

CANADA / JUDGMENT

R. v. Francis

2024 BCSC 1740

COURT

Supreme Court of British Columbia

DECIDED

13 September 2024

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2024 BCSC 1740 R. v. Francis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Francis,

2024 BCSC 1740

Date: 20240913

Docket: 89081-2

Registry: Nanaimo

Rex

v.

Carl Michael Francis

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Before: The Honourable Madam Justice Forth

Oral Reasons for Sentence

Counsel for the Crown:

J. Simpson

Counsel for the Accused:

C. Hodson

Place and Date of Hearing:

Nanaimo, B.C.

September 12, 2024

Place and Date of Judgment:

Nanaimo, B.C.

September 13, 2024

INTRODUCTION

- [1] Following an eight-day trial, a jury convicted Carl Michael Francis of the following three offences: unlawful confinement contrary to s. 279(2) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], sexual assault causing bodily harm contrary to s. 272(1)(c) of the Code, and assault causing bodily harm contrary to s. 267(b) of the Code. The jury found Mr. Francis not guilty of the offence of overcoming resistance contrary to s. 246(a) of the Code.
- [2] It falls to me to find the facts and impose a fit sentence that is proportionate to the circumstances of the offences, including their gravity, and the circumstances of the offender, including Mr. Francis' degree of moral responsibility.
- [3] The Crown seeks a total custodial sentence for all three offences in the range of five-and-a-half to seven-and-a half years, accompanied by the following ancillary orders: a Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA] order for 20 years; a DNA sample; a mandatory firearms prohibition; and no contact with P.A. while the offender is in custody.
- [4] Mr. Francis has been in custody since July 24, 2024. As of the date of sentencing submissions, that amounted to 51 days. As of today's date that amounts to 52 days. I infer from Mr. Francis' pre-sentence detention that he has lost eligibility for parole or early release. Credit at a rate of 1.5 days for every day served is thus appropriate: *R. v. Summers*, 2014 SCC 26 at paras. 70-80. In addition, Mr. Francis spent time in custody prior to his conviction amounting to two days. Mr. Francis will accordingly receive credit for 54 days, with an enhanced credit of 81 days.
- [5] The defence seeks a concurrent sentence of four years' imprisonment for all three offences and the defence takes no issue with the ancillary orders sought by the Crown.
- [6] Given that this was a jury trial, I must begin by determining the material facts required for sentencing following the principles set out in *R. v. Ferguson*, 2008 SCC 6 at paras. 16-18.

- [7] First, s. 724(2)(a) of the Code directs that I must "accept as proven all facts, express or implied, that are essential to the jury's verdict". This means that I must identify any relevant factual determinations the jury has made by examining what facts were essential to the jury's verdict, and then apply those facts when sentencing the offender.
- [8] Second, s. 724(2)(b) of the Code directs that I may "find any other relevant fact that was disclosed by evidence at the trial to be proven ". This involves engaging in my own independent fact-finding exercise. As the Supreme Court of Canada noted in *Ferguson* at para. 18, "when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts".
- [9] Pursuant to s. 724(3)(e) of the Code, insofar as I may find aggravating facts which are not expressed or implicit in the jury's reasoning, I must be satisfied that those facts have been proven beyond a reasonable doubt.
- [10] Pursuant to s. 724(3)(d) of the Code, insofar as I may find facts that are relevant to the determination of the sentence other than aggravating factors, I need only be satisfied of them on a balance of probabilities. This category of facts includes mitigating facts.

CIRCUMSTANCES OF THE OFFENCES

- [11] The main issue at trial turned on credibility. In order to find Mr. Francis guilty of the three offences, the jury had to reject Mr. Francis' evidence where it differed with P.A.'s evidence, accept P.A.'s evidence, and be satisfied beyond a reasonable doubt that the Crown established the essential elements of the offences.
- [12] To the extent that there is ambiguity about the facts, I am satisfied beyond a reasonable doubt that the incidences of assault that P.A. described occurred, including that she was slammed and tossed to the ground, slapped, and choked on multiple occasions, and that she suffered the physical injuries that she and the forensic nurse examiner, Janet Hildebrand, testified to. On the sexual assault, I am satisfied beyond a reasonable doubt that Mr. Francis penetrated P.A. with his penis, without her consent and, as a result of the sexual assault, P.A. suffered bodily harm. In respect of the unlawful confinement, I find that P.A. felt she could not leave the tent area because of Mr. Francis' actions, and that those actions resulted in the unlawful confinement of P.A. for some period of time on June 14, 2021.
- [13] In addition, the following findings should be accepted as proven and form the essential facts on which sentencing is based.
- [14] P.A. and Mr. Francis met on the streets. The precise length of time they were together is in dispute. At the time they met, P.A. had left a hospital after having a psychiatric assessment for a distressed mental state. P.A. was a vulnerable 19-year-old who suffered from a number of significant mental health issues. She was not a regular user of illicit drugs.

