

CANADA / JUDGMENT

R. v. T.H.

2024 BCCA 123

COURT

British Columbia Court of Appeal

DECIDED

9 April 2024

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2024 BCCA 123 R. v. T.H.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. T.H.,

2024 BCCA 123

Date: 20240409

Docket: CA49558

Between:

Rex

Appellant

And

T.H.

Respondent

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s. 486.4 of the Criminal Code restricting the publication, broadcasting, or

transmission in any way of evidence that could identify the complainant.

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Before:

The Honourable Justice MacKenzie

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

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

November 29, 2023 (R. v. [T.H.], 2023 BCSC 2344,

Prince George Docket 76401-2).

Counsel for the Appellant:

S.K. Elliott, K.C.

Counsel for the Respondent:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

February 28, 2024

Place and Date of Judgment:

Vancouver, British Columbia

April 9, 2024

Written Reasons by:

The Honourable Justice MacKenzie

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

Summary:

After trial, the respondent was convicted of sexual assault by vaginal penetration. The Crown appeals the conditional sentence of two years less a day with strict terms, followed by a three-year probation order imposed by the sentencing judge. The Crown argues the judge made material errors in principle and imposed a demonstrably unfit sentence that did not reflect the overarching principle of proportionality.

Held: Leave to appeal granted but appeal dismissed. The cumulative effect of the terms and length of the sentence was sufficiently harsh to reflect the gravity of the offence and the moral culpability of the respondent. The judge made no material error in principle and the sentence was not demonstrably unfit. Intermediate appeal courts have been implored by the Supreme Court of Canada to defer to sentencing judges. While this case is borderline, the strict standard of review disposes of the appeal.

Reasons for Judgment of the Honourable Justice MacKenzie:

- [1] The respondent, T.H., was convicted after trial by judge alone in the Supreme Court of British Columbia on one count of sexual assault, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The Crown appeals from the respondent's conditional sentence of two years less a day followed by three years' probation. The terms of the conditional sentence included house arrest for the entire period, abstention from alcohol and drugs (also a term of the probation order) and restitution to the complainant of \$7,000. The judge also made ancillary orders, including a requirement to report for 20 years under the Sex Offender Information Registration Act, S.C. 2004, c. 10 ("SOIRA").
- [2] The reasons for judgment are indexed as 2023 BCSC 1221 ("RFJ"), and the reasons for sentence as 2023 BCSC 2344 ("RFS").
- [3] After a brief intimate relationship, the complainant made it clear to the respondent that she just wanted to be friends. The two had known each other approximately two months before the respondent sexually assaulted the complainant by forced vaginal penetration. The respondent was 25 years old when he committed the offence, and the two were celebrating the complainant's twenty-third birthday at the respondent's home.
- [4] The Crown submits the sentencing judge made several material errors in principle and imposed a demonstrably unfit sentence considering the gravity of the offence and the respondent's high degree of moral culpability. The Crown says the sentence was not faithful to the overarching principle of proportionality. The Crown now seeks a penitentiary term of 30 months, as it did at the sentencing hearing, and a "stand-alone" restitution order.
- [5] The respondent argues the judge made no error in principle and the sentence was neither clearly unreasonable nor demonstrably unfit, such that the high standard of review disposes of this appeal.
- [6] When the discrete terms of the conditional sentence are viewed cumulatively and as followed by the probation order to result in five years of supervision, I do not view this sentence as demonstrably unfit or the result of material error. The sentence is harsh in all the circumstances. This is a borderline case, and a conditional sentence will rarely amount to a fit sentence for a sexual assault of this nature. But ultimately, absent a material error in principle or a demonstrably unfit sentence, the test is not whether this Court would have imposed this sentence. I consider that the Crown is inviting us to reweigh the relevant sentencing principles and factors, which is not our role.
- [7] For the following reasons, I would grant the Crown leave to appeal, but would dismiss the appeal.

