

CANADA / JUDGMENT

R. v. Moazami

2025 BCCA 190

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 190 R. v. Moazami

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Moazami,

2025 BCCA 190

Date: 20250619

Docket: CA43857

Between:

Rex

Respondent

And

Reza Moazami

Appellant

File Sealed in Part

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Before:

The Honourable Madam Justice Bennett

The Honourable Justice Winteringham

The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated

August 15, 2016 (sentence) (R. v. Moazami, 2016 BCSC 2137,

Vancouver Docket 26423).

The Appellant, appearing in person (via videoconference):

R. Moazami

Counsel for the Respondent:

M.G. Scott

E. Aston, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

April 3, 2025

Place and Date of Judgment:

Vancouver, British Columbia

June 19, 2025

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Justice Riley

Summary:

The appellant was convicted of attempting to obstruct justice by trying to dissuade a Crown witness from testifying against him at a trial where he was charged with over 30 counts of prostitution-related and sexual offences. After his conviction for those offences, he was sentenced to 23 years imprisonment. For the obstruction and breach convictions (and at issue on this sentence appeal), the appellant was sentenced to three years imprisonment, to be served consecutively to the sentences for the prostitution and sexual offences. The appellant seeks leave to appeal his sentence, submitting the overall length of the sentence violated the principle of totality. He also seeks to introduce fresh evidence alleging misconduct on the part of the police and Crown.

Held: Leave to appeal is granted but the sentence appeal is dismissed. The judge committed no error when he determined the length of the sentence nor when he determined the sentence should be served consecutively to the prostitution-related and sexual offences. The overall sentence was long. However, the sentencing judge, having heard the evidence at trial and considering the particular circumstances of the offence and the offender, is owed deference. The application to admit fresh evidence is dismissed. The appellant failed to establish the materials bear upon a decisive issue or could reasonably be expected to have affected the resulting sentence.

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

- [1] Following a trial, the appellant was convicted of attempting to obstruct justice and violating a no-contact order after he conspired with a cellmate to discourage a complainant (S.W.) from testifying against him: *R. v. Moazami*, 2016 BCSC 99 (collectively, the "Obstruction Offences"). S.W. was one of 11 complainants named in the appellant's 36-count Indictment of living on the avails of prostitution, sexual exploitation, and sexual assault (collectively, the "Avails Offences"); the appellant was convicted on 30 counts and sentenced to 23 years imprisonment (the "Avails Sentence"): *R. v. Moazami*, 2015 BCSC 2055 [Avails RFS]. For the Obstruction Offences, the sentencing judge imposed a sentence of three years for the attempt to obstruct justice and six months for breaching the Court order (the "Obstruction Sentences"): *R. v. Moazami*, 2016 BCSC 2137 (unreported). The sentences were to be served concurrently to each other but consecutively to the Avails Sentence.
- [2] The appellant filed, on his own behalf, a notice of appeal of conviction and sentence on August 15, 2016. The appellant's counsel filed an amended notice of appeal (of conviction and sentence) on June 30, 2020. This Court dismissed the appellant's appeal of conviction for the Avails Offences in reasons indexed as *R. v. Moazami*, 2021 BCCA 328 (the "Avails Appeal") and on the same day, dismissed the appellant's appeal of conviction for the Obstruction Offences in reasons indexed as *R. v. Moazami*, 2021 BCCA 329 (the "Obstruction Appeal").
- [3] The appellant indicated an intention to appeal the underlying convictions to the Supreme Court of Canada and the sentence appeal was held in abeyance. In April 2024, Justice Fitch ordered that the sentence appeal could proceed. Counsel was appointed to represent the appellant but was discharged shortly before the filing deadline for the written statement of sentence appeal.
- [4] The primary legal issue on this appeal is whether the judge erred by imposing a consecutive sentence for the Obstruction Offences, adding to what the appellant asserts to be an already "crushing" penitentiary sentence for the Avails Offences. Having in mind the entire period of incarceration he was facing, the appellant says the judge ought to have imposed a lower sentence, to be served concurrently, to meet the sentencing objective of proportionality reflected in the principle of totality. Before the sentencing judge, the appellant expressly

relied on the principle expressed in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 1996 CanLII 230, that a judge who orders an offender to serve consecutive sentences for multiple offences must ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. This sentence, submits the appellant, greatly exceeded his overall culpability.

