
CANADA / JUDGMENT

R. v. Smith

2020 BCCA 87

COURT

British Columbia Court of Appeal

DECIDED

6 March 2020

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2020 BCCA 87 R. v. Smith

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Smith,

2020 BCCA 87

Date: 20200306

Docket: CA46019

Between:

Regina

Respondent

And

Stephen Smith

Appellant

Before:

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

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

January 18, 2019 (R v Smith, 2019 BCSC 236,

New Westminster Docket X079843-9).

Oral Reasons for Judgment

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

S. E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

March 6, 2020

Place and Date of Judgment:

Vancouver, British Columbia

March 6, 2020

Table of Contents

Paragraph Range

1.0 INTRODUCTION

[1] - [6]

2.0 THE CIRCUMSTANCES OF THE OFFENCE

[7] - [12]

3.0 CIRCUMSTANCES OF THE VICTIM

[13] - [13]

4.0 THE CIRCUMSTANCES OF THE OFFENDER

[14] - [14]

5.0 ARRIVING AT A SENTENCE

[15] - [18]

6.0 POSITION OF THE PARTIES

[19] - [22]

7.0 STANDARD OF APPELLATE REVIEW

[23] - [24]

8.0 FITNESS OF THE SENTENCE

[25] - [36]

9.0 DISPOSITION

[37] - [40]

Summary:

The appellant seeks an extension of time and leave to appeal his 10-year global sentence for convictions relating to his participation in a home invasion. The appellant and his cousin broke into the home of the victim, a 65-year-old widower, and awoke him from his sleep. One or both of them then savagely attacked him, assaulting him with a hammer and a knife. The attack was prolonged and left the victim with life-altering injuries. They then ransacked the house and robbed the victim. The appellant argues a 10-year sentence is demonstrably unfit and disproportionate, having regard to the appellant's youth and circumstances, and sentences imposed in other cases. He contends an appropriate sentence would be seven years. The appellant also submits the judge made an arithmetic error in his calculation of the amount of credit the appellant is entitled to for time spent in pre-sentence custody. Held: Extension of time and leave to appeal granted. Appeal allowed only to the extent of correcting an error in the calculation of credit for pre-sentence custody. The judge did not err in his assessment of the appropriate sentence in this case. The appellant, in essence, is asking this Court to reweigh the factors the sentencing judge carefully considered in crafting a sentence that was within the range for similar offences; that is not something this Court is entitled to do. Despite the appellant's very sympathetic personal circumstances and upbringing, the sentence has not been shown to be demonstrably unfit.

GRAUER J.A.:

1.0 Introduction

- [1] On July 6, 2016, the appellant, Mr. Smith, and his cousin, Mr. James, invaded a home they had randomly selected in New Westminster. The occupant, a 65-year-old widower who lived alone, was confined, assaulted, injured, and robbed. These events led to charges against Mr. Smith on the following counts: (1) breaking and entering; (2) aggravated assault; (3) unlawful confinement; (4) robbery; (5) possession of stolen property; and (6) and (7): attempted fraud.
- [2] At his trial, at the end of the Crown's case, the appellant entered guilty pleas to counts (5), (6) and (7), and invited the jury to find him guilty of count (1), breaking and entering. The jury did so, and further convicted the appellant of the remaining three counts of robbery, unlawful confinement, and aggravated assault.
- [3] For these, the trial judge imposed a global sentence of 10 years' imprisonment. The judge gave credit for three years and eight months for time spent in custody. The Crown concedes that the appellant was actually entitled to a credit of three years, nine months and 24 days.

- [4] The appellant applies for an extension of time within which to apply for leave to appeal, to which the Crown consents, and seeks leave to appeal. If granted, the appellant appeals his sentence, arguing that it is "demonstrably unfit" and out of proportion to other sentences imposed in similar circumstances. He does not maintain that the trial judge committed any errors of principle.
- [5] In the submission of the appellant, a fit and a proportionate sentence would be in the range of seven years, to be reduced for time served. In this regard, he relies principally upon his youth, the absence of an aggravating criminal record, the circumstances of his very difficult upbringing, his potential for rehabilitation, and the range set by what he contends are comparable cases.
- [6] I will now review the circumstances of the offence, the circumstances of the victim, and the circumstances of the appellant. These will cover the bases upon which this appeal rests, and provide context for examining the ranges set by comparable cases.

