CANADA / JUDGMENT

R. v. Peart

2022 BCSC 680

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Supreme Court of British Columbia

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2022 BCSC 680 R. v. Peart

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Peart,

2022 BCSC 680

Date: 20220408

Docket: 82768-2; 82768-4

Registry: New Westminster

Regina

v.

Floyd Broxton Peart

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Before: The Honourable Madam Justice Jackson

Oral Reasons for Sentence

Counsel for the Crown:

M.J.H. Stacey

Counsel for the Accused:

M. Beckett

Place and Date of Hearing:

New Westminster, B.C.

November 5, 2021

Place and Date of Judgment:

New Westminster, B.C.

April 8, 2022

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[1] THE COURT: This decision was delivered in the form of Oral Reasons. The Reasons have since been edited for publication, without changing the substance.

I. Introduction

[2] On April 12, 2021, I found the defendant Floyd Broxton Peart guilty of the March 5, 2017, sexual assault of A.B. (the "complainant") contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46, and one count of forcible confinement of A.B. during the same incident, contrary to s. 279(2) of the Criminal Code.

[3] Sentencing was put over to September 27, 2021, for the preparation of a pre-sentence report and a psychological assessment. Unfortunately, the pre-sentence report and the psychological assessment were not received by counsel until two business days before the hearing. Sentencing was rescheduled for November 5, 2021, by consent.

[4] Although I had made several earlier requests, the psychological assessment was only provided to me on November 3, 2021. I heard submissions on sentence on November 5, 2021. The victim impact statement and several letters of support were also provided on that date. I was not in a position to deliver my reasons for sentence on November 5th. A sentencing date of January 24, 2022 was chosen based on the mutual availability of the parties and the Court. Unfortunately, I was advised Mr. Peart was ill on that date, necessitating a further rescheduling of the sentencing hearing. A new sentencing date of April 8, 2022 was fixed.

[5] At this stage of the proceeding, my task is to determine a just and proportionate sentence. Counsel agree that a period of imprisonment is required, but disagree on the length. The Crown submits the appropriate sentence is four years' imprisonment for the sexual assault and one year of imprisonment for the forcible confinement to be served concurrently, along with various mandatory ancillary orders. Defence counsel agrees with the sentencing position of the Crown with one notable exception. Defence counsel submits a fit and proper sentence for the sexual assault of A.B. by Mr. Peart is between two years less a day and three and a half years.

II. Legal framework

[6] The purpose and principles of sentencing are codified in ss. 718 to 718.201 of the Criminal Code which, in part, provide as follows:

Purpose and Principles of Sentencing

Purpose

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.

. . .

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing principles

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;

. . .

(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.

[7] Sentencing is a "delicate art": R. v. M. (C.A.), [1996] 1 S.C.R. 500 at para. 91. It is an "individualized process, in that a sentence must be fashioned to take into account the circumstances of the offence, the circumstances of the offender, the moral blameworthiness of the offender, the principles of sentencing, and proportionality to the offence and the offender": R. v. Voong, 2015 BCCA 285 at para. 6.

III. The Gravity of the Offences

A. A. Circumstances of the Offences

[8] The circumstances of the offences are set out in my reasons for conviction. In summary, Mr. Peart sexually assaulted A.B. over the evening of March 5, 2017, by performing cunnilingus, inserting his penis into her mouth, penetrating her vagina with his fingers, and forcefully penetrating her vagina with his penis twice over the course of the attack. The sexual assault

was accompanied by physical violence, and verbal intimidation and degradation. Mr. Peart used a phone charger to restrain A.B.'s hands behind her back during part of the sexual assault.

B. B. Range of Sentences for Forced Sexual Intercourse

[9] The maximum sentence for sexual assault of an adult is imprisonment for a term of not more than 10 years: Criminal Code, s. 271(a).

[10] In serious sexual assault cases, the paramount sentencing objectives are denunciation and deterrence; R. v. G.M., 2015 BCCA 165 at para. 17, citing R. v. Wells, 2000 SCC 10 at para. 44; R. v. B.S.B., 2010 BCCA 40 at para. 39; and R. v. Thurairajah, 2008 ONCA 91 at para. 41. Ignoring a complainant's pleas to stop constitutes demeaning behaviour and contemptuous disregard for the personal integrity of the complainant, engaging the predominant sentencing principles of denunciation and deterrence: G.M. at para. 18.