- [5] In the companion sentence appeal, this Court allowed the appellant's sentence appeal for the Avails Offences and reduced the global sentence from 23 years imprisonment to 20 years and 8 months imprisonment.
- [6] In addition to the legal issue raised, the appellant has concentrated his focus on the misconduct of a police officer who was primarily responsible for the investigation into the Avails and Obstruction Offences. The appellant repeats his allegations of misconduct against other state actors, including various prosecutors who had conduct of the different proceedings. He also reiterates his allegations that his trial lawyers were ineffective. The appellant contends that cumulatively and separately, the conduct of those involved in the proceedings culminated in breaches of the Canadian Charter of Rights and Freedoms [Charter], and is a miscarriage of justice. In support of his assertions of misconduct, the appellant applies to introduce fresh evidence.
- [7] I would dismiss the application for fresh evidence. The appellant attempts to advance arguments about the conduct of the police and prosecutors. These arguments were largely dealt with by this Court in the Avails and Obstruction Appeals. None of these submissions bear on the fitness of the sentence.
- [8] For reasons I will explain, I would grant leave to appeal the sentence but dismiss the appeal. It is my view that the judge committed no error when he determined the length of the sentence for the Obstruction Offences nor did the judge commit any error when he determined the sentence should be served consecutively to the Avails Sentence. The overall sentence was long. However, the sentencing judge, having heard the evidence at trial and considering the "particular circumstances of the offence and the offender", is owed deference.

Circumstances of the Offence

- [9] In the fall of 2011, the appellant was charged with the first subset of prostitution-related offences (living on the avails of prostitution and procuring) alleged to have occurred from October 7, 2011 to December 22, 2011. Regarding the first subset of charges, the appellant was released on a recognizance with a \$100,000 surety (his mother). His bail continued after an 18-count Information was laid.
- [10] On August 12, 2012, a 36-count direct Indictment was preferred and the appellant was to turn himself in on August 13, 2012. However, on August 9, 2012, the appellant was arrested for breaching the terms of his bail by contacting one of the complainants (not S.W.) over the Internet (the "Bail Breach"). The direct Indictment charged the appellant with 36 counts of living on the avails of prostitution, sexual exploitation, and sexual assault against 11

complainants between the ages of 14 and 19. The appellant was held in custody from August 9, 2012 until October 12, 2012, while awaiting trial for the Avails Offences. While in custody, the appellant was subject to an order prohibiting him from contacting, directly or indirectly, any of the complainants. S.W. was one of the complainants scheduled to testify at the trial. Pursuant to the non-communication order, the appellant was prohibited from contacting her.

- [11] From August to October 2012 and contrary to the order, the appellant contacted S.W. indirectly through A.N., a friend of his cellmate. At the appellant's direction, A.N. befriended S.W. and offered her \$5,000 to write a letter to the appellant's lawyer stating his innocence and another \$5,000 if she failed to show up to Court to testify. A.N. offered S.W. more money if she convinced other witnesses to do the same. S.W. did not accept the proposal and contacted the police. The police secured telephone recordings from the institution where the appellant was held pending his trial. The primary investigator for the Avails Offences, James Fisher (once a police officer with the Vancouver Police Department) listened to approximately 200 phone recordings from the appellant's living unit and identified 30 recordings relevant to the obstruction investigation. Mr. Fisher connected the appellant to the recordings either through his unique calling card, by voice recognition, or the fact that a number of the calls were to the appellant's mother.
- [12] The appellant was charged with wilfully attempting to obstruct justice and for breaching the order not to contact S.W. At trial, the judge found the evidence, including the evidence from Mr. Fisher, established the appellant and his cellmate were involved in a common enterprise to obstruct the course of justice and that the appellant had breached the no-contact order by communicating indirectly with S.W. On February 11, 2016, the judge convicted the appellant of attempting to obstruct justice and for breaching a Court order.
- [13] At the appellant's sentencing hearing, the judge observed there was no evidence of an overt threat of violence against S.W. However, the judge noted the appellant had used violence against S.W. in the past. As reflected in a victim impact statement, S.W. was so scared that the appellant would "try something else" to stop her from testifying that she fled the province.
- [14] At the sentencing hearing, the judge was provided with the reasons for sentence for the Avails Offences, which set out the background between the appellant and S.W.: Avails RFS at paras. 38, 68-75. Regarding S.W., the appellant was convicted of living on the avails of prostitution of a person under 18 years (with coercion) and sexual exploitation. In 2011, the appellant pleaded guilty to assaulting S.W. with a weapon in relation to a single incident in 2010 when he went to S.W.'s apartment in Coquitlam and put a knife to her throat, causing a cut to her neck.
- [15] Despite his guilty plea to the assault with a weapon offence, the appellant continues to challenge the underlying circumstances of that conviction. He also maintains his challenge to his convictions for the Obstruction Offences and for the Avails Offences.