- [15] After meeting Mr. Francis, he supplied P.A. with methamphetamines on a daily basis. They spent some time living in a tent in Bowen Park.
- [16] On June 14, 2021, P.A. was assaulted when she woke up. Mr. Francis took her by the shirt, slammed her to the ground, tossed her across the tent, and slapped her once across her face. Mr. Francis choked her in different ways, using his hands over her face, placing both hands around her neck, and using his arm around her neck. She was choked until she almost passed out. Then he would stop. She would force her body to go limp so he would stop earlier. Later in the day when she tried to leave, he tackled her and covered her face. She had difficulty breathing.
- [17] Photographs taken of the injuries suffered by P.A. when she was taken to the hospital in the evening of June 14, 2021 depict extensive bruising and other injuries. Of particular significance were the "red flags" of strangulation, being petechiae, that Nurse Hildebrand noted on P.A.'s face, neck, and chest. In addition, Nurse Hildebrand identified a mark behind P.A.'s right ear, known as a "battle sign", which is a "red flag" that often shows up when someone has been strangled. A red-blue bruise measuring 8.5 cm was also visible on P.A.'s left upper neck, as well as deep purple bruising on her mid-neck area, and a reddened area measuring 7 cm on her left neck.
- [18] The sexual assault happened on the early morning of June 14, 2021, after some of the physical assaults took place. Mr. Francis had gone outside of the tent to listen to some music and likely, use meth. P.A. felt she was unable to move and Mr. Francis re-entered the tent. While she was lying on her stomach, he penetrated her with his penis, and only stopped when he was done. She testified as to how it hurt when he penetrated her. Both the ambulance attendant and Nurse Hildebrand documented P.A.'s distressed state following these events.
- [19] During June 14, 2021, P.A. felt she could not leave the tent area because she was afraid that if she did, Mr. Francis would see her and become angry. She was worried he would kill her. Some time after being sexually assaulted, she attempted to leave by running away from the tent. Mr. Francis pursued her and she fell to the ground. Mr. Francis convinced her to return to the tent and lie down. She laid down outside of the tent. Later, when she tried to leave again by running into the ravine, Mr. Francis followed and tackled her. She eventually convinced him to call 911.

Impact on Victim

- [20] The Crown read a victim impact statement, prepared by P.A., at the sentencing hearing. The assaults and sexual assault were deeply traumatizing and she experiences ongoing fear, flashbacks, nightmares, and jaw pain. In addition, she has endured feelings of hopelessness and shame, and in her words "loss beyond repair". She struggles to trust people to engage in emotional and/or physical intimacy. Certain areas of Nanaimo will trigger emotional distress or fear. She required treatment for her physical and psychological injuries.

- [21] I am satisfied that this crime has had a significant negative impact on P.A.'s physical and psychological integrity.
- [22] The Crown made an inquiry pursuant to s. 726.3 of the Code and P.A. confirmed that she wishes to receive information regarding the sentence.

CIRCUMSTANCES OF THE OFFENDER

- [23] Mr. Francis is 36 years old. He grew up in a small town in Saskatchewan and was raised by his mother. He describes having a good relationship with his mother. He claims he never met his father. He has two half brothers with whom he has no relationship.
- [24] During childhood, Mr. Francis was physically abused by his stepfather and his older half-brother. Ultimately, his mother left his stepfather because of the abuse. His mother remarried when he was 15 years old and he has a good relationship with his second stepfather.
- [25] He dropped out of school in grade 11 and left home at age 17 to work. His mother reports that he struggled in school. Mr. Francis was diagnosed in elementary school with Oppositional Defiance Disorder. His mother believes that Mr. Francis may have undiagnosed Autism or Asperger's. Mr. Francis does not agree he suffers from such.
- [26] When Mr. Francis was seven years old he was hit by a truck and sustained a head injury and broken collarbone.
- [27] In his early adult years, he was kidnapped, held hostage, and severely beaten.
- [28] He has worked a variety of jobs in the construction and service industries. Since his return to Nanaimo approximately five years ago, he has been unemployed. He receives social assistance.
- [29] Mr. Francis has two children from two different mothers. He does not see his children but he hopes to be a part of his children's lives in the future.
- [30] Mr. Francis is a methamphetamine addict. He says he started using drugs regularly about four years ago in Nanaimo to cope with the stress and difficulties of being homeless. He says he is able to control his addiction by using only twice a day. He uses meth to help him focus, wind down, and stay level.
- [31] He has been unhoused for several years. For the past four years, he has been living in Bowen Park in a tent. He spends his days wandering the streets, socializing with others and, in his words, just "chillin".
- [32] After he met P.A., he learned of her mental health challenges. He was aware that she had a history of self-harming by cutting herself and knew that she had never lived on the street before.