[11] The Court of Appeal for British Columbia has established that the Guideline range of sentences for sexual assault involving intercourse is two to six years: G.M. at paragraph 22, citing B.S.B., 2010 BCCA 40 at paragraph 6, and R. v. Pouce Coupe, 2014 BCCA 255 at paragraph 31.

C. Impact on A.B.

[12] The victim impact statement of A.B. was presented to the Court through Crown counsel under s. 722(5) of the Criminal Code. In her statement, A.B. describes the physical pain she experienced throughout her body in the wake of the sexual assault, and in particular her upper body and backside, some of which persisted for several months. After the assault she had trouble sleeping and suffered from nightmares. Emotionally she has lost her ability to trust people and finds herself jumping or jerking when men touch her. Her sense of self-worth has suffered. However, according to A.B., she is getting stronger and is not letting the sexual assault dictate the rest of her life.

[13] No words I can offer, or sentence I can impose, will undo the physical and emotional harm suffered by A.B. as a result of being sexually assaulted by Mr. Peart. However, it is appropriate that the impact of these offences on A.B. be taken into account at sentencing and I have done so: Criminal Code, s. 722(1), (5), (6), and (9).

IV. The degree of responsibility of Mr. Peart

A. Circumstances of the Offender

[14] Determining a fit and proper sentence requires consideration of the specific circumstances of the offender: R. v. Angelillo, 2006 SCC 55 at para. 18. In addition to the submissions of counsel, I have the benefit of a pre-sentence report dated September 23, 2021, prepared by probation officer Ranita Kajla (the "PSR"), as well as a psychological assessment report dated September 20, 2021, prepared by Sarah Coupland, Ph.D., Registered Psychologist with the

Forensic Psychiatric Services Commission (the "Psychological Assessment"), both of which were tendered as exhibits at the sentencing hearing.

[15] Mr. Peart is 49 years old. He is Black and is cisgender, identifying as male. He was born in Jamaica and moved to Canada at some point between the ages of five and eight. He was raised by his parents whom he describes as being supportive, caring, hardworking, and family-oriented. He is the eldest of four children.

[16] Mr. Peart's family lived in Surrey, BC for three years after arriving in Canada. During that time the PSR indicates Mr. Peart "experienced racism and violence outside of the home. You referred to that briefly in your comments as well Mr. Peart, just prior to my beginning these reasons. But the PSR provides no further detail. The Psychological Assessment goes into some more detail and explains Mr. Peart was subjected to racial slurs and was frequently targeted because he was Black, and then blamed for instigating fights.

[17] The family next moved to Guildford for a year, then to North Delta, and later moved back to Surrey where Mr. Peart attended middle school and high school.

[18] Mr. Peart describes himself as having been a rebellious youth. Mr. Peart says that his father used corporal punishment and that as Mr. Peart's behaviours escalated, so did the degree of physical punishment. He reports no sexual abuse or experience of neglect. He has some grade 11 education and has certifications in forklift operation, Food Safe training, and CPR. He reports he was diagnosed over 10 years ago with post-traumatic stress disorder ("PTSD"), but that he is not currently under the care of either a psychiatrist or a psychologist.

[19] He has worked on and off part-time as a cook in his parents' restaurants over the past 25 years. He currently receives disability benefits (for his PTSD and a shoulder injury), and does some work as a cook offering Jamaican food via mobile delivery.

[20] Mr. Peart married in August of 2021. He and his wife live in a basement suite in his parents' home.

[21] I understood the material to say you had four children, with four different women (described by Mr. Peart as "working girls", and who he says worked as prostitutes to support their drug habits. But I now understand you to say that including with your current wife, you have a total of seven children. Mr. Peart is in significant arrears of his child support obligations. The PSR states that according to Mr. Peart, "he has been fully involved in [his children's] lives for the past nine years since he has been clean and sober." However, the PSR also states Mr. Peart has had no contact with his third child (who he described in the Psychological Assessment as a "jerk") since the child's mother moved with the child to Ontario some years ago, and it appears that both he and one of his former partners are estranged from their 27-year-old daughter (the Psychological Assessment states that Mr. Peart described this daughter as a "bitch" who was "resentful of his absence from her life"). Based on the submissions of defence counsel and the support letters submitted on Mr. Peart's behalf, I understand he is involved in the lives of two of the four children he had with

his previous partners, as well as his five grandchildren.

[22] Mr. Peart has been a drug user since his mid-twenties and developed an addiction to crack cocaine and heroin by the age of 28. He worked as a disc jockey but began selling drugs full-time, feeling it was more lucrative. Mr. Peart reports he has been clean and sober for eight or nine years.

