
CANADA / JUDGMENT

R. v. Earhart

2010 BCSC 1602

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1602 R. v. Earhart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Earhart,

2010 BCSC 1602

Date: 20101112

Docket: 25454 & 25471

Registry: Vancouver

Regina

v.

Robert Clayton Earhart

On appeal from: the Provincial Court of British Columbia, June 7, 2010,

(R. v. Earhart, 15579-1)

Before: The Honourable Mr. Justice Cullen

Corrected Judgment: The Style of Cause was amended to add Docket 25471 on December 8, 2010

Reasons for Judgment

Counsel for the Crown:

A. Lee

Counsel for the Accused:

H. Patey

Place and Date of Hearing:

Vancouver, B.C.

October 29, 2010

Place and Date of Judgment:

Vancouver, B.C.

November 12, 2010

- [1] This is a Crown appeal from the sentence imposed on the respondent, Robert Earhart, for Assault Causing Bodily Harm and Breaking and Entering, respectively on June 7, 2010. The Assault Causing Bodily Harm occurred on May 26, 2010 at or near Sechelt, British Columbia, and the breaking and entering occurred on May 31, 2010 also in Sechelt.
- [2] The respondent pleaded guilty to those offences on June 7, 2010 and was sentenced, in the case of the Assault Causing Bodily Harm to a conditional sentence order for twelve months, followed by a two year probation order, and in the case of the Breaking and Entering, the respondent was sentenced to a suspended sentence with a probation order for twelve months.
- [3] The initial conditional sentence order imposed on the respondent consisted of the following terms:

Condition 1: Keep the peace and be of good behaviour.

Condition 2: Appear before the Court when required to do so by the Court.

Condition 3: You are to report in person within 24 hours of your release to your Conditional Sentence Supervisor at 203 5710 Teredo St., Sechelt, B.C., and thereafter as and when directed but not less than once a month in person.

Condition 4: Remain within the Province of British Columbia, unless written permission to go outside of the province is obtained from the Court or the Supervisor.

Condition 5: Notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

Condition 6: Provide your Conditional Sentence Supervisor with your address and you are not to change that address without first obtaining the permission of your Conditional Sentence Supervisor.

Condition 7: Attend and successfully complete such counselling as recommended to you by your Conditional Sentence Supervisor including but not limited to residential treatment.

Condition 8: You are to attempt to get into a residential treatment program as soon as possible.

Condition 9: For the first 4 months of this order, you must not be outside your residence between the hours of 11:00 pm and 6:00 am daily.

Condition 10: Abstain from the consumption of alcohol during the entire 12 month term of this Order.

POR Condition 11: You are to have no contact directly or indirectly with Andrew O'Hearn, Tiffany Boudrou, John Ladders or Keom Poirier.

- [4] The conditional sentence order was varied on July 18, 2010 by adding the following three conditions:
12. You are to be released into the custody of a representative of Hope for Freedom Society or the Resurrection House for Men.
 13. You are to abide by the rules and regulations of the Hope for Freedom Society or the Resurrection House for Men when you are in residence there.
 14. Do not change your address without the prior permission of your conditional sentence supervisor.
- [5] The term of the probation order imposed in relation to the Breaking and Entering read as follows:

Condition 1: Keep the peace and be of good behaviour.

Condition 2: Appear before the Court when required to do so by the Court.

Condition 3: Notify the Court or the Probation Officer in advance of any change of name or address, and promptly notify the Court or the Probation Officer of any change of employment or occupation.

Condition 4: You are to report in person within 24 hours of your release to your Probation Officer at 203 5710 Teredo St., Sechelt, B.C., and thereafter as and when directed.

POR Condition 5: POR - Have no contact directly or indirectly with Malcolm Raymond Darby Paul, Dorian Adonis Adonis James and Sabrina Suprenant.

Condition 6: Do not attend at the Golden City Restaurant for the whole 12 months of this Probation Order.

Condition 7: You are to advise your Probation Officer of your residential address and you are not to change that address without first notifying your Probation Officer.

Condition 8: Perform 20 hours of community work service under the direction of your Probation Officer. The times and places where such work is to be performed are to be arranged with your Probation Officer, and all such work is to be completed within the first eight (8) months of the Probation Order.

