

CANADA / JUDGMENT

R. v. Pete

2019 BCCA 244

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 244 R. v. Pete

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pete,

2019 BCCA 244

Date: 20190705

Docket: CA45771

Between:

Regina

Respondent

And

Matthew Pete

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the complainant referred to in this judgment by the initials C.W. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at paragraphs 2 and 93 on July 10, 2019.

Before:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

The Honourable Mr. Justice Butler

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

August 31, 2018 (R. v. Pete, 2018 BCSC 1741, Fort St. John Docket 34933-1).

Counsel for the Appellant:

R.A. McConchie

Counsel for the Respondent:

E.A. Campbell

Place and Date of Hearing:

Vancouver, British Columbia

May 1, 2019

Place and Date of Judgment:

Vancouver, British Columbia

July 5, 2019

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Dickson

The Honourable Madam Justice Griffin

Summary:

The appellant, a young Indigenous man, was convicted of sexually assaulting his cousin. He appeals his sentence of three years. At the time of the offence he did not have a criminal record. Subsequent to the offence, but prior to sentencing, he was convicted of a sexual assault committed when he was a youth and of an assault and breaches. On appeal he says the judge erred by failing to treat him as a first-time offender and by giving insufficient credit for pre-sentence custody. Held: appeal allowed. The judge erred by imposing a harsher sentence because of the subsequent convictions and thus failed to sentence the appellant as a first-time offender. Credit for pre-sentence custody varied in accordance with s. 719(3) of the Criminal Code so that the appellant received credit for pre-sentence custody "as a result of the offence", but not where it was unrelated to the offence.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] Matthew Pete was convicted of breaking and entering a dwelling house on December 1, 2015 and committing the indictable offence of sexual assault contrary to ss. 271 and 348(1)(d) of the Criminal Code, R.S.C. 1985, c. C-46. In reasons indexed as R. v. Pete, 2018 BCSC 1741, he was sentenced to three years in prison, less 12 months' credit for pre-sentence custody. He applies to extend the time to appeal his sentence. He appeals the sentence on the basis that the sentencing judge committed errors in principle which led her to impose a harsher sentence than was otherwise warranted and led her to give insufficient credit for his pre-sentence custody.
- [2] At the hearing, the Crown did not oppose the application to extend time and the Court granted that application. I would grant leave to appeal and, for the reasons that follow, I would allow the appeal and reduce the sentence to two years less 358 days credit for pre-sentence custody.

Background

- [3] The victim, C.W., was 13 years old at the time of the offence and is the appellant's cousin. She woke up at 1:30 a.m. to find she was being held down in her bed with hard pressure applied to her chest and inner thigh. The appellant was kissing her and touching her breasts and vagina over her clothes. He smelled strongly of alcohol. Initially she was unable to move but eventually did so and realized the assailant was her cousin. She asked how he got into the house and he said he had come in through the wood chute to see her brother. The appellant left when C.W. threatened to call her father or brother.
- [4] The appellant, C.W. and their families reside in the same community in northern British Columbia, near the Yukon border. The appellant, who was 18 years old at the time of the offence, and C.W. were very close prior to the assault; he was "like a brother" to her.
- [5] In the two and a half years between the date of the offence and the trial, the appellant was arrested, convicted of and sentenced for other offences:
- February 2, 2016: he was arrested for a sexual assault that occurred in Yukon in November 2014 when he was a youth;
 - January 16, 2018: he was sentenced to 75 days in custody for the Yukon offence;
 - February 3, 2018: he was arrested for breaching bail conditions between December 3, 2017 and January 30, 2018 and pushing his grandfather on February 3, 2018; and
 - May 17, 2018: he pleaded guilty to assaulting his grandfather, as well as to three breaches. He received a global sentence of 25 days for these offences.
- [6] The appellant spent 363 days in custody between his arrest and sentencing on this offence. The sentences he received for the Yukon offence and the convictions from his May 17, 2018 guilty pleas total 100 days. Accordingly, he spent an additional 263 days in custody beyond the custodial time to which he was sentenced for those offences.

Reasons for Sentence

- [7] The judge described the circumstances of the offence and the events of the next day which led C.W. to provide a statement to the police. She set out in full the victim impact statements provided by C.W., her father and her grandmother. C.W.'s statement described how angry she was because she considered the appellant to be a friend and an older brother. She described the fear and anxiety she now experiences in her own home and community; she no longer feels safe in the community that previously felt like a perfect place to grow up. The victim impact statements of her father and grandmother repeat those views and comment on the unfortunate impact the incident has had on their extended family.
- [8] The judge set out the criminal record of the appellant and described his background. The appellant is Indigenous and a member of the Daylu Dena First Nation. He had little contact with his biological parents while he was growing up. He was raised by his grandparents who adopted him at the age of five months. They provided a good home and allowed him to hunt, fish, canoe and play hockey. Both of his grandparents attended residential schools but did not speak to the appellant about their experiences. The appellant completed grade 11 and a number of courses for grade 12. Prior to his arrest, he was working full-time in maintenance for the Band. He was living with his grandfather who is 80 years old and somewhat frail. His grandfather would like the appellant to be able to return to live in his home to help with chores and look after the house.
- [9] The judge made extensive reference to the statements and opinions contained in the psychological evaluation prepared by Dr. Lopes. She noted that the appellant's community plan was to return to his grandfather's home when released from prison. She summarized Dr. Lopes' comments about the appellant's academic, vocational and life skills at para. 46:
- [46] In summary, Dr. Lope[s] concluded that, with respect to his academic and vocational skills, Mr. Pete's level of skills are causing minor issues; that he had a stable pattern of employment and there were no current difficulties; that he had situational and minor difficulty with financial management; that he had occasional instability relationship with his biological parents; and that he had no current difficulties with his companions or significant others. The psychologist also found that Mr. Pete had no current difficulties respecting his behaviour or emotional stability, except that he needs some assistance. He also has some alcohol usage causing problems and is unable to recognize problem areas in his attitude.
- [10] At para. 47, the judge summarized Dr. Lopes' opinion regarding the appellant's risk of reoffending:
- [47] Given that this was a sexual offence, there was a concern about Mr. Pete's risk of re-offending. Mr. Pete, at the time of the assessment, was given a particular assessment. Crown counsel contacted Dr. Lope[s] and given that Mr. Pete had a prior sexual assault conviction, he was considered a high risk for future sexual recidivism.

