Court of Queen's Bench of Alberta

Citation: R v Shrivastava, 2019 ABQB 663

Date: 20190828
Docket: 151398500Q1
Registry: Calgary

Between:

Her Majesty the Queen

Crown

- and -

Prachur Shrivastava

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the complainant or witness, A.B., must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the identification ban.

Reasons for Decision on Sentence
of the Honourable Madam Justice J.A. Antonio

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[1] Prachur Shrivastava was found guilty after trial of sexually assaulting AB under s 271 of the *Criminal Code*, RSC 1985, c C-46. I must now determine a fit sentence.

[2] Exhibits filed on sentencing include a victim impact statement, a pre-sentence report prepared by a probation officer, a psychiatric report prepared by a forensic psychiatrist, and numerous letters of reference.

I. Background

a. Circumstances of the offence

[3] The following is a brief summary of the circumstances of the offence. A detailed account can be found in the reasons for conviction, reported at 2018 ABQB 998.

[4] On May 31, 2014, Ms. B met with some friends and had a substantial amount to drink. She described her state as "black out" drunk. Later, she arrived at her friend Dr. Schultz's house with others and fell asleep on the mattress that was set up for her.

[5] When Mr. Shrivastava arrived at Dr. Schultz's house, he noticed Ms. B sleeping. He had never met her, yet he implied an intention to sleep next to her and made comments about her that other witnesses found odd or objectifying. One of them directed him to sleep apart from Ms. B. Later that night, Mr. Shrivastava laid next to Ms. B on her mattress. She was unconscious or sleeping heavily when Mr. Shrivastava began to touch her sexually. Ms. B awoke to Mr. Shrivastava thrusting his penis in and out of her vagina. She did not fully comprehend what was happening and soon fell out of awareness again. She did not have an operating mind at any relevant time and therefore was incapable of consenting to sexual contact. Mr. Shrivastava intended to touch her sexually and knew that she had not consented.

[6] The significant impact of the offence on Ms. B was apparent at trial. In her victim impact statement, Ms. B described her constant fear and distrust of people, her troubles with sleeping, and her ongoing depression and anxiety.

b. Circumstances of the offender

[7] Mr. Shrivastava was 22 years old at the time of the offence. He is now 27. His family moved to Canada from India when he was a child. He speaks positively of his childhood and youth. He was a high achiever in sports and academics. His university studies focused on fields related to biology, and he was involved in volunteer activities relating to health projects in developing countries. He worked at Alberta Health Services before being admitted to medical school. He completed a year and a half in that program before being charged with this offence, at which time he was placed on academic leave by the medical faculty. He went on to complete a master's degree in biotechnology in 2018. According to the psychiatric report, he hopes to work in medical marketing but is currently supporting himself working as a server and a consultant in medicine and technology. According to the pre-sentence report, his recent work history consists of numerous consulting jobs, primarily in marketing and sales; he hopes to work for a few years and then obtain a "Master of Management surrounding Social Justice".

[8] Mr. Shrivastava has received two conditional offers of employment. One is from his current employer, a medical technology consulting firm based in California. The owner describes him as her "right hand" and hopes eventually to make him a partner in the company. The other offer is from the director of a Toronto-based organic waste processing company, who describes herself as one of Mr. Shrivastava's best friends. A conditional letter of employment as a research and development associate was included with her reference letter. Mr. Shrivastava's signature appears below the acceptance clause.

[9] He has no prior convictions and denies any problems with substance dependencies, though he acknowledges occasional social use of alcohol and marihuana, and youthful experimentation with cocaine. He reports that he has not experienced abuse, but he has encountered "racially charged people" and comments in Canada.

[10] Mr. Shrivastava advised the report authors that he has had positive intimate relationships in the past, and has been in his current intimate relationship for two and half years. His partner confirmed that information in the pre-sentence report, adding that they have known each other for three and a half years; in her reference letter, dated 25 March 2019, she stated that she and Mr. Shrivastava have known each other for two and a half years, first as friends, and as intimate partners for the last year. Both describe the relationship in positive terms.

[11] The authors of the reference letters and the individuals contacted for the pre-sentence report speak glowingly of Mr. Shrivastava's caring and giving nature, as shown through direct relationships and through his extensive volunteerism and contributions to the community. A number of writers comment on his respectful and egalitarian attitude toward women. Mr. Shrivastava has a strong network of support among family, friends and co-workers.

[12] Mr. Shrivastava has not been diagnosed with any mental health concerns. He reports feeling stress and sadness from his outstanding charges, though he said he is doing better than he would have thought, thanks to support from family and friends. He denies symptoms of depression, anxiety, psychosis or mania and thoughts of suicide or homicide. He had not engaged any mental health services prior to the offence date. Pending sentencing, he attended one session at the Centre for Addiction and Mental Health in Toronto, though it is not clear what issues Mr. Shrivastava hopes to address.

[13] For the psychiatric report, two clinical tools were used to assess Mr. Shrivastava's risk of committing sexual offences in the future. The STATIC-99 places him in the average range for sexual recidivism among male adults convicted of one sexual offence, with risk factors including offending against a stranger and a person unrelated to him, and the fact that he will still be young upon the conclusion of any sentence imposed. By contrast, the RSVP places him in the lowest possible range of risk of recidivism because he had no risk factors in categories such as sexual violent history, psychological or social adjustment, mental disorder, and future manageability.

[14] The psychiatrist concludes that Mr. Shrivastava is in "the very low category of individuals who are at risk of recidivism" and does not require sex offender treatment. In his view, the prognosis is positive.

[15] At the close of the sentencing hearing, Mr. Shrivastava addressed the court as follows:

> I'm aware that this matter has affected a lot of people and for that I am truly sorry. I never meant for any of this to happen. I sincerely regret the entire incident and I can only hope that I can contribute and become a contributing member of society as I have been in the past. Thank you.

c. Mr. Shrivastava's attitude toward the offence

[16] The probation officer who wrote the pre-sentence report advises that Mr. Shrivastava "acknowledged the offence, states taking responsibility for his action; however, he appears to have minimized some aspects in his role in the offence."

[17] The author of the psychiatric report reviewed, among other things, some police documentation on the offence and the reasons for conviction. He also received Mr. Shrivastava's account of the offence.

[18] As relayed in the psychiatric report, Mr. Shrivastava said that he attended a barbeque and consumed three drinks. He left with friends to go to a different friend's place and then to a pub.

