
CANADA / JUDGMENT

R. v. Forner

2020 BCCA 103

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 103 R. v. Forner

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Forner,

2020 BCCA 103

Date: 20200407

Docket: CA46431

Between:

Regina

Respondent

And

Sharon Forner

Appellant

Before:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated August 16, 2019 (R. v. Forner, 2019 BCPC 208, Penticton Docket 46016-1).

Counsel for the Appellant:

E. J. Weisenburger

Counsel for the Respondent:

C. E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

March 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 7, 2020

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

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Summary:

The appellant appeals the custodial portion of her 40-month sentence, and a banishment term in her probation order. The appellant, who had a long history of depression and alcohol abuse disorder, appeared at the victim's door visibly intoxicated, wearing a wig, and asking to see the victim's baby. She then entered the victim's home holding a large butcher knife. The incident ended when the victim successfully pushed the appellant back outside. She was sentenced to three years, four months and 11 days, less time served, plus three years' probation. The probation order included a term banishing her from Osoyoos. Held: Appeal allowed. The custodial sentence is reduced to 20 months. The judge erred in principle by failing to treat the appellant's mental illness as a mitigating factor and by treating her addiction as significantly aggravating, where one contributed to the other, and both contributed to the offence. Moreover, there was no history of violence and no physical injury. The result was an unfit sentence. The banishment term was unreasonable. This was an isolated event, the term did not facilitate the offender's rehabilitation, and the non-contact terms of the order adequately provide for the victim's safety and security.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1.0 INTRODUCTION

- [1] This is a sentence appeal. The appellant, Sharon Forner, pleaded guilty to one count of breaking and entering into a dwelling house to commit the indictable offence of assault with a weapon, contrary to section 348.1(b) of the Criminal Code. Given the bizarre circumstances of the offence, the sentencing judge ordered the production of presentence reports with psychological and psychiatric components.
- [2] What had happened was this. On August 8, 2018, the appellant, visibly intoxicated, and wearing a long dark wig and dish gloves, knocked at the door of the house of Katherine Rinas in Osoyoos, BC. Ms. Rinas was at home with her four-year-old daughter and newborn baby, and answered the door. The appellant asked to see the baby. Ms. Rinas shut the door on her. The appellant then re-opened the door and entered the home, wielding a large butcher knife over her head. She did not get very far. Showing considerable fortitude, Ms. Rinas grabbed the appellant, pushed her out the door, and called 911. The police tracked the appellant down quite quickly.

[3] The judge imposed sentence as follows (2019 BCPC 208 at para 36):

The sentence I would have imposed would have been 1,226 days [three years, four months and 11 days]. You have been in custody for 330 days. With enhanced credit, that is 495 days. The actual sentence is 731 days. Because 2020 is a leap year, this is a two-year sentence which means your sentence will be served in a federal penitentiary for women, but it also allows me to impose a probation order and I am going to impose the maximum period of probation of three years.

[4] The probation order included a term that the appellant must not be within a 50-kilometre radius of Osoyoos, BC, except with the written permission of her probation officer.

[5] Ms. Forner appeals both the custodial sentence, on the ground that the judge erred in principle and the sentence is unfit, and the term of the probation order imposing a "banishment condition", barring her from being within a 50 km radius of Osoyoos during the three years of probation.

[6] The appellant submits that the judge improperly weighed aggravating and mitigating factors. By this, the appellant contends that the judge erred in principle by treating the appellant's mental health and addiction problems as aggravating factors when they ought to have been considered as tending to diminish her culpability.

[7] The respondent maintains that the sentencing judge appropriately considered the evidence in the presentence reports, and properly carried out the difficult task of weighing the aggravating and mitigating factors. In the circumstances, the respondent submits, it is not for this Court to reweigh those factors.

[8] For the reasons that follow, I would allow the appeal. I would reduce the custodial sentence to 20 months less credit for time served, and I would remove the banishment clause from the terms of the three-year probation. I would not otherwise interfere with the terms of probation.

[9] I have already described the circumstances of the offence. I will now turn to the circumstances of the offender as revealed in the presentence reports that were before the sentencing judge.

2.0 CIRCUMSTANCES OF THE OFFENDER

[10] The appellant is 47 years old. She grew up on a farm in Keremeos, BC, the youngest of three children. She did not do well in school, though ultimately she was able to graduate from high school. She started working at the age of 15, and last worked cleaning bathrooms at a campsite in June 2018.

[11] At the time of the offence, the appellant was unemployed, lived alone, and collected a disability pension. She had been married once, and was in a later relationship with another man who was both physically and emotionally abusive. Both relationships were complicated by her medical inability to have children.