[23] Mr. Peart attributes many of the entries on his criminal record, which is extensive, to his addiction. His criminal record dates back to 1999, and consists of multiple convictions for possession of goods obtained by crime over $5,000, multiple convictions for theft under $5,000, multiple convictions for assault, including one for domestic assault in 2011, a conviction for assault with a weapon, a conviction for uttering threats, multiple convictions for breach of probation orders and undertakings or recognizances, multiple convictions for possession of controlled substances, a conviction for possession of a controlled substance for the purpose of trafficking, a conviction for trafficking in a controlled substance, as well as a conviction for breaking and entering. In total, his record consists of 46 convictions. His criminal record includes a prior conviction in 2006 for unlawful confinement. His most recent conviction was for living on the avails of prostitution, for which he was convicted in February of 2013, receiving a 28-month jail sentence. The circumstances leading to that conviction are very troubling and misogynistic, but Mr. Peart has already served his sentence for that offence.

[24] Leaving aside the offences for which he is being sentenced today (which he continues to deny), Mr. Peart's explanations for his past convictions, as set out in the PSR, demonstrate a failure to accept responsibility for the consequences of his actions and a tendency to blame other people or external circumstances for his situation.

[25] The PSR states that the BC Correction Branch's file notes from 2010 indicate Mr. Peart "made sexist and inappropriate remarks toward female Corrections staff" and "pushed boundaries of authority while on remand at the Surrey Pretrial Services Centre". Records from the Correctional Service of Canada indicate Mr. Peart received an institutional infraction on May 26, 2014, when he was warned for possessing and dealing in contraband. After Mr. Peart was paroled in October 2014, his parole was revoked after the Surrey RCMP High Risk Target Team observed him and a known sex-trade worker walking towards a wooded area. When the RCMP called out to him, he fled into the woods and was later remanded back into custody.

[26] Mr. Peart has been previously viciously assaulted himself, reportedly by drug dealers, when he was actively engaged in the drug world and in the throws of his addiction. His diagnosis of PTSD and the shoulder injury appear to arise from that incident.

[27] Results of some of the psychological testing indicate that Mr. Peart did not always respond to questions in a completely forthright manner and that there were "some indications of positive impression management or defensive responding", suggesting he is reluctant to acknowledge personal limitations and has a tendency to minimize his problems. With

respect to the risk Mr. Peart poses to the public in the future, the Psychological Assessment states that "there is a high likelihood that he will commit another act of sexual violence absent strategies to mitigate his risk." He has stated that he is currently unwilling to engage in treatment programming targeted at reducing his risk for sexual offending.

[28] Letters of support for Mr. Peart were provided by his mother, sister, wife, and two friends. I accept those letters as evidence that Mr. Peart is a source of strength and support for them and that they see a side of him not reflected in the offences for which he has been convicted, which is a good thing.

[29] According to a letter provided by Dr. Elaine Jackson, M.D., which consists of only three sentences, Mr. Peart is under her medical care for various "medical concerns", including sleep apnea, and also has some "mood difficulties". The information provided by Dr. Jackson is vague and of little to no assistance. I note that the Psychological Assessment states that the records of Dr. Jackson had been requested but had not been provided by the time the report was submitted. If there is additional information in Dr. Jackson's records that could have been of assistance to the Court in determining a fit and proper sentence, it is not before me.

B. Anti-Black Racism

[30] Relying on R. v. Morris, 2021 ONCA 680 [Morris ONCA], R. v. Jackson, 2018 ONSC 2527 [Jackson], and R. v. Brissett and Francis, 2018 ONSC 4957 [Brissett], defence counsel submits Mr. Peart's "race and experience of racism because of his race may be considered by the court as a relevant and mitigating factor at his sentencing." It is submitted that I can "take judicial notice of the history of colonialism, slavery, policies and practices of segregation, intergenerational trauma, and both overt and systemic racism that continue to affect Black Canadians like Mr. Peart today."