Appellant's Circumstances

- [16] The appellant came to Canada from Iran with his parents when he was 11 years old. He is a Canadian citizen. He was 27 years old when he committed the Obstruction Offences. He was between 25 and 27 when he committed the Avails Offences. At the time of sentencing, he was 31 years old.
- [17] The appellant struggled in school as a result of his lack of English language skills. He suffered significant corporal punishment while attending elementary school; he reported being frequently struck with a ruler and being struck in the face by a teacher in sixth grade. At home, the appellant experienced a loving relationship with his mother and sister but suffered regular physical abuse from his father, who could not find work as a civil engineer after the family's move to Canada. The appellant's parents separated in 2000, and in 2002, his father returned to Iran. Around this time, the appellant suffered a brain injury as a result of a serious motor vehicle accident. He fully recovered from his injuries after a year-long rehabilitation but failed to graduate from high school due to his long absence. After leaving high school, the appellant worked at a variety of unskilled jobs. In 2009, he started his own personal training business. With respect to the appellant's circumstances, there was no independent verification of the appellant's background as he refused to participate in the preparation of a pre-sentence report.
- [18] During his incarceration leading up to the trial for the Avails Offences, the appellant had tried to better himself by taking all possible courses offered by the pretrial centre and he completed a 300-hour business course, obtaining a business diploma with the highest honours.
- [19] At the time of sentencing for the Avails Offences, the appellant's criminal record consisted of two convictions for obstructing a police officer in June and August of 2007, two convictions for failing to appear from March 2009 and March 2010, and one conviction for assault with a weapon from August 2010 (relating to S.W.).
- [20] The sentencing hearing for the Obstruction Offences occurred on May 24, 2016. By this time, the appellant was serving two other sentences previously imposed. First, on November 10, 2015, Justice Bruce sentenced the appellant to 23 years imprisonment less time served, credited as five years and 26 days, leaving a sentence of 17 years and 339 days on the Avails Offences, which included convictions for his sexual exploitation of S.W. and 10 other teenaged girls. Second, on January 28, 2016, the appellant was sentenced in Provincial Court to 44 days imprisonment for breaching his bail terms by contacting another complainant.

Reasons for Sentence

- [21] The appellant received a consecutive sentence of three years imprisonment for the attempt to obstruct justice and six months imprisonment for breaching the no-contact order, to be served concurrently: at paras. 33, 35.

- [22] The sentencing judge began his reasons for sentence by summarizing the circumstances of the offences and the parties' positions on sentencing. The Crown sought a sentence of three to five years imprisonment for the attempt to obstruct justice and six to nine months for the breach of the no-contact order, to be served concurrently. The Crown argued that the sentences should be served consecutively to the sentence the appellant was currently serving. The defence submitted that the range of sentence for wilfully attempting to obstruct justice, where the attempt was unsuccessful and there were no threats involved, was six to 24 months imprisonment. The appropriate sentence in these circumstances, the defence argued, was one year.
- [23] The judge considered the relevant legal framework for sentencing, noting that for offences involving the obstruction of justice, the most important sentencing objectives are denunciation and general deterrence: at para. 15, citing *R. v. Guess*, 2000 BCCA 602. He noted that the rehabilitation of an offender is also a factor and observed that "[a]lthough the prospects appear to be bleak", he hoped the appellant would attend the programs available to him, as he "[would] benefit from some rehabilitation": at para. 15. The judge also emphasized that "the indignation that might be felt in the community in relation to [the Avails Offences] should not unduly affect the imposition of a sentence for the convictions before this Court" and that the appellant's 23-year sentence for those offences demonstrated that his plans to obstruct justice had "failed completely": at para. 15.
- [24] With respect to aggravating factors, the judge highlighted the length of time that the appellant attempted to contact S.W. (from "at least August 20, 2012 until October 12, 2012"), S.W.'s vulnerability as a young victim, and that the appellant had committed the obstruction offences when he was already in custody for two breaches of a no-contact order, in addition to his previous criminal record: at para. 16.
- [25] The judge found there were no mitigating factors that he was aware of. He stated that the absence of a threat or the use of violence was not a mitigating factor but rather, was "another aggravating factor that was absent in this case": at para. 17, citing *R. v. Crazyboy*, 2012 ABCA 228 at para. 9.
- [26] Next, the judge considered the cases relied upon by each party to establish the range of sentence. The Crown cited four cases where the sentence exceeded two years: *R. v. Simmons* (1984), 45 O.R. (2d) 609, 1984 CanLII 3558 (C.A.); *R. v. Dasilva*, 2002 BCPC 217; *R. v. Gill*, 2002 BCSC 977, aff'd on appeal, 2003 BCCA 208; and *R. v. Jeurissen*, 2014 BCSC 1718. The defence cited four cases in support of a sentence in the range of six months to two years: *R. v. Jahanrakhshan*, 2013 BCCA 128; *R. v. Ward*, 2011 ABCA 30; *R. v. Hall*, 2001 BCCA 74; and *R. v. Maynard*, 2008 ONCJ 445. The judge observed that many of the cases advanced by the parties involved another offence followed by the obstruction or attempted obstruction. In these cases, the judge noted, the court would have considered the totality principle when sentencing for more than one offence consecutively, which "may have influenced the sentence imposed for the obstruction offence": at para. 29.