- [6] In the course of this sentence appeal, the Crown/Appellant brought an application to adduce fresh evidence on the appeal relating to the respondent's breach of the conditional sentence order by leaving his residence at Resurrection House in Port Coquitlam, without permission and without reporting in advance to his conditional sentence supervisor and in breach of the rules and regulations of the treatment centre, all of which was in breach of the amended condition 13 to his conditional sentence order. It was alleged that the respondent left Resurrection House in breach of his order on August 13, 2010. He was arrested on August 19, 2010 at 6:45 p.m. in the area of Cambie and 41st Avenue in Vancouver. He was taken into custody on that date and detained on August 24, 2010 by a detention order made on August 24th, 2010. On August 31st, 2010, the respondent's conditional sentence order was suspended for a period of 90 days. His conditional sentence order has been further varied such that on his release, condition 12 now provides that he will be released into the custody of a representative of Options House in Surrey and condition 13 is varied to substitute Options House for Resurrection House
- [7] In seeking to adduce the fresh evidence on appeal, the Crown relied on *Palmer v. R.*, (1980) 1 S.C.R. 759 and *R. v. Levesque* (2000) 2 S.C.R. 487.
- [8] In *Levesque*, the criteria for admission of fresh evidence is set forth in para. 14 which reads as follows:

In *Palmer*, supra, this Court considered the discretion of a court of appeal to admit fresh evidence pursuant to s. 610 of the Criminal Code, the predecessor of s. 683. After emphasizing that, in accordance with the wording of s. 610, the overriding consideration must be "the interests of justice", McIntyre J. set out the applicable principles, at p. 775:

- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
- (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
- (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
- (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

In *R. v. M. (P.S.)* (1992), 77 C.C.C. (3d) 402 (Ont. C.A.), at p. 410, Doherty J.A. wrote the following concerning these principles:

The last three criteria are conditions precedent to the admission of evidence on appeal. Indeed, the second and third form part of the broader qualitative analysis required by the fourth consideration. The first criterion, [page 498] due diligence, is not a condition precedent to the admissibility of "fresh" evidence in criminal appeals, but is a factor to be considered in deciding whether the interests of justice warrant the admission of the evidence: *McMartin v. The Queen*, *supra*, at pp. 148-50; *R. v. Palmer*, *supra*, at p. 205.

In my view this is a good description of the way in which the principles set out in *Palmer* interact.

- [9] The Crown submits, in effect, that the criteria set forth in *Levesque* and *Palmer* are met in the case at bar in light of the totality of the evidence and it should be admitted and considered by this Court in reviewing the fitness of the sentence imposed below.
- [10] The position of the respondent submits the fresh evidence ought not to be admitted or considered in connection with the fitness of the sentence appealed from. He submits that as the Criminal Code provides a full remedial scheme at s. 742.6 which allows the original sentencing judge to address breaches of a conditional sentencing order by means including revocation of the CSO, compelling the offender to serve the remaining portion of his sentence in real jail is a circumstance which weighs against admitting the fresh evidence.
- [11] He further submits that the evidence of the breach of the CSO is not decisive of the issue on appeal and that represents a conclusion that the sentencing judge of any issue on appeal in that from the fact that the sentencing judge suspended the CSO meant that she did not "appear to have given up on her original reasoning" in imposing the conditional sentence initially.
- [12] Counsel for respondent also submits that criterion 4 in *Levesque* simply doesn't fit with the notion of events that have occurred after the fact of sentencing.
- [13] The respondent submits that generally, breaches of a CSO should be inadmissible as fresh evidence in an appeal against sentence as repercussions for the breach of a CSO are best imposed by the original sentencing judge under the legislative scheme provided, rather than by appellate courts on appeals against sentence. He submits there may in the result be punishment imposed twice for the same breach: one by having the CSO suspended and again by using the breach as a means to have the CSO set aside and replaced with a sentence of conventional incarceration through an appeal.
- [14] As to the substance of the appeal, the facts comprising the offence of Assault Causing Bodily Harm, are set out in para. 10 of the appellant's statement of argument as follows:

Mr. Ladders, the complainant, was at Snickett Park with Mr. O'Hearn, Mr. Kalmakoff and Ms. Boudreau. The Respondent and Mr. Poirier arrived later in the evening. All parties were drinking. While the complainant went to get firewood, an altercation ensued between Mr. O'Hearn and Mr. Poirier. Counsel for the Respondent, on his submissions of the facts, states that the Respondent attempted to intervene in the altercation to stop it. The complainant 'appeared to hit him from the side' and the Respondent ended up in the water. The Respondent then got up and went up to

the complainant and hit him once in the jaw area. The blow to the complainant was significant in that it caused the complainant to fall to the ground. He was unable to remember anything until he woke up in hospital. He had suffered a broken jaw and lacerations to his mouth and lips, and may have to receive follow-up dental treatment. A day after the incident, Mr. Boudreau spoke to the Respondent; advised him about the injuries suffered by the complainant as a result of him hitting the complainant and the Respondent stated to Ms. Boudreau: "Good. I'll break his other teeth, too if he comes down here and talks smack about me again."

[15] The facts with respect to the charge of Break and Enter are set out in para. 11 as follows:

On May 31, 2010 the Respondent, together with two other individuals, went to the Golden City Restaurant. The Respondent, by way of video surveillance, is observed to break the window of the restaurant. The Respondent, with the two others, entered the restaurant via the broken window. They stole a large quantity of alcohol from the restaurant. It is of note that the break and enter at the restaurant took place one day before the Respondent's required appearance on assault charges. As stated herein, the Respondent failed to appear on June 1, 2010 and a warrant was issued for his failure to appear. The Respondent was arrested at a bus stop on June 1, 2010.

