Court of King's Bench of Alberta

Citation: R v TCF, 2022 ABKB 643

Date: 20220929
Docket: 161500723Q1
Registry: Calgary

Between:

His Majesty the King

Crown

- and -

T.C.F.

Offender

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Judgment
of the
Honourable Justice W.T. deWit

I. Introduction

[1] The offender T.C.F. was found guilty of sexual assault contrary to s. 271 of the *Criminal Code*. This matter is before the Court for sentencing. The offender T.C.F. was originally found not guilty after trial, but that acquittal was reversed by the Court of Appeal, (See: ***R v AE,*** 2021 ABCA 172), and T.C.F. was then found guilty of one count of sexual assault. The Supreme Court of Canada upheld the Court of Appeal's decision, and the matter was sent back to the Court of King's Bench for sentencing: ***R v AE***, 2022 SCC 4.

[2] The offender T.C.F. along with 2 other individuals were involved in sexual activity with the complainant, who was seventeen years of age, which involved rough sex and multiple partners. T.C.F. continued to have oral sex with the complainant after she revoked her consent by making sounds which indicated that she was in pain and saying "No". T.C.F. took no steps to determine whether the complainant was consenting after she withdrew her consent and continued with demands for oral sex and the continuation of oral sex, which the complainant was not consenting to.

[3] The defence takes the position that an appropriate sentence would be the time that T.C.F. served in pretrial custody which was 6 days or one time and a half of 9 days' incarceration. The Crown takes the position that T.C.F. should serve a sentence of 4-6 years' incarceration. These divergent positions require this Court to consider a number of issues regarding the appropriate sentence and most importantly the facts upon which the sentence is to be determined.

II. Facts

[4] In this case, the complainant gave consent to sexual activities with T.C.F. and the other 2 co-offenders and then withdrew that consent, but T.C.F. continued with the sexual activity that was already occurring and had been consented to after which the complainant withdrew her consent. That sexual activity was oral sex. Counsel for T.C.F. indicates that the offence in question began when the complainant uttered the word "No", and that the offence of sexual assault, with respect to T.C.F., only lasted 39 seconds. The defence also takes the position that the actions that T.C.F. is being sentenced for are the oral sex given by the complainant to T.C.F., which they concede was non-consensual.

[5] The Crown takes the position that the complainant rescinded her consent much earlier when she made sounds such as "ow", which indicated that she was in pain and that this was a signal that she was no longer consenting to the activities in question.

[6] In addition, the Crown indicates that when the complainant questioned whether this was on video, she was no longer consenting and from that time on T.C.F. was committing a sexual assault.

[7] The Crown also takes the position that T.C.F. is also liable for the actions of the other co-offenders which involved the slapping and hitting of the complainant and the touching of the complainant's vagina, which were actions of the co-offenders and not actions of T.C.F. The Crown argues that this was a group endeavour and T.C.F. was responsible for the actions of the co-offenders. The Crown conceded that this was not a situation where T.C.F. and the others were parties to the offence under s. 21 of the *Criminal Code*. However, the Crown took the position that this was a joint endeavour and therefore all were responsible for the others violent actions. I will deal with each of these factual issues.

III. Factual Issues

A. Video Recording Vitiating Consent

[8] In the Court of Appeal decision, Justice Martin discussed the issue of the recording of the sexual activity vitiating consent and came to the conclusion that he did not have to make that determination in this case as it had not been argued fully at trial and that it was unnecessary to address the matter further, but that he would make comments for future assistance.

[9] The transcript of the recorded sexual activity, marked as exhibit S2 in these proceedings shows that after the complainant became aware that the incident was being videotaped, the complainant stated "I need a Dick in my mouth Tim." This would clearly suggest that the complainant was consenting after she learned that a video was being recorded.

[10] In the end, Justice Martin, and the Court of Appeal did not order a new trial but substituted a conviction with respect to the charge against T.C.F. Mr. Justice Martin stated at paras 103-104:

> As to the surreptitious recording, the respondents maintain they would have presented their case, and cross-examined the complainant, differently had they not misunderstood the trial prosecutor's comments. Further, they submit that although the complainant was not asked about recording the encounter and did not expressly consent to it, her reaction on becoming aware the events were being recorded indicate she was consenting to it. They argue the complainant was not misled by their denial when she asked whether they were recording the activity as the video shows her then looking directly at the camera, apparently smiling, and continuing with the sexual activity. They say that with these ambiguous circumstances substituting verdicts would not be appropriate.
>
> I am inclined to agree. In the final analysis we are left without a determination whether the complainant consented to recording the activities on becoming aware that was happening and the scope of any such consent.

[11] In the Supreme Court decision, ***R v AE***, the Court at para 2 referred to ***R v Cassidy***, [1989] 2 SCR 345 which allows an appeal court to substitute a conviction instead of ordering a new trial, where the Court of Appeal has found there was an error of law and the facts necessary to support a verdict of guilty have been made out explicitly or implicitly or are not in issue. The Supreme Court then explained that the trial judge's explicit and implicit findings included the complainant's crying out "No" and T.C.F. not taking any steps to find out if the complainant had withdrawn her consent. In particular, A.E. slapped the complainant's buttocks and T.C.F.

continued to engage the complainant in sexual activity and ordered her to perform fellatio, after she had stated "No".

[12] In ***AE***, the Supreme Court then went on at paragraph 5 to state that the issue of surreptitious recording constituting fraud vitiating consent was a matter discussed by the Court of Appeal in *obiter*, but added that it was unnecessary for the Supreme Court to address it in the circumstances.

