

CANADA / JUDGMENT

R. v. Townsend

2024 BCSC 1313

COURT

Supreme Court of British Columbia

DECIDED

21 June 2024

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2024 BCSC 1313 R. v. Townsend

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Townsend,

2024 BCSC 1313

Date: 20240621

Docket: 35242-2

Registry: Dawson Creek

Rex

v.

William Fredric Townsend

Before: The Honourable Mr. Justice Giaschi

Oral Reasons for Sentence

Counsel for the Crown:

P.J. Beirne

Counsel for the Accused:

T. Zipp

Place and Date of Trial/Hearing:

Dawson Creek, B.C.

May 9, 2024

Place and Date of Judgment:

Dawson Creek, B.C.

June 21, 2024

- [1] THE COURT: We are here today for me to deliver reasons for judgment in sentencing. I reserve the right to edit these reasons should they be ordered, but the substance and result will not change as a consequence of any such amendments.
- [2] On May 11, 2023, I found the defendant guilty on the single count of the indictment in this matter. More particularly, he was found guilty of sexually assaulting L.D. on July 20, 2019, at or near Moberly Lake, British Columbia, contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code]. Both the defendant and L.D. are Indigenous persons.

Facts

Circumstances of Offence

- [3] The circumstances of the offence are fully set out in my reasons rendered on May 11, 2023, and indexed at 2023 BCSC 1236.
- [4] In summary, on the evening of July 19, 2019, L.D. and a friend went to the Link's Pub in Chetwynd for dinner and drinks. While there, they met the defendant and a friend of his. After the pub closed, the four of them went to Moberly Lake and then to the home of the defendant. The four of them drank significant amounts of alcohol throughout the evening. At approximately 5:00 or 5:30 a.m. on July 20, 2019, the complainant went to lie down in the defendant's bed. The defendant later joined her on the bed and began to sexually touch her. The complainant told him to stop, but he ignored her pleas. The defendant got on top of her, pulled her pants/leggings off, ripped her shirt off, and penetrated her with his penis. The complainant was able to kick the defendant and fled the bedroom.
- [5] I note that, during the course of submissions, it was suggested by the Crown that the complainant was sleeping or unconscious or nearly sleeping or unconscious at the time of the offence. I made no such findings in my reasons. Rather, the complainant's evidence was that, before the commission of the offence, the defendant woke her by tapping her on the shoulder. He asked if he could lie with her on the bed and she replied in the affirmative. She testified that the accused complimented her, then began to touch her, and finally got on top of her. She testified she repeatedly told him to stop and, as indicated, finally got him to stop by kicking him. Her evidence was entirely inconsistent with the suggestion that she was sleeping or unconscious or nearly sleeping or unconscious at the time of the offence. She was awake and conscious of what was happening and took steps to bring the assault to an end.

Circumstances of Offender

- [6] Mr. Townsend is a member of the Saulteau First Nation as is L.D. He was 22 years old at the time of the offence and is now 26. He has no criminal record. He worked at odd jobs during high school to make money. He graduated high school in 2015, took one year off to work and improve his grades, and then enrolled at BCIT in Burnaby.
- [7] At BCIT, the defendant completed programs in electrical computer engineering and technology. He achieved a specialist designation in electrical power and industrial control. He also completed a six-month in-house telecommunications specialty certificate. He is currently in the first year of a four-year apprenticeship with BC Hydro.
- [8] The defendant is the first member of his family to graduate from high school and attend college, a significant accomplishment given his background as outlined in the Gladue report which I will address momentarily. He has paid off all of his student loans, has no debt, has some savings, and earns approximately \$80,000 per year on average. He lives currently in Vernon with his fiancée and a roommate.
- [9] I have been provided with several letters of support for the accused. In general, the authors of these letters express that the defendant has always been polite, respectful, law-abiding, productive, and hard-working. In particular:
- a) Starr Gauthier, a second cousin, writes that the defendant rarely hung around the reserve and partied like others did. He says the defendant always worked hard, helped his mother when he could, and wore his cadet uniform proudly.
 - b) The defendant's grandmother writes that he always worked hard, was dedicated to his studies, and never caused trouble.
 - c) His mother writes that, when not in class or at cadets, the defendant helped with childcare. She expresses pride in his accomplishments.
 - d) Lorraine Courtorielle, the mother of one of the defendant's school friends, writes that the defendant has always been polite and honest and slow to anger and that he worked hard to get where he is today. She expresses her pride in him and his successes.
 - e) Wayne Howse, a project manager with the defendant's former employer, writes that the defendant was well-mannered, polite, respectful, reliable, got along well with others, and always showed up fit and ready to work.
 - f) The defendant's father writes that the defendant exceeded expectations and succeeded despite a plethora of obstacles and temptations.
 - g) Andreas Carlson, a family friend, writes that the defendant has worked hard and risen above the stereotypes. She says he is intelligent, theological, deep, and gentle, and has never so much as jaywalked.