Criminal Record

[33] Mr. Francis does not have an extensive criminal record. In Moose Jaw, he was found guilty of causing a disturbance contrary to s. 175(1) of the Code, and three failures to appear. On February 12, 2019 he was given a conditional discharge and six months of probation. On June 20, 2023, he pled guilty to failing to attend the preliminary inquiry in this proceeding and for a breach of a release order. He received a suspended sentence and 12 months' probation.

Offender's Attitude Towards the Offences and Efforts Toward Rehabilitation

[34] Mr. Francis maintains that the sexual intercourse was consensual. He denies that he assaulted P.A., or caused her any injury. His denial flies in the face of P.A.'s evidence, as well as the objective evidence of the extensive bruising on P.A.'s body, and the "red flags" of strangulation identified by Nurse Hildebrand.

[35] Mr. Francis expressed no remorse for his actions and the harm he caused P.A. It is not clear to me whether he is open to attending and benefiting from programs to assist in his rehabilitation.

[36] It is clear to me that Mr. Francis has no understanding of the need to obtain consent when engaging in sexual activities. His repeated comment to the arresting officer that: "you can't rape your girlfriend" is indicative of his lack of insight.

SENTENCING PARAMETERS AND RANGE FOR EACH OFFENCE

Unlawful Confinement

[37] Unlawful confinement is an indictable offence punishable by a maximum sentence of ten years. There is no minimum sentence.

[38] The sentencing range for unlawful confinement is infinite: R. v. Handule, 2023 BCSC 1031 at para. 72; R. v. Tse, 2010 BCSC 1273 at para. 115. This is because of "the myriad of circumstances in which the offence may arise, the personal characteristics of the offender, the nature and length of the confinement and its purpose": Handule at para. 57, citing Tse at para. 115.

Sexual Assault Causing Bodily Harm

[39] Sexual assault causing bodily harm is an indictable offence, punishable by a maximum sentence of fourteen years. In the circumstances of this case, there is no minimum sentence.

[40] The sentencing range for sexual assault involving intercourse is two to six years: R. v. G.M., 2015 BCCA 165 at para. 22; R. v. B.S.B., 2010 BCCA 40 at para. 6; R. v. Pouce Coupe, 2014 BCCA 255 at para. 31; R. v. M.K.M., 2024 BCSC 575 at para. 48.