[13] Therefore, I infer that the issue of surreptitious recording vitiating consent did not meet the ***Cassidy*** test and is not part of the facts that I must consider for sentencing in this matter.

B. Whether the Words "No" Indicated the Withdrawal of Consent

[14] The trial judge in this case made certain factual findings which were upheld by the appellate courts. The trial judge had found that the complainant had expressed a desire or a willingness to engage in group rough sex with the offender and that there was consent to these actions. The Court of Appeal held that this finding was supported by the evidence. Justice Pentelechuk stated at para 151:

> As a starting point, the trial judge's factual findings that the complainant initiated group sex and asked that it be rough are entitled to deference. Indeed, the Crown does not challenge those findings. Giving full effect to sexual autonomy means that courts are not to decide whether sexual activity is "nice" or "normal", but strictly whether it was consensual. Where genuine, legally effective consent exists, unconventional sexual choices, even those that some might find offensive or questionable, should be protected.

[15] Justice Martin concurring in the same Court of Appeal decision, stated at para 92:

> In this case we have a video of part of the event and the trial judge's finding that the complainant consented to rough sex at the outset. As that finding is supported by the evidence and is not challenged by the Crown, the video must be viewed in that context and in light of the applicable law.

[16] The fact that the complainant consented to rough sex may suggest that some pain and indications of pain would be part of the sexual activity consented to. This factual issue was not fully determined by the appellate courts. Mr. Justice Martin, when determining whether a conviction could be entered, stated at paras 100-101:

> There are no express findings but two observations from the trial judge's reasons are telling. The first was his assessment of the complainant's statement to police which he interpreted as being "more consistent with her having commenced the sex consensually and having withdrawn her consent when it began hurting her" […]. The second was his rejection of AE's defence of mistaken belief the complainant was consenting to the use of the toothbrush, specifically the observation that AE had not obtained the complainant's consent to use the toothbrush as he did, and that he did not stop immediately when the complainant first uttered "No" […]. While those observations offer guidance, the video is determinative. The video leads to the inevitable conclusion that had the trial judge directed his mind to this issue, he would have found there were times when the complainant withdrew her consent yet the respondents did not pause until her

> consent was reestablished. No other reasonable conclusion is available on this record.
>
> The complainant clearly withdrew her consent when she cried out in pain as identified in para 36 above, and her consent was not reestablished until she agreed to perform fellatio on TF as shown near the end of the video. What transpired in the interim was a sexual assault.

[17] This quotation seems to suggest that the complainant's indication of pain by stating "ow", was sufficient to rescind consent. However, the Court of Appeal mentions the word "No" as clearly indicating that she was rescinding her consent.

[18] As stated by the Supreme Court of Canada at para 2, after mentioning the ***Cassidy*** test:

> The trial judge's explicit and implicit findings demonstrate that both AE and TCF continued, and AE escalated the sexual interactions with the complainant even after she cried out "No", without taking any steps to find out if she was withdrawing her consent.

[19] The Supreme Court of Canada went on to say that specifically T.C.F. continued to engage the complainant in sexual activity and ordered her to perform fellatio. I note that the Supreme Court did not mention that the complainant had made utterances indicating pain that withdrew her consent and focused on her using the word "No" to withdraw consent.

[20] The complainant said "ow", a number of times, but was then told by T.C.F. to perform oral sex and she answered: "Make me". She was then told that she was disobeying and answered by stating: "I'm sorry". After saying "ow" a number of times, the complainant then asked the offenders to hold her hair. It was shortly after she told the offenders to hold her hair that she then cried out "No". However, the transcript of the video shows the complainant saying "ow" and then clearly saying "No" were in fairly close proximity in time. The consent was clearly withdrawn at the time the complainant uttered "No", and in my view this is when the sexual assault by T.C.F. began. As I will discuss later, whether it lasted for 39 seconds or more, in my view does not lessen the seriousness of the sexual assault. In my view, whether one considers the indication of pain by the complainant or her using the word "No" does not change the seriousness of the sexual assault in this case to any great extent. Therefore T.C.F. is guilty of one count of sexual assault simpliciter and he is being sentenced for that offence which clearly began after the complainant stated "No".

C. Should T.C.F. be Sentenced for the Actions of the Other Offenders?

[21] After the complainant had said "No", T.C.F. told the complainant to keep doing it and "don't fucking stop" and "spread your legs". The Crown says this was encouragement towards the other offenders' actions and that T.C.F. is also culpable for the actions of the others, because the sexual assault by the others was related to the actions of T.C.F. She specifically stated in her oral submissions that all of the parties were in a joint group endeavour and that they were all responsible for each other's actions. However, the trial judge found that he was not satisfied that those utterances related to the use of the toothbrush and that they could easily have been related to the complainant's actions on T.C.F.'s penis. He also stated that T.C.F.'s comments about spreading her legs were equivocal. The trial judge also found that T.C.F. was in such a position that he could not really see what was happening behind the complainant and the actions of the co-offenders.

[22] Three judges of the Court of Appeal gave written decisions and these decisions were different regarding how many charges T.C.F. should be found guilty of committing. However, the Court of Appeal could not come to a consensus regarding the charge of sexual assault with a weapon against T.C.F. and dismissed the Crown's appeal of T.C.F.'s acquittal. He is therefore not being sentenced with respect to the use of the toothbrush on the complainant.