The Offence

- [8] In his reasons for sentence, the judge summarized the circumstances of the offence:

- [5] The [complainant] met the offender by way of a dating app in October of 2021. They went on a couple of dates together and were briefly in a romantic relationship.
- [6] The complainant described the offender as a good friend, and on December 10, 2021, she planned to spend the evening with the offender as a way of celebrating her birthday.
- [7] The plan was that the complainant and the offender would watch movies together. During the course of the evening, the complainant drank one or two ounces of rum and was not intoxicated. The offender drank approximately 18 ounces of bourbon and was extremely intoxicated.
- [8] Later in the evening the offender took the complainant to his bedroom and he had sexual intercourse with the complainant on one occasion. The offender took the complainant's clothes off of her and the complainant was crying and shaking during the sexual activity. The complainant did not consent to the sexual activity.
- [9] At one point the complainant was lying on the floor of the offender's residence and the offender brought her back to bed with him.
- [9] During the assault, the respondent, then a close friend of the complainant, told her that he was helping her get over childhood trauma. The complainant was unable to talk. The respondent flipped the complainant over onto her stomach and forced vaginal intercourse upon her. At some point, the respondent put his hands on the complainant's neck, but did not choke her. When the respondent finished, the condom had broken and the complainant had semen running down her leg.
- [10] The judge quoted the note the respondent left for the complainant when she picked up some belongings from his residence a few days later. The note said:
- [the complainant], I can't even begin to comprehend what I put you through, the horrendous things I don't remember will haunt me for the rest of my life. Please understand that I didn't want any of it to happen. I sincerely hope that you will be able to heal from the trauma I caused and be able to trust someone again. You may never give me a chance to try to make amends but going forward I will be better. I will never lose control of my actions again. I can never apologize enough. [the respondent].
- [11] The judge found, based on the respondent's evidence of his alcohol consumption as well as the note he wrote to the complainant, that he did not remember many of the details of the sexual activity between him and the complainant.
- [12] In his sentencing reasons, the judge replicated the following from his reasons for judgment after trial:
- [130] I have already found that the accused was extremely intoxicated on the evening in question. In my view, his judgment was significantly impaired and any belief that he had that the complainant consented to sexual activity arose from his self-induced intoxication.

- [131] The complainant had told him before the sexual activity that she was not consenting to any sexual activity. I find that she was crying and shaking throughout the sexual activity, and never said yes, either through words or her actions.
- [132] Further, the accused was reckless in his actions towards the complainant, given his level of intoxication, and his actions in ignoring what should have been obvious to the accused; that the complainant was in physical distress because she was crying and shaking.
- [133] The accused's own evidence is that he did not believe either party was capable of providing informed consent to sexual activities. Further, there were clear points in time when the accused acknowledged that something appeared to be wrong with the complainant during the sexual activity, and nonetheless he persisted.

Victim Impact

- [13] The gravity of the offence is confirmed by the victim impact statement, in which the complainant described suffering crippling anxiety, insecurity, self-doubt and an eating disorder, all arising from the offence committed against her. Although previously an anxious person, the complainant had previously managed without medication. At two months after the offence when she wrote the victim impact statement, the complainant was taking medication for anxiety and panic attacks. She had lost sleep and required counselling. The complainant was unable to work for two months after the offence, and her early attempts to return to work were difficult because of her struggles with anxiety. The offence affected her financially because of time off work, medical and counselling expenses.

The Circumstances of the Respondent

- [14] The judge noted in his sentencing reasons that the respondent was young, had no criminal record, and was gainfully employed as a tradesperson. He had strong family ties and had been undergoing counselling.
- [15] The judge quoted from a letter written by the woman engaged to the respondent. She wrote that the respondent had always shown respect and care for her and her boundaries.
- [16] The respondent's probation officer wrote in the pre-sentence report that the respondent believed (at that point) he had been treated unfairly and the allegations were "never thoroughly investigated". The probation officer included a negative description of the respondent by a former girlfriend who said he was "controlling and sexually the subject was pushy and would get pissy after being told no."
- [17] The judge also referred to a psychological assessment in which the writer said the significant differences between the description of the offence and the victim statement made it difficult to fully evaluate his risk of future sexual offending. However, the writer opined that the likelihood of any sexual violence in the near future was low.

- [18] Significantly, the respondent's counsellor wrote that the respondent "has shown growth in understanding external influencers that can affect his judgement and actions and he was abstained from them since; [he] does not blame alcohol for his actions or misjudgments but realizes they did influence it and accepts responsibility for his choices. He has also developed awareness of how his and [others'] emotions affect situations and relationships [He] has shown remorse and empathy for how the victim felt and how this situation has impacted them as well ".
- [19] Referring to his apology to the complainant and to the court, the judge said, "[t]he offender has expressed remorse for his actions, which I accept as being sincere, though he does not seem to accept that he has done anything legally wrong nor taken full responsibilities for his actions" (RFS, at para. 21).

