In the Court of Appeal of Alberta

Citation: R v Araya, 2026 ABCA 348

Date: 20261028
Docket: 2301-0193A
Registry: Calgary

Between:

His Majesty the King

Appellant

- and -

Hasron Araya

Respondent

The Court:

The Honourable Acting Chief Justice Dawn Pentelechuk
The Honourable Justice April Grosse
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Justice M.T.C. Tyndale
Sentenced on the 2nd day of August, 2023
(2023 ABCJ 174, Docket: 210022497P1)

Memorandum of Judgment

The Court:

[1] The Crown appeals a Conditional Sentence Order ("CSO") followed by probation imposed on the respondent, Hasron Araya, after his convictions on five firearms offences: ***R v Araya***, 2023 ABCJ 174 (the "Decision").

[2] Mr Araya was 18 years old when he carried a loaded handgun, concealed in a satchel, in a vehicle and then into a pharmacy. He was arrested upon exiting the pharmacy after briefly fleeing from police. Mr Araya's convictions followed his unsuccessful *Charter* application alleging breaches of his ss 8, 9, and 10(b) rights: ***R v Araya***, 2022 ABPC 261. These findings were upheld on appeal: ***R v Araya***, 2025 ABCA 61, leave to appeal dismissed, 2025 CanLII 85606 (SCC).

[3] The Crown argues the trial judge erred in his analysis of the relevant aggravating and mitigating factors in sentencing Mr Araya. The Crown further submits a CSO was disproportionate to the gravity of the offence and Mr Araya's moral blameworthiness, did not properly reflect the paramount sentencing principles of denunciation and deterrence, and was demonstrably unfit. This Court is asked to allow the appeal and impose the 4-to-4.5-year sentence sought by the Crown at the sentencing hearing.

[4] We recognize as unquestionable that "[g]un-related crime poses grave danger to Canadians": ***R v Nur***, 2015 SCC 15 at para 1, [2015] 1 SCR 773 [***Nur***].

[5] To some extent, the Crown's appeal questions whether a CSO may ever be an appropriate sentence where an accused is found guilty of unlawful possession of a loaded firearm in a public place. That question was recently before the Supreme Court of Canada in a Crown appeal of the decision in ***R v Burke-Whittaker***, 2025 ONCA 142 [***Burke-Whittaker***] where the Ontario Court of Appeal dismissed an appeal from a conditional sentence of 2 years less a day followed by 3 years' probation for a serious firearms offence.

[6] The parties did not wish to wait for a decision in that matter before this Court renders its judgment in this case. The Supreme Court dismissed that appeal on May 19, 2026, with reasons to follow. The reasons have not yet issued.

[7] The parties' request is reasonable because the facts in ***Burke-Whittaker*** are distinguishable from this matter, as is this Court's decision in ***R v Saeed***, 2024 ABCA 373 [***Saeed***] which post-dates the sentencing decision below. Moreover, the Supreme Court recently reminded appellate courts: "Sentencing is ultimately a discretionary, fact-specific, and individualized exercise. Any suggestion by an appellate court that sentencing judges are obligated to abide by stringent judicially crafted categories, particularly those defined solely by the type of physical act committed, is wrong in law" (citations omitted): ***R v Sheppard***, 2025 SCC 29 at para 105 [***Sheppard***].

[8] For the reasons that follow, the appeal is dismissed.

Background

[9] On January 7, 2021, the police were seeking the arrest of Phillipe Lugela in relation to an armed robbery. The victim identified Mr Lugela as the culprit who robbed him after producing a handgun from a crossbody satchel. Undercover surveillance by the Calgary Police Service tracked Mr Lugela's vehicle. At some point the vehicle stopped to pick up an unknown Black male from a Calgary residence, who was later identified as Mr Araya. After initially entering the vehicle, Mr Araya returned to the residence, retrieved a crossbody satchel, and re-entered Mr Lugela's vehicle which then travelled to a shopping centre in Airdrie. Mr Araya and Mr Lugela exited the vehicle and entered a pharmacy.

[10] The men were confronted by police when they exited the pharmacy. After running 4 or 5 steps from police before tripping and falling, Mr Araya was taken into custody. The crossbody satchel he wore was searched, and a loaded (10 rounds) operational .9 mm handgun was found; its serial number was defaced. Mr Araya had no firearms license or permits allowing him to possess a firearm. The trial judge found "no evidence that Mr. Araya brandished or used the firearm in any manner during the period of his possession of it" and "no evidence of any other criminality surrounding Mr. Araya's possession. . . such as drug dealing, intimidation, etc": Decision at para 10.

[11] Mr Araya was charged with seven firearms-related offences and was ultimately convicted of five: carrying a handgun in a careless manner (s 86(1)); carrying a concealed weapon (s 90(1)); being an occupant of a vehicle knowing there was a prohibited firearm therein (s 94(1)); unauthorized possession of a loaded prohibited firearm (s 95(1)); and possessing a handgun with a defaced serial number (s 108(1)(b)): Decision at para 2. The other two offences were stayed pursuant to the rule against multiple convictions for the same criminal act: ***R v Kienapple,*** 1974 CanLII 14 (SCC), [1975] 1 SCR 729.

[12] Mr Araya was born and raised in Calgary, the eldest of four children of Eritrean immigrants. A Pre-sentence Report confirmed "Mr Araya grew up in a middle-class Christian home. His parents worked hard, built a family, and urged education on their children": Decision at para 12.

[13] Mr Araya completed high school and had worked for safety response companies in the oil patch, attaining various safety certificates. He was not employed at the time of sentencing, largely due to a reluctance to make plans in the face of his pending sentence. Mr Araya had intended to attend SAIT for heavy duty mechanics training, and his parents had put significant money aside for his education. Mr Araya lived at home and had the support of his parents, although in the last few years he admitted to not "communicating clearly or completely with them" including not telling them about the charges and "the negative peer group with which he has at least partly

engaged". His father described him as a "good kid" with a "big heart", but lacking in social and cognitive skills. Mr Araya acknowledged his low self-esteem and confidence but lacked insight into negative social peers and influences: Decision at paras 13-19.

[14] The parties had vastly different positions on sentence. The Crown submitted the need for deterrence and denunciation warranted a 4-to-4.5-year sentence, focusing on the dangerous nature of having a loaded firearm in public and highlighting the rise of gun crimes in Calgary. Defence counsel sought a CSO of 2 years less a day, followed by probation, urging that Mr Araya was a youthful first-time offender from a racialized community, had good prospects for rehabilitation and had not committed any other crime in conjunction with possessing the handgun.