- h) Melva Sorrell, a grandparent, writes that he is an outstanding citizen who has always been friendly and gentle to others.
 - i) Sheridan Townsend, the defendant's sister, writes that, despite growing up in an environment of alcoholism and domestic violence, the defendant supported her and her younger brother and sacrificed to look after them.
- [10] In addition to these, I have been provided with a letter from Brent Enridge of Valhalla Counselling Services. He writes that the defendant has attended 34 counselling sessions as of May 3, 2024. He notes that these sessions were booked voluntarily, that the defendant has participated consistently, and that he has indicated that he intends to continue therapy regardless of the legal outcome.

Gladue Report

- [11] I have been provided with a Gladue report authored by Nikita Paradise which provides considerable detail about the defendant, his background, and upbringing. In addition to the facts mentioned above/earlier, the report notes:
- a) The defendant is a status man from the Saulteau First Nation on his mother's side and European on his father's side.
 - b) Many members of the defendant's family on his mother's side attended Kamloops Indian Residential School.
 - c) The defendant's mother experienced physical, emotional, and sexual abuse from a young age.
 - d) The defendant's father, who was not interviewed for the Gladue report, was reported as having suffered abuse as a child from alcoholic parents. The father was also reported as being an alcoholic and was said to have been abusive towards his spouse, the defendant, and the defendant's sister.
 - e) The defendant's father and mother separated when the defendant was about seven years of age.
 - f) Alcohol and drug misuse was common within the defendant's family both before and after his parents separated.
 - g) The defendant was sexually assaulted by a variety of family members from a young age.
 - h) The defendant has consumed marihuana, alcohol, and medicinal mushrooms since the age of seven, but does not consider himself addicted and, since the offence, has refrained from drinking alcohol in any public setting.

- i) Since the offence, the defendant has reached out for help from a social development worker for West Moberly First Nation. The social worker shared that psychological evaluation is imperative for the long-term success of the defendant as well as counselling.

[12] The Gladue report writer notes that several Gladue factors are present. I quote from the report:

The Gladue factors that are present in the concentric circles of William's community, family, and personal life include the following: intergenerational impacts of colonialism and displacement, loss of autonomy via the Indian Act, and other attacks on self-determination. William experienced a normalization of physical, sexual, and emotional abuse within the home and community. William experienced generational impacts and loss of parenting skills and familial composition. William experienced the normalization of alcoholism and physical violence in his home and social settings throughout his adolescence. William experienced loneliness, dislocation from culture, community, and family. William experienced racism and systemic discrimination against Indigenous Peoples within his own home throughout his adolescence.

[13] The report writer provides a summary which includes the following, and again, I quote:

William grew up often moving from home to home between Sauteau First Nation and Chetwynd, B.C. William experienced abuse within the home from birth, throughout his childhood. William's family shares that his father did not have respect for First Nation women which showed in his daily treatment and violence to William's mother. William was exposed and further normalized to daily alcoholism. William's parents separated at the age of seven. William lived with a multitude of his mother's partners living in unsafe environments. William experienced sexual abuse from family and community members starting at a young age. Williams identifies he has had an unhealthy relationship with sex and women starting from a young age. William states he suffered from undiagnosed depression, anxiety, and suicidal ideations from a young age.

[14] The report writer also notes that the defendant has been working with Jackie Stelkia, a Gladue support worker for BC First Nations Justice Council, on a healing plan. The writer notes:

Since working with William, Jackie and William have collaborated on a healing and restorative justice plan focusing on repairing harm and supporting William with his mental, emotional, physical, and spiritual well being by leasing [sic] resources and breaking down barriers.

Jackie will be working with William long-term during his future transitions and relocation due to his BC Hydro apprenticeship program and will adapt for William and his healing plan resources based on his current location so that he can continue his healing journey.

Victim Impact Statement

[15] Concerning a victim impact statement, there is no victim impact statement from the complainant, L.D.

Positions of Crown and Defence

[16] The Crown concedes that:

- a) the offence was not premeditated,
- b) there was no gratuitous violence,
- c) alcohol played a major role in the commission of the offence,
- d) the likelihood of the defendant reoffending is slight, and
- e) the defendant is entitled to significant credit for overcoming his personal circumstances.

[17] Nevertheless, the Crown submits that a jail term is required because the victim was vulnerable and the primary sentencing objectives for the offence of sexual assault are denunciation and deterrence. When pressed as to what length of sentence was appropriate, Crown counsel suggested a term of 12 to 30 months to be followed by a term of probation with mandated counselling. The Crown further submits that the offender should be registered on the sex offender registry pursuant to the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA].

