

CANADA / JUDGMENT

R. v. Kulatheeswaran

2026 ONCA 128

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Kulatheeswaran

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Tulloch, Michael H.; Roberts, Lois B.; Rahman, Moiz

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COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kulatheeswaran, 2026 ONCA 128

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Tulloch C.J.O., Roberts and Rahman JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Thaksan Kulatheeswaran

Respondent

Akshay Aurora, for the appellant

Julia Kirby, for the respondent

Heard: February 5, 2026

On appeal from the sentence imposed by Justice Richard Blouin of the Ontario Court of Justice, on June 2, 2025.

Tulloch C.J.O.:

A. overview [1] The Crown appeals the two years less a day conditional sentence imposed on the respondent, a youthful first-time offender with strong rehabilitative prospects who faces severe neurological health challenges, for serious firearm and driving offences. The appeal highlights the need to strongly denounce and deter the possession of illegal handguns while still carefully accounting for significant mitigating factors and personal circumstances. The Crown submits that the sentence is demonstrably unfit, that a substantial penitentiary term was necessary, and that the respondent should be reincarcerated to serve that term. The respondent, in turn, maintains that the sentence was fit and that reincarceration would not serve the interests of justice, particularly in light of his illness and his compliance with strict release conditions.

[2] I would grant the Crown leave to appeal sentence because the conditional sentence was demonstrably unfit. As in *R. v. Habib*, 2024 ONCA 830, 99 C.R. (7th) 110, a three-year penitentiary sentence was warranted to denounce the respondent's dangerous actions, including discarding a loaded prohibited firearm in a residential neighbourhood after it discharged and while fleeing on foot from police. The important mitigating factors – the respondent's youth, lack of a prior criminal record, strong rehabilitative efforts, and health challenges – temper the length of the penitentiary term but do not justify a conditional sentence in this case.

[3] However, in the particular circumstances of this case and in light of the fresh evidence, I would decline to order the respondent's reincarceration and would instead direct that he continue to serve the remainder of his conditional sentence. While this is a close call, reincarcerating him at this stage would interfere with his successful rehabilitation and materially disrupt the monitoring of his serious neurological condition, which has become even more severe and uncertain since sentencing. To ensure that the respondent serves out his conditional sentence and remains under the court's supervision, I would dismiss the sentence appeal.

B. background 1. The Gravity of the Offence [4] The respondent's offences were very serious. He carried a loaded prohibited semi-automatic handgun equipped with an overcapacity magazine in his car. After he collided with another vehicle in a residential neighbourhood at night, the firearm discharged. He fled the scene on foot with the gun in hand and discarded it in a snowbank. When police apprehended him, he refused to provide a breath sample. The trial judge convicted him of possessing a loaded prohibited firearm and overcapacity magazine, careless handling of a firearm, failing to remain at the scene of an accident, and refusing to comply with a demand for a breath sample.

- [5] While these offences are undoubtedly very grave, the Crown did not prove the additional aggravating factors it alleged in its factum – impairment, dropping the gun, pointing it at others, and offending while on release. The trial judge acquitted the respondent of impaired driving, he did not find that the respondent dropped the gun or pointed it at others, and there was no evidence that the respondent was on release at the time of these offences.
2. The Circumstances of the Respondent [6] The respondent is a youthful first-time offender who was 23 at the time of the offences and had turned 25 by the time of sentencing. The youngest of three children, he overcame the financial hardship his South Asian family faced to pursue college education and full-time work. He maintained close family ties and a long-term supportive personal relationship.
- [7] The pre-sentence report records that the respondent was associating with negative peers around the time of the offences and tended to act impulsively when faced with stressful circumstances. Prior to the charges at issue in this appeal, he was charged with impaired and dangerous driving in relation to an incident in which his vehicle crashed while he was fleeing a bar.[1]
- [8] The present charges appear to have been a turning point for the respondent. While he maintains his innocence and has appealed his conviction, the trial judge found that he had strong rehabilitative prospects and family support. He complied with strict house arrest bail conditions for two years without incident and stopped associating with negative peers. Instead, he focused on supporting his family, pursuing personal growth, and advancing his career and education. The pre-sentence report concluded that he was suitable for community supervision.
- [9] While the charges were pending, the respondent developed a serious neurological condition. He was hospitalized after experiencing stroke-like symptoms. After imaging revealed multiple brain lesions, he was referred to a specialized clinic for further scans and follow-up care to confirm whether he had multiple sclerosis or another grave ailment. Crown counsel conceded at sentencing that his condition posed significant challenges.