- [41] In *R. v. A.J.K.*, 2022 ONCA 487 at para. 68, the Ontario Court of Appeal clarified that the approximate range of sentence for sexual assault involving forced penetration is three to five years, regardless of whether the accused and the complainant were strangers or in some sort of relationship. The Court explained:
- [73] A sexual assault involving forced penetration is a sexual assault involving forced penetration. An act of sexual violence perpetrated on a stranger to the accused is not necessarily worse than a similar act of sexual violence perpetrated on an intimate or former intimate partner. Any suggestion to the contrary could only rest on unacceptable myths and stereotypes, ones that a fair justice system must continuously confront and eradicate .
- [74] All sexual assaults are serious acts of violence. They reflect the wrongful exploitation of the victim whose personal autonomy, sexual integrity, and dignity is harmfully impacted while being treated as nothing more than an object. Whether intimate partners or strangers, victims of sexual violence suffer profound emotional and physical harm and their lives can be forever altered. So too can the lives of their loved ones.
- [75] As the years pass, enlightenment on the implications of sexual violence continues to permeate our conscious minds. In *Friesen*, the court noted, at para. 118, that "our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened" and, I would add, is continuing to deepen: see also *R. v. Goldfinch*, 2019 SCC 38, [2019] 3 S.C.R. 3, at para. 37. As Moldaver J. stated in *R. v. Barton*, 2019 SCC 33, [2019] 2 S.C.R. 579, at para. 1: "Without a doubt, eliminating sexual violence against women is one of the more pressing challenges we face as a society" and "we can - and must - do better" (emphasis in original). This comment encapsulates why these sentencing ranges as they have come to be understood must be reconciled.
- [76] There is no justifiable reason for why sexually assaulting an intimate or former intimate partner is any less serious than sexually assaulting a stranger. The fact is that a pre-existing relationship between the accused and complainant places them in a position of trust that can only be seen as an aggravating factor on sentencing: Criminal Code, R.S.C. 1985, c. C-46, s. 718.2(a)(ii). Therefore, , the sexual assault of an intimate or former intimate partner can actually attract a greater sentence.
- [77] Absent some highly mitigating factor, the forced penetration of another person will typically attract a sentence of at least three years in the penitentiary. While *Bradley* [2008 ONCA 179] and the cases following it suggest that the range is three to five years, this is of course just a range, a quantitative sentencing tool designed to assist busy trial judges with where to start
- [42] The serious nature of sexual assaults was recently commented on by our Court of Appeal in *R. v. Maslehati*, 2024 BCCA 207 at para. 72, where the Court cites the comments made by Justice Fairburn in *A.J.K.* and in *R. v. Merasty*, 2023 SKCA 33 at para. 23: "[no] matter what form it takes, a sexual assault is a forceful subjection of the victim to their assailant's sexual desires" [emphasis in original].

- [43] Sexual assault causing bodily harm has a maximum sentence of fourteen years, which is higher than the ten-year maximum for sexual assault. Insofar as maximum sentences reflect the objective gravity of an offence, it is a more serious offence than sexual assault. A greater objective seriousness should generally be reflected in a higher range of sentence: *R. v. Friesen*, 2020 SCC 9 at paras. 95-97.

Assault Causing Bodily Harm

- [44] Assault causing bodily harm is an indicatable offence punishable by a maximum sentence of ten years. There is no minimum sentence.
- [45] The sentencing range for assault causing bodily harm is wide. In *R. v. Ordway*, 2023 BCSC 1624 at paras. 34-44 [Ordway BSCS], aff'd 2024 BCCA 154 [Ordway BCCA], this Court canvassed sentencing decisions involving assault causing bodily harm, and found the range to be between one to three years.
- [46] In this case, the most serious aspects of the assault and the bodily harm suffered by P.A. relate to the incidences of choking. In *R v. Menezes*, 2024 BCSC 448 at para. 71, Justice Ross cited *R. v. Drews*, 2022 ABKB 658, for the proposition that "choking is deemed to be a serious offence that frequently commands a significant period of incarceration". I adopt this proposition. However, I note that this case is distinct from *Menezes* insofar as the Crown did not charge Mr. Francis with assault by choking, which is a separate offence under s. 267(c) of the Code.
- [47] In *Ordway BCCA*, the Court of Appeal upheld a sentencing decision in which the trial judge found that the appropriate sentencing range for similar cases of assault causing bodily harm is between one and three years of incarceration.

Sentencing Ranges Are Only Guides

- [48] The sentencing ranges described above serve only as a guide for the application of the relevant principles and objectives of sentencing. Ultimately, a sentence must be proportionate to the particular circumstances of the offence, including its objective seriousness (as suggested by the maximum penalty and the sentencing range), its subjective seriousness (the particular circumstances in which it was committed), and the circumstances of the offender: s. 718.1 of the Code; *Friesen* at paras. 37-38, 96-97, 111-114.

PRINCIPLES AND OBJECTIVES OF SENTENCING

- [49] The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond any mathematical calculation. Many courts have recognized that imposing a just and proportionate sentence in serious cases, such as this one, is one of the most challenging responsibilities of a judge. It involves a careful balancing of several factors, in the context of a particular set of circumstances, and a particular offender. This balancing process must occur within the legislative framework and be informed by common law

principles. That framework is set out in s. 718 of the Code.

