral responsibility for committing this offence is high. Her job was to care for Ms. Rositch. She was paid to do so. She was trusted by her employer and by Ms. Rositch's family to do so. Although there is nothing to suggest that Ms. Brush was motivated by malice, which would of course increase her moral culpability, her blameworthiness nevertheless remains high. For over two years, Ms. Brush accepted her pay, while at the same time neglecting to care for Ms. Rositch in even the most basic of ways, to the point that Ms. Rositch nearly died of starvation. Ms. Brush hid aspects of her neglect from her employer. That others may also bear moral responsibility does not reduce the responsibility Ms. Brush bears.
- [68] Ms. Brush's claims of memory loss about the details of the offence seem disingenuous in light of her very detailed memories of all other events in her life during this timeframe. Although I accept that her offending occurred in an overarching context of long periods of various life stressors that may have been overwhelming for her, including symptoms associated with depression and menopause as she reports, the evidence is insufficient to support a finding of any causal relationship between her offending and any mental disability such as to reduce her level of moral blameworthiness in this case. I do see her actions in

taking Ms. Rositch to see Dr. Wiltshire and then to the hospital, though, as slightly attenuating her moral blameworthiness.

[69] I identify the following as mitigating factors in this case:

- (1) Ms. Brush pleaded guilty, which is a clear indication of her remorse. Her remorse is also apparent from her remarks to the court and to others;
- (2) Ms. Brush lacks a criminal record;
- (3) Ms. Brush has taken some positive steps towards her rehabilitation since her arrest such as attending counselling and continuing to take medications to assist in managing her symptoms of depression and anxiety;
- (4) Ms. Brush indicates a willingness to undergo further assessments, such as those recommended by the psychologist to perhaps obtain some insight into her offending;
- (5) Ms. Brush has strong family and social supports;
- (6) Ms. Brush is, on the available information seen as a low risk to re-offend; and
- (7) Ms. Brush will lose her part-time employment with the Phoenix Centre as a result of this conviction and sentence.

[70] The aggravating factors, all of which I am convinced beyond a reasonable doubt, are as follows:

- (1) Ms. Brush abused a position of trust or authority over a person who is extremely vulnerable as a result of her personal circumstances (s. 718.2(a)(iii));
- (2) The offence had a significant impact on the health of the victim (s. 718.2(a)(iii.1));
- (3) Ms. Brush attempted to deceive Dr. Wiltshire and medical staff at RIH by claiming that Ms. Rositch was eating well and always looked as thin as she did; and
- (4) Ms. Brush's obligations to care for Ms. Rositch arose through her paid employment as her caregiver. As the Crown argues, this places a higher burden on Ms. Brush to provide proper care to Ms. Rositch.

[71] In my view, a fit and proportionate sentence for Ms. Brush is 18 months imprisonment followed by 18 months probation. I recognize that an 18-month sentence was rejected in favour of a 12-month sentence by the court in Davy, an authority with some similarities to the case at bar, but the offenders in Davy were not employed to be caregivers as Ms. Brush was. In my view, the gravity of her offence and her moral responsibility are higher.

- [72] Ms. Brush seeks to have a term of imprisonment served in the community as a conditional sentence order pursuant to s. 742.1 of the Code. Conditional sentences can provide a significant amount of deterrence and denunciation, particularly when onerous conditions are imposed. Conditional sentence orders include both punitive and rehabilitative objections, and as I say, they can be onerous.
- [73] In *R. v. Cadman*, 2018 BCCA 100, Justice Goepel summarized the four criteria that must be considered when assessing the appropriateness of a conditional sentence. He wrote:
- [51] Proulx set out the four criteria that must be considered when assessing the appropriateness of a conditional sentence...:
- (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
 - (2) the court must impose a term of imprisonment of less than two years;
 - (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and
 - (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.
- [74] Despite the very able submissions of Mr. Johnson, who has said and done everything he can on behalf of Ms. Brush, I find that a conditional sentence order would not be consistent with the purpose, principles and objectives of sentencing in this case. It would not be in proportion to the gravity of the offence and the degree of responsibility of this offender. It would not give adequate emphasis to the primary objectives of sentencing in this case. Caregivers of the elderly, particularly those who are unable to care for themselves in any way, to borrow the words of Justice McKinnon in *R. v. Foubert*, [2009] O.J. No. 5024 at paras. 30-31, "hold tremendous power. That power cannot be abused. Caregivers must know that if they abuse their position of trust and authority over vulnerable individuals, the court will deal with them harshly." It must be brought home to Ms. Brush and other persons similarly employed that failing to provide those elderly and vulnerable persons in their care with the necessities of life will not be tolerated.
- [75] Ms. Brush, if I could ask you to please stand.
- [76] I sentence you to a period of imprisonment of 18 months. This is to be followed by an 18-month probation order. I think this sentence recognizes the individualized nature of this offence and this offender while respecting the principle of parity. It balances the serious nature of the offence, the specific harm it has been proven to have caused, the other aggravating factors, and the primacy of the objectives of denunciation and specific and general deterrence, along with the mitigating factors including your remorse, the need to exercise to restraint and to provide for rehabilitation. I see it as a just sanction that reflects both perspectives on proportionality. It does not elevate one at the expense of the other.

