

CANADA / JUDGMENT

R. v. Tayo Tompouba

2020 BCSC 308

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 308 R. v. Tayo Tompouba

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tayo Tompouba,

2020 BCSC 308

Date: 20200210

Docket: 106061-2

Registry: Kamloops

Regina

v.

Franck Yvan Tayo Tompouba

Before: The Honourable Mr. Justice L. Marchand

Corrected Judgment: The judgment was corrected at para. 83 on point #8
on March 25, 2020

Corrected Judgment: The judgment was corrected at para. 83 on point #8
on March 30, 2020

Corrigendum to Oral Reasons for Sentence

Counsel for the Crown:

L. Winters

Appearing on his own behalf:

F. Tayo Tompouba

Place and Date of Trial/Hearing:

Kamloops, B.C.

January 20, 2020

Place and Date of Judgment:

Kamloops, B.C.

February 10, 2020

Place and Date of Corrigendum:

Kamloops, B.C.

March 25, 2020

Place and Date of Corrigendum:

Kamloops, B.C.

March 30, 2020

Introduction

- [1] On September 10, 2019, I found Franck Tayo Tompouba guilty of one count of sexual assault committed on December 23, 2017, in Kamloops. These are my reasons for sentence.
- [2] As I did in my reasons for conviction, I will not refer to the complainant by name. In doing so, I intend no disrespect to her. Rather, I intend only to preserve her dignity and privacy to the greatest extent possible.

Circumstances

- [3] The circumstances are fully canvassed in my reasons for conviction which are reported at 2019 BCSC 1529. I must, of course, sentence Mr. Tayo Tompouba based on the facts that I found were proven by the Crown beyond a reasonable doubt.
- [4] In December 2017, both the complainant and Mr. Tayo Tompouba were in their early 20s. The complainant was living at her parents' home and working in Kamloops. Mr. Tayo Tompouba was living in Williams Lake and working at the Mount Polley Mine. They met on Tinder. When the mine shut down and Mr. Tayo Tompouba was laid off, he came to Kamloops to meet the complainant in person and to spend time with her.

- [5] On December 22, 2017, the complainant and Mr. Tayo Tompouba went to the Shark Club in downtown Kamloops where they hung out, danced, and were flirtatious with one another. The complainant had a number of drinks and became quite intoxicated. Mr. Tayo Tompouba is a non-drinker and was sober. Mr. Tayo Tompouba drove the complainant to her parents' home in her car. They ate snacks and chatted before going to bed.
- [6] At about 3:00 a.m. on December 23, 2017, the complainant and Mr. Tayo Tompouba stripped down to their underwear and climbed into the complainant's bed. They kissed and cuddled, but the complainant did not want to have sex with Mr. Tayo Tompouba.
- [7] Based on my trial findings, I am sentencing Mr. Tayo Tompouba on the basis that he honestly but mistakenly believed the complainant initially communicated her consent to intercourse. At some point, however, Mr. Tayo Tompouba believed the complainant was asleep. He continued to have intercourse with her without taking any steps to ascertain her actual, active, ongoing, and conscious consent. In other words, he continued to have intercourse with the complainant without an honest but mistaken belief that she was consenting.

Impact on the Complainant

- [8] Though given the opportunity to do so, the complainant did not file a victim impact statement. Even so, based on the text messages that were adduced into evidence and the complainant's trial testimony, it is apparent that Mr. Tayo Tompouba's sexual assault of the complainant had a negative impact on her.
- [9] The complainant was clearly angry about what happened. In fact, her initial reaction was to put the pain to Mr. Tayo Tompouba by asking him to pay her money in exchange for her not going to the police.
- [10] Mr. Tayo Tompouba's conduct also appears to have shattered whatever trust the complainant had in men. In one of her text messages to Mr. Tayo Tompouba, she specifically said:

Its people like [you're] why i can't trust men. Why I don't let anyone in. Bc the second you think you can let your [guard] down. Turns out they never had good intentions in the first place.

- [11] Despite experiencing what I am sure was a very traumatic event, during her testimony, the complainant presented as a strong and resilient person. In the absence of a victim impact statement, I do not know whether she has also struggled with some of the other common consequences of being sexually assaulted such as intrusive memories, nightmares, anxiety, depression, and misplaced feelings of shame and self-blame.

Circumstances of Mr. Tayo Tompouba

- [12] Mr. Tayo Tompouba is 25 years old. He is originally from Cameroon. He is the youngest of 11 siblings. His father and, soon after, his mother died when he was five years old. His oldest sister then raised him. She was a single mother and worked as a teacher. She treated Mr. Tayo Tompouba really well, like he was her own child. Mr. Tayo Tompouba considers his oldest sister to be his mother and her children to be his siblings.
- [13] Another of Mr. Tayo Tompouba's oldest sisters immigrated to Canada. Mr. Tayo Tompouba's family agreed that Mr. Tayo Tompouba's Canadian sister would sponsor him to join her in Montreal. After Mr. Tayo Tompouba finished high school in Cameroon, he immigrated to Canada arriving in Montreal as a permanent resident in 2013. Mr. Tayo Tompouba's oldest sister, the one who raised him, played a central role in Mr. Tayo Tompouba's immigration to Canada, including by supporting him financially.
- [14] Prior to coming to Canada, Mr. Tayo Tompouba was about to attend university in Cameroon to study nursing. On arrival in Canada, Mr. Tayo Tompouba began upgrading to pursue the same goal. He became disenchanted with the process, however, and decided to pursue other opportunities on his own.
- [15] Mr. Tayo Tompouba initially moved to Toronto and then to B.C. Since arriving in B.C., Mr. Tayo Tompouba has been working pretty steadily and learning new skills. He has worked in landscaping, general construction, carpentry, and at the Mount Polley Mine. At Mount Polley, he operated excavators and drove haul trucks. When Mr. Tayo Tompouba was laid off from the mine in December 2017, he was on Employment Insurance for about six months waiting for the mine to reopen. When that did not occur, he worked in construction and also began an educational assistant program. He eventually learned that he would not be able to get a job as an educational assistant due to the charges he was facing so he dropped the program. Instead, he took a job as a swamper with a moving company.
- [16] Mr. Tayo Tompouba is single, but he has three Canadian children, triplets, who turn three in June. Mr. Tayo Tompouba's children reside primarily with their mother. Mr. Tayo Tompouba co-parents the children. He has parenting time with them on weekends and sometimes during the week when he is not working. Mr. Tayo Tompouba does not pay child support, but he has an agreement with the children's mother to financially support them by buying groceries and other necessities like diapers. If his children's mother needs extra money, Mr. Tayo Tompouba provides additional financial support.
- [17] Mr. Tayo Tompouba also provides financial support to his oldest sister in Cameroon. Sadly, she suffered strokes in 2016 and 2018. She is partially paralyzed and unable to work. Her children are unemployed. Mr. Tayo Tompouba helps to pay for her treatment.
- [18] Mr. Tayo Tompouba was never in trouble with the law in Cameroon. Since being in Canada, he has one conviction under the Motor Vehicle Act for driving without a licence for which he received a \$300 fine.

