

CANADA / JUDGMENT

R. v. Lee

2025 BCCA 292

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 292 R. v. Lee

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Lee,

2025 BCCA 292

Date: 20250822

Docket: CA50674

Between:

Rex

Appellant

And

Jae Won Lee

Respondent

Before:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Mr. Justice Grauer

The Honourable Justice Warren

On appeal from: An order of the Provincial Court of British Columbia, dated April 17, 2025 (sentence) (R. v. Lee, Surrey Docket 256129-1).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

J.L. Dawkins

Place and Date of Hearing:

Vancouver, British Columbia

July 18, 2025

Place and Date of Judgment:

Vancouver, British Columbia

August 22, 2025

Written Reasons by:

The Honourable Mr. Justice Grauer

Concurred in by:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Warren

Summary:

The Crown seeks to appeal from a sentence of two years less a day, served under a Conditional Sentence Order (CSO), imposed for the offences of aggravated assault and possession of a dangerous weapon. The respondent stabbed the victim twice without provocation, relentlessly pursuing him and causing serious injuries. The respondent is a permanent resident of Canada but not a citizen. Imposition of a CSO avoided the respondent's collateral immigration consequences, preserving his right of review for inadmissibility to Canada. The Crown appeals on the ground that the judge below placed excessive weight on collateral immigration consequences and imposed a sentence that was demonstrably unfit.

Held: appeal allowed. While collateral consequences can be considered when crafting a sentence, they cannot be used to reduce a sentence to the point that it is disproportionate to the gravity of the offence and the moral blameworthiness of the offender. In the context of the gravity of the offence and the absence of significant mitigating factors, a sentence of two years less a day served in the community was an unjustified departure from the principle of proportionality. Here, the gravity of the offence and the respondent's blameworthiness required a significant penitentiary sentence. Further, the judge failed to consider properly the availability of a CSO in light of the dangers posed by the respondent serving his sentence in the community. A fit sentence for the respondent is 42 months' imprisonment, less credit for time served.

Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION

- [1] This is a Crown appeal from sentence rendered after guilty pleas. The crimes were aggravated assault and possession of a dangerous weapon: unprovoked, the respondent stabbed the victim in the arm with a knife, then chased him into a building and stabbed him again in the abdomen, causing serious injury. The sentence was a Conditional Sentence Order ("CSO") of two years less one day (to be served in the community), to be followed by a three-year probation order. The reasons for sentence are unreported: *R v Lee* (17 April 2025), Surrey 256129-1 (BC Provincial Court).
- [2] The Crown contends that the sentencing judge erred by placing too much weight on the collateral consequences the respondent would face if sentenced to a penitentiary term. The Crown says further that, in any event, the sentence is demonstrably unfit.
- [3] For the reasons that follow, I would grant leave to appeal and I would allow the appeal. I would substitute a sentence of 42 months' imprisonment minus 102 days' credit for pre-sentence custody.

2. CIRCUMSTANCES OF THE OFFENCE

- [4] On March 16, 2024, the victim, who was middle-aged, was having a cigarette outside his social housing complex in Surrey, BC. He saw the respondent take the cover off a motorcycle that the victim knew belonged to another resident. He approached the respondent and asked him what he was doing. The respondent, who was 23, told the victim to "mind your own business old man" and produced a knife with a 6-inch blade. When the victim attempted to return to his building, the respondent stabbed him in the arm. The victim then retreated into the lobby of his building. The respondent followed him inside, left, then pursued him once again. In the building, the respondent backed the victim into a stairwell and stabbed him in the abdomen. The respondent then told the victim: "better get on your knees and say you're sorry".
- [5] The victim required 18 stitches to repair his arm wound, and 50 staples from his groin to his chest to close the abdominal wound.

