

CANADA / JUDGMENT

R. v. Thomas

2022 BCSC 2297

COURT

Supreme Court of British Columbia

DECIDED

15 December 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 2297 R. v. Thomas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Thomas,

2022 BCSC 2297

Date: 20221215

Docket: 68941-2

Registry: Chilliwack

Regina

v.

Ricky Edwards Thomas

Restriction on Publication: Ban on Publication 278.95 CCC; 486.4(2) CCC

Before: The Honourable Madam Justice MacDonald

Oral Reasons for Sentence

Counsel for the Crown:

M.R. Rygus

Counsel for the Defence:

J.L. Currie

Place and Dates of Hearing:

Abbotsford, B.C.

August 5, December 2

and 15, 2022

Place and Date of Judgment:

Abbotsford, B.C.

December 15, 2022

Table of Contents

Introduction.. 3

Crown and Defence Positions.. 3

Circumstances of the Offender.. 4

Circumstances of the Offence.. 6

Impact on the Victim.. 8

Sentencing Principles.. 9

General 9

Cases Referred to by the Parties. 11

Application of Sentencing Principles.. 12

Mitigating Factors. 12

Aggravating Factors. 13

Risk of Reoffending and Rehabilitation. 14

Analysis.. 16

Legal Principles. 16

Is a CSO Appropriate in the Circumstances?. 17

General 17

Family Circumstances. 18

Health Conditions. 19

Conclusion. 20

Appropriate Sentence in All the Circumstances. 23

Sentence.. 24

Ancillary Orders. 25

Introduction

- [1] On February 18, 2022, I found Mr. Ricky Thomas guilty of two counts of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The sexual assaults took place between September 3, 2015 and April 1, 2016.
- [2] The full reasons for judgment are found at 2022 BCSC 1633 ("Reasons"). I identified the complainant and her mother by their initials to protect the complainant's privacy and dignity.
- [3] Mr. Thomas was originally scheduled for sentencing on May 24, 2022. There were several adjournment applications, all requested by defence, for a number of reasons but several of which were to obtain medical evidence. Ultimately, the sentencing hearing was scheduled for December 2, 2022. There was yet another adjournment application by Mr. Thomas on December 2, 2022, but it was denied. We proceeded to the sentencing hearing.
- [4] These are my reasons for sentencing.
- [5] In sentencing, I must balance the circumstances of the offence, the circumstances of Mr. Thomas, the impact on the complainant, and sentencing principles such as the need to denounce sexual assaults and to deter the offender and others from committing similar crimes. The sentence imposed must also be proportionate to the gravity of the offence and the degree of responsibility of Mr. Thomas.

Crown and Defence Positions

- [6] The Crown is asking this Court to impose a sentence of two years less a day in provincial custody, followed by a two-year probation order with a number of conditions. Crown points out there is a mandatory DNA order, a Sex Offender Information Registration Act, S.C. 2004, c. 10, order of 20 years, and a mandatory firearms prohibition.
- [7] Due to the recent passing of Bill C-5, An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, 1st Sess, 44th Parl, 2022, cl 14(2) (assented to 17 November 2022), amending s. 742.1(f)(iii) of the Code, sexual assault is an offence in which Mr. Thomas is eligible for a conditional sentence order ("CSO"). The defence is seeking a CSO based on Mr. Thomas's purported low risk of reoffending, his exceptional family circumstances, and his current poor health.
- [8] The Crown strongly opposes a CSO as being an appropriate sentence in the circumstances because it is inconsistent with the fundamental purposes and principles of sentencing set out in the Code.

Circumstances of the Offender

- [9] Mr. Thomas is 66 years of age. He was born and raised in North Vancouver, BC. He has three siblings, one from whom he is estranged. Mr. Thomas had a relatively normal childhood, although his father was often absent from the family home. His parents divorced when Mr. Thomas was 13. His father passed away at age 51. His mother was a stay-at-home mom until the relationship ended. She then worked outside the home to support the family.
- [10] Mr. Thomas's educational level is not confirmed. His testimony at trial was inconsistent and not supported by documentary evidence. I accept that Mr. Thomas likely has some post-secondary education, including business and investment training.
- [11] Mr. Thomas worked numerous jobs over the years including at a flooring company, a sailing business, and at investment companies. He has been married four times. His third wife died. His fourth wife was the complainant's mother.
- [12] I have the benefit of a Pre-Sentence Report ("PSR") filed October 27, 2022 and a psychological report dated October 26, 2022. Unfortunately, much of the reports are based on Mr. Thomas's self-reporting. While this is appropriate in determining his attitudes, as I explain below this is problematic when the report writers draw inferences based on facts that have not been accepted by this Court.
- [13] In my Reasons, I found much of Mr. Thomas's evidence to be internally inconsistent and I had serious concerns with Mr. Thomas's credibility. My concerns about Mr. Thomas's credibility are outlined in my Reasons. Examples from my Reasons include finding his narrative that the complainant and her mother were the sexual aggressors and took advantage of him financially not being believable, and finding Mr. Thomas's denial that he held himself out to be a sexual therapist not to be credible, especially given documentary evidence to the contrary.
- [14] The reason I raise this at the outset is because Mr. Thomas has new stories and allegations which he has told to the PSR author and Dr. Monkhouse, the psychologist. These stories were not mentioned at trial despite Mr. Thomas speaking about his personal circumstances at length. Some of these new stories are innocuous, apart from reinforcing my concerns about his credibility. For example, Mr. Thomas stated to Dr. Monkhouse that he sailed single handed across the Atlantic Ocean, almost 5,500 nautical miles. He stated he encountered a horrible storm where his boat was basically destroyed and he had to tie himself to the binnacle. He also stated he and his third wife started two orphanages, one in Romania and one in Thailand. Neither of these stories were mentioned at trial.
- [15] Some of the new allegations are relevant to sentencing, such as his new allegation of being sexually abused as a child. In the PSR, he claimed he became a victim of sexual assaults from trusted people in his life. However, his accounts to the two report writers are inconsistent.