[23] The video in this case shows that the complainant was punched in her vagina by the co-offender A.E. Counsel for T.C.F. indicates that these actions by A.E. cannot be visited on T.C.F. as he did not commit this action and he was not participating in any sexual activity at the time this was occurring, except the oral sex that was being given to him by the complainant. He was simply present when the others were committing other acts. There is no mention of this activity in the trial judge's decision and the video makes it clear that A.E. was the person who punched the complainant in the vaginal area. For T.C.F. to be complicit he would have to be party to A.E.'s action pursuant to s. 21 of the *Criminal Code*. In the Court of Appeal decision, Justice O'Ferrall held that the "respondent's guilt arises from the fact that he was a willing participant in a group sexual activity." He then stated at paragraph 135: "A person who participates in a group which has as its intention the application of force to another person must accept the criminal liability which may flow from the conduct of each and every member of the group." In contrast, Justice Martin stated at paras 47-48:

> My colleague Pentelechuk JA would also dismiss the Crown's appeal from T.F.'s acquittal on count #2, the sexual assault with a weapon charge, but would have entered a conviction on the included offence of sexual assault simpliciter instead. My difficulty with that lies with the trial judge's findings of fact. In particular that T.F. knew nothing about the toothbrush, that his comments while the toothbrush was being used may have related to other sexual activity and his ultimate finding that the evidence did not satisfy him that T.F. "knew, aided or encouraged the use of the toothbrush" and was therefore not a party to that offence. In my opinion, those findings, based not only on the video but also T.F.'s testimony, absolved T.F. of liability as a party to that offence.
>
> Finally, it should be noted that the Crown did not argue, either before us or at trial, that T.F.'s guilt was established by virtue of him being a joint principal participating in a group assault and therefore responsible for all acts of the group. See for example, ***R v Strathdee***, 2020 ABCA 443. As that matter is not before us and as we do not have the benefit of counsels' submissions, I will not consider it now.

[24] The Supreme Court of Canada, does not mention or discuss the issue of whether the offenders would be parties to the offence pursuant to s. 21 of the *Criminal Code* but does state at para five:

> We note that the Court of Appeal of Alberta addressed other issues in *obiter*, including: T.C.F.'s liability for sexual assault with a weapon; whether surreptitious recording constitutes fraud vitiating consent; and whether consent to sexual activity can be given in situations involving intentional bodily harm. In the circumstances, it is unnecessary for us to address these issues.

[25] As I stated earlier, the Crown concedes that T.C.F. was not a party to the actions and offences committed by the co-offenders but maintained that T.C.F. was culpable for the actions

of the others. The Crown has provided a number of cases relating to group endeavours as an aggravating factor in sentencing: See ***R v Katsnelson,*** 2010 ONSC 2246, ***R v Owusu***, 2006 ABCA 239, leave to appeal to SCC refused 31757 (March 29, 2007), ***R v Cerventes***, 2021 ABPC 250. None of these cases deal with a situation where there is initial consent to a group sexual endeavour which is later rescinded and where certain parties to the group endeavour were convicted of other offences while others were not.

[26] In my view the findings of the trial judge as well as the comments of the Court of Appeal and the Supreme Court of Canada that these matters were discussed in *obiter* and the mentioning of T.C.F.'s liability for sexual assault with a weapon, which clearly required that he was a party to that offence, also being obiter, suggests that T.C.F. should not be found implicitly guilty and sentenced for the actions of the other co-offenders.

[27] The video evidence shows rough sex that may be considered offensive and disturbing for many. However, the comments of Justice Pentelechuk about the protection of unconventional sexual choices, that others might find offensive, must be followed. The comments made by both Justice Martin and Justice Pentelechuk, that the trial judge found that the complainant had consented to rough sex and that this finding should be given deference must also be followed by this Court. Lastly, the Supreme Court of Canada's comments that T.C.F. did not take any steps to find out if the complainant was withdrawing consent and stating that this specifically referred to T.C.F. continuing to engage the complainant in sexual activity and ordering her to perform fellatio, lead to the conclusion that T.C.F. should be sentenced according to his actions after the complainant rescinded her consent to the sexual activity and is with respect to his actions in continuing to order the complainant to perform oral sex on him and her doing so.

[28] According to the facts as set out in the video, the trial decision and appellate decisions, T.C.F. was laying on his back on the bed receiving oral sex from the complainant. The complainant was on all fours performing the oral sex. The other co-offenders were behind the complainant. The complainant was slapped on the buttocks by one of the other offenders. The complainant said "ow", but then resumed performing oral sex on T.C.F. The offender T.C.F. told the complainant to suck his dick and the complainant responded by stating "make me" and then crying out. T.C.F. again told her to continue giving him oral sex and tells one of the other offenders to "smack her ass" because she is disobeying. The complainant responded by stating "I'm sorry" and T.C.F. responds by stating "let me smack your fucking face again bitch". Shortly after this, the complainant said to T.C.F. "hold my hair," and continued to perform oral sex.

[29] One of the other offenders then inserted the toothbrush into the complainant's vagina and the complainant stated: "No". This is the point where the complainant rescinded her consent to all of the sexual contact including the oral sex in question. T.C.F. instead of stopping, asked the complainant if she liked that shit and she said again "No". The offender T.C.F. said "suck my fucking dick" and the oral sex performed by the complainant continued. The complainant then stopped performing oral sex and one of the offenders and T.C.F. told the complainant to spread her legs. The complainant appears to again perform oral sex on T.C.F.