[31] In Morris ONCA, the Court of Appeal in Ontario observed at para. 56:

[56] . . . A sentencing judge must impose a sentence tailored to the individual offender and the specific offence. While evidence relating to the impact of anti-Black racism on an offender will sometimes be an important consideration on sentencing, the trial judge's task is not primarily aimed at holding the criminal justice system accountable for systemic failures. Rather, the sentencing judge must determine a fit sentence governed by the fundamental tenets of criminal responsibility, including free will, and the purposes, principles and objectives of sentencing laid down in Part XXIII of the Criminal Code: R. v. Nur, 2015 SCC 15, [2015] 1 S.C.R. 773 ("Nur (SCC)"), at para. 43, aff'g 2013 ONCA 677, 117 O.R. (3d) 401 ("Nur (ONCA)"); R. v. Nasogaluak, 2010 SCC 6, [2010] 1 S.C.R. 206, at paras. 39-45; Hamilton, at paras. 2, 87; see also Michael C. Plaxton, "Nagging Doubts About the Use of Race (and Racism) in Sentencing" (2003) 8 C.R. (6th) 299, at pp. 306-7.

[32] As I have already noted, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: Criminal Code, s. 718.1. Systemic racism does not diminish the seriousness of the offence committed, nor the court's obligation to denounce serious criminal conduct: Morris ONCA at paras. 75-77 and 87. However, evidence of anti-Black racism and its impact on the specific offender may be an important consideration when determining an appropriate sentence: Morris ONCA at para. 87. The Court in Morris ONCA expressed the principle in these words at para. 91:

[91] There can be no doubt that evidence on sentencing, describing the existence and effect of anti-Black racism in the offender's community and the impact of that racism on the offender's circumstances and life choices is part of the offender's background and circumstances. The evidence is not only admissible, it is, in many cases, essential to the obtaining of an accurate picture of the offender as a person and a part of society.

[33] However, the Court in Morris ONCA went on to hold at para. 97:

[97] There must, however, be some connection between the overt and systemic racism identified in the community and the circumstances or events that are said to explain or mitigate the criminal conduct in issue. Racism may have impacted on the offender in a way that bears on the offender's moral culpability for the crime, or it may be relevant in some other way to a determination of the appropriate sentence. Absent some connection, mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. Everyone agrees there can be no such discount: see e.g., F.H.L., at paras. 45-49; R. v. Elvira, 2018 ONSC 7008, at paras. 21-25; R. v. Ferguson, 2018 BCSC 1523, 420 C.R.R. (2d) 22, at paras. 126-29; and R. v. Biya, 2018 ONSC 6887, at para. 36, rev'd on other grounds, 2021 ONCA 171.

[34] In Morris ONCA, social context evidence about systemic anti-Black racism was tendered: see "Expert Report on Crime, Criminal Justice and the Experience of Black Canadians in Toronto, Ontario", attached as Appendix A to the reasons of the sentencing judge indexed as 2018 ONSC 5186 [Morris ONSC]. The report outlined some of the impact of anti-Black racism on members of the Black community, including how systemic discrimination combined with other factors to leave them with the reasonable perception that Canadian society is racist and unfair: Morris ONCA at para. 39. The purpose of the report was to "help [the sentencing judge] understand the conditions under which many Black people reside, receive education and employment, experience crime and the criminal justice system, and suffer from various forms of discrimination" and "the social conditions and context that may have led to [Mr. Morris's] involvement in the offences": Morris ONSC at para. 19. In addition to a pre-sentence report, the sentencing judge also relied on a report entitled "Social History of Kevin Morris", which provided an "analysis as to the impact of systemic racism on [Mr. Morris's] experience in and out of the justice system": Morris ONSC at para. 23.

[35] I make no comment about what evidence is generally necessary, appropriate, or admissible where a Black defendant seeks to mitigate their sentence on the basis of anti-Black racism. I take judicial notice of the fact that anti-Black racism exists in the Lower Mainland of British Columbia, as it does throughout Canada, and that anti-Black racism can have a profound and insidious impact on those who endure it on a daily basis: Morris ONCA at paras. 1 and 90; R. v. Chouhan, 2021 SCC 26 at para. 61.

[36] In this case, however, defence counsel did not offer any connection between the existence of anti-Black racism in BC, or the evidence I have about Mr. Peart's experiences of victimization because he is Black, to his commission of a violent sexual assault. Such connection, if established, could mitigate his personal responsibility and culpability for the offence: Morris ONCA at para. 99. There is no indication, however, that either systemic discrimination or Mr. Peart's specific experiences of discrimination played any role in the commission of the offence, so it does not serve to diminish his responsibility for the offence committed: R. v. Borde (2003), 63 O.R. (3d) 417 (C.A.) at para. 32; and R. v. Hamilton (2004), 72 O.R. (3d) 1 (C.A.) at para. 135. Moreover, defence counsel made no suggestion that anti-Black racism or Mr. Peart's specific experiences of discrimination was relevant in some other way to a determination of the appropriate sentence.

