

CANADA / JUDGMENT

R. v. Schank

2023 BCSC 2216

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 2216 R. v. Schank

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Schank,

2023 BCSC 2216

Date: 20231101

Docket: 111306

Registry: Kamloops

Rex

v.

Troy Stanley George Schank

Before: The Honourable Madam Justice Girn

Restriction on publication: A publication ban has been imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission of any evidence that would identify the complainant. This public ban applies indefinitely unless otherwise ordered.

Oral Reasons for Sentencing

Counsel for the Crown:

S.E. Firestone

Counsel for the Accused:

J. Killoran

Place and Date of Hearing:

Kamloops, B.C.

October 27, 2023

Place and Date of Judgment:

Kamloops, B.C.

November 1, 2023

- [1] These Reasons for Sentence were delivered as oral reasons. They have since been edited for distribution.
- [2] There is currently an order in place banning the publication of information that may tend to identify the complainant, now victim, in this case. For this reason and for convenience, I will continue to refer to the victim as A.G.

Introduction

- [3] On May 15, 2023, I convicted Troy Stanley George Schank of the sexual assault of A.G. between May 22, 2021 and May 23, 2021, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [4] At this sentencing hearing, the Crown tendered a victim impact statement written by A.G.
- [5] Mr. Schank submitted letters of support from his girlfriend and friends.
- [6] The maximum sentence for this offence is 14 years. The Crown seeks a sentence in the range of 30 - 36 months imprisonment, plus mandatory ancillary orders. The Crown submits that the sentence should be in the higher end of the proposed range.
- [7] Mr. Schank seeks a sentence of two years less a day followed by a period of probation for three years. He suggests certain conditions for probation including counselling and those to protect the victim are appropriate.
- [8] The Crown submits that in all of the circumstances a sentence of two years is not appropriate given the aggravating circumstances present in this case.
- [9] Sentencing is a highly individualized exercise. Ultimately, in order to arrive at a just and proportionate sentence I must balance a number of factors, including the circumstances of the offence, the circumstances of the offender, the impact on the victim, and sentencing principles including the need to denounce sexual assaults and deter both the offender and others from committing similar crimes. Finally, the sentence I impose must also be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Circumstances of the Offence

- [10] The circumstances of the offence were detailed in my reasons for conviction indexed as R. v. Schank, 2023 BCSC 931.

- [11] Following the trial, for reasons explained, I was satisfied the Crown had discharged its burden of proving beyond a reasonable doubt all of the essential elements of Count 1.
- [12] I will provide the following summary of the relevant details.
- [13] On the evening of May 22, 2021, A.G. went to her co-worker Mr. Whiffen's house for a barbecue. A.G. was employed as a bartender at a nearby bar after relocating to Kamloops earlier in the year.
- [14] As A.G. was new to Kamloops, it was a chance for her to get to know a few of Mr. Whiffen's friends. Apart from Mr. Whiffen and his girlfriend, A.G. was unfamiliar with everyone else present that evening, including Mr. Schank. A.G. had never encountered Mr. Schank before, despite the fact that Mr. Schank stated that he had seen her in the bar where she worked. She spent the evening getting to know him, both within the group and on her own.
- [15] Over the course of the evening, A.G. drank 4 cans of beer and also shared a marihuana joint with Mr. Whiffen and Mr. Schank. I accepted A.G.'s evidence that she was tipsy and that the marihuana made her sleepy but she was not intoxicated.
- [16] Because she did not have a car, A.G. intended to stay overnight at Mr. Whiffen's home. Around midnight, A.G. changed into a night shirt and settled in to sleep on a sectional sofa in the living room.
- [17] Shortly thereafter, Mr. Schank asked A.G. if she wanted to watch a movie which they did while sitting at opposite ends of the sectional sofa.
- [18] A.G. was laying down on her end of the sofa when Mr. Schank leaned over to kiss her. A.G. pushed him away and told him that she did not want to do anything because she had just recently met him.
- [19] Mr. Schank then asked if they could cuddle instead and A.G. agreed. She described it as "spooning" with Mr. Schank directly behind her and their bodies touching.
- [20] Before A.G. fell asleep Mr. Schank slid his hand down her hip and tried to remove her underwear. She moved his hand away and told him that she didn't want to do anything. A.G. testified that no kisses were exchanged after that.
- [21] A.G. eventually fell asleep, and when she woke up an hour later, she was in a distressed state because Mr. Schank's penis was thrusting within her vagina. Her underwear had been lowered to just above her knees, but she was still wearing the nightshirt. A.G. was unable to recall if Mr. Schank had ejaculated.
- [22] I accepted that A.G. did not consent to having sexual intercourse with Mr. Schank. She denied kissing him, thrusting with him and taking her underwear down.