He shared pints of beer with the group and left feeling "a little intoxicated." He went back to stay at the home of someone he had been introduced to as "Rob". He had pizza with some guys there and engaged in casual conversation. Around 3:00 a.m. they decided to go to sleep. The other two men went to their rooms. Mr. Shrivastava laid down on a futon. He recalled that "there was a girl next to [him]"; she started to touch him and he reciprocated, leading to genital-to-genital contact. He said, "she did not seem as drunk, she initiated on me, so I took it as her intent … as I reflect it was too good to be true."

[19] At the time, Mr. Shrivastava thought it was just a "hook-up" with no negative connotations. When asked to reflect on the interaction, he said "I should have moved away, I feel horrible this is her perception of the night, I feel really bad how this affected everyone." He acknowledged that he exercised very poor judgment, adding that this was not consistent with his past relationships or behaviour. He said "I feel she initiated but I accept the judgment of the Court."

[20] The psychiatrist opines that Mr. Shrivastava had expressed remorse and shown insight. He explains:

> [Mr. Shrivastava] was likely experiencing himself a degree of intoxication following the alcohol he had consumed that evening. I note that he had drank throughout that evening and it is likely that the full degree of intoxication of his night of consuming drinks and beer would have not been fully experienced until he reached the home where the offense occurred. The evidence, as described before the Court, clearly establishes that the victim of the offence did not welcome nor consent to the sexual activity. As described by Mr. Shrivastava he may have experienced the victim's physical motions to push him away as an invitation to touch. Given the degree of intoxication, as reported by the victim, she may not have been able to make clear and defined gestures of pushing Mr. Shrivastava away. It is possible that Mr. Shrivastava misinterpreted her gestures and motions of moving away as an invitation to touch, in the context of his experience of intoxication and impairment. This is not to say that Mr. Shrivastava obtained consent from the victim but rather may have misconstrued the events of that evening as an invitation to touch. I note that with Mr. Shrivastava's sobriety and reflection on the events states that he accepts the finding of the Court. He reports sincere remorse for the experience of the victim and how this must have impacted her.
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> … Further I note that he accepts responsibility for the offence and although he felt the victim invited him to touch, at no point did he place blame upon the victim for her experiences in this legal matter. He expressed a great deal of remorse that the victim experienced that night in a manner that was significantly different than his experience.
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> … In my opinion he has the awareness and insight to avoid future situations that would lead to the behavior and charges of which he has been found guilty.
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> … He clearly acknowledges the poor judgment that was displayed by himself on the night of the offence and recognizes the negative consequences this has had upon the victim, himself and all persons surrounding this evening.

[21] The psychiatrist's opinion on these points presents particular problems. He acknowledges that Ms. B did not consent, but then constructs a version of belief in consent. He bolsters his theory by speculating that Ms. B might have been too intoxicated to resist effectively. Though he says he reviewed the reasons for conviction, the psychiatrist nonetheless bases his opinion, in part, on premises that are contrary to my findings of fact. It is therefore open to me to give his opinion reduced weight or no weight: *R v Gibson*, 2008 SCC 16 at para 58 citing *R v Abbey*, [1982] 2 SCR 24 at para 52; *R v Dodds*, 1993 ABCA 223 at para 13.

[22] Mr. Shrivastava's account of the offence, as reported by the psychiatrist, echoes his trial evidence, which I rejected. He continues to construe the offence as a result of misreading Ms. B's physical signals. He expresses remorse for Ms. B's "perception" and "experience" of the night. This language continues the theme of misunderstanding and focuses on what she perceived, rather than what he did: he forced intercourse on an unconscious woman. Similarly, his statement that he takes responsibility rings hollow. He still asserts that Ms. B invited him to touch her. His only indications of what he could have done differently were that he should have realized her apparent invitation was too good to be true and should have moved away. I find that he has not shown insight into his offending behaviour and is not remorseful.

II. Positions of the parties

[23] Initially, the defence sought a sentence of 90 days' imprisonment and two years' probation. The defence later revised its position to eight to twelve months' imprisonment.

[24] Defence counsel cites *R v Stoney*, 2004 ABPC 3 at para 193, in which "some of the aggravating facts that justified lengthy prison terms for sexual offences" were identified, and observed that none of these facts exist in the case at bar. Counsel submits that the following factors should mitigate the sentence: (1) the absence of prior convictions, (2) his remorse and empathy for the complainant, (3) his very low risk of recidivism, (4) his familial and community support, (5) his education and employment history, (6) his young age, (7) his long-term stable romantic relationship, (8) a positive psychiatric report, and (9) his service to his community.

[25] Defence counsel emphasizes that Mr. Shrivastava's character is not merely good, but exemplary, justifying a lenient sentence. Acknowledging that the evidence and sentencing materials do little to explain why the offence was committed, defence counsel speculates that Mr. Shrivastava may have felt the pressure of his achievements and reputation. He suggests the offence was a "stupid decision" to seize an "opportunity", flowing from alcohol and temptation.

[26] Defence counsel submits that Mr. Shrivastava had a uniquely bright future, but it has now been taken away. The case has been covered by the media and the subject of commentary on social media, some of which has been extremely negative. Mr. Shrivastava's reputation has suffered, and will continue to suffer as information about his offence will remain available on the internet forever. He has therefore already paid a unique penalty, and the court should take that into account.

[27] The Crown seeks a sentence of four to five years' imprisonment. Crown counsel submits that the aggravating factors include the fact of "forced full vaginal penetration to ejaculation" and the emotional injury to the victim; the vulnerability of the unconscious victim; Mr. Shrivastava's callous post-offence attitude; and the fact that Mr. Shrivastava did not use a condom, thereby exposing Ms. B to the risk of pregnancy and sexually transmitted infection. The only mitigating factors acknowledged by the Crown are Mr. Shrivastava's youth and family

support, which may affect the prospects of rehabilitation and specific deterrence, but would have little to do with denunciation and general deterrence.

III. Governing law

[28] The fundamental principle of sentencing is proportionality. This means the sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender: *Criminal Code* s 718.1; *R v Arcand*, 2010 ABCA 363 at para 47.

[29] According to s 718 of the *Criminal Code*, the fundamental purpose of sentencing is "to protect society and to contribute … to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions" that have at least one of the following objectives:

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

[30] Denunciation and deterrence are paramount to sentencing major sexual assault cases: *Arcand* at para 274; *R v Glessman*, 2013 ABCA 184 at para 8.