Sentencing Reasons

- [20] As stated, in the court below the Crown sought a sentence of 30 months' imprisonment. The respondent sought a two-year-less-a-day term of imprisonment to be served in the community as a conditional sentence, followed by three years of probation. The respondent pointed out he had been subject to a long-standing bail order of conditions prohibiting alcohol and use of controlled drugs, suggesting such a further order was appropriate. He further suggested he could realistically pay restitution of up to \$5,000. The respondent addressed the court with an emphatic apology to the complainant, telling the court he was a changed man.
- [21] The judge acknowledged the offence was very serious, carrying a maximum punishment of 10 years in jail, and the offence had had "a significantly pejorative effect on [the complainant]" (RFS, at paras. 39-40).
- [22] After reciting the purpose and principles of sentencing in ss. 718-718.2 of the Code, the judge set out s. 742.1 of the Code governing the requirements for imposing a conditional sentence. In particular, a judge may impose a conditional sentence where four prerequisites are met: (1) the offence must not carry a minimum period of incarceration; (2) the trial judge must determine appropriately that a sentence of less than two years of incarceration will be imposed; (3) serving the sentence in the community would not endanger the safety of the community, and (4) a conditional sentence would be consistent with the fundamental purposes and principles of sentencing. Where these requirements are satisfied, conditional sentences are available for sexual assaults.
- [23] The judge next summarized the aggravating and mitigating factors. He observed that the respondent and complainant had been in an intimate relationship and remained close friends afterward. Significantly, he noted the complainant had trusted the respondent as her friend and had stayed at his residence before, feeling safe there. But the respondent broke that trust by committing the offence. The complainant suffered significant psychological harm, as well as financial harm. She had to take time off work for at least two months and

had medical expenses.

- [24] The judge noted that ranges of sentences are guidelines only (the Crown had relied on *R. v. G.M.*, 2015 BCCA 165, in support of a range of two to six years' imprisonment). He recognized this case involved sexual intercourse and a significant psychological injury to the victim. He said the respondent was young, had no criminal record, and was gainfully employed. The respondent agreed to pay restitution that would cover many of the complainant's expenses arising from the offence.
- [25] The judge recognized that deterrence and denunciation are the primary considerations on sentence for this offence, but rehabilitation was also a consideration. Importantly, he concluded a fit sentence of two years less a day "in custody" followed by three years of probation would achieve the goals of deterrence and denunciation, assist with the respondent's rehabilitation, and meet the requirements of a conditional sentence of not endangering the safety of the community and being consistent with the fundamental purpose and principles of sentencing.
- [26] The judge considered that total supervision of five years would ensure the public safety and enable the respondent to maintain his employment and pay restitution of \$7,000 to pay for the complainant's counselling, medical expenses, and a rough assessment of lost wages.
- [27] The judge then set out the compulsory and optional conditions of the conditional sentence, which included no contact with the complainant, house arrest for 24 hours a day for the full term of the conditional sentence, except for employment or other compelling reasons, no possession of alcohol, drugs or any other intoxicant except by medical prescription, counselling, and the restitution order of \$7,000. The judge imposed various ancillary orders, including compliance with the SOIRA for 20 years.

Issues on Appeal

- [28] The issues raised by the Crown on appeal are whether the judge erred in principle by:
- a) failing to engage with the gravity of the offence as a sexual offence;
 - b) failing to properly assess the respondent's high degree of moral culpability;
 - c) treating factors such as youth, employment and family support as mitigating when they were not;
 - d) failing to give primacy to the punitive sentencing objectives of denunciation and deterrence; and
 - e) imposing a conditional sentence.