- [11] Relying on Dr. Lopes' report, at para. 48, the judge arrived at the following conclusions about the appellant's need for future treatment:
- [48] As Mr. Pete appears to have little or no extrinsic motivation to cease substance abuse, Dr. Lope[s] recommended that he complete and participate in the substance abuse treatment program as well as a motivation enhancement program preceding substance abuse treatment. Mr. Pete was further recommended to complete and participate in a relapse prevention program, following formal substance treatment. He will also require successful completion and participation of a sex offender treatment program.
- [12] The judge then set out the position of the Crown in some detail. In doing so, she also commented on principles she was required to take into account. She noted that the Crown referred to a number of legal principles including that the appellant "could not be considered as a first-time offender given his record." The Crown referred to *R. v. Gladue*, [1999] 1 S.C.R. 688 and *R. v. Ipeelee*, 2012 SCC 13, and the judge acknowledged that the appellant is an Aboriginal offender, and that s. 718.2(e) is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal peoples in Canadian prisons. She also noted that she should be mindful of the unique systemic or background factors that may have played a part in bringing the appellant before the court.
- [13] The judge referred to a number of authorities brought to her attention by the Crown in which courts imposed four year sentences for breaking and entering and sexual assault offences including *R. v. Kelly*, 2002 BCCA 190 and *R. v. Flatfoot*, 2009 MBCA 109. She summarized the Crown's position which was that the appellant should receive a sentence of four years less credit for time served of eight and a half months.
- [14] The judge set out both parties' positions regarding the credit the appellant should receive for time served. The Crown agreed the appellant was entitled to enhanced credit at a rate of 1.5:1 for that portion of the time in custody totalling 173 days, and took the position that he was entitled to no further credit. The defence sought enhanced credit at the rate of 1.5:1 for the full 263 days served. The judge concluded at paras. 59-61:
- [59] Noting in fact that Mr. Pete did not get bail in the matter before the court until there was a bail review brought in the Supreme Court. He was given credit for some days, however, when he was sentenced on those matters for which he was detained.
- [60] In those circumstances, I find that Mr. Pete will be given credit, but only those for which he has not already been credited, and it will not be at a rate of 1 to 1.5. He will, instead, be credited with 80 days for the one period, and 25 days for the other period. Adding that to the 259 days is a total of 364 days, with one being .5; that is an even year that he will be credited for.
- [61] I am mindful that Mr. Pete has taken a course when he was in custody, but he has not had access to any real treatment that would get to the bottom of the offence before the court, and it is because of that denial to treatment the credit is given.

- [15] The judge also set out the defence position on sentence: the appellant should be sentenced to time served with 18 months of probation. Defence counsel noted that the appellant is remorseful and that he acknowledged the impact of his conduct on the community. The appellant apologized to the court and to C.W. and her family.
- [16] The judge rejected the defence position, stating she was mindful of the aggravating factors: it happened in C.W.'s home, at night and she was held down in a manner that bruised her thighs. She was only 13 years old and suffered serious emotional trauma having been the victim of an assault by a family member.
- [17] The substance of her reasons is set out at paras. 67-73 which read in part:
- [67] I am mindful, as well, of the risk of Mr. Pete's re-offending, and that he must get treatment not just on substance abuse, but also through the sexual offender treatment program.
- [68] I am also mindful that C.W. is not Mr. Pete's first sexual assault victim nor [is it] his first conviction. I am aware that he is an [A]boriginal offender, and I bear in mind that by Gladue, any custodial sentence must be carefully assessed, and that there may be circumstances where a sentence should be less.
- [69] I am aware that substance abuse in the community has affected Mr. Pete, it explains, in part, by this offence [sic]. However, it does not address the underlying problem - he needs treatment. I am mindful, as that is clarified in Ipeelee and Gladue, that it applies to even the most serious of offences. I consider as well the age of the victim and the force applied during the offence.
- [70] I was provided with the decision of Justice Joyce of this court in R. v. Leon, 2014 BCSC 202. Before him was a conviction by a jury following a sexual assault on an adult victim, it was an actual sexual intercourse. He was also assessed psychologically. Justice Joyce wrote:
- [83] It is my view based on the report of Dr. LaTorre, that Mr. Leon would benefit from the high intensity sexual offender program that is available to him at a federal institution than he would from the less intense programs that are available [in] a provincial institution.
- [84] It is also my view, however, that a period of probation would be beneficial, if not essential, to successfully addressing Mr. Leon's risk of re-offending and his rehabilitation.
- [71] Justice Joyce continued:
- [85] I believe that the best chance for successfully reducing Mr. Leon's risk of re-offending would be to impose a sentence that allows for both the more intense programs available at a federal institution, and a term of probation under which a probation officer could not only supervise his conduct in the community but also direct him to attend counselling programs including the relapse or maintenance programs with regard to both sexual offending and substance abuse.

I find that those are the same objectives that I have with respect to Mr. Pete.

[73] In all of the circumstances, I am sentencing you to an actual sentence of two years, which is going to be reflected as three years, less the time you have already served in custody. This enables me to attach to your sentence a term of probation following your release so that you will be followed in the community.

Ground for Appeal

[18] The appellant says the judge made three errors in principle:

- 1) She treated convictions entered against the appellant after he committed the subject offence as prior convictions, contrary to the Coke rule;
- 2) She relied on unreliable hearsay information or misapprehended the evidence to find that a federal sentence was required in order for the appellant to receive intensive sex offender treatment; and
- 3) She denied enhanced credit for part of the appellant's time in pre-sentence custody.

Standard of Review

[19] On a sentence appeal, this Court can intervene where: (1) the sentencing judge has committed an error in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor that impacts the sentence; or (2) the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at paras. 40, 44; and *R. v. Agin*, 2018 BCCA 133 at para. 5.

[20] As noted in *Agin*, at para. 52, where an error in principle is found, intervention is justified where the error was material in the sense that it impacted the sentence imposed:

[52] In our view, the question is whether the error was material in that it had an impact on the sentence imposed and the sentence would have been different had there been no error. In other words, did the error impact the judge's analysis in imposing the sentence: *R. v. Eakins*, 2016 BCCA 194, at para. 21. This accords with the rationale, outlined at para. 43 of *Lacasse*, that requiring an impact aims to prevent appellate courts from intervening where an error cannot be said to have impacted the sentence, as to do so would undermine the deference owed to sentencing judges as well as public policy goals animating appellate review, including finality.

[21] Where appellate intervention is justified, the Court will examine the fitness of the sentence imposed and may replace it with a sentence it considers appropriate without deference to the sentencing judge's disposition: *Agin* at para. 55.

Did the judge erroneously treat convictions entered against the appellant after he committed the subject offence as prior convictions?