[31] A major sexual assault is "where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs" and includes non-consensual vaginal intercourse: *Arcand* at para 171.

[32] The starting point for determining a fit sentence for a major sexual assault is three years: *Arcand* at para 169; *R v Sandercock*, 1985 ABCA 218 at para 17. As is made clear in *Arcand* at paragraphs 105 and 106, all relevant factors must be considered in determining how to tailor the starting point to the individual case:

> … *deviations from the starting point in service of proportionality are an inseparable aspect of the starting point approach*. Therefore, mere departure from the starting point does not, by itself, demonstrate error in principle. But a significant degree of departure may do so. A word of caution is in order. Facts relied on to deviate from the starting point should be relevant to sentence and reasonably justify deviation. It is not enough that there be differences from other cases. There always will be. And in dozens of *irrelevant* ways. The difference said to justify the deviation from the starting point should be a *relevant difference*. This is consistent with the parity principle [codified in *Criminal Code* s 718(2)(b)] which requires similarity of outcome for cases that are *relevantly similar*. [emphasis in original, citations omitted]

[33] In *Arcand*, the victim allowed the offender, a distant relative, to stay in her family home. After talking and drinking with the offender, she fell asleep. She awoke to find the offender on

top of her with his penis in her vagina. The offender was immature at 18 years of age, had diminished capacity, had suffered abuse as a child, and had an extensive history of substance abuse. Information before the court demonstrated his high degree of community support, volunteer contributions, efforts in counselling, compliance with his probation order, impediments to education and post offence efforts in receiving admission to a local college. The psychologist who counselled him for 21 months reported that he had "served rehabilitation effectively": *Arcand* at paras 12-13, 256-261, 289-293. The sentencing judge imposed a sentence of 90 days' imprisonment and three years' probation: *Arcand* at para 14.

[34] The Court of Appeal held that the significant departure from the starting point was a reviewable error. Among other errors, the sentence gave inadequate weight to deterrence and denunciation and failed to treat the victim's unconsciousness as an aggravating factor: *Arcand* at paras 274-279, 282-284. The Court of Appeal substituted a sentence of two years less one day of imprisonment plus two years of probation: *Arcand* at paras 280, 296, 305.

[35] In *R v Sitko*, 2017 ABCA 434, the offender committed a major sexual assault on a sleeping victim. In a memorandum that contains little detail about the offence or the offender, the Court of Appeal increased the sentence of imprisonment from 18 months to two years less a day, while maintaining an 18-month probation order. It held that the sentencing judge had properly "referenced the respondent's intoxication to explain – but not to justify or mitigate - the behavior of an otherwise pro-social mature adult" and correctly accounted for mitigating factors that included remorse and "better-than-average character, both of which are supported by the positive pre-sentence report and supporting letters". It found that the sentencing judge had failed "to expressly consider the complainant's vulnerability as a sleeping and intoxicated victim", underscoring that it had, "on numerous occasions, unequivocally condemned the act of sexually assaulting a sleeping or unconscious complainant and, in doing so, has sent a strong message that sexually assaulting someone in a vulnerable position is an aggravating factor on sentencing." The court emphasized that the sentence it imposed was "towards the low end of the applicable range in the circumstances of this case": *Sitko* at paras 4-6, 8-9.

[36] In *R v David*, 2002 ABCA 129, the indigenous offender committed a major sexual assault on the victim. While intoxicated, he entered the room where she was sleeping, removed her clothing and physically controlled her while he forced sexual intercourse upon her. He pleaded guilty and the trial judge found that he was remorseful. No *Gladue* evidence was presented, and the judgment reveals little about the offender's circumstances, other than a history of alcohol dependency. Upon balancing the mitigating and aggravating factors in the case, the Court of Appeal followed *Sandercock* and sentenced the offender to three years in prison: *David* at paras 3, 12, 15-24.

[37] In *R v Milosevic*, 2019 ABQB 199, the victim and the offender arrived at a friend's apartment with several other people. The victim was asleep in a bedroom when the offender began touching her. The offender proceeded to kiss, undress, and insert his tongue into her vagina after she awoke: *Milosevic* at para 12. The offender was a Serbian working in Canada as a drywaller and painter on a temporary foreign worker visa. The conviction would likely result in his deportation. He was described in reference letters as kind and reliable. The trial judge found it mitigating that "the Accused is of above average good character and that this offence was out of character". The vulnerability of the sleeping victim was aggravating. The offender was sentenced to 30 months in prison: *Milosevic* at paras 22, 24-26, 43.

[38] In *R v Krueger*, 2017 ABQB 459, the victim was 16 years of age at the time of the offence and was attending a party at her friend's place. Most of the guests were adults, including the 42-year-old offender. The victim fell asleep in her friend's bedroom. The offender entered the room and rubbed her body, digitally penetrated her vagina, and performed cunnilingus while she slept. He was sentenced to two and a half years' imprisonment. The court found he had a stable personal life and there was no need for further special deterrence. However, in addition to the aggravation of the victim's age and unconscious state, the court was concerned that the offender's attitude appeared to be "entrenched in stereotypical thinking and myth-like beliefs", including believing the victim was "flirting" with him, inferring consent from the victim's silence, and otherwise shifting the responsibility to the victim. The 30-month jail sentence was "meant to seriously denounce this conduct, dislodge [the offender's] attitudes and the attitudes of others like-minded, and to deter others who might otherwise act on those wrong attitudes": *Krueger* at paras 3-4, 8-11, 43, 48-49, 54, 56.

[39] In *R v Wright*, 2017 ABPC 150, the victim allowed the homeless offender to sleep in her apartment because of the bad weather and awoke to the offender thrusting his penis inside her vagina. The offender was a 56-year-old indigenous man with a criminal record. He was raised in an atmosphere of poverty, alcohol abuse and racism and had struggled with substance abuse himself. He had little education and had held a variety of jobs ranging from farm hand to carpenter. He showed no insight into the effects of his conduct on the victim or the community. It was aggravating that the offender abused the victim's kindness and hospitality. *Gladue* factors diminished his moral culpability to some extent and mitigated the sentence by six months. The offender was sentenced to 48 months in prison: *Wright* at paras 7-15, 29-30, 32-46, 51, 54-56, 62.