2.0 The circumstances of the offence

- [7] The oral reasons of the sentencing judge are indexed at 2019 BCSC 236. At para 2, the judge summarized what had happened:

All of the charges related to a home invasion that occurred in New Westminster on 6 July 2016. The home invasion involved a violent assault in which the victim, Mr. Innis, was awoken from his sleep in the bedroom of his home by an intruder who demanded his wallet, bank card, and security code, and then began to beat him. At a certain point, a second intruder was present. After a prolonged assault in which Mr. Innis was attacked with a hammer and a knife, the intruders fled, taking valuables from a number of different rooms throughout the house. Mr. Innis suffered severe injuries including a concussion, lacerations and bruises, broken ribs, and a loss of hearing in one ear.

- [8] The judge then proceeded to determine the facts for the purpose of sentencing, noting the fundamental principle under section 718.1 of the Criminal Code, RSC 1985, c C-46, that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Accordingly, it became incumbent upon the judge to determine the extent of the appellant's involvement.
- [9] This was particularly important in relation to the verdict on the counts of robbery, unlawful confinement, and aggravated assault. The jury could have found the appellant guilty as a principal offender, or alternatively, as a participant in the break and enter who was a party to those subsequent offences.
- [10] Partway through the sentencing hearing, the appellant applied for leave to testify about his specific role in the offence, which the judge granted. Ultimately, however, the appellant made a decision not to give any such evidence.

[11] The judge then proceeded to make findings of fact concerning the appellant's involvement. These are set out at paras 28-29 of the reasons for judgment, and may be summarized as follows:

- a) The appellant was a principal in the break and enter, and was physically present in the victim's house when the home invasion occurred.
- b) The appellant, his cousin, and a third friend drove to the victim's house with the specific intent of effecting a break and enter into a dwelling house to steal property. They randomly selected Mr. Innis's house because the back door was not locked.
- c) Both the appellant and his cousin actually broke into Mr. Innis's house and were present in the upper level during the course of the robbery, unlawful confinement, and physical assault.
- d) The three offences were committed over a significant period of time, between 60 and 90 minutes.
- e) Both offenders were physically present for a significant portion of the time during which Mr. Innis was confined and assaulted.
- f) During that time of confinement, Mr. Innis was beaten with hands or fists, hit with a hammer, and slashed with a knife. The judge was left, however, with a reasonable doubt as to whether the appellant physically assaulted Mr. Innis.
- g) During the course of the assault, one of the two offenders tried to limit the extent of violence, but the judge was unable to say which of the two offenders did so.

[12] The appellant does not take issue with these findings of fact.

3.0 THE Circumstances of the victim

[13] Noting that the age, health and personal circumstances of the victim are important sentencing considerations under section 718.2(iii.1) of the Criminal Code, the judge reviewed the impact of the offences on the victim:

[30] Mr. Innis was 65 years old at the time of the offences. He was alone in his house. His wife had recently passed away. He was awoken from his sleep by an intruder, a complete stranger, who proceeded to threaten and beat him. A second intruder, also a complete stranger, joined in. Mr. Innis has a very poor memory of the subsequent events. He was traumatized. He suffered extensive injuries including a concussion, a broken nose, damage to his left ear resulting in the loss of an eardrum and the loss of hearing that persists even after at least one surgery, a broken tooth requiring dental work, broken ribs, and bruises and cuts on his face and other parts of his body.

- [31] Mr. Innis prepared a very compelling victim impact statement that was read into the record during the sentencing hearing. He presents as a person who has tried to remain stoic in the wake of a terrifying and traumatic experience. When the home invasion happened, Mr. Innis was in a vulnerable state, grieving after the recent death of his wife. As it was unfolding, Mr. Innis feared for his life. He considers himself in that regard lucky to be alive.
- [32] Mr. Innis has suffered prolonged physical and emotional effects. He had significant physical injuries. His hearing in one ear has not yet returned despite at least one surgery. He is concerned that the concussion he suffered may lead to memory loss. Emotionally, the incident has had an effect on Mr. Innis's self-esteem. He suffers from a lack of confidence and he has increased anxiety. The offences have also impacted Mr. Innis financially, although this is less of a concern to him than the physical and emotional impacts.
- [33] The offences also impacted Mr. Innis's family. His daughters were called to the hospital and were traumatized to see the extent of his injuries. One of his daughters was married a few months after the events and Mr. Innis found it difficult to meaningfully participate in or to enjoy the wedding given the extent of his injuries.