- [16] Mr. Thomas has also raised concerns about his health. On December 2, 2022, I declined the further adjournment application because Mr. Thomas's claims to have cancer were not supported by the medical evidence. In fact, the pathology report following his October 15, 2022 colonoscopy stated the opposite. It was dated two days after his procedure, on October 17, 2022. Nevertheless, up to December 2, 2022 I was led to believe he was still awaiting the results.
- [17] In terms of Mr. Thomas's health status, what is clear from the medical records and not simply from self-reporting is that Mr. Thomas suffers from type-2 diabetes. He has a lesion on his left kidney which is likely a cyst but further investigation is necessary to confirm. He has also been referred to a surgeon to investigate his gastrointestinal complaints because he has reported black stools and bleeding. Mr. Thomas does not have cancer despite having advised this Court, Dr. Monkhouse (thyroid, colon, and kidney cancer), and the PSR writer (colon and thyroid cancer) that he does.
- [18] All this is to say that unless Mr. Thomas's claims to the report writers are corroborated by other sources, I can give them little weight in determining a fit sentence.
- [19] Mr. Thomas is currently residing in Abbotsford in the townhouse he has owned for approximately eight years. He reports renting out his basement suite where the complainant lived while she was under his roof.
- [20] Mr. Thomas reports that his peer supports are limited. He reports that he spends the majority of his time with family. He asserts that his health concerns monopolize much of his time. Mr. Thomas is close with his sister, Sandra; they connect weekly for dinner. He indicates his family is aware of his conviction, aside from his mother, and they are very supportive of him.
- [21] Mr. Thomas says he has been spending time with a neighbour from his complex, Leonardo Varela. Mr. Varela confirmed he has known Mr. Thomas for approximately four years and they have a close connection. He describes Mr. Thomas as a "good quality person" who is respectful.

Circumstances of the Offence

- [22] Mr. Thomas was found guilty of two counts of sexual assault, one which was characterized as the digital penetration incident and four instances of "sexual massages."
- [23] The complainant and her mother are from Ukraine. The complainant was very young, only 19, when the sexual assaults commenced. Mr. Thomas was 59 years of age. During the relevant period, the complainant's mother was in a romantic relationship with Mr. Thomas.

- [24] The complainant arrived in Canada in early September 2015, by herself, to study at a Canadian university. When she arrived in Canada she lived with Mr. Thomas at his residence in Abbotsford. The complainant's mother did not arrive in Canada until late December of 2015.
- [25] Mr. Thomas did not deny the sexual activities but had a very different version of how the incidents occurred, who was the aggressor, and challenged some of the complainant's dates.
- [26] With respect to the first sexual assault, Mr. Thomas entered the complainant's bedroom, uninvited, laid down beside her, and digitally penetrated her vaginal area. There was no evidence of communicated consent through words or actions. This happened approximately three weeks after the complainant arrived in Canada. Mr. Thomas attempted to explain away that conduct, stating that he was helping her to overcome an orgasm barrier.
- [27] Mr. Thomas engaged in highly inappropriate discussions of a sexual nature with the complainant. For example, Mr. Thomas discussed the benefits of tantric massages with the complainant and sent the complainant videos on the subject. He told the complainant that this form of masturbation was very common in sexual therapy. He conveyed that those who do not participate were closed-minded. Mr. Thomas held himself out as a sexual therapist. This helped induce the complainant to masturbate him on a number of occasions despite her not consenting to these sexual acts. These are referred to in the Reasons as the "sexual massages". Mr. Thomas tried to justify the massages to the complainant's mother, once she became aware of them, by stating that they were not sexual in nature.
- [28] Mr. Thomas told the complainant that she owed him the massages because he was financially supporting her.
- [29] The nature, frequency, and duration of the sexual assaults of the complainant are important features of the seriousness of the offences which I return to later in these reasons.

