

CANADA / JUDGMENT

R. v. Chow

2024 BCSC 576

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Supreme Court of British Columbia

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2024 BCSC 576 R. v. Chow

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chow,

2024 BCSC 576

Date: 20240409

Docket: X084865

Registry: New Westminster

Rex

v.

Brent Wei Kuen Chow

Before: The Honourable Mr. Justice Riley

On Appeal from: Provincial Court of British Columbia

(R. v. Chow, Surrey File No. 243647)

Reasons for Judgment

Counsel for the Crown:

D.J. Beesley

Counsel for the Appellant:

S. Wright

Place and Date of Hearing:

New Westminster, B.C.

February 26, 2024

Place and Date of Judgment:

New Westminster, B.C.

April 9, 2024

Overview

- [1] This is an appeal from a sentence imposed by a Provincial Court Judge following Mr. Chow's guilty plea to assault with a weapon and causing damage to a motor vehicle. These offences arose out of what is commonly known as a road rage incident that took place in Surrey, B.C., on 13 October 2020. The incident involved a significant degree of violence, both on the part of Mr. Chow - who could fairly be described as the instigator of the incident - and on the part of the other individual involved, Mr. Adjijaj.
- [2] At sentencing, Mr. Chow argued for a discharge, relying on his lack of a prior criminal record, the discrete or isolated nature of the event, his guilty plea, the significant injuries he suffered in the incident, and the impact that a criminal record would have on his ability to travel to and work in the United States. The Provincial Court Judge found that a discharge would be in Mr. Chow's interests, but concluded that it would be contrary to the public interest, considering all of the circumstances, and most notably (i) the nature of the crime, (ii) the prevalence of road rage crimes, (iii) the public's attitude toward such crimes, and (iv) the need for general deterrence. The Provincial Court Judge sentenced Mr. Chow to pay fines totalling \$2,500, and placed him on probation for a period of 12 months.
- [3] Mr. Chow's notice of appeal raised multiple grounds but at the hearing of the appeal his counsel chose to pursue only one of them, namely a contention that the Provincial Court Judge erred in taking into account the prevalence of road rage offences in the community without any supporting evidence and without giving notice of an intention to take judicial notice. Counsel says that as a consequence of the Provincial Court Judge's error on this point, no deference is owed to his conclusion, and that on a proper consideration of all of circumstances, the court should conclude that this is an appropriate case for a conditional discharge.
- [4] I would dismiss Mr. Chow's appeal from sentence, for the reasons given below. By way of a precis, I would summarize my reasoning as follows. I find that the issue of the prevalence of road rage crimes was raised in the course of submissions at the sentencing hearing, giving counsel for Mr. Chow a reasonably informed opportunity to make submissions on the point. In any event, even if I were to accept that the Provincial Court Judge erred in considering the prevalence of road rage crimes without giving Mr. Chow an informed opportunity to make submissions, and that this error materially impacted on the Provincial Court Judge's analysis, in my view the sentence imposed on Mr. Chow was not unfit. Indeed, it might be

regarded as lenient in view of the objective seriousness of the offences and Mr. Chow's degree of moral blameworthiness.

The Facts

The Offences

- [5] The road rage incident that led to the charges against Mr. Chow took place in Surrey, B.C., on the afternoon of 13 October 2020. The circumstances were set out in an agreed statement of facts, the details of which were recounted in the Provincial Court Judge's reasons and which I would summarize as follows:
- a) Both the offender Mr. Chow, and the other individual involved, Mr. Adjijaj, were driving their vehicles westbound on 100 Avenue.
 - b) The two vehicles stopped at a red light at the corner of 100 Avenue and 140 Street, parallel to each other, separated by an empty lane. Mr. Chow showed Mr. Adjijaj his middle finger and Mr. Adjijaj responded in kind.
 - c) Mr. Chow then got out of his vehicle and walked across the empty lane toward Mr. Adjijaj's vehicle. Mr. Chow was holding a folding knife with a black handle and a serrated edge.
 - d) Mr. Chow struck the hood of Mr. Adjijaj's vehicle with the knife and then moved toward the driver side of Mr. Adjijaj's vehicle.
 - e) As Mr. Adjijaj was rolling down the driver's side window to engage in some way, Mr. Chow smashed the window out with the butt end of the knife. Mr. Chow then struck Mr. Adjijaj in the head with the knife, causing Mr. Adjijaj to bleed profusely, with blood running down his forehead into his face.
 - f) Mr. Adjijaj got out of his vehicle and the two men engaged in a physical struggle. The Provincial Court Judge described it as grappling. At this point the two men were in the crosswalk, in full view of other people on the street, at least one of whom recorded the incident on a mobile phone.
 - g) Mr. Chow got Mr. Adjijaj in a headlock. The knife fell to the ground. Mr. Adjijaj then seemed to get the upper hand. He got out of the headlock, hit Mr. Chow in the head several times, and picked up the knife.
 - h) Mr. Adjijaj, now holding the knife, approached Mr. Chow. The two men then came together again. Mr. Adjijaj stabbed Mr. Chow seven or eight times in rapid succession. Mr. Adjijaj then threw the knife into the bushes.
 - i) After Mr. Adjijaj threw the knife away, Mr. Chow made gestures that were interpreted by Mr. Adjijaj as an invitation to continue the fight. They clashed again and Mr. Adjijaj got Mr. Chow in a headlock.