3. CIRCUMSTANCES OF THE OFFENDER

3.1 Personal history

- [6] The respondent was born in Canberra, Australia, on September 7, 2000. He has an older brother. His family moved to New Zealand shortly after he was born, and then, when he was eight years old, the family moved to Canada. The respondent is not a citizen of Canada, but is a permanent resident. Hence the collateral consequences, which I will discuss in more detail below.
- [7] The respondent's parents separated in 2015. The respondent then lived with his mother, while his brother lived with his father. During his teen years, the respondent did not get along with his mother, and he became involved in the youth criminal justice system--about which I will also have more to say below.

- [8] The respondent attended a number of schools after arriving in Canada and did well. He was a talented competitive ski racer before his parents separated, but they could not afford it after. He then moved in and out of alternative education programs, returning to regular schooling for his grade 11 and 12 years.
- [9] By age 18, the respondent was on his own. He told the pre-sentence report ("PSR") writer that he did fairly well for about four years before entering a period of "chaos" marked by partying, excessive drug use, housing instability and association with crime-involved peers.
- [10] The sentencing judge noted that his misuse of drugs, particularly Xanax combined with alcohol, had been a key driver of his personal struggles. The Xanax and alcohol led him to experience blackouts. He overdosed five times, including four times in 2023. When he overdosed in March 2023, he tested positive for fentanyl, amphetamines, benzodiazepines and cannabinoids. He explained that when he blacked out, anything could happen, and he would use substances that he would not normally consume. He claimed he was under the influence of Xanax and alcohol when he committed the index offences and could not recall anything that happened.
- [11] The respondent attended several recovery houses since 2019, with mixed success. According to the PSR writer, he did well on bail while residing at New Vision Supportive Housing Society. The judge observed that by the time of sentencing, the respondent had been clean and sober for eight months, with a positive attitude, and had been working on his reintegration goals. He had also started sessions with a private counsellor in addition to the programming at his recovery house. He was successfully employed at a flooring installation company.
- [12] According to the psychological report, the respondent's answers on tests were consistent with someone who would be adversely impacted by drug use, and indicated "an impulsive personality style characterized by adventurousness and risk-taking". They also indicated that he was motivated for treatment and had a positive attitude to therapy. In terms of the risk of future violence, the assessor offered the opinion that his risk of violence in the next months to one year was low to moderate but would increase if he returned to substance use, carrying weapons, and associating with a negative peer group. In this regard, the assessor observed that the respondent had a history of relapsing after completing substance abuse recovery programs.

3.2 Criminal justice history--youth

- [13] In evidence before the sentencing judge was a copy of a JUSTIN "conviction list" for the respondent, showing a youth record dating from April 2017 through September 2020, including findings of guilt for possessing a weapon for a dangerous purpose, property offences, and breaching the term of release orders. The Crown relies on these records on this appeal.

- [14] There was no objection to the youth record being placed before the sentencing judge, notwithstanding that it would appear--given the time that had elapsed since the charges were disposed of--that access to them may have been prohibited by Part 6 of the Youth Criminal Justice Act, SC 2002, c 1. The point was not argued before us. Of course, it would have been open to the Crown to apply to a youth justice court judge for access to all or part of the record, and such access likely would have been granted in the circumstances before us. Indeed, both the PSR and the psychological report reviewed the respondent's youth justice history, which was a necessary aspect of their role. But no such application was brought, and it is not at all clear that the record was properly available otherwise.
- [15] As it is, however, the judge expressly assigned "little weight" to the respondent's youth record (at para 62), and no objection to the admissibility of the record was made either at trial or on appeal. I conclude in the circumstances that the record is properly before us, although I, too, would assign it little weight.