Impact on the Victim

- [30] Relying on the complainant's statement to the author of the PSR, her testimony at trial, and an email submitted to the Court, I accept that the complainant struggled for many years due to Mr. Thomas's conduct. The complainant was unable to complete her post-secondary education due to a lack of financial support once she was forced out of the home Mr. Thomas shared with her mother. She struggled with her mental health after the assaults and became very depressed. She stated she would cry uncontrollably for hours, could barely get out of bed, had panic attacks, and occasionally had suicidal thoughts. She could not find a stable job and was demoted due to her poor emotional state. She also suffered from daily headaches due to stress.

- [31] The complainant was estranged from her mother in the year following her departure from Mr. Thomas's home. This was deeply hurtful to the complainant. Believing that she might have forever lost contact with her mother was the most painful experience in her entire life. It took the complainant years to address these emotional challenges.
- [32] The offences seriously affected the complainant. Unfortunately, the complainant was unable to afford counselling and had no access to mental health support until after she reported the offences to the police. Fortunately, after much counselling, the complainant is doing much better, both physically and mentally.
- [33] I find the complainant suffered physically, mentally, and financially as a result of the sexual assaults.

Sentencing Principles

General

- [34] Section 718 of the Code identifies that the fundamental purpose of sentencing is to protect society and to contribute to, along with crime prevention initiatives, respect for the law and the maintenance of a just, peaceful, and safe society. The principles of sentencing include denunciation, general and specific deterrence, protection of the public, rehabilitation, providing reparations for the harm done to victims and the community, and promoting an offender's sense of responsibility for, and acknowledgment of, the harm done.
- [35] The primacy of deterrence and denunciation when sentencing offenders for sexual assault has been emphasized by appellate courts. For example, the Court of Appeal has stated the range for serious offences of sexual assault is between two- and six-years' imprisonment: *R. v. G.M.*, 2015 BCCA 165 at para. 22.
- [36] Section 718.1 of the Code provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The gravity of an offence has subjective and objective elements. As stated in the seminal case *R. v. Friesen*, 2020 SCC 9 at paras. 75-76, the gravity of an offence takes into account the normative wrongfulness of the conduct and the harm caused by the conduct.
- [37] Section 718.2 of the Code sets out a number of other principles that a court must consider when sentencing. One is parity. The sentence imposed should be similar to sentences imposed on similar offenders, for offences of similar gravity, committed in similar circumstances: s. 718.2(b). *Friesen* emphasizes the relationship between parity and proportionality. They do not exist in tension; rather parity is an expression of proportionality. A consistent application of proportionality will lead to parity: *Friesen* at para. 32.
- [38] Sections 718.2(d) and (e) of the Code emphasize the need for restraint in the use of the sanction of imprisonment. The Court of Appeal in *R. v. Bosco*, 2016 BCCA 55 at para. 35, stated that the restraint principle "encourages caution and moderation in the imposition of

custodial sentences". The sentence should not exceed what is just and appropriate given the moral blameworthiness of the offender and the gravity of the offence: *R. v. Nasogaluak*, 2010 SCC 6. The purpose of such restraint is "to reduce Canada's historically high incarceration rates and avoid sentences that are unduly harsh": *Bosco* at para. 35, citing *R. v. Proulx*, 2000 SCC 5 at paras. 16-17.

- [39] Despite these principles, sentences must be individualized to reflect the circumstances of the particular case and the particular offender. In *R. v. Lacasse*, 2015 SCC 64, the Supreme Court of Canada emphasized that sentencing ranges are guidelines, not mandatory rules: at para. 57.
- [40] Sentencing is a highly individualized process. The court must carefully consider the aggravating and mitigating factors, and the circumstances of the offender, and increase or reduce the sentence accordingly.
- [41] In *Friesen*, the Supreme Court of Canada articulated a new analytical framework to be applied by sentencing judges when sentencing offenders who have committed sexual offences against children. The Court emphasized an upward departure from prior sentencing ranges. The comments the Court made in *Friesen* have application to sentencing in sexual offences against adults (*R. v. Bunn*, 2022 MBCA 34; *R. v. Wood*, 2022 MBCA 46), namely that sexual violence invades personal autonomy, violates bodily and sexual integrity, and gravely wounds dignity: at para. 51. Courts are required to focus their attention on emotional and psychological harm, not just physical harm: at para. 56.
- [42] The Court in *Friesen* held that sentences for sexual assaults must recognize and reflect both the harm caused to girls and young women and the inherent wrongfulness of the violence: at paras. 5 and 74. The Court's reasoning emphasizes that all forms of sexual violence are morally blameworthy. The offender has treated the complainant as an object and has disregarded their human dignity. Courts must give proper weight to the offender's underlying attitude toward the complainant because it is highly relevant to assessing the offender's moral blameworthiness and to the sentencing objective of denunciation: *Friesen* at para. 89.