- [19] Mr. Tayo Tompouba faces automatic immigration consequences as a result of his sexual assault conviction. Under s. 271 of the Code, the maximum sentence for sexual assault, when prosecuted by indictment, is 10 years' imprisonment. As a result, under s. 36(1)(a) of the Immigration and Refugee Protection Act [IRPA], Mr. Tayo Tompouba is "inadmissible" as a permanent resident on grounds of "serious criminality." While a deportation order will not issue automatically as a result of Mr. Tayo Tompouba's conviction, the legislation points in that direction.
- [20] On my reading of the IRPA, if an officer of the Minister of Immigration, Refugees and Citizenship makes a "well-founded" report to the Minister, the Minister will very likely refer Mr. Tayo Tompouba to the Immigration Division for an admissibility hearing: ss. 44(1) and 44(2). In the circumstances, the Immigration Division would be obliged to make a removal order: s. 45(d). If Mr. Tayo Tompouba is sentenced to serve six months or more in prison, once he concludes his sentence, he would not be able to appeal his removal from Canada: s. 64. If, however, Mr. Tayo Tompouba is sentenced to serve less than six months in prison, the Immigration Appeal Division could consider whether there are sufficient humanitarian and compassionate grounds to warrant special relief or even a stay with or without conditions of the removal order: ss. 67(1) and (2) and 68(1) and (2).
- [21] If Mr. Tayo Tompouba is deported to Cameroon, many people will suffer. His children will be raised without a father. It will be hard for Mr. Tayo Tompouba to find employment of any kind, never mind employment that pays as well as the employment he has had in Canada. His children, as well as his family in Cameroon, will not have the same level of financial support from Mr. Tayo Tompouba as they currently enjoy. In fact, if Mr. Tayo Tompouba is unable to find work in Cameroon, he will become a burden on his already struggling family.

Position of the Parties

- [22] Against, this backdrop, the Crown emphasizes the seriousness of Mr. Tayo Tompouba's offence and submits that denunciation and deterrence are the paramount sentencing objectives. The Crown seeks a custodial sentence of three years' imprisonment, plus various ancillary orders.
- [23] Regrettably, following Mr. Tayo Tompouba's trial, differences arose between Mr. Tayo Tompouba and his counsel and his counsel withdrew. Despite my encouragement on more than one occasion, Mr. Tayo Tompouba chose to represent himself on sentencing.
- [24] During the sentencing hearing, Mr. Tayo Tompouba submitted that he is not a bad person, but rather made a mistake. His outlook is that life wanted to teach him a lesson, but not ruin his life. I took him to say that he has already learned his lesson, that jail is therefore not necessary, and that a suspended sentence with probation would be a sufficient punishment.

Sentencing Principles

[25] Sections 718 to 718.2 of the Criminal Code set out the purpose and principles of sentencing. Those sections provide, in part, as follows:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

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

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders

Range of Sentence

[26] Sentencing is a highly individualized process. The type of available sentence may be constrained by statutory provisions and the range of appropriate sentences is generally established through a consideration of sentences imposed for similarly situated offenders who have committed similar offences in similar circumstances.

- [27] In this case, as I have already mentioned, s. 271 of the Code provides for a maximum sentence of ten years' imprisonment. Under s. 742.1 of the Code, a conditional sentence order is not an available sentencing option. Somewhat incongruously, all other sentencing options, including a suspended sentence and even a discharge, are.
- [28] In British Columbia, one of the leading cases on sentencing offenders convicted of sexual assault involving intercourse is *R. v. G.M.*, 2015 BCCA 165. In that case, G.M. was convicted of assaulting and sexually assaulting his former boyfriend. During consensual intercourse, the complainant became uncomfortable and asked G.M. to stop. G.M. did, but after the complainant closed his eyes to go to sleep, G.M., without warning and without the complainant's consent, forcefully penetrated the complainant's anus with his penis. G.M. refused to stop despite the complainant crying, screaming, and continuing to express his lack of consent.
- [29] With respect to G.M.'s sexual assault conviction, the trial judge sentenced G.M. to a 90-day intermittent sentence to be followed by two years probation. The Court of Appeal allowed the Crown appeal against the sentence. The Court of Appeal held that the range of sentence for sexual assault involving intercourse is two to six years' imprisonment. The Court held that the sentencing judge erred in principle by failing to give appropriate weight to the primary sentencing principles of denunciation and deterrence, as well as to various aggravating factors. The Court imposed a custodial sentence of 18 months to be followed by 18 months' probation.
- [30] Of course, sentencing ranges guide but do not bind a sentencing judge: *R. v. Lacasse*, 2015 SCC 64. In *R. v. Williams*, 2019 BCCA 295, the Court explained at paras. 57-58 as follows:
- [57] This Court has adopted the approach of sentencing ranges because, in our view, they provide an optimal balance between furthering parity and individualization in a sentence. Sentencing ranges are not more rigid than starting points but simply reflect an overview of sentences that have previously been imposed for a particular offence. They are intended to assist judges in arriving at a sentence that is consistent with sentences for similarly situated offenders, in similar circumstances--furthering the principle of parity--without constraining the judge's discretion to go outside of the range to properly reflect the unique circumstances of the offence or the offender. They do not set out "practical minimum and maximum sentences." For example, in *Voong*, Justice Bennett, for the Court, upheld three sentences that fell below the sentencing range she identified.
- [58] Individual circumstances of the offence or the offender may require an increase or reduction from the range of sentence in order to ensure that the sentence is a proportionate one that properly reflects the offender's moral blameworthiness.