[15] In detailed written reasons, the trial judge found various aggravating factors including that Mr Araya chose to carry a concealed handgun in a vehicle and into a pharmacy; he endangered the lives of innocent bystanders at the strip mall and the pharmacy; the handgun was loaded with 10 live rounds of ammunition and the serial number was defaced. In mitigation, the trial judge found Mr Araya was only 18 years old at the time of the offence, had no criminal record (which was characterized as the absence of an aggravating factor but showed the offence was out of character), and had a supportive family. The trial judge found that Mr Araya could obtain and maintain employment, had complied with bail for 2.5 years and was a "member of a racialized community" which was "not strictly a mitigating factor [but] must be factored into his moral culpability when calculating proportionality": Decision at paras 25-32.

[16] The trial judge reviewed the maximum sentences for the offences committed and the purposes and principles of sentencing. He extensively discussed proportionality as the fundamental principle of sentencing before reviewing the relevant sentencing principles for firearms offences, quoting this Court's comments in ***R v Chin***, 2009 ABCA 226 at paras 10-12 [***Chin***]:

> Mere possession of loaded firearms is inherently dangerous. When such weapons are allowed in the community, death and serious injury are literally at hand, only an impulse and trigger-pull away ... .
>
> This problem is not unique to Alberta; it has become a nationwide phenomenon ... .
>
> These crimes present a particularly serious threat to the safety and security of the community. Like drug trafficking, they also require forethought and planning. The weapon must be obtained, which is in itself a serious offence. Keeping it loaded, or with ammunition nearby, means that it is to be used for more than intimidation. Simply put, carrying a loaded restricted or prohibited firearm is an extremely dangerous act for which there is absolutely no justification.

[17] The trial judge recognized that "for these reasons . . . deterrence and denunciation must be the primary objectives in the sentencing of firearm offences": Decision at paras 35-36. In addition to noting the numerous cases provided by both counsel the trial judge examined another 46 firearm sentencing decisions. He found that while a conviction for serious firearms offences will usually result in a penitentiary sentence, in certain cases involving "youthful first offenders and the absence of evidence of other criminality such as drug dealing or overt use of the firearm, the sentencing objectives of deterrence and denunciation can be achieved by the imposition of sentences in the high reformatory range. Among those cases, some may be eligible to be served in the community pursuant to a Conditional Sentence Order". He added: "Ultimately, I must determine a sentence that is proportional to the seriousness of the offence and to the degree of culpability of the offender": Decision at paras 44-45. This included considering whether a CSO was not only available, but appropriate.

[18] Pursuant to the four CSO criteria set out in s 742.1 of the *Criminal Code* and ***R v Proulx***, 2000 SCC 5, [2000] 1 SCR 61 [***Proulx***], the trial judge found no minimum sentence applied for Mr Araya's offences, and he was eligible for a term of imprisonment "at or just below two years". Mr Araya had no criminal record and had "complied fully with the terms of his judicial interim release for a period of over two and half years", so the trial judge concluded that serving a sentence in the community would not endanger the safety of the community. On the final criterion, whether a CSO would be consistent with the fundamental purpose and principles of sentences in ss 718-718.2 of the *Criminal Code*, the trial judge found that deterrence and denunciation could be met through a carefully crafted CSO, while also assisting with Mr Araya's rehabilitation, his reparations to the community and promoting his sense of responsibility. The trial judge also determined that a CSO would be consistent with the principle of restraint and noted the federal government's recognition of the overincarceration of Black persons in the Canadian justice system. The trial judge found that sending the emotionally immature and easily influenced Mr Araya to the penitentiary "will almost certainly" ensure he is lost to the "unhealthy influences found therein": Decision at paras 50-59.

[19] The trial judge concluded that imposing a strict CSO and a Probation Order on Mr Araya would meet the fundamental purpose and principles of sentencing in ss 718-718.2 and 742.1. The first 21 months of the CSO were to be under house arrest with exceptions for work or educational training, and the final 3 months under a 6:00 pm to 6:00 am curfew. Intoxicants including alcohol were prohibited and 200 hours of community service were to be performed. The 2-year Probation Order was to include a 9-month 6:00 pm to 6:00 am curfew, a further 9-month 11:00 pm to 6:00 am curfew and a 12-month intoxicant ban.

Grounds of appeal

[20] The Crown argues four grounds of appeal:

1) The sentence imposed is not proportionate to the gravity of the offence and the offender's degree of moral blameworthiness.

2) The trial judge erred in his analysis of the aggravating and mitigating factors.

3) The sentence imposed did not properly reflect the paramount sentencing principles of deterrence and denunciation.

4) The sentence imposed is demonstrably unfit.

[21] Many of the arguments under these grounds overlap and will be dealt with together.

Standard of review

[22] As the Supreme Court recently reaffirmed in ***Sheppard*** at paragraphs 38-42, sentencing decisions "are discretionary and owed considerable deference from appellate courts". Deference is rooted in the fact that sentencing judges, especially trial judges, have the advantage of hearing the evidence and submissions first-hand, are "immersed in the jurisdiction where the offence took place and understand the needs of the community as they relate to denunciation and deterrence". Deference also protects against the misuse of judicial resources and unnecessary delay.

[23] As a result, an appellate court may only intervene where there has been an "error in principle that impacted the sentence or where the sentencing is demonstrably unfit". Errors in principle can include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. Importantly, "[a]ppellate courts must take great care not to allow their own assessment of the record, and what weight they would have given to various factors, to colour the lens through which they view the sentencing judge's reasoning": ***Sheppard*** at paras 38-40 and citing ***Proulx*** at paras 123-125.

[24] "A sentence is demonstrably unfit only if it is an unreasonable departure from the principle of proportionality": ***R v Cope***, 2026 SCC 32 at para 203 [***Cope***] (per Rowe and Jamal JJ in dissent, but not on this point), and citing ***R v Lacasse***, 2015 SCC 64 at para 53, [2015] 3 SCR 1089 [***Lacasse***], and ***R v Parranto***, 2021 SCC 46 at para 30, [2021] 3 SCR 366. Proportionality is central to the sentencing process, serving as a "limiting or restraining function" so that the sentence does not exceed what is appropriate for the offence and the offender. It is counter-balanced by a "just desserts" philosophy which ensures offenders are "held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused". Nevertheless, "the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it": ***R v Nasogaluak***, 2010 SCC 6 at paras 41-42, [2010] 1 SCR 206 [***Nasogaluak***].

[25] The sentencing provisions of the *Criminal Code* empower sentencing judges with "broad discretion to craft a sentence tailored to the nature of the offence and the circumstances of the offender. The determination of a 'fit' sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case": ***Nasogaluak*** at para 43.