Standard of Review

- [29] It is well established that sentencing is a highly individualized and profoundly subjective process (R. v. Lacasse, 2015 SCC 64, at para. 40, citing R. v. Shropshire, [1995] 4 S.C.R. 227, at para. 46).
- [30] An appellate court can intervene to vary a sentence only where the sentence is demonstrably unfit, and where the sentencing judge has made an error in principle that had an impact on the sentence (R. v. Friesen, 2020 SCC 9, at para. 26). Demonstrably unfit sentences constitute a clearly unreasonable departure from the fundamental principle of proportionality (R. v. Merkel, 2021 BCCA 445, at para. 46).
- [31] Sentencing decisions are entitled to considerable deference and an appeal court should only substitute its own decision for a sentencing judge's for good reason (Friesen, at para. 25, citing Lacasse, at para. 48, Shropshire, at para. 46). Sentencing judges have front-line experience, see and hear all the evidence and submissions in person, and are generally familiar with the circumstances and needs of the local community. As a result, sentencing judges have broad discretion to impose a fit sentence.
- [32] When weighing competing sentencing objectives, it falls to the sentencing judge to determine which deserve the greatest weight (R. v. Nasogaluak, 2010 SCC 6, at para. 43). An appeal court may not vary a sentence simply because it would have imposed a different one (R. v. L.M., 2008 SCC 31, at para. 14).
- [33] As the respondent submits, the sentencing judge was in a "unique position to consider all the circumstances of the offence and its impact on both the complainant and the appellant in an individualized way this Court simply could not replicate in its role as a reviewing court" (R. v. Davies, 2022 BCCA 391, at para. 22). This Court is simply reviewing an impersonal written record, while the sentencing judge had the advantage in this case of presiding over the trial and of direct exposure to the witnesses themselves.

Discussion

- [34] The Crown points to a number of alleged errors, with its fundamental complaint being that the imposition of a conditional sentence and probation does not reflect the predominant sentencing principles of denunciation and deterrence for sexual assault. Further, the sentence is not proportionate to the gravity of the offence and the moral culpability of the respondent. The Crown submits this sentence was ultimately unfit. The Crown characterizes the sentence as reflecting an unreasonable balancing of the relevant sentencing principles and thus an expression of error in principle.
- [35] Despite the Crown's able submissions, its difficulty is the highly deferential standard of review. The Crown in effect disagrees with the weight the sentencing judge attributed to the relevant factors and asks this Court to reweigh those factors, which is not our role (Lacasse, at para. 49).

[36] Viewed in its totality, the sentence was reasonably harsh and proportionate to the gravity of the offence and the moral culpability of the respondent. The strict standard of review applicable on this appeal must be emphasized. In *R. v. R.S.*, 2023 ONCA 608, Justice Paciocco (in his concurring reasons) emphasized:

[46] [I]ntermediate appeal courts have been repeatedly implored by the Supreme Court of Canada to exercise a high degree of deference to the sentencing decisions of trial judges and to allow a broad range of discretion, including in identifying fit sentences, even where a sentence falls outside of the usual range or where a trial judge gives different weight to the principles of sentencing than an appellate court would

[Emphasis added.]

Other cases underscore this strict standard of review, which is a bedrock principle in the law of sentencing (Lacasse, at paras. 11-12, 39-40; Friesen, at paras. 25-26).

[37] In my view, the following factors, in their cumulative effect, make for a punitive and onerous sentence imposed in the present case:

- A substantial restitution order of \$7,000 (which, were the respondent to be imprisoned, his counsel advises the respondent would no longer be able to pay as he would lose his job);
- A five-year period of supervision in the community including:
 - o Two years less a day of house arrest for 24 hours a day (the maximum length of a conditional sentence permissible by law) subject to strict exemptions; and
 - o Three additional years of probation (the maximum available);
- A prohibition on the use of alcohol, drugs, or any other intoxicating substance (except by medical prescription) for the entire length of the conditional sentence and the probation order;
- Counselling; and
- Ancillary orders that included compliance with the SOIRA for a lengthy 20 years.

Gravity of the Offence and Moral Blameworthiness

[38] The Crown contends the judge failed to engage with the gravity of the offence, which included breach of trust, significant intrusion of bodily integrity, and immense harm. According to the Crown, the judge neglected to recognize the guidance of the Supreme Court of Canada that "our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened" (Friesen, at para. 118). The Crown also submits the judge did not properly assess the respondent's high moral culpability, which he did not mention.

[39] Respectfully, I would not accept these arguments in the circumstances of this case.