- [27] The judge pointed out that, in this case, the appellant's attempts had been unsuccessful, as S.W. immediately reported his attempts to the police and testified at trial. The judge also highlighted that although there was "no evidence of an overt threat of violence by [the appellant] to S.W. if she were to testify", their prior relationship had involved violence against her: at para. 30. On this point, the judge included an excerpt from S.W.'s victim impact statement, where she wrote about feeling unsafe in her home, not knowing who she could trust after the appellant used her friend to deliver his messages, and her choice to move away from B.C. because she was scared the appellant would find her: at para. 31.
- [28] Noting that the offence of obstructing--or attempting to obstruct--justice has been described by many judges as "one that strikes at the heart of our justice system" and taking into account the particular circumstances of the offence and the offender, the judge concluded that a sentence of three years imprisonment was fit and appropriate: at paras. 32-33. He stated the sentence would be served consecutively to the Avails Sentence the appellant was currently serving and added that "[a]lthough the attempted obstruction charge flows from the offences related to prostitution, it cannot be characterized as a linked series of acts within a single endeavour": at para. 33. Imposing a concurrent sentence, the judge noted, "would be like imposing no sentence at all for this serious subsequent offence [and] would also be an open invitation to offenders to attempt to prevent a victim from testifying and have little, if any, deterrent effect": at para. 33.
- [29] The judge also observed that when a consecutive sentence is imposed, the court will consider the totality principle to ensure the sentence does not exceed the overall culpability of the offender. However, the judge found that in the present circumstances, where "the subsequent offence of attempted obstruction [was] not part of a linked series of acts within a single endeavour, th[e] Court [was] not constrained by that principle to impose a sentence that would be less than otherwise appropriate in the circumstances": at para. 34.

On Appeal

- [30] The appellant appeals the sentence imposed for the attempt to obstruct justice and breach convictions and seeks a reduction in his sentence. He submits, in his first notice of appeal filed in August 2016, that the sentencing judge failed to "consider the relevant principles of sentencing, including rehabilitation, and the appellant's personal circumstances and wrongfully failed to find mitigating circumstances". In his amended notice of appeal filed in June 2020, the appellant further submits that the totality of the sentences is unfit in the circumstances.
- [31] In the statement of sentence appeal, the appellant submits this is an exceptional case and seeks a conditional and absolute discharge "due to State egregious misconduct" and violations of the Charter. He seeks to adduce fresh evidence in support of his position that the Charter violations have never been redressed and are ongoing.

- [32] The Crown takes the position that the judge properly considered the appellant's personal circumstances, which were based on the submissions of counsel and the trial judge's reasons for judgment. The Crown says that this was the only information available to the sentencing judge because the appellant did not participate in a pre-sentence report. The Crown submits that the judge considered mitigating factors as those factors which tend to support the imposition of a lesser sentence, rather than those that show diminished blameworthiness or refer to the offender's prospects of rehabilitation; the judge was not suggesting there was nothing to be said about mitigating culpability or the possibility of rehabilitation.
- [33] With respect to the submission that the overall sentence is unfit, the Crown argues that the authorities demonstrate that the offence of attempting to obstruct justice frequently results in consecutive sentences as the offence is typically not linked to other offences as parts of a single endeavour. The Crown also submits that the need for an independent sentence "is pressing where the obstruction targeted the justice system's ability to protect vulnerable victims from their abusers" and to impose a concurrent sentence "would be like imposing no sentence at all". The Crown says that even if the judge erred by failing to consider the totality principle, the resulting sentence was not disproportionate to the appellant's overall culpability, given the offence involved attempting to dissuade S.W. and other complainants from taking part in the efforts to bring him to justice for his "sustained and multifaceted exploitation of 11 teenaged girls". The Crown contends that the sentence is not demonstrably unfit in light of the circumstances of the offence and the relevant authorities.

Application to Admit Fresh Evidence

- [34] I would dismiss the appellant's application to introduce fresh evidence. The significance of Mr. Fisher's misconduct was addressed by this Court in the Avails Appeal and again in the Obstruction Appeal. The appellant's additional submissions about Mr. Fisher's misconduct; prosecutorial misconduct; and, allegations of Charter violations (as those allegations relate to the sentence appeals) have been addressed in the companion sentence appeal CA43308, released with this judgment, indexed as 2025 BCCA 189. In this appeal, we rely on those reasons. We are not satisfied that Mr. Fisher's misconduct (or other allegations of misconduct) provides a basis for interfering with the obstruction sentence. The appellant maintains his complaint that Mr. Fisher's conduct (and the conduct of other state actors) should essentially result in a stay of all charges, or at the very least, result in a significantly reduced sentence, such as an absolute or conditional discharge. It is my view that none of the appellant's allegations of misconduct have been made out. The allegations do not bear on the issues raised in this sentence appeal.