Analysis

[26] Carrying a loaded handgun in public is an extremely grave offence and must be treated as such. "Gun violence and the potential for gun violence is a serious problem and an affront to a society that values the Rule of Law and maintaining a just, peaceful and safe society. It cannot be tolerated": ***R v Kumi***, 2019 ABCA 496 at para 21; see also ***Chin*** at paras 10-12; ***Saeed*** at para 15. These concerns were reiterated in ***R v Morris***, 2021 ONCA 680 at para 68 [***Morris***]:

> Gun crimes involving the possession of loaded, concealed firearms in public places pose a real and immediate danger to the public, especially anyone who interacts with the gun holder … A person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. Carrying a concealed, loaded handgun in a public place in Canada is antithetical to the Canadian concept of a free and ordered society. [Citations omitted]

[27] As ***Nur*** provided at paragraphs 6-14, Parliament has taken extensive measures to protect the public and deter firearm-related offences through both licensing and registrations requirements (*Firearms Act*, SC 1995, c 39 and related regulations) and criminal prohibitions. Anyone wanting to possess a firearm must meet the strict criteria for a license, and the illegal possession and use of a firearm is subject to criminal offences and the potential for significant penal consequences.

[28] After various mandatory minimum penalties for firearms-related (and other) offences were struck down as being unconstitutional, including in ***Nur***, Parliament in November 2022 enacted Bill C-5 which repealed many of these penalties, and CSOs once again became available for 13 firearms offences. The stated objectives of Bill C-5 included the promotion of "fairer and more effective responses to criminal conduct, and to address systemic racism and discrimination in Canada's criminal justice system". The Government of Canada acknowledged that "restrictions on the use of [CSOs] and the greater use of [mandatory minimum penalties] have contributed to the overincarceration of Indigenous people, Black persons and members of marginalized communities", and further stated: "The proposed reforms would enable sentencing courts to impose just sentences that are proportionate to the degree of responsibility of the offender and the gravity of the offence".[1]

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[1] **Bill C-5,** ***An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*****,** Policy Q's and A's – What are the Objectives of the Bill? https://www.justice.gc.ca/eng/trans/bm-mb/other-autre/c5/qa-qr.html#q2

[29] Shortly thereafter however, on December 15, 2023, the maximum penalty for some weapons offences, including s 95 – unlawful possession of a prohibited or restricted firearm – was raised from 10 to 14 years imprisonment. This signified Parliament's continuing view that such offences remain an extreme danger to Canadian society and must be met with a proportionate response from our courts: see ***Sheppard*** at para 74.

[30] While the trial judge did not have the benefit of this Court's recent decision in ***Saeed***, he quoted the relevant passages related to possession of a loaded firearm in ***Chin*** (*supra,* para 16), finding that such an act was "extremely dangerous. . . for which there is no justification". He further determined that for those reasons, deterrence and denunciation were paramount in determining Mr Araya's sentence: Decision at paras 35-36.

1. The sentence imposed is not disproportionate to the gravity of the offence and the offender's degree of moral blameworthiness

[31] As with all criminal penalties, proportionality is the fundamental principle of sentencing. "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender": s 718.1 of the *Criminal Code.* As explained in ***Nur*** at paragraphs 42-45, "imposing a proportionate sentence is a highly individualized exercise, tailored to the gravity of the offence, the blameworthiness of the offender, and the harm caused by the crime. . . 'Only if this is so can the public be satisfied that the offender 'deserved' the punishment he received and feel a confidence in the fairness and rationality of the system'" (citations omitted). While courts may use a sentence to send a deterrence message, the offender must nevertheless deserve the sentence; "a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending". See also ***R v CAM***, 1996 CanLII 230 (SCC) at para 40, [1996] 1 SCR 500 [***CAM***]; ***R v Ipeelee***, 2012 SCC 13 at para 37, [2012] 1 SCR 433; ***Lacasse*** at paras 12, 53; ***Cope*** at para 36.

[32] The trial judge extensively discussed the purpose and principles of sentencing, with particular attention given to proportionality, noting both its codification in the *Criminal Code* and its status as a "fundamental principle of justice". He stated that a fit sentence "is one that is commensurate with the gravity of the offence and the moral blameworthiness of the offender", citing ***CAM*** and ***Proulx***. The trial judge correctly held that while proportionality is the fundamental principle of sentencing, it is not the only relevant principle and sentencing courts must consider parity, totality and restraint, with restraint being particularly important where incarceration is a possible disposition, per ss 718.2(d) and (e): Decision at paras 21-29.

[33] The Crown submits the trial judge committed errors in his assessment of proportionality in relation to Mr Araya's degree of moral blameworthiness.

Criminality

[34] First, the Crown argues the trial judge erred in finding Mr Araya's moral culpability was reduced because there was no proof of additional criminality while in possession of the handgun. We find no support for this argument in the record. In setting out the circumstances of the offence, the trial judge found "no evidence of any other criminality surrounding Mr. Araya's possession of the firearm, such as drug dealing, intimidation, etc": Decision at para 10. The trial judge did not use this fact as a mitigating factor, nor as a reason to "reduce" Mr Araya's culpability. His role was to assess moral blameworthiness in all the circumstances; lack of additional criminality was relevant to that assessment. More specifically, what Mr Araya did, and by extension did not do, while possessing the gun spoke to his moral blameworthiness. The Crown's arguments about aggravation caused by his flight with the gun and his possible possession of it in his home illustrate this point.

[35] In discussing the sentencing range for similar firearm offences, the trial judge was entitled to note that some cases, as summarized in ***Stewart***, 2022 ONSC 6997 at paras 74-80 [***Stewart***], and citing ***Morris***, provide that the "range [includes] sentences as low as upper reformatory (including conditional sentences) for young first offenders, where other criminality such as drug dealing or making threats using the firearm is not proven ... [A] higher range above three years ... typically is applied where there is evidence that a firearm was possessed in connection with some other criminality": Decision at paras 37-45. The trial judge did not use this information to "reduce" Mr Araya's culpability, but to properly assess proportionality in the context of parity. This type of balancing was required and did not lead to reviewable error. As stated in ***Lacasse*** at paragraph 53: "Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(a) and (b) of the *Criminal Code".* Without losing sight of the seriousness of the offence, the trial judge reasonably found at paragraph 44 of the Decision that a CSO is available in certain circumstances:

> From a review of these cases I distill the following: that, although a conviction for a serious firearms offence will usually result in the imposition of a penitentiary sentence, in certain cases, often involving youthful first offenders and the absence of evidence of other criminality such as drug dealing or overt use of the firearm, the sentencing objectives of deterrence and denunciation can be achieved by the imposition of sentences in the high reformatory range. Among those cases, some may be eligible to be served in the community pursuant to a Conditional Sentence Order.

[36] To the extent the Crown argues Mr Araya's moral culpability was much like that of the offender in ***Saeed***, namely that Mr Araya had no legitimate purpose for possessing the handgun, and then later fled from police, we are unable to accede to these arguments. At best, the Crown is taking issue with clear findings of fact made by the trial judge which are owed deference; at its

weakest, the Crown's argument attempts to litigate issues on appeal that were not argued at the sentencing hearing.