- [31] While sentencing judges enjoy wide latitude in imposing what they consider to be fit sentences, in *G.M.* at para. 23, the Court cited the Supreme Court of Canada's decision in *R. v. Nasogaluak*, 2010 SCC 6, at para. 44, for the proposition that the discretion on sentencing is not unlimited and that the overarching requirement remains to impose a sentence consistent with the principles and objectives of sentencing.
- [32] In this case, the Crown provided a number of authorities in support of its submission that a three-year custodial sentence is warranted in the circumstances of Mr. Tayo Tompouba's case.
- [33] In *G.M.*, there were a number of features that were somewhat similar to Mr. Tayo Tompouba's case. There were also some differences. Though initially the complainant consented to having intercourse with G.M., G.M. initiated further intercourse after the complainant withdrew his consent. Like Mr. Tayo Tompouba, G.M. had no prior record, had not acknowledged his actions, and provided no formal risk assessment to establish that he was a low risk to re-offend. In fact, a lack of victim empathy and G.M.'s continued denial that the events occurred were, in the Court's view, material factors to consider in determining whether G.M. was likely to re-offend. While the Court of Appeal imposed a sentence below the range it established, the Court did so only in view of the position on sentence the Crown had taken at trial and on appeal, namely, that a custodial disposition of 18 months followed by 18 months of probation was appropriate. At para. 35, the Court specifically noted that the sentence it imposed "should not be taken as a sentence within the appropriate or normal range."
- [34] In *R. v. Berry*, 2015 BCCA 210, the Court upheld a two-year sentence imposed on an offender who had sexually assaulted his common law partner by repeatedly digitally penetrating her while she was asleep. Mr. Berry had video-recorded these incidents. He had also surreptitiously video-recorded consensual sex between he and his partner on other occasions. Mr. Berry received a consecutive sentence of nine months' imprisonment for voyeurism in relation to his recordings of his common-law partner. Mr. Berry also received a concurrent one-day sentence for assaulting his common-law partner following the end of their relationship and two months concurrent for voyeurism in relation to another complainant he surreptitiously video-recorded while she was using the toilet. Mr. Berry had a dated and unrelated criminal record. A pre-sentence psychological assessment indicated that he was a low to moderate risk to re-offend and met the full criteria for sexual deviance based on the number of victims and the number of deviant activities.
- [35] In *R. v. Pouce Coupe*, 2014 BCCA 255, a 19-year-old Indigenous offender sexually assaulted a 15-year-old Indigenous complainant. Mr. Pouce Coupe isolated the complainant by taking her for a ride on a recreational vehicle. He threw the complainant to the ground and had forced sexual intercourse with her. The complainant pleaded with Mr. Pouce Coupe to stop, but he held her to the ground with at least one hand around her neck. The sexual assault only stopped when another vehicle drove up. The complainant had red marks on her neck and scratches on her back, knee, and ankle. Her victim impact statement indicated that she

was depressed and suffering from nightmares. The Court upheld a three-year custodial sentence finding that such a sentence was not demonstrably unfit. The Court noted that the three-year sentence was at the low end of the two to six-year range of sentences for similar offences and dismissed Mr. Pouce Coupe's argument that the sentencing judge had over-emphasized his lack of remorse.

- [36] Finally, in *R. v. Narcisse*, 2017 BCSC 2485, a 19-year-old Indigenous offender had intercourse with the complainant following a social gathering at the complainant's home. The complainant was highly intoxicated and, in fact, unconscious at the time. The complainant experienced many detrimental effects as a result of Mr. Narcisse's actions, including feelings of depression, embarrassment, shame, and guilt. She began to drink more to cope with her feelings and ended up losing friends, her job, and even her spouse as a result. Mr. Narcisse was in a common-law relationship and had two children. He lost his job working for his Band following his guilty plea. He quit drinking as a result of the events at issue. He had an unrelated record that included an over .08 conviction and a Motor Vehicle Act conviction. Mr. Narcisse was described in positive terms by his friends and family. Mr. Narcisse had been victimized in his own youth. The sentencing judge accepted that he was remorseful.
- [37] The sentencing judge characterized Mr. Narcisse's action as a serious sexual assault and found him to have a somewhat tempered, but high level of moral blameworthiness. She considered his actions to have been opportunistic and predatory. She noted that denunciation and deterrence were the primary sentencing objectives. She held that there was nothing unusual or exceptional to take Mr. Narcisse below the usual range of two to six years' imprisonment. After considering all of the aggravating and mitigating factors, she imposed a custodial sentence of two years less a day, plus two years of probation.
- [38] Mr. Tayo Tompouba, as a self-represented offender, did not provide me with any authorities in support of his submission on sentence. In fairness to Mr. Tayo Tompouba, I have reviewed a number of authorities in which sentences below two years' imprisonment were imposed in cases involving serious sexual assaults. Some of these involved the imposition of conditional sentence orders when they were still an available sentencing option.
- [39] In *R. v. Chen*, 2019 BCSC 1290, Ms. Chen was convicted of sexual assault for having sex with a 13-year-old boy. The boy was staying with his mother and siblings at a transition house where Ms. Chen was also staying. The Crown submitted an appropriate sentence would be one to three years' imprisonment. Ms. Chen was sentenced to two years' probation. At para. 44, Murray J. held as follows:

Taking all of the evidence and all of the circumstances of this unique and exceptional case into consideration I find that a period of incarceration would not serve in the public interest, or the interests of Ms. Chen. Because of Ms. Chen's fragile mental state and the fact that it would be served away from her home, separated from her family including her two young children who are dependent on her, any length in jail would be disproportionately harsh. As stated I have found that Ms. Chen does not pose a risk of reoffending. Ms. Chen's reaction in terms of finally

addressing her deep rooted issues satisfies me that specific deterrence has already been satisfied. The fall out from this has been and will continue to be significant. With regard to general deterrence, this situation is so unusual in my view it will not apply to like minded individuals. In my view this crime turned on the personalities of Ms. Chen and [the complainant] and the unusual circumstance that they found themselves in.

- [40] In terms of aggravating factors, Murray J. considered the seriousness of the offence, Ms. Chen's breach of friendship with the complainant's mother, and the fact that the offence took place in a transition house. With respect to mitigating factors, Murray J. noted that Ms. Chen was very socially young and immature, she was a pro-social individual, her life was in turmoil at the time of the offence, she posed little risk of re-offending, she had no criminal record, and her moral culpability was reduced as a result of her troubled upbringing and mental health issues. Murray J. also considered a number of other considerations, "that do not necessarily fit under the heading of mitigating circumstances," but were "equally significant" and needed to be weighed, including her immigration to Canada which had been difficult for her, her stormy relationship with her husband, their subsequent commitment to couple's counselling, her two young children, and her permanent residence status.
- [41] In *R. v. Tuffs*, 2011 SKQB 441, Mr. Tuffs had been consuming alcohol. While the complainant was sleeping, he came up behind her and placed his hand down her pyjama bottoms, waking her, and uttered words to the effect that even though she was protesting, "he knew that she wanted it." Mr. Tuffs also aggressively pulled the complainant by the hair and tried to kiss her. The Crown submitted that Mr. Tuffs be sentenced to either a penitentiary term of two years or provincial incarceration of two years less a day.
- [42] Popescul J., as he then was, determined that a suspended sentence and probation for 18 months would be appropriate. The aggravating factors included the complainant was sleeping at the time of the assault, violence was used, the offence of sexual assault is serious, and the complainant had experienced negative psychological effects. In terms of mitigating factors, Mr. Tuffs had no prior criminal record, he had an exemplary employment history, he was an extremely low risk to re-offend, he was married and had two young children to support, and the incident appeared to be completely out of character. While recognizing at para. 8 that "a woman's sexual integrity must be respected", Popescul J. noted at para. 11 that "Significantly, the victim is not a child, the incident was isolated, fleeting and was not gravely invasive."
- [43] While Popescul J. accepted that normally a custodial sentence would be imposed in such cases, he concluded a non-custodial sentence would be appropriate because Mr. Tuffs' "wife and children depend upon [him] and sentencing [him] to prison would be unduly harsh on both [him] and [his] family." Popescul J. also considered the fact that Mr. Tuffs was found guilty of the "stigmatizing offence" of sexual assault which he considered to be "the harshest penalty that can be imposed upon [him] - an otherwise outstanding citizen in [his] community."

- [44] In *R. v. Yusuf*, 2011 BCSC 626, Mr. Yusuf was convicted of a historical sexual assault causing bodily harm against a sex trade worker. Mr. Yusuf was from Fiji. He was married and had three children aged approximately 16, 23 and 24 at the time of sentencing. His family wrote letters of support attesting that he had been a good father and family man and that the circumstances of the offence were out of character. He had no criminal record. His common-law wife said the family could lose their home without the offender providing for them.
- [45] Crown and defence agreed to a sentence of two years less a day to be served as a conditional sentence. Griffin J., as she then was, concluded that a conditional sentence of two years less a day would be appropriate. In reaching her conclusion, she noted at para. 36 that, while reprehensible, the case did not involve the same degree of violence nor was the victim left with as severe emotional or physical trauma as compared with cases at the higher end of the sentencing range. At para. 39, Griffin J. found that Mr. Yusuf was unlikely to re-offend.
- [46] In *R. v. Hans*, 2016 BCPC 222, an Indigenous offender pled guilty to one count of sexual assault which proceeded summarily. Mr. Hans met up with the complainant and friends at a local bar. The complainant continued drinking in her residence with a friend. The friend later departed. The complainant took sleeping pills and fell asleep on an air mattress in her living room. She later awoke in the early morning hours to what she believed was a "vivid sexual dream." She felt Mr. Hans on top of her penetrating her. When she pushed him off, Mr. Hans got up and said, "I'm sorry," and left her residence.
- [47] The Crown sought a custodial sentence of between 15 and 18 months and a period of probation between two and three years. MacCarthy P.C.J. ordered an 18-month conditional sentence with a 26-month probation order to follow. While recognizing the vulnerability of the complainant, the seriousness of the offence, and the need for denunciation and deterrence, MacCarthy P.C.J. considered a conditional sentence order appropriate. In view of so-called Gladue considerations, Mr. Hans' acceptance of responsibility and efforts to rehabilitate, the low risk that Mr. Hans presented to re-offend, and Mr. Hans' high level of compliance following court conditions for 19 months, MacCarthy P.C.J. concluded that Mr. Hans was an "excellent candidate for a community disposition."
- [48] In *R. v. Kain*, 2004 ABCA 127, Mr. Kain was convicted of having sexual intercourse with the complainant while she was intoxicated and asleep. The Alberta Court of Appeal upheld a conditional sentence order of two years less a day. In terms of aggravating factors, the sentencing judge had noted the offence was serious and that Mr. Kain sexually assaulted someone "who was merely an acquaintance, when she asleep and defenceless." With respect to mitigating circumstances, the sentencing judge noted that the offender had no criminal record, was 28 years old, showed remorse, had a long and stable work history, and had an obligation to support his two young children. The sentencing judge had concluded:

Mr. Kain lives in a very small community where everybody knows him. His conviction for this offence will be well-known in the community. By imposing strict conditions, the deterrent effect will be filled, even though he is not incarcerated in a prison. Nothing is to be gained by imposing a sentence which puts the accused in jail and, in fact, our legislation requires that all alternatives be canvassed before incarceration. He has two children to support and another on the way. He is employed fulltime so that he can attempt to meet his obligation to these children.

- [49] In *R. v. White*, 2008 ABCA 328, the Alberta Court of Appeal upheld a conditional sentence order of two years less one day imposed following Mr. White's guilty plea to one count of sexual assault. Mr. White and the complainant were family friends. Mr. White committed the sexual assault while the complainant was compromised due to the ingestion of Ativan. While she was sedated, Mr. White began making physical advances. The complainant told him to stop, but he continued by putting his penis in and around her mouth. In terms of aggravating factors, the complainant was clearly incapacitated, the offence occurred in the complainant's home where she was entitled to feel safe and secure, Mr. White took advantage of a close family relationship, and Mr. White continued despite the complainant's protestations. In terms of mitigating factors, Mr. White had no criminal history, the conduct was out of character and isolated, Mr. White entered a guilty plea, and he was unlikely to re-offend.
- [50] In *R. v. J.M.*, 2012 BCPC 530, J.M. pled guilty to sexually touching his eight-year-old daughter on her vagina underneath her clothing on more than one occasion. J.M. was born in Colombia and came to Canada as a refugee claimant. He had two children who were six and nine at the time of sentencing. J.M. was the sole income earner in the family. Crown sought a term of imprisonment of six to nine months, plus three years' probation. In terms of mitigating circumstances, Buller Bennett P.C.J. noted that J.M. pled guilty early on and he did not have a criminal record. With respect to aggravating circumstances, she noted the sexual assault involved his own young child on multiple occasions and that the assaults occurred in the family home constituting a "horrendous breach of trust." Buller Bennett P.C.J. concluded a 90-day jail sentence to be served intermittently was appropriate in the circumstances. She also ordered three years' probation. On my reading of the judgment, Buller Bennett P.C.J. rejected a conditional sentence order because J.M. had had difficulties complying with the terms of a bail order. She also rejected a longer jail sentence as that would re-victimize the complainant as the family would eventually be out of their home with no financial support.
- [51] Finally, in *R. v. W.B.*, 2014 ONCJ 799, the complainant was renting a room from her boyfriend's best friend, W.B. After an evening of consuming alcohol and some cocaine, the two went into their separate rooms to sleep. W.B. woke up for work and proceeded to the complainant's bedroom. He put his hands on her vagina above her underwear, but did not digitally penetrate her vagina. She awoke, became upset, and told the accused to leave. He did. Later that day, she wrote him an email asking him why he got into her bed naked and had his hands on her privates, to which he responded that he had been under a great deal of

stress, was lonely, and hoped that some day she could forgive him.

[52] West J. concluded that the appropriate sentence would have been a conditional sentence of six months had the Crown proceeded summarily. However, the complainant did not go to the police for approximately ten months after the incident. Therefore, Crown proceeded by indictment. West J. considered various circumstances of the offence and W.B. W.B. had abused alcohol and drugs since he was a teenager, he had nine good character references, all of which suggested the conduct was out of character, he had no prior criminal record, he surrendered himself to the police when requested to do so and, though he touched the complainant's vagina, that was over clothing and there was no digital penetration. Having regard to the mitigating and aggravating circumstances, West J. imposed a 60-day intermittent jail sentence so that W.B. could remain gainfully employed and support his children. This would be followed by a period of probation for 18 months.

[53] What I take from the cases is that, in the vast majority of cases, the primary sentencing objectives of denunciation and deterrence dictate custodial sentences of between two to six years in cases of sexual assault involving intercourse. In particularly compelling circumstances, a custodial sentence below the usual range may be appropriate. In rare and truly exceptional cases, a community-based disposition may be imposed. I further draw from the cases that the following factors may lead a sentencing court to conclude that a sentence below the usual range would be appropriate:

- a modest impact on the complainant;
- an offender with a reduced level of moral blameworthiness;
- an offender with no criminal record who acted out of character and posed a low risk to re-offend;
- a significant impact on the offender's family if the offender were to be incarcerated;
- the permanent resident status of the offender; and
- the absence of a need to specifically deter the offender.

[54] This list is not intended to be exhaustive.

[55] I consider the availability of a community-based disposition in cases involving serious sexual assault to be in line with recent jurisprudence from the Court of Appeal in the context of sentencing for dial-a-dope operations and street-level trafficking in fentanyl. Ordinarily, a substantial jail term is required in both of these contexts to meet the primary sentencing objectives of denunciation and deterrence. Nevertheless, the Court has held that in truly exceptional circumstances a community-based disposition may be appropriate: *R. v. Voong*, 2015 BCCA 285 and *R. v. Schneider*, 2019 BCCA 310.

Consideration of Immigration Consequences

[56] Being aware of the possibility that Mr. Tayo Tompouba's conviction could lead to his deportation, I asked the Crown and Mr. Tayo Tompouba to address how I might take into account any immigration consequences in my sentencing decision. The Crown identified the leading authority and a recent and relevant authority involving an application of the principles from that leading case.