4.0 The circumstances of the offender

- [14] The judge reviewed these in detail, noting in particular the difficult circumstances in which the appellant grew up, and his victimization due to racism:
- [35] Mr. Smith was 21 years old, almost 22, at the time of the offences. He is now 24. He was born in Toronto. He never met his biological father. He spent his early years under the care of his mother.
- [36] When Mr. Smith was seven years old, his mother remarried. Mr. Smith says he had a strained relationship with his stepfather. From Mr. Smith's perspective, he grew up without a male role model. The Crown questions the reliability of this assertion, but in my view, there is no basis in the evidence to question Mr. Smith's account of his own relationship and feelings towards his stepfather.
- [37] At the age of seven or eight, Mr. Smith began to have behavioural problems both at home and at school. He was diagnosed, according to his mother, with ADD and prescribed Ritalin.
- [38] At a certain point when Mr. Smith was still very young, he went into the care of the Children's Aid Society in Ontario. He went through a total of 15 different placements in foster homes and group homes. In the midst of this, there was a respite for a period of some two years when Mr. Smith went to live with relatives in Jamaica. He viewed this as a positive experience. He got to know his extended family and learned about his culture. Regrettably, upon his return to Canada, Mr. Smith ended up back in the care of the Children's Aid Society.

- [39] Between the ages of 13 and 17, Mr. Smith accumulated a youth record with 11 separate dispositions including entries for assault, obstruction of a peace officer, possession of a controlled substance for the purpose of trafficking, and most notably, three separate robbery offences. The first of these related to an incident in which Mr. Smith and two others swarmed and robbed another youth. The third and final robbery offence arose from an incident in which Mr. Smith and two others robbed a convenience store using an imitation firearm. Mr. Smith played the role of a lookout in that matter. For that offence, Mr. Smith received a sentence of 10 months' secure custody (time served), which was the longest period of time that Mr. Smith spent in custody as a youth. In that particular matter, the Crown counsel had urged some degree of leniency in view of the fact that he characterized Mr. Smith's upbringing as "tragic."
- [40] Mr. Smith testified at the sentencing hearing describing some of the events referred to above in very broad strokes. Mr. Smith said he had a difficult time growing up in part because he was in so many different foster homes and group homes and so many different schools. Mr. Smith also testified about his experience as a black person growing up in Ontario. He said he was often the victim of racial discrimination or out-and-out racist behaviour. He described one period of time when he was the only black child in an all-white neighbourhood with pervasive anti-black sentiment and his peer relationships were such that he began to hate the colour of his own skin. Mr. Smith said that racial discrimination and racism have affected him throughout his life. He accepts that there will always be at least some people with racist attitudes. He is not seeking any lesser sentence based on his experiences of racism or discrimination as a black male in Canada, but he maintains that racism is a reality which has affected his life and how he has ended up where he is now. Mr. Smith bristles at overtly racist behaviour and takes offence when people use racial slurs or derogatory terms towards him. Mr. Smith's testimony in this point was offered to explain some of his behaviour while in pretrial custody, an issue discussed below.
- [41] In 2013, at the age of 19 or 20, Mr. Smith moved from Ontario to British Columbia. He lived with his aunt and his cousin, Mr. James. Mr. Smith met and formed a relationship with Ms. Pilgrim. The two of them moved to Edmonton where they had two daughters, aged three and four at the time of the presentence report. At a certain point Mr. Smith and Ms. Pilgrim separated and Mr. Smith returned to British Columbia.
- [42] At the time of the offences, Mr. Smith had begun to use drugs and, according to his counsel, he was in a downward spiral. He claims to have lost his job and that he was on a week-long drug binge with Mr. James and Mr. Navarro. It was at the end of this drug binge that Mr. Smith says he became involved in the offences now before the court. The Crown points out some aspects of Mr. Smith's account do not square with the evidence at trial. In particular, there was evidence that Mr. Navarro had not been in contact by phone with Mr. Smith or Mr. James for a number of days before 5 July 2016. This does not square with Mr. Smith's untested assertion that he was doing drugs with Mr. Navarro and Mr. James for some five days leading up to the events of 6 July 2016. However, the evidence does indicate that Mr.