[30] The toothbrush was again inserted into the complainant's vagina, and she again yelled out "No" and T.C.F. said "keep doing it" and "don't fucking stop." This led to the complainant stating, "No No ow". T.C.F. continued to tell the complainant to give him oral sex and mentioned other derogatory terms like calling her a "fucking bitch". The co-offenders continued to insert the toothbrush and slap the complainant's buttocks. The complainant had moved up so

that her hips were close to T.C.F.'s hips. T.C.F. told her to keep performing oral sex, but she was no longer in a position to do so and stated, "No I can't". And there was no further sexual activity between the complainant and T.C.F. and one of the other offenders said: "stop stop stop stop". This summarizes the facts of the sexual assault committed by T.C.F.

[31] There was no further sexual activity between the parties until later, approximately 15 minutes later, when the complainant was again performing oral sex on T.C.F., but this was consensual as testified to by the complainant. In my view this sexual activity is not relevant to the offence as the actions of sexual assault victims post offence are not relevant because the reaction of sexual assault victims differs; consent is necessary each time.

IV. Sentencing Principles

A. Generally

[32] The fundamental purpose of sentencing is to protect society and its members and to contribute, along with crime prevention initiatives, to respect for the law and to maintain a just peaceful and safe society by imposing just sanctions: s. 718 of the *Criminal Code*. In order to meet this purpose, the Court will consider a number of objectives as set out in s. 718 of the *Criminal Code*. These objectives include denouncing unlawful conduct and the harm done to victims and the community from such conduct, deterring offenders who may partake in committing such crimes, separating offenders from society where necessary, rehabilitating offenders, providing reparations to victims where appropriate, and promoting a sense of responsibility and acknowledgement of harm done to the victims. In cases of sexual assault, the focus is on the sentencing objectives of denunciation and deterrence, this prioritization is mandated under the *Criminal Code* when the offence is against a person under the age of 18 years old: s. 718.01.

[33] The fundamental principle of sentencing, set out in s.718.1 of the *Criminal Code* and referred to in ***R v Friesen***, 2020 SCC 9, is that the sentence must be proportionate to the gravity of the crime committed and the degree of responsibility of the offender. The responsibility of the offender is equated with the offender's moral blameworthiness. A sentence should be proportionate and not too lenient nor too harsh. Proportionality requires that every sentence be individualized and that it consider the unique circumstances of the case and the individual offender. In the circumstances of this case, the fact situation becomes very important to a determination of proportionality.

[34] The principle of parity is set out in s. 718.2(b) and provides that sentences be the same for similar type offences and similar type offenders. Parity becomes an even more important principle where two or more offenders commit the same offence together: see ***R v Mahoney***, 2018 NLCA 16. However, a court must remember that there will be differences in offenders and differences in their involvement in a crime even though two or more offenders may be involved. In this case one of the co-offenders in this matter was sentenced to three years' imprisonment for the offence of sexual assault with a weapon which is a more serious charge than what T.C.F. is charged with. I must take that into consideration in determining the appropriate sentence in this case.

[35] Section 718.2 sets out further sentencing principles such as the principle of restraint found in ss. 718.2(d) and (e) and that a sentence should be similar for offenders who have committed similar offences in similar circumstances. Section 718.2 also provides that a court

should consider the aggravating and mitigating factors of the offence or relating to the offender to increase or reduce the sentence.

[36] Central to sentencing are the gravity of the offence and the moral blameworthiness of the offender and that is especially so in the circumstances of this case. The Crown and defence take significantly divergent positions with respect to the gravity of the offence with respect to T.C.F. Therefore, I wish to discuss the jurisprudence regarding the determination of the seriousness of a particular sexual offence.

B. Seriousness of Sexual Assault

[37] In ***R v Sandercock***, 1985 ABCA 218, the Court of Appeal set out the starting point sentence of three years' imprisonment for a major sexual assault which includes fellatio. One of the most significant basis for a significant sentence for a conviction of sexual assault is the lasting emotional or physiological harm that occurs to the victim. In ***R v Arcand***, 2010 ABCA 363, the Court of Appeal again emphasized the effects of a sexual assault on the victim and that emotional or psychological harm may be more serious than physical harm and must be considered when sentencing.

[38] In ***Friesen***, the Supreme Court of Canada stated that any form of sexual assault involved "sexual violence" and there was no hierarchy of physical acts to be used for determining the degree of physical interference. In ***Friesen***, the Court stated at para 146: "It is an error to assume that an assault that involves touching is inherently less physically intrusive than an assault that involves fellatio, cunnilingus or penetration." In this case, although the actions of T.C.F., where he is committing the sexual offence are for a relatively short period of time and are similar to actions which the complainant consented to immediately before the sexual assault, other circumstances of the encounter would clearly exacerbate the emotional or psychological harm to the complainant. As stated by Justice Martin, in the Court of Appeal decision in this case, at para 93:

> Here the respondents engaged in a very high-risk encounter with the complainant who was a sexual stranger to them. Accepting the trial judge's finding that the complainant consented to rough sex, there was no agreement or even discussion as to the limits of the violence contemplated and no suggestion that the complainant consented to all of the violence inflicted on her, such as being punched in her vaginal area. <u>In these circumstances the respondents were required to be particularly vigilant and responsive to any indication the complainant was no longer consenting to continue.</u> [emphasis added]

[39] In my view, although T.C.F. cannot be sentenced with respect to his actions prior to the complainant rescinding her consent, or for the actions of the other offenders, the nature of this consensual activity, would exacerbate the harm to the complainant resulting from the actual events of the sexual assault.

[40] Therefore, a determination of sentence must begin with the three-year starting point set out in ***Sandercock*** and ***Arcand*** since the intrusiveness of the sexual assault perpetrated by T.C.F., when considered with all the circumstances, has resulted in emotional and physiological harm to the complainant. As stated in ***R v Goldfinch***, 2019 SCC 38 at para 37: "As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens."