- j) Both men continued to grapple, leaning or pushing up against Mr. Adjijaj's vehicle, when the police arrived, broke up the fight, and took them into custody.
- k) The entire interaction between Mr. Chow and Mr. Adjijaj, from the point that their vehicles stopped at the red light to the point that the police intervened, lasted one minute and 10 seconds.
- l) Both men were taken to the hospital. Mr. Adjijaj was treated for a 2-3 cm laceration on his forehead and a contusion to the top of his head.
- m) Mr. Chow's injuries were more serious. He suffered (i) a stab wound to his stomach resulting in a laceration of his liver that required laparoscopic surgical repair, (ii) a scalp wound that had to be closed with staples, and (iii) stab wounds to his back and upper arm, both of which were sutured and did not result in any internal injuries.

The Appellant's Personal Circumstances

- [6] Mr. Chow's personal circumstances were detailed in a pre-sentence report, supplemented by two psychiatric reports, one authored by Dr. Pritchard, and the other by Dr. Oswald.
- [7] Mr. Chow was 43 years old at the time of sentencing. He was born and raised in Alberta. He recounted a close relationship with his mother and a strained relationship with his father, who he described as a physically abusive alcoholic.
- [8] Mr. Chow moved from Alberta to British Columbia in his early 30s. Initially he worked as a manager of a bar or restaurant, and later he started a bookkeeping and accounting business. After a brief foray into real estate followed by a personal bankruptcy in 2018, Mr. Chow refocused his effort on the accounting and bookkeeping business in 2019.
- [9] Mr. Chow was in a personal relationship for a period of some three or four years, ending in 2022. He has no children or dependants.
- [10] Mr. Chow had no prior criminal record. The Provincial Court Judge found that apart from his role in the road rage incident leading to the charges, Mr. Chow was "otherwise a productive member of the community running his own business and employing others".
- [11] At the sentencing hearing, a great deal of time and energy was devoted to the effect of the criminal proceedings on Mr. Chow's ability to travel to and work in the United States, in terms of both (i) the impact of Mr. Chow's release terms on his financial situation, and (ii) the impact of a criminal conviction on his business going forward. I do not intend to re-hash all of the evidence and submissions on these points at the sentencing hearing. In the end, the Provincial Court Judge, who was sceptical of other factual assertions advanced by Mr. Chow, did not attach much significance to the effect of the criminal proceedings on Mr. Chow's business. The judge did not recognize this as either a mitigating circumstance or a collateral consequence weighing in favour of leniency. Later in the reasons, in considering whether a discharge would be in Mr. Chow's personal interests, the judge referred to

"possible negative travel consequences" of a criminal conviction, with potentially "significant repercussions" for Mr. Chow's ability to work in the U.S.

- [12] After his arrest, Mr. Chow had "sought out counselling" and was "open to continuing with counselling", although as of the date of sentencing he had "limited insight into the impact of his actions".

Impact on the Other Party Involved

- [13] Mr. Adjijaj, who was the victim of Mr. Chow's assault, provided an impact statement relating that in the wake of this incident he experienced a reluctance to leave his home, feelings of distrust and a sense of paranoia in public places, a lack of focus and composure at work, and a fear of chance encounters with Mr. Chow.
- [14] The Provincial Court Judge noted that Mr. Adjijaj was prosecuted for his role in the road rage incident. Recall that during the struggle - which was clearly instigated by Mr. Chow - Mr. Adjijaj gained control of the knife and stabbed Mr. Chow multiple times. Mr. Adjijaj was sentenced separately and received a discharge.

Mr. Chow's Attitude Toward the Offences

- [15] The Provincial Court Judge took into account Mr. Chow's guilty pleas, which were indicative of some degree of remorse and acceptance of responsibility. However, this was tempered by the fact that Mr. Chow "demonstrated both a drastically inaccurate account of the circumstances of the offences" and limited insight into "the effect of his actions on Mr. Adjijaj".
- [16] With regard to Mr. Chow's "inaccurate account of the circumstances", the pre-sentence report indicated that while he admittedly made a mistake by engaging and thereafter failing to "de-escalate the situation", Mr. Chow still minimized his actions by denying that he had a weapon, only taking responsibility for "throwing a rock toward the victim". The Provincial Court Judge found this account to be inconsistent with the video footage of the incident, which shows Mr. Chow holding a knife and banging it on the hood of Mr. Adjijaj's car. Nor did the judge place much stock in Dr. Oswald's opinion that Mr. Chow's inaccurate recall was referable to "dissociative amnesia", at least in part because the opinion gave no explanation for Mr. Chow's continued unwillingness to acknowledge the effect of his actions on Mr. Adjijaj.
- [17] With regard to Mr. Chow's understanding of the impact of his conduct, the pre-sentence report recounts that he would only acknowledge the effects on himself, his family and friends. Mr. Chow appeared unwilling to recognize the impact on Mr. Adjijaj, other than to say that he "hopes the other driver learned a lesson".