[16] At the hearing before the sentencing judge, the Crown sought a sentence of incarceration of between twelve and eighteen months. The Crown opposed the imposition of a CSO on the basis that the respondent has a lengthy record, including crimes of violence, and with a significant number of breaches of court orders and accordingly the safety of the public could not be satisfied by the imposition of a CSO.

[17] Counsel for the respondent sought a conditional sentence, filing in support a letter from the Hope for Freedom Society and a letter from the respondent himself, both of which were considered by the sentencing judge. The letter from the respondent was not filed on the sentencing hearing and the appellant was not able to locate the letter for my consideration. The letter from the Hope for Freedom Society reads as follows:

This letter is to inform you that we have had ongoing communication with Mr. Earhart we are ready to accept him into our facility. The Hope for Freedom Society is willing to accept any addict that is actively seeking recovery. Mr. Earhart has completed the necessary requirements for acceptance into our program and we are prepared to welcome him into Resurrection House pending bed availability and confirmation of funding through THE MINISTRY OF HUMAN RESOURCES or some other appropriate source. Please, be aware that we DO NOT accept methadone clients. All Prospective intakes must arrive at our facility before 4:00 PM on the date that they are expected. ALL INTAKES ARE SUBJECT TO BED AVAILABILITY. Unfortunately, DUE TO ZONING RESTRAINTS AND OTHER CONSIDERATIONS the Society's written policy (Para. 4.7 of ADMISSIONS/INTAKE POLICY) dictates that we do not accept specific types of "VIOLENT/SEXUAL OFFENDERS". We do not provide a means of transportation for prospective clients when released: Unless being released from NFPC or Port Coquitlam courts. Clients must be able to make their own way to our facility. If there are any further questions, please feel free to contact me at the number provided in our letterhead.

- [18] Counsel for the respondent took the position before the sentencing judge that the respondent has a long-standing issue with abuse of alcohol and that alcohol was the root of the charges for which the respondent was being sentenced.
- [19] The issues raised by counsel for the appellant on this appeal are three-fold and are as follows:
1. The Learned Sentencing Judge erred in finding that the precondition was met that the Respondent, by serving his sentence in the community, "would not endanger the safety of the community" as it appears on section 742.1 of the Criminal Code.
 2. The Learned Sentencing Judge, in imposing a Conditional Sentence Order, imposed a sentence that was demonstrably unfit.
 3. The Appellant submits that the Learned Sentencing Judge erred in failing to give due regard to the principle of parity and as a result imposed a sentence that was demonstrably unfit for the break and enter.

APPELLANT'S SUBMISSIONS

- [20] It is the appellant's position on appeal that the case at bar demands a sentence that more properly reflects and addresses all of the principals of sentence set out in s. 718 of the Criminal Code and that it would be appropriate in the circumstances to rescind or to revoke the CSO with respect to the charge of Assault Causing Bodily Harm and impose a custodial sentence of nine to twelve months, followed by a period of probation and to substitute a consecutive three to six month sentence of conventional incarceration on the Breaking and Entering.
- [21] The Crown submits that the applicable standard of review is that set out in *R. v. C.A.M.*, (1996) 1 S.C.R. 500 at para. 89 which reads as follows:

In *Shropshire*, supra, this Court recently articulated the appropriate standard of review that a court of appeal should adopt in reviewing the fitness of sentence under s. 687(1). In the context of reviewing the fitness of an order of parole ineligibility, Iacobucci J. described the standard of review as follows, at para. 46:

An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

As my learned colleague noted, this standard of review traces part of its lineage to the jurisprudence of the British Columbia Court of Appeal. As Bull J.A. described the nature of a trial judge's sentencing discretion in *R. v. Gourgon* (1981), 58 C.C.C. (2d) 193, at p. 197:

... the matter is clearly one of discretion and unless patently wrong, or wrong principles applied, or correct principles applied erroneously, or proper factors ignored or overstressed, an appellate Court should be careful not to interfere with the exercise of that discretion of a trial Judge.

[22] On the first issue, the asserted failure to give proper consideration to the safety of the community, the appellant relies on the judgment of the Supreme Court of Canada in *R. v. Proulx*, 2001 S.C.R. 61 at para. 63 as follows:

As a pre-requisite to any conditional sentence, the sentencing judge must be satisfied that having the offender serve the sentence in the community would not endanger its safety ... [if] the sentencing judge is not satisfied that the safety of the community can be preserved, a conditional sentence must never be imposed.