[41] The seriousness of sexual assaults and their significant negative effects on victims, which clearly occurred in this case, makes denunciation and deterrence the main sentencing objectives and requires a significant sentence.

C. Victim Impact Statements

[42] In this case the complainant and her father provided victim impact statements marked as exhibit S5. These victim impact statements were originally entered as exhibits in the sentencing of the other offenders in this case and counsel agreed to them being entered in this case with a number of redactions.

[43] Section 722 of the *Criminal Code* instructs judges to consider the victim impact statement which provides information about the physical, psychological, emotional and economic impact of an offence on the victim.

[44] After reading the victim impact statements in this case, there is no doubt that the complainant has suffered significant negative physical, psychological and emotional trauma as a result of what occurred in this case. This trauma was a result of the actions of all the co-offenders in this case. However, I must keep in mind the factual situation related to T.C.F. when considering the victim impact statements in this case. She was in the hospital and had to take medication and her school marks suffered. Being a young person, she had to endure the effect of rumours, and being judged in school and as she informed the Court, her feelings of worthlessness that led to suicidal ideation.

[45] The complainant's father also provided a victim impact statement which informed the Court of the significant amount of counselling that the victim had to undergo due to the negative psychological effects of the sexual assault in this case.

[46] I have considered these victim impact statements pursuant to s. 722 of the *Criminal Code* and recognize the harm suffered by the complainant and her family.

D. Starting Points

[47] The case of ***R v Parranto***, 2021 SCC 46, recently considered the starting-point method of sentencing and concluded that they are a tool to assist sentencing judges in reaching a proportionate sentence, but that they are not binding. The Court stated that starting points reflect judicial consensus on the gravity of the offence and advance parity in sentencing. They provide a judge with a starting point for their thinking. However, the Court went on to state that individualization required that proportionality be determined on an individual basis and the circumstances of the offence, and the offender must be considered. The Court in ***Parranto*** stated at para 12: "The question is always whether the sentence reflects the gravity of the offence, the offender's degree of responsibility and the unique circumstances of each case."

[48] In ***Parranto*** the Supreme Court made it clear at para 46, that a court must consider aggravating and mitigating circumstances and stated:

> […] Importantly, neither tool incorporates other potential mitigating circumstances or *Gladue* factors, nor should it. Appellate sentencing guidance ought not to purport to pre-weigh or "build-in" *any* mitigating factors (*contra*, *Arcand*, at para. 135). Likewise, since starting points are intended to reflect the gravity of the offence and the resulting need for deterrence and denunciation, they should not be viewed as incorporating sentencing principles such as restraint or

> rehabilitation, contrary to the suggestion in *Arcand* at para. 293. Where sentencing judges choose to refer to the starting point or range, they are not precluded from considering any factor that is "built in" as mitigating in the individual circumstances, and they retain the discretion to consider and weigh all relevant factors in their global assessment of a fit sanction. This comports with the principle that the sentencing judge must always consider all relevant individual circumstances in reaching a fit sentence tailored to the offender before the court.

[49] In my view the starting point of 3 years is appropriate in this case and sets out the general gravity of the offence in this case. I must now consider the personal circumstances of T.C.F. and the mitigating and aggravating factors regarding the offence and T.C.F.

E. Personal Antecedents of the Offender

[50] The personal circumstances of an offender are an important consideration with respect to the principle of proportionality.

[51] The personal circumstances of T.C.F. are that he is now 24 years of age and was 19 at the time of the offence. T.C.F. was born and raised in Calgary. His parents split up when he was five years of age. T.C.F. has lived with his father since he was 14 years old. He has one older brother who is 27 years of age and has a half-sister who is 13 years of age.

[52] T.C.F. has completed grade 12. He has also worked as a financial advisor and during that employment he took a 13-week course dealing with financial planning. T.C.F. has also worked as a roofer and a show home host. His counsel informs the Court that since December 2021 he has worked for PepsiCo and promotes their products by stocking a number of stores and setting up displays in the stores for PepsiCo products. Counsel informs the Court that the offender makes approximately $50,000 a year.

[53] T.C.F.'s father was in court during sentencing submissions, and I accept that he has family support from both his father and mother and siblings.

[54] The defence informs the court that T.C.F. has now been on release since 2017. During the entire time he has been on release he has never breached any of the conditions and I accept that he has been under a certain amount of stress, since being charged with these offences.

[55] T.C.F. addressed the Court after the sentencing submissions and apologized for his actions. He indicated that he did not mean to harm the complainant in any way. He indicated that he had been friends with the complainant and wished that she could move forward from something like this. He then indicated that he had micro analyzed everything about himself before moving forward with it. He indicated that he had made serious changes to the person he was. He stated that the level of regret he had towards this situation was incredible. He then stated that he wished for every single party member to what occurred that evening to look at themselves and grow as an individual and become the best version of themselves. He lastly stated that this was the single most biggest regret he ever had in his entire life and he apologized for that.

[56] The only reference he made to the damage that had occurred to the complainant was when he stated that it would be incredibly difficult for anybody who went through a sexual assault and that he could not imagine how hard that could be. He stated that a person would need a lot of rebuilding and that he hoped that the complainant would have the courage to do that.