[40] The defence relies on four authorities in which jail sentences of nine to 18 months were imposed. In one, the adult offender was sentenced as a youth for a historical offence. Two are from out of province; the courts therefore were not bound by *Arcand* and *Sandercock*. These three cases offer examples of low sentences for serious sexual offences but are not legally or factually comparable to the case at bar.

[41] In the fourth case, *R v AS*, 2003 ABPC 138, the sentencing judge cited *Sandercock* but suggested that the "major sexual assault" concept was not binding. The 44-year-old offender digitally penetrated a 13-year-old's vagina while she was asleep in his home during a sleepover. He became aroused on seeing the victim in a state of undress and "lost control". He attempted to apologize but then told the victim it was her fault. He confessed to the police and entered an early guilty plea. He was the sole caregiver to his special-needs child, had limited education and was unemployed at the time of sentencing. He struggled with a speech impediment, low self-esteem and substance abuse. He was a moderate risk for sexual recidivism. He appeared genuinely concerned for the victim and the impact his actions would have on her for the rest of her life. He was sentenced to 12 months' jail and three years' probation: *AS* at paras 3-4, 9-10, 19-21, 24, 31.

IV. Aggravating and mitigating factors

[42] Mr. Shrivastava committed a major sexual assault, engaging the three-year starting point. The starting point is defined to apply to a mature person of previous good character with no criminal record, who was convicted after trial: *Sandercock* at paras 17, 23; *Arcand* at paras 132,

169-172.Vaginal penetration, emotional injury and lack of a criminal record are encompassed in the starting point; they neither mitigate nor aggravate.

a. Aggravating circumstances of the offence

[43] In *Arcand* at paragraphs 283 and 284, the Court of Appeal expressed the "unequivocal" need to "send a strong message" that sexually assaulting a sleeping or unconscious person must be condemned and therefore will be treated as an aggravating factor on sentencing:

> Sexually assaulting an unconscious victim elevates an offender's degree of responsibility for the crime beyond the norm contemplated by the three year starting point. An offender who sexually assaults a person who is asleep or passed out is treating that person as if the person were an object to be used – and abused – at will. Since the offender knows full well that the person is not consenting, this reveals an enhanced degree of calculation and deliberateness by the offender. Further, at that point, the person is at their most vulnerable, unable to defend themselves in any way and unable to call for help from others. The offender knows this too, adding further to the high level of moral blameworthiness for the illegal conduct. …
>
> … [W]e are also bound to say that there is considerable experience of the judges of this Court in Alberta, the Northwest Territories and Nunavut with offences similar to this one. The victim, after partying with friends, awakens in her home to find herself being violated by a "guest" who has taken advantage of the victim's deep sleep or unconsciousness to sexually assault her. Hence the need for this Court to unequivocally condemn this behaviour and send a strong message that sexually assaulting someone in these circumstances constitutes an aggravating factor in sentencing.

[44] I add the observation that there is also considerable judicial experience with offences of this kind occurring outside the victim's own home: eg *Milosevic; Krueger; R v Dippel*, 2011 ABCA 129; *R v Osvath* (1996), 46 CR (4th) 124, 87 OAC 274 (CA); *AS; R v Lennie*, 2013 NWTCA 7; *R v Gargan*, 2018 NWTSC 70; *R v Kakfwi*, 2018 NWTSC 62; *R v Dick*, 2018 NWTSC 15.

[45] Mr. Shrivastava's failure to use a condom is an aggravating factor. It added to the gravity of the offence by exposing Ms. B to a risk of pregnancy and disease: *R v Deck*, 2006 ABCA 92 at para 20; *R v Ford*, 2017 ABQB 542 at para 78.

b. Remorse and low risk of recidivism

[46] Alberta's leading case on the role of remorse in sentencing is *R v Ambrose*, 2000 ABCA 264. The reasoning of Fraser CJA, dissenting in the result, was adopted by the majority.

[47] Remorse is a mitigating factor. "[A]bsence of a mitigating factor does not necessarily translate to an aggravating factor"; therefore lack of remorse "should not be used to impose a sentencing surcharge on top of what would otherwise be an appropriate sentence": *Ambrose* at paras 71, 85.

[48] Lack of remorse may still play a role in sentencing. It can show an offender's "continued indifference to the plight of his or her victims", and a "hardened attitude towards one's victims is more blameworthy than a temporary lapse in judgment". Lack of remorse may be relevant in

assessing an offender's future dangerousness. However, an offender's choices about conducting his or her defence must not be equated with lack of remorse, and must not be used to aggravate the sentence: *Ambrose* at paras 77, 80, 83, 85.

[49] I have found that Mr. Shrivastava is not remorseful or insightful. His continued minimization of the offence and his role in it causes me concern about his prospects for rehabilitation: *Criminal Code* s 718(d). If he does not recognize or understand his own wrongdoing, how can I be assured that he is capable of addressing its source and becoming internally motivated to prevent it from recurring? If the prospect of rehabilitation is poor, I need to consider specific deterrence, as it is one of the only remaining tools for correcting his conduct: *Criminal Code* s 718(b). Changing his behaviour is an essential element of protecting society: *Criminal Code* s 718.

[50] These concerns will factor into my assessment of a fit sentence, but will not be determinative. Rehabilitation is a subsidiary objective in sentencing sexual offences, though specific deterrence may carry more weight. Despite my reservations about the basis for the psychiatrist's opinions, I agree that recidivism is a lesser concern, as contact with criminal justice has already had some deterrent effect on Mr. Shrivastava.

[51] Mr. Shrivastava's lack of remorse and insight play into my reasoning only to the extent just described. He has not displayed the kind of actively blameworthy conduct described as potentially aggravating at paragraphs 80 and 81 of *Ambrose*. Therefore, while I am unable to award mitigation for remorse, I do not treat Mr. Shrivastava's post offence attitudes as aggravating.

c. Youth and stupidity

[52] The starting point applies to a mature offender. Maturity brings an ability to self-regulate. Young people may be more prone to impulsivity and unconstrained reactions; therefore youth may reduce an offender's degree of responsibility, often to a significant degree. I accept the parties' submissions that youth is a mitigating factor here, but in context its weight is reduced. Mr. Shrivastava's accomplishments and references show that he is a disciplined person, capable of suborning his wishes or impulses to his own future prospects and the needs of others.

