

CANADA / JUDGMENT

R. v. Johnson

2025 BCSC 1591

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2025 BCSC 1591 R. v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Johnson,

2025 BCSC 1591

Date: 20250710

Docket: 187392-1

Registry: Victoria

Rex

v.

Christopher Sura Johnson

Before: The Honourable Justice Morley

Oral Reasons for Judgment

(Sentencing)

Counsel for the Crown:

T. P. Stokes

Counsel for the Accused:

R. C. Neary

Place and Date of Hearing:

Victoria, B.C.

July 4 and 10, 2025

Place and Date of Judgment:

Victoria, B.C.

July 10, 2025

Table of Contents

I. introduction.. 3

II. Overview.. 3

III. circumstances of the offence. 5

A. Victim and Community Impact 7

B. Findings Regarding Section 718.2(a)(i) of the Code. 8

IV. Circumstances of the Offender.. 12

A. Findings About Mr. Johnson's Mental Health. 14

V. Legal Principles. 15

A. Mental Illness and Consequent Substance Use 17

B. Offence as Attack on Freedom to Protest 18

C. Considerations About Fitness of Conditional Sentence. 21

D. Aggravating and mitigating factors. 22

E. Offence-specific Provisions and Sentencing Range. 23

VI. Conclusion.. 25

VII. Mandatory and discretionary Ancillary Orders. 26

VIII. conclusion.. 26

I. introduction

- [1] When I gave these reasons orally, I reserved the right to edit a written version for errors, omissions and clarity. I have made edits within those parameters. The result is the same and so is the basis for it.

II. Overview

- [2] Christopher Sura Johnson is guilty of one count of assault with a weapon and one count of dangerous driving, arising out of an incident on December 3, 2023, when Mr. Johnson drove his vehicle suddenly towards Omar Babili, requiring Mr. Babili to run out of the way. Mr.

Johnson did this because he responded angrily when Mr. Babili, while participating in a peaceful protest at the Legislature, waved a Palestinian flag and shouted, "Free Palestine!" In November, I found that Mr. Johnson did not intend to actually hit Mr. Babili, but did intend to scare him, thus committing assault with a weapon (namely, his car), as well as dangerous driving.

- [3] The Crown asks for a penitentiary sentence of 3.5 to 4 years incarceration for the assault with a weapon charge and a concurrent sentence of 18 months to 2 years for dangerous driving. The Defence asks for a 2-year conditional sentence order, one year of which would be served under house arrest.
- [4] Section 718 of the Criminal Code tells us that the fundamental purpose of sentencing is to protect society and contribute to the respect for law and the maintenance of a just, peaceful and safe society. We do this by imposing just sanctions that serve one or more of the "objectives of sentencing" -- denunciation, deterrence, separation of offenders from society, rehabilitation, reparation of the community and promotion of a sense of responsibility and acknowledgment of the harm that they have done to their victims and to the community.
- [5] It is a mark of a just, peaceful and safe society that everyone has the right to gather together in protest of the actions or inaction of their government, however much that message may anger those who disagree with it. According to s. 2(c) of the Charter, this is a "fundamental freedom". While the Charter only protects us from government, the reality is that this fundamental freedom can also be threatened by individual violence by those enraged by a message they do not want to hear. The community is rightly worried that our ability to peacefully differ about questions of fundamental importance is being diminished by an increasingly angry public sphere in which the objective is to "destroy" opponents, rather than reason with them. Mr. Johnson's violent act of chasing a peaceful protester with his car because he does not agree that Canadians should sympathize with Palestinians threatens the very possibility of peaceful resolution of our differences. It therefore calls both for denunciation and for a punishment that will deter others from acting likewise.
- [6] Another mark of a just, peaceful and safe society is that no one would be concerned for their personal security because of who they are or what they believe. Unfortunately, Canada has long been plagued with hatred of, and bias against, both Muslims and Arabs. Along with the scourge of anti-Semitism, Islamophobia has increased as a result of the deep divisions within Canadian society about whether the actions of the Israeli Defence Force in Gaza since October 2023 are largely self-defence or a series of war crimes, possibly genocide. The impact of Mr. Johnson's act on Mr. Babili cannot be detached from the impact Islamophobia has had on his life. Moreover, because of that Islamophobia, the attack has had an impact on the overlapping-but-distinct groups of Muslims, Arabs and people of Middle Eastern background throughout our community. This too calls for denunciation and general deterrence.

- [7] At the same time, Mr. Johnson's situation raises another issue of broad public concern, one which points in the direction of the importance of rehabilitation. Mr. Johnson, I find, has undiagnosed and untreated mental health problems that seriously diminish his ability to regulate his anger. This makes him dangerous to society, but it is also a condition beyond his own control. If he realizes this problem and addresses it, he could be a productive citizen. He is a good worker and has wide interests. In the past, he had a serious substance abuse problem, which has had negative effects on his brain. He overcame this in the sense of achieving years of sobriety, with one relapse. But drugs are not the only thing he has been addicted to. He has also been addicted to anger. Mr. Johnson has just begun to get insight into his mental health problems, and they are still not really understood. Only he can really address these problems. But society has to help him to do so, both so he can have a better life, but also to protect itself, and his ability to address his dependence on drugs, once he seriously tried to do so, give some hope that he can do the same with his dependence on rage.
- [8] For the reasons I am going to set out, I do not think a conditional sentence order would adequately address the need for denunciation and general deterrence in this case. But I also think that a penitentiary sentence would ignore rehabilitative objectives and would be disproportionate. I am going to order 1 year imprisonment, with credit for pre-sentence custody, for the assault with a weapon charge and 6 months, to be served concurrently, for dangerous driving. On release, Mr. Johnson will serve a 3-year probation term, during which it will be critical that he addresses his anger and untreated mental illness.

