

CANADA / JUDGMENT

R. v. Narcisse

2017 BCSC 2485

COURT

Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Narcisse,

2017 BCSC 2485

Date: 20171114

Docket: 100157-2

Registry: Kamloops

Regina

v.

Kenneth Brandon Narcisse

Restriction on Publication: Pursuant to 486.4(2) C.C.C.

Before: The Honourable Madam Justice Donegan

Oral Reasons for Sentence

Counsel for the Crown:

C. Cook

Counsel for the Accused:

J. Michi

Place and Date of Trial/Hearing:

Kamloops, B.C.

November 14, 2017

Place and Date of Judgment:

Kamloops, B.C.

November 14, 2017

INTRODUCTION

- [1] On June 1, 2017, Kenneth Brandon Narcisse entered a guilty plea to a single count of sexually assaulting B.K., contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. This event occurred on June 25, 2015, in Kamloops. Mr. Narcisse entered his guilty plea following the trial testimony of two Crown witnesses who saw Mr. Narcisse sexually assault the victim. Mr. Narcisse's guilty plea on that day spared B.K. the burden of testifying at trial.
- [2] I am now to determine the appropriate sentence in this case. The Crown seeks a period of imprisonment between 24 and 30 months, with probation to follow if the custodial portion of the sentence I impose permits. The defence seeks a period of imprisonment of 12 months, followed by probation.
- [3] In addition to the submissions of counsel and Mr. Narcisse's address, before me is a pre-sentence report prepared by a probation officer with a Gladue component, a victim impact statement prepared by B.K., nine letters of support for Mr. Narcisse and several case authorities provided by counsel.
- [4] Mr. Narcisse's address to the Court today indicate that he is very remorseful for his conduct and appreciates the impact his actions have had, not only on the victim, but on his family, his friends, and his community.

CIRCUMSTANCES OF THE OFFENCE

- [5] B.K. was 19 years old and living in a home in Kamloops with roommates on the evening of June 24, 2015, into the early morning hours of June 25. On that evening, she and one of her roommates, Mr. K., planned a small gathering of friends at their home. Others arrived throughout the evening, including Mr. Narcisse. The group socialized and played drinking games. The last thing B.K. recalls from that evening was playing drinking games. Her next recollection was the following morning when she was told by Mr. K. what had happened to her.
- [6] When asked about her level of intoxication that evening, relating to a scale of zero being sober to 10 being blackout drunk, B.K. placed herself at seven during the drinking games, and thereafter at a 10.

- [7] During the course of the evening, Mr. Narcisse was overtly flirting with and pursuing B.K. B.K. had a boyfriend at the time and did not return his advances and even told her roommate that she did not like her interactions with Mr. Narcisse. Mr. K. saw Mr. Narcisse behaving what he perceived to be aggressively towards B.K. and saw her reacting defensively to him, so he told Mr. Narcisse on three occasions to stay away from B.K. and leave her alone.
- [8] On one of those occasions, Mr. Narcisse accused Mr. K. of interfering with his sexual intentions toward B.K., accusing Mr. K. of "cock blocking" him.
- [9] Mr. K. was concerned for B.K. because she was highly intoxicated. She had marked and noticeable indicia of intoxication, including the need to be supported when she stood, slurred speech, non-sensical discussions, and other observable symptoms. Mr. K., with the assistance of another, took steps to try and hydrate her later in the evening. Following this, they had to effectively drag her into her bedroom where they placed her on the bed fully clothed. When they left her room, they closed the door behind them.
- [10] The party resumed for a time after that. Mr. K. eventually went to bed in his room. Party guests were permitted to stay overnight. A short time after he went to sleep, Mr. K. was awoken by others who expressed concern about B.K. Mr. K. went to her room and opened the door to find Mr. Narcisse having intercourse with B.K. while she was unconscious. Mr. Narcisse was naked and B.K. was naked from the waist down. B.K. was lying on her back on the bed and Mr. Narcisse was above her, holding her legs in the air and penetrating her vagina with his penis. Mr. K. described it as "vigorous" penetration.
- [11] Mr. Narcisse told Mr. K. to go away and tried to shuffle Mr. K. out of the room. Mr. K. tried to drag Mr. Narcisse off of B.K., but he would not leave. The men loudly argued back and forth, with each trying to get the other to leave the room.
- [12] While Mr. Narcisse was having intercourse with B.K., she was unconscious. Mr. K. saw B.K.'s eyes were closed but occasionally when opened, he saw that her eyes rolled back such that only their whites could be seen. He described her head as being like a "bobble head" or a "ragdoll" and noticed that she was drooling.
- [13] While the men argued loudly in her bedroom, B.K. remained unmoving and unresponsive on her bed. After several minutes of yelling, Mr. Narcisse pushed Mr. K. out of the room and slammed the door. Mr. K. opened it and tried to get Mr. Narcisse out of the room again, to no avail. Mr. K. then took it upon himself to retrieve a knife and confront Mr. Narcisse with it. This had the desired outcome and Mr. Narcisse left.
- [14] The next morning, B.K. was quite ill, suffering from the effects of her profound intoxication. Mr. K. told her what happened so she went to the hospital and underwent a sexual assault examination by medical personnel.