- [77] You can have a seat while I read out the terms of your 18-month probation order.
- [78] You must comply with the probation order for a term of 18 months. The conditions are as follows:
- (1) The first is a compulsory condition. You must keep the peace and be of good behaviour. You must appear before the court when required to do so by the court. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or your probation officer of any change of employment or occupation.
 - (2) You must report in person to a probation officer at Kamloops - the address will be included - within two business days after your release from custody unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different timeframe. After that you must report as directed by your probation officer.
 - (3) You must have no contact or communication, directly or indirectly, with Jeannette Rositch.
 - (4) You must not go to any place where Jeannette Rositch lives, attends school, worships, or happens to be. If you see them, you must leave their presence immediately without any words or gestures.
 - (5) When first reporting to your probation officer, you must provide them with the address where you live and your phone number. You must not change your address or phone number without notifying your probation officer in writing at least seven days in advance of any change.
 - (6) You must attend, participate in, and complete any intake, assessment, counselling, or education program as directed by your probation officer. This may include but is not limited to counselling or programming for mental health and gambling addiction.
- [79] I see a Rogers order as unnecessary in this case for protecting society, for facilitating rehabilitation or to assist with Ms. Brush's successful reintegration into the community. The psychologist does not recommend that Ms. Brush attend Forensic Psychiatric Services for any further assessments or treatments. Ms. Brush has been taking prescribed medications for her conditions of depression and anxiety and has been voluntarily attending counselling to assist her with these conditions for some time now. I have no reason to doubt that she will continue to take her medications as prescribed for her conditions of depression and anxiety and that she will attend all scheduled appointments with those in charge of her mental healthcare.
- [80] The final condition of your probation order is:
- (7) You must not supervise or care for any persons that are unable to care for themselves by reason of detention, age, illness, mental disorder, and/or otherwise unable to provide themselves with the necessities of life.

[81] Those are the terms of your probation order. Ms. Brush, the legislation requires that I inform you that with respect to your probation order, s. 732.2(3) of the Code outlines the procedure for a change to the optional conditions of your probation order. You, the prosecutor, or your probation officer can apply at any time to the court for a change. The court can, if it considers the change desirable by a change in circumstances since the condition was imposed, make any changes. The court can also relieve you from compliance with a term or decrease the period of probation in those circumstances. Section 732.2(5) deals with the procedure where an offender who is bound by a probation order is convicted of an offence, and I am also to advise you that s. 733.1 of the Code creates an offence of failing or refusing to comply with a probation order. The maximum sentence is set out in the legislation if the Crown proceeds by indictment and there is also a maximum sentence if the Crown proceeds by way of summary conviction.

[82] No ancillary orders have been sought. I do not know if counsel wish to deal with exhibits at this time or have any other matters they wish to deal with.

[SUBMISSIONS RE: VICTIM FINE SURCHARGE]

[83] THE COURT: All right. If a victim fine surcharge applies to this offence, I will waive it in the circumstances.

[DISCUSSION RE EXHIBITS AND FORFEITURE ORDER]

[84] THE COURT: I will mark, as the next exhibit at the sentencing hearing, this Report to a Justice containing an exhibit flowchart reflecting 74 items seized by the Kamloops RCMP in relation to this investigation. By consent, I will make an order that items one through 73 be forfeited to the Crown for destruction, and that item number 74, an Acer computer, be returned to Ms. Brush or an authorized representative of Ms. Brush, Dale Brush, within 60 days of today's date. Failure to pick up the Acer computer within 60 days from the Kamloops RCMP detachment will result in its forfeiture to the Crown for destruction, so please ensure that you will attend to doing so. Thank you counsel.

"S.A. Donegan J."

DONEGAN J.

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