III. circumstances of the offence

- [9] Both counts for which Mr. Johnson has been found guilty arise out of an incident around 2:15 p.m. on December 3, 2023, in which Mr. Johnson's car almost hit the complainant, Omar Babili. The incident occurred at the west entrance to the front driveway of the B.C. Legislature at the intersection of Menzies and Quebec streets.
- [10] That afternoon, Mr. Johnson was driving his vehicle westbound on Belleville Street, near the Legislature, when he noticed a rally protesting the actions of the Israeli Government and Israeli Defence Force in the Gaza Strip after the attack by Hamas and allied militias on Israeli civilians on October 7, 2023. This angered Mr. Johnson. After he turned onto Menzies Street, he stopped in the middle of the street and started yelling at rally participants. He used juvenile and degrading language, including referring to "Phallus-stine", which compares Palestine to male genitalia.
- [11] Mr. Babili was a marshal for the rally and was wearing a reflective vest. He came within Mr. Johnson's field of vision to see what was going on with Mr. Johnson's yelling. They briefly had eye contact. Mr. Babili waved a Palestinian flag and said, "Free Palestine!"

- [12] Mr. Johnson then executed a sharp, sudden and unexpected left turn into the driveway where Mr. Babili was standing. Mr. Babili ran out of the way. Mr. Johnson turned further towards Mr. Babili as Mr. Babili was trying to get out of the way. If Mr. Babili had not run, on the trajectory Mr. Johnson was on, he would have been hit by Mr. Johnson's car. However, Mr. Babili was physically unharmed.
- [13] In the guilt phase of this trial, I found that the Crown had proven beyond a reasonable doubt that Mr. Johnson intended to intimidate Mr. Babili by making him think he would be hit by the car, although I also found that Mr. Johnson's testimony that he did not actually intend to hit Mr. Babili raised a reasonable doubt. So I did not find that Mr. Johnson actually intended to hit Mr. Babili. However, a threat of applying force with a car is an assault with a weapon, as I explained. It is also dangerous driving.
- [14] When Mr. Johnson got out of the car, he went "toe to toe" with another rally participant, one he had been yelling at prior to driving his car towards Mr. Babili, Ali Abou Said. He continued his yelling at Mr. Abou Said. Among the things he yelled was "Go back to Jordan."
- [15] Constable Ross of the Legislative Assembly Protective Services intervened between Mr. Johnson and Mr. Abou Said. Mr. Johnson yelled that the participants in the rally of being a "terrorist organization" (or perhaps "terrorist organizations"). He then pointed to the spot where his car had almost hit Mr. Babili and stated:

Did you see what I did just there? That is what you're [or possibly, "they're] doing to Jews all the time.

- [16] As I found in the guilt phase of the trial, the only reasonable inference from the fact that he was comparing his own action to what he would certainly consider to be terrorism against Israelis was that Mr. Johnson was asserting a political objective to his driving his car towards Mr. Babili. He was, in effect, admitting that he had deliberately tried to scare a pro-Palestine protester by driving a car at him in order to make a political point, certainly knowing that this would have the effect of sowing fear among opponents of what Israel was doing in Gaza.

A. Victim and Community Impact

- [17] Anyone would experience trauma from having a car apparently try to hit them. What Mr. Babili makes clear in his victim impact statement, is that his experience on December 3, 2023 cannot be dissociated from his lifelong experience of hatred of Arabs and Muslims in North America.
- [18] Mr. Babili is a 26-year-old engineering student, of Muslim faith, and of Arab background. He says that as a younger person, he saw and experienced violent Islamophobia "across the border" (presumably in the United States). He came to Canada to seek better safety "as a Muslim and a human being". This was shaken by Mr. Johnson's assault with his car. Mr. Babili has experienced post-traumatic symptoms.

- [19] Mr. Babili also points to the context of a peaceful protest being targeted for violence because of what it was protesting. Mr. Babili acknowledges the support of the local Indigenous community.
- [20] In addition to the individual statement from Mr. Babili, a community impact statement was submitted on behalf of Victoria's Muslim community. It was signed by Shawn Ullah, the Government Relations Officer for the National Council of Canadian Muslims; Asad Gondal, president of the British Columbia Muslim Association; Bushar Alqudaryi, community programs officer with the Ministry of Social Development and Poverty Reduction; Yahya Odatallah, the president of the Muslim Student Association at UVic; Asiyah Igobkoyi, a policy analyst with the Multiculturalism and Anti-Racism Branch of the Ministry of Attorney General; Zaheera Jinnah, also of UVic; Gulsen Cok, a Spiritual Care provider; Tala Abdukhalek and Mr. Abou Said.
- [21] The Community Impact Statement says the incident has "left a profound impact on the entire Muslim community here in Victoria, as well as across the nation." It states that the incident installed "a sense of fear and apprehension among us, as we now live in constant fear of attending peaceful gatherings and expressing our grief during this difficult time."