- [50] Section 718 of the Code provides that the fundamental purpose of sentencing is "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions". To achieve this purpose, a judge must impose a sentence that, among other things:
- (a) denounces the unlawful conduct;
 - (b) deters the offender and other persons from committing further offences;
 - (c) separates the offender from society, where necessary;
 - (d) assists in the rehabilitation of the offender;
 - (e) provides reparations for harm done to victims and to the community; and
 - (f) promotes a sense of responsibility in the offender and acknowledges the harm done to the victims and to the community.
- [51] Absent exceptional or unique circumstances, it is incumbent on the sentencing judge to give primacy to deterrence and denunciation when imposing a sentence for a serious sexual assault: G.M. at paras. 17-18.
- [52] Section 718.1 of the Code provides that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender". An offender should not be punished more than is just and appropriate in the circumstances: R. v. Nasogaluak, 2010 SCC 6 at paras. 40, 42. Further, s. 718.2(d) of the Code provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances".
- [53] As discussed further below in these reasons, the sentence should be "similar to sentences imposed on similar offenders for similar offences committed in similar circumstances": s. 718.2(b) of the Code.
- [54] The principle of restraint, long part of our common law, is also partly codified in s. 718.2(e) of the Code. Restraint is a principle of particular salience in the sentencing of a first time offender: R. v. Batisse, 2009 ONCA 114 at paras. 32-35. I believe that an aspect of this principle is that we must not lose sight of the fact that an offender is more than his offending conduct. They are also "an individual with strengths, weaknesses, and potential, who will be returned to the community after serving their sentence": R. v. Katsnelson, 2010 ONSC 2246 at para. 37.

APPLICATION OF THE LEGAL PRINCIPLES

Moral Blameworthiness

[55] The relevant factors engaged in the assessment of an offender's moral blameworthiness were recently discussed by the Court of Appeal in *R. v. C.K.*, 2023 BCCA 468. At para. 71, Justice DeWitt-Van Oosten held that the assessment of an offender's personal responsibility must involve consideration of their state of mind and acts at the time of the offence.

Relevant factors include but are not limited to:

- the level of planning and/or intentionality brought to the crime;
- the degree, nature and extent of the offender's personal participation in the offence;
- the means or method by which the crime was committed;
- the motive or reasons for the offender's participation;
- the offender's awareness of the legal and moral wrongfulness of their conduct;
- their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and
- their persistence in perpetrating the offence despite that awareness.

[56] Upon consideration of these factors, I find that Mr. Francis has a high degree of moral responsibility for the offences for which he was convicted. He took a very vulnerable young woman, supplied her with drugs, isolated her in a tent in a park, and physically and sexually abused her. The forcible sexual intercourse was for his own sexual gratification. He did not care what pain or distress he inflicted on P.A. He choked her repeatedly and with enough force to leave bruises and rupture blood vessels in her face. He should have been aware of the legal and moral wrongfulness of his acts and for the potential of immediate and long-term physical and psychological harm to P.A.

Aggravating and Mitigating Factors

[57] Section 718.2 of the Code stipulates that, when imposing a sentence, the Court should take into consideration any relevant aggravating or mitigating circumstances related to the offence and increase or decrease the sentence accordingly.

Aggravating Factors

[58] I find that the following aggravating factors exist in this case:

- a. the offences were a serious and violent attack and a violation of P.A.'s sexual, emotional, and physical well-being;
- b. Mr. Francis took advantage of her incapacity, which he caused, when he sexually assaulted her;

- c. P.A. was a very young and vulnerable person who was violently attacked in a tent which she considered her home;
- d. the abuse took place while P.A. was Mr. Francis' "girlfriend", and he stood in a position of trust, which are statutorily aggravating factors pursuant to ss. 718.2(a)(ii) and (iii) of the Code; and
- e. P.A. suffered significant injuries and impacts from the assaults, which is a statutorily aggravating factor pursuant to s. 718.2(a)(iii.1).

Mitigating Factors

[59] Mr. Francis has a very minor criminal record. Of note, this conviction is his first for violent crimes. He continues to have the support from his mother. I also note that he suffered a difficult childhood and received a number of serious injuries in a car accident and as a result of being assaulted.

Parity

[60] The principle of parity is codified in s. 718.2(b) of the Code and provides that similar offences committed by similar offenders in similar circumstances should receive similar sentences. In *R. v. Dias*, 2024 BCSC 431, Justice MacNaughton commented on the principle of parity, stating:

[82] Parity introduces a level of objectivity and rationality to sentencing. However, it is often difficult to achieve in practice, because sentencing is an individualized process and no two cases are exactly alike, and every offender is an individual with a unique background and personal circumstances.