[23] The Crown submits that the Court in *Proulx* regarded the requirement that the judge be satisfied that the safety of the community would not be endangered is a condition precedent and that in making the determination, the judge considered the risk posed by the offender of re-offending and the gravity of damage that could ensue in the event of re-offending. The Crown further submits *R. v. Proulx* establishes that a sentencing judge is to consider whether the offender has previously complied with court orders, whether the offender has a criminal record that suggests he would not abide by the terms of the conditional sentence, the circumstances of the offence, the degree of participation of the offender, the profile of the offender (including his occupation and lifestyle) and his conduct after the offence. The appellant submits that the sentencing judge in the case at bar did not conduct any assessment of the danger that the respondent posed to the community prior to imposing the CSO. The appellant relies on the fact that the respondent's criminal record is lengthy, consistent and persistent, and includes in 2009 alone, five convictions including the following:

1. September 9, 2009 - Assault Causing Bodily Harm, 6 months jail, 2 years probation;
2. September 9, 2009 - Obstruction of Justice, 6 months jail, 2 years probation;
3. November 25, 2009 - Theft, 6 months jail, 2 years probation;
4. November 25, 2009 - Assault of a police officer, 6 months jail, 2 years probation; and
5. November 25, 2009 - Uttering Threats, 6 months jail, 2 years probation.

[24] In addition, the appellant relied on the fact that the respondent has been convicted of thirteen failures to comply with court orders and/or breaches of probation that at the time of sentencing the respondent had an outstanding assault charge for which he had been granted bail during the currency of which he committed the two offences before the court and that at the time of sentencing he had failed to attend court as he was required to do so on June 1, 2010. The appellant also notes and relies on the fact that at the time of sentencing, the respondent was subject to two separate probation orders in relation to substantive offences involved violence. The appellant submits that the respondent is firmly entrenched

in a criminal lifestyle, showed no remorse for his actions in relation to the Assault Causing Bodily Harm and initiated the Breaking and Entering for which he was given a suspended sentence.

- [25] With respect to the issue of the fitness of the sentence with respect to the Assault Causing Bodily Harm, the appellant submits that many, if not all of the factors at play in relation to the issue of the safety of the community are similarly applicable to a consideration of whether the sentence in the case at bar was fit.
- [26] The appellant advanced and relied on three decisions and submit that those decisions establish the appropriate range of sentence and bear on the issue of fitness of the sentence in the case at bar. In particular, the Crown relied on *R. v. Chow*, 2009 BCCA 369 for which the accused received a twelve month jail sentence for Assault Causing Bodily Harm and a consecutive nine month sentence for possession of stolen property. In *R. v. Rufus*, 2009 BCCA 419 the sentence imposed was eighteen months and six months for an assault causing bodily harm and an additional six months for a charge of Possession of a Weapon for a Purpose Dangerous to the Public Peace, which occurred some two weeks after the Assault Causing Bodily Harm. The six months for the weapons charge was to be served concurrently.
- [27] In *R. v. Graham*, 1991 Victoria Reg. V01526 (BCCA) the accused was 19 years old and in a drunken state assaulted the victim, resulting in a broken jaw. The accused had a youth criminal record and the Court held that a sentence of fifteen months was fit in the circumstances.
- [28] On the issue of parity, counsel for the appellant submits that the failure of the trial judge to give due regard to the principle of parity is in relation to the Breaking and Entering charge where she imposed on the appellant the same sentence imposed on his co-accused, notwithstanding the fact that the co-accused had "virtually no record" and given that it was the appellant, rather than the co-accused who initiated the offence. The appellant submits that given the respondent's criminal record and his "high moral culpability with respect to the Break and Enter" and given that he was on probation and judicial interim release at the time render the sentence imposed by the learned sentencing judge demonstrably unfit.
- [29] The appellant submits that consecutive sentences should be imposed with respect to the Assault Causing Bodily Harm and the Breaking and Entering as the offences are separate and distinct and not connected in terms of time, relying on *R. v. Chow*, supra.
- [30] The appellant submits, in effect, that although the learned trial judge's reasons for sentence reflect an acknowledgement and awareness of the respondent's criminal record and danger to society, she performed no assessment or analysis with respect to the issue whether a conditional sentence order would not endanger the safety of the community and whether the conditional sentence order was, in all the circumstances of the case, fit. The appellant further submits that although the sentencing judge referred to the sentence given to the co-accused on the Breaking and Entering, she neglected to give any regard to the principal of

parity, given the distinction between the respondent and the co-accused's criminal history and involvement in the offence at issue.