EFFECTS OF THIS CRIME

[15] B.K. prepared a victim impact statement dated November 2, 2017. She writes:

The offence made me feel embarrassed and ashamed of myself. Because of that guilt and shame I started drinking more to cope with those feelings. I lost good friends because of what happened, including my roommates at that time. After the offence I ended up losing my job because I was depressed and wouldn't leave the house and because I was so busy talking with authorities/getting rape kit done. The offence affected my relationship with my spouse at the time and we ultimately split. What happened made me feel very guilty and upset about myself.

[16] Later in her victim impact statement, B.K. writes that she was prescribed medication for depression and anxiety that she experienced as a result of this crime. She was also impacted financially in that she lost her job as a result of her mental health difficulties arising from the offence. She was unable to pay her rent, so she was evicted from her home.

[17] B.K. describes fear for her security as well. She writes:

I am always worried about bumping into Kenneth in public places. I no longer go to the [location omitted] area in fear of seeing him or being approached by one of his family/friends and being harassed by them.

[18] It is clear from these brief remarks by B.K. that she has been significantly impacted by this crime. She is currently 21 years of age. I share Mr. Narcisse's expression of hope that with this sentencing, B.K. can close this terrible chapter, heal, and move on successfully with her life.

BACKGROUND OF THE OFFENDER

[19] Mr. Narcisse is currently 23 years old. He has been in a common law relationship for about the last four years with the mother of his two young children. His boys are 17 months old and four months old.

[20] Mr. Narcisse has a grade 12 education. He suffers from no learning or cognitive disabilities. He is currently unemployed, collecting Employment Insurance benefits. At the time of the offence, he had been enrolled in a trades program.

[21] Following his guilty plea on June 1, 2017, Mr. Narcisse lost his employment with the Fountain Indian Band.

[22] Mr. Narcisse enjoys good physical health. He reports no current issues with drugs or alcohol. He took the step about two years ago, a little more than two years ago now, of choosing to consume no alcohol whatsoever and has maintained abstinence since then.

[23] Mr. Narcisse has a very limited criminal record. He was convicted of driving while over .08 on October 16, 2012 and was sentenced to pay a \$1,000 fine and was subjected to a one-year driving prohibition. Mr. Narcisse also has a Motor Vehicle Act offence conviction. I conclude that these convictions are largely irrelevant to the sentencing at hand.

- [24] In terms of his attitude toward this offence, Mr. Miller, the pre-sentence report writer, reports that Mr. Narcisse did not articulate remorse or empathy for the victim and claimed a poor recollection of the events of the evening due to his alcohol consumption, but told him that he would not object to attending and completing the Forensic Sex Offender program through Corrections.
- [25] Mr. Narcisse has explained to me today that he does have profound remorse for what he did and that Mr. Miller's perceptions of his remorse are explained by Mr. Narcisse's inability to be immediately forthcoming with his emotions. Mr. Narcisse was raised and lived in a home where his family did not express their feelings. It is difficult for him to open up. I accept this explanation.
- [26] Mr. Narcisse is Aboriginal. He is a member of the Fountain Band through his mother, with whom he maintains a close relationship. His father, with whom he has no contact, is Cree, from the Thunder Child First Nation community in Saskatchewan. In that regard, Mr. Miller writes at page 4 of his report:

Mr. Narcisse is not fluent in Interior Salish but can read/write and sing some of the language. Kenneth was influenced by a step father to be close with his First Nation ancestry. He attends cultural events such as 'pow-wow's', sweat lodge ceremonies, hunting/fishing and gathering and gathering berries. Kenneth travels British Columbia dancing as a 'grass-dancer'.