[18] The defence submits that the sentence should be less than two years and that serious consideration should be given to a conditional sentence order. The defence says this was a spontaneous offence involving alcohol that is on the low end of the gravity spectrum. The defence stresses that the personal circumstances of the defendant and the Gladue factors in play militate in favour of a reduced sentence and a conditional sentence order. Further, the defence submits that registration under the SOIRA can be dispensed with in the circumstances.

Principles of Sentencing

Purpose and Objectives of Sentencing

[19] The general principles and purposes of sentencing are set out in ss. 718-718.201 of the Criminal Code. The purpose and objectives are set out in s. 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.

[20] It is undisputed that in cases of sexual assault, denunciation and deterrence are the primary objectives of sentencing. One such authority for that is *R. v. Wells*, 2000 SCC 10.

[21] Pursuant to s. 718.04 of the Criminal Code, where the offence involved the abuse of a person who is vulnerable because of personal circumstances, including because the person is Aboriginal and female, the objectives of denunciation and deterrence are to be given primary consideration.

718.04 When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances -- including because the person is Aboriginal and female -- the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[22] Pursuant to s. 718.1 of the Criminal Code:

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

[23] Other principles of sentencing that I am required to take into account are set out in s. 718.2 of the Criminal Code. In summary, these are:

a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender

a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to [the] victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

Prescribed Limits on Sentence

[24] The maximum sentence that may be imposed for the offence of sexual assault when the proceedings are by way of indictment, as in this case, is 10 years.

Conditional Sentence

- [25] Section 742.1 of the Criminal Code provides that if a person is convicted of an offence and the court imposes a sentence of less than two years, the court may order that the sentence be served in the community subject to various conditions. The first condition is that the court must be satisfied that service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing. The other conditions imposed under s. 742.1 are not relevant and I will not consider them further.
- [26] If a conditional sentence is imposed, the mandatory and optional conditions to be prescribed are set out in paras. 742.2-742.3 of the Criminal Code.
- [27] The imposition of a conditional sentence requires a two-step process. At the first step, the court must establish that the prerequisites in 742.1 are established and exclude probationary measures or a term of imprisonment of two years or more. This involves a consideration of the fundamental principles and objectives of sentencing only to the extent necessary to determine if a penitentiary term or probation order should be excluded. Once these are excluded, the court then proceeds to the second step which involves a comprehensive assessment of the principles and objectives of sentencing. It is at the second stage that the court determines the duration and venue of the sentence and if a conditional sentence is reasonable in the circumstances: *R. v. Proulx*, 2000 SCC 5, at paras. 58-60 and *R. v. Wells* at paras. 27-30.
- [28] I also observe that a conditional sentence "need not be of equivalent duration to the sentence of incarceration that would otherwise have been imposed": *Proulx* at paras. 104 and 127.
- [29] The appropriateness of a conditional sentence is directly raised by the submissions of the parties. It is undisputed that, pursuant to the provisions of s. 742.1, a conditional sentence is technically available in this matter if:
- a) a sentence of less than two years is imposed;
 - b) I am satisfied that such a sentence would not endanger the safety of the community; and
 - c) I am satisfied that such a sentence is consistent with the fundamental purpose and principles of sentencing.
- [30] However, notwithstanding that a conditional sentence may be technically available, it is only in rare cases that such a sentence will be appropriate for a sexual assault conviction.
- [31] In *Wells*, the Supreme Court of Canada addressed the availability and appropriateness of a conditional sentence order in a case of sexual assault involving an Indigenous offender and an Indigenous victim. The facts were the defendant sexually assaulted the victim while she was asleep or unconscious. At trial, the judge determined a conditional sentence was not appropriate and sentenced the defendant to 20 months' incarceration. That sentence was

upheld on appeal to the Alberta Court of Appeal and on further appeal to the Supreme Court of Canada. Although the appeal to the Supreme Court of Canada was dismissed, Justice Iacobucci did note, at para. 36, that a conditional sentence might be appropriate in cases of sexual assault depending on the circumstances and the conditions imposed.

- [32] Recently, in three cases, *R. v. T.H.*, 2024 BCCA 123; *R. v. Henry*, 2024 BCCA 132; and *R. v. Maslehati*, 2024 BCCA 207, the British Columbia Court of Appeal addressed the fitness of conditional sentences for sexual assault convictions. I will address these cases in more detail later in these reasons. For now, it is sufficient to note that the Court of Appeal has indicated that, although a conditional sentence may be technically available in cases involving sexual assault, it is only in very rare cases that such a sentence will be appropriate.

Probationary Sentence

- [33] Section 731(1) of the Criminal Code provides that the court may order probation in two circumstances: first, where no minimum punishment is prescribed; and second, where the offender is sentenced to a term of imprisonment of not more than two years, an additional probationary term may be imposed. Pursuant to s. 732.2(2)(b) of the Criminal Code, the maximum period of probation is three years.