- [22] The appellant argues the judge erred by failing to sentence him as a first-time offender. The appellant says the judge must have accepted the Crown's submission that he could not be considered a first offender (para. 49) given her finding that C.W. was not his first sexual assault victim and this was not his first conviction (para. 68). The appellant says this is contrary to the Coke rule that a first offender must be sentenced as such, even if, prior to sentencing, he has been convicted and sentenced for other offences. The appellant says the judge could legitimately use the subsequent convictions as evidence of his character and prospects for rehabilitation, but says she went much further than that by impermissibly imposing a harsher sentence because of his criminal record.
- [23] The Crown argues that the judge did not err in referring to the appellant's other convictions and did not rely on those convictions to treat the appellant as other than a first-time offender. The Crown says the judge fairly and accurately set out the appellant's criminal record as of the date of sentencing and properly considered the prior sexual assault when assessing his risk of recidivism and need for treatment. The Crown argues that the statement at para. 68 of the reasons is factually accurate and does not demonstrate any improper use of the appellant's other convictions.
- [24] Following the hearing, the Court directed the parties to *Andrade v. R.*, 2010 NBCA 62, and afforded counsel the opportunity to make further written submissions. In *Andrade*, the court held that the Coke rule is not a general principle of sentencing but a canon of statutory construction that applies to offences where the Criminal Code imposes a harsher sentence for subsequent convictions.
- [25] The appellant submits that *Andrade* is inconsistent with the reasoning in *R. v. Skolnick*, [1982] 2 S.C.R. 47, and appellate authority in British Columbia. The appellant says it applies generally, and not just to offences with statutorily-increased penalties. Further, the appellant says the Coke rule is consistent with the general principles of sentencing.
- [26] The Crown submits this case can and should be decided without resort to the Coke rule as it is unnecessary and unhelpful to the analysis. The Crown says general sentencing principles apply and that the trial judge properly applied those principles to the appellant's circumstances including his other convictions.

Applicable Law

- [27] As explained in *Skolnick*, at 50, the Coke rule is a common law principle or policy derived from the writings of Sir Edward Coke, as set out in *Coke's Institutes*, vol. 2, at 468. The principle is applied in cases where the punishment prescribed for a subsequent offence is greater than for an initial offence. The rationale is that after conviction for an offence, the peril of a more severe penalty for the subsequent offence will be present in the mind of the offender and will guide his future conduct: *Skolnick* at 54.
- [28] In *Skolnick*, Chief Justice Laskin summarized the principle at 58-59:

- (1) The number of convictions per se does not govern in determining whether the Coke rule applies.
 - (2) The general rule is that before a severer penalty can be imposed for a second or subsequent offence, the second or subsequent offence must have been committed after the first or second conviction, as the case may be, and the second or subsequent conviction must have been made after the first or second conviction, as the case may be.
- [29] The Coke rule has been applied generally and not just where, as in *Skolnick*, there was a statutorily prescribed minimum sentence for subsequent convictions. In *R. v. Paquin* (1989), 70 C.R. (3d) 39 (Que. C.A.), the first-time offender pleaded guilty to three drug offences and his sentencing was postponed. In the interim, he was convicted and sentenced to six years' imprisonment for a subsequent drug offence. He was then sentenced to seven years for the first offences.
- [30] On appeal, the court concluded that the judge took the subsequent convictions into account and improperly imposed a more severe sentence than would have been imposed had Mr. Paquin been treated as a first offender. The court acknowledged that "subsequent convictions may be taken into account in order to assess the character of the accused and the degree to which he may or may not be on the road to rehabilitation following his conviction.": at para. 9. However, the court emphasized that he should have been sentenced as a first offender, concluding at para. 10:

But the sentencing judge, in considering offenses committed by an accused subsequent to those for which he is to be sentenced, must not treat those subsequent offenses as he would a criminal record and ascribe to the accused the same degree of culpability or criminalization as if the accused had been previously convicted of and punished for these offenses and, notwithstanding the previous conviction and punishment, had committed criminal offenses anew. If the accused was a first offender when the offenses were committed, he must be sentenced as a first offender: *R. v. Jung* (1976), 1 C.R. (3d) S-1 (B.C.C.A.); *R. v. Reddick* (1976), 17 N.S.R. (2d) 369 (C.A.); *Nadin-Davis*, *Canadian Sentencing Digest* (1982), Carswell, vol. 1, p. 72.

- [31] In doing so, the court referred, at para. 11, to *Ruby's Sentencing* (3rd ed., 1987) at 109:

Since a first offence is dealt with as lightly as possible, and a subsequent offence may be viewed more seriously, it becomes a matter of some importance to determine whether a particular conviction was prior to the offence under consideration. Any misapplication of the rules in this regard may result in an offender being treated more harshly than his record warrants. A repetition of an offence after one has been, so to speak, "warned" and "put on notice" by the imposition of a prior sentence, absent explanation, may be viewed more seriously than a first offence. Determining what is a prior conviction for purposes of sentence is therefore crucial.

It is not the order of a commission of offences that is significant, nor the order of convictions, but the order of sentences. It is only offences for which one has already been sentenced which may be taken into account as a prior criminal record. One should ask whether at the time of committing the offence in question, a conviction and sentence had then been imposed.

- [32] In *Andrade*, the court referred to jurisprudence indicating that the Coke rule originated as a principle of statutory interpretation, including the decision of this Court in *Skybar Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, 2006 BCCA 62. *Skybar* involved a licensing statute and the Court concluded the Coke rule did not apply, but acknowledged that it was a principle of statutory construction. The court in *Andrade*, went on to conclude that the Coke rule should not be extended so as to become a general principle of sentencing. In doing so, the court reasoned at para. 20:
- [20] With great respect, it seems to me that there is no need to extend the Coke rule beyond its original purpose for the following reason. In short, the law required a simple and expedient method for determining what qualifies as a second or subsequent offence. The rule does just that. Admittedly, it favours the offender but this is so because of the mandatory imposition of a fixed or minimum sentence; one that removes the element of discretion so as to impose a sentence that the court might not otherwise have imposed. On the other hand, there is no mandatory rule or principle that second or subsequent convictions for the same offence must attract a harsher sentence. Courts retain the discretion to decide whether prior convictions will be treated as an aggravating factor. Typically, a subsequent conviction will be viewed more seriously because of an earlier conviction but it does not automatically follow this is true in all cases. Moreover, the sentencing judge will be guided by the jump principle, sometimes called the step principle, which contemplates a progression in the length of sentences imposed in the event of recidivism for the same offences. One of the concerns of the court is to ensure that the offender is not being re-punished for past offences. In *R. v. Muyser*, 2009 ABCA 116, [2009] A.J. No. 323 (QL), the Alberta Court of Appeal confirmed these understandings by reference to *Coke's Institutes*, *R. v. Skolick* and *R. v. Cheetham*. In my view, the notion that the prior conviction should not be treated as part of the offender's criminal record for sentencing purposes, because he or she was not properly forewarned before committing the second or subsequent offence, is a theoretical construct too far removed from the realities of what is in the minds of repeat offenders and the purpose underlying the Coke rule. What is or is not an aggravating factor and how one should deal with the offender's prior criminal record is a matter better left to the sentencing judge having regard to the factual matrix under consideration.
- [33] I am of the view that while the Coke rule originated as a principle of statutory interpretation, it is now understood as a term used to describe the proper approach to treatment of first offenders in circumstances where they have been subsequently convicted of other offences by the time they are sentenced. As such, I will refer to it as the Coke principle and I would not limit it as suggested in *Andrade*. As I will explain, it has been applied generally in this province. Further, I reject the suggestion that the rationale for the

principle is "a theoretical construct too far removed from the realities" of what is in the minds of offenders. An offender is treated as a first offender because the absence of prior convictions is a mitigating factor justifying a more lenient sentence. This is based on the understanding that subsequent offences reflect on an offender's moral culpability and normally attract relatively harsher sentences. This approach to sentencing applies generally, not just for offences with statutorily prescribed increases.