[53] More significantly, this offence was not one of momentary impulse. Defence counsel submits that Mr. Shrivastava made an alcohol-fuelled "stupid decision" to give into "temptation" or "opportunity". I accept that alcohol consumption may have affected Mr. Shrivastava's judgment, and take that into account in assessing his degree of responsibility. I reject the remainder of defence counsel's submission.

[54] A loosely analogous argument was rejected in *R v Field*, 2011 ABCA 48. There, the Court of Appeal increased the sentence of an 18-year-old man convicted of street racing. It found that the sentencing judge had erroneously minimized the offence by calling it "stupid" and "impulsive". The racing was not merely momentary; the offender had opportunities to desist, but continued, even after his passenger expressed concerns: *Field* at paras 16, 19-23. Here, before retiring, Mr. Shrivastava signalled an interest in Ms. B that the witnesses found concerning. He was directed to sleep apart from her, but went to her mattress nonetheless. Despite a gentle warning, he actively placed himself in a position to commit the offence. I do not suggest that the offence was the product of elaborate planning, but it is not accurate to call it impulsive. Therefore the mitigating role of immaturity is reduced.

[55] This offence was predatory. Ms. B was incapable of consenting when Mr. Shrivastava first encountered her, when he made an objectifying comment about her, when he suggested that he wanted to sleep next to her, when he moved from his couch to her mattress, when he pulled her pants down and her shirt up, and when he penetrated her vagina with his penis. Throughout, he knew she was unconscious or deeply asleep. He deliberately treated her body as an object for his use.

[56] This conduct must not be minimized or rationalized away, least of all by reference to "temptation" or "opportunity". I emphatically reject any innuendo that a woman's body, or the body of any victim, is a natural sexual "temptation" that an offender might simply be unable to resist, as did the Court of Appeal in *Sandercock* at paragraphs 29 and 30:

> Sexual arousal is not the same thing as the arousal of a desire to seek sexual satisfaction by violence to another, and provocation of the first is not necessarily provocation of the second.
>
> Negligence of the victim as to his or her own safety is generally not relevant. The blameworthiness of the offender is not in the least diminished because the victim imprudently provides the offender with an opportunity for crime, nor does it necessarily follow that such imprudence lessens the likely pain, outrage and indignity which then visits the victim.

And again in *Arcand* at paragraph 268:

> [Temptation] reasoning reflects discredited thinking. It implies that sexual assaults occur because a) the female complainant has "invited" it by putting herself in harm's way; and b) men have limited ability to control their sexual impulses. Thus, if "temptation just gets to them" or they were "weak", the gravity of the unlawful act is diminished along with their moral blameworthiness. This reasoning wrongly stereotypes both men and women. It implies that a woman has an obligation not to "tempt" a man or she assumes the risk of being sexually assaulted. It also implies that a man is unable to control himself in the presence of an unconscious woman. We reject the notion that the offender here was himself a victim – of temptation. He is not the victim; the complainant is.

[57] The common law has always protected the fundamental principle that "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner": William Blackstone, *Commentaries on the Laws of England*, 4th ed (Oxford: Clarendon Press, 1770), Book III at 120, quoted in *R v Ewanchuk*, [1999] 1 SCR 330, 169 DLR (4th) 193 at para 28. In the twenty-first century, Canadian courts extend the same protection to all people, including unconscious women.

[58] To be clear, though I have rejected the rape-myth theory advanced by defence counsel, I do not use it against Mr. Shrivastava in assessing a fit sentence.

d. Loss of reputation and future prospects

[59] Defence counsel submits that Mr. Shrivastava has suffered a loss of reputation in the community and a loss of future prospects since being charged with this offence. This is a version of a "collateral consequences" argument.

[60] In *R v Suter*, 2018 SCC 34 at paragraph 47, the Supreme Court defined collateral consequences as "any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender". Collateral consequences do not relate to the gravity of the offence or the degree of responsibility of the offender and therefore, are not necessarily aggravating or mitigating factors. They "nevertheless speak to the 'personal circumstances of the offender'" and, in part, stem "from the application of the sentencing principles of individualization and parity… s. 718(2)(b) of the *Criminal Code*)": *Suter* at para 48.

[61] Collateral consequences are not the dominant consideration in sentencing and do not justify the imposition of "inappropriate and artificial sentences": *R v Pham*, 2013 SCC 15 at para 15; *R v Lopez-Orellana*, 2018 ABCA 35 at para 26. They can be taken into account, "so long as the sentence imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender": *R v SLW*, 2018 ABCA 235 at para 39; see also: *Pham* at para 14; *Lopez-Orellana* at paras 24-28; *R v Mbachu*, 2016 ABCA 270 at paras 32-34. Their weight "varies from case to case and should be determined having regard to the type and seriousness of the offence": *Pham* at paras11-12; *SLW* at para 41.

[62] The nature of the collateral consequence will also affect its weight on sentencing. Expected consequences are likely to carry little weight, as the Supreme Court stated in *Suter* at para 49:

> Collateral consequences do not need to be foreseeable, nor must they flow *naturally* from the conviction, sentence, or commission of the offence. In fact, '[w]here the consequence is so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished'. [citation omitted]

[63] Publicity is an "ordinary incident of our justice system". Its consequences will not always mitigate, though they can do so when the publicity "fulfills a denunciatory function that has an inordinate impact on the offender": *Deck* at para 17; *R v Heatherington*, 2005 ABCA 393 at para 5. Adverse publicity should be used cautiously in mitigation. Among other reasons, cases might be newsworthy because of factors that should aggravate sentence. To use the publication of these factors to mitigate would be "totally backwards". More concerningly, "[t]here is a grave danger that the suggestion that publicity replaces punishment, will degenerate into lower sentences for the prominent, the successful, and those holding public office": *R v Zentner*, 2012 ABCA 332 at para 49.

[64] Offenders convicted of fraud may suffer loss of reputation, loss of employment, shame, financial ruin, and negative repercussions for the family. These are ordinary consequences of a fraud conviction and should not be considered exceptional for sentencing purposes: *R v Zenari*, 2012 ABCA 279 at para 8. The Court of Appeal made similar comments in the context of drug trafficking in *R v Godfrey*, 2018 ABCA 369 at paragraphs 15-16. I see no reason why the ordinary consequences of committing sexual violence should be given greater mitigating weight.