- [12] It is noteworthy that, at the time of the offence, Ms. Forner had a 16-year history of alcohol abuse, and was drinking 12 to 15 drinks daily in combination with prescribed psychiatric medication. She expressed what was considered to be significant and genuine remorse about the offence, but said that she had no memory of it, and could not explain it.
- [13] At the request of the court, two reports were prepared. The first, dated May 22, 2019, was prepared by a probation officer in Kamloops, Elizabeth Barry. The second, dated June 14, 2019, was prepared by Dr. Kimberly Kreklewetz, a registered psychologist with BC Mental Health & Substance Use Services.
- [14] Dr. Kreklewetz noted the appellant's report of a long history of depression, with alcohol being the only thing that helped her escape feelings of distress and emotional pain. According to the appellant, her drinking became much worse after the death of her father in 2003 or 2004, and still worse after a motor vehicle accident in 2006 or 2007 that has left her with ongoing nerve pain.
- [15] The appellant has suffered from depression most of her life, but was not diagnosed until 2007. She was hospitalized in March 2009 for "suicidal thoughts and depression without an active plan", and August 2009 after having consumed "a handful of prescribed medication". Diagnoses at that time included Depressive Disorder NOS, Alcohol Dependence, and Polysubstance Abuse. The appellant attended at BC Mental Health & Substance Use Services as an outpatient but file information indicated multiple appointment no-shows, as well as attendance at appointments smelling of alcohol and/or cannabis.
- [16] Dr. Kreklewetz offered the following summary and recommendations:

SUMMARY AND RECOMMENDATIONS

Before the court is Ms. Forner, sentencing for Break and Enter and commit Assault with a Weapon. The offence occurred on August 8, 2018. Ms. Forner entered the residence of Katherine Rinas wearing a long, dark wig and yellow rubber gloves and holding a knife. Forner told Rinas that she wanted to see her new baby.

At interview, Ms. Forner reported 16-year history of alcohol abuse and noted that around the time of the offence, she was drinking approximately 12 to 15 drinks daily plus taking prescribed psychiatric medication. She described this combination as "like putting gasoline on a fire." Ms. Forner was very tearful when discussing the index offence. She appeared to express genuine remorse and shame for her actions and she demonstrated good insight into victim impact. She took responsibility for her actions and framed her long-term alcohol use as a significant factor in the offence, but not an excuse, Ms. Forner asserted that "I'm not the victim at all in this. It's sickening! My sentencing does not begin until I walk out these doors [and into the community]. I want [Rinas] to know how sorry I am and how bad I feel for her. I am so grateful that no one got hurt." Ms. Forner had the following additional comments to be directed to the victim and the Court: "I hope I didn't traumatize Katherine too much, I'm really, really sorry for what I've done. I'm not a bad person. I just did a bad thing. I am a caring, giving person and I wear my heart on

my sleeve. I was just lost in life."

Results of risk assessment (HCR20-V3) indicate that Ms. Forner is rated as posing a Low-Moderate risk for future violence. Her level of risk is thought to increase towards the moderate range when she is under the influence of alcohol and other substances that would impair judgement, reduce behavioural controls, and increase impulsivity. Substance abuse should be considered a critical risk factor for Ms. Forner. When she is clean and sober, her risk level for future violence is deemed to be low. Imminent risk for violence is also low.

Ms. Forner reported a longstanding history of depression and noted that her alcohol abuse was a form of self-medication. She noted that "When I drank alcohol, I didn't have to think or feel; I felt fine." Of note, Ms. Forner also discussed her history of endometriosis and how her inability to conceive a child has impacted both her relationship history and her psychological / emotional health. File information indicates Ms. Forner was hospitalized in March 2009 for suicidal ideation and again in August 2009 for a suicide attempt. Ms. Forner also reported a more recent suicide attempt while in custody at OCC. Prior to the current assessment, Ms. Forner was admitted to the Forensic Psychiatric Hospital for an assessment of criminal responsibility for the offence, which was completed by psychiatrist Dr. Kolchak. Based on a review of file information, medical records, behavioural observations, and Ms. Forner's self-reports during the clinical interview, the following DSM-5 diagnostic formulation is proffered;

Query Persistent Depressive Disorder

Alcohol Use Disorder, severe, in remission, in a controlled environment

Cannabis Use Disorder, moderate, in remission, in a controlled environment

Opioid Use Disorder, (Tylenol 3 with codeine) moderate in remission, in a controlled environment

As noted above, Ms. Forner has a history of psychiatric hospitalization, outpatient mental health contacts, and suicide attempts, most recently in custody. She reported current symptoms of depression and anxiety, but denied any current suicidal ideation /plans/ intent. Based on the information available, a review of relevant SAD PERSONAS risk factors indicates that Ms. Forner presently rates as a Low-Moderate risk for suicide/self-harm. Note that this measure is used to assess the client's current status and should not be used to predict future risk.