- [34] Further, the Coke principle accords with the fundamental sentencing principles of general and specific deterrence which are based on the same underlying presumptions about human behaviour. General deterrence relies on the assumption that the threat of punishment will deter potential offenders. Specific deterrence relies on the idea that offenders will learn from past punishment. In other words, the Coke principle is based on a theoretical construct that underlies accepted sentencing principles.
- [35] The principle has been applied in this province for some time. In *R. v. Jung* (1976), 1 C.R. (3d) S-1 (B.C.C.A.), a sentence appeal was allowed in circumstances where the accused was sentenced for trafficking in heroin and the trial judge wrongly referred to him as a second offender. While he had been convicted and sentenced for a similar trafficking offence prior to his sentencing, the commission of that offence predated the offence in question. This Court concluded that it was an error to treat someone as a "second offender" in those circumstances and reduced the sentence by five years.
- [36] In *Jung*, this Court did not refer to the Coke principle, but that principle was subsequently accepted by this Court as a principle of general application, in spite of its origins as a rule of statutory interpretation. In *R. v. Johnson* (1998), 131 C.C.C. (3d) 274 (B.C.C.A.), the Court referred to *Paquin* and *Skolnick*, and confirmed that it is an error to treat a conviction as a prior record if it occurred after the offence for which the offender is being sentenced: paras. 14, 21.
- [37] In *R. v. Peters*, 2000 BCCA 307, the Court considered an appeal of a sentence where the offender was found guilty of manslaughter approximately 20 years after the offence was committed. At para. 9, the majority acknowledged the principle in *Paquin* but concluded that the sentencing judge was justified in considering the offender's numerous convictions in the intervening period as a basis for the lengthy sentence imposed:
- [9] There is no suggestion that the sentencing judge misused the criminal record by treating the post-offence convictions as previous convictions (See *R. v. Paquin* [1989] A.Q. No 457 (Que. C.A.)). It is apparent from his reasons, however, that he treated both the criminal record and Mr. Peters' long-standing alcohol addiction as strong indicators that Mr. Peters was not a good candidate for rehabilitation. In my view, he was justified in so doing. It is apparent that Mr. Peters has a deep-seated addiction which goes hand in hand with his criminal behaviour. Until his addiction is successfully addressed (which will be no easy task), the public will be at risk from his antisocial behaviour.

[38] Other appellate courts have found that it is an error to treat a subsequent conviction as a prior offence for sentencing purposes: *R. v. Auger*, 2017 ABCA 304 at para. 9. Trial courts in other provinces have also treated the Coke principle as having general application. In *R. v. Finelli*, [2008] O.J. No. 2537 (S.C.J.), the court sentenced an offender for an historical sexual assault. It was the third such offence but the three offences were prosecuted in reverse chronological order. The court noted that, if the Coke principle was applied, it would mean that the offender would be sentenced three times as a first offender. Nevertheless, the sentencing judge applied the Coke principle and treated the offender as a first offender, stating at para. 39:

I have concluded that the Coke principle does apply, but that the earlier convictions for sexual assault have some relevance to my sentencing of Mr. Finelli.

[39] The recent edition of *Ruby's Sentencing*, (9th ed., 2017) at 440 now recognizes that subsequent convictions may be taken into account for some purposes:

It would seem, therefore, that serious subsequent convictions - especially if for similar offences - can be looked to for the purpose of ascertaining the offender's character and the prospects for rehabilitation, but not for the purpose of imposing a heavier sentence than the offence would otherwise warrant. However, it might be better to leave subsequent convictions out of consideration completely, as this fine distinction may well escape those serving the sentence.

[40] In summary, the Coke principle describes the proper approach to treatment of first-time offenders in circumstances where they have been convicted of other subsequent offences by the time they are sentenced. It has been accepted and applied in this province as having general application and also permits consideration of subsequent convictions in appropriate cases for the purpose of ascertaining an offender's moral culpability and prospects for rehabilitation. Further, this approach to sentencing is consistent with general sentencing principles. A sentencing judge should not treat post-offence convictions as prior convictions or as an aggravating circumstance calling for a harsher sentence. The danger in doing so is that the offender may be treated more harshly than his or her record warrants. The degree of culpability of a first-time offender is not as high as someone who has been convicted and sentenced of other offences at the time of commission of the subject offence.

Analysis

[41] While the principle is clear, it can be difficult on appeal to ascertain if the sentencing judge treated the offender as a first-time offender, where, as here, that is not clearly indicated in the reasons for sentence. As the Crown argues, the statement at para. 68 that C.W. is not the appellant's first sexual assault victim, nor is it his first conviction, is factually accurate. However, when I consider the sentence imposed in the context of the reasons as a whole, I reject the Crown's submission that the judge treated the appellant as a first-time offender.

- [42] There is nothing in the reasons to indicate the judge sentenced the appellant as a first-time offender. The statement at para. 68 is not qualified in any way. It is followed by the acknowledgment that the appellant must be treated as an Aboriginal offender, but not by an acknowledgment that he should also be treated as a first-time offender. When the comments in that paragraph are considered in light of the judge's reference to the Crown position that the appellant could not be sentenced as a first-time offender and her rejection of the defence position on sentence, I conclude that she failed to treat the appellant as a first-time offender and instead, imposed a harsher sentence because of the Yukon offence. This conclusion is supported by the sentence imposed.
- [43] The circumstances of the offence were towards the lower end of the spectrum for similar offences and the appellant is a young Indigenous person with rehabilitation prospects. A custodial sentence of three years is well above the lower end of the range for a first offender taking into account the appellant's circumstances and the circumstances of the offence.
- [44] In summary, I conclude that the judge erred in principle by imposing a harsher sentence because of the Yukon sexual assault conviction that was entered against the appellant after he committed the subject offence. The appellant had not been convicted or sentenced of that offence at the time he committed the subject offence. This error was material and impacted the sentence imposed. The custodial sentence would have been less onerous had the judge given proper consideration to the appellant's status as a first offender. I will consider an appropriate sentence after addressing the remaining grounds of appeal.

Did the judge erroneously rely on unreliable hearsay information about treatment programs or misapprehend the evidence to find that a federal sentence was required in order for the appellant to receive intensive sex offender treatment?