- [27] To this, I would add from his counsel's submissions that he has been dancing in pow wows since he was five years old, performing as a grass dancer at numerous pow wows and travelling throughout Western Canada and the northwestern United States for that purpose. Mr. Narcisse estimates that he has performed in upwards of 350 pow wows.
- [28] Mr. Narcisse's mother did not attend residential school and he is not aware if his father attended, but both of his maternal grandparents did attend at St. Joseph's Residential School in Williams Lake and Kamloops Residential School. They have shared some of their experiences with Mr. Narcisse. They now live on the Fountain Reserve outside of Lillooet.
- [29] Mr. Narcisse is described by his friends and family in positive terms. I have read the nine reference letters that have been tendered and am impressed by their positive descriptions. As I have indicated, he has a good relationship with his mother, but he also has a very good relationship with his two step-siblings. His stepfather has been a role model to him and taught him many important life lessons.
- [30] Mr. Narcisse made the decision to abstain completely from the consumption of alcohol in September of 2015, and has maintained his abstinence ever since.

THE LEGAL FRAMEWORK

- [31] The seriousness with which Parliament views the offence of sexual assault is reflected by its maximum penalty of 10 years' imprisonment. The determination of a just and appropriate sentence is a highly-individualized exercise that goes beyond any mathematical calculation.

Many courts have recognized that imposing a just and proportionate sentence in serious cases such as this is among the most challenging responsibilities a judge can have. It involves a careful balancing of a variety of factors in the context of a particular set of circumstances in respect of a very particular offender.

[32] This balancing process is to occur within a framework, and that framework is set out in s. 718 of the Code. Section 718 of the Code sets out the fundamental purpose and objectives of sentencing as follows:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[33] Section 718.1 of the Code sets out the principle of proportionality. This principle is fundamental to sentencing. It provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[34] Other principles of sentencing that I am to apply are set out in s. 718.2 of the Code:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender . . .
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

This is often referred to as the principle of parity.

- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [35] Recent Supreme Court of Canada decisions have explained many of these principles.
- [36] In *R. v. Nasogaluak*, 2010 SCC 6, the Supreme Court of Canada discussed generally the purpose and principles of sentencing. The Court writes:
- [43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.
- [37] In *R. v. Pham*, 2013 SCC 15, the Court discusses the principles of proportionality and parity at paras. 7-8:
- [7] LeBel J. explained proportionality as follows in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 37:

Proportionality is the sine qua non of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

- [8] In addition to proportionality, the principle of parity and the correctional imperative of sentence individualization also inform the sentencing process. This Court has repeatedly emphasized the value of individualization in sentencing: *Ipeelee*, at para. 39; *R. v. Wust*, 2000 SCC 18, [2000] 1 S.C.R. 455, at para. 21; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 92. Consequently, in determining what a fit sentence is, the sentencing judge should take into account any relevant aggravating or mitigating circumstances (s. 718.2(a) of the Criminal Code), as well as objective and subjective factors related to the offender's personal

circumstances.

- [38] In *R. v. Lacasse*, 2015 SCC 64, the Court re-emphasized the principle of proportionality as a fundamental one in sentencing. It is to be determined both on an individual basis, that is in relation to the offender himself or herself, and to the offence committed by the offender, and by comparison with sentences imposed for similar offences committed in similar circumstances. The concepts of individualization and parity of sentences must be reconciled for a sentence to be proportionate.
- [39] The concept of moral blameworthiness in the principle of proportionality was discussed by Madam Justice Stromberg-Stein in *R. v. Lilgert*, 2013 BCSC 1329 at para. 31:
- [31] Section 718.1 provides that any sentence imposed must be proportionate to the gravity of the offence and the degree of responsibility or moral blameworthiness of the offender. Determining moral blameworthiness includes an examination of the intentional risks taken by the offender, the harm he or she has caused, and the degree of deviation from acceptable standards of behaviour the conduct represents. This is set out in a number of decisions, including: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500; *R. v. Bhalru*, 2003 BCCA 645) at para. 28; and *R. v. Johnson* (1996), 84 B.C.A.C. 261 at para. 32.
- [40] Madam Justice Stromberg-Stein also discussed the objectives of denunciation and deterrence at para. 33:
- [33] At paragraph 45 of *Bhalru*, the court discusses the principle of denunciation as related to deterrence. Both are considered punitive. The object of denunciation is to communicate "society's condemnation of that particular offender's conduct [denunciation] satisfies a community's desire and need to condemn certain conduct, and also plays a more positive role in communicating and reinforcing society's shared set of values." However, at para. 46, the court noted:

The punitive objectives of general deterrence and denunciation should not overwhelm the restorative objectives that are also embodied in the new sentencing regime.