[37] We do not agree that Mr Araya's moral culpability is at the level of the more serious circumstances in ***Saeed***. Mr Saeed was on release at the time of committing his firearm offence, with specific conditions that included house arrest and a firearms ban. The police were called after Mr Saeed was involved in a domestic dispute, following which he left the residence with a gun. He later ran from police when confronted, at one point reaching into his satchel which held the gun before he slipped and fell dropping the satchel; he got up and continued to flee. The gun in that case had a round in the chamber. In overturning the CSO, this Court found the sentencing judge "disassociated the respondent's offence from its admitted domestic dispute context", a fact which "cannot be overlooked". This Court also concluded the sentencing judge "said nothing about the respondent's attempted flight from police or that he was reaching into the satchel where the loaded gun was located when he slipped and fell, further minimizing the threat the respondent's criminal conduct actually posed". As this Court previously found in ***Saeed*** (referring to Mr Araya's sentencing Decision), the offences committed by Mr Saeed are not "on all fours" with the circumstances here: ***Saeed*** at paras 18-19, 27.

[38] We make a similar finding with respect to the facts in ***Burke-Whittaker***, where Mr Burke-Whittaker attended a funeral of someone killed by a shooting in downtown Toronto, took out a firearm from his satchel, and fired the gun in the direction of a moving car from which shots had been fired into a crowd. It was indeed "moral luck" that no one was killed or injured. ***Nur*** is also distinguishable; while being chased by police, Mr Nur threw away a loaded semi-automatic firearm with an oversized ammunition clip with 23 bullets in the clip and 1 in the chamber.

Flight

[39] The Crown argued at the sentencing hearing that Mr Araya's flight from police when confronted outside the pharmacy was aggravating, as was the fact Mr Araya had to be "taken down".

[40] Generally, flight from police while possessing a loaded firearm has two discrete and highly aggravating features. First, flight with a loaded firearm presents a significant safety risk to the police and the public. As this Court found in ***Saeed*** at paragraph 17, quoting ***Morris*** at paragraph 68:

> . . . When the person with the gun is confronted by the police, who are engaged in the lawful execution of their duties, the risk increases dramatically. It increases yet again when the gun holder flees, and still again when the gun holder discards the weapon in a public place. A person who carries a concealed, loaded handgun in public undermines the community's sense of safety and security. . . [it is] antithetical to the Canadian concept of a free and ordered society: see [***R v***

Nur, 2013 ONCA 677], at paras. 82, 206 [*Nur CA*]; *R. v. Felawka*, 1993 CanLII 36 (SCC), [1993] 4 S.C.R. 199, at pp. 214-15.

[41] Second, flight from police while carrying a loaded firearm increases an offender's moral culpability for and the gravity of the possession offence. This by necessity alters the proportionality assessment, and the need for denunciation and deterrence.

[42] The issue of whether Mr Araya fled from police was squarely before the trial judge, who studied the police video of Mr Araya's arrest and heard all the evidence. Mr Araya's counsel argued flight had not been proven beyond a reasonable doubt, pointing to the video: "These two individuals walk through a blind corner, and big guys with guns jump out screaming at them. He turns around and within a second-and-a-half he falls over his feet". During the discussion with counsel, the trial judge agreed stating he did "not place much weight on that", from what he observed it was "more of a reaction" and he "suspect[ed] in the accused's mind he was not clear at that moment whether these were police or somebody else who is looking to do him harm". That is an expression of reasonable doubt, and the trial judge was entitled to find no aggravating flight.

[43] We are further guided by the Supreme Court's direction in ***R v GF***, 2021 SCC 20 at para 79, [2021] 1 SCR 801, albeit in the context of a conviction appeal, that an appellate court is not to parse a trial judge's reasons in a search for error; rather, the reasons must read as a whole and considered in light of the evidence and the arguments made. "Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error" (citations omitted). (This guidance applies equally to our assessment below of the Crown's argument that the trial judge gave a sentencing discount based on Mr Araya's racialization.)

[44] Regardless, the "flight" in this case is materially different from the other cases relied on by the Crown; there is no finding Mr Araya used or brandished the gun, reached inside the satchel, or discarded the gun while being chased. He was not "taken down" but fell and was immediately arrested. While we in no way excuse Mr Araya's actions, the gravity of this offence is informed by its own set of surrounding circumstances.

Gun in Mr Araya's home

[45] The Crown appellant argues Mr Araya had the gun in his home prior to taking it into the vehicle and then the pharmacy, elevating the seriousness of the offences and the need for denunciation and deterrence. However, the trial judge did not rely on such a finding because of the Crown's position at the sentencing hearing. While Mr Araya's trial counsel made submissions about how Mr Araya came to possess the handgun, and its storage in his house before getting into Mr Lugela's vehicle, Crown counsel specifically objected to these submissions because that evidence did not come from Mr Araya himself: "You don't have Mr. Araya testifying in the trial as far as how he obtained the gun. You don't have even at sentencing now an affidavit from Mr.

Araya . . . So, in essence, what my friend is doing is he's simply proffering a reason as to how this firearm came about post trial, post conviction, and respectfully, it's not proper. You don't have that evidence before the court".

[46] The trial judge apparently agreed with this argument as he did not comment on the gun being in Mr Araya's home in his sentencing reasons. The Crown's change of position on appeal, which seeks to establish an error on the part of the trial judge, is not compelling. To the extent the Crown further hints Mr Araya was returning the handgun to Mr Lugela knowing that he had committed an armed robbery, this was also not established on the record.

Racialization

[47] The Crown argues the trial judge erred in his analysis of whether Mr Araya's membership in a racialized community affected his moral culpability. The Crown does not dispute that Mr Araya is racialized, nor does it take issue with these findings on sentence:

> [31] Mr. Araya is a member of a racialized community. Although the hard work of his parents has spared their family the difficulty of economic hardship often experienced by racialized groups, and indeed has afforded Mr. Araya a middle-class upbringing, that is not the same thing as saying that Mr. Araya has experienced no anti-Black prejudice. As the Ontario Court of Appeal noted in its opening paragraph in ***Morris***:
>
> > It is beyond doubt that anti-Black racism, including both overt and systemic anti-Black racism, has been, and continues to be, a reality in Canadian society, and in particular in the Greater Toronto Area. That reality is reflected in many social institutions, most notably the criminal justice system. It is equally clear that anti-Black racism can have a profound and insidious impact on those who must endure it on a daily basis: [citations and other references omitted] ... Anti-Black racism must be acknowledged, confronted, mitigated and, ultimately, erased. This appeal requires the court to consider how trial judges should take evidence of anti-Black racism into account on sentencing.

[48] Rather, the Crown argues Mr Araya's counsel "convinced the Trial Judge that the existence of institutional racism itself was sufficient to mitigate sentence. The Trial Judge merely stated that because [Mr Araya] is a young Black man, his moral culpability was reduced". We do not find that trial counsel made such arguments, nor did the trial judge make those findings.