F. Aggravating and Mitigating Factors

[57] The principle of proportionality requires that a court consider all the facts of the case including the circumstances of the individual offender and the circumstances of the offence. Aggravating and mitigating factors will determine whether a sentence is higher or lower and how it should be adjusted in light of the circumstances of the case.

i. Victim is a Child

[58] In this case, there are a number of aggravating and mitigating factors. One of the aggravating factors are that the complainant in this case was a child being only 17 years of age at the time of the offence. Sections 718.01 and 718.2(a)(ii.1) provide statutory guidance that an offence committed against a person that is under 18 years of age is an aggravating factor on sentencing. Section 718.01 states that a court will give primary consideration to the objectives of denunciation and deterrence where the victim is under the age of 18. This is clearly an aggravating factor and there is no doubt that denunciation and deterrence are the primary objectives for sentencing in this case. According to the Alberta case law, denunciation and deterrence are the primary sentencing objectives with respect to major sexual assaults. However, this does not mean that other factors are ignored. In ***R v Lis,*** 2020 ONCA 551 Justice Watt stated at paras 47-48:

> By enacting s. 718.01, Parliament prioritized denunciation and deterrence for offences that involve abuse of children. The words "primary consideration" prescribe a relative ordering of sentencing objectives, a feature that does not appear in their listing in s. 718. This ordering reflects Parliament's intention that sentences "better reflect the seriousness of the offence": ***Friesen,*** at paras 101-102.
>
> The enactment of s. 718.01 also qualifies the previous direction of the Supreme Court that it falls to the sentencing judge to determine which sentencing objectives are to be prioritized. Section 718.01 confines the sentencing judge's discretion from elevating other sentencing objectives to an equal or higher priority. However, the sentencing judge retains the discretion to assign significant weight to other factors, such as rehabilitation, in giving effect to the fundamental principle of proportionality: ***Friesen***, at para 104; ***R. c. Rayo***, 2018 QCCA 824 (C.A. Que.) at paras. 103, 107 and 108.

[59] In this case I note that the age difference between the offender and the complainant is approximately 2 years. This factor was discussed in ***R v Hajar***, 2016 ABCA 222 where the Court of Appeal clearly stated that a significant gap in age for sexual offences involving a minor complainant and adult offender will call for a longer sentence. The Court in ***Hajar*** stated at para 122:

> Where the adult falls just outside the close-in-age exception, this too will be a factor to be taken into account in sentencing. However, since the three-year starting point only applies where the offender is an adult, this factor will generally be of lesser weight.

[60] As I have already stated denunciation and deterrence will be the primary objectives of sentencing for major sexual assaults. The complainant in this case was under 18 years of age which is also a reason why denunciation and deterrence are the primary objectives in this case.

However, the fact that the offender and complainant are relatively close in their age makes this factor less aggravating.

ii. Recording of Sexual Offence on Video

[61] I find that it is also an aggravating factor that the offences in question were recorded on video by cell phones. T.C.F. has not been charged with a voyeurism offence or the making of child pornography. He was not personally videotaping the complainant or himself during the offences and those were the actions of other individuals involved in the circumstances of this case. However, T.C.F. certainly was not against the videotaping and smiled at the camera on occasion while the videotaping took place.

[62] The videotaping of the sexual offence will often be part of the offence in question and cannot be ignored in the description of the sexual assault: see ***R v Berry,*** 2015 BCCA 210 at para 25. Videotaping has been recognized as an aggravating factor and makes the offence highly intrusive: ***R v Sawchuk***, 2014 SKCA 88, ***R v Dogra***, 2018 ABPC 140. Where the sexual assault in question is recorded, this will add to the violation of the person's privacy, personal autonomy, and human dignity. Because there is a risk that such videos may be circulated or shared, the videotaping will create further harm and negative effects to the victim. This was made clear in ***R v Sharpe***, 2001 SCC 2 where the Court referring to the abuse of children in the production of child pornography stated at para 92:

> The trauma and violation of dignity may stay with the child as long as he or she lives. Not infrequently, it initiates a downward spiral into the sex trade. Even when it does not, the child must live in the years that follow with the knowledge that the degrading photo or film may still exist, and may at any moment be watched and enjoyed by someone.

[63] In my view, the videotaping of the sexual events and the sexual assault in this case was an aggravating factor, but to a lesser degree, because T.C.F. was not the individual filming the events.

iii. Group Endeavour

[64] The Crown also argues that the offence in this case was a group endeavour which makes it an aggravating factor. I mentioned this issue earlier with respect to the Crown argument that T.C.F. was responsible for the actions of the other co-offenders in this case. The facts here are that the actions of T.C.F., which were a sexual assault, were committed while others were committing a different sexual assault. I find that there was a group endeavour relevant to sentencing. I consider this an aggravating factor though of lesser significance because of T.C.F.'s lack of knowledge of the actions of the other offenders while it was occurring.

iv. Remorse

[65] T.C.F. apologized to the complainant and showed some remorse for his actions. However, in his apology, he did not acknowledge the harm caused to the complainant as a result of what occurred on the night in question. This lack of insight may be partially explained by the fact that T.C.F. was 19 at that time and lacked maturity. I find that though he did not provide a full apology, in my view, the offender showed genuine remorse, and this is a mitigating factor, though to a smaller degree.

v. Length of Time of the Offence

[66] The defence argued that the offence lasted only 39 seconds with respect to the actions of T.C.F. A sexual assault of short duration can and in this case did result in significant harm to the complainant. In my view the length of time of the offence is a neutral factor.

vi. Time Since Offence Occurred

[67] Time between the date of the offence and the date of sentencing is not usually a mitigating factor in the circumstances of a sexual assault. In this case, T.C.F. was on a curfew from 10 P.M. to 6 A.M. Defence counsel argues that T.C.F. committed this offence over five years ago and has been under a curfew for the last five years as this case proceeded to trial, and then appeal and finally to sentencing. Bail conditions are not part of the sentence but can sometimes be a mitigating factor where the offender has been subject to house arrest. However, there is a distinction between restrictive house arrest conditions and a curfew, especially where the curfew would only restrict a person to the hours that is consistent with when most working people would be at home: see ***R v RJH***, 2012 NLCA 52 at paras 7-10. In addition, in light of ***RJH***, where bail conditions are raised as a mitigating factor, the offender must provide details of the alleged undue hardship so that a sentencing judge can consider the weight that should be given to the bail conditions. In this case, T.C.F. has not set out the undue hardship that he has suffered because of the curfew conditions in his release.