- [41] Retribution also has a proper place in sentencing, but it is a concept that must be distinguished from vengeance. The distinction between those concepts was discussed again by the Supreme Court of Canada in *R. v. M.(C.A.)*, 1996 CanLII 230 (SCC) at paras. 77, 80 and 81:
- [77] It has been recognized by this Court that retribution is an accepted, and indeed important, principle of sentencing in our criminal law. As La Forest J. acknowledged in discussing the constitutionality of the dangerous offender provisions of the Criminal Code in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 329:

In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing. [Emphasis added.]

This Court has since re-endorsed this passage on a number of occasions as a proper articulation of some of the guiding principles of sentencing in a number of subsequent cases. See Luxton, *supra*, at p. 721; Goltz, *supra*, at p. 503; and Shropshire, *supra*, at para. 23.

[80] However, the meaning of retribution is deserving of some clarification. The legitimacy of retribution as a principle of sentencing has often been questioned as a result of its unfortunate association with "vengeance" in common parlance. See, e.g., *R. v. Hinch and Salanski*, *supra*, at pp. 43-44; *R. v. Calder* (1956), 114 C.C.C. 155 (Man. C.A.), at p. 161. But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing. See Ruby, *Sentencing*, *supra*, at p. 13. Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. As R. Cross has noted in *The English Sentencing System* (2nd ed. 1975), at p. 121: "The retributivist insists that the punishment must not be disproportionate to the offender's deserts."

[81] Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. 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". The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the offender must bear in committing an enumerated offence. Our

criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the Criminal Code.

- [42] In the case at bar, s. 718.2(e) of the Code applies. This provision requires that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [43] The Supreme Court of Canada has provided guidance here as well in the very well-known decisions of *R. v. Gladue*, [1999] 1 S.C.R. 688 and then *R. v. Ipeelee*, 2012 SCC 13. Mr. Justice Romilly provided a summary of these cases in *R. v. Peters*, 2014 BCSC 1009 at paras. 22- 27:
- [22] All available sanctions, other than imprisonment, should be considered, particularly with respect to Aboriginal offenders - s. 718.2(e). When an offender is identified as an Aboriginal it is necessary, when arriving at a fit and proper sentence, for the court to consider (a) the unique systemic or background factors that brought the offender before the court and (b) the types of sentencing that may be appropriate because of the offender's Aboriginal heritage or connection: *R. v. Gladue*, [1999] 1 S.C.R. 688; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207; *R. v. Ipeelee* 2012 SCC 13.
- [23] In *Gladue*, the court addressed the problem of over-incarceration of Aboriginal persons in Canada and the over-representation of Aboriginal Canadians in penal institutions. The court noted at para. 64:
- . . . It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree.
- [24] At para. 80, the Supreme Court in *Gladue*, provided an outline of the approach which should be taken when sentencing Aboriginal offenders. The court said:

As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these

circumstances? (Emphasis original)

[25] With respect to more violent and serious offences, the court in Gladue, at para. 79, said that, even taking into account the offender's Aboriginal background:

. . . the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, . . .

[26] This is particularly so when sentencing a dangerous offender, where the objective is the protection of the public.

[27] Ipeelee, supra, again emphasized the need to consider the unique circumstances of Aboriginal persons when sentencing and to take judicial notice of historical factors affecting Aboriginals. The court said at para. 60:

. . . To be clear, courts must take judicial notice of such matters as the history of colonialism, displacement, and residential schools and how that history continues to translate into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and of course higher levels of incarceration for Aboriginal peoples. These matters, on their own, do not necessarily justify a different sentence for Aboriginal offenders. Rather, they provide the necessary context for understanding and evaluating the case-specific information presented by counsel. Counsel have a duty to bring that individualized information before the court in every case, unless the offender expressly waives his right to have it considered . . .

See also R. v. Kakekagamick (2006), 81 O.R. (3d) 664 (Ont.C.A.), R. v. Whiskeyjack, 2008 ONCA 800, [2008] O.J. No. 4755 (Ont.C.A.), R. v. Jacko, 2010 ONCA 452, R. v. Napesis, 2010 BCCA 499, R. v. Jack, 2008 BCCA 437, R. v. Armstrong, 2010 BCCA 451; R. v. Napesis, 2010 BCCA 499.