[57] In *R. v. Pham*, 2013 SCC 15, the Court held that collateral immigration consequences can be taken into account at the sentencing stage. Mr. Pham was a non-citizen who was convicted of possession and trafficking of marihuana. The sentencing judge accepted a joint submission and imposed a sentence of two years' imprisonment. This sentence triggered s. 64 of the IRPA which meant Mr. Pham lost his right to appeal his removal. At the time, s. 64 was triggered when a sentence of two years' imprisonment was imposed. That threshold was reduced to six months in 2013. In any event, neither the Crown nor defence counsel raised the issue of collateral consequences of this sentence on Mr. Pham's immigration status.

[58] Mr. Pham appealed his sentence seeking to have it reduced by one day. A majority of the Alberta Court of Appeal dismissed the appeal holding that allowing the appeal would inappropriately undermine the provisions of the IRPA. The Supreme Court of Canada allowed the appeal and reduced the sentence by one day. Wagner J., as he then was, made the following observations about collateral immigration consequences in sentencing:

- Collateral consequences may be taken into account as personal circumstances of the offender, however, they are not aggravating or mitigating factors;
- The weight to be given such collateral consequences varies from case to case and should be determined having regard to the type and seriousness of the crime;
- A sentence must be fit having regard to the particular crime and the particular offence;
- While a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, the sentence ultimately imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender;
- The collateral consequences must not dominate the sentencing exercise or skew the process in favour of or against deportation;
- Courts must not impose inadequate or artificial sentences in order to circumvent the consequences of the IRPA;
- Where a sentence is varied to avoid collateral consequences, the further the "varied sentence" is from the range of "otherwise appropriate sentences," the less likely it will remain proportionate to the gravity of the offence and the responsibility of the offender;

· Conversely, the closer the varied sentence is to the range of otherwise appropriate sentences, the more probable it is that the reduced sentence will remain proportionate and thus reasonable and appropriate.

[59] In *R. v. Gill*, 2018 BCCA 60, Mr. Gill appealed a three-year custodial sentence that was imposed by Abrioux J., as he then was, following Mr. Gill's conviction by a jury of sexually assaulting the complainant. Mr. Gill was a permanent resident and had been a cabdriver. He picked up the complainant following a bachelorette party. The complainant was tipsy and fell asleep in Mr. Gill's cab on the way to her boyfriend's. Mr. Gill lowered the passenger side visor to block the security camera, reached over, and touched the complainant on her leg. The complainant reacted by telling Mr. Gill to stop. Instead, he digitally penetrated the complainant's vagina causing a vaginal injury in the form of an abrasion, cut, or tear. The complainant also had a bruise on her left upper arm from where Mr. Gill had grabbed her to pull her towards him to try to kiss her.

[60] The Court of Appeal dismissed Mr. Gill's sentence appeal. The Court endorsed the conclusion of Abrioux J. that the potential collateral consequences regarding deportation of Mr. Gill did not arise because Abrioux J. had concluded that a fit sentence was significantly in excess of six months' imprisonment. At para. 24, the Court added:

In my view, the sentence is entirely fit in the circumstances, if not at the low end of the acceptable range. As the judge said, this was disgraceful and disgusting conduct, committed by a man who was in a position of trust to transport a young woman in a safe environment to her destination. She was entitled to believe she would be safe in a taxi. The offence was aggravated because he lowered the visor to block the security camera in an attempt to avoid detection, and the complainant suffered physical, emotional and mental injury.

Aggravating Factors

[61] In this case, there are a number of aggravating factors, including:

- The complainant was vulnerable due to her intoxication;
- Mr. Tayo Tompouba was sober;
- The complainant appeared to be asleep and therefore incapable of communicating her ongoing consent;
- The sexual assault occurred in the complainant's home where she was entitled to feel safe and secure;
- Mr. Tayo Tompouba breached the trust the complainant had placed in him when she invited him into her home and room; and
- Mr. Tayo Tompouba did not use a condom and exposed the complainant to health risks and unwanted pregnancy when he ejaculated inside her knowing he did not have her ongoing consent.

Mitigating Factors

- [62] As a self-represented offender, Mr. Tayo Tompouba did not arrive for the sentencing hearing with letters of support or other documents to objectively establish information he shared with me at the sentencing hearing. Nevertheless, I have had an opportunity to observe Mr. Tayo Tompouba over an extended period of time. I have read the text messages he exchanged with the complainant following the sexual assault. I have watched the video recording of the statement Mr. Tayo Tompouba gave to the police following his arrest. I observed him in the courtroom throughout his trial, including when the complainant was testifying. I heard his testimony. I have interacted with him directly and extensively during various court appearances and the sentencing hearing. Based on all of my observations, and noting that the Crown has not raised any concerns with respect to the veracity of what Mr. Tayo Tompouba has told me, I accept the information Mr. Tayo Tompouba has shared about himself and how he feels about what he has done. Not all of that information is "mitigating," but all of it is relevant to my sentencing decision.
- [63] In terms of mitigating factors, Mr. Tayo Tompouba is a young man with no criminal record and his conduct appears to have been out of character. While not amounting to a mitigating factor, I accept that Mr. Tayo Tompouba made a mistake, a monumental mistake, but did not intend to hurt the complainant. As he said in one of his text messages to the complainant, he thought she would wake up and enjoy having sex with him.
- [64] I also accept that Mr. Tayo Tompouba, as he put it, is "not a bad guy." His communications with the complainant the next day lacked insight into the seriousness of what had happened, but were respectful and apologetic. He was polite and cooperative with the police. He listened attentively in court and has treated everyone, including me, with the utmost respect in the courtroom despite being under intense stress. He has worked very hard to support his children, as well as his family back in Cameroon.
- [65] While I do not have a formal risk assessment, when I take into account the personal qualities that Mr. Tayo Tompouba has displayed over the years, I accept that he has "learned his lesson". Having said that, I cannot ignore that Mr. Tayo Tompouba has not fully acknowledged what he has done, which is problematic in my assessment of the risk he poses to re-offend.
- [66] Finally, Mr. Tayo Tompouba's family circumstances are compelling. If I incarcerate Mr. Tayo Tompouba for two to six years, his children and his family in Cameroon will lose his financial support and the situation will become worse if he is ultimately deported to Cameroon. His children would grow up without their father.