THE RESPONDENT'S SUBMISSIONS

- [31] The respondent contends that a review of the reasons for sentence of the sentencing judge reveals clearly that she was alive to all the factors that the Crown submits she ought to have taken into account and weighed and assessed those factors, giving them appropriate consideration and due weight. The respondent further submits that the sentencing judge had evidence of remorse before her as expressed by his early guilty plea and his comments to the court during sentencing. The respondent also submits that on the issue of the willingness of the respondent to comply with court orders, if the fresh evidence is admitted, there is evidence that the respondent did report to his supervisor in accordance with the conditions of the CSO. The respondent submits that just as there is some evidence that the respondent breached his CSO, there is also some evidence that he as well complied with it. The respondent submits the sentencing judge repeatedly referred to the risks posed by the respondent and that her sentence reflected a conclusion that the CSO would not endanger the safety of the community and it reflected her conclusion that conventional incarceration was having no deterrent or rehabilitative effect on the appellant.
- [32] It is the respondent's submission that the effect of the sentencing judge's sentence was in keeping with the principals in *R. v. Proulx* reducing the respondent's risk to a minimal one by the imposition of the conditions relating to his alcohol issues.
- [33] The respondent submits that the learned sentencing judge fully considered the issue of the safety of the community and concluded that it is best protected from the respondent if he is rehabilitated.
- [34] As to the fitness of the Assault Causing Bodily Harm sentence, the respondent notes that in *Chow*, supra, the accused was convicted following a trial and did not have the ameliorating effect of a guilty plea. Alcohol was not a factor in relation to *Chow*. In *Rufus*, the respondent submits the facts are arguably more aggravated and alcohol does not appear to have been a factor in the offence. As far as *Graham* is concerned, counsel for the respondent submits it is a case which turns on deference to the discretion of the sentencing judge "and nothing more". He submits it is not a situation involving an appellate court substituting a period of incarceration for a conditional sentencing order. Counsel for the respondent submits that in each of *Chow*, *Ruffas* and *Graham*, the Crown originally proceeded by indictment which increases the potential range of sentence for an assault causing bodily harm.
- [35] Insofar as the parity principal is concerned, the respondent submits that the totality principal comes into play as it is expressed in *R. v. C.A.M.*, supra, as the respondent was being sentenced for two offences while as far as known, his co-accused was sentenced for only one. He submits there is nothing aggravated about the offence of Breaking and Entering as it was a business premise and no one was present in the business at the time of

the break-in. The respondent submits that while he may have been given a higher sentence than his co-accused, if both were before the court solely for the Break and Enter offence, in the circumstances where the totality principle is invoked, it operates to reduce the respondent's sentence for this particular offence.

[36] The respondent submitted that sentencing is an individualized process which depends on the particular and unique circumstances of both the offender and the offence before the court. He emphasized that sentencing courts are entitled to great deference by appellate courts and relied on *R. v. C.A.M.* at paras. 90 and 91 which read as follows:

90. Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code. As s. 717(1) reads:

717.(1) Where an enactment prescribes different degrees or kinds of punishment in respect of an offence, the punishment to be imposed is, subject to the limitations prescribed in the enactment, in the discretion of the court that convicts the person who commits the offence.

91. This deferential standard of review has profound functional justifications. As Iacobucci J. explained in *Shropshire*, at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both *Shropshire* and this instance), the argument in favour of deference remains compelling. A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[37] The respondent submits that there is nothing in the materials before the court to demonstrate that the sentencing judge failed to consider any other relevant factors or principles at play in the case at bar and that in fact the sentencing judge's reasons demonstrate that the factor raised as absent by the appellant were at the forefront of the

sentencing judge's mind and reasoning. The respondent submits that the appellant has failed to demonstrate any error on the part of the sentencing judge and failed to demonstrate that the sentence is outside of the applicable range and demonstrably unfit. The respondent submits that there is no reason not to defer to the learned sentencing judge in the case at bar and the appeal should be dismissed.

ANALYSIS AND CONCLUSION

[38] As I see it, a critical aspect of the issue raised by this sentence appeal is the criminal record of the offender/respondent. Prior to the two offences at issue on this appeal, the accused had pleaded guilty or had been found guilty of 36 offences, as a youth and as an adult, reaching back to October 26, 2001. Of those 36 offences, 12 were for violent offences of either assault, robbery or uttering threats. He was also convicted as noted earlier of some 13 offences of failing to comply with court orders. The balance of the offences involve theft, possession of stolen property, trafficking, and flight from a peace officer. As noted, in 2009 he had 5 convictions, four which involved violence or threats of violence. At the time of the offences before the court the respondent was on probation with respect to two of his prior convictions and was on bail in respect of another offence. It is in that context that counsel for the Crown at the sentencing hearing sought a global sentence of twelve to eighteen months and opposed a conditional sentence order. It is also in that context that the Crown/appellant submits that the learned sentencing judge committed errors in principle in arriving at the sentence which she did.

[39] The learned sentencing judge did not give her reasons for sentencing in a conventional way. Rather, she imposed the sentences in the case at bar in the context of a series of exchanges with the respondent. She began by referencing some of his prior convictions and asking about one of them - a prior conviction for Assault Causing Bodily Harm. She then characterized the Assault Causing Bodily Harm before her as "a bunch of drunken louts down on the beach and everybody gets into a fight." The respondent gave his explanation of the events, prompting the sentencing judge to remark "Hitting people in the face is pretty dangerous." The respondent replied:

I understand that. That is why I put in early guilty pleas on everything, 'cause like I know I did something wrong, right? Like I am not saying I didn't. I am not trying to cover it up or anything, you know, like I did something wrong and ...I am prepared to do something about it, right?