[44] I do wish to emphasize that in Ipeelee, the Supreme Court of Canada critically analyzed the post-Gladue jurisprudence applying s. 718.2(e), and identified several errors that courts have made in its application. The Court first made it clear that an offender does not need to establish any sort of causal link between background factors and the offence before the court before he or she is entitled to have those matters considered by the sentencing judge:

[82] This judgment displays an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples. It also imposes an evidentiary burden on offenders that was not intended by Gladue. As the Ontario Court of Appeal states in R. v. Collins, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33:

There is nothing in the governing authorities that places the burden of persuasion on an Aboriginal accused to establish a causal link between the systemic and background factors and commission of the offence....

As expressed in *Gladue*, Wells and Kakekagamick, s. 718.2(e) requires the sentencing judge to "give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts": *Gladue* at para. 69. This is a much more modest requirement than the causal link suggested by the trial judge.

(See also *R. v. Jack*, 2008 BCCA 437, 261 B.C.A.C. 245.)

[83] As the Ontario Court of Appeal goes on to note in *Collins*, it would be extremely difficult for an Aboriginal offender to ever establish a direct causal link between his circumstances and his offending. The interconnections are simply too complex. The Aboriginal Justice Inquiry of Manitoba describes the issue, at p. 86:

Cultural oppression, social inequality, the loss of self-government and systemic discrimination, which are the legacy of the Canadian government's treatment of Aboriginal people, are intertwined and interdependent factors, and in very few cases is it possible to draw a simple and direct correlation between any one of them and the events which lead an individual Aboriginal person to commit a crime or to become incarcerated.

Furthermore, the operation of s. 718.2(e) does not logically require such a connection. Systemic and background factors do not operate as an excuse or justification for the criminal conduct. Rather, they provide the necessary context to enable a judge to determine an appropriate sentence. This is not to say that those factors need not be tied in some way to the particular offender and offence. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, they will not influence the ultimate sentence.

[45] Second, the Court emphasized that sentencing judges have a duty to apply s. 718.2(e) in every case, including serious and violent offences:

[84] The second and perhaps most significant issue in the post-*Gladue* jurisprudence is the irregular and uncertain application of the *Gladue* principles to sentencing decisions for serious or violent offences. As Professor Roach has indicated, "appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments -- paragraphs that discuss the relevance of *Gladue* in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders" (K. Roach, "One Step Forward, Two Steps Back: *Gladue* at Ten and in the Courts of Appeal" (2008-2009), 54 *Crim. L.Q.* 470, at p. 472). The passage in *Gladue* that has received this unwarranted emphasis is the observation that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for Aboriginals and non-Aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (*Gladue*, at para. 79; see also Wells, at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the *Gladue* principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)).

[85] Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear, at para. 82, that sentencing judges have a duty to apply s. 718.2(e): "There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence." Similarly, in *Wells*, Iacobucci J. reiterated, at para. 50, that

[t]he generalization drawn in *Gladue* to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

This element of duty has not completely escaped the attention of Canadian appellate courts (see, e.g., *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192).

[86] In addition to being contrary to this Court's direction in *Gladue*, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The Code does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (*R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons"* (2001), 39 *Osgoode Hall L.J.* 469, at p. 479). Trying to carve out an exception from *Gladue* for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in *Gladue*. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.

[87] The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the Criminal Code, to consider the unique circumstances of Aboriginal offenders. Failure to apply *Gladue* in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the *Gladue* principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