Recommendations

- 1) Given the nature, of the index offences, it is respectfully recommended that Ms. Forner participate in relevant institutional and / or correctional programming, which may include violence prevention programming and anger and emotions management, where available.

- 2) Most importantly, in order to reduce and manage Ms. Forner's risk, it is also recommended that she participate in intensive programming to maintain her abstinence from alcohol and past drugs of abuse. Substance abusing programming is available at both provincial and federal level institutions, as well as in the community through corrections and / or BC Mental Health and Substance Use Services (BCMHSUS). Depending on the nature / length of her sentence, Ms. Forner may benefit from additional inpatient substance use treatment.
- 3) Finally, Ms. Forner may benefit from individual psychotherapy, provided from a Cognitive Behavioural (CBT) perspective. In general, therapy could potentially focus on: 1) managing strong emotions, 2) identifying, challenging, and replacing negative and / or irrational thought patterns that perpetuate difficulties in the areas of mood, stress, and interpersonal difficulties, and 3) implementing behavioural change and building positive coping strategies. Therapy may also address issues of grief surrounding both Ms. Forner's father's death and her inability to conceive a child. Such therapy should be provided by a registered psychologist or mental health professional with equivalent education and training.

[Emphasis added.]

- [17] The parole officer, in her report, noted 11 previous convictions, comprised of one conviction for impaired driving, two convictions for theft under \$5,000, and the remainder for failure to comply with court direction. The last of these was in relation to this offence. She had been released on a bail order in September 2018 to a recovery home in Surrey, BC. She reported consistently to her bail supervisor for three weeks, but was evicted from the recovery home in October for failing to comply with its rules. She was subsequently breached for this, and returned to custody. In the meantime, though being without a proper residence for approximately one week, she nevertheless maintained contact with her bail supervisor, did not consume alcohol, and kept her electronic monitoring equipment charged.

3.0 DISCUSSION

3.1 Standard of Review

- [18] Appellate courts are obliged to give wide latitude to sentencing judges, who are in the best position to determine, having regard to the circumstances, a just and appropriate sentence: *R v Lacasse*, 2015 SCC 64. Accordingly, appellate intervention is only warranted if the sentence is (a) demonstrably unfit, or (b) based on an error of law, error in principle, failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor that had an impact on the sentence. Even if such an error is established, the court must then consider the fitness of the sentence by conducting its own sentencing analysis: *Lacasse*; *R v Agin*, 2018 BCCA 133 at para 56; *R v Williams*, 2019 BCCA 295 at para 44.
- [19] As the Supreme Court of Canada stated in *Lacasse* at para 53, the fitness inquiry

must be focused on the fundamental principle of proportionality stated in s. 718.1 of the Criminal Code, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle.

3.2 Did the Judge err in principle?

- [20] The appellant's submission that the judge did err in principle focuses on the judge's treatment of her mental health and addiction issues.
- [21] We have seen in Dr. Kreklewetz's report a recognition of the appellant's long history of depression and substance abuse (severe alcohol use disorder, moderate cannabis use disorder, and moderate opioid use disorder). Dr. Kreklewetz further noted the appellant's "history of psychiatric hospitalization, outpatient mental health contacts, and suicide attempts." Her recommendations included individual psychotherapy.
- [22] The sentencing judge discussed the appellant's mental health issues both generally and under his list of mitigating factors:
- [14] She is described by the professionals as suffering from severe alcohol abuse disorder and is assessed as a low moderate risk for future violence with her level of risk increasing if she is under the influence of alcohol or drugs. Clearly, if Ms. Forner does not successfully address her addiction issues, she will, in my opinion, remain a risk to the public. As the Crown points out, it is difficult to determine how she will manage in the community. She has few supports, has lost one recently and was unsuccessful in her last attempt to comply with the rules of the recovery home that she was sent to on bail. However, as Mr. Dosanjh reminds, Ms. Forner did have a large gap in her criminal record between 2012 and 2018 when she appears to have acted in a prosocial manner. He also points out that when she was discharged from the recovery home, she did not flee or consume alcohol, but continued to report each day and kept her electronic supervision equipment charged.

The Objectives of Sentence

- [15] The paramount sentencing objectives are denunciation, general and specific deterrence, separation from society, and finally rehabilitation because, as the Crown points out, successful rehabilitation is the best way of protecting the public. Ultimately, the sentence I impose must be one that is proportionate to the gravity of the offence committed by Ms. Forner and her degree of moral culpability.

The Mitigating Factors

1. Ms. Forner pled guilty after a preliminary hearing, but well before the trial. Her guilty plea spared Ms. Rinas from having to testify and relive these events at trial, albeit it did not spare her from testifying at the preliminary hearing.