Discussion

- [34] I now turn to the application of these various principles and factors to the circumstances of this case.

Availability of a Conditional Sentence - Step One

- [35] Given that the defendant submits a conditional sentence is a serious option, I commence my analysis with the first step from Proulx which is to determine whether the prerequisites for a conditional sentence as set out in s. 742.1 of the Criminal Code are established and whether probationary measures or a term of imprisonment of two years may be excluded from consideration.

Will a conditional sentence endanger the public?

- [36] The first requirement is that a conditional sentence will not endanger the public. This requires both a consideration of the risk of reoffending and of the gravity of the harm that could ensue in the event of reoffence: Proulx at para. 69.
- [37] I am satisfied that a conditional sentence will not endanger the public. Although there is no doubt that the gravity of harm caused by a sexual assault is grave and serious, that is outweighed by the low risk of reoffending. The Crown, quite properly, concedes that the likelihood of the defendant reoffending is slight. I would go further. The offence was an isolated incident and completely out of character for the defendant. There is no reason to believe that he will re-offend or that the public will be endangered in any way if he is released into the community.

Can a probationary sentence be excluded?

[38] The second requirement is whether a probationary sentence should be excluded. Again, this requirement is met. Neither party has suggested that a probationary term is appropriate and I have no hesitation in excluding it from consideration. The offence of sexual assault is much too serious to give consideration to a probationary sentence.

Can a penitentiary term be excluded?

[39] Excluding a penitentiary term from consideration is more difficult. In *R. v. G.M.*, 2015 BCCA 165, at para. 22, it was stated that the range of sentences for sexual assault is two to six years which would involve a penitentiary term. This was reiterated in *Henry* at para. 35. However, the court in *G.M.* also reminds us that ranges are guidelines, not hard and fast rules. Moreover, the Crown in this matter proposed a sentence range beginning with 12 months.

[40] Additionally, I have been referred to several cases where sentences of less than two years have been imposed for sexual assaults. These include:

- a) *G.M.* itself where the sentence was 18 months imprisonment to be followed by 18 months probation;
- b) *R. v. Daychief*, 2023 BCPC 62, aff'd 2024 BCSC 424, where the sentence was 12 months imprisonment followed by 18 months probation, although that case was not a proceeding by way of indictment;
- c) *R. v. Rosenthal*, 2015 YKCA 1, where the sentence was 14 months imprisonment;
- d) *R. v. Azim*, 2023 BCSC 482, where the sentence was 21 months imprisonment and three years probation;
- e) *R. v. Hart*, 2023 BCSC 933, where the sentence was 22 months imprisonment and two years probation; and
- f) *Henry* where the sentence imposed was two years less a day.

[41] I am satisfied that a penitentiary term can be excluded in the circumstances of this case. Indeed, in *Henry*, in somewhat similar circumstances, Justice Newbury remarked that a conditional sentence should not be dismissed out of hand.

[42] Although I accept that sexual assault is a serious offence and that denunciation and deterrence are paramount objectives of sentencing, the circumstances of the offence, the circumstances of the offender, and the Gladue factors at play, all of which I will address in more detail below, militate strongly against a penitentiary term. If a term of imprisonment in an institution was to be imposed in this matter, it would be at most for a term of two years less a day.

[43] Accordingly, the prerequisites for a conditional sentence as set out in s. 742.1 of the Criminal Code have been established.

What is the Appropriate Sentence?

[44] I now turn to the sentence that should be imposed, including whether it should be a conditional sentence.

Objectives

[45] In crafting an appropriate sentence, I must take into account the objectives of sentencing as set out in s. 718 of the Criminal Code. As indicated, the paramount sentencing objectives in this matter are denunciation and deterrence because the offence is one of sexual assault and, pursuant to s. 718.04, because the victim was Indigenous.

[46] The cases to which I have been referred and have discussed clearly establish that the objectives of denunciation and deterrence generally require that a term of imprisonment be imposed for a sexual assault conviction. Moreover, the range of sentences is generally two to six years, although, as indicated, lesser sentences can be imposed in appropriate circumstances.

Gravity of the Offence

[47] I must ensure that the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[48] Turning first to the gravity of the offence, Justice Newbury reminds us in Henry that the offence of sexual assault is always grave and serious. It is a violation of the victim's bodily autonomy, sexual integrity, and dignity. It can cause severe and long-lasting, often lifelong, psychological and emotional harm and sometimes financial harm to the victim.

[49] In Maslehati, Justice DeWitt-Van Oosten observed at para. 72 that it is now generally recognized that all sexual assaults are serious. At para. 73, she wrote that the focus should be on the:

circumstances surrounding the offence at issue, including the nature of the sexual contact, its duration, the context in which it occurred, and the actual and reasonably foreseeable harms that flowed from it.