Cases Referred to by the Parties

- [43] Both parties referred me to a number of cases which I have considered. The Crown relied on *Friesen* which I have already addressed. I mention a few cases that I found to be helpful.
- [44] The Crown referred to *R. v. Alasti*, 2011 BCSC 824. *Alasti* involved an individual who was convicted of two counts of sexual assault after a trial. Mr. Alasti was an unlicensed massage therapist. While there are a number of differences, the case is similar to the one before me in that there was a single incident of digital penetration of one complainant while Mr. Alasti was giving her a massage. This caused some pain and vaginal bleeding. There was also touching of a second complainant's chest. A CSO was rejected by the Court. A 12-month custodial sentence was imposed for the digital penetration and six months for a single

incidence of sexual touching.

- [45] In *R. v. Anthony*, 2014 BCSC 2132, the Crown proceeded by indictment. As a result, a CSO was not available. Dr. Anthony was a psychologist who was treating the complainant for her anxiety disorder. He asked invasive questions regarding her relationship with her husband. He asked her if she had ever achieved orgasm and spoke to her about her need for alternative radical sex therapy. Dr. Anthony advised the complainant that he was impotent and that he required the complainant's assistance.
- [46] While there were a number of more serious factors in Anthony, like Mr. Thomas, Dr. Anthony had no criminal record and had significant health issues. In particular, he had a heart condition controlled by medication, but which would possibly require significant bypass surgeries. He also had arthritis and undiagnosed breathing problems. Dr. Anthony refused to take responsibility for his conduct and lacked remorse for his offending behaviour.
- [47] Dr. Anthony was sentenced to three years in a federal penitentiary. However, the sentencing judge exercised his discretion to temper the sentence, partly due to Dr. Anthony's health issues, and imposed a sentence of two years less a day.
- [48] The Crown also relied on *R. v. Khan*, 2016 ONCJ 282, a summary conviction proceeding in which a CSO was considered but rejected. While there are a number of differences, there were some similarities to the case before me. Mr. Khan was not a registered massage therapist. The complainant had attended a clinic, believing him to be registered. He massaged her breasts and vaginal area.
- [49] Mr. Khan was a first-time offender. The most significant aggravating factor was that he engaged in a breach of trust. The Court found the victim was in a vulnerable position at the time of the offence because she was in a small room with Mr. Khan, and she was disrobed. He was given a six month custodial sentence.
- [50] Defence relied on a number of cases where a CSO was imposed. They were sexual assault cases ranging from full intercourse to sexual touching. The sentences ranged from a six-month CSO to a CSO of two years less a day: *R. v. A.I.*, 2014 BCPC 183; *R. v. Alves*, 2009 BCPC 320; *R. v. B.S.S.*, 2006 BCPC 135; *R. v. Buna*, 2010 BCCA 53; *R. v. Chen*, 2017 BCCA 426 (21 month CSO except for 75 day sentence for the offence that carried a mandatory minimum); *R. v. Haugo*, 2006 BCPC 319; *R. v. Holland*, 2022 ONSC 1540; *R. v. J.L.H.*, 2018 BCPC 221; *R. v. Lorenzo*, 2005 BCPC 354; and *R. v. Matthews*, 2016 BCPC 59. Unfortunately, these cases are dated because, until recently, CSOs were not available for indictable sexual assault convictions.
- [51] I address the defence cases that I found helpful in my analysis.

Application of Sentencing Principles

Mitigating Factors

- [52] Mr. Thomas comes before the Court as a 66-year-old man with no criminal history; he is a first-time offender. Mr. Thomas has a positive work history, mostly as a business person in the financial industry. He is now retired.
- [53] Mr. Thomas has some character references but they are of slightly less value as they come from his sisters, who exhibit some hostility toward the complainant and her mother, and from a friend who has only known Mr. Thomas for approximately three months. The PSR report also referred to Mr. Varela, a friend Mr. Thomas has known for approximately four years. He describes Mr. Thomas as a "good quality person" who is respectful.
- [54] Mr. Thomas has health concerns. While they have been overstated, his health challenges are nonetheless a mitigating factor when considering a fit sentence.

Aggravating Factors

- [55] There are two statutorily aggravating facts that are relevant. First, s. 718.2(a)(iii) of the Code provides that the abuse of a position of trust or authority in the commission of an offence is an aggravating factor. Second, s. 718.2(a)(iii.1) provides that evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation, is an aggravating factor.
- [56] Mr. Thomas took advantage of the power imbalance between himself and the complainant. There was a relationship of economic dependency and the complainant was a new arrival in Canada. Importantly, there was a level of deceit in that Mr. Thomas held himself out to be a sexual therapist to the complainant and to her mother. He convinced both the complainant and her mother there was nothing sexual about the sexual massages, ultimately exploiting the complainant for his own sexual gratification. It was calculated conduct on the part of Mr. Thomas. This was a significant breach of trust, a statutorily aggravating factor pursuant to s. 718.2(a)(iii).
- [57] The complainant's age and vulnerability are statutorily aggravating factors: s. 718.2(a)(iii.1) of the Code. The complainant's economic dependence, combined with her young age and being from a foreign country, made her very vulnerable. The complainant was significantly impacted by the offences as indicated in the victim impact statement email and the PSR report. The sexual assaults had a significant impact on the complainant's educational achievements, financial security, and her mental health. Importantly, they had a detrimental impact on one of the most important relationships in her life, the complainant's relationship with her mother.