2. I accept that Ms. Forner is remorseful for her actions.
 3. Ms. Forner has some insight into her offending behaviour and has expressed some willingness to consent to both a treatment and medication condition.
 4. Ms. Forner has used her time wisely in custody. She has taken 21 courses while in custody. A number of them relate to substance abuse. She is also attending AA on a regular basis and, by all accounts, she is a model prisoner and doing well, certainly better than she did at the facility she was released to on bail which was not a positive experience.
 5. Although Ms. Forner has had some setbacks in her life, including failed relationships and an inability to conceive, I would not, as counsel has characterized her upbringing or life, as tragic. Her problems are not unlike others who do not resort to crime. Her upbringing is not mitigating.
 6. Mental illness, in order for mental illness to be considered a mitigating factor, its nature and effects must be proven under s. 724 and not just alleged. The offender must show a causal link between the illness and the criminal conduct. The illness must be an underlying reason for the improper conduct. In this case, the professionals have not identified any underlying mental illness beyond depression, nor have they drawn a link between her depression and her offending behaviour.
- [16] However, Ms. Forner's actions are sufficiently bizarre and out of character that both counsel in their submissions refer to mental illness as being a contributing factor, something beyond the severe alcohol abuse disorder recognized by the experts. Essentially they say, and I agree, people just do not do what Ms. Forner did because they are drunk. I accept that there may have been some type of mental health issue at play that was exacerbated by her consumption of alcohol and prescription medication.
- [17] The troubling part is that we do not know specifically what that or those issues were, nor can we say that they have been addressed through treatment. In this regard, her mental health is both mitigating and aggravating.

[Emphasis added.]

[23] Then, at the end of his list of aggravating factors following para 17, the judge included these:

9. Criminal record. Ms. Forner has a criminal record, albeit a minor criminal record, but a record that demonstrates a serious struggle with being able to comply with court orders.
10. Consumption of alcohol and non-prescription drugs. Addiction can be essential in assessing the accused's moral culpability, the likelihood of rehabilitation, and the risk of recidivism. Past failures to take advantage of treatment and counselling programs can be an aggravating factor.

[24] The judge went on to say:

- [18] In Ms. Forner's case, she has been convicted on more than one occasion of crimes associated to her consumption of alcohol and has had the benefit of multiple probation orders. She was in a serious car accident while impaired, yet none of this inspired her to change or gain control of her addiction issues. This incident is not the first time that it has been brought home to Ms. Forner that she does not do well when she consumes alcohol.
- [19] Ms. Forner has long known the negative effects of alcohol on her actions and her behaviours. She commented in the report that she would often ask people the next day whether she had anything to apologize for from her drinking the night before. She was also aware of the harmful effects of combining her medication with alcohol. She said it was like pouring gasoline on fire. Because of her conscious decision not to deal with her alcoholism, Ms. Forner must accept a high degree of responsibility for her actions that were influenced by her consumption of alcohol.
- [20] Although both dealing with consumption of drugs and not alcohol, the following cases are instructive on assessing blame when it comes to addiction and violence. In *R. v. Hamlyn*, 2016 ABCA 127, the Alberta Court of Appeal commented that the accused was convicted of assaulting a co-worker. At the time of the assault, he had been using synthetic marihuana despite knowing that it made him paranoid and delusional. The Alberta Court of Appeal observed that this reckless behaviour equated to an extremely high degree of personal responsibility or moral blameworthiness.
- [21] In *R. v. Newton*, 2016 BCSC 1440, the court held that the fact that the accused made a conscious decision to embark on the use of mind-altering drugs which carried a high risk of "inducing behaviour out of their conscious or rational control" must understand that they will be held accountable for the harm they do to others while they are intoxicated or in an altered state. The court went on to say the accused's state of extreme intoxication by illegal drugs was an aggravating factor. It said he knew he had an addiction problem, but turned down any help.
- [22] Ms. Forner's consumption of alcohol and prescription drugs was highly reckless and irresponsible and endangered the welfare of Ms. Rinas and her children and is an aggravating factor.
- [Emphasis added.]
- [25] The question here is whether, in the highly unusual circumstances of this case, the judge erred in principle by considering the appellant's mental health to be an aggravating factor as well as a mitigating factor, and by focusing on her consumption of alcohol as a significant aggravating factor. In my view, he did so err.

[26] The impact of mental health and addiction issues on moral culpability is a complicated question. This Court provided helpful guidance in *R v Badhesa*, 2019 BCCA 70, a decision that appears not to have been brought to the sentencing judge's attention. There, as here, the Court had to consider the relevance of self-induced intoxication in circumstances where the offender's mental illness (depression) contributed to his or her excessive consumption of alcohol.