[61] There is inherent tension between the principle of parity and individualized sentencing, but in *R. v. Parranto*, 2021 SCC 46 at paras. 11-12, the Supreme Court of Canada explained that both are integral to the overarching principle of proportionality. Ultimately, the total sentence must be proportionate to the gravity of the offence, the offender's degree of responsibility, and the unique circumstances of each case: *Parranto* at para. 12. In this case, the cumulative sentence I impose must be sufficient to reflect the inherent harmfulness of Mr. Francis' violent assaults and degrading sexual assault.

Crown Cases

[62] The Crown submits that appropriate sentences would be:

- i. Sexual assault causing bodily harm: 48-60 months
- ii. Assault causing bodily harm: 24-30 months
- iii. Unlawful confinement: 18-24 months

- [63] The Crown submits that the sentences should be consecutive to each other. Applying the principle of totality, the Crown argues a custodial sentence of five-and-a-half to seven-and-a-half years is a fit sentence. The Crown directed me to several cases involving assaults, sexual assaults causing bodily harm and unlawful confinement.
- [64] In *R. v. Razak*, 2019 BCSC 1677, the accused was convicted for sexually assaulting, choking, threatening, robbing, and confining the victim in a local park in Vancouver. He choked her and forced her to perform various sexual acts including unprotected intercourse. He did not have a criminal record at the time of the offences. The victim suffered abrasions and bruising, as well as an injury to her neck and a laceration on her external genitals. The accused was sentenced to four-and-a-half years' imprisonment.
- [65] In *R. v. Nystrom*, 2023 BCCA 232, the accused was charged with three counts of sexual assault under s. 271 of the Code. The assaults included digital, vaginal, and anal penetration. The victim suffered cut knees and a scrape on her face. The victim was 14 at the time, five years younger than the accused. Both the victim and the accused were unhoused. The accused had no criminal record. He was sentenced to three-and-a-half years' imprisonment.
- [66] In *R v. Jajja*, 2022 BCSC 467, the accused was sentenced to three years' imprisonment for a sexual assault where the complainant had blacked out and had no memory of the offence.
- [67] In *Ordway*, the accused confined the victim in her own home and assaulted her multiple times, causing bruising and burn marks: *Ordway BCSC* at para. 4. The sentencing judge sentenced the accused to 18 months' imprisonment for assault causing bodily harm followed by an 18-month probationary term. On appeal, the Court held that the Crown's position that this sentence was "restrained" was an understatement, and noted that a fit sentence in that case "could well have been twice that" (*Ordway BCCA* at para. 39).
- [68] In *R v. Armstrong*, 2021 BCSC 2377, the accused was sentenced to one year in jail for unlawful confinement after he broke into his former partner's home and attacked her with a box-cutter like object, causing grievous injury.

Defence Cases

- [69] The defence submits that appropriate sentences would be:
- i. Sexual assault causing bodily harm: 48 months
 - ii. Assault causing bodily harm: 24 months concurrent
 - iii. Unlawful confinement: 18 months concurrent
- [70] The defence directed me to several cases in support of a sentence of four years' imprisonment.
- [71] In *R. v. Reddemann*, 2017 BCSC 1731, the accused pled guilty to offences arising from separate attacks against two sex trade workers. He had an extensive criminal record, which included recent convictions for violent offences. However, the Court noted a number of

mitigating factors including that he had plead guilty, he demonstrated remorse for the offences, indicated he was willing to engage in treatment, and experienced a difficult time in pre-sentencing custody including being assaulted, resulting in the loss of vision in one eye. He was sentenced to four years' imprisonment for sexual assault with a weapon against one victim and four years' imprisonment for sexual assault causing bodily harm against the other victim, to be served consecutively.