3.3 Criminal justice history--adult

- [16] As an adult, the respondent, who turned 18 on September 7, 2018, was found guilty three times of failure to comply with his sentence, and once of a breach of undertaking or recognizance, all in relation to youth offences. He was further found guilty in 2019 of two counts of theft under \$5,000, for which he was sentenced to a probation order of 12 months with a conditional discharge.
- [17] Then, two months before he stabbed the victim, the respondent was on the Skytrain with two friends. He dropped his credit card, and one of his friends picked it up but refused to return it. The respondent pulled out a switchblade and pointed it at his friend's stomach. A passenger on the Skytrain attempted to move away. The respondent blocked him and pushed him into a seat. Threatening him with the switchblade, he demanded the passenger's cell phone and said, "I could have taken your life right there". Other passengers called security, and the respondent was arrested and searched. The police seized his switchblade, which is a prohibited weapon.
- [18] After his arrest, the respondent gave a police undertaking and was released. The undertaking included a condition that he possess no prohibited weapons. Strictly speaking, that did not cover the knife used to stab the victim in the present case, because unlike the switchblade, it was not a "prohibited weapon".
- [19] On December 11, 2024, after the aggravated assault with which we are concerned but before the sentencing for that offence, the respondent was convicted of possessing a weapon for a dangerous purpose and handed a CSO of 60 days.

3.4 Collateral consequences

- [20] As a permanent resident (without Canadian citizenship), the respondent is deemed inadmissible by reason of having been convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years: Immigration and Refugee Protection

Act, SC 2001, c 27 [IRPA], s. 36(1)(a). By s. 64(1) of the IRPA, a finding of inadmissibility may not be appealed to the Immigration Appeal Division if it is based on specified grounds, including "serious criminality". By s. 64(2), "serious criminality" must be "with respect to a crime that was punished in Canada by a term of imprisonment of at least six months". A CSO of any length is not considered a "term of imprisonment" for this purpose.

- [21] Consequently, while the respondent's conviction exposes him to a removal order, a sentence of imprisonment for more than six months would deprive him of any right to appeal that removal order to the Immigration Appeal Division. Preserving his right of appeal while imposing a sentence of more than six months could be accomplished only by a CSO. The Crown's position is that the judge was led into error by attempting to preserve the respondent's right of appeal, resulting in a demonstrably unfit sentence.

4. THE JUDGE'S REASONS FOR SENTENCE

- [22] At the sentencing hearing, the Crown sought a global four-year jail sentence less credit for time spent in pre-sentence custody, plus a DNA order and a mandatory s. 109 firearms prohibition. The defence submitted that a CSO of two years less a day, followed by a period of probation, would be fit given the respondent's background and youth, his intoxication of the time of the offence, his rehabilitation efforts since that time and the risk of deportation without review should he receive an institutional jail sentence.
- [23] The judge reviewed the principles of sentencing, acknowledging that denunciation and deterrence are the primary principles when sentencing an offender for offences against the person where weapons are used and injuries inflicted (at para 28). He noted that aggravated assault is the most serious in this category because victims are "wounded, maimed, disfigured or have had their lives endangered", citing *R v Quash*, 2019 YKCA 8 at para. 35. The judge further noted at para 30 the necessity of striving to ensure that the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender, citing *R v Parranto*, 2021 SCC 46 at para 10.
- [24] The judge then reviewed the cases to determine the sentencing range for aggravated assault. He concluded that the bottom of the range is imprisonment for 16 months, with a higher end of the range falling between imprisonment for 6 to 8 years. The judge noted that the higher end "is reserved for cases involving assault with a weapon without provocation or any opportunity to mount a defence, while situations like consensual fights leading to more serious injury tend toward the lower end of the range." He followed this discussion with a survey of sentences handed out for aggravated assault.
- [25] Next, the judge considered the aggravating and mitigating circumstances (paras 48 and 49).
- [26] The aggravating factors that he considered were these: the assaults were unprovoked; the respondent was relentless in his pursuit of the victim after the initial assault; he caused the abdominal injury inside the building after the victim had sought refuge; he engaged in these attacks a little over a month after being arrested with a switchblade he had wielded to

threaten a Skytrain passenger without provocation; he had become intoxicated knowing he was prone to blackouts and could pose a risk to others when in that state; and he had a criminal record.