- [45] The judge placed considerable reliance on the decision in *Leon*, 2014 BCSC 202. The appellant says that the judge erroneously accepted the finding in *Leon* about the availability of sexual offender programs in federal institutions. Justice Joyce stated, "Mr. Leon would benefit from the high intensity sexual offender program that is available to him at a federal institution [more] than he would from the less intense programs that are available [in] a provincial institution." The appellant argues that the judge's acceptance of this finding was erroneous as it was contrary to the evidence and is based, at best, on unreliable hearsay.
- [46] The Crown says that the judge did not erroneously rely on the statement in *Leon* about the availability of better sexual offender programming in federal institutions. Rather, the judge simply indicated that she had the same sentencing objectives for the appellant as the court in *Leon* had for that offender. She wanted the appellant to be subject to probation as well as an appropriate treatment program in custody. The Crown argues that the judge imposed a shorter custodial sentence so that she could impose a term of probation in addition to the prison term.

[47] The only evidence before the court about sexual offender treatment programs was in Dr. Lopes' report. He opined that the appellant needs to participate in and complete the "Sex Offender Treatment Program". He states:

This program is offered in various communities through the Forensic Psychiatric Services by qualified and specialized Registered Psychologists. It is noted that the same program is also offered by the same service provider at Ford Mountain Institution.

[48] In other words, the only recommendation before the court was that the appellant should take a treatment program that is available either in the community or in a provincial institution. Accordingly, if the judge relied on Leon to conclude that better or more appropriate treatment is available in a federal institution, this amounts to a misapprehension of the evidence, or an improper reliance on hearsay that was not reliable. Indeed, such a finding would be contrary to the evidence presented by the forensic psychologist.

[49] The reasons for sentence do not clearly indicate whether the judge imposed a federal sentence so that the appellant could take advantage of the better sex offender programming referenced in Leon (which would be an error), or if the reference to Leon was intended to highlight the judge's view that the sentence imposed should allow the appellant to have access to appropriate treatment and probation. I am unable to resolve that issue. Moreover, in light of the conclusion I have reached on the previous issue, I need not do so. However, it is clear on the evidence before the Court that the treatment programs that would be of value to the appellant are available in provincial institutions and the community. Accordingly, their availability is not a factor to be considered in fixing the length of the appellant's custodial sentence.

Did the judge erroneously deny enhanced credit for part of the appellant's time in pre-sentence custody?

[50] The appellant submits the judge erred by failing to give enhanced credit at a rate of 1.5:1 for 90 days of his time in pre-sentence custody. But for this error, the appellant contends he would have received enhanced credit for the entire 263 days he spent in pre-sentence custody, for a total of 395 days. He says the judge erroneously granted credit at a rate less than 1.5:1 without specifying a principled basis for denying enhanced credit or what ratio she was applying, in order to reach a mid-point between the Crown and defence's positions. Further, the judge failed to recognize the "quantitative rationale" for giving enhanced credit -- to compensate for the loss of eligibility for early release that results from serving part of a sentence in pre-sentence custody. He says enhanced credit should have been granted here as the Crown failed to establish that the accused was unlikely to be released early or had intentionally delayed proceedings.

[51] The Crown submits the appellant's eligibility for enhanced credit turns on whether the appellant was in pre-sentence custody "as a result of the offence" within the meaning of s. 719(3) of the Criminal Code. In its factum, the Crown says the judge erred in granting the

appellant 105 days' credit for time in pre-sentence custody on the other unrelated offences. The Crown acknowledges that "it would not be fair" to take those 105 days' credit away from the appellant if it would mean increasing the time he has left to serve on this sentence, but submits that this Court should correct this error, rather than repeat it, if it decides to reduce the appellant's sentence.

- [52] At the hearing, the Crown suggested that the proper approach to deal with time served that is not otherwise credited to an offender because it was not served "as a result of the offence" is to take that into account as a mitigating factor.
- [53] Based on the parties' submissions in their factums and at the hearing, two periods of pre-sentence custody are in dispute:
- a) February 2, 2016 to May 11, 2016 ("Period 1") -- During this time, the appellant was in custody for the 2014 sexual assault in Yukon. Of these 100 days, the appellant received credit for 75 days when he was sentenced for that sexual assault. The appellate was given credit on this matter for the remaining 25 days on a 1:1 basis.
 - b) February 3, 2018 to May 17, 2018 ("Period 2") -- During this time, the appellant was in custody on an assault charge and various breach charges. Of these 105 days, the appellant received credit for 25 days when he was sentenced for those offences. The appellant was given 80 days' credit on this matter.
- [54] The Crown says the appellant erroneously received 25 days' credit for Period 1. The Crown argues the appellant was not in custody for the offence at issue in this appeal during that time, but was in custody for the 2014 Yukon sexual assault which predates this offence. The Yukon judge's reasons for granting the appellant bail on May 11, 2016 only contemplated the Yukon charge. The Crown says the appellant would not have been released on bail if he was in custody for the offence at issue in this appeal. Accordingly, granting the appellant credit for Period 1 would mean that offenders could potentially apply time "banked" in custody on other unrelated offences towards any outstanding offence. The Crown says s. 719(3) of the Criminal Code clearly requires more -- that an accused be in custody "as a result of the offence" at issue in the sentencing proceedings.
- [55] In its factum the Crown made a similar argument for the time in issue in Period 2. However, in subsequent written submissions, the Crown accepts that the interpretive approach as reflected in *R. v. Barnett*, 2017 ONCA 897 is reasonable. It now concedes that the appellant is entitled to 98 days' credit for Period 2 (at the rate of 1.5:1), which is 18 more days of credit than given by the trial judge. The transcript from sentencing proceedings for the assault and three breach offences indicates that the breaches were associated with "the bail that applied in respect to the break and enter and sexual assault" that are the subject of this appeal.
- [56] The Crown also submits that the additional 18 days' credit for Period 2 should be offset against the 25 days' credit the appellant erroneously received for Period 1.

Applicable Law

- [57] Sections 719(3) and (3.1) of the Criminal Code govern a sentencing judge's treatment of time spent in pre-sentence custody:
- (3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.
- (3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody.
- [58] As set out in *R. v. Summers*, 2014 SCC 26, the circumstances justifying enhanced credit under s. 719(3.1) need not be exceptional or unique to the offender. The loss of early release, taken alone, will generally provide a sufficient basis to grant credit at a rate of 1.5:1, even if the conditions of detention are not particularly harsh, and parole is unlikely: at para. 71. This is because it would be incompatible with the principles of parity and proportionality if offenders who did not obtain bail served longer sentences than otherwise identical offenders: at para. 61. In addition to this "quantitative rationale", judges may also consider the "qualitative rationale" for granting enhanced credit -- the harsh conditions, lack of access to treatment and overcrowding in many remand centres: at para. 80. The onus is on the offender to demonstrate that he should be awarded enhanced credit as a result of his pre-sentence detention. Generally speaking, the fact that pre-sentence detention has occurred will usually be sufficient to give rise to an inference that the offender has lost eligibility for parole or early release, thus justifying enhanced credit: para. 79.
- [59] Section 719 is engaged "only where the pre-sentence detention is a result of the offence for which the offender is being sentenced": *Summers* at para. 71.
- [60] The Court of Appeal for Ontario has considered the meaning of "as a result of the offence" in s. 719(3) in *R. v. Wilson*, 2008 ONCA 510; and *Barnett*. In *Wilson*, the appellant argued for enhanced credit against robbery offences for time served on an earlier sentence for importing cocaine. Subsequent to sentencing on the robbery charges, the importing conviction was quashed and proceedings on that charge were stayed. The appellant sought enhanced credit for the 494 days served on the importing sentence.
- [61] Writing for the majority, Justice Rosenberg held that the appellant was not entitled to any credit for time served on the importing sentence. He concluded that the appellant's time in custody on the importing sentence was not in any sense part of the "punishment" for the robbery offences; it was punishment for the importing offence. He found that giving the appellant credit for time spent serving a sentence for another unrelated offence would distort the sentencing regime: at para. 42. If credit is given for time in custody for an unrelated offence, it would have the effect of permitting such time to be "banked": at para 43. Justice Rosenberg noted, at para. 43, that there are a variety of ways in which an offender