- [72] In *R. v. Latreille*, 2009 BCSC 1892, the accused pled guilty to a prolonged violent attack against a sex trade worker, involving choking. The accused punched the victim in the back of the head, punched and kneed her in the face, and choked her to the point of blackout. He also forced her to remove her clothes and engage in vaginal, anal, and oral sex. In addition to the mitigating factor of the guilty plea, the accused also agreed to participate in a sexual offender treatment program. The accused had a youth record containing convictions for an assault and assault causing bodily harm. He was sentenced to five years' imprisonment for the one count of sexual assault causing bodily harm.
- [73] In *R v. R.L.W.*, 2011 BCSC 1363, the Indigenous accused was convicted of possession of child pornography, sexual assault causing bodily harm, and uttering threats against a domestic partner. He was also sentenced for three breaches of his judicial interim release. On the night the victim attempted to end the relationship, the accused threatened to kill her, sexually assaulted her anally, forced her to perform fellatio, bit her breasts, and forced her to view images of child pornography. He was sentenced to six years and seven months' imprisonment as follows:
- 18 months' imprisonment for possession of child pornography;
 - Five years' consecutive imprisonment for sexual assault causing bodily harm;
 - Three months' concurrent imprisonment for uttering threats; and
 - Seven days, 10 days, and 14 days in jail for each of the three judicial interim release breaches.
- [74] The sentence in *R.L.W.* was upheld on appeal: *R. v. R.L.W.*, 2013 BCCA 50.
- [75] In *R. v. Heppner*, 2017 BCSC 2433, the Indigenous accused was convicted of aggravated sexual assault and choking with intent to enable the indictable offence of sexual assault. The victim was assaulted, choked and sexually assaulted and suffered significant bruising to her face and neck, ligatures on her neck, a fractured jaw, and loose teeth. The accused had a youth and adult criminal record, the latter of which included convictions for significant assaults, including one with an offence date after the index matter. He was sentenced to six years' imprisonment for each offence to be served concurrently.
- [76] The defence also cites *Razak*, which was relied upon by the Crown and summarized earlier in these reasons.

DETERMINING THE APPROPRIATE SENTENCE

- [77] It is my responsibility to determine an appropriate sentence for Mr. Francis that is fit and proper in the circumstances. In doing so, I have considered all of the cases put before me by the parties.
- [78] I accept that the primary sentencing considerations are general deterrence and denunciation. In this case, P.A., a vulnerable teenager, ended up in a tent with Mr. Francis. He supplied her with illicit drugs. He was aware of her mental health challenges but, instead of helping her, he violently physically and sexually assaulted her.
- [79] The choking and suffocating acts are serious. By attempting to cut off her oxygen, Mr. Francis could have caused P.A. serious personal injury. As P.A. described in her trial evidence, Mr. Francis strangled her to the point where she began to lose consciousness. She went limp so he would stop earlier. These events must have been terrifying for P.A.
- [80] P.A. was seriously injured when she was admitted to hospital. Nurse Hildebrand's evidence is particularly striking. Out of the 280 plus sexual assault examinations Nurse Hildebrand has carried out in her career, she had a strong memory of this case because of the volume of P.A.'s injuries.
- [81] Mr. Francis' acts seriously violated P.A.'s sexual and physical integrity and well-being. The impact on P.A. is significant and continues to have a profound impact on her both physically and psychologically.
- [82] Since the accused has been convicted of three offences, I will first determine the appropriate sentence for each offence, and then decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, I will then determine whether the sentence, as a whole, is unduly harsh or disproportionate, and whether the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence: R. v. Li, 2009 BCCA 85 at para. 28; R. v. Anderson, 2020 BCCA 297 at para. 90.
- [83] Based on the sentencing principles and the case law I have summarized, I find the appropriate sentence for each of the offences is as follows:
1. Count 1 - unlawful confinement: 18 months' imprisonment
 2. Count 2 - sexual assault causing bodily harm: four-and-a-half years' imprisonment
 3. Count 3 - assault causing bodily harm: two-and-a-half years' imprisonment