Discussion

Standard of review

- [35] The standard of review applicable to sentencing decisions is not controversial. It is highly deferential. Sentencing is a decidedly individualised process. An appellate court may intervene to vary a sentence only if the sentencing judge made an error in principle that had an impact on the sentence or if the sentence is demonstrably unfit: *R. v. Friesen*, 2020 SCC 9 at para. 26.
- [36] In *R. v. Milne*, 2021 BCCA 166, Justice Dickson made clear that "[a]n error in principle may include an error in law, a failure to consider a relevant factor or the overemphasis of a relevant factor": *Milne* at para. 44. A sentence is demonstrably unfit where it is clearly or manifestly excessive or inadequate or represents an unreasonable or marked departure from the principle of proportionality: *R. v. Lacasse*, 2015 SCC 64 at paras. 52-53.
- [37] The same standard of review applies to the sentencing judge's application of the totality principle (*R. v. Joseph*, 2010 BCCA 525 at para. 12) and the judge's determination as to whether sentences are served consecutively or concurrently (*R. v. Maliki*, 2005 BCCA 495 at para. 19).

First ground: Did the judge make a material error by failing to consider the relevant principles of sentencing?

- [38] In the first notice of appeal, the appellant alleges the sentencing judge failed to "consider the relevant principles of sentencing, including rehabilitation, and the appellant's personal circumstances and wrongfully failed to find mitigating circumstances". The appellant submits the judge stressed the need for deterrence and denunciation, while giving no weight to the rehabilitation objective for sentencing.
- [39] The judge considered the appellant's circumstances, describing his background, his difficult years as an adolescent, his brain injury suffered after his parents separated, and his father having returned to Iran: at paras. 7-8. The judge delineated the appellant's work history after he left high school and wrote about his involvement with steroids as he tried to grow a personal training business: at para. 9. The judge went on and noted the appellant "has tried to better himself and taken all of the courses offered at the Pretrial Centre" and completed an online business course "with the Stratford Career Institute and received a diploma with the highest honours": at para. 10.
- [40] The judge acknowledged rehabilitation as a factor for him to consider even though the prospects "appear to be bleak": at para. 15. However, citing *Guess*, the judge noted the most important sentencing objectives in relation to obstruction of justice offences are denunciation and general deterrence: at para. 15. Later, the judge acknowledged that the nature of the offence of obstruction of justice has been described as "one that strikes at the heart of our justice system": at para. 32.

- [41] During the sentencing hearing, the Crown presented a number of institutional reports describing the appellant's participation in prison programming. The Crown highlighted aspects of the reports suggesting the appellant had refused to participate in programming and refused to take responsibility for his crimes. In his submission, the appellant's lawyer explained the appellant's apparent lack of engagement with prison programming, explaining that the appellant was relying on his lawyers' advice; that is, while his appeals were extant, he should not speak about the offences or his involvement in them. The appellant submitted that he should not be further punished for his refusal to speak about the offences.
- [42] Reasons must be read in context and as a whole, in light of the live issues raised: *R. v. G.F.*, 2021 SCC 20 at para. 69. As I read the judge's reasons as a whole and consider the record, I do not agree with the appellant's submission that the judge failed to consider his personal circumstances or his prospects for rehabilitation. It is clear in his reasons that the judge did not lose sight of rehabilitation as an important sentencing objective. The judge was hopeful that the appellant would "[attend] the programs available to him in a federal institution" and commented that he would "benefit from some rehabilitation": at para. 15.
- [43] In my view, the judge highlighted the appellant's efforts while at the institution in the most positive light. The difficulty with the appellant's submission is that there was little else to commend the appellant's prospect for rehabilitation--not that the judge overlooked his efforts.
- [44] At the sentencing hearing, the appellant described in some detail the support received from his mother and sister. Although the judge did not regard this as a mitigating factor, he mentioned the "loving and supportive relationship" the appellant had with his mother and sister: at para. 8.
- [45] It is my view that the judge adequately addressed rehabilitation and recited all he could on this topic. Although he characterized the appellant's prospects as apparently "bleak", this was a finding amply supported by the evidence and submissions. Nevertheless, the judge specifically referred to the appellant's progress while institutionalized and highlighted some of these factors in his reasons. The fact that these offences were committed while the appellant was awaiting trial on serious charges justified the judge's emphasis on deterrence and denunciation. I can see no error in the approach taken by the judge in his emphasis on denunciation and deterrence. I would not accede to this ground of appeal.

Second ground: Did the judge err in his consideration of the totality principle?

- [46] The appellant contends the three-year sentence, consecutive to the Avails Sentence and the 44-day sentence imposed for the Bail Breach (the "Bail Breach Sentence"), resulted in an unduly harsh total length of incarceration. The appellant raises two points regarding the overall length of the sentence imposed. First, the appellant suggests the judge erred in making the sentence consecutive to the lengthy sentence he was already serving. Second, the appellant submits the judge failed to consider the totality of the entire sentence to

determine whether it was excessive in the aggregate. He submits that having in mind the entire period of imprisonment, the judge ought to have reduced the sentence to meet the sentencing objective of proportionality reflected in the principle of totality.