[27] In *Badhesa*, this Court observed that self-induced intoxication that leads to violence is typically "the product of intentional risk-taking, which conduct is itself dangerous, irresponsible and blameworthy" (at para 39). That is what the sentencing judge found here. The Court went on to note at para 40, however, that

an offender's volitional and decision-making capacity in connection with self-induced intoxication and related violence may stem, at least in part, from mental illness or other cognitive disability. Depending on the circumstances, both the mental illness and related self-induced intoxication may reduce the offender's moral culpability.

[28] Thus, in *Badhesa*, this Court recognized that mental illness in the form of depression may reduce moral culpability where it indirectly contributed to the commission of the offence. This is in contrast to the statement by the sentencing judge under para 17 that "the offender must show a causal link between the illness and the criminal conduct". If the judge was referring to a direct causal link, I am respectfully of the view that he erred. The link here is indirect but real: depression contributing to alcohol abuse and addiction, together contributing to the offence. In para 16 of his reasons, the judge recognized that a mental health issue was at play "that was exacerbated by her consumption of alcohol and prescription medication", without considering the causal link between them.

[29] In *Badhesa*, this Court noted:

[42] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated. In these circumstances, general deterrence is a less weighty consideration because a mentally ill offender is not an appropriate medium for making an example to others: *R. v. Belcourt*, 2010 ABCA 319 at para. 8. Nor does specific deterrence or severe punishment play a significant role in the determination of a fit sentence. The former is meaningless when an offender is out of touch with reality and the latter may be disproportionate to the offender's degree of responsibility: *R. v. Batisse*, 2009 ONCA 114 at para. 38.

[Emphasis added.]

[30] It follows that the error that the Court found in *Badhesa* is, in my view, the error the judge made here: in assessing the appellant's moral culpability, he failed to consider the extent to which her mental illness (depression) contributed to her excessive consumption of alcohol, a 16-year-long relationship. Instead, while accepting that the appellant's mental health must have been a contributing factor in the offence, he treated it as both mitigating and

aggravating, and then separately treated her consumption of alcohol as a significant aggravating factor, referring to her "conscious decision not to deal with her alcoholism." But the 'consciousness' of that decision diminishes to the extent that it was fuelled by her mental illness.

- [31] An additional aspect was discussed by this Court in *R v Penttila*, 2020 BCCA 63, decided after the sentencing judge's decision in this case. There, the appellant had been sentenced for fraud involving a breach of trust. On appeal, she maintained that the sentencing judge had erred in principle by failing to treat her acknowledged gambling addiction as a mitigating circumstance.
- [32] In dismissing the appeal, this Court emphasized at para 68 the importance of considering whether an offender has a medically recognized disorder and, if so, whether that disorder caused or contributed to the commission of the offence. Consequently, it rejected a line of authority applied by the sentencing judge that stood for the proposition that a diagnosed gambling disorder can never amount to a mitigating circumstance. Justice Fitch, for the Court, observed that a more nuanced and flexible approach is required. In that case, however, Fitch JA concluded that the error in principle did not have a material impact on the sentence. This was based largely on the evidence accepted by the sentencing judge that the offender was not significantly impaired in her behaviour while the offence was ongoing, but was well able to control her addiction. In our case, the appellant's inability to control her addiction in the face of her depression was clear, and yet her failure in this regard was treated as an aggravating factor.
- [33] In doing so, the sentencing judge relied on two decisions that he considered (at para 20) "instructive on assessing blame when it comes to addiction and violence": *R v Hamlyn*, 2016 ABCA 127, and *R v Newton*, 2016 BCSC 1440.
- [34] In *Hamlyn*, the Alberta Court of Appeal allowed a Crown appeal from a suspended sentence plus a three-year probation order in a case where the offender, while under the influence of synthetic marijuana, attacked a co-worker from behind with a screwdriver. The victim suffered two puncture wounds to the back of his neck and eight puncture wounds to his head, right nostril and cheek. The offender then fled the scene in a stolen company truck. When located by police, he claimed that he had been set up, and "they" were trying to kill him.
- [35] After noting that the gravity of the offence was "indisputably extremely serious, the conduct life-endangering" (para 11), the court went on to discuss the offender's degree of responsibility:

- [13] At the time of these offences, Hamlyn was using synthetic marijuana at his employer's worksite, because he believed that synthetic marijuana could not be detected during employment drug-testing. He continued to use synthetic marijuana to the date of these offences, despite his specific knowledge that synthetic marijuana made him paranoid, and delusional.
- [14] We find this reckless behaviour to equate to an extremely high degree of personal responsibility or moral blameworthiness.
- [36] But then, when outlining the offender's personal circumstances, the court noted the offender's evidence that he did not attend addictions counselling because he did not believe such would be of benefit to him "as he was able to quit using substances when he wanted to" (para 17), and that "if he had known that using synthetic marijuana would have [led] him down the path that it did, he would have chosen not to use the substance." (para 18). No such evidence was forthcoming from the appellant in our case. Here, the appellant's inability to control her alcohol abuse disorder was clear.
- [37] Newton was a manslaughter case. At para 54, Justice Holmes (as she then was) said this:
- It is extremely important that people who embark on the use of mind-altering drugs which carry high risks of inducing behaviour out of their conscious or rational control understand that they will be held accountable for harm they do to others while they are in the intoxicated or altered state. The lure of the drugs can be strong from the start, and the addiction is hugely powerful once it has set in. The Court's message, through its sentence, must therefore be strong.
- [38] I observe, first, that both Hamlyn and Newton involved drug-induced states of psychosis with no evidence of pre-existing or contributing mental health issues. I observe, second, that in both cases, the use of drugs "which carry high risks" of violent behaviour, led to violent attacks. That was not a feature of Ms. Forner's 16-year-long alcohol abuse disorder.
- [39] The problem then becomes an evidentiary one. As this Court recognized in *Badhesa*:
- [43] Cases involving mental illness and intoxication in combination are, of course, intensely fact-driven. Detailed and specific medical evidence is essential to a proper understanding of their relationship in a particular case, if any, as well as their impact on the offender's moral culpability. Generalizations are insufficient: [*R. v. Friesen*, 2016 MBCA 50] at para. 25. In our view, insofar as possible, taking into account all of the relevant evidence, a sentencing judge should strive to determine the extent to which an offender's mental illness contributed to the offending conduct, including any contribution to his or her self-induced intoxication: *R. v. Ellis*, 2013 ONCA 739 at para. 116; *Friesen* at paras. 22-32.
- [40] Here, as quoted above, the sentencing judge commented on the need to prove the nature and effects of mental illness, rather than merely allege them. But he went on to accept that there was a mental health issue at play, though he could not say specifically what the issue was.

- [41] In this, he seemed to expect (given the bizarreness of the incident) a diagnosis different from what was before him: a history of depression and associated alcohol abuse and dependency. But as the sentencing judge observed at para 16, "People just do not do what Ms. Forner did because they are drunk". Nevertheless, in paras 18-19, where he considered the negative effects of alcohol on the appellant's actions and behaviours, the judge took no account at all of the role of Ms. Forner's mental health.
- [42] While Dr. Kreklewetz's description was indeed based in part on the appellant's self-reporting, the previous diagnoses and hospitalizations for depression, not to mention suicide attempts, were very real. The reported combined effect of the appellant's depression, her alcohol abuse ("self-medication") and her history of endometriosis on her psychological/emotional health could not be ignored in the context of this offence. As the Manitoba Court of Appeal observed in Friesen at para 32, the conduct of the offender at the time of the offence may itself suggest the necessary nexus.
- [43] In my view, while the evidentiary record was less extensive than one might wish (one must bear in mind the resources available to the offender), when taken together with the positions of counsel, it clearly established, on a balance of probabilities, a nexus between the appellant's long history of depression and her long history of alcohol addiction, and the contribution of both to her behaviour at the time of the offence. In these circumstances, I am satisfied that the judge erred in principle in treating the offender's mental illness as both mitigating and aggravating, and in treating her addiction as a significantly aggravating factor. In doing so, he failed to grapple with the extent to which her moral culpability was diminished by the relationship between the mental illness and the alcohol abuse.

3.3 Did the error in principle impact the sentence?

- [44] I am also satisfied that this error in principle had an impact on the sentence imposed. But for the error, the weighing of mitigating factors and aggravating factors would of necessity have been different, and would have led to a different balancing of the paramount sentencing objectives employed by the sentencing judge. As it was, this balancing was based upon a higher level of moral culpability than principle permitted, given the evidence.
- [45] The question then becomes whether the sentence was thereby rendered unfit. In my view, it was. I say this notwithstanding that the judge purported to reduce the custodial sentence to take into account the fact that he was imposing a banishment clause in the probation order, which term, as we shall see, I consider to be unsustainable. The obvious implication is that, but for the banishment clause, the custodial sentence would have been at least nine months longer. But in my view, even without the banishment clause, the sentence as imposed was unfit.

- [46] I have already discussed the issue of reduced moral culpability. There is another significant factor in common between this case and *Badhesa*. In neither did the offender have a record of violent behaviour. In both cases, the behaviour that gave rise to the conviction had no precedent. But unlike *Badhesa*, which was a case of manslaughter, the appellant caused no physical injury.
- [47] As I see it, the absence of any history of violent behaviour, and the lack of any physical harm in this case (or in any previous incident), are factors of considerable significance in assessing the future risk that arises from the history of substance abuse, as well as the overall fitness of the sentence.