- [27] The mitigating factors the judge reviewed were the following: the respondent was only 23; he pled guilty early in the proceedings, saving the cost and expense of a trial and the need to call the victim to testify; by pleading guilty, he took responsibility for his actions; in his letter to the court, the respondent apologized to the victim and expressed remorse; he performed well on bail and has taken steps to deal with his addiction issues.
- [28] The judge then turned to the collateral consequences reviewed above. He noted, correctly, that collateral consequences may be taken into account in sentencing, though they are not mitigating because they do not relate to the gravity of the offence or the moral blameworthiness of the offender. Rather, they speak to the offender's "personal circumstances", to be taken into account based on sentencing principles of individualization and parity: *R v Suter*, 2018 SCC 34 at paras 47-48. The judge further observed, again correctly, that "collateral consequences cannot be used to reduce a sentence to a point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender" (*Suter* at para 56).
- [29] At para 54, the judge referred to *R v Ali*, 2022 BCCA 83, where this Court observed that the weight assigned to collateral consequences depends on the facts of the case, and "cannot detract from the court's responsibility to impose a sentence that gives sufficient recognition to the seriousness of the offence and the offender's moral blameworthiness" (at para 48, citing *R v Pham*, 2013 SCC 15 at para 14).
- [30] After rejecting the Crown's position that a 4-year sentence was fit, the judge turned to consider the defence position of a sentence of 2 years less a day served as a CSO. The judge went on to say this:
- [63] I have given careful consideration to the immigration consequences--deportation, without review--which would follow an [institutional] jail sentence of six months or more per the IRPA. That provision does not apply to a CSO. Mr. Lee knows nothing of Australia, his country of birth. He has no family connections or other supports there. I have struggled to determine the weight I should attach to these immigration consequences in fashioning a fit sentence. As discussed above, in *Suter*, *supra*, the Supreme Court of Canada held that the relevance of collateral consequences at sentencing stems from the sentencing principles of individualization and parity. The immigration consequence of deportation without review is a key individual circumstance that differentiates Mr. Lee from other offenders; although not punishment *per se*, for Mr. Lee it may be almost as life changing and impactful as the punishment itself.

- [64] Mr. Lee has taken important steps along the road to rehabilitation during his time on bail. I agree with defence counsel that he has demonstrated an ability to live a sober and pro-social life. I accept the opinion expressed in the psychological report that he poses a low to moderate risk to re-offend if he can maintain his current path.
- [65] Taking all of these factors into account, I find that a global sentence of two years less a day jail would be fit for these offences and this offender. This is not the bottom of the range for the offence of aggravated assault, but I acknowledge that it does fall somewhere below the usual range for unprovoked assaults with a weapon.
- [31] The judge then proceeded to consider the CSO provisions in the Criminal Code, concluding that they were met:
- [67] In addition to the requirement that the jail sentence imposed must be for less than two years, before imposing a CSO the court must be satisfied that 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 set out in sections 718 to 718.2 of the Code.
- [68] I am satisfied that, in light of Mr. Lee's rehabilitative efforts since his release on bail and the risk assessment, service of the sentence in the community would not endanger the safety of the community.
- [32] Next, the judge considered whether a CSO would be consistent with the fundamental purpose and principles of sentencing, and reviewed *R v Proulx*, 2000 SCC 5. He concluded:
- [71] I have concluded that a CSO of two years less a day with punitive conditions that restrict Mr. Lee's liberty would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the Code. Coupled with a lengthy probationary term to follow, this sentence recognizes and implements the important principle of restraint, encourages Mr. Lee's ongoing rehabilitation, while at the same time providing significant denunciation and deterrence.
- [33] In the result, the judge imposed the same sentence on each count, to be served concurrently: a CSO of two years less a day, without credit for time served. The CSO was to be followed by a three-year probation order.