[47] Regarding the appellant's first point, the judge specifically turned his analysis to whether the sentence imposed should be served consecutively. Counsel relied on numerous authorities regarding the range of sentence for the offence of attempting to obstruct justice. Many of these authorities also considered whether the sentence should be served consecutively to a sentence already imposed.

[48] After summarizing several of the cases referred to by counsel, the judge wrote:

[33] The sentence in each case must reflect the particular circumstances of the offence and the offender together with the principles of sentencing that I have referred to. In the circumstances of this case, I have concluded that a sentence of three years is fit and appropriate in respect of the attempted obstruction by [the appellant]. [The appellant] shall serve this sentence consecutively to the sentence he is presently serving. Although the attempted obstruction charge flows from the offences related to prostitution, it cannot be characterized as a linked series of acts with a single endeavour. More importantly, to impose a concurrent sentence would be like imposing no sentence at all for this serious subsequent offence. It would also be an open invitation to offenders to attempt to prevent a victim from testifying and have little, if any, deterrent effect, and I refer there to *R v. Sinclair*, [2010] M.J. No. 341 (CA) and *R. v. Jeurissen*.

[49] When the judge found the sentence should be consecutive, he specifically cited *Jeurissen* where Justice Ker set out the test for determining whether a concurrent or a consecutive sentence should be imposed as "whether the acts constituting the offence were part of a linked series of acts within a single endeavour": at para. 466. Justice Ker continued and stated the following:

[466] Although the predicate offence and the non-predicate offences were all part of an ongoing pattern of offending and took place within a relatively short period of time, they were all separate endeavours. I have imposed consecutive sentences between the two Indictments as the offences, while related in part because the obstruct flows from the predicate offence, they cannot be accurately characterized as a linked series of acts within a single endeavour. Moreover, to impose concurrent sentences would, in effect, be to impose no sentence at all for the very serious subsequent offences: *R. v. Abrosimo*, 2007 BCCA 406 at para. 32.

This Court has held that consecutive sentences are appropriate where the acts constituting the offences were not linked as parts of a single endeavour or "when the offences committed protect different societal interests": *R. v. Robertson*, 2020 BCCA 65 at paras. 90-91.

[50] In the case at hand, the judge recognized the sentence for the obstruction charge should be a consecutive one. Although the offence involved one of the complainants from the avails proceeding, the judge noted that to impose a concurrent sentence "would be like imposing

no sentence at all": at para. 33. I see no error in the judge's decision to impose a consecutive sentence. The judge carefully considered whether the sentence should be consecutive or concurrent and we must, absent an error being shown, give appropriate deference to this discretionary decision. Indeed, the decision to order concurrent or consecutive sentences should be treated with the same deference owed by appellate courts to sentencing judges concerning the length of sentences ordered. In *R. v. McDonnell*, [1997] 1 S.C.R. 948, 1997 CanLII 389, Justice Sopinka highlighted deference to be shown:

46 The rationale for deference with respect to the length of sentence, clearly stated in both [*R. v. Shropshire*, [1995] 4 S.C.R. 227, 1995 CanLII 47] and *M. (C.A.)*, applies equally to the decision to order concurrent or consecutive sentences. In both setting duration and the type of sentence, the sentencing judge exercises his or her discretion based on his or her first-hand knowledge of the case; it is not for an appellate court to intervene absent an error in principle, unless the sentencing judge ignored factors or imposed a sentence which, considered in its entirety, is demonstrably unfit.

See also *R. v. Berry*, 2014 BCCA 7 at para. 48.

[51] The judge considered relevant and appropriate factors when he imposed a consecutive sentence. S.W. was a complainant in the original set of serious outstanding charges the appellant was facing. He tried to prevent S.W. from going to court to testify against him. Although the appellant's efforts did not dissuade her from testifying, the criminal conduct nonetheless impacted her. S.W. had a long and abusive association with the appellant. She was fearful of his attempt to "bribe" her, so much so that "[b]ecause [she] was scared [she] left B.C.": at para. 31.

[52] I turn to the second point raised by the appellant. Here, the appellant submits that even if the judge was correct to impose a consecutive sentence, he failed to downwardly adjust the sentence to account for the principle of totality. In *R. v. Li*, 2009 BCCA 85, Justice D. Smith provided a succinct consideration of the totality principle, where she wrote:

[27] The principle of totality also factors into the imposition of an appropriate aggregate sentence for multiple offences. In *M.(C.A.)*, Lamer C.J.C. described the principle:

[42] In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D.A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979) at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

[28] Thus, there is a two-stage approach to sentencing an offender convicted of multiple offences. The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591.

[Emphasis added.]