[37] Such connection was found in Morris ONCA and in Jackson. In Morris ONCA, the Court agreed with the sentencing judge that anti-Black racism was connected to Mr. Morris's fear for his personal safety in the community, explaining why he was in possession of a loaded gun: see paras. 99 to 100. In Jackson, in which Mr. Jackson was found guilty of possession of a prohibited firearm with ammunition, the Court found at para. 32 Mr. Jackson's "personal history of early racial conflict, identity confusion and family disruption created conditions for him to slide easily into criminality".

[38] In the absence of a connection between such racism and the offence committed, or some other principle of sentencing I must take into account, there is no basis to reduce the significance of the objectives of denunciation and general deterrence in sentencing for sexual assault involving forced sexual intercourse: Morris ONCA at 79; G.M. at para. 17. In the circumstances of these offences and this offender, I do not accede to defence counsel's argument that either systemic anti-Black racism, or Mr. Peart's personal experiences of that form of ignorance and hatred, should "count towards some mitigation in sentencing in the case at bar".

V. Mitigating and aggravating circumstances

[39] In discerning what the fit and proper sentence is in this case, I am to consider all of the mitigating and aggravating circumstances relating to the offences or the offender: Criminal Code, s. 718.2(a).

A. Neutral factors

[40] Remorse can be a mitigating factor and is sometimes expressed by pleading guilty. However, as pointed out by defence counsel, Mr. Peart's exercise of his rights to plead not guilty and put the Crown to the test of proving his guilt beyond a reasonable doubt at trial, does not constitute an aggravating circumstance: Allan Manson, The Law of Sentencing (Toronto: Irwin Law, 2001) at 160. See also R. v. Crier, 2020 ABQB 475 at para. 77. The Crown did not argue Mr. Peart's exercise of those rights was an aggravating circumstance, which I understand to be based on a shared understanding of how the law treats such fundamental rights and choices. I agree with defence counsel that Mr. Peart's post-conviction denial of guilt is to be treated similarly, namely as a neutral circumstance and not an aggravating one: R. v. Muhammad, 2004 BCCA 396 at para. 9.

B. Aggravating circumstances

[41] The Crown has the burden to establish beyond a reasonable doubt any fact it seeks to rely on as an aggravating circumstance: R. v. Matonovich, 2007 BCCA 472 at para. 13, citing R. v. Gardiner, [1982] 2 S.C.R. 368. There are no statutorily deemed aggravating circumstances in this case.

[42] The Crown argues, and I find, the following facts have been proven beyond a reasonable doubt and are appropriately considered as aggravating circumstances in determining the appropriate sentence in this case:

§ The sexual assault involved multiple incidents of forced penile vaginal penetration;

§ The sexual assault was violent and caused A.B. to suffer physical pain. Mr. Peart slapped A.B., pulled her hair, put his hands around her throat and tightened his grip when she displeased him, restrained her, and refused her pleas that he stop and disregarded her expressions of pain, instead telling her "it was supposed to hurt";

§ According to the expert opinion evidence, which I accept, there is a high likelihood Mr. Peart will commit another act of sexual violence absent strategies to mitigate his risk. As I have already noted, Mr. Peart is currently unwilling to engage in treatment programming targeted at reducing his risk for sexual offending; and

§ Mr. Peart has an extensive criminal record, which includes previous convictions for violent offences, including a previous conviction for forcible confinement. Moreover, as the Crown submits, Mr. Peart's conviction record includes a conviction for spousal assault and a conviction for living on the avails of prostitution, showing a pattern of violent and misogynistic behaviour.

C. Mitigating circumstances

[43] I find the following facts constitute mitigating circumstances in this case:

§ Mr. Peart served 12 days in custody following his arrest before being released on bail on June 3, 2019. It was not submitted that the circumstances justified credit of more than one day for each of the days he was in custody: Criminal Code, ss. 719(3) and (3.1);

§ Many of the convictions of Mr. Peart's criminal record involve crimes against the administration of justice (breaches of probation orders, undertakings, and recognizances) which often do not involve any victim, violence, or direct harm to the public or to property: R. v. Zora, 2020 SCC 14 at para. 2. However, given that I know very little about the circumstances of those convictions, I am unwilling to place much weight on this circumstance;

§ There has been a break in Mr. Peart's criminal record leading up to these offences. His most recent previous conviction was in 2013, for an offence that occurred in March of 2011. Such a break reflects an ability to conform to legal norms for a substantial period of time and shows rehabilitative potential: (Law of Sentencing at pp. 143 and 144); and

§ Mr. Peart has a supportive family and a community network, which bodes well for his rehabilitation.