3.4 What is the appropriate custodial sentence?

- [48] The judge referred in his reasons to the lack of cases with similar features to the appellant's. He noted that both counsel agreed that there were none directly on point to be found. Before us, neither counsel relied on other cases to demonstrate an appropriate range. Nevertheless, it can be seen that cases involving breaking and entering where the custodial sentences are in the range of three years, like this one, tend to involve violence and injury: see, for instance, *R v Ayotte*, 2014 YKTC 21 (assault, robbery, break and enter, etc., 4 years); *R v KSC*, 2015 BCPC 199 (addiction and mental health issues; break and enter, assault of wife and son, history of domestic violence, high risk of recidivism, 37.5 months); and *R v Fisher*, 2016 BCPC 39 (break and enter, assault and aggravated assault, disguise/wear mask, etc., 44 months).
- [49] *Hamlyn* is also instructive. In that case, as noted, the sentencing judge had imposed a suspended sentence with a probation order. The offence (aggravated assault) carried a maximum sentence of 14 years, and in this case encompassed a life-endangering physical attack that caused significant injury to the victim as described above. In overturning the suspended sentence, the court said this:
- [33] The failure to impose a custodial sentence does not reflect the gravity of the circumstances of *Hamlyn's* offence or his degree of responsibility or moral blameworthiness. Again "proportionality is the sine qua non of a just sanction": *R v Ipeelee*, 2012 SCC 13 at para 37, [2012] 1 SCR 433.
- [34] Although *Hamlyn's* post-sentencing pro-social behaviour is laudable, a primarily rehabilitative sentence is not sufficient societal censure, or punishment, for his violent aggravated assault of the victim. Being a law-abiding citizen is not exceptional: [*R v Arcand*, 2010 ABCA 363], at paras 132-136.
- [35] As was said in *R v K (JC)*, 2013 ABCA 50 at para 31: "The unhappy duty of the Courts on occasion is to impose sentences that may seem harsh for the individual, but are driven by the need to reflect the degree of injury to our common values as well as to the victim of the offence." This is one such occasion. Accordingly, we allow the Crown's appeal.

[36] Having regard to the totality of sentencing objectives, including parity and proportionality, having considered the offender's relative youth and guilty pleas, plus his apparent genuine remorse and his post-offence and pre and post-sentencing rehabilitation efforts, together with his individual circumstances, we impose a custodial sentence of 21 months, and grant a credit of eight months for that portion of the probationary period already served, leaving 13 months to serve.

[Emphasis added.]

[50] Turning to the present case, again having regard to:

- the totality of sentencing objectives,
- an appropriate weighing of the offender's moral culpability considering the role her mental illness and addiction played in the circumstances of the offence,
- her genuine remorse,
- her post-offence rehabilitation efforts,
- the lack of any record of violent behaviour, and
- the absence of physical injury,

I consider that a proportional sentence would be 20 months, or 605 days, reduced by 495 days being the enhanced credit for pre-sentence time served. The resulting net sentence is 110 days.

[51] I now turn to consider the term of the probation order banishing the appellant from a 50 km radius of Osoyoos.

3.5 Is the banishment term sustainable?

[52] In deciding to impose the term, the sentencing judge said this:

[24] If I do impose a probation order, the Crown has asked that I consider either banishing Ms. Forner from Osoyoos entirely or place an area restriction on her. Ms. Forner's current residence, as I indicated, is only 120 metres from Ms. Rinas' residence. Banishment conditions are rare. In most cases, it is fundamentally wrong to foist one community's problem onto another. However, such a condition will be fit if it is reasonable and desirable for protecting society and facilitating the reintegration of the offender into the community.

[25] The purpose of such a term is to remove the offender from the place where she habitually gets into trouble or associates with or where she has threatened or terrorized a particular individual. Banishment orders cannot be penal such that their sole purpose is to promote deterrence or denunciation. Instead, they can be an effective tool to manage risk for a victim.