- [23] After the sexual activity, A.G. initially laid on the sofa in shock. She then grabbed her clothes and changed in the bathroom. A.G. came back to the living room and grabbed her purse at which point Mr. Schank asked "what's wrong?" She replied that she wanted to go home.
- [24] A.G. then went outside to the porch and called a cab. Mr. Whiffen noted that A.G.'s mannerism clearly showed that she was very upset.
- [25] A.G. was distraught and sobbing when she arrived home because she could not believe what had happened to her. On May 24, A.G. visited the hospital and underwent a thorough examination using the rape kit. The police were then contacted by the examining nurse.
- [26] Mr. Schank admits that a partial DNA profile belonging to him was located in a mixed DNA profile on a vaginal swab taken from A.G.
- [27] Mr. Schank did not deny that he had sexual intercourse with A.G. but argued that it was consensual. He testified that while on the sofa with A.G. they were spooning/cuddling and kissing for a while and that there was an attraction between them.
- [28] Mr. Schank testified that while they were kissing, it was A.G. who brought her underwear down to her knees and they decided to have sex.
- [29] Mr. Schank said that A.G. was thrusting her back and buttocks on him and there were no signs that A.G. was not consenting nor was there any resistance on the part of A.G. He denied that A.G. pulled away or that she told him that she didn't want to kiss him or do anything.
- [30] He was clear they made the decision to have sexual intercourse. Mr. Schank testified that they arrived at that decision because they were cuddling and kissing.
- [31] Mr. Schank agreed that they did not speak about having sexual intercourse. He also agreed they did not exchange words of where on A.G.'s body he could touch her.
- [32] After A.G came out of the bathroom, Mr. Schank asked if everything was ok to which A.G. replied that she wanted to go outside. He says he wasn't quite sure what was going on but there was no doubt in his mind that A.G. consented to sexual intercourse.
- [33] According to Mr. Schank's testimony, nothing could be misunderstood or misinterpreted. It appeared to him that they both wanted to have sexual relations. He denied taking advantage of her by having sex with A.G. while she was asleep.
- [34] A.G. and Mr. Schank exchanged text messages the next day. In particular, Mr. Schank wrote the following:
- "I'm sorry if I got the wrong impression"
 - "I'm so sorry this all a big misunderstanding"
 - "I misinterpreted the situation."

- [35] Mr. Schank testified that the misunderstanding was around the text messages themselves. I found that this was simply not borne out in a plain reading of the messages when read in their entirety.
- [36] Mr. Schank tried to explain that the misunderstanding related to the whole evening, to everything that was going on and not just the text messages. I also found this explanation was simply not believable.
- [37] Mr. Schank also advanced that he had an honest but mistaken belief as it relates to A.G.'s consent. Mr. Schank was not able to identify any discussions he had with A.G. about the specifics of what was agreed upon, in terms of which parts of her body he could touch and which parts of his body he could use to touch her.
- [38] I found that even if I were to accept Mr. Schank's evidence, A.G. removing her underwear was not consent nor was A.G.'s thrusting her body towards him. I found that those acts did not amount to consent for him to engage in sexual intercourse.
- [39] I also found there was no evidence that Mr. Schank took reasonable steps to ascertain consent from A.G. or that Mr. Schank honestly believed that A.G. communicated consent. I concluded that the defence of honest but mistaken belief in communicated consent had no air of reality.
- [40] Finally, given that A.G. and Mr. Schank were not known to each other prior to the night in question, I concluded that Mr. Schank did not take greater care in ascertaining consent thereby raising the risk of miscommunications, misunderstandings, and mistakes.