[53] Here, the judge acknowledged the second stage of the analysis. However, based on the circumstances of this case, he determined the totality principle was somewhat tempered. That is, when a consecutive sentence is imposed, a court considers the totality principle to ensure that the cumulative sentence does not exceed the overall culpability of the offender: at para. 34. The judge went on to consider, however, that unlike the judge in the *Avails Sentence*, he was not imposing a sentence on an offence that was part of a linked series of acts within a single endeavour. Rather, the obstruction offence, occurring later than the *Avails Offences* and occurring in distinct circumstances, did not constrain the exercise of the Court's discretion to the same extent.

[54] As I read the reasons and the record as a whole, the judge knew well his task at the second stage of the analysis. The appellant spent considerable time explaining to the judge the *Avails Sentence*, the *Bail Breach Sentence* (44 days consecutive to the *Avails Sentence*), and the resultant impact of the Court imposing the Crown's sentencing position on the *Obstruction Offences*. Before the sentencing judge, the appellant stated his position this way:

The Crown wants the [C]ourt to add to this total another three to five years. And in my submission, to do that would make the totality of the sentences, when combined, unduly harsh and crushing. That would mean a sentence of some 26 to 28 years in custody

[55] The judge sought to clarify the appellant's calculations and counsel told the judge that the sentence sought by the Crown would result in warrant expiry for the appellant of 2036 to 2038. While questioning counsel, the judge also sought to confirm that the *Obstruction Sentences* would commence after the *Avails Sentence* and *Bail Breach Sentence* had concluded. Counsel informed the judge about the *Avails Sentence* and the particulars of it and provided him with the reasons for sentence. Counsel also informed the judge about the pending appeal of conviction and sentence for the *Avails Offences*.

[56] In *R. v. Learning*, 2019 BCCA 332, Justice Hunter considered the situation where a judge was imposing a sentence on an offender previously sentenced in another jurisdiction. Justice Hunter's analysis as set out below is particularly helpful:

- [28] The sentencing judge here considered the totality principle in fairly brief compass but concluded that ordering that the sentence be served consecutive to the Saskatchewan sentence "would not offend the totality principle". The real question, as it was in Hassan, is whether the judge was unreasonable in concluding that the totality principle was not offended by directing that the sentence run consecutively without reduction.
- [29] The principle of totality arises most commonly when the same judge is sentencing an offender for multiple offences, the circumstances of which are well known to the sentencing judge. When a sentencing judge is asked to reduce a sentence based on a consideration of the sentence received by the offender for some other offence in another jurisdiction, the judge must make an assessment of overall culpability of the offender based on the information available.
- [57] It is my view that the judge correctly characterized the Obstruction Offence as distinct from the Avails Offences and he explained the basis for his decision. First, to impose a concurrent sentence would be like imposing no sentence at all for this serious subsequent offence. Second, the sentence sought by the appellant would not serve to deter offenders from engaging in similar conduct to prevent victims from testifying. It was for these reasons that the judge determined he was not constrained to impose a sentence that would be less than otherwise appropriate in the circumstances: at para. 34. The judge decided a three-year sentence was fit in the circumstances. This was less than the upper range sought by the Crown.
- [58] The judge considered the principle of totality and his approach was consistent with that observed by this Court in Learning and R. v. Hassan, 2012 BCCA 201--he recognized that the principle of totality did not apply in the same way it would if he were imposing consecutive sentences himself. The judge was given information about both sets of offences for which sentences had already been imposed.
- [59] In my view, considering the reasons and the record as a whole, I cannot say the judge's approach was flawed. He stated he was not "constrained" by the totality principle--in the sense that the circumstances called for a fit and consecutive sentence, such that a further three years would not result in a total period of incarceration that was disproportionate to the appellant's overall culpability. This was not an unreasonable assessment. The judge was sentencing the appellant for conduct that occurred after he was arrested and detained for the serious sexual and prostitution-related offences. This was conduct that was "serious" and the sentence imposed was "appropriate in the circumstances" for this offence and this offender. The judge thought it just that the appellant not be given a "pass". He imposed a consecutive sentence, less than that sought by the Crown, and one that was consistent with the range of sentences reflected in the authorities. I would not accede to this ground of appeal.

Third ground: Was the sentence for attempting to obstruct justice demonstrably unfit?

