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R. v. Andersen

Her Majesty the Queen and William Andersen III

Newfoundland and Labrador Supreme Court (Trial Division)

Robert P. Stack J.

Heard: February 17, 2011
Judgment: April 11, 2011
Docket: 201008G0149

Counsel: Mr. Stephen Dawson, for Crown

William Andersen III, for himself

Subject: Criminal

Criminal law.

***Robert P. Stack J.*:**

Introduction

1 William Andersen III was charged with one count of sexual assault which was alleged to have occurred at Nain, Labrador, on or about October 30, 2007. The Crown proceeded summarily. The trial was held at Provincial Court in Nain and in a written decision issued January 25, 2010 (the "Verdict"), Mr. Andersen was found guilty.

2 Sentencing was postponed pending preparation of a pre-sentence report and a victim impact statement. Written sentencing reasons were released on October 25, 2010 (the "Sentencing Decision"). The trial judge granted the offender a conditional discharge with twelve months supervised probation. One of the conditions was that:

> He must speak to public gatherings in Nain or elsewhere in Labrador with the prior approval of his probation officer, including schools or churches or other public assemblies, on at least 3 different dates during the next 12 months concerning his experience with alcohol and the need for respect for women, or about what he has learned from going through the court process and otherwise in his life about the importance of those

topics for life in aboriginal communities, or about any of those topics. He must carry out this condition while at all times respecting the non-publication order with respect to the identity of the victim on this offence.[FN1]

3 Mr. Andersen appealed the finding of guilt and the Crown cross-appealed from the sentence. Mr. Andersen was represented by counsel at the trial and at the sentencing hearing but conducted his own appeal.

Appeal from Verdict

4 By section 812(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, the appeal court for summary conviction offences in the Province of Newfoundland and Labrador is the Trial Division of the Supreme Court. By section 730(3)(a) an offender may appeal from a determination of guilt where he has been discharged pursuant to section 730(1). By section 822(1) the procedures relating to appeals for indictable offences apply to summary conviction appeals with such modifications as the circumstances require.

5 In *R. v. Riggs*, Justice Handrigan of this court recently stated:

> In **R. v. Harper**, Estey, J., said that an appellant court inquiring into the reasonableness of a trial verdict should only "intercede" if "... the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence...".[FN2] Otherwise the appellant court has "...neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence".[FN3]

6 Mr. Andersen's principle ground for appeal against his conviction is that the complainant failed to answer truthfully about where she was earlier in the evening of the alleged assault. Notwithstanding the fact that she had been at a private residence for more than two hours earlier that evening, she testified that she could not remember the location of the residence or gender or identity of the person she visited. The trial judge found this testimony to be "not believable".[FN4] The accused submits that the trial judge should have come to one of two conclusions with respect to the complainant's credibility: (i) that she was too drunk to remember where she was earlier in the evening and consequently would be too drunk to recall with accuracy the events of the alleged assault, or (ii) she was an untruthful witness with respect to where she was earlier in the evening, as a result of which he should have concluded that she was an untruthful witness with respect to the alleged assault.

7 The well known principle that the trier of fact is entitled to accept none, part or all of a witness's evidence was restated succinctly by the Supreme Court of Canada in *R. v. W.(D.)*, where Cory J., speaking for the majority, said that the trier of fact "need not firmly believe or disbelieve any witness ...".[FN5]

8 In determining whether the trier of fact could reasonably have reached the conclusions that he did, I must "reexamine, to some extent at least, re-weigh and consider the effect of the evidence".[FN6] This applies to findings of credibility as well, provided that in doing so, I "show great deference to findings of credibility made at the trial"[FN7] :

> This court has repeatedly affirmed the importance of taking into account the special position of the trier of fact on matters of credibility: **White v. The King**,[FN8] ; **R. v. M. (S.H.).**[FN9] The trial judge has the advantage, denied to the appellant court, of seeing and hearing the evidence of witnesses. However, as a matter law it remains open to an appellant court to overturn a verdict based on findings of credibility where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, it con-

cludes that the verdict is unreasonable.[FN10]