The Provincial Court Judge's Reasons

- [18] After recounting the underlying circumstances in some detail, the Provincial Court Judge summarized the purpose, objectives and principles of sentencing. The judge referred to the fundamental principle that the sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. He found the key sentencing objectives in Mr. Chow's case to be denunciation, deterrence of Mr. Chow and others, assisting in Mr. Chow's rehabilitation and promoting his sense of responsibility, and acknowledging the harm done to victims and the community. The judge also referred to the principle of parity of sentence for like offences committed by like offenders, and the principle of restraint. I should add that the judge referred to the concept of separation of offenders from society, but that does not appear to have played a factor in the sentence.
- [19] The Provincial Court Judge went on to describe Mr. Chow's personal circumstances, the impact of the offences on the other party involved, and Mr. Chow's degree of insight into the offences and their impact as described above.
- [20] Next, the judge considered the aggravating and mitigating circumstances. The aggravating circumstances were: (i) the fact that Mr. Chow initiated the conflict, (ii) the fact that Mr. Chow introduced the weapon, and (iii) the fact that Mr. Chow used physical violence by striking Mr. Adjijaj in the head with the weapon. The mitigating circumstances were: (i) the fact that Mr. Chow had no prior criminal record, (ii) the fact that he has the support of his family and friends, (iii) the guilty plea, although his acceptance of responsibility was tempered by his lack of insight and unwillingness to acknowledge the victim impact, (iv) Mr. Chow's status as an otherwise productive member of the community with a business and employees, and (v) his efforts in seeking out counselling and willingness to continue with it.
- [21] The Provincial Court Judge also acknowledged several collateral consequences flowing from the criminal proceedings against Mr. Chow, namely (i) his compliance with the terms of his release from the date of arrest up until the conclusion of sentencing, and (ii) the fact that Mr. Chow suffered significant physical injuries during the incident.
- [22] The Provincial Court Judge found Mr. Chow's degree of culpability for the offences to be high. I will have more to say about that point later in these reasons.
- [23] Turning to the sentencing positions of the parties, the Provincial Court Judge addressed the defence submission seeking a conditional discharge at considerable length. The judge set out a number of propositions or principles emerging from the leading case of *R. v. Fallofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.). Paraphrasing from the Provincial Court Judge's reasons, I would summarize these as follows:
- (i) A discharge can be imposed for any offence other than one with a mandatory minimum sentence or a maximum sentence of 14 years or more.

- (ii) There is nothing in the language of what is now s. 730(1) of the Criminal Code limiting the availability of a discharge to technical or trivial violations of the law.
 - (iii) To grant a discharge, the sentencing judge must first determine whether it would be in the interests of the offender, and if so the judge must move on to the second precondition.
 - (iv) The second precondition is that a discharge cannot be contrary to the public interest.
 - (v) The first requirement generally pre-supposes that the offender is a person of otherwise good character with no prior criminal record, that it is not necessary to enter a conviction against him to deter him from future offences or rehabilitate him, and that entering a conviction against him could have significant adverse repercussions.
 - (vi) As to the second requirement, the sentencing court must give due weight to the public interest in deterring others, although this consideration does not preclude the judicious use of the discharge provision.
- [24] The Provincial Court Judge also instructed himself that s. 730(1) should not be applied "routinely" for any particular type of offence.
- [25] In Mr. Chow's case, the Provincial Court Judge was satisfied that Mr. Chow was otherwise of good character without prior criminal involvement. The judge accepted that the "possible negative travel consequences" of a conviction could have significant repercussions for Mr. Chow's employment. The judge had a continuing concern about Mr. Chow's "lack of insight and understanding of the seriousness of the offence[s]", but was satisfied on balance that a discharge would be in Mr. Chow's interest.
- [26] Turning to the second prong of the Fallofield test, the issue was not whether a discharge is in the public interest, but rather whether a discharge would not be contrary to the public interest. The Provincial Court Judge cited a list of factors to be considered in addressing this question, as set out in *R. v. MacFarlane* (1976), 55 A.R. 222 (C.A.), namely the nature of the offence, the prevalence of the offence, whether the accused stood to make personal gain as distinct from a crime involving an act that might be regarded as a prank or some other act not motivated by self-interest, whether the act was committed impulsively or conversely whether it was calculated, and whether the fact that the accused had committed the offence should be made a matter of public record. Other factors that the Provincial Court Judge listed included "the public's attitude towards the offence, whether a criminal record will be counterproductive to rehabilitation, the need for general deterrence, and the public's confidence in the enforcement of the criminal law", with "the overriding principle" being the determination of a sentence that is fit for the specific offender and the circumstances, and is "proportionate to the gravity of the offence and the degree of responsibility of the offender".