Smith, Mr. James, and Mr. Navarro made arrangements to buy cocaine on the evening of 5 July 2016, mere hours before the home invasion took place.

- [43] Mr. Smith's account of his actual role in the offences as set out in the presentence report was disputed by the Crown. Accordingly, it is not admissible in the absence of viva voce testimony with cross-examination. In an earlier ruling, I granted Mr. Smith's application to call evidence about his role in the offences, but Mr. Smith later made a decision not to offer any testimony about his involvement.
- [44] Mr. Smith has been in custody since his arrest on 6 July 2016. There is conflicting evidence as to his behaviour while in pretrial detention.
- [45] On the one hand, Mr. Smith says he has taken all of the Essential Skills to Success programming available to him and that he has tried to get work placement in the institution, but has been consistently refused that opportunity. He also says that since his remand in custody, he has become addicted to drugs including methamphetamine and fentanyl. Mr. Smith says that he has been trying to deal with the addiction by going into a Suboxone treatment program. He has been in that program for some time now.
- [46] On the other hand, the Crown says that Mr. Smith has not done well in pretrial detention, indicating a lack of progress towards rehabilitation, poor responsiveness to authority, and poor prospects of future rehabilitation while in custody. The Crown tendered Mr. Smith's institutional client logs and associated records indicating multiple disciplinary findings for infractions including assault or fighting and possession of contraband. The disciplinary records include two incidents involving violence. In one, Mr. Smith admittedly used excessive force. In the other, Mr. Smith initiated an unprovoked attack. These are serious matters, although the Crown has not tendered them as aggravating factors on sentence, but only as evidence of Mr. Smith's unproductive attitude and poor response to prison programs.
- [47] Beyond this, the records involve citations and warnings for infractions of institutional rules. These may be no small matter in terms of managing Mr. Smith's behaviour in the institution, but they are not really of much assistance in deciding the appropriate sentence for Mr. Smith in relation to the very serious criminal offences that are now before the Court. The most that can be gleaned from the records is that Mr. Smith's performance and behaviour while on pretrial detention has been far from exemplary. No one would say he has been a model prisoner. The records indicate that Mr. Smith sometimes has problems with authority and does not react well to orders or directions, particularly when he does not want to comply with them. He has the ability to be respectful and sometimes he is respectful and other times he is not.
- [48] However, I accept Mr. Smith's testimony that one of the main triggers for his verbally aggressive or abusive conduct is a perception that he is being treated with a lack of respect. This perception is fuelled at least in part by his perceptions about racial discrimination and outright racism. In view of his background and experience, these perceptions are understandable, although it is also understandable that many jail staff who act

professionally should not be subjected to verbal abuse or other forms of aggression by prisoners. There are grievance and complaint procedures available to prisoners and Mr. Smith knows this as he has been chosen as a tier representative for prisoner-staff liaison meetings.

- [49] With respect to Mr. Smith's substance abuse issues, the Crown says that, to the extent that Mr. Smith has become dependent on drugs while in custody, it is a product of his choices. The Crown points out that it is not easy to get drugs inside a jail. It is a strictly controlled environment and one has to go out of one's way to pay for, acquire, and use illicit drugs in this setting and, although Mr. Smith is on the Suboxone program, the Crown says the institutional records also show that he has declined to attend Narcotics Anonymous meetings on various occasions. In the end, I accept and find on a balance of probabilities that Mr. Smith has, in fact, developed a drug dependency while in pretrial detention. I also accept that it is not easy to get access to illicit drugs in custody and Mr. Smith must have made some effort to do this.