[68] In ***R v Spence***, 1992 ABCA 352, the Court stated that the lapse of time was inapplicable to the principles of general deterrence and denunciation. In ***Spence***, the offences committed by two offenders were sexual offences against children at that time the offences were rape and indecent assault. The Court held at paras 10 - 14 that the passage of time did not lessen the relevance of the principles of denunciation and deterrence or diminish their importance. The Court went on to state that the lapse of time could affect the principles of individual deterrence and rehabilitation. However, and as I have already discussed, in the case of a major sexual assault, and where the offences were perpetrated against a young person, denunciation and deterrence are the paramount objectives.

[69] Defence counsel referred to ***R v JW,*** 2020 ONSC 5748, which was a sentencing for a minor sexual assault. A husband ejaculated on the face of his wife while she was sleeping, and she only learned of the event when the husband text messaged the wife apologizing for his actions. The husband was not charged until a year after the event, there were delays in the trial because of Covid and because the accused did not have a lawyer, and there was appellate delay which resulted in the sentencing occurring more than five years after the offence. The Crown elected to proceed summarily and sought a sentence of 4 to 6 months' imprisonment. The sentencing judge stated that the demands of denunciation and deterrence had abated with the lapse of time. This is understandable in the circumstances of that case where the sexual assault was not a major sexual assault and the Crown proceeded summarily. In cases where a sexual assault is not a major sexual assault, specific deterrence and rehabilitation may be a primary objective and general deterrence and denunciation may be of lesser importance. However, that is much different than the circumstances of this case and there is no doubt that the sexual assault in this case was a major sexual assault of a child. The objectives of denunciation and deterrence have not been abated. Therefore, in my view the passage of time and the bail restrictions provide little mitigating effect, if any, in the circumstances of this case.

vii. Revocation of Consent

The effect of mitigating and aggravating factors was discussed in the recent case of ***R v Bear***, 2022 SKCA 69 at para 86:

> In the sentencing context, mitigating factors are those which tend to decrease either the gravity of the offence or the degree of responsibility of the offender (see, for example: ***R v Pham,*** 2013 SCC 15 at para 11, [2013] 1 SCR 739 ; and ***R v T.F.***, 2019 SKCA 82 at para 54. In this way, the consideration of aggravating and mitigating factors is tied to the fundamental sentencing principle of proportionality.

[70] In this case, the facts upon which I am to sentence T.C.F. include the fact that the complainant consented to the sexual activity of providing oral sex to T.C.F. initially and then revoked that consent. The defence argues that, in this case, the fact that the complainant consented to the sexual activity in question, but then revoked that consent, decreases the gravity of the offence and the degree of responsibility of the offender. As authority for the proposition that prior consent to the same sexual activity can be a mitigating factor, the defence refers to ***R v Decelles***, 2013 ABPC 85 where the trial judge concluded that in certain circumstances, initial consent to the same type of sexual activity could be mitigating. The Court stated at para 22:

> […] It is also important to note that the act of sexual intercourse between Mr. Decelles and ACL began as a consensual act. While the fact that the sexual act began with consent may not always constitute a mitigating factor, I am of the view that in the circumstances of this case, it is a mitigating factor. In the vast majority of instances when sexual intercourse constitutes sexual assault, the sexual intercourse is nonconsensual from the very beginning. Here, the sexual intercourse became a sexual assault when consent was revoked after the intercourse had began. Let me be clear that the complainant was perfectly entitled to revoke her consent of the sexual intercourse after it had commenced, and is entitled to the full protection of the law. Let me also be clear that the offending act of Mr. Decelles is no less a major sexual assault (as discussed below) because he initially had consent to commence the sexual intercourse. Rather, I'm saying that when sentencing Mr. Decelles for sexual assault, the court should take into account that this offence of sexual assault was committed in circumstances which had a very different beginning from the circumstances of most sexual assaults involving intercourse. In the case at bar, Mr. Decelles' sexual intercourse with ACL was legal when it began, and became illegal during the course of the act, as opposed to being illegal from the very beginning.