[40] The sentencing judge went on to note that the jail sentences the respondent received "are not making much of an impression". The respondent told the judge he realized he had a problem and did not "want to be like this anymore".

[41] The sentencing judge and the respondent then had the following exchange at paras. 34 - 40 of the Reasons for Sentence:

34. THE COURT: You have a problem, but with assault charges and robbery charges, then the community has an even bigger problem. It is not like it is a victimless crime. It is not like you are only hurting yourself. It is not a property crime, to think something that can be repaired. There is a whole lot of case law out there from the Supreme Court that basically says that, you know, for property offences, we maybe use jail too often, and for victimless crimes, perhaps, it is the same problem, and that the jails, as a very limited resource, are for the people that cannot control themselves and seem to just require some controls from the community. So, that says to me that it is for people who are causing harm, okay?
35. Bodily harm is up there. A broken jaw is probably going to have some sort of lifelong effect on Mr. Lodders. Just because you are a bunch of rounders that are at the beach getting drunk and fighting all the time does not mean that the law is different. It is not something that any of us should be willing to put up with. My job is to try and figure out - my problem is to figure out, yeah, you can write this letter saying that you really do want to get into recovery and you really, really, really do want to get some help and that jail is a negative thing and it is not going to do you any good, but like the Crown says, how many times do we have to figure that out and how many times have you said that, and how many opportunities have you had to try and do something about it and you haven't.
36. THE ACCUSED: Well, it is because I didn't think I had a problem, but obviously I have a problem, you know what I mean? Like, I am 22 years old and I've like been in jail my whole life, you know? It is not easy. It is not at all, right? I just finally got back with my family and stuff, so I don't know...
37. THE COURT: You see, I don't -
38. THE ACCUSED: - makes you think
39. THE COURT: I don't know whether to believe you or not, and all of this record says that you are not trustworthy, you know? So I have to figure out what is it that might make you stop this so that you do not end up killing somebody and spending the rest of your life in jail, right? And wasting that other person's family or, harm them to the extent that - I mean, this is serious enough, but it could have been worse, right? You don't appear to exercise any kind of self control. Somebody throws you in the water. Does that justify that extent of your reaction?
40. THE ACCUSED: Not at all.
- [42] The judge then went on to speculate that the respondent's mother's death, when the respondent was 13 may be a cause of his difficulties and saw him as "a little powder keg that is walking around" who "could cause serious injuries". She observed that if the respondent was "carrying that around as some kind of load" he should "deal with it in ways that do not end up spending the rest of your life in jail". She noted "... booze does not help. Maybe you have figured that out. Sounds like there is possibility."

- [43] The evidence before the sentencing judge that led to her speculation about the mother's death being a cause of his violent tendencies was scant. It consisted of the respondent telling the judge that "she bumped her head on a ... I do not know, she smashed her head off something and went into a coma and then she passed away." He said he wasn't sure if it was some sort of violence and did not know if it was "tied up in this."
- [44] The information before the sentencing judge relating to the respondent's problem with alcohol came from his counsel in submissions. He noted that both of the offences before the sentencing judge were fuelled by alcohol. Defence counsel's submissions in that regard were as follows:

Obviously, alcohol is a problem and a long-standing problem.

Mr. Earhart has prepared a letter that he's asked that I submit to Your Honour. And I can say I am going to be asking Your Honour, despite his record, to consider a long-term conditional sentence and to a treatment centre.

Your Honour, as Mr. Earhart notes and because it's the case, he's never had a conditional sentence. He realizes he can't go on indefinitely going to jail for offences arising out of his alcohol abuse and penchant for violence when he is intoxicated. The - he's never had a break and enter offence before.

With regard to - he, of his own volition, last week, had contacted Jim O'Rourke from VisionQuest as to whether he - whether there was any space available for him to enter a treatment centre. VisionQuest, as Your Honour may know, operates a facility in Surrey and a facility on the Sunshine Coast. The facility on the Sunshine Coast is a secondary treatment centre for individuals who I believe are supposed to have had at least six months at the Surrey facility before being considered to be placed at the facility on the Sunshine Coast. I've spoken with Mr. O'Rourke today and he advises that there is space available for Mr. Earhart, who he acknowledged speaking to last week, and that VisionQuest would be prepared to take him.

The facility in Surrey - I'm familiar with Mr. O'Rourke, and Mr. O'Rourke, not uncommonly in these circumstance and in his vocation, is someone who himself had a post involved with drug and alcohol abuse and incarceration. And without knowing quite what it involves, I can say that he strikes me as someone who can be hard to deal with for people who are not prepared to follow the rules and regulations of the treatment facility. And he knows how to deal with people with histories involving time in jail, and it's not uncommon then in the Surrey facility that a number of the long-term clients there are people with jail history. The - I have seen persons sentenced - long-term conditional sentences at that facility who have remained there upwards of a year or - and then gone into secondary facilities in the Surrey area, got work, continued in their treatment. This is an option I'd like Your Honour to consider with respect to sentencing of Mr. Earhart and with respect to bail on the outstanding assault matter.