- [40] The Supreme Court of Canada has recognized that sexual violence has a disproportionate impact on girls and young women, thereby undermining gender equality because girls and young women disproportionately face the profound physical, emotional psychological, and economic costs of the sexual violence (Friesen, at para. 68). Sexual assaults are serious acts of violence that cause victims to suffer profound emotional and physical harm. There is no question this offence was a serious violation of the complainant's bodily autonomy, sexual integrity and dignity that caused her profound psychological harm (R.S., at para. 33). In this case, the offence also had substantial financial consequences for the complainant.
- [41] The judge could have addressed moral culpability more extensively. His reasons in general are brief. But although the judge did not use the precise words "moral culpability", I consider his reasons to reflect his recognition of both the high degree of culpability and of the gravity of the offence. The respondent gathers the passages in the reasons that illustrate this.
- [42] First, the judge extensively quoted directly from the complainant's victim impact statement and stated that she "clearly suffered significant emotional and financial harm" (RFS, at paras. 22-23). Second, later in his reasons, the judge stated the offence was "very serious" (RFS, at para. 39). Third, the judge accepted as aggravating that the respondent broke a position of trust toward the complainant as they were friends, she trusted him, and she felt safe in his home (RFS, at paras. 46-47). Fourth, the judge referred to the "significant psychological harm" the complainant had suffered and found that this was another aggravating circumstance (RFS, at para. 48). And fifth, the judge, later in his reasons, again referred to the "significant psychological injury to the victim" (RFS, at para. 52).
- [43] I consider it evident from his reasons as a whole and in the context of the record, including counsels' extensive submissions, that the judge recognized the principle of proportionality and appropriately balanced its elements.
- [44] Further, judges are not expected to explain their reasons in a 'watch me think' fashion, or to set out every finding or conclusion in the process of arriving at their ultimate verdict (R. v. R.E.M., 2008 SCC 51, at paras. 17-18). Just as reasons for judgment "are not intended to be, and should not be read, as a verbalization of the entire process engaged in by the trial judge in reaching a verdict" (R. v. Kruk, 2024 SCC 7, at para. 84, citing R. v. Morrissey, (1995), O.R. (3d) 514 (C.A.), at 525), nor are reasons for sentence so intended.
- [45] I consider the Crown's concern not to be that the judge did not appreciate the respondent's moral culpability or the gravity of the offence, but that the judge did not give these factors sufficient weight in his analysis. The Crown, in essence, is asking this Court to reweigh the relevant factors in the sentencing analysis, which is not this Court's role (Lacasse, at para. 49). In my view, the Crown invites us to take on the first-instance task of the sentencing judge without first establishing a demonstrably unfit sentence or an error in principle that impacted the sentence (Friesen, at para. 26). Critically, and as stated, unless a material error has been identified or the sentence is demonstrably unfit, it matters not that this Court would impose a different sentence.

Consideration of Mitigating Factors

- [46] Next, the Crown submits the judge treated certain factors as mitigating when they were not. This included that a man of 25 was not "youthful", and that positive systemic background factors and "good character" do not unduly mitigate the degree of responsibility for offences usually perpetrated in private. The Crown says the value of counselling was reduced by the respondent's deflection of responsibility for the offence, and his intention to pay restitution was not in and of itself mitigating.
- [47] As held in *R. v. Nystrom*, 2023 BCCA 232, at para. 50, to properly give primary consideration to the principles of denunciation and deterrence in sexual assault offences, the personal circumstances of the offender necessarily have a reduced role. However, I cannot say the judge inappropriately emphasized the respondent's personal circumstances.
- [48] As the respondent submits, the personal circumstances of an offender always inform the search for a fit and proportionate sentence, and judge's comments about the respondent's personal circumstances were quite limited and understated. This Court has held that an offender's "good character", i.e., a lack of a criminal record, or a strong employment record, can be considered as mitigating, even in cases of serious sexual assaults (see *R. v. R.M.*, 2019 BCCA 409, at para. 20; *R. v. Horswill*, 2019 BCCA 2, at paras. 18, 20; *R. v. M.P.S.*, 2017 BCCA 397, at para. 22, where the lack of a criminal record, community support, and strong employment history were considered "mitigating factors").
- [49] Moreover, the Crown appears to overlook the mitigating effect of certain other features of this case. For instance, the judge viewed as mitigating the respondent's strong expressions of remorse in the note he left the complainant and in his statement of apology to the court. The Crown also does not mention the respondent's voluntary abstention from alcohol for five years, or that the restitution order, acceded to by the respondent, was mitigating as it indicated remorse (*R. v. Kodimyala*, 2020 BCCA 275, at para. 36). (As mentioned, it was also punitive (*R. v. Abdulahi-Sabet*, 2020 BCCA 213, at para. 12).)