[49] While Mr Araya's trial counsel pointed to Mr Araya being "an 18 year old, at the time, without a record, who's a marginalized member of the community", he did so largely in relation

to the applicable legislative framework. He further stated that "Parliament has through Bill C-5 communicated to courts across the country that over incarceration, particularly of marginalized populations like Indigenous and [B]lack, and other racialized populations, cannot continue". Counsel then made submissions about Parliament's legislative changes and Minister of Justice and Attorney General of Canada David Lametti's comments in making CSOs available once again for firearms offences. Counsel submitted that "the government has confidence that this tool can accomplish the kinds of objectives that will help Mr. Araya not be before you again". Counsel also discussed ***Proulx***, ***R v Gladue***, 1999 CanLII 679 (SCC), [1999] 1 SCR 688, and the principles of restraint, rehabilitation, reparations to the community and the promotion of responsibility. Counsel did not argue that race was either mitigating or a specific reason for a reduction of Mr Araya's sentence, only that a CSO was available and should be considered in the specific circumstances of this case.

[50] In particular, the Crown relies on two statements of the trial judge that "while Mr Araya's racialization is not strictly a mitigating factor, it must be factored into his moral culpability when calculating proportionality" (emphasis added): Decision at paras 32 and 54. We interpret those statements to be an acknowledgment by the trial judge that he was required to consider whether racialization affected the assessment of moral culpability. Reading the judgment holistically and considering the entire record and the arguments, we are not persuaded the trial judge found Mr Araya's racialization had an impact on his moral culpability. More specifically, we do not find the trial judge reduced Mr Araya's moral culpability for these offences due to his racialization.

[51] While ***Saeed*** was not decided at the time Mr Araya was sentenced, this Court has confirmed that mitigation of sentence is not "based simply on the existence of overt or institutional racism in the community": ***Saeed*** at para 24, citing ***Morris*** at para 97. More specifically, as explained in ***R v Pierre***, 2023 ABCA 300 at paras 6-7 (again decided after the trial judge's Decision), this Court has "no difficulty in taking judicial notice that systemic anti-Black racism exists in Alberta. . . [but that] is only the beginning of the *Morris* analysis". While "the offender is not required to establish a direct causal link between racism and the offence. . . 'absent some connection' . . . 'mitigation of sentence based simply on the existence of overt or institutional racism in the community becomes a discount based on the offender's colour. Everyone agrees there can be no such discount': *Morris* at paras 96-97".

[52] We agree with the Crown that being Black is not a mitigating factor that automatically discounts moral culpability. Nor does being Black lead to an automatic sentencing discount. Read holistically, however, the trial judge's reasons made no finding that Mr Araya had experienced specific anti-Black racism or that his moral blameworthiness for the offences was impacted by or reduced because of racialization. The trial judge was not misdirected by Mr Araya's counsel, and ***Morris*** was squarely before him including its limits on mitigation; direct reference was made to that decision in the trial judge's comments on racialization.

[53] The trial judge discussed racialization in the context of restraint, referring to the comments of Minister Lametti about overincarceration and overrepresentation of marginalized groups, and the benefits of using CSOs in lieu of incarceration generally. The trial judge repeatedly demonstrated he understood denunciation and deterrence to be paramount sentencing principles for gun crimes. He balanced that paramountcy against restraint, rehabilitation, reparations, and public safety in relation to the gravity of the offences committed by Mr Araya and his degree of responsibility. This was crystalized in the Decision's "Conclusion" where Mr Araya's rehabilitation was balanced against the heightened risk that incarceration will turn this youthful offender into a hardened criminal, causing a long-term public safety risk, and citing ***Proulx*** at paragraph 16. All these principles will be discussed below when assessing the conditions imposed on Mr Araya under the CSO and Probation Order in relation to the issue of fitness.

[54] We do not find the trial judge reduced Mr Araya's sentence based on his race.

Conclusion on Ground 1

[55] The trial judge recognized that proportionality is the fundamental principle of sentencing. He did not underemphasize the gravity of the offence committed by Mr Araya, nor his moral blameworthiness by erring in his consideration of whether there was additional criminality by Mr Araya, flight from police, a gun in his home, or with respect to racialization. This ground of appeal is dismissed.

2. The Trial Judge did not err in his analysis of the aggravating and mitigating factors

[56] We need not repeat our findings in relation to the flight and the handgun being in Mr Araya's home in the context of the Crown's further argument that these factors should have been considered aggravating by the trial judge.

[57] The Crown also argues the trial judge found mitigating factors that were not mitigating, including Mr Araya's lack of a criminal record, that he could obtain and maintain employment, had complied with bail for 2.5 years, and had a supportive family. Again, we cannot accede to these arguments.

[58] We agree with Mr Araya that while the trial judge's comments on these circumstances appear under the heading "Mitigating Circumstances" in the Decision, they were not treated as such but were related to his assessment of the "circumstances of the offender", particularly Mr Araya's prospects for rehabilitation.

[59] The trial judge specifically found that lack of a criminal record was not a mitigating factor but instead, a lack of an aggravating factor; it "serve[s] to show the offence as out of character, and to inform his prospects of rehabilitation": Decision at para 26. These findings were open to

the trial judge, who did not otherwise ignore, but rather stated more than once, that Mr Araya was "easily influenced", a "people pleaser", "lacking in social" skills, "self-esteem and confidence", and failed to "recognize how that makes him susceptible to negative influences": Decision at paras 18, 58. While there were limits to this evidence, the trial judge did not misuse these considerations.

[60] Similarly, no reviewable error arises from the trial judge's finding that Mr Araya had completed several safety certificates and had a history of working in the oil patch. He also found it reasonable, in the face of a possible penitentiary sentence, that Mr Araya held off on further employment or schooling. These findings were open to the trial judge, and he was not obligated to discount the submissions or evidence on these points as suggested by the Crown, merely because other offenders might have made different choices in the same circumstances. The trial judge was further entitled to note Mr Araya had been successfully on bail for 2.5 years. While the Crown argues these conditions were "not onerous", compliance remains relevant to whether the offences may have been "out of character", and more importantly, whether Mr Araya could safely comply with conditions imposed on a CSO or Probation Order.

[61] Lastly, there was no palpable and overriding error in the trial judge's conclusion that Mr. Araya had a supportive family. His father described him as a "good kid", with a "big heart", and significant resources were set aside for his further education. Mr Araya benefits from family members who want to see him succeed. At the same time, while his family remains supportive, they acknowledge that Mr Araya requires self-improvement, including through counselling, and that he should work on his confidence, communication skills, self-awareness about the offence and negative peers, and his social skills. As the trial judge found, "Mr Araya has a supportive family, whose support can become more effective contingent on Mr. Araya's better communication with them": Decision at para 27. This measured and balanced finding is free from error.