Mr. Earhart advises that he's not gone to a treatment centre before. He - it's something that he seems ready to - to try and do, and I'd ask Your Honour to give him that opportunity, excepting - and I have spoken to him of this - that it would need to be a long conditional sentence and if he breached it, he would be looking at doing the full amount of his sentence in jail.

[45] The sentencing judge's reasons for imposing the conditional sentence with respect to the Assault Causing Bodily Harm read as follows:

59. A conditional sentence says:

If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment [which is not the case here] for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment ...

So what is the maximum for assault causing bodily harm? Break and enter is life, is not it? 267(b)?

60. MS. WEST: With respect, if - indictably, it is 10 years; on a summary conviction it is 18 months.

61. THE COURT: Eighteen months. So he is eligible. Then:

... satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing ...

"Would not endanger the safety of the community."

62. The purpose of sentencing is to try and figure out a just, peaceful, and safe society. We have to somehow take the risk out of having you walking the streets. You know it is wrong. To try and deter you and separate you when necessary, to assist in rehabilitation, provide reparations for harm done and promote a sense of responsibility.

63. THE ACCUSED: I'm not sure, but like I don't think you are allowed to leave a recovery house, are you? I - I don't know -

64. THE COURT: Rules vary.

65. THE ACCUSED: - not familiar with it.

66. THE COURT: If you are going to stay in the program, certainly it is at least 30 days.

67. On the assault causing bodily harm, I am going to impose a conditional sentence order for 12 months. You are going to keep the peace and be of good behaviour. You are going to report to a probation officer within 24 hours and thereafter as required. You are going to be reporting no less than once a month in person. You are going to provide the probation officer with your address and you are not to change that address without getting permission of the probation officer. They need to know where you are. You are going to attend and successfully complete such counselling as recommended to you by the probation officer,

including and not limited to residential treatment and you are going to attempt to get into a residential treatment program as soon as possible.

- [46] Insofar as the breaking and entering is concerned, the sentencing judge's reasons were very short and read as follows:
115. The break and enter, that is going to be - and, sorry, the other fellow got - Paul got a suspended sentence, right, with probation for 12 months and that was with virtually no record? All right. So this will be a suspended sentence for 12 months with respect to the break and enter.
116. And the terms will be keep the peace and be of good behaviour, report to the probation officer and have no contact, directly or indirectly, with Paul, Malcolm Raymond Darby Paul, and Dorian Adonis James and to stay away from the Golden City Restaurant; no-go to that for the whole twelve months.
- [47] The main thrust of the appellant's submissions in the present case is that the sentencing judge erred by failing to engage in any analysis whether a conditional sentence was appropriate, having regard for the need to be satisfied a conditional sentence "would not endanger the safety of the community" by failing to undertake any analysis as to whether and why the conditional sentence was a fit sentence, in the circumstances, and by failing to undertake any analysis of the parity principal in relation to the sentencing for breaking and entering.
- [48] As I read them, the learned sentencing judge's reasons do not illuminate these issues. In that regard, the words of Frankel J.A. in *R. v. Nguyen*, 2008 B.C.J. No. 1128 are apposite. In that case, the Crown/Appellant argued that the sentencing judge "failed to engage in substantive analysis" with respect to the appropriateness of a conditional sentence in the prevailing circumstances.
- [49] Frankel J.A. held as follows in paras. 28 - 31:
- [28] In my view, the Crown is correct. The single paragraph in the sentencing judge's reasons dealing with the imposition of a conditional sentence (reproduced in paragraph 24 above) sheds little, if any, light on how he decided that such a sentence was appropriate. The words used merely express a conclusion.
- [29] Sentencing is one of the few situations where there is a statutory requirement to give reasons. Section 726.2 of the Code reads:

When imposing a sentence, a court shall state the terms of the sentence imposed, and the reasons for it, and enter those terms and reasons into the record of the proceedings.

[Emphasis added]

- [30] As Mr. Justice Binnie stated in *R. v Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, s. 726.2 "facilitate[s] appellate review of the correctness of [a] sentence": para. 20. However, in speaking of reasons for judgment generally, he also stated that they are "the primary mechanism by which judges account to the parties and to the public for the decisions they render": para. 15.
- [31] I consider it to be an error in principle for a judge to fail to provide some explanation for why a particular sentence is being imposed. Offenders, those affected by criminal activity, and the general public, are entitled to know why a judge considers a particular punishment appropriate. With respect to the public, the following from the judgment of Mr. Justice La Forest in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, is apt (at para. 88):

In any criminal case, the sentencing process serves the critically important social function of permitting the public to determine what punishment fits a given crime, and whether sentences reflect consistency and proportionality.