Risk of Reoffending and Rehabilitation

- [58] Dr. Monkhouse's testing indicates that Mr. Thomas is in the low range of reoffending. As Dr. Monkhouse stated at p. 14: "In general, an assessment of low risk suggests that the individual is not in need of any special or more intensive intervention or supervision strategies designed to manage risk."
- [59] Counsel for Mr. Thomas argues that Dr. Monkhouse was not simply relying on Mr. Thomas's self-reporting but on testing. I agree Dr. Monkhouse conducted testing. However, much of the report is based on Mr. Thomas's own views. As a result, I must exercise caution regarding the factual foundations of Dr. Monkhouse's report.
- [60] I accept that Mr. Thomas has no prior history of sexual violence and there was no evidence before me of diversity of sexual violence, sexual deviance, psychopathic personality, problems with substance abuse, major mental illness, or escalation of sexual violence which, according to Dr. Monkhouse, would increase the risk of reoffending.
- [61] Defence counsel points out that on page 11 of Dr. Monkhouse's report, Mr. Thomas acknowledges "full responsibility" for the masturbation incidents and "accepts the judgment of the court." Counsel states: This is an "improvement in insight and acceptance of responsibility over his comments to the PSR writer." He further states that Dr. Monkhouse's report should be given greater weight because it followed extensive counselling and it is more recent than the PSR.
- [62] Although I accept that Mr. Thomas had extensive counselling, I have some problems with this argument. First, on the previous page of Dr. Monkhouse's report, Mr. Thomas states that he stayed "in a highly dysfunctional abusive relationship with the two complainants." I do not read that as Mr. Thomas acknowledging that he was the dysfunctional abusive individual in the relationship, especially in light of other comments he made. I do not read the report, as a whole, as Mr. Thomas accepting full responsibility for the offences.
- [63] Second, the psychological report was written on October 26, 2022 whereas the PSR, although not dated, was filed October 27, 2022, a day after Dr. Monkhouse's report. Dr. Monkhouse bases their report on interviews that occurred on May 15, 22, and 29; June 5, 12, 19, and 26; and July 2, 2022. Mr. Thomas was interviewed by the PSR writer on September 20 and September 22, 2022. Consequently, it is the PSR that relays Mr. Thomas's most current views regarding accepting responsibility and having insight into his offences.
- [64] To the PSR author, Mr. Thomas demonstrated a lack of concern for victims of sexual assault. Mr. Thomas shared his thoughts about the "injustices of men in the judicial system". He advised that "sexual assault is undefendable", that he was "guilty before the trial" and that "a man is automatically guilty". Dr. Monkhouse also points out that Mr. Thomas lacks insight into "the issues and factors that have contributed to his offences."

- [65] While the absence of remorse is not an aggravating factor, it is a factor which may be considered when determining the risk to reoffend.
- [66] Mr. Thomas indicated that he was willing to do whatever it took to get better. He confirmed he will attend all programming and counselling as directed. He also advised the PSR writer that he will comply with all expectations of the Court in community corrections. These are positive comments and assist in crafting a just and fit sentence for Mr. Thomas. Nevertheless, restorative and rehabilitation objectives can play but a limited role because Mr. Thomas has not accepted responsibility for, or gained insight into, the offences. Again, while this is not an aggravating factor, the absence of the acceptance of full responsibility and lack of insight into his behaviour undermines Mr. Thomas's prospects for rehabilitation.

Analysis

Legal Principles

- [67] The CSO was introduced to relieve the high incarceration rates in Canada and to permit those who are not a danger to the public to serve their sentence in the community under tight controls (e.g., house arrest or strict curfew): Proulx at para. 36.
- [68] Section 718.2 (d) and (e) of the Code require that the court not deprive the offender of liberty if less restrictive sanctions are available. A sentencing judge should limit any custodial period imposed to the lightest incarceration term that is reasonable in the circumstances: Nasogaluak; Bosco.
- [69] Despite the principle of restraint, in serious cases of sexual assault the primary sentencing objectives are denunciation and deterrence: G.M. at paras. 17 and 18. Nevertheless, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. The personal circumstances of offenders can have a mitigating effect. This is because the focus on the offender may reveal characteristics that distinguish them from other ostensibly similar offenders.
- [70] Both the defence and the Crown referred me to helpful cases, but many pre-date Friesen. This was partially because until very recently a CSO was unavailable to offenders who were found to have committed the indictable offence of sexual assault. While I appreciate the reason, I must exercise some caution in relying on these authorities.
- [71] Consistent with s. 742.1 of the Code, the criteria to apply when determining whether a CSO should be imposed were summarized by Chief Justice Lamer in the seminal case of Proulx at para. 46: i) the safety of the community would not be endangered by the offender serving the sentence in the community; and ii) a CSO is consistent with the fundamental purpose and principles of sentencing set out in the Code. Proulx also emphasized that in determining whether the offender has prospects of rehabilitation, the judge should focus on whether the offender has proposed a particular plan of rehabilitation, the availability of appropriate community service and treatment programs, and whether the offender has acknowledged