B. Findings Regarding Section 718.2(a)(i) of the Code

- [22] Section 718.2(a)(i) of the Criminal Code makes it an aggravating factor if there is "evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor." When I get to the analysis of aggravating factors, I will address the interpretative issues relating to this section, in particular whether "any other similar factor" includes targeting people for their peacefully-expressed political opinions. At this stage of setting out the circumstances of the offence, I will confine myself to making factual findings.
- [23] I found in the guilt phase of the trial that Mr. Babili was targeted because he was in a demonstration that was protesting the Israeli government and Israeli Defence Force's actions in Gaza and because he held up a Palestinian flag and said, "Free Palestine!". There is no doubt that expressing these views was what triggered Mr. Johnson's anger.
- [24] I take judicial notice of the fact that Canadian society is characterized by a widespread prejudice or bias that can be conveniently labelled "Islamophobia". As a prejudice, Islamophobia does not necessarily distinguish between Arabs, people of Middle Eastern or South Asian national origin, and Muslims, even though these are overlapping-but-distinct groups of people. It tends to associate Muslims, Islam, Middle Easterners and Arabs in a blanket way with "terrorism" and "danger", and it denies that their lives are as valuable as those of "Westerners" or people of Judeo-Christian religious background.

- [25] Islamophobia is logically distinct from anti-Arab racism, but distinguishing them in practice is more difficult. There is a Palestinian Christian minority and people of many faiths and none throughout the Arab-speaking world. The majority of the world's Muslims are not Arab. But what matters for a prejudice is not the reality, but what is in the imagination of the people manifesting the prejudice, and in that imaginary reality, Muslims, Arabs and people of Middle Eastern background are conflated.
- [26] In this sense, a Christian Palestinian or a Sikh can be the target of Islamophobia, and, at least arguably, a Muslim from Kosovo or Albania sometimes will not be, although in other contexts, they will. Taken together, as they should be, anti-Arab racism and Islamophobia are a form of bias, prejudice or hatred based on race, national or ethnic origin and religion.
- [27] I take judicial notice of the fact that while Islamophobia has been present in Canada since colonial times, it was exacerbated by the events of September 11, 2001, and that it, along with anti-Semitism, tends to become more virulent when conflicts between Israel and Palestinians become more prominent in the news. Certainly, the end of 2023 was a time in which the reality and fear of Islamophobia and anti-Arab racism were at very high points. Mr. Babili and the Community Impact Statement both speak eloquently to the fear of Islamophobic and anti-Arab racist violence that existed then and continues now.
- [28] With respect to whether these offences were motivated by Islamophobia and anti-Arab racism, because this is an aggravating factor, the onus is on the Crown to establish this fact beyond a reasonable doubt. I accept that it is sufficient for the Crown to prove that the offence was motivated in part by such bias, prejudice or hatred: *R. v. Vrdoljak*, [2002] O.J. No. 1332 at para. 5; *R. v. Bethune and Seerve*, 2022 BCPC 243 at para. 73.
- [29] Mr. Johnson made Islamophobic or racist statements:
- a) When he first started yelling at some protesters, he, in a juvenile and insulting way, used a phrase ("Phallus-stine") associating Palestine with male genitalia.
 - b) He referred to peaceful protesters as "terrorists".
 - c) In his testimony, he claimed he knew Mr. Babili could get away because what he referred to as "these people" are "soccer players". In addition to being a rationalization for his assault, that is a racial stereotype.
- [30] The Crown points out that Mr. Johnson, when arguing with Mr. Abou Said, used the phrase, "Go back to Jordan." It is of course a classically racist statement to tell a person to "go back" to a country the person making the statement believes they are from. (In fact, although of course Mr. Johnson would not know this, Mr. Abou Said grew up in Lebanon.) However, in context, I think Mr. Johnson meant something different, and was expressing a political opinion about the Israel-Palestine conflict.
- [31] The videos reveal that Mr. Johnson said the following:

They [in context, presumably Israelis] have every right to that land. From the River to the Sea, eh? That's what they [in context, Palestinians and their supporters] said since '48."

[32] Mr. Abou Said, responded, "And?"

[33] Mr. Johnson said the following:

So when are you going to get the fucking reality? Go back to Jordan.

[34] In context, I believe it is probable that Mr. Johnson was expressing a belief, common among people who support settlement of the West Bank and deny that the expulsion of Palestinian refugees from what is now Israel in the aftermath of the 1948 war was morally problematic, that Palestinian Arabs are not really native to Israel (and perhaps not to the West Bank and Gaza), or, at minimum, do not have a distinct national identity, and should go "back" to Jordan and other Arab states.

[35] I want to emphasize that this belief that pre-1948 Mandate Palestine was a "land without a people" is not historically correct, as has been shown by numerous Israeli historians, among others. But it is a belief about a matter of historical and political controversy, and is distinct from a nativist Canadian telling an individual here to go back to their (presumed) country of origin.