can spend time in jail in excess of what should be the case if the system worked expeditiously and flawlessly. However, he did not read s. 719(3) as requiring a court to give an offender credit for time he or she spent serving a sentence for an unrelated conviction:

- [44] No doubt there are flaws in our justice system. Innocent people are held in custody, and innocent people are found guilty and sentenced to terms of imprisonment. To avoid this severe unfairness, bail is granted as liberally as possible consistent with public safety, cases of in-custody accused come on for trial as soon as possible and safeguards are in place to avoid wrongful convictions. As well, in some cases, people who have been wrongfully convicted and spent time in jail receive monetary compensation from the government.
- [45] But, at the end of the day when it comes time to sentence an offender the court can only take into account factors that relate to the particular offence under consideration. The fact that an offender, like the appellant, still happens to be in the appeal system when a flaw in relation to a totally unrelated conviction comes to light is not, in my view, a principled reason for giving that offender credit for the time he or she spent serving the sentence for that unrelated conviction.
- [62] In concurring reasons, Justice Doherty agreed with the majority that s. 719(3) did not apply:
- [24] on a plain reading of s. 719(3) the phrase "convicted of an offence" and the phrase "as a result of the offence" must refer to the same offence or offences. Section 719(3) is directed to situations in which a person has spent time in custody prior to sentencing in respect of the offence or offences for which the person is being sentenced. The subsequent quashing of the cocaine conviction, and the still later stay of proceedings in respect of that charge, cannot retroactively change the reason for the appellant's custody during the 494 days between February 23, 2004 and July 2, 2005. He was not in jail at that time as a result of the robbery charges; rather, he was serving a sentence on his conviction for importing cocaine.
- [63] However, Justice Doherty reasoned that the court could consider the events relating to the importing charge that occurred subsequent to the appellant's sentencing as mitigating factors in the appellant's sentences on the robbery charges.
- [64] In Barnett, the respondent was arrested for robbery and other related charges. While on bail, he committed other unrelated offences, was arrested, denied bail and detained in custody. At sentencing for the robbery charges, the judge gave the respondent credit for his time in pre-sentence custody following his detention for the unrelated offences committed while on bail. The Crown appealed, arguing the sentencing judge erred in granting the appellant enhanced credit for pre-sentence custody incurred following his detention for a later, unrelated offence.
- [65] In joint reasons for the court, Justices Doherty and Rouleau held that the sentencing judge properly viewed the detention as meeting the "as a result of the offence" requirement of s. 719(3). In their words:

- [43] the first set of offences had some link to the decision of the justice of the peace not to grant bail on the second offence. This refusal combined with other factors such as the significant length of the pre-sentence custody and the fact that the first offences related to the robbery were the most serious made it reasonable for the sentencing judge to view the inability to obtain bail on the second offence as being linked to or resulting at least in part from the first set of offences.
- [66] The court interpreted s. 719(3) as requiring some "causal connection" or "sufficient link or relation" between the offence for which the offender is being sentenced and the pre-sentence custody sought to be credited, but that the relation or link is not limited to the offence that directly triggered detention and can exist with more than one offence. In Justices Doherty and Rouleau's words:
- [27] We do not read ss. 719(3) and (3.1) as limiting consideration of pre-sentence custody only with respect to the offence that was the immediate trigger of the detention. Rather, the court is to assess whether a sufficient link exists between the pre-sentence detention for which credit is sought and the offence or offences for which the offender is being sentenced so as to meet the "as a result" requirement of s. 719(3). Even where, as here, the detention followed a later charge, the circumstances may be such that this later detention can nonetheless be considered to be "as a result" of both the earlier and the triggering offences.
- [Emphasis added.]
- [67] At paras. 28-29, the court commented that it would be artificial to restrict a judge's ability to give credit for pre-sentence custody only to "those charges that are the immediate trigger of the detention." There are a variety of circumstances where it could be said that an offender was in pre-sentence custody as a result of two or more sets of charges, and it would not stretch the language of s. 719(3) to describe the pre-sentence custody as being as "a result of" both sets of charges. The court referred to interpretations given to the phrase by other appellate courts and concluded:
- [30] What we draw from the case law is that ss. 719(3) and (3.1) require that there be some causal connection, a sufficient link or relation between the offence for which the offender is being sentenced and the pre-sentence custody. That relation or link can exist with more than one offence. It is not limited to the offence that directly triggered the detention, but will include offences that contributed to the denial of bail or, in the trial judge's assessment, factored into the offender's decision to not seek bail on the charges that triggered the detention order.
- [31] There is no strict rule dictating what constitutes a sufficient link or relationship between the given charge and the pre-sentence custody so as to meet the "as a result of" standard. The sentencing judge will take into account relevant factors that might include the reasons for bail having been granted on the first set of offences and denied for the second set of offences; whether bail was sought on the later offences; whether there has been revocation of the bail on the first set of offences; the impact if any of the reverse onus provisions of ss.

515(6) or 522(2) of the Criminal Code; whether subsequent charges remain outstanding, have been withdrawn or stayed; the amount of pre-sentence custody accumulated; the nature and seriousness of the various charges; and the relationship, if any, that charges have to one another. In sum, the sentencing judge must be satisfied that the offences upon which he is sentencing the accused have some meaningful causative connection to the accused's pre-sentence custody.

[Emphasis added.]