his or her wrongdoing and expresses remorse.

Is a CSO Appropriate in the Circumstances?

General

- [72] Defence counsel argued that a CSO is an appropriate and fit sentence in the circumstances. He emphasized that there was no sexual intercourse so this case is not as serious as most cases relied upon by the Crown. Further, defence points out that Dr. Monkhouse found that Mr. Thomas has a low risk to reoffend.
- [73] I agree that based on Dr. Monkhouse's report, Mr. Thomas presents with a relatively low risk of reoffending. I do not dispute the test findings of Dr. Monkhouse and I agree Mr. Thomas has characteristics that would lower his risk to reoffend (e.g., no evidence of mental health issues or substance abuse). However, I do not accept that Mr. Thomas presents a low risk to reoffend given his comments to the PSR writer that led the author to conclude that Mr. Thomas does not have insight into his offences and he exhibits no empathy toward the complainant.
- [74] That said, I accept that Mr. Thomas does not present with a high risk to reoffend. Overall, his risk is moderate. In this circumstance, step two of the legal test is important: whether a CSO in Mr. Thomas's case would meet the principles of sentencing.
- [75] I do not accept that the lack of penetration in this case detracts from harm caused to the complainant. I outlined how seriously she was affected earlier in these reasons. The new direction from the Supreme Court of Canada is that harm to the victim is not necessarily dependent on the type of physical interference involved. At para. 142, Friesen held that sentencing judges should "not assume that there is any clear correlation between the type of physical act and the harm to the victim"; sexual touching is not inherently less serious than penetration. The Court cautioned "against downgrading the wrongfulness of the offence" where the sexual assault does not involve penetration, but instead involved sexual touching or masturbation: at para. 144.
- [76] While defence counsel argued that Friesen is more nuanced on this point than Crown asserted, I understand Friesen to say that while there is a spectrum of interference, I am to focus on the harm to the complainant and the violation of her sexual autonomy and integrity rather than just the physical interference.

Family Circumstances

- [77] Defence counsel's primary focus in justifying a CSO was on Mr. Thomas's family circumstances. There was evidence before me that Mr. Thomas manages and invests his step-father's estate. He is involved in day trading and his mother relies on him in managing these funds to gain a return. His sister, who is the power of attorney over his mother's current affairs, has provided a letter stating she cannot manage the funds without Mr. Thomas.
- [78] I accept that Mr. Thomas assists with managing the estate, which pays for his mother's care. His mother has advanced dementia and is in full-time care. However, I am not aware of any authority where assistance in managing financial investments or bank accounts amounts to exceptional family circumstances.
- [79] In any event, the cases defence relies on, while dated, had more compelling facts with respect to family circumstances than those of Mr. Thomas. For example, in *R. v. Ellrodt*, 1999 BCCA 57, the offender's wife had given birth to their child since Mr. Ellrodt had been incarcerated (at that point four months) and the wife was struggling in their remote Vancouver Island town. The family was economically dependant on the offender. The Court found the custodial sentence was a sentence on the wife and the child. In these circumstances, the BC Court of Appeal substituted a conditional sentence.
- [80] There is no evidence before me that Mr. Thomas's mother is financially dependant on him.
- [81] The difference is even more striking in *R. v. Tait*, 2006 BCPC 315. Mr. Thomas points out that Tait involved sexual interference with a minor including full intercourse. I agree it involved a very serious offence. However, a significant factor in imposing a CSO was that the offender's wife and daughter had a serious incurable disease and they depended on the offender for assistance and financial support. The mother had mobility issues and had difficulty caring for herself and her daughter. Also, Mr. Tait had pleaded guilty and the Court found his remorse to be genuine.
- [82] There are many instances where courts incarcerate offenders and refuse CSOs to those who have dependant children and who are financially responsible for them. It is not by itself considered an exceptional family circumstance. Mr. Thomas does not have a partner or children who are dependant on him. Rather he has a mother who is financially independent but due to her dementia cannot handle her own financial affairs.
- [83] If Mr. Thomas's sister is unable to manage the funds without Mr. Thomas's assistance, she may consider other options, such as retaining a financial adviser. Mr. Thomas's circumstances do not meet the exceptional family circumstances test.