Concurrent vs. Consecutive Determination

- [84] In 2015, Parliament amended s. 718.3(4) of the Code, which deals with cumulative punishments generally. Section 718.3(4)(b) provides that where a judge is imposing a custodial sentence for more than one offence at the same time, they may make the sentence on one offence consecutive to another, including when:
- i. the offences do not arise out of the same event or series of events,
 - ii. one of the offences was committed while the accused was on judicial interim release, including pending the determination of an appeal, or
 - iii. one of the offences was committed while the accused was fleeing from a peace officer.
- [85] The test for determining if concurrent or consecutive sentences are appropriate is "whether the acts constituting the offence were part of a linked series of acts within a single endeavor": *R. v. Robertson*, 2020 BCCA 65 at para. 90, citing *R. v. G.P.W.*, [1998] B.C.J. No. 835 at para. 35, 106 B.C.A.C. 239 (C.A.). Whether the offences arise out of the same event or series of events is a fact-specific exercise: *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 95. Some of the factors the court may consider in reaching this determination are: "the nature and quality of the criminal acts; the temporal and special dimensions of the offences; the nature of the harm caused to the community or to victims; the manner in which the criminal acts were perpetrated; and the offenders' role in the crimes": *Robertson* at para. 90, citing *R. v. Potts*, 2011 BCCA 9 at para. 89.
- [86] However, notwithstanding a finding that the offences are sufficiently linked, the sentencing judge retains broad discretion to order the sentences be served consecutively where the offences constitute invasions into different legally protected interests: *Bertrand Marchand* at para. 97; *Anderson* at paras. 80-83.
- [87] Where sentences are imposed consecutively, the judge must provide reasons for doing so: *Bertrand Marchand* at para. 98.
- [88] In determining the appropriate sentence to be imposed on Mr. Francis, it is clear to me that the assault and sexual assault offences were committed during one series of events, albeit separated briefly temporally. While each offence is serious in its own respect, I do not find that they constitute invasions of different legally protected interests such that they should be served consecutively. Both offences involve violations of an individual's bodily integrity and autonomy. Accordingly, I find that the custodial sentences for assault and sexual assault should be served concurrently.
- [89] In contrast, the unlawful confinement took place over a lengthier period of time, under different circumstances, namely outside of the tent, and one of the occurrences took place many hours later when Mr. Francis tackled P.A. as she tried to escape. For these reasons, the sentence for the unlawful confinement should be served consecutively.

Totality Determination

- [90] Section 718.2(c) of the Code codified the totality principle and provides that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh".
- [91] The purpose of the totality principle is to ensure that where a sentencing judge imposes consecutive sentences for multiple offences, the cumulative sentence does not exceed the overall culpability of the offender: *R. v. Berry*, 2014 BCCA 7 at paras. 55-56; *R. v. Nelson*, 2018 BCCA 161 at para. 27.
- [92] As the sentencing judge, I must ensure that the sentence to be served is "just" and "appropriate". The total sentence calculated is six years. I do not find that this is an unduly harsh and lengthy sentence given the high moral blameworthiness of Mr. Francis' actions. In my view, this is a fit sentence considering the violent nature of the assaults, the significant physical danger Mr. Francis created by choking P.A. multiple times, and his complete lack of any remorse for his actions. He appears to have no appreciation for the harm he caused P.A. I find that the global six-year sentence is just and appropriate in the circumstances and should not be reduced.
- [93] I am hopeful that Mr. Francis will be able to complete rehabilitative programs while in custody and address his addiction issues. If he does, I hope that once he has completed his sentence he can return to society as a responsible contributing member and hopefully reconnect with his children.

THE SENTENCE

- [94] As required by s. 719(3.3) of the Code, I must set out the sentence that would have been imposed for each count before giving any credit for any time spent in custody. Once I have done so, I will state the amount of time for pre-trial custody to be credited to you and set out the sentence to be imposed after such credit is applied.
- [95] Mr. Francis would you please stand.
- [96] I sentence you to imprisonment for a period of six years before consideration of credit for time served. The sentences imposed are: four-and-a-half years for the sexual assault causing bodily harm and two-and-a-half years for the assault causing bodily harm, to be served concurrently. I sentence you to 18 months for the unlawful confinement to be served consecutively. You are entitled to an enhanced credit of 81 days served. The remaining sentence you must serve is five years, 9 months and 9 days in jail. You may be seated.
- [97] The credit for time served will be applied against the sentence for the sexual assault causing bodily harm.
- [98] I also impose the following ancillary orders.

- [99] Sexual assault causing bodily harm is a primary designated offence. Pursuant to s. 487.051(1) of the Code, I authorize the taking of samples of bodily substances from you. The samples will be taken from you while you are in custody and you must submit to the taking of the samples.
- [100] Pursuant to ss. 490.012(3) and 490.013(2)(b) of the Code you are required to comply with the SOIRA for 20 years.
- [101] Pursuant to s. 109 of the Code, you are prohibited from possessing:
- any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance for a period of ten years after your release from prison, and
 - any prohibited firearm or restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
- [102] Pursuant to s. 743.21(1) of the Code, you are to have no contact with P.A. while in custody.
- [103] In light of your history of unemployment, unhoused status, and lengthy sentence of incarceration, I will waive the victim surcharge. I note the Crown agreed this was appropriate in the circumstances.
- [104] Finally, pursuant to s. 743.2 of the Code, I direct the Court Services Branch forward a copy of these reasons to the Correctional Service of Canada.

"Forth J."

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Prepared on 29 October 2026 · Esheria