5.0 Arriving at a sentence

- [15] The judge reviewed and discussed what he considered to be the important sentencing principles for a case such as this, as set out in sections 718 to 718.2 of the Criminal Code, being proportionality, denunciation, deterrence, rehabilitation, promotion of a sense of responsibility in the offender and acknowledgement of the harm done to the victim, and restraint. He then noted seven aggravating factors, and what he described as a "short and not particularly compelling" list of mitigating circumstances.
- [16] The judge then reviewed the case law presented by the parties, which he described as suggesting a sentencing range of 5 to 12 years in home invasion cases involving violence, with a higher range of 14 to 15 years where there has been a death, serious crimes such as sexual assault, or where the victim is left with serious and lasting injuries. He considered that although the injuries to Mr. Innis were very serious, the case did not cross over the line into that higher range of 14 to 15 years reserved for those most serious home invasion incidents.
- [17] The judge noted:
- [66] Sentencing is, in the end, an individualized exercise. It focuses on the particular offences and particular offender before the court. I can take general guidance from the range and from the notion that like cases are to be treated alike, but in the end, I have to determine where in the identifiable sentencing range this particular case sits. To quote from Stromberg-Stein J. (as she then was) in [R. v. Araki and Ryan, 2005 BCSC 978], at para. 22:

The difference between the ranges is explained by assessing the nature of the offences and the degree of participation and culpability of the offenders. While case authorities and ranges of sentence are helpful, each case must be decided with regard to its own particular facts and circumstances in relation to the individual offender bearing in mind that s. 718.1 provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[18] He then imposed sentence:

- [67] Mr. Smith, given the significant aggravating features, the overall seriousness of the offences, your moral responsibility, and the relative absence of any significant mitigating features, one could make a case that the principles of denunciation and deterrence demand the longest possible sentence that could be justified on the authorities that have been placed before me. That would be a sentence of 12 years. However, that would not necessarily do justice or take proper account of your personal circumstances including your relative youth and your very difficult upbringing, which no doubt is part of what led you to a place where you became involved in such heinous criminal conduct. The principle of restraint must also be considered.
- [68] As for the principle of rehabilitation, I must say that on the materials placed before me, your rehabilitative progress has been mixed at best. You have taken some courses, but you are now battling substance abuse and you have had a fair amount of strife with other prisoners and with staff in the institution. I accept the Crown's submissions that there is generally more programming and more opportunity available in the federal correctional system than in either a provincial remand centre or a provincial jail facility. So there is reason to believe that you will have more success in your rehabilitative efforts in a federal penitentiary.
- [69] I accept the observation of Crown counsel, reflected in the institutional records, that you have the ability to be considerate and respectful and to get along with prison staff and other prisoners, but sometimes you choose not to do so. In your testimony, you struck me as a person with a fair degree of self-confidence and a well-developed sense of understanding regarding the importance of mutual respect. Of course in the commission of the crimes for which you are being sentenced, you did not show the victim, Mr. Innis, the least bit of respect, dignity, or concern. Your conduct was reprehensible and has had a profound effect on Mr. Innis.
- [70] In the circumstances, I conclude that a sentence of 10 years in jail is necessary in order to address all of the objectives of sentence discussed above. With credit for time spent in custody, this will result in a net sentence of six years and three months. This is a long time for anyone to spend in custody, but it is what justice demands here.

[71] Mr. Smith, you should be aware that if it were not for your prior personal circumstances as emphasized by your counsel, you might have received a longer sentence than that. I want you to keep in mind that even after serving this sentence, you will be a relatively young man with an opportunity to turn your life around, to return to society, and to make a positive contribution. So you can have a seat, sir.