- [50] It seems to me the circumstances are similar here. While it could be inferred that that learned sentencing judge, in imposing the sentence which she did, accepted the submissions of counsel for the respondent and his reasoning, that reasoning does not extend to address the question of whether or why the sentence would not endanger the community, or why in all the circumstances it was a fit sentence. Rather, it appears that the sentencing judge accepted the precept that the respondent should be given the opportunity to go to a treatment centre under the auspices of a conditional sentence order, but did not consider whether, in the circumstances, that was a viable sentence, either from the point of view of fitness or from the point of view of whether such a sentence would or would not endanger the community.
- [51] It is evident that a finding that a sentencing judge erred by not adequately explaining or analyzing critical findings does not necessarily vitiate the sentence at issue. In *R. v. Nguyen*, *supra*, Frankel J.A. noted as follows at para. 32:
- [32] This is not to suggest that inadequate sentencing reasons will invariably result in a successful appeal. The ultimate question on such an appeal is the fitness of the sentence imposed. Even though the reasons being reviewed are deficient, an appellate court may well decide, having regard to the circumstances of the offence and the offender, that the sentence imposed is nevertheless a fit one.
- [52] I am unable, however, to come to that conclusion in the present case. In my view, while the aggravated assault, although serious in terms of consequences to the complainant, was not an aggravated case of its kind. It was, as noted by the learned sentencing judge, a product of drunken aggressiveness on the part of both participants. Similarly, while breaking and entering is an inherently serious offence, this too, it appears, was fuelled by alcohol and involved a commercial, rather than a residential premises.

- [53] Notwithstanding that, however, what is at issue in this case is a relatively young man with a very serious criminal record, involving multiple crimes of violence and revealing an unwillingness or inability to obey court orders. The fact that he was on two probation orders, judicial interim release, and failed to attend court on June 1, 2010 on the offence for which he was on bail, speaks volumes about the respondent's willingness to adhere to community based supervision. Additionally, although it appears the learned sentencing judge accepted the precept that the respondent's willingness to attend treatment for alcohol abuse justified the imposition of a conditional sentence order, there was very little evidence before her of the nature and extent of the respondent's alcohol abuse problem or its relationship to his offending. Nor was there evidence in the nature of an objective assessment of his suitability for a conditional sentence order or community based treatment.
- [54] In view of those considerations, it is my view that the fresh evidence relating to the respondent's departure from the treatment centre, together with his subsequent failure to contact his conditional sentence supervisor, is cogent evidence that falls within the factors enumerated in *R. v. Levesque* and justifies its admission on this appeal. That evidence, taken in combination with the other evidence of the respondent's unwillingness to abide by community based supervision orders, establishes that a conditional sentence was not a fit sentence, both on the basis that it could not be said that imposing it in this case would not endanger the safety of the community and also on the footing that it was unfit as a reflection of the seriousness of the offences and more particularly, the circumstances of the offender.
- [55] Insofar as the issue of parity is concerned with respect to the sentencing on the breaking and entering, while I accept the submissions of counsel for the respondent that it is necessary to invoke the totality principle to ensure that a cumulative sentence that does not exceed the overall culpability of the offender is imposed, in this case, as I have determined that the underlying sentence on the assault causing bodily harm is not fit, it is necessary to consider what cumulative sentence is appropriate with respect to both the Breaking and Entering and the Assault Causing Bodily Harm should be imposed.
- [56] In all the circumstances of this case, given that the offender has served part of a conditional sentence, and has effectively been in custody since August 19th and has had his conditional sentence suspended for a period of 90 days commencing August 31st, in my view, the appropriate global sentence in this case is a sentence of 8 months in custody, to be followed by a period of probation of 2 years. Accordingly, I set aside the conditional sentence imposed by the learned sentencing judge, and impose a sentence of 6 months in custody, to be followed by a sentence of 2 months consecutive on the charge of Breaking and Entering. There will be a 2 year probation order imposed in connection with both offences. The terms will be as follows:
1. Keep the peace and be of good behaviour;
 2. Appear before the Court when required to do so by the Court;

3. Report in person, within 72 hours of your release to a probation officer at 203 - 5710 Teredo Street, Sechelt, B.C., and thereafter as and when directed;
4. Notify the Court or the probation officer in advance of any change of name or address and notify the Court or the probation officer of any change of employment or occupation.
5. You will have no contact directly or indirectly with Malcolm Raymond Darby Paul, Dorian Adonis, Adonis James, Sabrina Suprenant, Andrew O'Hearn, Tiffany Boudrou, John Loddors or Keom Poirier.
6. You will attend and successfully complete such counselling as recommended to you by your probation officer.
7. You will abstain from the consumption of alcohol.
8. You will not attend the Golden City Restaurant situated at 5550 Warf Road, in Sechelt, B.C.

"A.F. Cullen J."

The Honourable Mr. Justice A.F. Cullen

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