Victim Impact Statement

- [41] In *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada provided guidance on the significance of victim impact statements on sentencing in sexual assault cases. At para. 85, the majority of the Court wrote:

When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence. This consequential harm is a key determinant of the gravity of the offence.

(emphasis added)

- [42] Section 718.1 of the Criminal Code articulates the "fundamental principle" of sentencing in the following terms:

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

- [43] It follows that a sentence for sexual assault must be proportionate to the gravity of the assault, and that the impact upon the victim is "a key determinant of the gravity of the offence": *R. v. Zerbin*, 2023 BCPC 54(CanLII) at para. 20.

[44] The victim impact statement from A.G. was presented to the Court through Crown counsel under s. 722(5) of the Code.

[45] The following are lifted directly from the A.G.'s victim impact statement:

Emotional Impact: I have anxiety constantly and I'm always angry. I feel I am a burden on everyone and I'm just exhausted because I'm not even living. I'm barely surviving. I'm also sad. I used to dance and sing and play music. I do none of that now.

I feel like the most disgusting person on the planet and I want to burn my skin off until you can no longer tell that I've been touched.

I HATE who I am. A scared little girl who literally can't do anything by herself.

Physical Impact: I have developed anxiety that so bad I can't even get out of bed some days. My heart races and I feel scared it will kill me. I've gone to the emergency room a few times due to chest pain which always ends up being extreme anxiety. I go to counseling often. I am always in pain and the views I have on myself have changed drastically.

Economic impact: I recently got let go from my job because my anxiety has taken over my entire life, where I was too scared to even go to work. Somewhere that I was safe and respected has been turned into something negative. I'm unreliable because I can't bring myself to do anything outside my house.

Fears for security: I can't leave my house without the fear I may run into him. I'm scared to do anything. I have less patience with everyone around me. I feel like at any moment someone is out to get me.

[46] There can be no doubt that this offence has had profound and significant negative consequences for A.G. in terms of her physical and psychological well being as well as her economic stability. It has also affected her relationships with those in her life.

[47] While I hope that A.G. will continue to seek counselling, I have no doubt that the sexual assault will have long term ramifications. It is possible she will never recover from this.

Circumstances of the Offender

[48] I do not have the benefit of a pre-sentence report. However, counsel for Mr. Schank provided detailed submissions on behalf of Mr. Schank.

[49] Mr. Schank is 37 years old. He was born in Owen Sound, Ontario and lived there until he was 26 years old. He is close to his family and had a typical childhood growing up. He has three siblings.

[50] Mr. Schank is currently in a relationship but has never been married.

- [51] Mr. Schank has four children - all girls. They are 20, 12, four and 1.5 years old. Each of his children have different mothers but he has relationships with each of his children and pays child support.
- [52] Mr. Schank has a grade 11 education. He has worked in restaurants since the age of 13 and has also worked in construction over the years. He currently works at a nightclub in Kelowna where he has been for the past year.
- [53] Mr. Shank has been struggling with depression and anxiety.
- [54] Mr. Schank maintains his innocence, as he has done throughout. I accept that his failure to acknowledge responsibility for the offence is not an aggravating factor on sentencing and is merely the absence of a mitigating factor.
- [55] While it is common in sexual assault sentencing for the Court to have the benefit of a psychological assessment to determine the offender's risk for re-offending, one was not conducted for Mr. Schank.
- [56] Both Crown and Defence agree that the absence of a risk assessment report is a neutral factor in this hearing.
- [57] Mr. Schank provided several letters of support from his girlfriend and friends, who also attended the sentencing hearing.
- [58] They all point to his good character and that he is a good friend, hard working, reliable, respectful and caring.
- [59] His girlfriend writes that Mr. Schank is reliable and professional and notes his contribution to the community including fundraising this past summer for those affected by wild fires and advocating for persons with disabilities.
- [60] I note that all five individuals who wrote letters of support have not known Mr. Schank for periods longer than two years. As well, only his girlfriend wrote that she was aware of Mr. Schank's conviction. None of the others made reference to this in their letters of support.