[62] Finally, we reject the general notion that where some aggravating and mitigating factors cannot be differentiated from other cases, a court must inevitably end up at the same result. That is for the trial judge to assess and weigh, and deference is owed unless that analysis is unreasonable.

[63] This ground of appeal is dismissed.

3. The sentence imposed adequately reflected the paramount sentencing principles of denunciation and deterrence

4. The sentence is not demonstrably unfit

[64] We will address the final two grounds together.

[65] This matter ultimately falls to be determined on whether the required denunciation and deterrence, both general and specific, can be achieved by Mr Araya receiving a CSO, having regard for all the circumstances.

[66] As set out above, the gravity of Mr Araya's unlawful possession of a loaded firearm in a public place is extremely dangerous and cannot be tolerated on our streets; it is contrary to the moral fiber at the foundation of the Rule of Law. In this respect, we are mindful of the Supreme Court's recent guidance: "The objective of denunciation in particular demands a contemporary perspective because it entails condemning the offender 'for encroaching on our society's basic code of values' (*Friesen*, at para. 105, citing *M. (C.A.)*, at para. 81)": ***Sheppard*** at para 71.

[67] As ***Sheppard*** continued, however, "[t]o sentence in a manner that breathes new life into dated or defunct societal values would distort the expressive function of the criminal justice system". Here this applies not only to the general notion that courts do not acknowledge the serious nature of firearms offences unless a significant period of incarceration is imposed, but more specifically that a CSO (and its renewed availability) for firearms offences, can never properly address their seriousness and the need for denunciation and deterrence.

[68] Importantly, the trial judge determined that the imposition of a CSO is consistent with the principle of restraint: Decision at para 53. In particular, he noted that ***Morris*** at paragraph 124 states: "The restraint principle plays a specific and important role in sentencing for serious crimes like crimes involving the unlawful possession of loaded handguns. Because of the seriousness of [such] crimes. . . some term of imprisonment will usually be required to reflect the seriousness of the crime". As ***Morris*** also found, the "requirement of a sentence of imprisonment does not, however, end the operation of the restraint principle" which will favour "conditional sentences over incarceration if a conditional sentence is consistent with the proportionality principle" (emphasis added), citing ***R v RNS***, 2000 SCC 7 at para 21, [2000] 1 SCR 149. Further, "a carefully fashioned conditional sentence that is responsive, both to the needs of denunciation and deterrence and the rehabilitative potential of the offender, can, in some situations, be a fit sentence for a s 95 offence": ***Morris*** at paras 125-126; Decision at para 53. We agree. This is entirely consistent with the Supreme Court's recent reminder in ***Cope*** at para 73 that a "sentencing judge must still weigh *all* the relevant sentencing objectives, including rehabilitation, even where deterrence and denunciation are owed primary consideration" (citations omitted) (emphasis in original).

[69] More than 25 years have passed since the Supreme Court of Canada's decision in ***Proulx*** which followed the 1996 sentencing reforms that created a new conditional sentence of imprisonment where certain conditions are met, including that the predicate offence have no mandatory minimum penalty. Since then, Canada has seen a series of mandatory minimum penalties enacted for various offences, including unlawful possession of a firearm, thereby eliminating the possibility of a conditional sentence. Those penalties were later struck down as unconstitutional and many ultimately repealed. Maximum sentences were soon after increased for

various offences. Parliament, the courts, and the Canadian public have wrestled with the notion of restorative justice versus traditional incarceration, and the related ills of overincarceration for certain groups, for almost three decades. While the debate has come full circle, this does not by itself answer the question of whether a CSO (and its conditions) may be appropriate or fit in an individual case. Amid this context, it is important to review both the merits and limits of the conditional sentence regime, as well as potentially dispel any lingering misconceptions that a CSO is not a punitive sentence.

Conditional sentences generally

[70] The sentencing criteria for imposing a conditional sentence are set out in s 742.1 of the *Criminal Code*, which at the time Mr Araya was sentenced in 2023 provided as follows:

> **Imposing of conditional sentence**
>
> **742.1** If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if
>
> > **(a)** the court is satisfied that the 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 set out in sections 718 to 718.2;
> >
> > **(b)** the offence is not an offence punishable by a minimum term of imprisonment;
> >
> > **(c)** the offence is not an offence under any of the following provisions:
> >
> > > **(i)** section 239, for which a sentence is imposed under paragraph 239(1)(b) (attempt to commit murder),
> > >
> > > **(ii)** section 269.1 (torture), or
> > >
> > > **(iii)** section 318 (advocating genocide); and

> **(d)** the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more.

[71] As the Supreme Court further elaborated in ***Proulx***, four criteria must be met before a conditional sentence may be imposed:

1) no minimum term of imprisonment is attached to the offence;

2) a sentence of less than 2 years is the appropriate range of sentence (i.e. a penitentiary term and probationary measures are inappropriate);

3) "the safety of the community would not be endangered by the offender serving the sentence in the community"; and

4) a conditional sentence "would be consistent with the fundamental purpose and principles of sentences set out in ss 718.718.2": at para 46.

[72] "The requirement in s 742.1(*b*) that the judge be satisfied that the safety of the community would not be endangered by the offender serving his or her sentence in the community is a condition precedent to the imposition of a conditional sentence, and not the primary consideration in determining whether a conditional sentence is appropriate". The risk posed by the specific offender is to be considered, "not the broader risk of whether the imposition of a conditional sentence would endanger the safety of the community by providing insufficient general deterrence or undermining general respect for the law": ***Proulx*** at paras 66-68, 127. Two factors are considered when assessing the safety of the community: "(1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence": ***Proulx*** at para 69.

[73] A conditional sentence is not probation, which is largely a rehabilitative sentencing tool. Rather, conditional sentences are meant to incorporate both punitive and rehabilitative aspects. An offender's liberty should be restricted while serving a CSO and house arrest is "the norm, not the exception": ***Proulx*** at para 36. While a significant difference exists between serving a sentence in an institution and serving a sentence in the community, "[t]his is not to say that the conditional sentence is a lenient punishment or that it does not provide significant denunciation and deterrence, or that a conditional sentence can never be as harsh as incarceration". Indeed, a "conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls": ***Proulx*** at para 41. Further, conditional sentences are not subject to reduction though parole, and there is generally one primary punishment for breaching conditions – some form of incarceration, including serving all the time remaining on the CSO in jail.