Sentencing Objectives

- [50] The Crown submits the judge failed to give primacy to the punitive sentencing objectives by wrongly focussing on individual deterrence, rehabilitation, and restitution at the expense of general deterrence, denunciation, and retribution.
- [51] I would not accede to this argument. As the respondent points out, the judge expressly stated that denunciation and deterrence were the "primary considerations on sentence". At the same time, the judge found that rehabilitation was also "a consideration" (RFS, at para. 54). These were correct statements of principle. The sentencing judge retains discretion to accord significant weight to other factors, including rehabilitation (see *Friesen*, at para. 104).

- [52] I discern nothing to suggest the judge inappropriately "focussed" on other sentencing principles like rehabilitation or restitution. In my view, he did not overstate "good character" or allow it to displace the primary emphasis on denunciation and deterrence. The judge did what he said he was doing--he fashioned a sentence by considering the offence to be very serious, that it had a profound effect on the victim, and that denunciation and deterrence were the paramount sentencing principles. I see nothing to suggest that the judge merely paid lip service to these considerations. This complaint, again, appears to be about the ultimate fitness of the sentence imposed--reviewable on a highly deferential standard--and not an error in principle (R. v. L.S.N., 2020 BCCA 109, at para. 80).
- [53] The reasons for sentence as a whole and in the context of the record reflect that the judge was alive to the overarching objective of the criminal justice system as being the protection of the public. Section 718 of the Code sets out the "fundamental purpose" of sentencing as: "to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions". As examples, the terms prohibiting the consumption of alcohol for five years when the judge concluded that intoxication was an apparently obvious factor underlying the respondent's offending behaviour, and the stringent house arrest, address the protection of the public and the objectives of deterrence and denunciation.

Availability of Conditional Sentence

- [54] Finally, the Crown contends that the imposition of a conditional sentence, as opposed to incarceration in the penitentiary, was erroneous. The Crown submits the judge erroneously regarded statutory reform as changing the sentencing principles applicable to cases of this kind. The Crown points to R. v. S.S., 2023 BCCA 207, at para. 25, (citing G.M.) for the range of sentences for sexual assault involving such aggravating circumstances as penile penetration as being two to six years' imprisonment. (And I note that S.S. and G.M. established this range before Friesen was decided.) The Crown contends the judge did not explain why he departed from this range.
- [55] The Crown refers to the following authorities where sentences ranging from two to three years' imprisonment were imposed after trial, largely by the Supreme Court of British Columbia, with one in the Provincial Court, after trial for sexual assault by forced vaginal or anal penetration, including by one Indigenous offender, and by two offenders who risked deportation: R. v. J.J., 2023 BCSC 2342; R. v. O.R.R., 2023 BCSC 2325; R. v. Schank, 2023 BCSC 2216; R. v. Khaliq, 2023 BCPC 32; R. v. Barnes, 2022 BCSC 2073; R. v. Albornoz-Vaca, 2022 BCSC 2116; and R. v. Jajja, 2022 BCSC 467 (sentence under appeal).
- [56] Respectfully, I do not accept the Crown's arguments as to the alleged errors in principle. Nor do I consider the conditional sentence in the present case, with its multiple punitive terms, to be demonstrably unfit.