- [60] There is some overlap between this ground of appeal and the asserted totality error. However, in fairness to the appellant's position, I will similarly address this ground. The appellant submits three years was excessive in the circumstances. A sentence is demonstrably unfit if it is "clearly unreasonable", "clearly or manifestly excessive", or constitutes a "substantial and marked departure" from other sentences imposed on similar offenders for similar offences. In *R. v. Leach*, 2019 BCCA 451, Justice Fitch stated the standard this way:
- [71] Where appellate intervention is sought on grounds that a sentence is demonstrably unfit, the standard of review is deferential. This is reflected in the high threshold that must be met to establish demonstrable unfitness. A sentence will be demonstrably unfit if it constitutes a "substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes", is "clearly unreasonable" or "clearly or manifestly excessive": see *R. v. Shropshire*, 1995 CanLII 47 (SCC), [1995] 4 S.C.R. 227 at para. 46; *R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500 at para. 91; *Lacasse* at para. 52.
- [61] The parties placed a number of authorities before the judge to establish the appropriate range of sentence. The Crown relied on four cases where the sentence exceeded two years, listed at paras. 19-23:
- a) *R. v. Simmons*, where the president of a motorcycle club attempted to prevent a sexual assault victim from testifying by threatening her that members of the club would always be looking for her if she testified. The offender had a long and serious criminal record. His sentence of five years was upheld by the Ontario Court of Appeal.
 - b) *R. v. Dasilva*, where a conspiracy existed between three accused to attempt to obstruct justice by dissuading a witness from testifying. Mr. Dasilva had a serious criminal record and the attempted obstruction involved an implied threat of violence in that the witness would be labeled a "rat" in the criminal community. He was sentenced to four years.
 - c) *R. v. Gill*, where the accused in a murder trial had a romantic affair with a juror. He was sentenced to just under six years with credit.
 - d) *R. v. Jeurissen*, where the accused was a serious long-term offender who had an almost unbroken string of convictions for the prior 26 years. His attempt to obstruct justice involved violence and the disregard of a no-contact order in trying to get his spouse to drop an assault charge against him. He was sentenced to three years for assault with a weapon and four years consecutive for attempting to obstruct justice.
 - e) *R. v. Thomas*, [2011] O.J. No. 3460, where the offender was sentenced to six months for attempting to obstruct justice by asking the complainant's friend to ask the complainant to drop the charges of sexual assault in exchange for money.
- [62] The appellant relied on authorities where the sentence imposed was less than that sought by the Crown. Those cases, listed at paras. 25-28, included:

- a) R. v. Jahanrakhshan, where the offender was faced with fraud charges and attempted to influence bank officials to assist his case. He was sentenced to six months jail.
 - b) R. v. Hall, where the offender was convicted of aggravated assault and other offences in relation to the swarming of an innocent victim. A witness was threatened by the offender. A sentence of three months was imposed.
 - c) R. v. Ward, where the offender pleaded guilty to the offence of obstruction of justice involving a threat to a witness that, if he showed up in court, he would be beaten or stabbed. He was sentenced to six months.
 - d) R. v. Maynard, where the offender pleaded guilty to aggravated assault. In the face of a no-contact order, he called one of the complainants in an attempt to persuade her not to testify against him. He was sentenced to six months jail to be served consecutively to a five-year sentence for assault.
- [63] The judge noted that many of the cases cited by counsel involved substantive offences followed by the obstruction offence. In those cases, he noted, the court would have considered the totality principle when sentencing the offender for more than one offence consecutively and that may have influenced the sentence imposed for the obstruction offence: at para. 29. What is clear from the judge's case review is that the jail terms for obstruction offences can range from a few months to five or six years: Gill; R. v. Hansen, 2018 ONCA 46.
- [64] The judge explained the basis for the decision that three years was a fit sentence. He found:
- a) the attempt to bribe S.W. was unsuccessful because she reported it to the police and was not deterred from testifying at trial, but she was nonetheless impacted by the appellant's attempt to obstruct justice;
 - b) although the appellant did not use violence in his attempt to obstruct justice in this case, his conduct caused fear to S.W., so much so that she left the province; and
 - c) the nature of the offence is one that strikes at the heart of the justice system.
- [65] I agree with the Crown's submission on appeal that there were a number of relevant considerations justifying the three-year sentence, including:
- a) the offence was planned and deliberate and not a momentary lapse in judgment and the appellant persisted in pursuing the plan over about two months;
 - b) the seriousness of the underlying substantive offences for which the appellant sought to escape liability;
 - c) the violation of a custodial no-contact order on the heels of the appellant's arrest for violating a no-contact condition of a bail order;

- d) the seriousness of offering a bribe to a complainant in a case where trepidation about coming forward and testifying would be expected; and
 - e) the community's stake in protecting some of its most vulnerable members from serious exploitation and abuse by protecting their ability to come forward and participate in bringing their abusers to justice.
- [66] The judge stated, correctly in my view, the absence of violence is not a mitigating factor. Rather, it is another aggravating factor that was absent in this case: at para. 17, citing Crazyboy at para. 9.
- [67] The judge summarized the authorities presented to him and reached a conclusion based on those authorities. His conclusion was not unreasonable. In my opinion, in light of the authorities and the circumstances of this case and this offender, the three-year consecutive sentence for attempting to obstruct justice cannot be said to be manifestly excessive or clearly unreasonable.
- [68] In my view, when the sentence is examined in its context, it cannot be said that the judge failed to consider the totality of the sentence or imposed a sentence that was disproportionate to the gravity of the offence. I would not accede to the submission that the sentence is demonstrably unfit.

Disposition

- [69] I would grant leave to appeal, dismiss the application to present fresh evidence, and dismiss the appeal.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Riley"

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