Health Conditions

- [84] Defence counsel submits that Mr. Thomas's deteriorating health is a material fact, and therefore one factor to consider. He argues the more severe the health condition, the greater the mitigation. I agree.
- [85] Mr. Thomas has type-2 diabetes and is undergoing some other investigations. Mr. Thomas does have health conditions but they are not as serious as many in the cases to which I have been taken.
- [86] Defence relied on *R. v. A.E.S.*, 2018 BCCA 478 where the 79-year-old offender had been sentenced to six years for sexual offences against children. On appeal, he adduced fresh evidence of poor health which included stage four cancer. He had a survival rate of approximately 20 months. The Court of Appeal held that judges should refrain from imposing sentences that exceed the offender's life expectancy. It also held that age and health were factors to consider when determining what is a fit sentence in the circumstances.
- [87] In *R. v. Sandhu*, 2020 BCSC 1190, the offender had poorly controlled diabetes, high blood pressure, and was identified as being immune-compromised during the height of the COVID-19 pandemic. His doctor stated that he should not live with others in close quarters. Despite these health concerns a sentence in a federal penitentiary was determined to be appropriate.
- [88] Mr. Thomas's health conditions are not as serious as the cases to which I have been taken. On the medical evidence before me, he does not have cancer or a short life expectancy. His health conditions can be managed in custody: s. 86, Corrections and Conditional Release Act, S.C. 1992, c. 20. These circumstances do not justify a CSO. Nevertheless, like the court in *Anthony*, I will take Mr. Thomas's health conditions into account when determining what is a fit sentence in all the circumstances.

Conclusion

- [89] I find a few cases to be particularly helpful. In *Alasti*, a CSO was available because it was a summary proceeding. The sentencing judge concluded that service of the sentence in the community could endanger the safety of the community. The judge imposed a 12-month custodial sentence for one count, and six months for a second count, to be served consecutively for a total of 18 months. The 18-month custodial sentence was upheld on appeal. *Alasti* demonstrates that substantial sentences have been imposed where there is only a single incidence of sexual assault, on a single victim.
- [90] In *Khan and Anthony* a CSO was rejected. A conditional sentence would not satisfy the fundamental purpose and principles of sentencing, particularly denunciation and deterrence.

- [91] While a CSO may be imposed where aggravating circumstances are present (Proulx at para. 127), there were a number of aggravating circumstances here. Although the complainant was not a child as defined in the Code, Mr. Thomas was 59 and the complainant was 19 at the time of the offences. The principles of Friesen are helpful given the complainant's young age and the vast difference in their ages. Moreover, the sexual assaults occurred while the complainant was living with Mr. Thomas and was dependent upon him. She was from a foreign country, had just arrived in Canada, and English was not her first language.
- [92] Mr. Thomas abused his position of trust or authority, especially when viewed in light of the complainant's multiple vulnerabilities. Mr. Thomas held himself out as a sexual therapist, a professional with specific knowledge, in order to achieve his own sexual gratification. These circumstances heightened the complainant's vulnerability and make the offences more troubling. Moreover, the sexual assaults had a profound impact on the complainant, as outlined earlier in these reasons.
- [93] This case is similar to Anthony, where the Court found that Dr. Anthony was engaged in a breach of trust, partly by engaging in inappropriate and invasive sexual questions. He invaded the complainant's privacy and was highly invasive of her sexual autonomy and integrity. Mr. Thomas engaged in comparable questioning of a sexual nature of the complainant.
- [94] Lastly, in Alasti, the judge emphasized that both offences were committed in private rooms, behind closed doors. The complainants were vulnerable in that they were undressed and alone. The complainant before me was in her bedroom, having just woken up at the time of the digital penetration incident. The massages occurred in the basement of the residence where she was living with Mr. Thomas. She was alone and isolated.
- [95] Mr. Thomas's assaults were not momentary; they were calculated.
- [96] Safety of the community in the context of re-offending is a very important factor when considering a conditional sentence. I note Mr. Thomas advised the PSR author that he is renting out the basement level of the residence in order to help cover his monthly financial commitments. This is where the complainant lived when the assaults occurred which puts Mr. Thomas at a heightened risk of reoffending.
- [97] While a CSO is better suited for achieving "the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community" (Proulx at para. 127), in the case before me, denunciation and deterrence are pressing and Mr. Thomas's prospects for rehabilitation are limited given his lack of insight into the harmfulness of his behaviour.