- [27] Applying that reasoning in Mr. Chow's case, the Provincial Court Judge concluded that in view of "all of the factors, and in particular the nature of the offence, the prevalence of the offence, the public's attitude towards the offence and the need for general deterrence", a discharge would not be "proportionate to the gravity of the offence and the degree of personal responsibility of Mr. Chow".
- [28] The Provincial Court Judge went on to determine that the fit sentence in Mr. Chow's case was a fine and probation. The judge considered the sentencing recommendation of the Crown for fines totalling \$4,000 to be "somewhat high", and settled on a fine of \$1,500 for the assault with a weapon count and \$1,000 for the mischief count. The judge set the duration of the probation order at 12 months, and also imposed: (i) an order that Mr. Chow pay restitution in the amount of \$80, (ii) a DNA collection order under s. 487.051(1) of the Criminal Code, (iii) a five-year firearms prohibition order under s. 110, and (iv) a victim fine surcharge of \$750.

Analysis

Standard of Review

- [29] A sentencing judge has a broad discretion to determine a fit and proper sentence based on the judge's assessment of the facts of the case and weighing of the relevant sentencing objectives. As stated by Justice Wagner, as he then was, in *R. v. Lacasse*, 2015 SCC 64 at para. 39, "appellate courts may not intervene lightly, as trial judges have a broad discretion to impose the sentence that they consider appropriate within the limits established by law".
- [30] The appeal court can only intervene where the sentencing judge commits an error in principle, fails to consider or overemphasizes a relevant factor, or where the sentence is demonstrably unfit: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 90.
- [31] Even where the sentencing judge commits a reviewable error, appellate intervention is only justified where the error materially impacted on the resulting sentence: *Lacasse* at paras. 11, 45-46; *R. v. Agin*, 2018 BCCA 133 at para. 56. Where the appeal court finds that an error has occurred and "the sentence would have been different absent the error", the court must then "assess the fitness of the sentence by conducting its own sentencing analysis". If the sentence is found to be unfit, the court may vary it to impose a sentence that is fit: *Agin* at para. 56.
- [32] Quite apart from all of this, even where there is no reviewable error in the sentencing judge's analysis, the appeal court may revisit the sentence where it is "demonstrably unfit": *M.(C.A.)* at para. 90; *Lacasse* at para. 52; *Agin* at para. 57. A "demonstrably unfit" sentence is one that is "clearly excessive or inadequate", or represents a "substantial and marked departure" from the type of sentence that is customarily imposed for similar offenders committing similar offences: *Lacasse* at para. 52; *M.(C.A.)* at para. 92.

Mr. Chow's Argument on Appeal

[33] Mr. Chow's factum raises a number of grounds of appeal, but at the hearing his counsel chose to pursue only one of them, namely the argument that the Provincial Court Judge erred by considering the "prevalence" of road rage offences in the community without any supporting evidence and without giving notice of an intention to take judicial notice. Counsel submitted that this error played a material part in the Provincial Court Judge's sentencing decision, and that on a proper consideration of all of circumstances, the court should conclude that this is an appropriate case for a conditional discharge.

The Crown's Response

[34] The Crown's position, as I understand it, is fourfold. First, the Crown says that the prevalence of road rage offences was addressed in Crown counsel's submissions and in the case law discussed by both counsel, such that the Provincial Court Judge did not commit any procedural error in citing this factor in his reasons. Second, the Crown says the Provincial Court Judge's reference to prevalence of the crime was not material to the outcome, because this was one of many factors the judge considered in determining the fit sentence. Third, the Crown says that even if the Provincial Court Judge did commit a procedural error in making findings on prevalence of road rage crimes without giving Mr. Chow fair notice of his intention to do so, the situation can be remedied by allowing both parties the opportunity to fully address the point in this court, which they have now done in the course of the appeal hearing. Fourth, the Crown says that in any event, a discharge is not an appropriate disposition in this case, considering the totality of the circumstances.

Procedural Fairness Concerns Articulated in the Case Law

[35] Both parties cited *Lacasse* for its discussion of a sentencing judge's authority to take into account the "local reality" or "the frequency of a crime in a given region": at para. 94. In *Lacasse*, the offender pleaded guilty to two counts of impaired driving causing death. The sentencing judge imposed a six-and-one-half year jail term. In his reasons, the judge "emphasized the particular situation" in his region, "where approximately one in five cases involves an impaired driving offence", causing the judge to question whether impaired driving may be trivialized: at para. 27. The Court of Appeal reduced the sentence four years, but in a majority judgment authored by Wagner J., the Supreme Court of Canada restored the original sentence.