5. DISCUSSION

5.1 Standard of Review

- [34] In sentence appeals, the standard of review is deferential. To justify appellate intervention, the appellant must establish an error in principle that impacted the sentence or show that the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at paras. 41-44.
- [35] As this Court said in *R v Ali*, 2022 BCCA 83,

- [25] Errors in principle include errors in law, failures to consider relevant factors, and the erroneous consideration of an aggravating or mitigating factor. A demonstrably unfit sentence is a sentence that constitutes a "clearly unreasonable" departure from the fundamental principle of proportionality: Lacasse at paras. 53-55.
- [26] Where the test for appellate intervention is satisfied, the appeal court will perform its own sentencing analysis with deference to any factual findings made by the sentencing judge that are not tainted by legal error: *R. v. Friesen*, 2020 SCC 9 at paras. 27-29; [*R v. Parranto*, 2021 SCC 46] at paras. 29, 30, 36 and 122.
- [36] The Crown argues that the judge erred in principle through erroneously giving improper weight to the collateral consequences the respondent faces, which impacted the sentence by taking it well below the appropriate range, and that in any event, the sentence of a CSO of two years less a day constitutes a clearly unreasonable departure from the fundamental principle of proportionality.
- [37] As I shall explain, I consider that these two grounds tend to converge: the result of the judge's treatment of the collateral consequences was a sentence that cannot be justified.

5.2 A clearly unreasonable departure

- [38] The judge quite properly referred to both Suter and Ali for the proposition that the collateral consequences of sentencing may be taken into account, but "cannot be used to reduce a sentence to the point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender" (Suter at para 56). Yet that is the effect of what the judge did: he used the collateral immigration consequences at issue here to reduce the respondent's sentence to the point where it became disproportionate to both the gravity of the offence and the moral blameworthiness of the offender. To quote further from Ali at para 48,

A court cannot impose (or substitute on appeal) an "inappropriate and artificial" sentence "to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will" [*R. v. Pham*, 2013 SCC 15] at para. 15; *R. v. Gonzales*, 2016 BCCA 436 at para. 30.

As I see it, that would be the effect here if the respondent's CSO were upheld.

- [39] Moreover, in my respectful opinion, the judge failed to give appropriate consideration to the proper prerequisites for a CSO. These require the court, among other things, to be satisfied that service of the sentence in the community would not endanger the safety of the community (s. 742.1(a) of the Criminal Code). All the judge said on that score was this:
- [68] I am satisfied that, in light of [the respondent's] rehabilitative efforts since his release on bail and the risk assessment, service of the sentence in the community would not endanger the safety of the community.

- [40] With respect, this did not give anything close to adequate weight to either the respondent's recent history of unprovoked violence or the psychological report's full risk assessment. That report noted that there was a lack of information, which "suggests that other risk factors, not identified in the present evaluation, may be present" and further describes a history of problems with violence and other antisocial behaviour. As we have seen, the assessor concluded that the risk of violence over the next six months to one year was "low to moderate" on the assumption that he would maintain sobriety. Otherwise, the risk would increase. Thus, while the assessor suggested that the respondent's risk "might be considered manageable in the community if he complies with treatment, maintains his sobriety, and does not associate with antisocial peers", the assessor further observed that the respondent had a history of relapsing after completing substance abuse recovery programs.
- [41] That is not, in my view, an adequate basis for a conclusion that service of the respondent's sentence in the community would not endanger the safety of the community. As I see it, service of this sentence in the community would very much endanger the community's safety. The risk was not one that should be taken.
- [42] But even if a CSO would not endanger the community's safety, this would still result in a sentence that unreasonably departs from the fundamental principle of proportionality.
- [43] The judge referred to this Court's very recent decision in *R v Davis*, 2025 BCCA 113, where, in a case of aggravated assault, a CSO of two years less a day was substituted on appeal for a 21-month sentence of imprisonment. That case was nothing like this one, as the original sentence suggests.
- [44] There, the offender was Indigenous, and had no criminal record or any history of violent behaviour. Without warning, he punched the victim, who suffered a serious brain injury from hitting the ground. Although the assault was unprovoked, the offender believed (mistakenly) that the victim was threatening his mother, a trigger given the impact on his family of the historical treatment of Indigenous peoples. The ground of appeal, conceded by the Crown, was that the judge had given insufficient weight to Gladue factors. The question was whether this impacted the sentence. The majority of this Court found that it had, concluding that Mr. Davis's moral blameworthiness was "markedly diminished" as a result of his personal circumstances as an Indigenous offender: at para. 29.
- [45] Those circumstances put the offender in *Davis* towards the lower end of the range for aggravated assault, as the judge here recognized when he articulated a range of beginning at around 16 months, going up to "somewhere between 6-8 years jail" (at para 37). Given his blameless record, his genuine remorse, his success in graduating from high school and gaining employment, and the lack of any negative peer associations or addiction issues, it could safely be predicted that Mr. Davis posed no threat to the safety of the community.