[44] Defence counsel points to a connection between Mr. Peart's history of addiction and his criminal record, and argues that connection is a mitigating factor. I disagree. While Mr. Peart had consumed some alcohol that evening, he was not intoxicated or impaired by drugs at the time he sexually assaulted A.B. There is no evidentiary link between his history of addiction and the offences for which he is being sentenced. Even if I were satisfied there was a causal connection between his history of addiction and his extensive criminal record, it would not lead me to treat such connection as a mitigating factor. At best it would be a neutral factor in sentencing for these offences, in my view.

1. Are Mr. Peart's bail conditions a mitigating circumstance?

[45] When Mr. Peart was released on bail, his conditions included reporting to bail supervision, not being permitted to attend motels or hotels (which was varied for his wedding), and a curfew for part of the time he has been on bail following his release. The curfew condition was deleted entirely on January 30, 2020. There was no suggestion Mr. Peart did not comply with the conditions of his release.

[46] Defence counsel argues the restrictive terms of Mr. Peart's bail should have a mitigating effect on the sentence. Whether restrictive bail conditions should be treated as a mitigating factor is a matter of discretion and depends on several factors, including the length of time spent on bail, the stringency of the conditions, and the impact of the offender's liberty and ability to carry on normal family and business relationships: R. v. Plowman, 2015 BCCA 423 at para. 28. Justice Neilson noted in that case that the defendant's bail conditions "did not amount to house arrest", but instead involved a curfew from midnight to 6:00 a.m. and a requirement that he remain in BC, except trips to Calgary for up to seven days to visit his children: Plowman at para. 29. Similarly, in R. v. Spencer (2004), 72 O.R. (3d) 47 (C.A.) at para. 43, the Court did not treat the defendant's bail conditions as a mitigating factor

because "the terms of her bail imposed virtually no restraint on her liberty". In R. v. Perreault, 2005 BCCA 226 at paras. 12 and 19, Justice Hall acknowledged the possibility of credit for time spent on bail under strict conditions akin to house arrest. In R. v. Tse, 2010 BCSC 1273 at para. 21, Justice Davies exercised his discretion to treat the defendants' stringent bail conditions, which included a lengthy period of strict house arrest and stringent supervision, as a mitigating factor.

[47] Although Mr. Peart was on bail for an extended period, I find the evidence does not support the conclusion that Mr. Peart's bail conditions adversely impacted his ability to carry on normal family relationships or his work. The conditions were adjusted to be less restrictive several times and by January of 2020 involved no curfew at all. When he wanted to attend a hotel following his wedding he was permitted to do so. I find the conditions did not restrain his liberty to a degree that warrants any mitigation of his sentence in this case.

[48] Defence counsel also argues Mr. Peart's compliance with his bail conditions ought to be considered in crafting a fit and appropriate sentence. However, adherence to bail conditions is a neutral factor: R. v. Ravelo-Corvo, 2020 BCSC 2130 at para. 31.

D. Collateral consequences

[49] Collateral consequences are those that are secondary to the criminal process and include consequences arising from the commission of an offence, a conviction for an offence, or the sentence imposed for an offence, and that impact the offender: R. v. Suter, 2018 SCC 34 at para. 47; R. v. Wong, 2018 SCC 25 at para. 68. While collateral consequences on an offender may be considered in sentencing as personal circumstances of the offender, "they are not, strictly speaking, aggravating or mitigating factors, since [aggravating or mitigating factors] are by definition related only to the gravity of the offence or the degree of responsibility of the offender": R. v. Pham, 2013 SCC 15, at para. 11; Criminal Code, 718.2(a); and Suter at para. 48. Nevertheless, collateral consequences may be relevant when applying the principles of individualization and parity: Pham at para. 11.

[50] Defence counsel argues several collateral consequences should have a mitigating effect on the sentence to be imposed in this case.

1. The stigma of being convicted of sexual assault

[51] There is a stigma associated with being convicted of any crime, but I agree with defence counsel that a public conviction for sexual assault has a particularly odious connotation and I take this collateral consequence into account.