Principles of Sentencing

- [61] In *R. v. Kehoe*, 2023 BCCA 2, the Court of Appeal confirmed the key sentencing principles. Justice Marchand, writing for the Court noted:
- [32] The purpose and principles of sentencing were codified in 1996. In striving to protect society and contribute to respect for the law and the maintenance of a just, peaceful and safe society, s. 718 of the Code identifies denunciation, deterrence and rehabilitation, among others, as important sentencing objectives.
- [33] According to s. 718.1, the "fundamental principle" of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

- [34] Section 718.2 identifies a number of other important principles. Under s. 718.2(a), a sentence must be increased or reduced to account for any relevant aggravating or mitigating circumstances. Under s. 718.2(b), similar sentences should be imposed for similar offences committed in similar circumstances by similar offenders. Sections 718.2(c), (d) and (e) promote restraint in sentencing.
- [62] In sentencing for sexual assault offences, denunciation and deterrence are paramount. Absent exceptional circumstances, the sentencing judge must give them primacy: *R. v. G.M.*, 2015 BCCA 165, at paras. 17 and 18.
- [63] I am also guided by the comments in *Friesen*, that the use of sentencing ranges advances the consistent application of the principle of proportionality which leads to parity:
- [32] Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality [Citations omitted.]
- [33] In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.
- [64] In British Columbia, the range of sentence for sexual assault involving intercourse is two to six years imprisonment: *G.M.*; *R. v. B.S.B.*, 2010 BCCA 40.
- [65] In *G.M.*, the Court stated:
- [23] The importance of sentencing ranges was explained in *R. v. Nasogaluak*, 2010 SCC 6 at para. 44. In *Nasogaluak* the Court emphasized that the discretion on sentencing is not unlimited, with the overarching requirement being that the sentence imposed is consistent with the principles and objectives of sentencing:
- [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offenses, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles of and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

[66] I agree with the Crown that there has been an evolution in sentencing for sexual assault cases since Friesen and R. v. Goldfinch, 2019 SCC 38 due to the deepening awareness on the impacts of sexual violence.

Position of the Parties

[67] As I have noted earlier, the Crown seeks a sentence in the range of 30 - 36 months imprisonment. The Crown submits that a lower sentence would not address the principles of deterrence and denunciation and the existence of the various aggravating circumstances.

[68] In particular, the Crown points to the following aggravating circumstances:

The sexual assault involved penetrative sexual act; A.G. was vulnerable because she was sleeping when the sexual assault occurred, after she had previously said no to Mr. Schank on more than one occasion in regards to any sexual activity; The level of trust A.G. had placed in the accused when she permitted him to lay down beside her. She trusted that Mr. Schank would not molest her in her sleep; The impact on the victim is significant. It has profoundly affected her physical and psychological well-being as reflected in the victim impact statement; and Based on the DNA evidence an inference can be drawn from the circumstances that Mr. Schank engaged in unprotected sex.

[69] Mr. Schank submits that the Crown has not established the last aggravating factor beyond a reasonable doubt.

[70] Mr. Schank submits that a sentence of two years less a day followed by a period of probation for three years is an appropriate sentence in the circumstances. Mr. Schank points to his lack of criminal record and support from the community as mitigating circumstances.

Application of Sentencing Principles

[71] I will begin by noting that there is no dispute this event has had and will continue to have a significant impact on the victim. No matter what sentence I impose, it will not turn back the clock for A.G.

[72] There is also no dispute that sentencing is a highly individualized exercise. There is no hard and fast rule when it comes to sentencing.

[73] I will now address what I have identified as the mitigating and aggravating circumstances.

[74] The Crown bears the burden of proving disputed aggravating factors or circumstances beyond a reasonable doubt: s. 724(3)(e) of the Criminal Code; R. v. Gardiner, [1982] 2 S.C.R. 368.