9 In this case, the trial judge carefully considered but did not believe the evidence of the accused. Specifically, he found that aspects of the touching, holding and kissing that constituted the assault were not disputed. Furthermore, the accused admitted that he may have touched the breast and between the legs of the complainant inadvertently with his free hand on the couch but denied any intention to do so. The trial judge found that "the movement of his free hand has not been shown to be involuntary in any way".[FN11]

10 The trial judge detailed eight inconsistencies between the accused's statement to the police five days after the alleged events and his testimony at trial.[FN12] The trial judge concluded that they "show a pattern of the accused working to avoid the appearance that he was seeking or needing intimate contact with [the complainant] or others, and also of his minimizing the amount and importance of the contact between him and [the complainant]".[FN13] Notably the trial judge found "some of the inconsistencies could be attributed to the effects of alcohol, if it were not for the fact that they all cut in his favor".[FN14] And further "this pattern of inconsistency gave rise to an inference that the accused was trying to play down what happened to [the complainant] and not being candid with police."[FN15]

11 Of course, because the trial judge did not believe his evidence does not mean that the accused should be found guilty. In *R. v. W. (D.)*, the Supreme Court of Canada held that the trier of fact is required to acquit the accused in two situations. First, if she believes the accused. Second, if she does not believe the accused's evidence "but still [has] a reasonable doubt as to his guilt after considering the accused's evidence in the context of the evidence as a whole."[FN16] Consequently, the Provincial Court Judge could not convict Mr. Andersen unless that part of the complainant's evidence regarding the alleged sexual assault established Mr. Andersen's guilt beyond a reasonable doubt.

12 The Provincial Court Judge recognized the deficiencies in the complainant's testimony as to where she was earlier that evening and its possible effect on her evidence as a whole.[FN17] As a result, he carefully examined the remainder of her testimony to satisfy himself that she was telling the truth as regards the offence itself.[FN18]

13 The Provincial Court Judge found it plausible that the complainant's state of upset when she returned to her grandmother's house was because of two matters: first, the intimacy which she rejected and second, the accused's offensive remarks to her just before and while she was leaving his house.[FN19] He found that she was forthright in detail about her contact with the accused.[FN20] Her testimony was not shown to be inconsistent with her complaint to police and to others. For example, she testified that she went to the RCMP detachment five days after the assault which was consistent with the accused's prominence in the community and his chilling remarks to her.[FN21] Furthermore, he found that the complainant's testimony on other matters was consistent with the independent evidence of others, including the accused, in respect of the meeting at the hotel bar and the invitation to his home.[FN22] Finally, the trial judge noted that there was no evidence of any motive for the complainant to make a false accusation against the accused.[FN23]

14 As to the complainant's level of intoxication, the Provincial Court Judge found that although she was intoxicated, she was "in a normal and sociable state of mind at the bar that evening."[FN24] Later, she was alert enough to call her boyfriend for a ride home.[FN25] The Provincial Court Judge, therefore, specifically addressed the complainant's state of intoxication and found that it did not prevent her from accurately testifying as to the essential elements of the sexual assault.

15 Based upon the forgoing, the trial judge, to whom I must show deference, accepted some aspects of the complainant's evidence while rejecting others. He was satisfied beyond a reasonable doubt that a sexual assault had occurred and convicted the accused accordingly. As stated by O'Halleron, J. A. of the British Columbia Court of Appeal in *R. v. Pressley*:

> The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.[FN26]

16 Here, the trial judge found the complainant's evidence to be in harmony with the preponderance of probability disclosed by the evidence as a whole. I have reviewed the trial transcript and, coupled with the deference accorded to the trier of fact, it amply supports his conclusion that the accused is guilty of sexual assault beyond a reasonable doubt. The appeal from the finding of guilt is dismissed.