2. Impact on Mr. Peart's family relationships and his ability to support them

[52] Defence counsel urges me to consider the loss of Mr. Peart's contributions to his family as a result of his incarceration. However, I have very little information about this collateral consequence in terms of the relative degree of his financial and other contributions to his family's overall situation and well-being. Further, while this is a factor relevant to determining a fit and proportionate sentence, in my view, the weight it attracts in this case does not displace the paramountcy of denunciation and deterrence as sentencing principles.

VI. Sentencing authorities relied on by the parties

[53] In G.M., the Court of Appeal set aside a 90-day intermittent sentence followed by two years of probation, and imposed a sentence of 18 months' incarceration on the defendant, who was 43 years old and had no criminal record, for a sexual assault involving forced intercourse with his former intimate partner. In imposing that sentence, the Court noted its decision was influenced by the position adopted by the Crown on appeal, which was in turn influenced by the position taken by the Crown at trial. As a result, I do not feel that case is a helpful comparator.

[54] In R. v. Hackett, 2016 BCSC 1424, Justice Fleming sentenced an Indigenous offender, who had a low to moderate risk to reoffend and had no related convictions for sexual assault, to two years less a day in prison followed by two years' probation for a sexual assault involving partial penetration. The defendant had a history of alcohol dependency and his life had been directly and devastatingly impacted by colonialism, including the residential school system. The complainant in that case woke up to find the defendant beginning to penetrate her vagina with his penis, at which point she began to punch him in the face and hit him with a vacuum hose, causing him to bleed and flee from the apartment without his boots. In imposing the sentence, the Court noted that while all sexual assaults are inherently violent, the nature of the sexual assault before the Court did "not involve any gratuitous violence, manipulation, threats or attempts to persist" and that it was "opportunistic rather than predatory." The Court further explained that the sexual assault was very brief, and did not cause any physical injuries to the complainant, and that she did not describe it as having caused her any physical pain or discomfort: Hackett at para. 49. The circumstances of the sexual assault committed by Mr. Peart did include gratuitous violence, which caused A.B. both immediate and ongoing physical pain, and involved repeated, forced sexual intercourse. Quite simply, the circumstances surrounding the sexual assault committed by Mr. Peart are much more egregious than those in Hackett.

[55] In Pouce Coupe, the Court of Appeal upheld a three-year prison sentence imposed on a 19-year-old Indigenous defendant with no prior criminal record who forced sexual intercourse on a 15-year-old complainant in an assault that involved additional elements of violence: Pouce Coupe at para. 3. The defendant in that case was part of a community with a history of dislocation and displacement from their lands. His community suffered a corresponding loss of culture and was the target of prevalent racism due in part to compensation his Band received through negotiated agreements and court cases: para. 11.

In addition, his mother, sibling, and grandparents had a history of drug and alcohol abuse, and he had been in foster care from the age of seven to 17, where he experienced racism, and physical and sexual abuse: para. 11. According to the Gladue report in that case, the defendant had a lack of cognitive development and possibly suffered from fetal alcohol syndrome: para. 11. Mr. Peart's circumstances are very different than those of Mr. Pouce Coupe.

[56] In R. v. Skoyen, 2020 BCSC 362, the Court sentenced the defendant to three years of imprisonment for a violent sexual assault that shares many similarities with the circumstances surrounding the sexual assault committed by Mr. Peart, including sexually assaulting the complainant on two occasions on the same night, disregarding the complainant's pleas for him to stop, and ignoring the complainant's "clear indications that she was being hurt by what he was doing": Skoyen at para. 47. However, the defendant in that case had no criminal record, and his risk of reoffending was low to moderate: para. 29.

[57] In Ravelo-Corvo, the defendant, who was 25 years old at the time of the offences and had no prior criminal record, was sentenced to three years in prison for a sexual assault, which involved forcing sexual intercourse twice during the incident, and 12 months' concurrent imprisonment on a charge of forcible confinement for preventing the complainant from leaving the apartment. Again, the circumstances of the offence are similar to those in the case before me, but Mr. Peart's circumstances are very different.

[58] Defence counsel also referred me to three Ontario cases, but I find they are poor comparables for the purposes of achieving parity between the sentence in this case and cases similar to it. In R. v. D.E., 2014 ONSC 7573, a 23-year-old (at the time of the offence) defendant who had no criminal record and a learning disability, and who had suffered from a compromised mental state, was sentenced to a prison term of two years less a day for having unprotected intercourse with the complainant against her will, causing temporary injuries to her genitalia. Both the circumstances of the offence and the offender in that case are markedly different from the case before me.