- [75] While the Crown submits that an inference can be drawn that the accused engaged in unprotected sex, this is disputed by the accused. I am unable to accept beyond a reasonable doubt that no condom was used by Mr. Schank. There is no evidence that accused's DNA found inside A.G.'s vagina was in fact semen. Accordingly, I do not accept this as an aggravating circumstance.
- [76] However, as I have noted the sexual assault has had a significant impact on A.G. Her victim impact statement was difficult to hear. She is still a very young woman and I accept that A.G. is no longer the outgoing individual who moved to Kamloops from Saskatchewan.
- [77] A.G. was new to Kamloops and did not know many people. She accepted Mr. Whiffen's invitation to the barbeque, in part, so she could meet more people. She should have felt safe in the privacy of her friend's home.
- [78] As a result of the sexual assault she is now a person who is afraid to leave her home and she no longer dances, sings and plays music. These were activities that made her happy. A.G. now suffers from anxiety and as a result has lost the ability to earn an income at a place where she felt safe and respected.
- [79] Mr. Schank has been convicted of a very serious sexual assault involving penetrative sexual act on a sleeping vulnerable individual.
- [80] Adding to the seriousness of the offence is that A.G. said no to him on more than one occasion in regards to any sexual activity. She was clear that she did not want to engage in sexual activity because she did not know Mr. Schank that well.
- [81] While Mr. Schank was not a stranger to A.G. in the complete sense of the word, A.G. and Mr. Schank did not know each other prior to that night. Yet, despite this she trusted Mr. Schank. She allowed him to cuddle with her. But that was as far as she wanted to go.
- [82] Mr. Schank argues that there was no formal trust as was the case in *R. v. Gill*, 2018 BCCA 60, where the accused was a taxi driver who was to drive home an intoxicated victim.
- [83] While I agree, there was nonetheless a level of trust that A.G. had placed in Mr. Schank when she permitted him to lay beside her. I agree with the Crown that A.G. trusted that Mr. Schank would not molest her in her sleep.
- [84] As well, while there was no physical force applied in the conduct of the sexual assault, the law is clear that a sexual assault is inherently a violent act.
- [85] In assessing the gravity of the offence, Justice Warren's comments in *R. v. Jajja*, 2022 BCSC 467 are instructive at para. 61:

Mr. Jajja exploited C.L. He treated her as an object and disregarded her dignity and autonomy. The offence had a significant impact on her. The gravity of the offence is very high.

- [86] While I accept that Mr. Schank's conduct was not at the same level as that of Mr. Jajja, I nonetheless also find that Mr. Schank disregarded A.G.'s dignity and autonomy. As well, I have noted that the offence had a significant impact on A.G. In that regard, I find that the gravity of the offence is very high.
- [87] The fact that A.G. was asleep when Mr. Schank engaged in the sexual activity heightens his moral blameworthiness. This also makes his degree of responsibility high. Mr. Schank was advised by A.G. on two separate occasions that she did not want to engage in sexual activity. Despite this, he chose to ignore her wishes.
- [88] In all of the circumstances, the proportionality principle weighs in favour of a sentence that is not on the lower range of sentencing for sexual assault offences.

Appropriate Sentence in All the Circumstances

- [89] Mr. Schank says the gravity of the offence and moral blameworthiness can be addressed with the imposition of a sentence of two years less a day.
- [90] To his credit Mr. Schank has no prior criminal record and he is a contributing member of society who has support from his girlfriend and friends.
- [91] However, these mitigating circumstances are tempered by the severity of the sexual assault that was perpetrated on A.G. in circumstances where she felt there existed a level of trust. That trust in him allowed her to have Mr. Schank to lay beside her while they watched a movie and eventually fall asleep. He shattered that level of trust.
- [92] The effect of that breach of trust has had a significant impact on A.G. and will very likely to continue for years to come. She has endured significant emotional distress as a result of the sexual assault and continues to suffer including economically.
- [93] In arriving at a just and proportionate sentence I must also consider the parity principle. I have considered each of the cases submitted by the Crown and Mr. Schank.
- [94] The Crown relies on the following cases:
1. R. v. Gill, 2018 BCCA 60
 2. R. v. Cartwright, 2019 BCSC 820
 3. R. v. West, 2020 BCSC 352
 4. R. v. Jajja, 2022 BCSC 467
 5. R. v. Laz-Martinez, 2011 ONCJ 115
 6. R. v. Peters, 2023 MBKB 13
- [95] Mr. Schank relies on the following cases:
1. R. v. Cartwright, 2019 BCSC 820