- [10] After his bail was revoked upon his conviction, the respondent experienced over two months of harsh pre-sentence custody that interfered with his medical treatment. The trial judge characterized the conditions which he faced – overcrowded cells and lockdowns – as “abhorrent” and found that he missed a medical appointment to confirm his neurological diagnosis because he was incarcerated.
3. The Sentencing Decision [11] At the sentencing hearing, the Crown sought a forty-six-month penitentiary sentence, and the respondent sought a conditional sentence.
- [12] The trial judge imposed a conditional sentence of two years less a day. He concluded that a reformatory range sentence was appropriate and should be served in the community owing to the respondent’s youth, lack of a prior record, strong rehabilitative prospects, and serious health condition. He further found that a conditional sentence would not endanger community safety because the respondent had complied perfectly with strict house arrest bail conditions for over two years.

C. Standard of Review [13] An appellate court may intervene and sentence afresh where the sentencing judge committed an error in principle that affected the sentence, or where the sentence is demonstrably unfit. In sentencing afresh, the appellate court will defer to any findings that are unaffected by an error in principle absent palpable and overriding error: *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at paras. 26-28; *R. v. L.S.N.*, 2020 BCCA 109, at para. 60.

D. Analysis 1. The Sentence Was Demonstrably Unfit [14] I agree with the Crown that the conditional sentence imposed was demonstrably unfit because the trial judge lost sight of the gravity of the offence: *R. v. Burke-Whittaker*, 2025 ONCA 142, 175 O.R. (3d) 726, at para. 42, per Favreau J.A., and at para. 136, per Hourigan J.A., leave to appeal granted, [2025] S.C.C.A. No. 162. As a result, it is not necessary to address the errors in principle alleged by the Crown.

- [15] A sentence is demonstrably unfit where it constitutes “a substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes”: *R. v. Parranto*, 2021 SCC 46, [2021] 3 S.C.R. 366, at para. 69 (citation omitted). This test guards against unreasonable departures from the fundamental principle of proportionality and the other principles of sentencing, including denunciation: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at paras. 53-54. As explained in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 81:

The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: “society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass”. [Emphasis in original.]

- [16] Possessing a loaded firearm in a public place gravely endangers the public. Denunciation and deterrence are paramount, and a penitentiary sentence is normally required. While sentences at the lower end of the penitentiary range may sometimes be available, three-year sentences are common even if the firearm does not discharge and mitigating factors are present. Reformatory and conditional sentences typically require strong mitigating factors or personal circumstances that significantly reduce moral blameworthiness or substantially intensify the impact of incarceration: *R. v. Morris*, 2021 ONCA 680, 159 O.R. (3d) 641, at paras. 71, 82, 125-131, 151; *Burke-Whittaker*, at paras. 38, 50-51, per Favreau J.A., and at para. 136, per Hourigan J.A.
- [17] Aggravating factors that intensify public safety risks must be reflected in the sentence imposed. As *Morris* held, “[t]he risk increases dramatically when the gun holder flees, and still again when the gun holder discards the weapon in a public place”: at para. 68. As *Burke-Whittaker* ruled, “danger increases exponentially when the firearm is discharged in public,” which is “a very serious aggravating factor”: at para. 48, per Favreau J.A., and at para. 137, per Hourigan J.A.
- [18] Each escalation described in *Morris* and *Burke-Whittaker* occurred here. As the trial judge acknowledged, this case involves aggravating features beyond simple possession. The firearm was loaded with an overcapacity magazine, it discharged, and the respondent discarded it in a residential neighbourhood during his flight from the scene. The convictions establish conduct of grave seriousness presenting an obvious and pronounced risk to public safety. The potential for catastrophic harm was obvious.
- [19] The conditional sentence imposed does not meaningfully reflect the seriousness of the aggravating findings. Neither does it adequately denounce conduct of this gravity. A penitentiary term was required. The important mitigating factors relied upon by the trial judge – youth, lack of a prior record, strong rehabilitative prospects and family support, and a serious health condition – temper the length of imprisonment, as I will later explain. In the circumstances of this case at the time of sentencing, however, these considerations could not overwhelm the other principles of sentencing or remove the need for incarceration: *Habib*, at para. 6, 30, 43; *R. v. Premji*, 2021 ONCA 721, at para. 6.
2. A Three-Year Penitentiary Sentence Would Have Been Fit [20] In my view, a global sentence of three years imprisonment, less 112 days of credit for pre-sentence custody and seven months credit for the two years of strict bail conditions, would have been appropriate at the time of sentencing. This penitentiary term, midway between the Crown and defence positions, would have sufficiently punished and denounced the respondent’s dangerous conduct and, to the extent possible, deterred other youthful adults from following suit. The respondent would have felt its serious consequences keenly – the interruption of his young adulthood, career and educational trajectory, personal and family ties, and ability to support his family.