- [46] Counsel have also provided several case authorities for my consideration. These can be helpful to and, in some cases, binding upon me, in terms of their principles. They are, of course, useful in terms of their application to the facts of the particular case, and also offer a sentencing range.
- [47] I do not intend to go through all of the cases that have been provided. I have read them all. I will first highlight *R. v. G.M.*, 2015 BCCA 165, where the Court confirmed that in serious sexual assault cases, the paramount sentencing objectives are denunciation and deterrence. The Court held that it is not an error in principle to give these objectives primacy over other sentencing principles such as rehabilitation at paras. 17-18:
- [17] In serious sexual assault cases, the paramount sentencing objectives are denunciation and deterrence; it is not an error in principle to give them primacy over other sentencing principles such as rehabilitation: see e.g. *R. v. Wells*, 2000 SCC 10 at para. 44; *R. v. B.S.B.*, 2010 BCCA 40 at para. 39; *R. v. Thurairajah*, 2008 ONCA 91 at para. 41.
- [18] Absent exceptional or unique circumstances, it is incumbent on the sentencing judge to give primacy to the deterrence and denunciation when imposing a sentence for a serious sexual assault: *R. v. Garrett*, 2014 ONCA 734. At para. 19 of *Garrett*, the Ontario Court of Appeal stressed that ignoring pleas by a complainant to stop "in itself" constituted "demeaning behaviour and contemptuous disregard for the personal integrity of the complainant" that engaged "the predominant sentencing principles of denunciation and deterrence."
- [48] The Court of Appeal also confirmed a range of sentences for sexual assault involving intercourse of two to six years' imprisonment. As both counsel have emphasized, this range is a guideline rather than a hard and fast rule. A judge can impose a sentence outside the range, as long as it is in accordance with the principles and objectives of sentencing.
- [49] In terms of comparable sentences, as I have indicated, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. I appreciate, as counsel have emphasized, that no two cases are the same, but they can provide some guidance.
- [50] In *R. v. Williams*, 2011 BCCA 194, found at Tab 2 of the Crown's book of authorities, a 41-year-old offender sexually assaulted a 14-year-old girl who was unconscious, by placing his hand in her vagina. He was intoxicated at the time. Both the accused and the victim were of First Nations heritage. The accused was a serious alcoholic. A sentence of two years' imprisonment followed by three years' probation was upheld by the Court of Appeal as a fit one in the circumstances.

- [51] In *R. v. Thomas*, 2010 BCSC 1337, found at Tab 3, the sentencing judge acceded to a joint submission for 26 months' imprisonment and probation. The offender was Aboriginal with very tragic antecedents. He pled guilty to sexually assaulting a 13-year-old girl, conduct which involved progressively more significant assaults upon her. He showed sincere remorse, was seen as a moderate risk to sexually reoffend in the short- to medium-term and alcohol was involved.
- [52] *R. v. Hackett*, 2016 BCSC 1424, found at Tab 5, presents some similarities to the case at bar. At the time of the offence, the offender was 28 years old and the victim was 18 years old. The offender was Aboriginal. Alcohol was involved. He was found to be a low to moderate risk to reoffend and received a sentence of two years less a day followed by two years' probation. There was only partial penetration in that case, although I note that that offender had a serious criminal record involving convictions for assault, including assault with a weapon.
- [53] Mr. Michi has provided authorities for my consideration as well. In *R. v. Yamelst*, 2013 BCSC 1689, a 24-year-old offender was convicted of sexual assault following a jury trial. He was sentenced to a period of imprisonment of 18 months, followed by 18 months' probation. Again, the victim in that case was sleeping and helpless. The offender had a lack of prior related convictions, was relatively young, had community support, and had the support of his grandparents. He was an Aboriginal offender who had lost his mother in an accident, had been abandoned by his father and raised by his grandparents. As Ms. Cook notes, this decision was rendered prior to the Court of Appeal's decision in *G.M.*
- [54] In *R. v. Eustache*, 2014 BCSC 256, a 48-year-old sexually assaulted an unconscious 18-year-old victim by rubbing his genitals against her. The offender was a residential school survivor who had been subject to abuse and neglect in his childhood and had prior convictions for assaulting the victim's mother when she refused him sex. On appeal (2014 BCCA 337), the Court confirmed a fit sentence was one year imprisonment followed by two years' probation.
- [55] Finally, in *R. v. Willis*, 2016 BCSC 752, the offender was convicted of sexually assaulting an unconscious friend following a trial. He received a sentence of two years' imprisonment, followed by three years' probation. This offender had a fairly significant criminal record, suffered from a number of deficits including fetal alcohol spectrum disorder, and was seen to have very little in terms of rehabilitative prospects. The circumstances of the offence are quite similar in that the victim in that case expressed no interest in Mr. Willis when he made advances toward her, did not consent to having intercourse with him, and in fact awoke to find him on top of her, having vaginal intercourse. She tried to push him away, but was unsuccessful. Mr. Willis was heavily intoxicated at the time. While not completely on all fours with the case at bar, it is quite similar in terms of the circumstances of the offence.