- [46] In the present case, the judge further noted that the higher end of the range "is reserved for cases involving assaults with a weapon without provocation or any opportunity to mount a defence" (at para 37). This was precisely the situation before the judge, particularly given the respondent's history of violence, addiction issues and negative peer associations--all factors that distinguish this case from Davis.
- [47] Nevertheless, the judge concluded that the sentence of four years' imprisonment sought by the Crown would be "too long for a young man with no prior youth or adult convictions for offences involving actual violence" (at para 59). He then proceeded immediately to discuss the defence position, designed to avoid the immigration consequences, that a CSO was appropriate. As already reviewed, the judge began by considering whether a sentence within the CSO range (two years less a day) would be fit taking into account the immigration consequences, stating, as quoted above, that "the immigration consequence of deportation without review is a key individual circumstance that differentiates [the respondent] from other offenders" (at para 63).
- [48] What the judge failed to consider at all was the appropriateness of a penitentiary term between two and four years. Respectfully, it was incumbent upon the judge first to consider the proper and fit length of term, and only then to consider (if it fell below two years) whether a CSO was appropriate; see, for instance, *R v Fice*, 2005 SCC 32 at para 15.
- [49] I conclude that, in the result, the sentence imposed by the judge of a CSO of two years less a day is a clearly unreasonable departure from the fundamental principle of proportionality, notwithstanding the collateral immigration consequences. Again, the consequence in question is the loss of the right to seek a review, not the exposure to deportation. The latter consequence follows from the nature of the offence itself, not from the sentence. In my view, a custodial sentence was required.

5.3 A fit sentence

- [50] In the Crown's submission on appeal, the appropriate range for an aggravated assault that comprised relentless pursuit and repeated unprovoked stabbings of a defenceless victim is at the higher end of the range, between four and six years' imprisonment. The Crown seeks a sentence of four years' imprisonment for the aggravated assault with a concurrent one-year sentence for possessing a weapon dangerous to the public peace--less 102 days' credit for the time spent in pre-trial custody.
- [51] As we have seen, the judge considered that a four-year jail term "is too long for a young man with no prior youth or adult convictions for offences involving actual violence". With respect to the latter, this seems to me to minimize the troubling Skytrain incident mere weeks before the offence, for which the respondent was bound by an undertaking in effect at the time of this offence, and for which he was given a CSO.

[52] Taking all of these factors into account, together with the collateral immigration consequences, I would impose a sentence of 42 months (3½ years) on Count 1 (aggravated assault), less credit for 102 days spent in pre-sentence custody, with a concurrent one-year sentence on Count 3 (possessing a weapon dangerous to the public peace). This should run from the original date of sentence, April 17, 2025.

6. DISPOSITION

[53] For these reasons, I would grant leave to the Crown to appeal the sentence, and I would allow the appeal. I would set aside the conditional sentence order and substitute a custodial sentence of 42 months, less credit for 102 days spent in pre-sentence custody, running from April 17, 2025. All ancillary orders should remain in place, and, pursuant to s. 743.21 of the Code, I would add an order prohibiting the respondent from communicating with the victim, directly or indirectly, during his time in custody. This replaces the 'no contact' term of the CSO.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Justice Warren"

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