- [21] The longer 46-month penitentiary term requested by the Crown would have been appropriate but for the important mitigating factors identified by the trial judge. Applying Friesen’s deferential standard for factual findings untainted by error in principle, I accept the trial judge’s determinations that the respondent had strong rehabilitative prospects and family support, perfectly complied with strict bail conditions, and no longer endangered public safety.[2] These findings, coupled with the respondent’s youth and lack of a prior record, call for restraint. They require this court to account for the respondent’s apparent impulsivity and susceptibility to bad influences, grapple with the harsher impact of incarceration on him as a youthful adult, and avoid a crushing sentence that would risk endangering society by jeopardizing his successful rehabilitation: *Habib*, at paras. 39, 56.
- [22] The respondent’s serious neurological condition at the time of sentencing also tempers the length of the penitentiary term. The Supreme Court reaffirmed the settled principles governing the mitigating effect of physical illness or injury in *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496, at paras. 47, 50, 56-57, and in *R. v. Hills*, 2023 SCC 2, [2023] 1 S.C.R. 6, at para. 135.[3] These cases establish that physical health conditions matter to sentencing – they are always relevant and must be considered to craft a proportionate sentence. Their presence usually establishes that the defendant will face additional hardship while incarcerated. Thus, they are mitigating even if they did not contribute to the offending conduct or diminish moral blameworthiness. It is an error in principle to overlook physical health challenges or treat them as a mere afterthought.
- [23] Serious physical health challenges typically have an important mitigating effect. For instance, a grave neurological condition like multiple sclerosis often provides significant mitigation because those suffering from such a “cruel affliction” usually face pronounced hardship while incarcerated: *R. v. Raymond* (1985), 44 Sask. R. 163 (C.A.), at para. 8; see also *A.R.*, at para. 46; *Silaphet*, at para. 84.
- [24] Health conditions, while always relevant, gain added significance if there is an evidentiary foundation for a concern that they would not be properly treated during incarceration. For instance, the Supreme Court concluded that imprisonment would be disproportionately harsh on individuals with mental disorders by taking judicial notice of well-known barriers to accessing mental health services faced by prisoners in some federal correctional institutions: *R. v. Bertrand Marchand*, 2023 SCC 26, 487 D.L.R. (4th) 201, at para. 149.
- [25] In this case, I accept the trial judge’s finding that the respondent’s neurological condition provides important mitigation. As the trial judge recognized, the presence of multiple lesions in the brain of a 25-year-old youthful adult experiencing stroke-like symptoms is “significant” to sentencing. Whether caused by multiple sclerosis or some other serious neurological affliction, these severe physical health challenges increase the impact of a custodial sentence on the respondent and provide meaningful mitigation. This finding is owed deference under Friesen because it is untainted by error.

- [26] Furthermore, the trial judge was entitled to place added weight on this serious neurological condition because he was legitimately concerned that incarceration would interfere with treatment. The respondent's experience in pre-sentence custody – facing harsh conditions and missing an important medical appointment – supplied an evidentiary foundation for this concern, and the trial judge's determination on this point merits deference under Friesen. It is thus unnecessary to address the respondent's request to take judicial notice of alleged systemic barriers to healthcare access in correctional institutions.
3. Reincarceration and the Interests of Justice [27] Having concluded that the sentence imposed was demonstrably unfit and that a penitentiary term should have been imposed at the time of sentencing, we must determine whether the respondent should now be reincarcerated.
- [28] The respondent submits that reincarceration would not serve the interests of justice. He emphasizes that he has served a substantial portion of his house arrest under strict GPS monitoring and has complied fully with all conditions. His fresh evidence shows his post-sentence rehabilitative efforts, including continued education, and demonstrates that he remains under active neurological investigation for a serious and unresolved medical condition, requiring ongoing medical monitoring. I would admit this fresh evidence because it is relevant to and could reasonably impact the appropriateness of reincarceration, it is reasonably capable of belief, and it could not have been adduced at the sentencing hearing: *Habib*, at para. 49 n.6.
- [29] This court retains discretion to decline to order reincarceration where doing so would not meaningfully advance the purposes and principles of sentencing. In *R. v. Smickle*, 2014 ONCA 49, 306 C.C.C. (3d) 351, at para. 10, this court recognized that, while the appellate court should identify the appropriate sentence to mark the error if the original sentence was too low, in some circumstances reincarceration at the time of appeal is not required. More recently, in *R. v. R.S.*, 2023 ONCA 608, 168 O.R. (3d) 641, at paras. 41-42, this court acknowledged that written reasons may sufficiently denounce and deter wrongful conduct where the offender has already served a significant portion of the sentence imposed.
- [30] I am mindful that this is a close case. The respondent has served a substantial portion of the 15-month house arrest component of his conditional sentence. Owing to the credits for pre-sentence custody and strict bail conditions, the custodial sentence that should have been imposed at the time of sentencing would have only been slightly longer than two years. Had that sentence been imposed initially, he may by now have been eligible for parole. That reality weighs against ordering reincarceration at this stage: *R. v. Sharma*, 2019 ONCA 274, [2019] 5 C.T.C. 67, at para. 24.
- [31] The respondent's medical circumstances further distinguish this matter. His neurological condition remains unresolved and appears to be worsening. For instance, a post-sentencing follow-up appointment – which appears to be the same one he missed because he was in pre-sentence custody – identified a “questionable new lesion” on his brain. Multiple sclerosis