- [98] Restorative objectives also play a limited role because Mr. Thomas has not accepted full responsibility for the offences. Further, there was no plan put forward regarding reparations to the complainant and to the community. While not aggravating factors, these factors undermine restorative objectives.
- [99] I am mindful that s. 718.2(d) and (e) emphasize the need for restraint in the use of the sanction of imprisonment. The Court of Appeal in *Bosco* at para. 35 stated that the restraint principle "encourages caution and moderation in the imposition of custodial sentences". Imprisonment should be treated as a sanction of last resort.
- [100] Despite the principles of restraint, I am not satisfied that a conditional sentence is consistent with the fundamental purpose and principles of sentencing. As stated in *Sandhu*: "In serious sexual assault cases, it is recognized that denunciation and deterrence are the paramount sentencing objectives. Absent exceptional circumstances, the sentencing judge must give them primacy": at para. 39. Given the seriousness of the sexual assaults and the emotional harm to the complainant by the violation of her sexual autonomy and integrity, and the other concerns I have noted, a sentence served in the community will not give sufficient weight to the primacy of deterrence and denunciation.
- [101] In these circumstances, I reject defence arguments that this case justifies a conditional sentence. I am not prepared to order a CSO.

Appropriate Sentence in All the Circumstances

- [102] I have considered the likelihood of Mr. Thomas to reoffend, his abuse of his position of trust or authority, the duration and frequency of the sexual assaults, the complainant's age, her vulnerabilities, and the degree of physical interference involved.
- [103] The fact that Mr. Thomas is 66 years old without a prior criminal record does have significant weight: *Sandhu* at para. 71. He has been a contributing member of society. However, these mitigating factors are tempered by the severity of the sexual assaults that were conducted, the aggravating circumstances of a breach of trust, and evidence that the offence had a significant impact on the complainant. She endured significant emotional distress as a result of the assaults.
- [104] In my view, a sentence of two years less a day addresses the primacy of denunciation and deterrence while also addressing the sentencing objective of rehabilitation. Denunciation and deterrence are addressed through the custodial nature of the sentence. Rehabilitation is addressed by facilitating Mr. Thomas's access to the Forensic Sex Offender Program, from which I hope he will benefit.
- [105] A sentence of two years less a day in prison is proportionate to the individual circumstances of this offence and this offender, and it is similar to a number of more recent cases. It therefore satisfies the principle of parity, required by s. 718.2(b) of the Code.

[106] A sentence of two years less a day of incarceration gives effect to Friesen, while also recognizing that the complainant was not a child at the time of offence. It accords with the principle of restraint, as required by s. 718.2(d) and (e) of the Code, because it does not place Mr. Thomas in a federal penitentiary.

[107] Although I believe a sentence of two years less a day is appropriate, I must give proportionate weight to Mr. Thomas's advancing age and poor health. Although he can receive medical treatment in prison, I understand this will be more challenging than if he were confined to his home. In consideration of his age and health, I reduce Mr. Thomas's sentence by three months.

Sentence

[108] Considering the facts of this case, your background, the aggravating and mitigating circumstances, and the principles of sentencing, I impose a sentence of 21 months incarceration.

[109] Following the expiry of your sentence, you will be bound by a probation order for two years and will abide by the following conditions:

- 1) You must report in person to a probation officer at Abbotsford Community Corrections within two business days after your release from custody unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different time frame. After that, you must report as directed by your probation officer.
- 2) 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 probation officer in writing at least two business days in advance of any change. You must also provide your officer with the name and contact number of any tenant(s) residing at your place of residence.
- 3) You must keep the peace and be of good behaviour. You must appear before the court when required to do so by the court. You must notify the court or your probation officer in advance of any change of name or address, and promptly notify the court or your probation officer of any change of employment or occupation.
- 4) You must have no contact or communication, directly or indirectly, with G.N. or R.N.
- 5) You must not distribute, publish, post, or make publicly available in any way, information, including comments and images, which refer to or depict G.N. or R.N.
- 6) You must not go or be within 500 metres of any place where G.N. or R.N. live, work, attend school, worship, or happen to be. If you see them, you must leave their presence immediately without any words or gestures.

- 7) You must not enter into or continue any dating, marriage, or common-law relationship with any person until you have identified to your probation officer the person with whom you are in, or propose to enter, a relationship, and your probation officer has informed that person of your convictions, and this order.
- 8) You must attend, participate in, and complete any intake, assessment, counselling, or education program as directed by your probation officer. This may include but is not limited to mental health and sexual offence prevention.
- 9) You must not access any computer network, including the internet, to access, directly or indirectly, or maintain any personal profile on any online dating website or application.

Ancillary Orders

- 1) Pursuant to s. 487.051 of the Code, you are required to provide samples of bodily substances that are reasonably required for the purposes of forensic analysis of DNA, as the offence of sexual assault is a primary designated offence. The samples should be taken by the least intrusive means available.
- 2) Pursuant to s. 109 of the Code, you are prohibited from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substance for a period of ten years commencing on the day this Order is made.
- 3) Pursuant to s. 490.012 of the Code, you are required to comply with the Sex Offender Information Registration Act for 20 years (s. 490.013).

"D. MacDonald J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/22/2022BCSC2297.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-thomas-2022>

Prepared on 26 October 2026 · Esheria