ANALYSIS

- [56] Of primary importance here are the sentencing objectives of denunciation and deterrence. There is no question that this offence is a serious sexual assault. Although of lesser importance, I do not lose sight of the other sentencing objectives, including the objective of rehabilitation.
- [57] Looking first at the aggravating factors, I agree with the Crown that this was a crime of opportunity and it was predatory. Mr. Narcisse made unwanted advances toward the victim throughout the course of the evening. His advances were not received well by B.K. and he was firmly told on more than one occasion by her roommate to leave her alone. B.K. was visibly intoxicated to the point that she could not walk unassisted, rendering her very vulnerable.
- [58] The circumstances of the offence are aggravating. B.K. was in her own home, in her bedroom with the door closed. This is a place where she was entitled to, and should, feel safe and secure. Mr. Narcisse took advantage of her extreme vulnerability by having intercourse with her while she was completely incapable of consent. She was unconscious. This constitutes one of the most profound and demeaning examples of disregard for the personal integrity of another that one could imagine. The effect on B.K., as outlined in her victim impact statement, has been significant.
- [59] There are mitigating factors, of course, as well. Mr. Narcisse is a youthful offender for which consideration of rehabilitation is important. He has excellent family and community supports. To his credit, he has taken the step of abstinence from alcohol. He recognizes that alcohol played a disinhibitory role that evening and that he simply cannot drink alcohol anymore. He is to be commended for taking the positive step.
- [60] Mr. Narcisse's guilty plea is also a mitigating factor. While the plea was not at the earliest opportunity, it did, nevertheless, spare the victim from the stress and trauma of testifying at trial. I do accept his guilty plea as an indication of Mr. Narcisse's remorse. In this regard, I agree with his counsel that sometimes it takes longer for an offender to come to take responsibility for his offending than others.
- [61] While some may see Mr. Narcisse's crime against B.K. as a defining moment in his life, Mr. Narcisse rather sees his guilty plea as his defining moment. His guilty plea was a moment where he, after a considerable period of self-reflection, came to accept responsibility for what he did and accept the consequences of his actions. He took this step for the sake of his family, for the sake of his children. I accept he is sincere when he says he accepts responsibility in order to be the role model for his children he wants to be.
- [62] While his guilty plea is perhaps not worthy of the same weight as an early guilty plea where the victim is spared testifying altogether (B.K. testified at the preliminary inquiry), and the court system is relieved of cost and time, it is still worthy of some weight in the circumstances of this case.

- [63] I also see as mitigating Mr. Narcisse's background circumstances as an Aboriginal offender. The long-term impacts of the residential school system in Canada have been well documented. Many of the leaders, teachers, parents, and grandparents of today's First Nations communities are residential school survivors. There are well-recognized intergenerational effects, as well. Many descendants of survivors are recognized to share the same burdens as those who attended the schools, including personal trauma, compromised family systems, loss of language, culture and teachings, and loss of traditions. Residential schools laid the foundation for much of the violence and substance misuse suffered by First Nations people today.
- [64] It is well recognized in this context that generations of children have grown up without a nurturing family life, self-abuse, high rates of alcoholism, substance misuse, and even such tragic consequences as suicide are recognized results.
- [65] Mr. Narcisse has revealed that he himself was victimized at a young age. He is fortunate in that he had grandparents that did nurture him and he maintains a close relationship with his mother and other family members, but he certainly has suffered the background circumstances common to Aboriginal offenders that I have just outlined.
- [66] The gravity of this offence is very high. It is very serious. Mr. Narcisse's moral blameworthiness is also high, although it is tempered somewhat by his background circumstances, his alcohol consumption at the time, and the other mitigating factors that I have outlined.
- [67] I am going to ask you to stand, sir, please. On the basis of all that I have considered and outlined, I find there is nothing unusual or exceptional to take Mr. Narcisse below the bottom of the range set out by our Court of Appeal for this offence. I conclude that a fit, just, and proportionate sentence for Mr. Narcisse for this crime is two years less a day imprisonment, followed by two years' probation.
- [68] Mr. Narcisse will be classified to Ford Mountain Correctional Centre where he can be offered the Forensic Sex Offender Program to promote and assist with his rehabilitation.
- [69] You can have a seat, sir, I am going to outline the terms of your probation order.
- [70] In addition to the statutory terms, you will be bound by the following terms:
- Within 72 hours of your release from custody, you must report to a probation officer at 101, 640 Borland Street in Williams Lake, British Columbia, and report thereafter as directed by your probation officer;
 - You must reside in a residence approved of in advance by your probation officer and you must not change your residence unless you have written approval of your probation officer;
 - You must attend counselling or programs as directed by your probation officer. You must attend the Forensic Sex Offender Program if directed by your probation officer;