Principles of Sentencing Deserving Greatest Emphasis

- [67] The circumstances and sentencing authorities make clear that denunciation and deterrence are the primary sentencing objectives. A fit sentence must reinforce that men must not make assumptions about consent. Men must understand that yes means yes and everything

else means no. Sentences imposed by the court must communicate in the clearest terms that the community has no tolerance for the sexual abuse of vulnerable women and that anyone who violates a woman's sexual integrity will face serious consequences, including a significant loss of liberty.

- [68] That said, the cases I have reviewed, including Voong and Schneider, demonstrate that, in particularly compelling and/or truly exceptional circumstances, intermittent jail sentences or appropriately structured community dispositions can adequately address the sentencing objectives of denunciation and deterrence even when, ordinarily, a significant period of incarceration would be required.

Conclusion and Sentence

- [69] Mr. Tayo Tompouba has committed a very serious offence. He had intercourse with the complainant when he believed she was asleep and when he had no reason to believe he had her ongoing consent. He breached the trust the complainant put in him when she invited him into her home and bed. He violated her sexual integrity and her sense of safety and security. He ejaculated inside her exposing her to the risk of an unwanted pregnancy and/or a sexually transmitted infection.

- [70] While all sexual assaults are serious, my role as a sentencing judge requires that I draw some distinctions. In doing so, I do not wish to be taken as minimizing the seriousness of any of the offences in the comparator cases and certainly not what Mr. Tayo Tompouba has done.

- [71] Having said that, I have to say that I consider Mr. Tayo Tompouba's conduct to be objectively less serious than the cases relied on by the Crown. Whereas Mr. Tayo Tompouba honestly but mistakenly believed that the complainant consented to having unprotected sex with him but failed to stop when he believed the complainant was asleep:

- In G.M., the offender had forceful anal intercourse with the complainant despite the complainant's cries, screams, and clearly expressed lack of consent;
- In Berry, there were repeated invasive sexual assaults involving digital penetration of the offender's common-law partner when he knew she was asleep and these were video-recorded by the offender;
- In Pouce Coupe, the offender violently forced sexual intercourse on a 15-year-old complainant despite her pleas for him to stop; and
- In Narcisse, the offender preyed on the complainant who was unconscious in her own home when the offender had intercourse with her.

- [72] I also consider Mr. Tayo Tompouba's conduct to have been somewhat less serious than several of the cases where probation, conditional sentences, or intermittent jail sentences were imposed:

- In Chen, the offender had intercourse with a 13-year-old boy;
- In Yusuf, when the complainant sex trade worker withdrew her consent to sexual intercourse, the offender punched her in the face causing her to lose consciousness and continued to have intercourse with her;
- In Hans, the offender had intercourse with the complainant in her home when she was asleep, with no belief at any time, honest or otherwise, that he had her consent; and
- In Kain, the offender also had intercourse with the complainant when she was asleep, with no belief at any time, honest or otherwise, that he had her consent.

[73] As for the remaining cases I have cited, Mr. Tayo Tompouba's conduct was clearly more objectively serious than the non-penetrative sexual assaults perpetrated by the offenders in Tuffs and W.B. and the forced oral intercourse perpetrated by the offender in White. Though the sex acts in Gill and J.M. were also less objectively serious than Mr. Tayo Tompouba's, other factors make those cases somewhat comparable to Mr. Tayo Tompouba's case in terms of seriousness. In Gill, the offender rather violently digitally penetrated the complainant causing injuries to her arm and vagina. In J.M., the offender sexually touched his eight-year-old daughter, a very grave breach of trust.

[74] While Mr. Tayo Tompouba clearly should have known better, I also consider him to have a reduced level of moral blameworthiness compared to many of the offenders in the cases I have cited. He initiated intercourse with the complainant honestly but mistakenly believing that he had her consent. Though he was sober, Mr. Tayo Tompouba was only 22 or 23 at the time and mistakenly believed that the complainant would wake up and enjoy having sex with him. In other words, he did not think that he would be hurting her. While that was a massive mistake with criminal consequences, as I just said, he did not intend to hurt the complainant.

[75] In my determination of a fit sentence, there are certainly a number of other factors that I must consider. These include:

1. Mr. Tayo Tompouba is a young man with no criminal record;
2. Given his history of working hard to make his way in Canada and to financially support his children and family back in Cameroon, he is ordinarily a good person;
3. His conduct toward the complainant involved a monumental lapse in judgment, but was out of character;
4. Partly because of the immigration consequences he is facing, but also because he has seen that he, in fact, hurt the complainant, Mr. Tayo Tompouba has come to understand that his conduct was wrong;
5. The absence of evidence regarding the extent of harm suffered by the complainant;