[36] I find that while Mr. Johnson did exhibit biases against Muslims, Palestinians and Arabs in the course of his various diatribes, he was motivated, not by the fact Mr. Babili was Arab or Muslim, but by the fact that he supported the cause of "Free Palestine!" I find no reason to doubt that if a person who was clearly not of Arab ethnic extraction, or who did not fit a visible stereotype of a Muslim, had waved the same flag, it would have triggered Mr. Johnson just as much, and would have been just as likely to lead to his attempt to intimidate. While it is plausible that Mr. Johnson was motivated in part by his demonstrated racism and Islamophobia, both with respect to being so triggered and in deciding to target Mr. Babili in particular, since proof of an aggravating factor is on a "beyond a reasonable doubt" standard, mere plausibility is not enough.

[37] It is fair to label sufficiently intense hostility to the pro-Palestinian cause that it leads to a violent and potentially life-threatening assault on a peaceful protester, "violent pro-Israel extremism", just as we would label a similar assault on peaceful pro-Israel protesters "violent pro-Palestinian extremism". There is no doubt that Mr. Johnson exhibited violent pro-Israel extremism. I accept that violent pro-Israel extremism is associated with Islamophobia and anti-Arab racism, both in Mr. Johnson's case and in general. However, they are distinct motivations, just as violent anti-Israel extremism would be distinct from, if possibly associated with, anti-Jewish racism.

[38] In saying this, I do not want, in any way, to diminish the understandable fear that the Muslim and Arab communities, in particular, would have when there are acts of violent pro-Israel extremism, a fear that both Mr. Babili and the Community Impact Statement referred to. I imagine that while such a fear would definitely have been spread if a pro-Palestinian

protester who was not of Muslim or Arab background had been targeted, the fact that it was Mr. Babili no doubt made that fear even worse. That is indeed a major part of the harm that Mr. Johnson's actions caused. But since s. 718.2(a)(i) speaks of "motivation" and since the Crown must prove aggravating factors beyond a reasonable doubt, it is a distinction I must make, for the purposes of setting out the circumstances of the offence.

- [39] Whether an attack on a peaceful protester, motivated by bias, prejudice or hate towards their views, is, nonetheless, contrary to s. 718.2(a)(i), or otherwise an aggravating factor, is something I will address later.

IV. Circumstances of the Offender

- [40] Mr. Johnson is a 41-year-old apprentice carpenter. He is known as a good worker. His main family connection at the time of the offence was his mother, with whom he lived with for many years. She has now moved to be with his sister in New Brunswick. He has social connections through his church.
- [41] Mr. Johnson's early family life was described by Dr. Oswald as "chaotic". His father suffered from mental health problems and had a breakdown when Mr. Johnson was seven or eight. He recalled to Dr. Oswald seeing his father crying in the bathroom. His parents separated when he was 18. Mr. Johnson sided with his mother, and has been close to her since, albeit sometimes in a complex relationship.
- [42] Mr. Johnson got involved in drug culture in middle school. He started selling cannabis in grade 8. After he left high school, Mr. Johnson's principal source of income was drug trafficking. He sold powder cocaine, ecstasy and crack cocaine up into his mid-twenties. He was a heavy user during this time period as well. In short, he lived a criminal lifestyle.
- [43] This stage of his life was interrupted when, at the age of 26, Mr. Johnson suffered cardiac arrest and kidney failure as a result of mixing cocaine and Percocet. He attended residential treatment for substance use in 2011.
- [44] Mr. Johnson has a substantial criminal and motor vehicle record. His earliest criminal conviction was in October 2006 for failure to comply with a probation order. In 2009, he was found guilty of a number of offences, including possession of a firearm contrary to an order. In 2010, he received a conditional sentence of 6 months for assault. In 2012, he was convicted of unauthorized use of credit card data.
- [45] Particularly concerning is his conviction in 2013 of a 2010 assault with a weapon, dangerous driving causing bodily harm and failing to stop at the scene of an accident. In that offence, Mr. Johnson deliberately tried to run over his victim. Missing her the first time, he returned and struck her with his car, causing a concussion and a broken leg. He then fled the scene. The 2010 assault occurred after a four-day crack bender. He was sentenced to a three-year term in a federal penitentiary.

- [46] While there, Mr. Johnson did make attempts to straighten out his life. He developed a Christian faith, which has remained important to him. He stopped using drugs, and has remained sober since then, with the exception of a relapse into crack use in 2020, after which he returned to residential treatment.
- [47] However, he did not stop offending. In terms of offences prior to the one for which I am sentencing him today, he committed an assault on September 1, 2017, criminal harassment and breach of release order in September 2022, Mischief Under \$5,000 in September 2023. His post-penitentiary offences seem to be related to rage.
- [48] Mr. Johnson has taken some responsibility for the offence since his conviction. He apologized for infringing on people's freedom to protest in Canada, and said he was deeply sorry and regretful for his actions. He said he wants to find a way to right his wrongs and make a contribution to the community.