2. R. v. Narcisse, 2017 BCSC 2485

3. R. v. Skoyen, 2020 BCSC 362

4. R. v. Smith, 2018 BCSC 1972

[96] While counsel directed me to the similarities and differences in each of the cases, it must be remembered that sentencing is a highly individualized exercise.

[97] The Crown submits that Gill is similar to the case at bar. In that case, Mr. Gill appealed a three-year sentence following his conviction by a jury. A key aggravating factor was the significant breach of trust because the victim had the right to assume she was going to be safe when she entered the taxi cab. The victim was in a vulnerable situation because she was intoxicated inside a taxi cab driven by Mr. Gill and was a stranger to him. The Court of Appeal upheld Mr. Gill's three-year sentence.

[98] The Crown says there are some parallels in that A.G. was also in a vulnerable state because she was asleep when the sexual assault occurred. As well, Mr. Schank and A.G. were strangers prior to that night.

[99] I find that Gill is also similar as it relates to the trust factor. A.G. was also entitled to feel safe in her friend's home after she said no to sexual activity on more than one occasion. She trusted Mr. Schank when she permitted him to cuddle with her. She could not have anticipated that he would do anything untoward given her refusal to accede to his sexual advances. I note that Mr. Gill also faced immigration consequences and did not have a criminal record.

[100] While the Gill case bears some similarities to this case at bar, I find that Gill is distinguishable in some respects given that the Court found the offender's conduct to be reprehensible because of his attempt to evade detection by lowering the visor to block the security camera. In my view, this made Mr. Gill's conduct more blameworthy and the degree of responsibility much higher warranting the three-year sentence.

[101] Both the Crown and Mr. Schank rely on Cartwright. After a jury convicted the offender of sexual assault, Justice Jenkins sentenced the offender to 30 months jail noting that the aggravating circumstances included that the victim was intoxicated before she fell asleep; she was asleep when the sexual assault occurred; the victim had no reason to expect that the offender would make sexual advances on her; the offender was forceful in initiating the assault throughout and he engaged in unprotected sexual intercourse.

[102] In my view, Cartwright bears close similarities to the case at bar in that A.G. was also asleep when the sexual assault occurred and she also had no reason to expect that Mr. Schank would make sexual advances on her while asleep after she told him no.

[103] I note that despite the fact that there was some level of violence inflicted on the victim in Cartwright, it is accepted that all sexual assaults are violent in nature.

- [104] In my view, the Jajja case also bears some similarity to the circumstances of this case. Justice Warren sentenced Mr. Jajja to three years imprisonment.
- [105] Mr. Jajja also faced immigration consequences and risked deportation as a result of the conviction. Like Mr. Schank, Mr. Jajja did not have a criminal record.
- [106] I am unable to agree with Mr. Schank that the circumstances surrounding his offence is materially less grave than Mr. Jajja's or that his moral blameworthiness is lower. In both cases, Mr. Schank and Mr. Jajja both took advantage of a victim who was in a vulnerable state and the victim and offender were not known to each other prior to the offence.
- [107] In West, there was a joint submission on a guilty plea. There were two victims and the offender had a criminal record. I find this case not particularly helpful.
- [108] Nor do I find the two cases from outside British Columbia, Laz-Martinez and Peters, overly helpful in terms of the parity principle. While I am not bound to follow them, I do, however, take note of the general comments in relation to sexual assaults, in particular to the reference in Peters to R. v. Arcand, 2010 ABCA 363.
- [109] I will now address the cases relied on by Mr. Schank.
- [110] In Narcisse, after pleading guilty, the offender was sentenced to two years less a day. He was a youthful Indigenous offender who had taken active steps to address alcohol abuse which played a role in the commission of the offence. Mr. Schank submits that the sexual act was more violent than the circumstances before me. However, I note once again that all sexual assaults are violent in nature.
- [111] Accordingly, I find Narcisse distinguishable. Mr. Schank was found guilty after trial. The rehabilitation principle was a significant factor in the court's decision in Narcisse imposing the sentence of two years less a day. Although I have considered this principle in my determination of a fit sentence for Mr. Schank, it is not a significant consideration.
- [112] Skoyen is a case that was released before Friesen. Like Mr. Schank, Mr. Skoyen was a first-time offender. The facts were much more egregious and involved two different incidents of sexual assaults. Mr. Skoyen had overcome significant addiction issues.
- [113] Justice Donegan sentenced him to three years. I agree that Mr. Skoyen's moral blameworthiness was higher which warranted the three-year sentence and, in my view, a three-year sentence for Mr. Schank would not be an appropriate sentence.
- [114] Finally, Mr. Schank relies on Smith. Mr. Smith was initially sentenced to 2 years, seven months.
- [115] On appeal, the Court reduced the sentence to two years. Mr. Smith's conduct was slightly more egregious. However, Mr. Smith also had immigration consequences.