- [68] A similar interpretation of s. 719(3) was adopted in *R. v. Hoelscher*, 2017 ABCA 406, where Justice Martin held that s. 719(3) requires a "logical connection" between the time spent in pre-sentence custody and the offence for which the offender is being sentenced:
- [27] I conclude that within those confines the proper interpretation of the phrase "as a result" [in s. 719(3)] requires that there be a logical connection between the offence for which the offender is being sentenced and the time spent in predisposition custody, such that the former can be said to have made a real and substantial contribution to the latter.
- [69] In *Hoelscher*, the court also rejected an approach that would require offenders to formally apply for bail on a later charge, or for the Crown to successfully have bail revoked on an earlier charge, in order for time spent in pre-sentence custody after the later offence to be credited on sentencing; at paras. 30-32. Justice Martin concluded:
- [32] In my opinion, the better answer is to leave it to sentencing judges to determine the existence of a logical connection, if any, between the predisposition custody and the offence for which the offender is being sentenced.
- [70] This Court has commented on the correct interpretation of s. 719(3) in *R. v. Mills*, 1999 BCCA 159; and *R. v. Calder Berg*, 2007 BCCA 343. In *Mills*, Justice Donald, on behalf of a five-judge division, explained that the focus of the inquiry under s. 719(3) is whether the custody was "on account of the offence":
- [33] In my opinion, the question of which periods of incarceration should be considered for credit must be determined according to the words of the relevant provision, s. 719(3). That section provides that credit may be given for time spent imprisoned "as a result of the offence". Thus, if the custody resulted from the offence then credit should be given unless there is a sound reason for not doing so. When that rule is applied to the circumstances of this case, it is obvious that the time served on the separate threatening offence had to be deducted. But I do not think that the test should involve a meticulous inquiry into the reasons why an accused was in custody pending disposition or why the case may have been prolonged. What really matters is whether the custody was on account of the offence charged.

- [34] Mills did not "consent" to incarceration in the usual sense of the word: he simply declined to apply for bail after considering his record and the pending threatening charge. He knew that he probably would not have been released, so why should he have bothered? It is neither relevant nor useful to look into his motives for not applying earlier than he did.
- [36] If time in custody is seen as part of the punishment for the offence, the need to dissect the reasons for the lapsed time fades away. Viewed in that way, the offender is not gaining an advantage on the system and so it becomes unnecessary to assign responsibility for the length of the time in custody. Conversely, if an accused is denied credit for time in custody because he presents too high a safety risk, or has no one to act as surety on his behalf, he would endure a longer punishment than someone who was able to make bail.

[Emphasis added.]

- [71] Finally in *Calder Berg*, Justice Prowse, writing for the Court, granted enhanced credit for time spent in pre-sentence custody based on a "sufficient nexus" between the offence and the offender's continued detention:
- [28] It is not disputed that, on a two for one basis, the total credit which Ms. *Calder Berg* should have received was 18 months. The trial judge gave her eight months' credit and offset that time against the terms of imprisonment on the two counts of driving while prohibited. The question is whether the other ten months can properly be credited against the sentence for criminal negligence causing death. In that respect, it is important to note that, but for that charge, it is highly unlikely that Ms. *Calder Berg* would have been detained in custody. When she was arrested in November 2005, her bail on the count of criminal negligence causing death was revoked. She remained in detention thereafter. In these circumstances, I conclude that there was a sufficient nexus between the count of criminal negligence causing death and her continued detention to permit the Court to credit the remaining ten months against the sentence on that offence.

[Emphasis added.]

Analysis

- [72] What emerges from the cases is that the loss of early release generally provides a sufficient basis for granting enhanced credit for pre-sentence custody, but only where the pre-sentence detention is "a result of the offence" for which the offender is being sentenced within the meaning of s. 719(3) of the Criminal Code. The requirement in s. 719(3) has been interpreted as requiring: "some causal connection"; "a sufficient link or relation"; "some meaningful causative connection"; "a logical connection"; or "a sufficient nexus" between the pre-sentence custody and the offence for which the offender is being sentenced: *Barnett* at paras. 30-31; *Hoelscher* at para. 27; and *Calder Berg* at para. 28.

- [73] There is no strict rule dictating what constitutes a sufficient link or relationship between a given charge and pre-sentence custody so as to meet the "as a result of" standard. Sentencing judges will consider relevant factors, including: (1) the reasons for bail having been granted on the earlier offence(s) and denied on the latter; (2) whether bail was sought on the later offence(s); (3) whether bail was revoked on the earlier offence(s); (4) the impact, if any, of the reverse onus provisions of ss. 515(6) or 522(2) of the Criminal Code; (5) whether subsequent charges remain outstanding, have been withdrawn or stayed; (6) the amount of pre-sentence custody accumulated; (7) the nature and seriousness of the various charges; and (8) the relationship, if any, that the charges have to one another: Barnett at para. 31.
- [74] The sufficient nexus requirement is not limited to the offence that directly triggered the detention, but can include offences that contributed to the denial of bail or, in the trial judge's assessment, factored into the offender's decision not to seek bail on the charges that triggered the detention order. There is no formal requirement for the offender to have been denied bail or for the Crown to have bail revoked: Barnett at paras. 30-31; Hoelscher at paras. 30-32; Mills at paras. 33-34, 36; and Calder Berg at para. 28. The fact that an offender, like the appellant, may have spent time in custody on an earlier offence without being credited for it is not in itself a principled reason for granting enhanced credit for that time on a later unrelated conviction: Wilson at para. 45.
- [75] Nevertheless, in appropriate circumstances, the court may consider events relating to other offences, whether they took place prior to or subsequent to the appellant's sentencing, as part of the totality of circumstances in arriving at a fit sentence, including time spent in custody for which no credit would be available under s. 719(3). Where appropriate, consideration of these events may be taken into account to mitigate the sentence imposed where they have some bearing on arriving at a fit sentence for the offence in question: Wilson at para. 46.

Application

- [76] The sentencing judge did not err by considering the "qualitative rationale" for granting enhanced credit for pre-sentence custody, nor in failing to expressly state the "quantitative rationale" for why enhanced credit is generally granted. Summers does not require a rote recitation of the principled reasons for granting enhanced credit under s. 719(3). The judge did, however, err by granting the accused credit for time spent in pre-sentence custody during Period 1 on an unrelated offence, and by denying the appellant enhanced credit at a rate of 1.5:1 for his time in pre-sentence custody during Period 2.

Period 1: February 2, 2016 to May 11, 2016

- [77] The judge erred in crediting the appellant with the "unused" 25 days in Period 1. There was no causal connection or sufficient nexus between the subject offence and the appellant's custody in that period. There is no indication that the appellant remained in custody on the Yukon charge during that period for reasons related to the offence at issue in this appeal.

Quite simply, the time in custody was not "as a result" of this offence, nor was his pre-sentence custody extended or prolonged by reason of this offence. The appellant was released after his first bail review in the Yukon charge in acknowledgement of the fact that he was already bound by a recognizance on the offence at issue in this appeal.

- [78] Applying the rationale from *Wilson*, it would distort the sentencing regime's emphasis on promoting responsibility in offenders if the appellant were allowed to apply the remaining 25 days of pre-sentence custody on the Yukon offence to this offence merely because these 25 days were not credited on the Yukon offence. This is the mischief of "banking" time expressly warned against in *Wilson*.
- [79] Keeping with the language of s. 719(3), the offence at issue in this appeal is to be addressed by a sentence that properly accounts for the appellant's responsibility, and time already served, "as a result of the offence". The 25 days spent in custody on the Yukon offence that were not credited when the appellant was sentenced for that offence, should not be "banked" and applied toward this subsequent unrelated offence.
- [80] While it might be possible in an appropriate case to treat additional time in custody as a mitigating factor following Justice Doherty's reasoning in *Wilson*, I see no reason in the circumstances of this case to do so.