[36] Much of Wagner J.'s analysis in *Lacasse* was focused on the standard of review, the appropriate role of sentencing ranges, and the scope of the appeal court's jurisdiction to revisit or reassess a sentence based on its own view of the appropriate range. Justice Wagner determined that the appeal court erred in reconsidering the sentencing judge's determination of the appropriate sentencing range in the absence of any error in principle or demonstrable unfitness.

- [37] The majority in *Lacasse* also found that the appeal court erred in disregarding the "local reality", thereby failing to properly account for the objectives of denunciation and deterrence: *Lacasse* at para. 72. The sentencing judge considered the "local situation", and stressed "the need to convey a strong message of general deterrence and denunciation". In Wagner J.'s view, the appeal court erred by completely overlooking this factor, en route to its decision to reduce the sentence from six and one-half years to four years: *Lacasse* at para. 87.
- [38] In the Supreme Court, counsel for the offender argued that the sentencing judge erred in his consideration of the prevalence of impaired driving offences in the region. Justice Wagner disagreed, observing that "the frequency of a type of offence in a particular region can certainly be a relevant factor for a sentencing judge": *Lacasse* at para. 89. Justice Wagner drew support for this approach from *M.(C.A.)* at para. 91, wherein sentencing is described as a "delicate art" that takes into account, among other things, "the needs and current conditions of and in the community". Although an increased frequency of a particular crime in a particular region is "not in itself an aggravating factor", the court may "nonetheless consider such a fact" in balancing the relevant sentencing objectives, including the goals of denouncing and deterring the unlawful conduct in question in the particular region or community: *Lacasse* at para. 90.
- [39] However, the majority in *Lacasse* also cautioned that a sentencing judge who is inclined to attach weight to the prevalence of a crime in a given region must adhere to principles of "procedural fairness", by offering the parties "an opportunity to make representations on the subject": para. 94. On the particular facts of the case, procedural fairness concerns did not arise because "the local reality was not in dispute". The Crown made timely submissions about the local conditions. The offender had "all the information he needed" to determine how to respond, and ultimately decided to "say nothing" about this topic: *Lacasse* at para. 94.
- [40] Justice Wagner went on to explain that there was a permissible basis for the sentencing judge to take judicial notice of local conditions. As a "resident judge" in the district, the judge was "in a position to observe and assess the magnitude of the problem in his region". Case law recognizes that "trial judges and provincial courts of appeal are in the best position to know the particular circumstances in their jurisdictions": *Lacasse* at para. 95. Because the sentencing judge was in "the best position" to appreciate the nature of cases in the region, additional evidence concerning the prevalence of the crime would be "pointless": *Lacasse* at para. 96.
- [41] The majority also discussed an alternative approach of relying on objective evidence to determine the frequency of impaired driving charges by comparing the "hearing rolls" in the particular district "with the rolls of other districts": *Lacasse* at paras. 95, 98. However, such a process was not necessary in *Lacasse* because the sentencing judge was taken to know the local conditions, and the issue was raised on the record thereby affording the offender the chance to comment upon it, such that "the local reality was not in dispute": *Lacasse* at paras. 94-95, 98-99.

- [42] Mr. Chow also cites *R. v. V.H.M.*, 2004 NBCA 72, *R. v. Trachsel*, 2010 SKQB 288, and *R. v. Baptiste*, 2021 QCCA 1064. Of these cases, I intend to focus on *Baptiste*, because it contains a detailed discussion of the nature of the procedural fairness concerns that arise where the judge intends to make findings about the prevalence of a particular crime as a sentencing consideration, with the benefit of the Supreme Court of Canada's guidance on that same issue in *Lacasse*.
- [43] In *Baptiste*, the sentencing judge was presented with a joint submission for a 16-month jail sentence following the offender's conviction on firearms charges. At the sentencing hearing, the judge enquired about the context of the joint recommendation and was told that the parties had "met halfway" in their respective sentencing positions: para. 26. The judge also asked what impact, if any, media reports of shootings in the region ought to have on the sentencing. The Crown responded that this was relevant, "in a general sense": at para. 24. The sentencing hearing took 33 minutes. Four days later, the sentencing judge issued a 47-page judgment, rejecting the joint submission, and imposing a 32-month jail term.
- [44] The Court of Appeal set aside the sentence and replaced it with a 16-month jail term, in line with the joint submission. The Court found that the sentencing judge committed procedural errors in failing to advise the parties of his concerns about the joint submission, and in making findings regarding the prevalence of gun crime without giving the parties an opportunity to make informed submissions on that point.
- [45] With regard to the prevalence issue, the sentencing judge in *Baptiste* fell into procedural error by failing to "forewarn" the parties "that, based on his perception of an increase in gun offences, he intended to depart from the joint submission": para. 64. The "mere fact that the sentencing judge alluded to an upward trend in gun offences was insufficient to alert [the parties] to his preoccupations": para. 65.
- [46] Crown counsel submits that *Baptiste* is distinguishable and should be viewed with caution. I agree that the context in *Baptiste* was quite different from this case, because what was in issue was not only the sentencing judge's reliance on his own assessment of the prevalence of gun crime, but also the judge's decision to reject a joint submission without giving the parties a fair opportunity to address the court's reservations. In that sense, the procedural fairness concerns were heightened, and the sentencing judge's passing reference to recent media reports about gun violence was not enough to put the parties on notice of either issue, that is (i) the judge's views as to the prevalence of gun crimes, and (ii) the judge's broader concerns as to the propriety of the joint recommendation.