[59] In R. v. J.R., 2008 ONCA 200, the Court considered the sentences of two defendants convicted of having sexual intercourse with the complainant while she was incapacitated by alcohol and drugs. At para. 21, the Court made a point of observing that the trial and sentencing judge had imposed a two-year prison term on both defendants as sought by the Crown. The Court also noted at para. 22 that on appeal, the Crown had consented to a reduction of one of the defendants' sentence to two years less a day to accommodate his immigration situation. The remaining defendant, an Indigenous man with no criminal record and a "very positive" Gladue report, sought a conditional sentence or a reduction in his sentence. He argued his situation was very different from that of the other defendant, and should not have received the same sentence. While the Court agreed at para. 25 "that in most circumstances, he should have received a lower sentence than his co-accused", the Court dismissed his sentence appeal, observing "the two-year sentence is at the low end of the appropriate range of [the] sentence" given the circumstances of the offence. Again, both the circumstances of

the offence and the offender in that case are markedly different from the case before me.

[60] In R. v. Allen, 2017 ONCJ 405, the defendant received a sentence of two years less a day for forcing the complainant to perform oral sex on him. This sentence exceeded the 20 to 26 months' prison term sought by the Crown, and was followed by a three-year probation order. At the time sentence was imposed he had already been in custody for 12 months. Again, both the circumstances of the offence and the offender in that case are markedly different from the case before me.

VII. Imposition of sentence for these offences

[61] Mr. Peart, please stand.

[62] Having considered the submissions of counsel, the governing legal principles and the case law, as well as your circumstances, and the circumstances of these offences, I have determined that the principles of deterrence and denunciation remain the paramount sentencing objectives in this case.

[63] For the offence of sexual assault, Count 1 on the indictment, I sentence you to three and a half years in prison.

[64] For the offence of forcible confinement, Count 2 on the indictment, I sentence you to 12 months in prison to be served concurrently.

[65] You can be seated, sir.

[66] I am now going to address the ancillary orders sought by the Crown, to which defence counsel did not object given they are all mandatory orders:

a) Pursuant to s. 109(2) of the Criminal Code, you are prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substance until 10 years after your release from prison on the charge of sexual assault;

b) Sexual assault is a primary designated offence within the meaning of s. 487.04 of the Criminal Code. As such, pursuant to s. 487.051(1), I order that, in Form 5.03, bodily samples be taken from you, for the purpose of forensic DNA analysis and inclusion in the national DNA databank;

c) Sexual assault is a designated offence within the meaning of s. 490.011(1) of the Code. As such, pursuant to s. 490.012(1) of the Criminal Code, I order, in Form 52, that you comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10. That order is for 20 years.

[67] An offender who is convicted of an offence under the Criminal Code shall pay a victim surcharge for each offence, in addition to any other punishment imposed on the offender: Code, s. 737(1). In this case, the victim surcharge for sexual assault prosecuted by indictment is $200: s. 737(2)(b)(ii). Imprisonment alone is not a reason to waive the victim

surcharge, but where the Court is satisfied the victim surcharge would cause undue hardship to the offender, meaning the offender is unable to pay a victim surcharge on account of the offender's precarious financial circumstances, including because of their unemployment, homelessness, lack of assets or significant financial obligations towards their dependants, the Court can order an offender to pay no victim surcharge, or to pay a reduced amount, but must state its reason for doing so: Code, s. 737(2.1), (2.2), (2.3), and (2.4).

[68] Mr. Peart, I am satisfied you are unable to pay a victim surcharge on account of your precarious financial circumstances, and so I order no victim surcharge be paid.

[69] The Crown did not seek a no-contact order during the custodial period of the sentence, but I wish to hear from the parties on that issue.

[70] CNSL M. STACEY: Madam Justice, there has been a significant period of bail without any attempts at contact so, quite frankly, I don't think it's necessary.

[71] THE COURT: All right. Finally, pursuant to s. 743.2 of the Criminal Code, I direct that the Court Services Branch prepare a transcript of these sentencing reasons and that it be forwarded to the Correctional Service of Canada together with the pre-sentence report prepared in this matter and the psychological report, both of which were marked as exhibits at this sentencing hearing.

[72] Counsel, have I omitted any mandatory orders or is there anything arising from my reasons that either counsel wish to address?

[73] CNSL M. STACEY: Not from the Crown's perspective.

[74] CNSL M. BECKETT: No, My Lady.

[75] THE COURT: Thank you. I wish to thank both counsel for their very able submissions throughout the proceedings.

"Jackson J."

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