A. Findings About Mr. Johnson's Mental Health

- [49] Dr. Tyler Oswald, a Forensic Psychiatrist, submitted a psychiatric presentence report for Mr. Johnson. He reviewed Mr. Johnson's self-reports of paranoid and grandiose ideas, his past psychiatric history, his family psychiatric history, his social history, his criminal history, and his past mental status exams. He spoke to Mr. Johnson's sister and mother.
- [50] Dr. Oswald found that Mr. Johnson's psychiatric history is complicated and does not fit easily within diagnostic categories. He clearly suffered in the past from substance use disorders, which are now in remission.
- [51] Mr. Johnson has been diagnosed with major depressive disorder. He clearly suffers from episodes of emotionally dysregulated and disruptive behaviour. He also has an attraction to paranoid ideas. Dr. Oswald suggested that multiple possible explanations for this behaviour should be considered, including:
- a) The effects of past drug use;
 - b) Antisocial or borderline personality traits;
 - c) Bipolar disorder;
 - d) Schizoaffective disorder;
 - e) Drug-induced mood or psychotic disorder;
 - f) Psychotic depression;
 - g) The sequelae of past drug use.

- [52] Dr. Oswald found it impossible to be confident about Mr. Johnson's diagnosis or prognosis. It is clear, and I find, that he has serious problems regulating his emotions, especially anger. He also appears to have a Manichean worldview, although it is not really clear whether this is just an unusual personality or an actual mental disorder.
- [53] Mr. Johnson showed a number of risk factors for violent offending, and overall Dr. Oswald opined that he has a moderate-to-high risk of engaging in violent behaviour in the near future (6-12 months).
- [54] Mr. Johnson has shown some greater insight into his mental health issues. He has worked consistently with a counsellor, but, in Dr. Oswald's opinion, is underserved given the complexity of his issues. He has been taking anti-depression medication. He is somewhat involved in a church. Legal conditions, such as bail or probation, seem to be somewhat helpful in reducing his propensity to violent or anti-social behaviour ("protective").

V. Legal Principles

- [55] The principal questions before me are the length of an appropriate jail sentence and whether there should be a conditional sentence order, as provided for by s. 742.1 of the Criminal Code.
- [56] The fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions: s. 718.
- [57] The objectives of sentencing are set out in s. 718 of the Code:
- a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct ("denunciation");
 - b) to deter the offender and other persons from committing offences ("deterrence");
 - c) to separate offenders from society, where necessary ("incapacitation");
 - d) to assist in rehabilitating offenders ("rehabilitation");
 - e) to provide reparations for harm done to the victim or the community; and
 - f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- [58] There is a principle that an offender should not be deprived of liberty if less restrictive sanctions are appropriate, and that available sanctions other than imprisonment should be considered if consistent with the harm done to the victims or the community. These are set out in ss. 718.2(d) and 718.2(e). They can together be referred to as the "restraint principle". We should not punish more than is necessary to fulfill the objectives of sentencing. While 718.2(e) states that particular attention should be given to the circumstances of Aboriginal offenders, the restraint principle applies to all offenders.

- [59] The fundamental principle, set out in s. 718.1, is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of the punishment should increase with the seriousness of the consequences of the offence and the moral blameworthiness or culpability of the offender: *R. v. Lacasse*, 2015 SCC 64 at para. 12.
- [60] As explained in *R. v. Parranto*, 2021 SCC 46, two secondary principles, individualization and parity, although apparently contradictory, in fact express this fundamental principle. "Parity" implies that it is important to look at other cases and appellate guidance to ensure that sentences are similar to those imposed on similar offenders for similar offences committed in similar circumstances, as mandated as a consideration by s. 718.2(b) of the Code. The "individualization" principle, on the other hand, recognizes that no two situations are the same. While I should pay heed to the general range of sentences for the offence to encourage greater consistency and to further the parity principle enunciated in s. 718.2(b) of the Code, ultimately regard must be had to all the circumstances of the offence and of the offender and to the needs of the community in which the offence occurred: *R. v. Nasogaluak*, 2010 SCC 6 at paras. 43-44. It is always about the seriousness of the specific offence and the blameworthiness of the specific offender before the court, in this case Mr. Johnson.

A. Mental Illness and Consequent Substance Use

- [61] Mental illness can be highly relevant to the moral culpability of the accused. A sentence should be reduced where the mental illness contributed or caused the commission of the offence or the effect of imprisonment or other penalty would be disproportionately severe because of the offender's mental illness: Clayton C. Ruby, *Sentencing* (6th ed.) (Markham: Butterworths, 2004) at paras. 5.246 and 5.256, as cited in *R. v. Belcourt*, 2010 ABCA 319 at para.8.
- [62] To be sure, this principle that mental illness is a mitigating factor should be applied contextually. When assessing a fit sentence, the judge should attribute a degree of moral culpability to the offender commensurate with the magnitude of the mental illness and its overall role in the commission of the offence: *R. v. Badhesa*, 2019 BCCA 70 at para. 44. This requires "detailed and specific medical evidence": *Badhesa* at para. 43. Just having a mental illness does not necessarily diminish culpability: *R. v. Milne*, 2021 BCCA 166. What matters is whether the mental condition reduces an offender's moral culpability or makes a punishment harsher than it otherwise would be.
- [63] Not all mental illness reduces culpability, either because it was not causative of the conduct or because the way in which it was causative does not diminish moral responsibility. So, for example, the Court of Appeal has denied that a personality disorder, as opposed to a major mental illness like schizophrenia, will normally reduce culpability: *R. v. Sesay*, 2020 BCCA 41 at para. 30.