[50] At para. 74, she provided a non-exhaustive list of 15 circumstances that elevate or aggravate "the already inherent seriousness of a sexual assault".

[51] The nature of the sexual contact in this matter includes vaginal penetration, a very serious violation of the dignity and integrity of the victim and a circumstance that elevates the gravity of the offence. However, the duration of the sexual assault in this case was not lengthy. Although neither the accused or the complainant testified to the duration in minutes, the complainant did testify that the accused penetrated her about three times before she was able to kick him and get him off of her. From this, I infer that the assault was of relatively short duration.

- [52] The only aggravating factor alleged by the Crown is that L.D. was in a position of vulnerability because she was asleep or unconscious at the time of the offence. As I have indicated, she was not asleep or unconscious and I do not find that she was vulnerable on this basis. However, she was at the accused's home and she trusted him by going to his bed in his home while in an intoxicated state. To this extent, she was vulnerable and this vulnerability is an aggravating factor. However, this vulnerability is, in my view, less of an aggravating factor than a victim who was asleep or unconscious. I observe that a vulnerable victim and breach of trust are two factors outlined by Justice DeWitt-Van Oosten in *Maslehati* as aggravating or elevating the gravity of a sexual assault.
- [53] Further, concerning the gravity of the offence, I note that I have no victim impact statement from L.D. and, therefore, there is no evidence of the actual harm suffered by her. I note that, when giving her evidence at the trial, L.D. did not appear overly traumatized by the event, but I acknowledge that victims of a sexual assault can be severely traumatized without an outward display of the trauma. At best, all I can say is I have no evidence of the actual harm.
- [54] Considering all of the circumstances of the offence, it is my view that, although undoubtedly serious, the gravity of this offence is towards the lower end of the spectrum of sexual assaults. It was not planned or premeditated, but rather was an act triggered by excessive alcohol consumption. It was a single incident of relatively short duration. There was no additional or gratuitous violence.

Degree of Responsibility of the Offender

- [55] The degree of responsibility of Mr. Townsend, his moral culpability, is more difficult to assess as there are multiple factors that affect his moral culpability. These are:
- a) The defendant was relatively young when the offence was committed. At time of the offence, he was 22 years of age. This is certainly old enough to know better, but he was without the level of maturity and experience that an older person would have.
 - b) He has no history of any prior criminal activity.
 - c) The offence was entirely out of character for the defendant. Indeed, he appears to have been a model citizen in all respects.
 - d) Since the commission of the offence, he has sought out counselling to address his various issues that contributed to his being before the court and he continues to participate in counselling.
 - e) Based on the numerous support letters submitted on the defendant's behalf, he appears to have strong family and community support.

- [56] In R. v. Wells, Justice Iacobucci noted that sentencing judges must take into account the unique systemic or background factors that are mitigating in nature and played a part in the Aboriginal offender's conduct. These are the so-called Gladue factors and, in my view, they are particularly important in this matter and diminish the defendant's moral culpability.
- [57] I have addressed the Gladue report. Significantly, as with many Indigenous persons, Mr. Townsend has experienced a normalization of alcohol abuse and of physical, sexual, and emotional abuse within his home and in his community more generally. He observed sexual abuse and was himself the victim of sexual abuse from a young age. He also has experienced racism and systemic discrimination because of his Indigenous heritage and has struggled with loneliness and dislocation from his culture, community, and some family members.
- [58] The defendant has struggled to overcome these very significant obstacles in his life. He now has stable employment and the potential for a successful career. His employment and this potential is in jeopardy as a consequence of the conviction in this matter.
- [59] In my view, the Gladue factors identified in the report have played a very significant role in bringing Mr. Townsend before this court and they operate to significantly reduce his moral culpability for what is a serious offence. In particular, the normalization of sexual abuse within the defendant's family and community is particularly relevant to him being before this court.

Conditional Sentence

- [60] I now address specifically whether a conditional sentence is appropriate in this case.
- [61] As I have indicated earlier, in a recent series of cases, the British Columbia Court of Appeal has repeatedly stated that a conditional sentence will rarely be appropriate in cases of sexual assault. I now consider these cases in more detail.
- [62] In T.H., the Court of Appeal upheld a conditional sentence imposed for a sexual assault conviction. In T.H., the defendant was given a conditional sentence of two years to be followed by three years' probation. An ancillary order was also imposed requiring the defendant to report for 20 years under SOIRA. The defendant in R.H. was 25 years of age and the victim 23. After a night of drinking, the defendant sexually assaulted the victim by vaginal penetration. The defendant was found to have been extremely intoxicated. The defendant was young, had no criminal record, was gainfully employed, had strong family ties, and had undergone counselling. A presentence report indicated that the risk of the defendant reoffending was low. At paras. 6 and 60, Justice MacKenzie, writing for the court, noted that a conditional sentence "will rarely amount to a fit sentence for a sexual assault" and that the case before the court was "a borderline case." Nevertheless, the court declined to change the sentence.
- [6] When the discrete terms of the conditional sentence are viewed cumulatively and as followed by the probation order to result in five years of supervision, I do not view this sentence as demonstrably unfit or the result of material error. The sentence is harsh in all

the circumstances. This is a borderline case, and a conditional sentence will rarely amount to a fit sentence for a sexual assault of this nature. But ultimately, absent a material error in principle or a demonstrably unfit sentence, the test is not whether this Court would have imposed this sentence. I consider that the Crown is inviting us to reweigh the relevant sentencing principles and factors, which is not our role.