[74] A conditional sentence need not be of equivalent duration to a sentence of incarceration that would otherwise be imposed; rather, the "sole requirement is that the duration and conditions of a conditional sentence make for a just and appropriate sentence": ***Proulx*** at para 104. Significant denunciation and deterrence can be provided by a conditional sentence, and generally, the more serious the offence, the longer and more onerous the conditions that should be imposed. However, circumstances may arise "in which the need for denunciation is so pressing that incarceration will be the only suitable way to express society's condemnation of the offender's conduct": ***Proulx*** at para 106. Such offences are to be approached individually, not categorically, and there is no presumption that a conditional sentence will not apply to certain offences. ***Proulx*** elaborates at paragraphs 81 and 114:

> . . . [W]hile the gravity of such offences is clearly relevant to determining whether a conditional sentence is appropriate in the circumstances, it would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences. Offence-specific presumptions introduce unwarranted rigidity in the determination of whether a conditional sentence is a just and appropriate sanction. Such presumptions do not accord with the principle of proportionality set out in s. 718.1 and the value of individualization in sentencing, nor are they necessary to achieve the important objectives of uniformity and consistency in the use of conditional sentences.
>
> . . .
>
> Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.
>
> [See also para 127 which provides a summary of all the principles related to conditional sentences.]

[75] Importantly, a conditional sentence is generally better than incarceration at achieving the restorative objectives of sentencing, such as rehabilitation, reparations to victims and the community, promoting a sense of responsibility in the offender and acknowledgment of the harm caused by the offence: ***Proulx*** at para 22, 109, 127.

[76] In summary, the renewed availability of conditional sentences for many offences including unlawful firearm possession, requires judges to give serious consideration to a conditional sentence by examining its consistency with the purpose and principles of sentencing set out in ss 718 to 718.2 in a specific case. Parliament's message is once again clear – reduce the use of incarceration as a sanction in appropriate cases and by extension, overincarceration: ***Proulx*** at paras 20, 90, 98. "Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration": at para 127.

[77] Appeals involving conditional sentences are subject to the same standard of review as other sentence appeals; "a trial court is entitled to considerable deference from appellate courts" as to the choice of the appropriate sentence. As ***Proulx*** at paragraphs 123-125, 127(13) made clear, "[i]n the context of the conditional sentence, s. 742.1 provides that the judge 'may' impose a conditional sentence and enjoys a wide discretion in the drafting of the appropriate conditions, pursuant to s. 742.3(2)". There is no prescription for how a judge achieves denunciation and deterrence. Paramountcy of these sentencing objectives "does not require reflexive increase in the severity of sentences, or a presumptive custodial sentence, without consideration of the other factors": ***Cope*** at para 79.

[78] Moreover, "[a]lthough an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant [appellate] intervention". In short, "appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit": ***Proulx*** at para 125.

Principles related to fitness of sentence

[79] Sentencing is an individualized process, and a trial judge is vested with considerable discretion in fashioning a fit sentence. As stated in ***Proulx*** at paragraphs 82-83, this rationale stems from the fundamental principle of proportionality, which "requires an examination of the specific circumstances of both the offender and the offence so that the 'punishment fits the crime'. As a by-product of such an individualized approach, there will be inevitable variation in sentences imposed for particular crimes". Further, any "suggestion that the proportionality principle presumptively excludes certain offences from the conditional sentencing regime. . . fundamentally misconstrues the nature of the principle" by focusing "inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender . . . Proportionality requires that full consideration be given to both factors" (emphasis in original).

[80] In ***Lacasse*** at paragraphs 52-53, various expressions are used to describe a sentence that is demonstrably unfit: "'clearly unreasonable', 'clearly or manifestly excessive', 'clearly excessive or inadequate', or representing a 'substantial and marked departure' . . . All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence". Again, this "inquiry must be focused

on the fundamental principle of proportionality . . . A sentence will therefore be demonstrably unfit if it constitutes an unreasonable departure from this principle". Proportionality is concerned with both the offender and the offence committed, "and by comparison with sentences imposed for similar offences committed in similar circumstances. Individualization and parity of sentences must be reconciled for a sentence to be proportionate: s. 718.2(*a*) and (*b*) of the *Criminal Code*".

[81] Determining whether a sentence is fit also requires that the sentencing objectives set out in s 718 of the *Criminal Code* and the other sentencing principles set out in s. 718.2 be considered. "Once again, however, it is up to the trial judge to properly weigh these various principles and objectives, whose relative importance will necessarily vary with the nature of the crime and the circumstances in which it was committed". Importantly, the principle of parity of sentences, is secondary to the fundamental principle of proportionality; "there is no such thing as a uniform sentence for a particular crime. . . and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction": ***Lacasse*** at para 54, quoting from ***CAM*** at para 92; ***Sheppard*** at para 105.

[82] A sentence falling outside a range of appropriate sentences is not necessarily unfit. Regard must also be had to all the circumstances of the offence and the offender, and to the needs of the community where the offence was committed. While parity in sentences is desirable, "the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded". Sentencing "goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit": ***Lacasse*** at para 58, citing ***Nasogaluak*** at para 44.

[83] As this Court recently recognized in ***R v Friesen***, 2022 ABCA 147 at para 59 [***Friesen***], arguments about unfitness largely come "down to whether the sentence imposed is clearly disproportionate and fails to provide adequate denunciation and deterrence".

[84] With all of this in mind, we turn to the CSO imposed in this matter.

Is Mr Araya's CSO demonstrably unfit?

[85] To answer the question of fitness, we must start with a summary of the conditions of the CSO and Probation Order imposed on Mr Araya. In our view, the CSO imposed (and the Probation Order that follows it) is a significant sentence both with respect to its duration and punitive nature.

[86] The CSO is for a term of 2 years less a day. For the first 21 months of that Order, Mr Araya is on 24-hour house arrest, meaning he must remain in his home or on the grounds except for medical or other emergencies, work, education or vocational training, counselling, community service, and religious services. For the remaining 3 months of the Order, a curfew between 6:00 pm and 6:00 am must be maintained. The 2-year Probation Order following completion of the

CSO also includes a curfew, from 6:00 pm to 6:00 am for the first 9 months, followed by a curfew of 11:00 pm to 6:00 am for another 9 months. Similar terms were described as "very restrictive" in ***Friesen*** at paragraph 59.

[87] House arrest can be more lenient than prison and offers an offender certain advantages. However, the confinement imposed by house arrest is still limiting. For a young adult like Mr Araya, serving house arrest while under the required "house rules set out in writing by [his] parents", as ordered by the trial judge, is a significant loss of independence and will be a weighty endeavour.

[88] As recently stated in ***R v Sangster***, 2025 ONCJ 444 at para 47, "[h]ouse arrest is particularly difficult on offenders. It amounts to isolation. It can be extremely difficult on offenders who have families or vast networks of friends . . . [or] who have significant mental health and addictions problems. It is a significant imposition on an offender's liberty". ***Proulx*** reinforced at paragraph 105 that the "stigma" of house arrest should not be underestimated: "Living in the community under strict conditions ... can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison".