- [64] As a general rule, however, the importance of deterrence and denunciation is attenuated when sentencing mentally ill offenders: *R. v. Ayorech*, 2012 ABCA 82 at para. 11; *Badhesa* at para. 42 (with respect to general and specific deterrence). "Attenuated" is not, of course, the same as "negated".
- [65] In this case, I find that Mr. Johnson has mitigated culpability when he acts in an irrationally angry way at least in part because he has underlying psychiatric conditions, possibly rooted in past drug use, and possibly in an as-yet undiagnosed condition like bipolar disorder or schizoaffective disorder. By the same token, this lack of regulation of his anger is a large part of what makes Mr. Johnson a risk to society. There is a real prospect that he will engage in violent impulsive behaviour in the future. Mr. Johnson is not suffering from delusions that make it difficult for him to even appreciate what he is doing: rather he has a lack of emotional regulation, and while that mitigates his culpability, it only does so partially, and only if it is combined with his doing everything in his power to address the threat his lack of emotional regulation poses to others.

B. Offence as Attack on Freedom to Protest

- [66] While his underlying mental health orders cut against an emphasis on general deterrence and denunciation, the circumstances of the offence cut in favour of emphasizing these principles.
- [67] While it is true that Mr. Babili was not physically hurt, and I found that it was not Mr. Johnson's intention to physically hurt him, not surprisingly he suffers from the psychological effects of such a traumatic event. In addition to Mr. Babili's personal suffering, I must take into account the impact on the community as a whole, and the part of the community that is of Arab origin, Muslim faith or otherwise sympathizes with the situation of Palestinians, especially in Gaza, in particular.
- [68] Mr. Johnson, as he acknowledged, attacked the basic principle that people in Canada have a right to peacefully protest, including on controversial subjects. He should know the importance of this right, because he participated in protests against what he saw as an overweening state response to the Covid pandemic. By attacking that right, Mr. Johnson struck a blow at Canadian society as a whole by undermining how we address our differences peacefully.
- [69] Moreover, as I have pointed out, Muslim and Arab Canadians live with the consequences of decades of Islamophobia and anti-Arab racism, made worse by international events and by hateful rhetoric on the Internet. A person using a weapon against a peaceful protest is bound to sow fear and could potentially encourage disorder. This kind of violent response to peaceful protest must be deterred and must be denounced.

- [70] As I mentioned earlier, s. 718.2(a)(i) of the Code proscribes, as an aggravating circumstance in sentencing, if the offence was motivated by bias, prejudice or hate based on a number of enumerated factors "or any other similar factor". I have found that Mr. Johnson was motivated by his bias and prejudice -- and arguably even hate -- of the message of the protest. One legal issue that arises is whether peacefully expressed political commitment is a "similar factor" that is also aggravating when it motivates an offence.
- [71] There is not a lot of case law on this question. In *R. v. Mills*, 2019 ONCA 940, the Ontario Court of Appeal found that it was an error to consider a motivation based on hostility to a rival gang to be a "similar factor":
- [258] We agree that the sentencing judge erred in the application of s. 718.2(a)(i). At the time, that section stipulated that where a crime is "motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or any other similar factor" it constitutes an aggravating factor on sentencing. The sentencing judge read "any other similar factor" as encompassing membership in a rival street gang. We do not agree that the phrase can bear that meaning. The ejusdem generis canon of statutory interpretation restricts the meaning of the phrase "any other similar factor" to those factors that are similar to the factors in the enumerated list that proceeds it: Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (St. Paul: Thomson/West, 2012), at pp. 199-213. Section 718.2(a)(i) assigns greater culpability to the commission of crimes motivated not by hatred of any identifiable group, but by hatred of persons or groups based on personal characteristics that are, to a degree, immutable, constitutive, and unchosen. Membership in a street gang is none of these things.
- [72] I agree with the Ontario Court of Appeal that not any identity -- and certainly not membership in a gang -- is akin to race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation and gender identity. I disagree, however, with an overemphasis on the factors of being "immutable" and "unchosen" (to be fair, the Court itself qualified its statement with "to a degree"). Religion, for example, is not immutable, and while it may feel unchosen to some believers, it may not to others. Language, age, and mental or physical disability have always been understood to be mutable, and the immutability and unchosenness of sexual orientation and gender identity are controversial. Some of these identities will be "constitutive" for some and not for others.
- [73] What all these identities have in common is not "immutability" or that they are necessarily constitutive of personal identity, but that it is an important value in Canadian society that we not impose disadvantages on other people based on any of them, including even by doing things that we would otherwise be within our rights to do. It is therefore an aggravating factor if someone commits an offence (something we have no right to do for any reason) motivated by bias, prejudice or hatred based on these factors.