- You must have no contact, direct or indirect, with B.K.
- You must not be within 50 metres of the residence of B.K., her school, or her workplace, unless in a moving motor vehicle in transit to somewhere else;
- You must abstain absolutely from the consumption of alcohol and non-prescription drugs;
- You must not possess, either personally or through another person, any firearm, cross bow, prohibited weapon, restricted weapon, prohibited device, ammunition, or explosive substance, anything that resembles a weapon or firearm, any weapon as defined in s. 2 of the Code, or any related authorizations, licences, or registration certificates. Except that you may possess a firearm or ammunition for sustenance purposes in accordance with the following terms and conditions: (a) you are properly licensed; (b) you are sober; and (c) you possess the firearm and ammunition only when travelling to, from, or in the course of a legal hunt.
- You must not enter any liquor store, beer and wine store, bar, pub, lounge, night club, beer garden, or any other business from which minors are prohibited are any time by the terms of a liquor licence.

[71] Those are the terms of your probation order.

[SUBMISSIONS ON ANCILLARY ORDERS]

[72] THE COURT: All right, so we will stand down briefly to allow counsel additional time to formulate further submissions, but before I do that, there are other ancillary orders that I will impose at this time.

[73] Pursuant to s. 487.051 of the Code, Mr. Narcisse, you are required to provide bodily samples for the purpose of forensic DNA analysis as may reasonably be required for that purpose by means of the investigative procedures described in s. 487.06(1) of the Code.

[74] The Sex Offender Information Registration Act, S.C. 2004, c. 10 requires that I shall, on application by the prosecutor, make an order that you comply with that Act because you have been convicted of a designated offence, in this case s. 271 of the Code.

[75] I am satisfied that the impact on your privacy or liberty would not be disproportionate to the public interest, so pursuant to ss. 490.012 and 490.013 of the Code, I order that you are required to comply with the Sex Offender Information Registration Act for a period of 20 years.

[76] There is a victim fine surcharge. Your client will need some time to pay, I assume, Mr. Michi.

[SUBMISSIONS ON TIME TO PAY]

[77] THE COURT: All right. The victim fine surcharge is payable by you, sir, in the amount of \$200 on or before six months following the date of your release from prison.

[78] All right, so we will stand down now for our afternoon break, and then I will hear your further submissions.

[79] THE CLERK: Order in court. This court is stood down for the afternoon break.

[PROCEEDINGS ADJOURNED AND RECONVENED]

[SUBMISSIONS RE WEAPONS PROHIBITION AT 3:23:40 TO 3:28:59 P.M.]

[80] THE COURT: Pursuant to s. 109 of the Code, Mr. Narcisse, you must not possess, either personally or through another person, any firearm, cross bow, prohibited weapon, restricted weapon, prohibited device, ammunition, or explosive substance, anything that resembles a weapon or firearm, any weapon as defined in s. 2 of the Code, or any related authorizations, licences, or registration certificates. Except that you may possess a firearm or ammunition for sustenance purposes in accordance with the following terms and conditions: (a) you are properly licensed; (b) you are sober; and (c) you possess the firearm and ammunition only when travelling to, from, or in the course of a legal hunt.

[81] The s. 109 order is for a period of 10 years, and of course your probation order is for a period of two years.

[82] Now, in terms of a surrender order, you have indicated that you do not have any firearms, sir, in your possession?

[83] THE ACCUSED: No.

[84] THE COURT: All right, sir, in the event you are mistaken, I will order forthwith upon your release from prison, you must place all of your firearms, cross bows, prohibited weapons, restricted weapons, prohibited devices, ammunition, explosive substance, and all weapons, including imitation weapons, imitation firearms possessed by you or through another person, and to the location of any related authorizations, licences, or registration certificates, you must surrender all of those items to the -- what, RCMP detachment at Williams Lake? Would that be the closest detachment to his release, or Kamloops?

[85] MS. COOK: 100 Mile, I think is --

[86] THE ACCUSED: 100 Mile.

[87] THE COURT: 100 Mile -- 100 Mile House, all right.

[88] I am declining to include any reference specifically to knives in your probation order. There is no nexus between your offending and the use of a weapon such as a knife.

[89] All right, does that complete matters? All right, thank you both very much, and good luck to you, Mr. Narcisse.

"S.A. Donegan J."

DONEGAN J.

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