6.0 Position of the parties

- [19] The appellant argues that the 10-year sentence, in the circumstances of this case, was disproportionate and demonstrably unfit because it failed to give full effect to the appellant's personal circumstances and the sentencing principle of restraint, as well as the relevant sentencing precedents for "home invasion" cases.
- [20] The appellant submits, correctly, that a sentence can be demonstrably unfit even though the trial judge has committed no error in principle: *R v Lacasse*, 2015 SCC 64 at paras 11, 44, 52; *R v Agin*, 2018 BCCA 133 at para 57; *R v Williams*, 2019 BCCA 295 at para 44.
- [21] To support his argument that the sentence here was disproportionate by comparison with sentences imposed for similar offences committed in similar circumstances, the appellant relies on three decisions: *R v Chudley*, 2016 BCCA 90, *R v Vickers*, 2007 BCCA 554; and *R v Moore*, 2008 BCCA 129. Comparison of the circumstances of this case to those, the appellant contends, indicates that a fit and proportionate sentence in this case would be seven years.
- [22] The respondent says: (1) the sentence imposed clearly falls within the range of sentences endorsed in this Court; (2) factual distinctions exist between the three cases cited by the appellant (all three of which were considered by the sentencing judge) and this case; and (3) the appellant is asking the Court to rebalance aggravating and mitigating factors, contrary to the well-established test for appellate intervention. The respondent accepts that there must be a correction to the arithmetic error concerning the amount of credit for time served.

7.0 Standard of appellate review

- [23] Appellate courts must show "considerable" or "great" or "significant" deference to sentencing judges. As stated by Justice Bennett in *R v Heatley*, 2015 BCCA 453:
- [11] The role of the appellate court in reviewing sentences is circumscribed by considerable or great deference. Courts of appeal give significant deference to sentencing judges. The scope of appellate review was set out in *R. v. C.A.M.*, [1996] 1 S.C.R. 500 at para. 90:
- [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

- [12] If there is an error in the sentencing process, the appellate court must still determine if, despite the error, the sentence is demonstrably unfit. See *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 at para. 37 (B.C.C.A.). Even if the sentence is outside the usual range of sentences for the offence, the sentence is not necessarily unfit. See *R. v. Nasogaluak*, 2010 SCC 6 at para. 44.
- [24] In *Lacasse*, the Supreme Court of Canada emphasized the importance of giving wide latitude to sentencing judges as they are in the best position to determine, having regard to the circumstances, a just and appropriate sentence. With respect to the standard of "demonstrably unfit", the Court went on to say:
- [51] Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.
- [52] It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure" (*R. v. Rezaie* (1996), 31 O.R. (3d) 713 (C.A.), at p. 720). All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence.
- [53] This inquiry must be focused on the fundamental principle of proportionality stated in s. 718.1 of the Criminal Code, which provides that a sentence must be "proportionate to the gravity of the offence and the degree of responsibility of the offender". A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle. Proportionality is determined both on an individual basis, that is, in relation to the accused him or herself and to the offence committed by the accused, and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2 (a) and (b) of the Criminal Code.
- [54] The determination of whether a sentence is fit also requires that the sentencing objectives set out in s. 718 of the Criminal Code and the other sentencing principles set out in s. 718.2 be taken into account. Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed. The principle of parity of sentences, on which the Court of Appeal relied, is secondary to the fundamental principle of proportionality. This Court explained this as follows in *M.* (C.A.):

It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime. . . . Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. [para. 92]

[55] This principle of parity of sentences also means that the deference owed to the sentencing judge must be shown except in the circumstances mentioned above. The Court said the following in this regard in *L.M.*:

This exercise of ensuring that sentences are similar could not be given priority over the principle of deference to the trial judge's exercise of discretion, since the sentence was not vitiated by an error in principle and the trial judge had not imposed a sentence that was clearly unreasonable by failing to give adequate consideration to certain factors or by improperly assessing the evidence (*M. (C.A.)*, at para. 92, quoted in *McDonnell*, at para. 16; *W. (G.)*, at para. 19; see also *Ferris*, at p. 149, and *Manson*, at p. 93). [para. 35]

[Emphasis added.]

8.0 Fitness of the sentence

[25] Here, the sentencing judge carefully considered the ranges established by the cases referred to him, the aggravating and mitigating factors arising from the evidence, including the circumstances of the offender, and the appropriate objectives and principles of sentencing. No error in principle is alleged. But was the sentence disproportionate? Or, when considered in light of the sentences imposed in other cases, including the three cases upon which the appellant relies, was it "clearly or manifestly excessive", or did it represent a "substantial and marked departure"?

[26] In two of the cases upon which the appellant relies, *Chudley* and *Vickers*, the offenders received equivalent sentences of 10 years. The appellant submits, however, that the circumstances of the home invasion offences were aggravated by the use of firearms, and the personal circumstances of the offenders were aggravated by criminal records.