- [74] So one reason that being motivated based on these grounds is aggravating is that it is committing a crime for a motivation forbidden even in civil life. Another reason is that such biases, prejudice and hatred pose special threats to the just, peaceful and safe society that sentencing aims at promoting.
- [75] In my respectful view, the same reasons apply when crimes are motivated by hostility to peacefully-expressed political opinion. We should not impose disadvantages in employment or housing for people's peaceful political opinions, and thus it is an aggravating motivation for a crime. Moreover, an attack on peacefully-expressed political opinion poses unique dangers to a just, peaceful and safe society.
- [76] Further, political opinion is a "similar factor" in the literal sense that opinions on questions of the day, especially questions like the Israel/Palestine conflict are closely bound up with race, colour, national or ethnic origin, and religion. The same could obviously be said of other issues of public interest, like abortion: it is hard to imagine that traditional Roman Catholics, for example, would not feel threatened by an attack on peaceful pro-life protesters.
- [77] As the community impact statement shows, it has a specific impact on the Muslim and Arab community when a peaceful pro-Palestinian demonstrator like Mr. Babili is attacked for exercising his democratic rights. In my view, peacefully expressed political opinion was precisely the sort of thing that Parliament was thinking about when it included the term "any other similar factor".
- [78] If I am wrong about this, I would still find it to be a "common law" aggravating factor to commit an offence with the intention of intimidating people for engaging in a peaceful political protest. It poses a special danger for democracies if citizens respond to perspectives they dislike by engaging in violence, including by threatening protesters with cars. Denunciation and general deterrence must take a higher role than they would in the case of purely personal motivations for offending.

C. Considerations About Fitness of Conditional Sentence

- [79] Conditional sentences are provided for by s. 742.1 of the Code:

If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

- (a) the court is 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 [...]

- [80] The Crown concedes that a conditional sentencing order is available, but say it is not proportionate.

- [81] I note the following guidance from the Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5:
- a) Conditional sentences facilitate the achievement of Parliament's objective of reducing the use of incarceration as a sanction and giving greater prominence to the principles of restorative justice: *Proulx*, paras. 98-99.
 - b) A conditional sentence can achieve both punitive and restorative objectives and where it can do so, a conditional sentence is preferable to incarceration. "Punitive" objectives in this context includes both denunciation and deterrence: *Proulx* at para. 114.
 - c) A corollary of this is that to the extent punitive objectives need to be met, punitive terms should be part of the conditional sentence: *Proulx* at para. 103.
 - d) The principle of proportionality does not presumptively exclude any offences from the conditional sentencing regime (other than those with a mandatory minimum or explicitly excluded by Parliament): *Proulx* at para. 83.
- [82] Conditional sentences can meet the objectives of denunciation and deterrence. The amount of denunciation provided by a conditional sentence will be heavily dependent on the circumstances of the offender, the nature of the conditions imposed and the community in which the sentence is to be served. Longer and more onerous conditions express greater denunciation. There may be certain cases in which the amount of denunciation called for requires incarceration: *Proulx* at para. 106. Similar considerations apply to deterrence: it can be met by the length and onerousness of the conditional sentence, although there will be cases in which only incarceration will have sufficient deterrent effect: *Proulx* at para. 107.
- [83] In applying these principles to the specific issue before me, namely whether a conditional sentence or a penitentiary term of imprisonment is a fit sentence, I must consider specifically whether, in given the circumstances of this offence and of this offender, a conditional sentence will meet the sentencing objectives in play. If it does, I should order it, but if it does not, I should not.

D. Aggravating and mitigating factors

- [84] The Crown asserts the following aggravating factors:
- a) Mr. Johnson's criminal and driving record.
 - b) Mr. Johnson's being motivated by anger.
 - c) Section 718.2(a)(i) of the Criminal Code.
 - d) The emotional impact on Mr. Babili.
- [85] The Crown has certainly established Mr. Johnson's criminal and driving record, and there is no doubt that it is an aggravating factor, particularly the fact that he committed a very similar offence a decade and a half ago.

- [86] I am not sure motivation by anger is specifically aggravating: the impulsive nature of the offence, while not mitigating perhaps, in fact shows lack of deliberation, which would be aggravating.
- [87] With respect to s. 718.2(a)(i), I find the Crown has established beyond a reasonable doubt that the offence was motivated by bias, prejudice or hatred of the cause for which Mr. Babili was peacefully protesting, which I view as aggravating, but not that he was motivated by Mr. Babili's race, ethnic or national origin, or religion, which would be even worse.
- [88] One mitigating factor was undisputed, namely Mr. Johnson's remorse and insight.
- [89] In my view, it is also mitigating that Mr. Johnson's impulsive rage is the product of mental health conditions beyond his control. I give more weight to this because he is obtaining insight into that condition, and that poses a potential for his rehabilitation.

E. Offence-specific Provisions and Sentencing Range

- [90] As explained in Parranto, two secondary principles, individualization and parity, although apparently contradictory, in fact express this fundamental principle of proportionality. "Parity" implies that it is important to look at other cases and appellate guidance to ensure that sentences are similar to those imposed on similar offenders for similar offences committed in similar circumstances, as mandated by s. 718.2(b) of the Code.
- [91] The "individualization" principle, on the other hand, recognizes that no two situations are exactly the same. While I should pay heed to the need for greater consistency, ultimately regard must be had to all the unique circumstances of the offence and of the offender and the needs of the community in which the offence occurred: Nasogaluak at paras. 43-44. Sentencing is always about the seriousness of the specific offence and the blameworthiness of the specific offender before the court: in this case, Mr. Johnson.
- [92] Both sections 267(a) and 320.13(1) carry a maximum sentence of 10 years in jail.
- [93] There does not seem to be a specific sentencing range set for either of the offences. In *R. v. Bosco*, 2016 BCCA 55 at para. 40, the Court of Appeal stated the range of appropriate sentences for dangerous driving is quite broad. The offence of assault with a weapon is more serious than dangerous driving because of the additional element of intent: *R. v. Dawydiuk*, 2010 BCCA 411 at para. 68. As a result, the range of sentences will usually be higher, but it is also broad.
- [94] Only one of the Crown's parity cases seems to me to be on point, although, as is usually the case, there are multiple areas of distinction. In *Dawydiuk*, the offender was convicted of dangerous driving causing bodily harm, assault with a weapon, and hit and run. He had driven his vehicle on the sidewalk with the intention of threatening pedestrians. He then hit one woman, who suffered significant and lasting injury. He had no significant criminal and no driving record. He was roughly the same age as Mr. Johnson. The Court of Appeal upheld the custodial sentence, which was for 12 months for the assault with a weapon, served as