Applying the Principles

- [47] Counsel for Mr. Chow says the Provincial Court Judge relied on the "prevalence" and "public attitude" toward road rage offences as at least part of the basis for his conclusion that a conditional discharge would be contrary to the public interest. Counsel submits that "[n]o evidence was led", and "[i]f judicial notice was being considered it was incumbent on the sentencing judge to give notice to the parties and allow submissions". The failure to do so, says counsel, amounted to a reviewable error.
- [48] Crown counsel responds that the "prevalence" of road rage offences was clearly a live consideration in this case, because both the Crown and defence cited case law in which the courts have recognized that "road rage violence" is a prevalent and significant problem in the Lower Mainland of B.C. Thus, the Crown submits, Mr. Chow "cannot now benefit from appellate intervention when, at best, he acquiesced in a finding of prevalence, and at worst he encouraged it". Crown counsel cites Lacasse at para. 94, where the majority reasoned that the "local reality" was not a live issue, because the Crown had raised the point in a timely fashion, and the defence had ample opportunity to respond but chose to say nothing about it.
- [49] The cases placed before the Provincial Court Judge at the sentencing hearing included *R. v. Evoy* (1993), 37 B.C.A.C. 103, 1993 CanLII 2092, *R. v. Supeene*, 2010 BCSC 2003, *R. v. Skierka*, 2017 BCPC 53, and *R. v. Nam*, [1999] O.J. No. 900 (Ont. C.J.). Each of these were sentencing cases relating to "road rage" incidents. Some of the comments in these cases addressed the prevalence of road rage offences in various jurisdictions.
- [50] In the course of submissions at the sentencing hearing, Crown counsel first referred the Provincial Court Judge to the following passage from *Nam*:
- [16] I agree with Crown counsel when he places denunciation at the top of the list. "Road-Rage" incidents have become all too common and popular on our highways. Motor vehicles, although not necessarily in this case, can be lethal weapons and "Road Rage" consequences can be tragic, not only for those engaged in it, but to innocent users of the highways. Although the vehicles were not used as weapons in this case, the "Road-Rage" incident on Sheppard Avenue and Leslie Street, precipitated the repulsive spitting incidents and the ultimate unprovoked violence by the accused. The other important principles to consider in relation to "road rage" and the assaultive conduct that followed are general and specific deterrence; protection of the driving community; proportionality in relation to the gravity of the offence; and retribution [see *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.) at 366].

- [51] It is true that this passage included the sentencing judge's observation that road rage incidents "have become all too common and popular on our highways". However, this comment is made in a 1999 sentencing decision, from Ontario. The overall thrust of the passage focuses on the objective gravity of the offence and the potentially deadly consequences, hence the importance of denunciation, deterrence, protection of the public, and proportionality of the sentence.
- [52] Crown counsel also referred the Provincial Court Judge to Evoy, in which the Court of Appeal overturned a fine and probation (which, at the time, was not a lawful disposition under the relevant provisions of the Criminal Code) and substituted a six-month jail sentence for a road rage incident. At the sentencing hearing, Crown counsel read into the record excerpts from the following passage in Evoy:

Crown Counsel has referred us to a number of authorities which reflect a range of sentences for this type of offence up to and including 12 months imprisonment. The thrust of those authorities is that in all but the exceptional cases a conviction for this type of crime requires some term of imprisonment. I agree with the submissions of the Crown. In my view the sentence imposed does not adequately reflect the seriousness of the crime. It does not properly reflect the deterrent nature of the punishment which must be imposed for this kind of offence, nor does it adequately reflect the denunciation which society necessarily expects such conduct to attract.

- [53] As I read it, this passage does not say anything about local conditions or prevalence of road rage offences. Once again, it speaks to the objective seriousness of the crime, and the corresponding importance of deterrence, and denunciation, which "society necessarily expects" in sentencing for such conduct.
- [54] Finally, Crown counsel drew the sentencing judge's attention to Supeene. In that case the sentencing judge imposed a conditional discharge for a "road rage" assault. A Crown appeal was dismissed and the sentence was upheld in this court. In the sentencing hearing in the case at bar, Crown counsel read into the record excerpts from the following passage in Supeene (underlining added):
- [6] After reviewing the circumstances of the offence and the submissions of counsel on the appropriate disposition, The Honourable Judge Dossa said the following beginning at para. 22 of her judgment:
- [22] In this case the road rage incident especially because of the prevalence of road rage is deserving of censure.
- [7] I will stop there and interject the following remark of my own: I think that remark is entirely appropriate. There is a perception which I believe is properly held by members of the public that road rage is a very serious problem on our streets. It may have been a problem that has become worse in recent years. Vehicles are more powerful; their suspensions and steering systems are more finely tuned. These factors perhaps lead drivers to feel that they are entitled to take liberties, disregard the rules of the road, and take chances with themselves

and take chances with other people's lives and other people's property.