Sentence Appeal

Standard of Review and Sentencing Purposes and Principles

17 The standard of review a sentence appeal is as stated *R. v. M. (C.A.)*:

> Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a *discretion* to determine the appropriate degree and kind of punishment under the *Criminal Code*.[FN27]

18 The purpose and principles to be applied in sentencing are well known and are set out in sections 718, 718.1 and 718.2 of the *Criminal Code*. The Newfoundland and Labrador Court of Appeal has identified the factors a court should take into account in imposing sentencing for sexual assaults:

> There are many factors to be considered in imposing sentence in any case. In cases of sexual assault these factors include the extent of the assault (for sexual assault encompasses a very wide range of human misbehaviour), the degree of violence or force used, the impact of the crime upon the victim, the family of the victim and the offender, the degree of trust involved, public abhorrence to the type of crime, the attitude of the offender to what he has done, his plea, the biological and psychiatric factors that lead to the commission of the offence, the need for specific and general deterrence, the prospect of successful rehabilitation, the antecedents and age of the offender, the time spent in custody prior to trial and the sentences imposed by other courts in Newfoundland and Labrador and elsewhere in Canada.[FN28]

Section 718.2(e) of the Criminal Code

19 Because Mr. Andersen is an aboriginal offender the sentencing judge must consider section 718.2(e) of the *Criminal Code*, i.e., take into consideration all available sanctions other than imprisonment that are available in the circumstances, with particular attention to the circumstances of aboriginal offenders. The trial judge discussed section 718.2(e) in the Sentencing Decision[FN29] but did not expressly apply the principles to this offender. At the appeal hearing, Mr. Andersen indicated that he does not feel that he should be given any special consideration because he is an aboriginal offender. While an offender may waive the application of the last part

of section 718.2(e)[FN30] , because this offender was unrepresented at the appeal hearing, I will consider his status as an Inuk male.

20 Mr. Andersen is not one of the many aboriginal offenders coming before the courts of Canada whose disadvantaged personal and societal circumstances result in them overpopulating our correctional facilities. Rather, he fits into the general category of advantaged people who, socially lubricated by alcohol, slide into criminal activity through poor judgment, a defect in character, or some combination of both. If Mr. Andersen is to avoid imprisonment it will be because of factors other than his aboriginal status.

Aggravating and Mitigating Circumstances

21 The Crown maintains that on sentencing the Provincial Court Judge failed to properly weigh the aggravating and mitigating factors because of a misapprehension of key facts that he had found at trial. Generally, the trial judge found that "...the aggravating factors are few, and the mitigating factors are powerful and beyond dispute...".[FN31]

a) Forceful Holding

22 The Verdict made it clear that three types of touching had been alleged: "penetrative kissing, forceful holding and touching of the breasts and between the legs."[FN32] On sentencing, however, there was no mention that Mr. Andersen had touched the complainant on her breasts and between her legs, and the "forceful holding" turned into "placed his arm around her".[FN33] According to the complainant, Mr. Andersen kissed her two or three times, each time forcing his tongue into her mouth;[FN34] there is reference to only one kiss in the Sentencing Decision.[FN35]

23 The Crown says an especially aggravating factor was that the complainant testified that the accused had only let her go when she had bit him on the tongue or cheek. While the trial judge generally accepted her evidence, I am unable to conclude that he made a specific finding of fact with respect to her allegation of biting. Arguably it can be inferred, but any doubt must be resolved in favour of the accused. Consequently, for the purposes of this appeal from sentence, I am not prepared to consider that resistance of that nature was required by the complainant in order for the assault to cease.