6. The impact on Mr. Tayo Tompouba, his children, and family if he is incarcerated for any significant length of time; and
 7. Even though I do not have a formal risk assessment, my somewhat hesitant conclusion that Mr. Tayo Tompouba's risk of re-offending is low.
- [76] With respect to Mr. Tayo Tompouba's risk to re-offend, I note that trial judges are often required to assess risk without the benefit of a formal risk assessment. In this case, I base my conclusion on Mr. Tayo Tompouba's lack of a criminal record, his otherwise good character, his good relationship with the mother of his children, his apologetic text message communications with the complainant, this being an isolated incident, the absence of any issues since Mr. Tayo Tompouba's arrest, the fact that he is a non-drinker, and the impression I have formed of Mr. Tayo Tompouba through the lengthy course of these proceedings.
- [77] Similar to Murray J. in *Chen*, I do not consider it necessary to imprison Mr. Tayo Tompouba for two to six years to specifically deter Mr. Tayo Tompouba. The immigration consequences Mr. Tayo Tompouba is facing, including the prospect of Mr. Tayo Tompouba not being present to raise his children and not being able to financially support them or his family in Cameroon, provide more than enough specific deterrence. The real question is whether the objectives of denunciation and general deterrence require Mr. Tayo Tompouba to be incarcerated and, if so, for how long.
- [78] I consider Mr. Tayo Tompouba's personal circumstances to be compelling, but not so exceptional that a suspended sentence and probation would be a fit sentence. While jail is required, restraint is also in order. I have concluded that an intermittent 90-day jail sentence, followed by a lengthy period of restrictive probation, plus the various ancillary orders I am compelled to make, plus the stigma of this conviction, will adequately address denunciation and general deterrence. That means that Mr. Tayo Tompouba will serve his sentence on weekends so that he can continue to work and support his children and family in Cameroon. In my view, any lengthier jail sentence would have an unduly harsh impact on Mr. Tayo Tompouba's children and family in Cameroon.
- [79] In the result, I have reached this conclusion without resort to a consideration of the collateral immigration consequences Mr. Tayo Tompouba faces. It remains the case, however, that he may eventually be deported.
- [80] Despite the outcome in this unique and isolated case, the overall message from the court remains crystal clear that sexual assaults involving intercourse with vulnerable women will, in the vast majority of cases, result in a jail sentence of two to six years, plus many other harsh personal consequences.
- [81] Mr. Tayo Tompouba, I am going to ask that you please stand, sir. Can you stand?

[82] Mr. Tayo Tompouba, you are sentenced to 90 days imprisonment. You must serve this sentence intermittently from Fridays at 6:00 p.m. to Sundays at 4:00 p.m. on consecutive weekends starting Friday, February 14, 2020 at the Surrey Pretrial Detention Centre.

[83] At all times when you are not in custody on this order, for the next 36 months, you are probation for a total of three years with the following conditions:

1. You must keep the peace and be of good behaviour;
2. You must appear before the court when required to do so by the court;
3. You must notify the court or the probation officer in advance of any change of name or address, and notify the court or the officer of any change of employment or occupation;
4. You must have no contact or communication directly or indirectly with the complainant;
5. You must not go to or be within 100 metres of any place where the complainant lives, works, attends school, worships, or happens to be. If you see the complainant, you must leave her presence immediately without any words or gestures;
6. You must report in person to a probation officer at the South Surrey Community Corrections office by 3:00 p.m. February 11, 2020, and after that, you must report as directed by your officer;
7. When first reporting to your probation officer, you must provide them with the address where you live and your phone number. You must not change your address or phone number without notifying your officer in writing in advance of any change;
8. For the first 24 months, you must obey a curfew by being inside your residence located at [address omitted for privacy purposes] between 8:00 p.m. to 6:00 a.m. every day.

[84] THE ACCUSED: Every day?

[85] THE COURT: Pardon me?

[86] THE ACCUSED: Is that every day?

[87] THE COURT: Every day. When I talked about a significant restriction in liberty, that is what I was talking about.

9. For the following 12 months of this order, you must be inside your residence between 11:00 p.m. and 6:00 a.m. every day;
10. You must present yourself at the door to your residence or answer the phone when any peace officer or probation officer attends or calls to check on you during the curfew;

11. You may be away from your residence during the curfew with the prior written permission of your probation officer. Such permission is to be given only for employment or other compelling reasons. You must carry the permission with you when you are outside your residence;
 12. You must attend, participate in, and complete any intake, assessment, counselling, or education program as directed by your probation officer, which may include counselling or programming for sexual offence prevention; and
 13. You must complete 160 hours of community work under the direction of your probation officer. Your community work service must be completed by June 1, 2022.
- [88] I must also make a number of ancillary orders.
- [89] Pursuant to s. 109 of the Criminal Code, you are prohibited from possessing (a) any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition, and explosive substance for a period of 10 years; and (b) any prohibited firearm or restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
- [90] Count 1 on the indictment is a primary designated offence. Pursuant to s. 487.051(1) of the Criminal Code, I authorize the taking of samples of bodily substances from you. That is for DNA purposes. The samples will be taken from you while you are in custody and you must submit to the taking of the samples.
- [91] Finally, pursuant to s. 490.012 of the Criminal Code, you are required to comply with the Sex Offender Information Registration Act for 20 years.
- [92] Mr. Tayo Tompouba, you will have to wait until the probation order that I have made has been prepared and you will have to sign it before you head back to Surrey.
- [93] Ms. Winters, I do not think I have overlooked any ancillary orders? Nothing else?
- [94] MS. WINTERS: My Lord, for an intermittent sentence, does there need to be a no-communication order with respect to the custodial portion?
- [95] THE COURT: I do not think it needs to be separate.
- [96] MS. WINTERS: No.
- [97] THE COURT: It is -- I --
- [98] MS. WINTERS: It is covered by the --
- [99] THE COURT: He is on probation for 36 months and, during that period of time, he will not be able to communicate with the complainant --
- [100] MS. WINTERS: All right, I just wanted to --

[101] THE COURT: -- no matter where he is.

[102] MS. WINTERS: Right. All right. Thank you. That was -- I believe that is -- that was it for the Crown.

[103] THE COURT: Thank you, and thank you very much for your helpful submissions.

[104] Mr. Tayo Tompouba, good luck to you. I do not expect to see you back in court in the future. Thank you.

"L.S. Marchand J."

MARCHAND J.

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