[71] I disagree that this could be a mitigating factor in the circumstances of the case at bar. It perpetuates that consenting to prior sexual activity makes the offence that follows less serious or that it matters less because consent was previously given. In my view this reasoning is flawed and is based on myths and stereotypes, fails to consider that continuing with sexual activity that is not consented to will have significant negative effect to the victim. As Justice Antonio stated in ***R v Shrisvastava***, 2018 ABQB 998 at para 103, though in the context of the air of reality test of the defence of honest belief in communicated consent:

> <u>If the initiator could never be the victim of sexual assault, it would mean that anyone who initiates sexual activity abandons her right to set limits, change her mind, or revoke her consent. This is not the law</u>. By the same token, the recipient

> of a sexual advance is not automatically a victim of a sexual assault. The roles of assailant and victim are defined not by initiation but by consent. [emphasis added]

[72] Lack of consent needs to be proven to establish the actus reus of sexual assault. The *Criminal Code* is clear when defining consent that it can be revoked at any time: s.273.1 (2)(e) *Criminal Code*. As stated *in* ***R v A(J)***, 2011 SCC 28 at paras 40-41:

> Section 273.1(2)(e) establishes that it is an error of law for the accused to believe that the complainant is still consenting after she "expresses ... a lack of agreement [to continue] to engage in the activity". Since this provision refers to the expression of consent, it is clear that it can only apply to the accused's mens rea. Nonetheless, it indicates that Parliament wanted people to be capable of revoking their consent at any time during the sexual activity. […]
>
> […] The provision in question establishes that the accused must halt all sexual contact once the complainant expresses that she no longer consents.

[73] In the case at bar the complainant was performing consensual oral sex on T.C.F. and she rescinded that consent. The very same act continued for a period of time after the revocation of consent, by the complainant stating "No" and with T.C.F. continuing to tell the complainant to give him oral sex and T.C.F. not ensuring that consent was ongoing after the clear indication that it was being rescinded. As discussed earlier, T.C.F. was engaging in a very high risk encounter and had to be particularly vigilant in confirming that consent was ongoing, and that the complainant had not rescinded her consent. In my view, the rescinding of consent to activity that was initially consented to is not a mitigating factor. The bodily integrity of a person and their ability to choose what sexual activity they will partake in and when, is not lessened by prior consent to that same sexual activity. In some circumstances, the negative effects of such a sexual assault may be more serious then when there is no prior consent.

[74] In the circumstances of this case, the fact that the complainant consented at some point is not a mitigating factor and does not reduce the gravity of the offence and the moral blameworthiness of the offender.

viii. Youthfulness of Offender and absence of criminal record

[75] T.C.F. is now 24 years of age and was 19 years of age at the time of this offence. In addition, T.C.F. has no criminal record and this is his first offence. Both the Crown and defence agree that T.C.F.'s youthfulness at the time of this offence is a mitigating factor on sentence.

[76] When an offender is youthful and has no prior criminal record, this is a mitigating factor that usually changes the primary objectives for sentencing to individual deterrence and rehabilitation. Where denunciation and deterrence are the most important considerations, because of the seriousness of the offence, a jail sentence will usually be appropriate notwithstanding the youthfulness of the offender and the lack of a prior criminal record. However, the immaturity in reasoning and irresponsibility of younger offenders is a significant mitigating factor: see ***R v Scott***, 2015 ABCA 99. This is especially so in the circumstances of this case where T.C.F.'s decision to engage in the type of sexual activities in question and continue with them after consent had been rescinded showed clear immaturity and irresponsibility and a lack of empathy which most people will acquire through life experiences.

[77] However, youthfulness and lack of a prior criminal record will lessen the length of the sentence where incarceration is necessary. The first sentence of imprisonment should be as short

as possible and restraint becomes more of a consideration when there are good prospects for rehabilitation: see ***R v Priest*** (1996), 30 OR (3d) 538 (CA), ***R v Shariff,*** 2015 ONCA 694. I agree that in this case, T.C.F.'s age is a significant mitigating factor which I take into consideration in my determination of the appropriate sentence in this case.

G. Case Law

[78] The Crown has provided a number of cases to the court that set out sentences which range from 2 years' incarceration plus 24 months' probation in ***R v Preston***, 2021 NSSC 316 to 4 years' incarceration in some of the cases provided by the Crown which I will not list here. In ***Preston***, both the offender and the complainant were 19 years of age, and they were in a vehicle late at night making out. The complainant indicated to the offender that she did not wish to have intercourse, but the offender forced intercourse on her. The complainant had consented to some sexual intimacy, but not the intercourse. The offender was convicted after trial.

V. Conclusion

[79] In my view the divergent positions taken by the Crown and defence with respect to the appropriate sentence in this case are a result of the Crown not recognizing that the actions of the other offenders, beside T.C.F., cannot be taken into account in imposing a sentence on T.C.F. Here, I am also cognizant that A.E. received a sentence of 3 years' incarceration for the more serious offence of sexual assault with a weapon. In addition, the Crown does not consider the fact that much of the actions that occurred, prior to the complainant rescinding her consent, although repulsive to some, were not illegal. The defence does not recognize that the actions against the complainant, by T.C.F., were a major sexual assault, and a major sexual assault requires a sentence where denunciation and deterrence are paramount, and a sentence of incarceration is appropriate.

[80] In this case after having heard all of the submissions by counsel, the facts of the case, the circumstances of the offender, the victim impact statements and after considering the principles of sentencing and the mitigating and aggravating factors, in my view a proper sentence in this case is 2 years' incarceration. In addition, I impose a mandatory DNA sampling order, a 20-year *SOIRA* order, a s. 109(1) weapons prohibition order for a duration of 10 years and for life under s. 109(2) with respect to restricted and prohibited weapons and firearms, I prohibit the offender from communicating with the complainant for the duration of the incarceration of the offender. In addition, pursuant to s. 490.1 of the *Criminal Code* I order the forfeiture of the seized cellular phone that contains intimate images and child pornography.

Heard on the 27th day of July, 2022.
Dated at Calgary, Alberta this 29th day of September, 2022.

W.T. de Wit
J.C.K.B.A.

Appearances:

Pamela McCluskey and Indira Bhaggan
for the Crown

Balfour Der, K.C. and James Mcleod
for the Offender