- [63] There are many similarities between T.H. and the facts before me, namely, a relatively young offender who had no criminal record, was gainfully employed, had undergone counselling, and was at low risk to reoffend. Additionally, there, as here, alcohol appeared to play a major role.
- [64] In Henry, the defendant was sentenced at trial to two years less a day. The defendant appealed on the grounds that a conditional sentence had become available because of a change in legislation. The circumstances of the offence were similar to what transpired in T.H. After a night of drinking, the victim went into the defendant's bed. She awoke to find the defendant touching her breasts. She told him she did not want to have sex and went back to sleep. She then awoke to find the defendant on top of her and penetrating her vaginally. She did not say anything to him. Rather, she kept her eyes closed until he was finished.
- [65] The circumstances of the offender were that he was 47 years old, had no criminal record, was unlikely to be a repeat offender, was of generally good character, and a jail sentence was likely to have significant consequences for him.
- [66] At paras. 31-36, Justice Newbury acknowledged that, in the circumstances, a conditional sentence should not be dismissed out of hand as a serious option, but she also noted that cases in which persons convicted of 'serious' sexual assaults and have received CSOs are few and far between [at para. 31]. She wrote that a conditional sentence will rarely amount to a fit sentence for a sexual assault involving forced vaginal penetration [at para. 32]. She noted that the recent trend in Canadian sentencing law recognized sexual assault as a serious offence [at para. 34], that the range of sentences for sexual assault involving intercourse was two to six years [at para. 35], and that sexual assaults involving sleeping or unconscious victims are particularly serious [at para. 36].
- [67] Justice Newbury ultimately determined at para. 37 that, despite the general good character and lack of a criminal record of the defendant, the offence carried a substantial moral blameworthiness and a conditional sentence would not serve the objectives of denunciation and deterrence.
- [68] There are similarities between the circumstances of the offence and the offender in Henry and those before me. In particular, there, as here, the offence involved vaginal penetration and there, as here, the offender was of generally good character, had no criminal record, was unlikely to reoffend, and the consequences of incarceration would be significant. However, there are also dissimilarities. In particular, Mr. Henry was much older than Mr. Townsend and the victim in Henry was asleep when the assault occurred. Additionally, Mr. Henry was not an Indigenous offender with strong Gladue factors.

- [69] In Maslehati, the circumstances of the assault were that the defendant had known the victim for 20 years. He was invited into her apartment to drink beer and smoke marihuana. The victim became incapacitated as a consequence. The defendant performed oral sex on the incapacitated victim despite her saying "no" on several occasions. The defendant in Maslehati was 60 years old at the time of the offence, had no criminal record, was "a man of prior good character", and was at very low risk to reoffend. The defendant also had some serious medical issues. The trial judge imposed an 18-month conditional sentence followed by 12 months' probation. The sentence was appealed by the Crown.
- [70] On appeal, Justice DeWitt-Van Oosten, writing for the Court of Appeal, set aside the conditional sentence and imposed a sentence of 28 months imprisonment. At paragraph 9, she wrote that conditional sentences will rarely be appropriate for sexual assault with aggravating circumstances such as penile penetration. At para. 11, she wrote that, in cases involving adult sexual assault with aggravating circumstances, conditional sentences will rarely be appropriate even for offenders without a criminal record. At para. 55, she wrote that the sentence imposed was demonstrably unfit as being inconsistent with the fundamental principles and purposes of sentencing and failed to give meaningful effect to the defendant's high moral blameworthiness and the sentencing objectives of denunciation and deterrence. She found at paras. 122-124 that the aggravating circumstances in the case were: the victim was incapacitated; the defendant had been invited into the victim's home to keep her safe; and the assault profoundly affected the victim's mental health, activities, and sense of safety. She held these aggravating circumstances were such as to put the sexual assault at the higher end of the range of wrongful conduct [at para. 125].
- [71] Again, there are similarities and dissimilarities between the circumstances in Maslehati and those here. The similarities include: alcohol or drug use was involved in both; and the defendants in both had no criminal record and were generally of good character. The dissimilarities include: the victim in Maslehati was much more incapacitated than the victim here and Mr. Maslehati was much older than Mr. Townsend. Additionally, evidence of the profound impact on the victim in Maslehati is not present here. A further significant distinguishing feature is that Maslehati was not Indigenous. Another dissimilarity is that the assault in Maslehati occurred in the victim's home whereas the assault here occurred in the defendant's home. However, in my view, this is a difference of little significance in the circumstances.
- [72] I have carefully considered the decisions of T.H., Henry, and Maslehati. I note the repeated statements that conditional sentences will rarely be appropriate in cases of sexual assault, in particular, sexual assaults involving penetration. Nevertheless, in my view, in the unique circumstances of this case, a conditional sentence is consistent with the fundamental objectives and principles of sentencing, including specifically the objectives of denunciation and deterrence, the prime objectives in this case.