[65] I am not satisfied that the effects of the offence on Mr. Shrivastava's reputation and future prospects are exceptional.

[66] Criminal convictions and sentences change most offenders' futures to some degree, resulting in a subjective loss. The impact might be harshest on those whose career prospects were

less lofty to begin with, and who have less ability to adapt. For instance, transportation workers can lose their careers when a conviction prevents them from crossing the border.

[67] Mr. Shrivastava has lost a potential career before having made a significant investment in it. Owing to a decision made by his former medical faculty, he can no longer pursue his dream of becoming a doctor. He has nonetheless obtained an advanced degree and secured two job offers; his future prospects are altered, but not lost. I do not accept that Mr. Shrivastava's experience has been uniquely harsh. I therefore give no weight to his altered career path as a mitigating collateral consequence.

[68] Similarly, I give no weight to the suggestion that loss of reputation should mitigate. The many reference letters show that Mr. Shrivastava still has widespread support within his circle of acquaintance. Though his case has been in the media and discussed on the internet, sometimes with commentary that is unjustifiably negative and premised on factors beyond the offence itself, there is no basis in the materials before me on which to conclude that he has suffered uniquely or inordinately.

[69] "Stigma for the offender is an inevitable feature of the criminal justice process": *Deck* at para 17. I decline to use society's disapproval of serious violent crime to mitigate the sentence for a serious violent crime. Doing so would pervert the aim of denunciation.

e. Good character

[70] Defence counsel submits that a significant departure from the starting point is justified by Mr. Shrivastava's exemplary character. "Character" appears to be used here as a global label for Mr. Shrivastava's lack of convictions, family and community support, education and employment history, long-term stable romantic relationship, positive personal traits, and service to the community.

[71] As noted above, the absence of prior convictions is encompassed in the starting point and is a neutral factor. Prior convictions may aggravate sentence in part because the offender has demonstrated that past penalties did not deter him from reoffending, and a heavier sentence is therefore required to alter his behaviour. Those with no prior convictions may be deterred by lighter penalties, and sentences should reflect the minimum restraint on liberty that is appropriate in all the circumstances: *Criminal Code* s 718.2(d). However, the absence of a criminal record cannot be used to adjust the sentence below a starting point that is premised on the absence of a criminal record. I will therefore consider the potential effect on sentence of the other proposed components of Mr. Shrivastava's exemplary character.

[72] Good character has long been accepted as a potential mitigating factor on sentence. According to the Court of Appeal in *Arcand*, "[t]he good character premise is that an offender should be able to contend in mitigation that he or she has acted as a law-abiding citizen generally": at para 136. At paragraphs 132-135, the Court of Appeal explained that it accounted for the effect of "average" good character in setting the starting point for sexual assault. It remains open to an offender to argue that his or her character is better than average, though this begs the question of what criteria can legitimately be used:

> Judges should avoid introducing unjust comparators since "good character" can be wrongly confused with work history, family stability, popularity, success, etc. This is especially so since general economic conditions may well influence such factors as employment opportunity.

[73] *Arcand* does not explain how any degree of "good character" operates in mitigation. Commentators have offered various rationales. However, the concept does not fit neatly within the legal framework of sentencing or recognized theories of accountability, and has been the subject of academic critique.

[74] It is often thought that a person of good character would inevitably suffer shame and disgrace from the offence and this is "partial punishment in itself", and similarly, "the mere fact of conviction is a punishment": Clayton C Ruby et al, *Sentencing*, 9th ed (Toronto: LexisNexis Canada Inc, 2017) at 321. To some extent, this is a recasting of the collateral consequence argument addressed above. It may be true in some circumstances that an offender of prior good character will require less punitive measures to prevent recidivism. This can influence sentencing, particularly in less serious offences and where the outward-facing objectives of denunciation and deterrence play a reduced role.

[75] It has been argued that good character shows the offence was out of character and that there is a higher chance of rehabilitation and therefore a lower chance of reoffending: Allan Manson, *The Law of Sentencing* (Toronto: Irwin Law, 2001) at 132; Lisa L Havens-Cortes, "The Demise of Individualized Sentencing in the Texas Death Penalty Scheme" (1993) 45:1 Baylor L Rev 49 at 69. At most, this theory would pertain to rehabilitation and specific deterrence. However, one review found no evidence demonstrating that those who contribute more to society have lower rates of recidivism: Mirko Bagaric & Theo Alexander, "First-Time Offender, Productive Offender, Offender with Dependents: Why the Profile of Offenders (Sometimes) Matters in Sentencing" (2014) 78:2 Alta L Rev 397 at 430.

[76] Here, the defence argues that Mr. Shrivastava had demonstrated good character in two primary ways: in his interactions with the people around him, and in his extensive volunteering.

[77] Mr. Shrivastava's references speak emphatically of his caring and moral nature. However, character traits displayed in public are of questionable relevance to offences committed in secrecy. In particular, since sexual offences are "usually perpetrated in private, out of sight and knowledge of friends and associates", evidence of community reputation has "little probative value": Manson at 132. Sexual offences "are committed by people from all walks of life, out of the public eye, clandestinely and secretly, often to the surprise of people who thought they knew the perpetrator best": *R v Hepburn*, 2013 ABQB 520 at para 37; see also: *R v M(CF)*, 2006 NWTSC 59 at paras 138-139.

[78] The words of the Supreme Court in *R v Profit*, [1993] 3 SCR 637, [1993] SCJ No 104 at para 2, written regarding the use of good character evidence by the defence at trial, are apt in most, if not all, sentencings for sexual violence:

> …as a matter of common sense, but not as a principle of law, the trial judge may take into account that in sexual assault cases involving children, sexual misconduct occurs in private and in most cases will not be reflected in the reputation in the community of the accused for morality. As a matter of weight, the trial judge is entitled to find that the propensity value of character evidence as to morality is diminished in such cases.

This parallels the Court of Appeal's conclusion in *Arcand* at paragraph 136 that "[i]t is difficult to see the logic of assigning mitigation credit for apparent prior compliance with social norms in

the face of a serious sexual assault": see also: *R v G(P)*, 2016 YKTC 73 at para 34; *R v Schug*, 2007 CarswellOnt 4992 at para 134; *R v M(CF)* at paras 140-141.