[89] House arrest may also have a specific rehabilitative effect "in so far as it prevents the offender from engaging in habitual anti-social associations and promotes pro-social behaviors such as attendance at work or educational institutions": ***Proulx*** at para 111. This rehabilitation effect is further aided by the condition that Mr Araya must complete 200 hours of community service in the first 18 months of the Order. Community service assists the offender in making reparations to the community and promotes a sense of responsibility; Mr Araya will also be seen by members of the public as paying back his debt to society: ***Proulx*** at para 112. Assessment, counselling, and treatment are to be completed as directed by Mr Araya's CSO Supervisor, and Mr Araya is required to work, or take educational training, as approved by his Supervisor.

[90] Further restrictions include that for the full term of the CSO and the first 12 months of the Probation Order, Mr Araya is prohibited from buying, possessing, using or consuming any intoxicating substances including alcohol, cannabis or any non-prescribed drugs, and is not to enter any liquor store or bar. He must remain in Alberta at his pre-approved residence, subject to monitoring by a land line telephone and spot checks, as well as random searches by a peace officer of his person or vehicle. Safety is addressed through a complete weapons ban, a no-contact condition with Mr Lugela, and regular reporting to the CSO Supervisor as directed. Most of these conditions continue into and for the duration of his Probation Order. Mr Araya's independence will be significantly restricted for four years, and his behaviour closely monitored.

[91] The Crown does not argue the conditions imposed on Mr Araya are neither punitive nor restrictive. Rather, it maintains a CSO generally does not meet the need for denunciation and deterrence in keeping with the gravity of the offences Mr Araya committed. The Crown compares

Mr Araya to the offenders in ***Saeed***, ***Nur,*** and ***R v Habib***, 2024 ONCA 830 (where a loaded handgun was brandished in a pizza store causing a staff member to flee and bystanders to fear for their safety). In those cases, the offenders received sentences in the range of 34 to 40 months. Again, we do not find the more serious facts in those cases are on par with the gravity of these offences, or Mr Araya's moral blameworthiness in all the circumstances.

[92] Importantly, the findings in ***Nur*** also do not support a rigid categorization of regulatory-type offences at the lower end and "danger" offences on the other. In our view, the middle category identified by the Supreme Court in that case where a 3-year sentence would be disproportionate, but not grossly so, is significant. Many offenders, Mr Araya included, may well fall within that part of the spectrum. Going "far beyond what is necessary in order to protect the public, . . . to express moral condemnation of the offender, and. . . to discourage others from engaging in such conduct. . . would [itself] be grossly disproportionate": ***Nur*** at para 104.

[93] The Crown argues that in reviewing the firearm jurisprudence, the trial judge unduly focused on whether a CSO was imposed in those cases, rather than on considering the circumstances of the offences or the offenders. It states that many of the cases listed by the trial judge were distinguishable because the offender, among other things, pled guilty, led evidence of anti-Black bias, had undertaken rehabilitation, had mental health issues, or the gun was not loaded or was in a private space. In contrast, the Crown contends Mr Araya did not plead guilty, had no mental health concerns and had a stable home, and had no remorse or insight for knowingly possessing a loaded firearm in a public place.

[94] In answering the Crown's arguments, we return to the warning in ***Proulx*** at paragraph 107:

> Judges should be wary . . . of placing too much weight on deterrence when choosing between a conditional sentence and incarceration. . . The empirical evidence suggests that the deterrent effect of incarceration is uncertain: see generally *Sentencing Reform: A Canadian Approach*, *supra*, at pp. 136-37. Moreover, a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences.

The trial judge in this case respected that caution.

[95] In our view, the trial judge made no reviewable error in carefully and fully assessing all the relevant sentencing principles in this matter, including the paramountcy of denunciation and deterrence. The sentence was not demonstrably unfit.

[96] More specifically, Mr Araya's sentencing options were not limited to actual incarceration merely for not pleading guilty, and certainly not for pursuing what the trial judge found was a "deliberate delay" of his *Charter* right to retain and instruct counsel upon arrest. Further, if an

offence meets the statutory requirements for a conditional sentence, a young, first-time offender with a supportive family and stable mental health may well be an appropriate case for community disposition.

[97] We accept that the gravity of the offence in this matter was high. But a sentencing analysis cannot be dominated solely by the gravity of the offence, which is only part of the proportionality assessment. As the trial judge noted from ***Morris*** at paragraphs 71, 131 (and quoting ***Nur*** at paragraph 82), while a three-year sentence may be appropriate "for the vast majority of offences" under s 95, "sentences at or just below the two-year mark may [also] be appropriate. . . When the sentencing judge determines that an appropriate sentence is in that range, counsel and the sentencing judge must fully explore various options which could eliminate or reduce the offender's period of actual incarceration while still giving effect to the proportionality principle". Particularly for those cases involving "young adults with no criminal record and good prospects for rehabilitation, a conditional sentence of imprisonment may be an appropriate sentence even for serious firearm possession offences: ***Morris*** at paras 124-28, 180-81": Decision at para 43, citing ***Stewart*** at paras 74-76. Given the changes brought about by Bill C-5 after ***Morris*** was determined, this can only be correct.

[98] The trial judge thoroughly canvassed the principles in ***Proulx***, including that a CSO is a punitive sanction which may not only provide the required denunciation and deterrence for a particular offence and offender, but may be better suited to achieving the restorative objectives of rehabilitation, reparation and the promotion of responsibility. Significant conditions were set out in Mr Araya's CSO addressing all these principles. It was not wrong for the trial judge to find that sentencing Mr Araya, "a young man who is emotionally immature, who is easily influenced and often a 'people pleaser', to the penitentiary. . . will almost certainly [mean we] have permanently lost him to the unhealthy influences found therein. As . . . noted in ***Proulx*** (at paragraph 16), 'Prison has been characterized by some as a finishing school for criminals and as ill-preparing them for re-integration into society'". In making these findings the trial judge did not improperly conclude that sending a young adult to the penitentiary in all circumstances is to be avoided; rather, his findings are grounded in his assessment of this particular offender as it relates to these offences.

[99] In sum, the Crown has not satisfied this Court that the balancing exercise undertaken by the trial judge was an unreasonable departure from the fundamental principle of proportionality, nor resulted in a demonstrably unfit sentence. We acknowledge that a period of incarceration in a penitentiary may well have been imposed on Mr Araya. However, that is not sufficient to disturb the result of a careful and thorough analysis by the trial judge, who was fully apprised of and guided by the facts and applicable law in this matter and exercised his discretion in a manner that demands deference.

[100] This ground of appeal is dismissed.

Conclusion

[101] The appeal is dismissed.

[102] Mr Araya's CSO has been suspended since September 19, 2023, pending both his conviction and sentence appeal. That suspension is lifted and Mr Araya will have until 4:00 p.m. on Friday October 30, 2026 to report to his CSO Supervisor.

Appeal heard on February 18, 2026

Memorandum filed at Calgary, Alberta
this 28th day of October, 2026

Pentelechuk A/C.J.A.

Grosse J.A.

Feth J.A.

Appearances:

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