- [73] Although the sexual assault in this case is undoubtedly serious, the moral culpability of Mr. Townsend is significantly less than the offenders before the court in Henry and in Maslehati because of his age and the very strong Gladue factors present, particularly in relation to the normalization of sexual violence and the normalization of alcohol abuse that he experienced. These serve to diminish his moral culpability significantly.
- [74] I also take into account that, despite the many obstacles faced by the defendant because of his Indigeneity, he has sought out higher education and is on a path towards a successful career. In other words, he appears poised to break the vicious cycle of intergenerational trauma inflicted on Indigenous people because of colonialism. A conditional sentence will allow him to continue on this path which is beneficial not only to him but to Indigenous Peoples in general and to society as a whole.
- [75] Additional factors that militate in favour of a conditional sentence are:
- a) the defendant's young age, 22 at the time of offence;
 - b) his lack of any criminal record;
 - c) the offence was out of character for him;
 - d) he is at very low risk to reoffend; the defendant has strong community support; and
 - e) he has taken positive rehabilitative steps.
- [76] The principles of sentencing include that 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, with particular attention to the circumstances of Aboriginal offenders. This principle and the above factors militate in favour of a conditional sentence.
- [77] Finally, as I have indicated, there is no necessity to separate Mr. Townsend from society. He is not likely to reoffend as the Crown conceded.

SOIRA

- [78] Before I impose sentence, I will address whether Mr. Townsend should be exempt from registration under SOIRA. The Crown submits that he should be subject to a 20-year registration.
- [79] Given that I have determined that a term of imprisonment of less than two years would have been appropriate in this case, the relevant provision of the Criminal Code is s. 490(3) which provides that I must make an order for registration under SOIRA unless I am satisfied that:
- (a) there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under that Act; or

- (b) the impact of the order on the person, including on their privacy or liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature, to be achieved by the registration of information relating to sex offenders under that Act.

[80] The onus under s. 490(3) is on Mr. Townsend and the factors which I am to consider are set out in s. 490(4). They are:

- (a) the nature and seriousness of the designated offence;
- (b) the victim's age and other personal characteristics;
- (c) the nature and circumstances of the relationship between the person and the victim;
- (d) the personal characteristics and circumstances of the person;
- (e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- (f) the opinions of experts who have examined the person; and
- (g) any other factors that the court considers relevant.

[81] I am satisfied that Mr. Townsend has discharged the onus on him under s. 490(3)(a).

[82] I accept that the offence is serious as it involved vaginal penetration. I also take into account that the victim was vulnerable by reason of her Indigenous status and being within Mr. Townsend's home. However, the other factors outweigh these. Mr. Townsend has no criminal history and is at very low risk of reoffending. As I have indicated, the offence was an isolated incident, was completely out of character for him, and there is no reason to believe that he will reoffend.

[83] Registration would not further the purpose of SOIRA by assisting police with the investigation and prevention of sexual offences. Indeed, in *R. v. Ndhlovu*, 2022 SCC 38, at para. 79, the Supreme Court of Canada observed that "Registering offenders who are not at an increased risk of reoffending bears no connection to this purpose".

[84] Accordingly, I make an order pursuant to s.490.012(3) of the Criminal Code that Mr. Townsend is not required to comply with the SOIRA.

Imposition of Sentence

[85] Mr. Townsend, please stand.

[86] On the single count of the indictment, sexual assault contrary to s. 271 of the Criminal Code, I impose a sentence of two years less a day to be served in the community and to be followed by three years of probation.