- [26] In *R. v. Felix*, 2002 NWTSC 63, the appellate court upheld a banishment order where the accused had a serious record for spousal violence and was on probation when he committed the most recent assault. The court recognized that since both parties lived in a small northern community, it would have been impossible to prevent future encounters with the victim unless the offender lived elsewhere.
- [27] Ms. Rinas has expressed concerns about Ms. Forner potentially exacting revenge on her for complaining to the police. This is not an uncommon reaction, albeit there is no evidence to support the concern at this point. However, it remains somewhat unclear what motivated the attack and there is nothing to suggest that the root cause has been adequately addressed. Furthermore, given the chilling nature of the attack, one can assume that Ms. Rinas would not be able to live her life nor allow her kids to live life to the fullest if she knew that Ms. Forner was allowed to return to Osoyoos. The town is simply too small.
- [28] Ms. Forner argues that she needs to return to Osoyoos because she cannot afford to live anywhere else and her support network, her roommate, and her mother live in Osoyoos. However, she has not had contact with her mother since being charged and little is known about her roommate. What we do know is that neither of these individuals were successful if, in fact, they even tried curtailing Ms. Forner's serious addiction to alcohol over the last 16 years. Her brother, who was supportive and attended some of the appearances, tragically passed away earlier this week and I am, as I indicated, sorry for your loss, Ms. Forner.
- [29] Ms. Rinas' and her children's safety, however, both physically and psychologically, outweigh Ms. Forner's need to remain in Osoyoos and the possible disruption that will flow from any removal.
- [53] The question is, having recognized that banishment terms are rare and, in most cases, "fundamentally wrong", did the judge err by concluding that this case falls into the category of rare cases warranting such a term? In my view, he did.
- [54] Probation conditions, which are authorized by section 732.1(3)(h) of the Criminal Code, are discretionary. The discretion is undoubtedly very broad, but it is not unlimited. In *R v Shoker*, 2006 SCC 44 at para 13, Charron J described the limits in this way:
- before a condition can be imposed, it must be "reasonable" in the circumstances and must be ordered for the purpose of protecting society and facilitating the particular offender's successful reintegration into the community. Reasonable conditions will generally be linked to the particular offences but need not be. What is required is a nexus between the offender, the protection of the community and his reintegration into the community.
- [55] In *R v Etifier*, 2009 BCCA 292, this Court ordered the deletion of a condition that prohibited the offender from being found in the city of Penticton. As the offender did not reside in Penticton, the Court observed that he did not face the sort of hardship faced by an offender who is forced to live outside his or her community of ordinary residence, like the appellant in our case. But, as the Court observed at para 16, it was also not a case

like most of the cases cited by the Crown, where an order has been made for the purpose of removing the accused from a place where he habitually gets into trouble, or where he has repeatedly threatened or terrorized particular individuals.

[56] Justice Groberman, for the Court, agreed with the observations of the Saskatchewan Court of Appeal in *R v Malboeuf* (1982), 68 CCC (2d) 544 at 546-7. There, the Court commented upon the undesirability of one community seeking to rid itself of undesirables by foisting them off on other communities, concluding that, "Broadly speaking, judicial banishment decrees should not be encouraged."

[57] Justice Groberman went on to note that there was no reason, on the materials before the Court, to believe that the offender would be rehabilitated more completely or more quickly by staying away from Penticton, or that society would be safer or more secure. Accordingly, there was no principled basis upon which the sentencing judge could have exercised his discretion to impose the condition.

[58] In my view, there was likewise no principled basis in this case for the imposition of such a condition.

[59] Here, unlike the offender in *Etifier*, the appellant does face the hardship of being forced to live outside her community of ordinary residence, and given her vulnerable situation, away from what family support network she has. The sentencing judge did not address in what way the banishment condition would facilitate her rehabilitation. On the record, there is every reason to believe that, far from facilitating her rehabilitation, the condition would hinder it.

[60] On the other hand, like the situation in *Etifier*, there is also no reason to believe that the condition would render society safer or more secure. There is no history of similar acts against either the victim personally, or persons in Osoyoos generally. Accordingly, this was not a case like *Felix*, relied on by the sentencing judge, where the accused had a significant record of spousal violence, and was on probation at the time of the most recent assault. Here, one can readily understand why the victim would prefer not to have to risk running into the appellant. The fact nevertheless remains that other conditions already protect the victim, barring the appellant from any direct or indirect contact or communication with the victim or her immediate family, and from going to any residence, school, or workplace of the victim or members of her immediate family. Consequently, the safety of the victim and her children has been addressed.

[61] It follows that the necessary nexus among the offender, her reintegration into the community, and the protection of the community, was missing. In these circumstances, it cannot be described as reasonable, and I would delete the condition.

4.0 DISPOSITION

[62] I would allow the appeal. I consider that the sentencing judge erred in principle in a manner that impacted the sentence he imposed. The result was a disproportionate sentence that failed to take proper account of the impact of the appellant's addiction and mental health issues on her moral culpability, as well as the absence of any history of violent acts. I would reduce the sentence to 20 months' imprisonment, less time served. I would also remove from the probation order the term preventing the appellant from being within 50 km of Osoyoos, BC. I would not otherwise interfere with the terms of probation.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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