- [57] I observe that *R. v. Parranto*, 2021 SCC 46, emphasized that appellate courts should not "'artificially constrain sentencing judges' ability to impose a proportionate sentence' by requiring 'exceptional circumstances' when departing from a range" (at para. 40, citing *Friesen*, at paras. 111-112). *Parranto* further held there is "no longer space to interpret [sentencing] ranges as binding in any sense" (at para. 36, emphasis in original). Ultimately, the Crown again in effect asks this Court to place different weight on the mitigating factors than did the sentencing judge, contrary to *Lacasse*.
- [58] It is well established that while sentences in other cases can be helpful, each set of circumstances is unique. This case, for example, involved a \$7,000 restitution order, which is very unusual in sexual assault sentencings; such orders are more conventionally imposed in offences involving financial dishonesty, property damage or theft. I consider it was open to the judge in these circumstances to give credit to the appellant for the restitution order in contribution to the complainant's recovery for lost income and expenses caused by his offending. Given his earning capacity in the industrial workplace, the sum is meaningful and lends weight to the degree of the respondent's remorse.
- [59] Above all, as the respondent points out, whether a conditional sentence is consistent with the fundamental principle of sentencing in any given case is a question of judgment and ultimately for the sentencing judge (*R. v. Proulx*, 2000 SCC 5, at para. 116).
- [60] I do agree, however, with the Ontario Court of Appeal that although conditional sentences are now available in sexual assault cases, they will rarely be proportionate in violent sexual assault cases (*R.S.*, at para. 4). But at the same time, I also note Justice Paciocco's statement in his concurring reasons that "[i]t would be an error in principle to hold that conditional sentences are not available in sexual offence cases because denunciation and deterrence are the primary sentencing goals, or based solely on the kind of sexual intrusion that has occurred" (*R.S.*, at para. 78).
- [61] I would emphasize the following observations of the Supreme Court of Canada in *Proulx*:
- 116 Sentencing judges will frequently be confronted with situations in which some objectives militate in favour of a conditional sentence, whereas others favour incarceration. In those cases, the trial judge will be called upon to weigh the various objectives in fashioning a fit sentence. There is no easy test or formula that the judge can apply in weighing these factors. Much will depend on the good judgment and wisdom of sentencing judges, whom Parliament vested with considerable discretion in making these determinations pursuant to s. 718.3.
- [Emphasis added.]
- [62] Finally, Justice Paciocco's comments in *R.S.*, which underscore the punitive nature of conditional sentences, should not be overlooked:
- [71] It is important to appreciate that a conditional sentence is a sentence of imprisonment, albeit one that may be served entirely in the community. It is described as a sentence of imprisonment in s. 742.1 of the Criminal Code: *Proulx*, at para. 29.[3] The punitive impact of

a conditional sentence should not be understated, even though an offender may not experience institutional incarceration where a conditional sentence is imposed. Conditional sentences carry significant consequences, and they are punitive, not lenient, and can be as harsh in application as sentences of incarceration: Proulx, at para. 41.

[Emphasis added.]

Further, the stigma of a conditional sentence with house arrest is also significant (Proulx, at para. 105).

[63] In my opinion, given the cumulative punitive effect of this sentence, it was open to the judge to conclude a conditional sentence was appropriate in the present case. Some factors weighed against imposing such a sentence, but others favoured doing so; ultimately, the sentence was a reasonable exercise of the judge's discretion. While the judge could have provided further analysis concerning why a conditional sentence and probation was a fit sentence, he did take steps to ensure the conditional sentence would be punitive enough to sufficiently address the paramount sentencing principles of denunciation and deterrence. He imposed the maximum conditional sentence permissible by law, a highly punitive house arrest provision for 24 hours a day for the entire duration of the conditional sentence, and the \$7,000 restitution order, which is part of the punishment (Abdulahi-Sabet, at para. 12). He increased the denunciatory and deterrent effect by adding the maximum probation order available which prolonged the alcohol and drug abstention condition for another three years. At the release of these reasons, the respondent has already served approximately four months of the conditional sentence, apparently without incident. Again, the purpose of the criminal law is protection of the public; it is clear that the judge reasoned that the public would be adequately protected through the strict conditions of the conditional sentence.

[64] Further, it must be remembered that if the respondent breaches the conditions of his conditional sentence, he will presumptively be incarcerated in an institution for the remainder of his sentence. The Crown need only prove breaches of a conditional sentence on a balance of probabilities, not beyond a reasonable doubt, for this to occur (R.S., at para. 72).

[65] In recognizing the punitive effect of the restitution order, I do not mean to suggest that an offender may 'buy his way out' of a jail sentence for a sexual assault. It is only that, in this case, the restitution order was a punitive measure which added to the cumulative punitive effect of the sentence and served to underscore the respondent's remorse.

[66] Overall, I am not persuaded that the Crown has met the "very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence" (Lacasse, at para. 52). I do recognize this as a borderline case, but in such a case, I consider the high standard of review to be decisive. I feel compelled to defer to the sentencing judge.

Disposition

[67] For these reasons, I would grant leave to appeal, but dismiss the appeal. I conclude the judge made no errors in principle, and the conditional sentence of two years less a day on its harsh terms, followed by the three years of probation was not a demonstrably unfit sentence.

"The Honourable Justice MacKenzie"

I agree:

"The Honourable Mr. Justice Willcock"

I agree:

"The Honourable Madam Justice Fenlon"

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Prepared on 26 October 2026 · Esheria