[79] Mr. Shrivastava's reliance on volunteerism echoes the theory that good character mitigation can be viewed as "a form of social accounting, and that courts should draw up a kind of balance sheet when sentencing. The offence(s) committed would be the major factor on the minus side; and any credible social acts would be major factors on the plus side": Andrew Ashworth, *Sentencing and Criminal Justice*, 5th ed (Cambridge: Cambridge University Press, 2010) at 182. This justification is abstract and unworkable. Sentencing judges are not equipped to learn of and assign weight to all of an offender's good deeds: Bagaric & Alexander at 429-430, citing, in part, Nigel Walker, *Punishment, Danger and Stigma*: *The Morality of Criminal Justice* (Totowa, Barnes and Noble Books, 1980) at 138. As Justice Jeffrey concluded in *Hepburn* at paragraph 37, "[i]t cannot be that because of a person's abundant good deeds and potential for societal contribution that they are given a free pass on a crime against another, that they can in a secret double life victimize the vulnerable of our society with impunity."

[80] Volunteerism presents its own concerns. People with financial means have a higher rate of participation in volunteer work while those who struggle economically have less freedom to donate their time: James Curtis, Edward Grabb & Thomas Perks, "Inequalities in Political and Community Participation" in David A Green & Jonathan R Kesselman eds, *Dimensions of Inequality in Canada* (Vancouver: UBC Press, 2006) 189 at 207. Extensive volunteerism is therefore one of the factors that can flow from "general economic conditions": *Arcand* at para 135. Like so many other features associated with "good character", reliance on volunteerism as evidence of good character has the potential to operate as a systemic bias based on socioeconomic status.

[81] Where does character fit within the *Criminal Code's* principles and objectives of sentencing? In some circumstances, aspects of an offender's character may have a once-removed relevance to the gravity of the offence: *Criminal Code* s 718.1. For instance, breaches of trust are aggravating, and positions of trust are often obtained on the basis of prior good character: *R v BSM*, 2011 ABCA 105 at para 16; *R v Fulcher*, 2007 ABCA 381 at para 35; *R v Perez*, 2012 ABCA 393 at para 19; *R v Drabinsky*, 2011 ONCA 582 at paras 167-168; *R v Cameron*, 2017 ABQB 554 at para 69; *R v Cook*, 2010 ONSC 5016 at para 36. In such circumstances, there is little reason to permit good character to mitigate.

[82] More commonly, character is relevant to the offender's degree of responsibility: *Criminal Code* s 718.1.

[83] Research suggests that people who have grown up without family or community support, or without the opportunity to learn appropriate behavioural norms, or to obtain education or career training, or to receive care for medical or mental health problems, can be impacted "physically, mentally, and emotionally, such that they cease to conform to the ideal of a free and rational actor": Lisa M Saccomano, "Defining the Proper Role of 'Offender Characteristics' in Sentencing Decisions: A Critical Race Theory Perspective" (2019) 56:4 Am Crim L Rev 1693 at 1719 referencing Robert J Sampson & John H Laub, "A Life-Course View of the Development of Crime" (2005) 602:1 Annals Am Acad Pol & Soc Sci 12. I do not accept that disadvantage results in a loss of free will or reason. However, judicial experience confirms, for example, that "[a] person who grows up in a culture of alcohol and drug abuse [may be] less blameworthy than

a person who commits a crime despite a positive childhood and upbringing": *R v Shanoss*, 2013 BCSC 2335 at para 164.

[84] This reasoning has been expressly recognized in its application to the intergenerational disadvantage of many indigenous Canadians. In ***R v Ipeelee***, 2012 SCC 13 at paragraph 73, the Supreme Court explained why negative systemic and background factors inform an offender's level of moral blameworthiness and operate in mitigation:

> Canadian criminal law is based on the premise that criminal liability only follows from voluntary conduct. Many Aboriginal offenders find themselves in situations of social and economic deprivation with a lack of opportunities and limited options for positive development. While this rarely — if ever — attains a level where one could properly say that their actions were not *voluntary* and therefore not deserving of criminal sanction, the reality is that their constrained circumstances may diminish their moral culpability. … Failing to take these circumstances into account would violate the fundamental principle of sentencing — that the sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*. [emphasis in original]

[85] It therefore stands to reason that "the culpability of offenders is enhanced when they commit crimes despite having had every advantage to steer them away from criminal behavior": Saccomano at 1719. Positive aspects of an offender's life, "somewhat ironically, can be viewed as increasing his moral blameworthiness because of the absence" of stressors such as poverty, social isolation, substance abuse or low cognitive functioning: ***R v H(KS)***, 2015 ABCA 369 at para 39. At the very least, positive systemic background factors do not mitigate the offender's degree of responsibility. "Good character" provides little or no assistance in contextualizing the offending behaviour, or understanding it as anything other than a freely made choice.

[86] Underlying all potential uses of "good character" in sentencing is a concern that it can act as a cloak for privilege and prejudice. As observed in *Arcand* at paragraph 135, good character can too easily be confused with "general economic conditions", or in Manson's phrasing at 132, with "standing in the community". Perceptions of "standing" are vulnerable to influence by perceived characteristics such as race, ability, gender or gender identity, and age, and therefore to systemic bias. For example, in 1995 the Ontario Commission on Systemic Racism reported that "[i]f… the courts consistently restrict mitigation to factors such as steady employment that may indirectly discriminate against black and other racialized accused, then the individualized approach may result in inequality in sentencing outcomes": Gareth Morley, "A Just Measure of Pain?: Determining Quantum of Punishment in the Charter Era" (1997) 55:2 UT Fac L Rev 269 at 278, footnote 62. In sum, "good character" may tend to advantage offenders with whom judges can readily identify.

[87] Allowing undue mitigation for "good character" can undermine the denunciative and deterrent functions of criminal sentences.

[88] In ***R v M(CA)***, [1996] 1 SCR 500, [1996] SCJ No 28, at paragraph 81, the Supreme Court defined the role of denunciation:

> [A] sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law.

> …"[S]ociety, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass". [citation omitted]

Denunciation is meant to produce "a moral or educative effect" by "emphasizing the community's disapproval of an act and branding it as criminal": Ruby et al at 7. In short, denunciation is intended to communicate society's values: Gilles Renaud, *The Sentencing Code of Canada: Principles & Objectives* (Markham: LexisNexis Canada Inc, 2009) at 13-17.