"real jail" rather than in the community, and 6 months, consecutive, for the hit and run.

- [95] By comparison, Mr. Johnson has a significant, and related, criminal record. Moreover, the element of terrorizing people for engaging in their right to protest was not present. On the other hand, Mr. Johnson was not drunk and he did not physically injure Mr. Babili. He also did not try to escape detection or engage in a "hit and run".
- [96] The defence puts forward the case of *R. v. Greiner*, 2021 ONCJ 357. Mr. Grenier used his vehicle as a weapon against police officers in various ways when he was pulled over and boxed in by police. The offender had serious mental health problems, including delusions. He had no prior criminal record.
- [97] While I agree with the defence that Greiner supports the proposition that mental health problems call for a greater emphasis on rehabilitation and less on denunciation and general deterrence than would otherwise be the case, it differs both because of the lack of a record and because of the severity of the mental health problems.
- [98] In *R. v. Biemans*, 2012 BCPC 95, the offender struck a traffic control person's legs with his bumper. He was sentenced to seven days in custody plus probation. That case lacked the aggregating factors present here.
- [99] In *R. v. Munden*, 2021 BCPC 292, also relied on by the defence, the offender deliberately used his motor vehicle to strike the victim on his bicycle and then drove away. The sentencing judge ordered a conditional sentence, relying in part on Mr. Munden's compliance with his bail conditions and lack of any prior offence relating to a breach of condition. Neither of these factors are present here.

VI. Conclusion

- [100] In my view, a conditional sentence would not, in the circumstances, meet the requirements of denunciation and general deterrence. Moreover, I have serious concerns about Mr. Johnson's compliance.
- [101] At the same time, I find that a penitentiary term would be disproportionate to the moral culpability of Mr. Johnson in light of his mental health struggles. I accept that there are serious risks of future impulsive violent action. But I think a penitentiary term would not reflect his remorse and insight or the extent to which his inability to regulate his anger is the product of conditions beyond his control. Risks to society would be better managed by a term in provincial custody followed by probation.

VII. Mandatory and discretionary Ancillary Orders

- [102] A DNA and Weapons Prohibition order are mandatory in the circumstances, and so I will make them.

[103] Given that this is the second time that Mr. Johnson has used his car as a weapon, I think this is an appropriate case to impose the maximum driving prohibition of 10 years, commencing when Mr. Johnson is released from imprisonment.

[104] I agree that there should be a non-communication order with respect to Mr. Babili and Mr. Abou Said. I will make an exemption for an apology letter to Mr. Babili sent through counsel.

VIII. conclusion

[105] Please stand up, Mr. Johnson.

[106] I pronounce the following sentence on you:

- a) On the first count of the indictment, you will serve a period of imprisonment of twelve months, less credit for pre-sentencing time served, calculated as a credit of 1.5 days for each day served.
- b) On the second count of the indictment, you will serve a period of imprisonment of 30 days, to be served concurrently with your term of imprisonment on the first count.
- c) On the completion of your period of imprisonment for the first count of the indictment, you will have a three-year term of probation with the following conditions.
 - i. You must keep the peace and be of good behaviour.
 - ii. You must appear before the Court when required to do so by the Court.
 - iii. You must have no contact or communication with Omar Babili or Ali Abou Said.
 - iv. You must report to a probation office within 48 hours of release from conditional sentence. Unless you obtain written approval to attend a different probation office, you must attend the Victoria Community Corrections office at 836 Courtney Street. After that you must report as directed by your probation officer.
 - v. On first reporting, you must provide your probation officer with your legal name and your address.
 - vi. You must notify your probation officer in advance of any change of name or address.
 - vii. You must attend, participate in and complete any intake, assessment, counselling or treatment program relating to substance use, anger management, and sensitivity to religious diversity, as directed by your probation officer.
 - viii. If you are expelled or remove yourself from a treatment program, you must report this in person to your probation officer on the next business day.
- d) There will be an order prohibiting you from possessing any firearm, any crossbow, restricted weapon, ammunition or explosive substance for life.

- e) There will be an order in Form 5.03 authorizing the taking of samples of bodily substances from you as reasonably required for the purpose of forensic DNA analysis.
- f) On the second count of the indictment, you are prohibited from operating a motor vehicle for a period of 10 years plus the entire period to which you are sentenced to imprisonment.

"J. G. Morley, J."

The Honourable Justice Morley

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