- [116] The Court of Appeal reduced the sentence on the basis of Mr. Smith's mitigating personal circumstances, the collateral immigration consequences and exercised judicial restraint. I note that by the time the appeal was heard, Mr. Smith had effectively served his sentence.
- [117] Mr. Schank does not have immigration consequences which would justify a sentence of two years.
- [118] In arriving at a just and appropriate sentence for Mr. Schank I have considered the purpose and objectives of sentencing and that deterrence and denunciation are paramount in sexual assault sentencing.
- [119] I have also considered the fundamental principles of proportionality and parity, as well as the need for restraint in the use of custodial sentences. I also take into account the gravity of the offence, Mr. Schank's high degree of responsibility, the aggravating circumstances, and Mr. Schank's personal circumstances.
- [120] In all of the circumstances, I find that a term of imprisonment of 30 months incarceration is a just and appropriate sentence.
- [121] Mr. Schank, please stand,
- [122] I sentence you to 30 months incarceration for sexual assault.
- [123] You may sit down now.
- [124] There will also be the following ancillary orders:
- a) Pursuant to s. 487.051(1) of the Code, there will be a DNA order in relation to both counts. Pursuant to s. 487.051(1), I authorize the taking of samples of bodily substances from Mr. Schank reasonably required for the purpose of forensic DNA analysis.
 - b) Pursuant to s. 109(1) and (2) of the Code, there shall be a firearms prohibition for a period of 10 years prohibiting Mr. Schank from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, and explosive substance during the period that begins on the day on which this order is made, and ending not earlier than 10 years after your release from imprisonment after conviction for these offences. As well, Mr. Schank is prohibited from possessing any prohibited firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
 - c) Pursuant to s. 490.011(a) and 490.012(1) and 490.013(2)(b) of the Code, there will be an order requiring Mr. Schank to comply with the provisions of the Sex Offender Information Registration Act, S.C. 2004, c. 10 for 20 years; and
 - d) Pursuant to s. 743.21 of the Code, I order that Mr. Schank have no contact or communication, directly or indirectly, with A.G. for the duration of his custodial sentence.

- [125] Finally, I will address a recent amendment to the Criminal Code. Bill S-12, An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act received Royal Assent on Thursday, October 26, 2023 and is now in force.
- [126] Specifically, s. 726.3 has been added into the Code, which requires the sentencing judge to inquire of the prosecutor if reasonable steps were taken to determine whether the victim wishes to receive information regarding the sentence and its administration and, if known, enter the victim's wishes into the record of proceedings.
- [127] I have been advised by Crown counsel that A.G. wishes to receive such information and so it will be entered into the record of proceedings.
- [128] Finally, I want to extend my sincere appreciation to Crown counsel and Mr. Schank's counsel for their excellent submissions not only during this sentencing hearing but also throughout the trial.
- [129] That concludes my oral reasons for sentence.
- "Girn J."

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