CSO Conditions

- [87] During the term of the conditional sentence order of two years less a day, you must comply with the following conditions.
- a) You must keep the peace and be of good behaviour;
 - b) You must appear before the court when required to do so by the court;
 - c) You shall report in person to a supervisor within two working days of today; thereafter, you must report to the supervisor when required by them and in the manner directed by them;
 - d) You must remain within British Columbia unless you have prior written permission from the court or your conditional sentence supervisor to leave the province;
 - e) You must notify the court or your conditional sentence supervisor in advance of any change of name or address and promptly notify the court or supervisor of any change in employment or occupation;
 - f) You must have no contact or communication directly or indirectly with L.D.;
 - g) You must not go to any place where L.D. lives, works, attends school or worships, or happens to be; if you see her, you must leave her presence immediately without any words or gestures;
 - h) When first reporting to your conditional sentence supervisor, you must provide them with the address where you live and your phone number; you must not change your address or phone number without prior written permission from your supervisor;
 - i) You must obey a curfew by being inside your residence, the address of which you will have given to your supervisor, between 9:00 p.m. and 6:00 a.m. every day except when you are going directly to or returning directly from a healthcare facility because of a medical emergency. You have consented in court to providing proof of your attendance at the healthcare facility if requested by your conditional sentence supervisor;
 - j) You must present yourself immediately at the door to your residence or answer the phone when any peace officer or a conditional sentence supervisor attends or calls to check on you during the curfew;
 - k) You may be away from your residence during the curfew with the prior written permission of your conditional sentence supervisor; such permission is to be given only for employment or other compelling reasons; you must carry the permission, which can be in electronic format, when you are outside your residence. In the event, your employment requires your attendance on an emergency basis outside your residence, you are exempted from the curfew provided that you provide written proof of the emergency to your conditional sentence supervisor as soon as practicable.

- l) You must not possess or consume alcohol or controlled substances as defined in the Controlled Drugs and Substances Act or any other intoxicating substance except with a medical prescription;
- m) You must attend, participate in, and complete any intake, assessment, counselling, or education program directed by your conditional sentence supervisor; this may include, but is not limited to, counselling or programming for alcohol or drug addiction, psychiatric or psychological health, and sexual offence prevention; and
- n) You must participate in a restorative justice program to address the impact of your crime on the victim at the direction of your conditional sentence supervisor; if you are subject to a no-contact condition with another person or person(s) participating in the program, you must only have contact and communication with that person or persons at the time and in the manner directed by your conditional sentence supervisor.

Probation Conditions

[88] Following the conclusion of your conditional sentence, you must comply with the conditions of your 36 months probation order. The probation conditions are:

- a) You must keep the peace and be of good behaviour;
- b) You must appear before the court when required to do so by the court;
- c) You must notify the court or the probation officer in advance of any change of name or address and promptly notify the court or the officer of any change of employment or occupation;
- d) You must report in person to a probation officer within two business days after completion of your conditional sentence unless you have obtained before your completion of your conditional sentence written permission from the probation officer to report elsewhere or within a different timeframe; after that, you must report as directed by your officer;
- e) When 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 21 days in advance of any change;
- f) You must not leave British Columbia unless you have the prior written permission of your probation officer; you must carry the written permission, which can be in electronic format, with you at all times if you are outside the province;
- g) You must provide your probation officer with the details of your employment status; you must inform your officer within two business days of any change in your employment status;
- h) You must not possess or consume alcohol, except while inside your residence or on its lots or while transporting it sealed directly to your residence;

- i) You must have no contact or communication directly or indirectly with L.D.; and
- j) You must not go to any place where L.D. lives, works, attends school or worships, or happens to be; if you see her, you must leave her presence immediately without any words or gestures.

[89] You may now sit, Mr. Townsend.

Ancillary Orders - DNA/Weapons/SOIRA

[90] I make the following ancillary orders.

- a) The single count of the indictment is a primary designated offence. Pursuant to s. 487.051(1) of the Criminal Code, I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Databank.
- b) Pursuant to s. 109(2) of the Criminal Code, you are prohibited from possessing:
 - i. 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 from today; and
 - ii. any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
- c) Finally, although I think I have already addressed this, pursuant to s. 490.012(3) of the Criminal Code, Mr. Townsend is not required to comply with the SOIRA.

[91] Is there anything else, counsel?

[92]

[93] CNSL P. BEIRNE: Victim fine surcharge, the Crown says his employment is such that he would be able to make that payment.

[94] CNSL T. ZIPP: Yes, I cannot object to that.

[95] THE COURT: All right. So then there will be a victim surcharge.

[96] CNSL T. ZIPP: May he have, please, 14 days for payment of that. That would give sufficient time for a cheque to clear.

[97] THE COURT: Yes, 14 days to pay.

[98] CNSL T. ZIPP: Thank you.

[99] THE COURT: Anything further, gentlemen?

[100] CNSL P. BEIRNE: No, thank you.

[101] CNSL T. ZIPP: Not from me, thank you, no.

[102] THE COURT: All right, fine, I thank you both very much.

[103] THE CLERK: Sorry, Your Honour, just to clarify, Mr. Justice, that would be July the 5th or would you want July the 8th, so the Monday after the 14 days?

[104] THE COURT: Make it July the 8th.

"Giaschi J."

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