[27] In the third case, *Moore*, this Court upheld an eight-year sentence in a home invasion that, the appellant submits, was roughly comparable to this one. There, the appellant points out, the offender had a serious criminal record, unlike the appellant, whose youth record, while not insignificant, was not considered by the judge to be an aggravating factor.

[28] In all three of those cases, the offenders were older than the appellant, but all were young men.

- [29] But does it follow from these differences that the appellant's sentence was disproportionate? In my view, it does not. Sentencing is not an exercise in applying a tariff. There are many factors that must be taken into account and carefully balanced. In *Moore*, for instance, while the offender had a serious criminal record, the invasion was relatively brief, the robbery was unsuccessful, and while one of the victims was punched and kicked, and a pillow held to her face, the injuries were considerably less severe than those suffered by Mr. Innis.
- [30] The sentencing judge here reviewed a number of significant aggravating factors, including the use of weapons; the duration of the invasion; the fact that Mr. Innis was vulnerable and compliant, and did not attempt to defend himself, yet was viciously assaulted, resulting in serious and lasting injuries; the ransacking of his home; and the fact that he was left in an unconscious or semiconscious state after the invaders stole his cellphone and cordless phone, hindering his ability to contact emergency assistance. These are similar to the sort of aggravating factors that this Court considered significant in *Chudley*.
- [31] The judge took into account the personal circumstances of the appellant, and engaged in an appropriate individualized assessment of all of the facts and circumstances in crafting a sentence that was, in his view, proportionate to the gravity of the offence and the degree of responsibility of the offender. In doing so, the judge recognized where the sentence lay within the range of 5 to 12 years that he considered applicable after rejecting the high end of 14 to 15 years.
- [32] This range is consistent with what this Court has recognized in a number of similar cases involving sentences of 5 to 15 years. In addition to *Chudley* and *Vickers*, see, for instance, *R v Johns*, 1999 BCCA 288; *R v Jones*, 2000 BCCA 379; and *R v DAW*, 2002 BCCA 336.
- [33] *DAW* is illustrative. There, the offender and an accomplice entered into the home of an elderly couple and threatened them with a knife. The offender then left for another part of the house, and when he returned, his accomplice was struggling with the wife on the couch, and fondled her breasts. The offender held a knife to the husband's cheeks. They left after around 30 minutes, taking money and jewelry. The offender had a prior criminal record but was receptive to treatment and acknowledged his addiction issues. He pleaded guilty. His sentence of 10 years and 10 months' imprisonment was upheld on appeal.
- [34] Here, the invasion was considerably longer; there was no sexual assault, but a vicious physical assault in which weapons were used, and Mr. Innis was seriously injured and severely traumatized. Mr. Innis's residence was ransacked, and a good deal more was stolen.
- [35] See also *R v Steinhauer*, 2016 BCSC 1322, where Justice Devlin sentenced the offender to 10 years, notwithstanding that the invasion lasted a relatively short time (13 minutes), and the physical assault was much less egregious than that inflicted on Mr. Innis. While the offender did have an imitation gun, he caused far less damage. Gladue factors were taken into account.

[36] In these circumstances, I am satisfied that it cannot be said that the appellant's sentence was demonstrably unfit, or a substantial and marked departure. What we are being asked to do is reweigh the factors that the judge carefully considered. That is precisely what this Court is not entitled to do, even if we might have come to a different conclusion at first instance.

9.0 Disposition

[37] For these reasons, I would grant the extension of time sought by the appellant, grant leave to appeal, and uphold the global sentence of 10 years imposed by the sentencing judge. I would, however, allow the appeal to the extent of directing that the credit for time served be increased to three years, nine months and 24 days, reducing the net sentence to six years, two months and six days.

[38] DICKSON J.A.: I agree.

[39] ABRIOUX J.A.: I agree.

[40] DICKSON J.A.: The extension of time sought is granted, leave to appeal is granted, and the appeal is allowed to the extent only of reducing the net sentence to six years, two months and six days in accordance with the reasons given by Justice Grauer.

"The Honourable Mr. Justice Grauer"

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