Period 2: February 3, 2018 to May 4, 2018

- [81] The appellant was detained in custody during Period 2 for assaulting his grandfather on February 3, 2018, and for three bail breaches on December 3, 2017, January 9, 2018 and January 30, 2018. Of these 90 days in pre-sentence custody, 25 days were credited on sentences for the assault and three breaches, and 80 days were credited in this matter. The appellant seeks 1.5:1 credit for 65 days of this pre-sentence custody for a total of 98 days' credit from this period. The appellant consented to being remanded from February 3 to May 4, 2018 on the assault charge. The Crown did not apply to have the appellant's bail revoked on the charge at issue in this appeal.
- [82] Unlike the first period of pre-sentence custody in dispute, and as the Crown now concedes, I am satisfied that there is a sufficient nexus between the appellant's custody during Period 2 and the offences at issue in this appeal. It can be inferred that the appellant consented to being remanded during this time on the 2018 assault charge and breaches, at least in part, because he knew that applying for bail in the circumstances would be difficult, and perhaps futile. This approach accords with the holdings in *Barnett*, *Hoelscher*, *Mills* and *Calder Berg*, which emphasize substance over formal procedural requirements. There is no formal requirement for the offender to have been denied bail or for the Crown to have bail revoked. It was reasonable for the judge to have inferred that the offences at issue in this appeal factored into the appellant's decision not to seek bail on the assault and breach charges, and therefore that the appellant was in custody during this time, at least in part, as a result of the offence at issue in this appeal.

- [83] As such, the appellant was entitled to enhanced credit for Period 2 pursuant to s. 719(3.1) in accordance with Summers unless he was unlikely to be released early or intentionally delayed proceedings. There is no evidence here to support either of those exceptions. The judge found that the qualitative rationale for granting enhanced credit existed in this case. There is no question that the "quantitative rationale" was also present. The judge only granted the appellant 80 days' credit for this period of pre-sentence custody, ostensibly at a ratio of 1:1, contrary to the approach set out in Summers. This was a legal error which deprived the appellant of 18 days' enhanced credit on this sentence.
- [84] As the judge also erred in granting the appellant 25 days' credit for his time in pre-sentence custody during Period 1, it is appropriate to offset the two errors. Cumulatively, the appellant received seven more days of pre-sentence credit than he should have. The appellant was only entitled to 358 days of credit for pre-sentence custody.

What is an appropriate sentence?

- [85] Having found that the judge erred by failing to treat the appellant as a first-time offender and that the error was material, this Court may impose a sentence it considers appropriate without deference to the sentencing judge's disposition. As explained below, I would have imposed a custodial sentence of two years prior to granting credit for time served. The appellant is entitled to credit of 358 days (one year less 7 days) for pre-sentence custody. This means that he has now served approximately ten months of his sentence.
- [86] The range of sentences for breaking and entering a dwelling house and committing the indictable offence of sexual assault is broad. Counsel referred to cases with some similarity that provide some guidance. Of course, sentencing is individualized and the sentence must be crafted for the offender.
- [87] The Crown referred to: R. v. Munt, 2012 BCCA 228; R. v. Perreault, 2005 BCCA 226; R. v. J.L.H., 2000 BCPC 121; Kelly; and Flatfoot. The sentences in these cases ranged from 30 months to four years. However, the circumstances of the offences in those cases are considerably more serious than those present here. The circumstances of the offences in the Crown cases involve preparation and planning (Munt and J.L.H.), the use or threatened use of weapons (Perreault, J.L.H. and Kelly), intercourse or digital penetration in the course of a protracted assault (Munt, Perreault and Kelly) and more than one break and enter on the same day (Perreault and Flatfoot).
- [88] The appellant referred to R v. R.R.G.S., 2014 BCPC 170; R. v. Maisonneuve, 2014 NBCA 32; R. v. A.B., 2018 NWTSC 8; and R. v. Henriksen (1997), 155 W.A.C. 13 (B.C.C.A.). The range of sentences in these cases was 90 days to two years, less a day. The circumstances of the offences in these cases are more similar to those in the present case. The assaults involved kissing and touching or attempted touching; the offenders did not use or threaten the use of a weapon and the assaults were not prolonged.

- [89] The judge rightly noted that deterrence and denunciation are significant sentencing principles with this kind of assault. She also appropriately highlighted the aggravating factors. However, as I have indicated, she gave little heed to the appellant's status as a first-time offender. As a result, she imposed a sentence at the highest end of the range for this kind of sexual assault in the course of breaking and entering.
- [90] As I have indicated, I would impose a sentence of two years before taking time served into account. A sentence of this length appropriately gives effect to the principles of deterrence and denunciation, taking into account the aggravating factors and the risk the appellant poses to the community. This includes the need to acknowledge, denounce and deter the excessive sexual violence experienced by Indigenous women and girls: *R. v. Barton*, 2019 SCC 33, paras. 198-200. Further, it fairly accounts for the appellant's personal circumstances. These include his status as a first-time offender and the relevant Gladue factors.
- [91] The judge did not explain the impact of the Gladue factors on the sentence fashioned for the appellant. Like many Indigenous offenders who find themselves before the court, the appellant has been disproportionately affected by systemic discrimination, abuse, dislocation from culture or family and substance abuse. The appellant was raised by his grandparents, both of whom attended residential schools, and does not maintain contact with his biological parents, with whom he does not have a good relationship. The impact of the residential school experience on small northern Indigenous communities, like the appellant's, is pronounced. At sentencing, the appellant's grandfather spoke about the proliferation of drug and alcohol abuse by young members of the community. Sexual offending in the communities is also an unfortunate repercussion from the legacy of residential schools. Finally, the overrepresentation of Indigenous peoples in Canadian prisons also militates against imposing lengthy custodial sentences on Indigenous offenders. In my view, given the systemic issues to be addressed, the appellant's status as a first-time offender, the nature of the offence and the appellant's family circumstances, these factors must be taken into account to arrive at an appropriate sentence.
- [92] In summary, the appellant was a first-time offender and is a young Indigenous person. Accordingly, the principle of rehabilitation should have been given more weight in the sentencing analysis, and the sentence imposed should not have been as harsh. I would allow the appeal and substitute a custodial sentence of two years for the three-year sentence imposed by the judge. The appellant should receive credit of 358 days for pre-sentence custody. The remaining terms of his sentence, including three years' probation, continue to apply.
- [93] As it appears to me that the effect of the disposition I propose is to make the appellant immediately eligible for release, I direct that these reasons be brought forthwith to the attention of the sentence administrator at the Pacific Institution.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Dickson"

I AGREE:

"The Honourable Madam Justice Griffin"

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