- [8] Our society is a busy one; people are stressed; our roads are more congested which leads to people feeling stressed, and leads to people again feeling the need to take shortcuts and playing fast and loose with the rules of the road.
- [9] There are also numerous distractions which face drivers such as cell phones, ipod devices and so forth although there have been recent changes in the law intended to address some of those.
- [10] All of these factors I think work towards making our streets less safe places and as a result of that we do see drivers who fly off the handle, who operate their vehicles inappropriately and in extreme cases such as this one, escalate their conduct into personal confrontations. The judge in the court below was entirely correct in saying that this incident was one deserving of censure.
- [55] In this passage, Justice Saunders endorsed the remarks of the sentencing judge in Supeene, adding further context to explain why road rage offences are a matter of particular concern to the community. The underlined portions of this passage speak directly to the Crown's submission that the prevalence of road rage crimes was squarely before the Provincial Court Judge in the case at bar.
- [56] In the course of the sentencing hearing, defence counsel made submissions on the cases cited by the Crown, but chose not to say anything about the prevalence point. With regard to Supeene, defence counsel focussed her submissions on the fact that the offender in that case actually received a discharge, without making any comment on the prevalence point that had been noted by the sentencing judge in that case, and affirmed or endorsed on appeal to this court.
- [57] Considering the entire record that was before the Provincial Court Judge, and the manner in which the case was presented to him, I agree with the Crown's submission that the prevalence of road rage offences was identified as a relevant factor that the Provincial Court Judge was invited to take into account in sentencing Mr. Chow. As in Lacasse, the issue of prevalence was raised by the Crown in the course of submissions. I reject the contention that it was raised so indirectly as to have escaped the attention of the defence. The Crown brought the point home in discussing the Supeene decision, inviting the Provincial Court Judge to consider the prevalence of road rage offences in determining the fit sentence in Mr. Chow's case. The defence had a full opportunity to comment on the prevalence point, or to question its application in Mr. Chow's case, but chose to focus on other things. On balance, I cannot say that the manner in which the issue was addressed involved any procedural unfairness.

- [58] I find that this case is distinguishable from Baptiste. The sentencing judge in Baptiste merely asked a question about recent media reports of gun violence, and then in his reasons went on at length to discuss the scourge of gun crime, relying on research that the judge had conducted on his own, using that very point as a basis to reject a joint submission.
- [59] It is important to look at precisely what the Provincial Court Judge said about the prevalence of road rage offences. The sole reference to prevalence is found in paragraph 63 of the Provincial Court Judge's reasons, which reads as follows:
- [63] In considering all of the factors and in particular the nature of the offence, the prevalence of the offence, the public's attitude towards the offence and the need for general deterrence, I conclude that the granting of a discharge would not be proportionate to the gravity of the offence and the degree of personal responsibility of Mr. Chow.
- [60] Now, on my reading of the reasons, this is indeed the key passage or the crux of the Provincial Court Judge's rationale for rejecting a conditional discharge in Mr. Chow's case. So, I cannot accept the Crown's alternative argument that the reference to prevalence of road rage crime had no material impact on the sentence. It was one of a handful of factors that the Provincial Court Judge listed as a basis for his conclusion that a conditional discharge would be contrary to the public interest in this case.
- [61] However, to go back a step, it is also important to consider the exact terms used by the Provincial Court Judge. The judge merely cited "the prevalence of the offence" as a factor in his analysis. He did not say that the incidence of road rage offences was much higher in his community than in other jurisdictions in B.C. or elsewhere. Nor did he say that the incidence of road rage offences had markedly increased over time, or that road rage crimes had become a "scourge". I would interpret the Provincial Court Judge's use of the term "prevalence of the offence" in this particular case as nothing more than a recognition that road rage offences are, regrettably, common enough in our communities to represent a genuine and continuing concern to the public and to the courts.
- [62] To repeat, the operative phrase in the Provincial Court Judge's reasons was, "the nature of the offence, the prevalence of the offence, the public's attitude towards the offence, and the need for general deterrence". Having regard to the submissions made at the sentencing hearing, I do not consider that the Provincial Court Judge's finding on this point was the product of any procedural unfairness. The point was raised in submissions. Counsel for Mr. Chow had the opportunity to address it, but chose to focus her submissions on other things.
- [63] For the sake of completeness, I will continue with the analysis on the assumption that the Provincial Court Judge's consideration of the "prevalence of the offence" was procedurally unfair to Mr. Chow. As explained above, I do not accept the Crown's submission that this point had no material impact on the sentence, because the prevalence of the offence was cited as one of only a handful of factors that led the Provincial Court Judge to reject a discharge. So, assuming that the Provincial Court Judge erred in doing so, and accepting that the error was material to the outcome, it would then fall on this court to "assess the fitness

of the sentence by conducting its own sentencing analysis": Agin at para. 56.