still has not been ruled out, and his medical team describes the ongoing uncertainty as “frustrating”. He requires serial MRI imaging and specialist monitoring extending into 2026. While incarceration does not automatically preclude medical care, the need for ongoing and consistent neurological investigation is neither speculative nor trivial, and deference is owed to the trial judge’s evidence-based concern that incarceration would interfere with his medical treatment.

- [32] Sentencing must be proportionate, but it must also be humane: *R. v. Pham*, 2013 SCC 15, [2013] 1 S.C.R. 739, at para. 19, quoting *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 158. In the particular circumstances of this case, we are satisfied that the objectives of denunciation and general deterrence are adequately achieved through these reasons, which make clear that the sentence imposed at first instance was erroneous and that a penitentiary sentence would ordinarily be required for conduct of this gravity on the factual record as it stood at the time of sentencing.
- [33] The respondent has demonstrated strict compliance with his conditional sentence, including GPS monitoring, has engaged in rehabilitative efforts, and was accepted to a college career enhancement program. The trial judge found that he no longer poses a risk to public safety, so reincarceration does not appear necessary for specific deterrence. To order reincarceration at this stage would materially disrupt necessary medical monitoring and rehabilitation without materially advancing the communicative function of sentencing.
- [34] Accordingly, I would not order the respondent’s reincarceration. The respondent shall continue to serve the remainder of his conditional sentence as imposed. To ensure that he does so and remains under the court’s supervision, I would grant the Crown leave to appeal sentence but dismiss the appeal: *R.S.*, at para. 42; *R. v. C.P.*, 2024 ONCA 783, at paras. 43-45.

E. Disposition [35] Leave to appeal sentence is granted. I would declare that the sentence imposed was demonstrably unfit and that, on the factual record as it stood at the time of sentencing, a three-year sentence should have been imposed. However, in the particular circumstances of this case and in light of the fresh evidence, I would decline to order the respondent’s reincarceration. The respondent shall continue to serve the remainder of his conditional sentence as imposed. To ensure that he does so, the appeal is dismissed.

Released: February 24, 2026 “M.T.”

“M. Tulloch C.J.O.”

“I agree. Roberts J.A.”

“I agree. M. Rahman J.A.”

- [1] The appellant was only convicted of these earlier charges after he was charged with the present offences.

- [2] I reject the Crown's challenge to the trial judge's finding on public safety risk. This determination was open to the trial judge on the totality of the evidence, including the respondent's significant rehabilitative efforts and perfect bail compliance, as well as the pre-sentence report's conclusion that he was suitable for community supervision. The Crown's argument that the trial judge should have drawn a different conclusion from this evidence does not establish a palpable and overriding error: 3091-5177 Québec inc. (Éconolodge Aéroport) v. Lombard General Insurance Co. of Canada, 2018 SCC 43, [2018] 3 S.C.R. 8, at para. 35.
- [3] Suter affirmed R. v. Folino (2005), 77 O.R. (3d) 641 (C.A.), and Hills endorsed R. v. A.R. (1994), 92 Man. R. (2d) 183 (C.A.), and R. v. Salehi, 2022 BCCA 1, leave to appeal refused, [2022] S.C.C.A. No. 66. Other relevant authorities include R. v. A.E.S., 2018 BCCA 478, 369 C.C.C. (3d) 92, and R. v. Silaphet, 2024 MBCA 58, [2024] 10 W.W.R. 345.

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