[89] For instance, in *R v Brown*, 1992 ABCA 132, the Court of Appeal acknowledged the "profound problem" of intimate partner violence – one that the courts alone cannot solve through sentencing. However, "when such cases do result in prosecution and conviction, then the courts do have an opportunity, by their sentencing policy, to denounce wife-beating in clear terms and to attempt to deter its recurrence on the part of the accused man and its occurrence on the part of other men": at paras 18-19.

[90] Good character mitigation may "dilute the deterrent effect of punishment" by "convey[ing] the message that an offender will get a break [or] will be treated leniently, as long as the offender has a previously clean record": Benjamin B Sendor, "The Relevance of Conduct and Character to Guilt and Punishment" (1996) 10:1 Notre Dame JL Ethics & Pub Pol'y 99 at 128. Worse, if not handled with scrupulous care, it stands to convey the message that an offender will be treated leniently if he is of high social or economic standing or is otherwise a member of a privileged group.

[91] When denunciation and deterrence are paramount objectives in sentencing an offence, as is true of sexual assault, "they should not be improperly discounted in the quest for individualized sentences": *R v Christie*, 2004 ABCA 287 at para 37; see also: *Arcand* at paras 274-276, *Glessman* at para 8. In particular, courts must ensure that denunciative and deterrent messages are heard by the audience of potential offenders: *Field* at paras 22-23.

[92] Sexual violence pervades society and is committed by offenders across the spectrum of "character". In *R v M(CF)* at para 138, the Northwest Territories Supreme Court accurately observed:

> [I]t is not the case that the abuser will always be somebody who is antisocial or "deviant" in a way that is easily identifiable by familiar markers such as diagnosis or mental illness. While sexual abuse may also be coupled with violence or other manifestly abusive conduct, it is also perpetrated by offenders who come across as sociable, involved in the community, and professionally successful. [citation omitted]

[93] People of good character, involved in pro-social careers or altruistic activities, are not immune from offending sexually: eg *R v Poon*, 2012 SKCA 76 (doctor); *R v Jovel*, 2018 MBQB 111 (doctor); *R v Anthony*, 2014 BCSC 2132 (psychologist); *R v West*, 2007 ABCA 67 (nurse); *R v Klok*, 2014 ABPC 102 (teacher); *R v Smith*, 2011 ABPC 268 (teacher/farmer/businessman); *R v Eszczuk*, [2009] AJ No 1503, 2009 CarswellAlta 796 (QB) (teacher); *R v Profit* (school principal); *R v Storheim*, 2014 MBQB 141 (priest); *R v Boudreau*, 2012 ONCJ 322 (priest); *R v M(CF)* (lawyer); *R v M(WE)*, 2014 ABQB 10 (decorated former military personnel); *R v Bradley*, 2008 ONCA 179 (police officer); *R v McInnes*, 1990 ABCA 276 (police officer); *R v Tatatoapik* (1995), [1996] NWTR 258, 1995 CarswellNWT 41 (SC) (police officer). All

potential offenders must hear the message of deterrence. Major sexual offences must be denounced as a serious wrong, no matter who commits them.

V. Sentence

[94] In summary, the offence of which Mr. Shrivastava stands convicted is a major sexual assault, such that a three-year starting point applies. The offence was aggravated by his failure to use protection against pregnancy or infection, and by the fact that Ms. B was functionally unconscious and therefore at her most vulnerable. The latter demands a strong deterrent message.

[95] I allow a small measure of mitigation for Mr. Shrivastava's youth. I give no mitigating or aggravating effect to his lack of prior convictions, lack of remorse, loss of reputation or altered career path.

[96] Mr. Shrivastava's character does not mitigate the gravity of offence or his degree of responsibility. The starting point presumes an offender of good character. I do not find in Mr. Shrivastava's status, aptitude, employment or education any circumstances that are exceptional or relevant to principles of sentencing such that they operate in mitigation. Positive conduct witnessed by others is of limited utility in sentencing an offence committed in secret. I find no place for the abstract notion that good deeds can create a bank of credit to be drawn on sentencing. Therefore I am unable to treat good, or exemplary, character as mitigating.

[97] Mr. Shrivastava's degree of responsibility is high. The only factor that tempers it somewhat is the fact that he had consumed alcohol, though its effects were not debilitating and did not undermine the deliberateness of the offence. He was, and is, an accomplished young adult with the benefit of a good childhood, a good education, and a good support network. He has no intellectual or psychological deficits, no addictions or mental health issues, and, I find, no excuse for sexually assaulting an unconscious stranger.

[98] He has shown no insight into his behaviour, and instead continues to minimize his authorship of the offence, even when purporting to take responsibility or to express remorse. I therefore conclude that rehabilitation has not yet been effected.

[99] The primary objectives of sentencing in this case are denunciation and general deterrence, with specific deterrence playing a lesser role. I recognize as well that there is a need for rehabilitation.

[100] Taking all of the foregoing into account, I impose a sentence of three years and nine months' incarceration.

VI. Ancillary Orders

[101] I grant the following ancillary orders.

[102] Pursuant to section 743.21 of the *Criminal Code*, Mr. Shrivastava is prohibited from communicating with Ms. B and the witnesses during his custodial period.

[103] A DNA order is made pursuant to section 487.051 of the *Criminal Code*.

[104] Pursuant to section 109(2) of the *Criminal Code*, Mr. Shrivastava is prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life. He is prohibited from possessing any firearm, other than a

prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition, and explosive substance for 10 years, commencing today.

[105] Pursuant to sections 490.012(1) and 490.013(2)(b) of the *Criminal Code*, Mr. Shrivastava is subject to a mandatory SOIRA order in Form 52 for 20 years. In making this order, I have rejected the defence's position that I am bound by a Court of Queen's Bench declaration that the SOIRA provisions are invalid, notwithstanding that the Court of Appeal has stayed its effect pending appeal: respectively, *R v Ndhlovu,* 2016 ABQB 595 and *R v Ndhlovu*, 2018 ABCA 260. The appellate order governs, meaning that the SOIRA provisions are valid at this time.

Heard on the 23rd day of April, 2019 and the 31st day of May, 2019 and the 18th day of July, 2019.
Dated at the City of Calgary, Alberta this 28th day of August, 2019.

J. A. Antonio
J.C.Q.B.A.

Appearances:

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for the Crown

D.W. Fedorchuk, QC
for the Accused