- [64] On my own assessment, I find that the sentence imposed by the Provincial Court Judge was fit, and indeed lenient. Even without any consideration of the "prevalence of the offence", a discharge would not have been appropriate in this case. It would have been contrary to the public interest to grant a discharge to Mr. Chow, considering the overarching principle of proportionality, as well as the need for denunciation and deterrence.
- [65] A discharge would not be proportionate to the gravity of the offences and Mr. Chow's degree of personal responsibility. The objective seriousness or gravity of the offences was substantial, in that they involved physical violence aggravated by the use of a weapon. Mr. Chow was the one who introduced the knife into the exchange. He used the knife to damage Mr. Adjijaj's vehicle, and then struck Mr. Adjijaj in the head with it. What is more, Mr. Chow's moral culpability was high. As the Crown pointed out in submissions, there were a number of inflexion points in this incident, and at each point Mr. Chow chose to continue or even escalate the conflict, rather than withdrawing. After the two men exchanged hand gestures, Mr. Chow escalated the situation by getting out of his vehicle and approaching Mr. Adjijaj's vehicle with the knife. When Mr. Adjijaj started to roll down his window, Mr. Chow smashed it out with the butt end of the knife. Mr. Chow then escalated the seriousness of the incident further by hitting Mr. Adjijaj in the head with the knife. Even after Mr. Adjijaj had stabbed him with the knife and threw it into the bushes, Mr. Chow continued to engage. The incident only came to an end when the police arrived, broke up the fight, and arrested the two combatants.
- [66] Nor would a discharge properly reflect the need for denunciation and deterrence. I take guidance from the Court of Appeal's remarks in *Evoy*. A violent offence committed in the context of a road rage incident will generally result in a sentence that represents a substantial deterrent and also reflects "the denunciation which society necessarily expects such conduct to attract". Indeed, in *Evoy* the court endorsed the view that in "all but the exceptional cases a conviction for this type of crime requires some term of imprisonment". That is why I say the sentence in the case at bar might be regarded as lenient.
- [67] Even though *Evoy* was decided more than 30 years ago, the concerns about the nature and seriousness of road rage assaults have not evaporated over time. Indeed, as the remarks of Justice Saunders in *Supeene* suggest, certain developments over the past two decades - including increasing traffic congestion, and the advent of devices like cell phones that can divert the attention of drivers away from their mutual responsibility to consider the safety of others on the road - have only increased the stress and anxiety that can lead some motorists to act out in anger and violence. But whatever the pressures that produce it, resort to violence is unacceptable in a just and peaceful society governed by the rule of law. Thus, sentences for road rage offences must be substantial enough to denounce and deter this kind of anti-social behaviour.

- [68] I appreciate that there were many mitigating features in Mr. Chow's case. These include his otherwise good character, his guilty plea, the support of his family, and his efforts at obtaining counselling and willingness to pursue further counselling in the future. Of course, Mr. Chow's acceptance of personal responsibility was tempered by his unwillingness to admit the full extent of his actions, and his lack of insight into the effect the incident had on the other party, Mr. Adjijaj.
- [69] I also appreciate that this incident and the resulting criminal proceedings have had collateral impacts on Mr. Chow, which will have or may have a bearing on his personal circumstances going forward. These include the serious injuries that Mr. Chow suffered as a result of the incident, and the potential limiting effects that a conviction could have on his ability to travel to and work in the U.S.
- [70] All of this probably explains why the Crown argued for a fine and probation rather than a jail sentence. But even after taking all of these factors into account, they do not tip the scales so far in favour of leniency as to justify a conditional discharge. A discharge would be contrary to the public interest, given the seriousness of the crime, Mr. Chow's degree of personal responsibility, and the correspondent need to impose a sentence that properly denounced his conduct, and deterred others from resorting to violence in response to some perceived injustice or insult by another driver.
- [71] I also acknowledge that the other individual involved in this incident, Mr. Adjijaj, was charged with and found guilty of assault, and ultimately received a discharge. This, despite the fact that after gaining the upper hand in the incident, Mr. Adjijaj stabbed Mr. Chow multiple times, causing serious injuries. Of course, Mr. Adjijaj's culpability was different, because he did not initiate the encounter, he was not the one who introduced the knife into the altercation, and initially at least, he may only have been repelling Mr. Chow. In any event, I do not have full insight into the sentence imposed on Mr. Adjijaj. His personal circumstances were not placed before me, nor have I been furnished with the sentencing reasons in his case. All of this is probably because Mr. Chow made no argument on appeal about disparity between his sentence and the one Mr. Adjijaj received. Hence, the fitness of Mr. Adjijaj's sentence is not an issue in this appeal.

Conclusion

- [72] Despite the able submissions of counsel for Mr. Chow, I would dismiss the appeal.

"Riley J."

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