24 Nevertheless, the circumstances of the sexual assault that the Provincial Court Judge found at the trial were more severe than those he referred to in the Sentencing Decision and they ought to have been given greater consideration in imposing sentence.

b) Unwise remarks

25 In the Verdict, the trial judge found:

> [The complainant testified] "I'm gonna tell", to which he said "no one's going to believe you, I'm the president of the government, I own the police", and that she "was nothing". She bit him on the face and tongue and he let her go. She got up and went straight to the door. She testified that he told her "no one's going to believe you". As she put on her shoes, he stood in the porch near her and said "don't tell anyone". He unlocked the gate at her request and she left.[FN36]

The unwise and insulting words to the complainant referred to in the Sentencing Decision[FN37] as having been made by the offender must be the ones referred to above.

26 The accused attempted to use his well known position of authority in the community to intimidate the complainant in an attempt to deter her from reporting the incident. For him to contrast his lofty position with her "being nothing" is an abuse of power in an attempt to avoid accountability for a criminal act and constitutes an aggravating factor in the circumstances of this case. This is further aggravated because he claimed to "own the police" and his tactic was almost successful insofar as the complainant delayed reporting the matter to the police for five days.

c) Victim Impact Statement

27 In the Sentencing Decision, the Provincial Court Judge said in regard to the complainant's reaction to the sexual assault:

> With all due respect to the victim's feelings, which must be taken as genuine, her ongoing serious emotional effect[sic] seem out of proportion to the minor nature of the assault and the total absence of any ongoing problems between her and the offender. The fact that of his prosecution, his bail condition to stay away from her, and the finding of guilt against the offender have not yet had any impact on her recovery, which is very unfortunate. However, again with respect, it is my conclusion that he is not an ongoing danger to her. [FN38]

28 This comment is wrong for two reasons. First, the purpose of the victim impact statement is not to determine whether the complainant is in danger from the offender, although that may be a factor to be considered, but to assess the general effect of the crime on her wellbeing and state of mind. Here, the sentencing judge appears to conclude that because, in his opinion the offender poses no ongoing danger to the victim, she should have no ongoing emotional trauma. Second, and perhaps because of the first error, the Sentencing Decision fails to treat the victim impact statement as an aggravating factor. In *R. v. B. (C.B)*, the Court of Appeal held that "...direct evidence of victim impact may constitute an aggravating factor in sentencing an offender...".[FN39]

29 Here, the accused must take his victim as he finds her. Even if her reaction to the events is more severe than might be expected, it is still an aggravating factor that must be considered in imposing sentence.

d) Premeditation

30 At sentencing, the judge noted:

> There is no evidence of premeditation here: He had invited several people to his home, and his purpose in doing so appears to have been merely social. There was no plan to assault or hurt the victim, but rather a recklessness as to whether she would be hurt by being kissed, held and touched as happened here. I am satisfied that the dominant intent of the offender was to make a sexual overture to the victim, and not to violate her. The fact that he violated her sexual integrity as he made that overture is the reason why what he did amounts to an offence. He did not merely make a mistake in courting.[FN40]

31 It is suggested by the Crown that the trial judge considered this a mitigating factor, at least inferentially. If it was, it was in error. As stated by the Court of Appeal in *R. v. G.(R.)*:

> ...Whether an assault is for sexual gratification is sometimes a factor in determining if there has been a sexual assault [citations omitted]. It has, in my view, no place in determining sentence. If the trial judge was, as the respondent argues, pointing out that there was less violence in this case than in [another], that is not a

mitigating factor but the absence of an aggravating factor.[FN41]

32 I agree, therefore, that by concluding that the accused did not have an intention to violate the complainant, the judge appears to have erroneously treated the relatively minor nature of the sexual assault as a mitigating factor.

e) Remorse

33 Pleading guilty to an offence and showing remorse can be mitigating factors. Pleading not guilty and not showing remorse are not aggravating factors but merely reflect the absence of a mitigating factor. In this case, the trial judge held, "lack of remorse is merely one of a constellation of factors that may show that an offender has failed to understand the wrongness of his conduct. Overall, considering the consequences of this charge for this offender, I doubt that he has failed to learn lessons from this process".[FN42] There was no evidence to support any lessons learned by the offender and, if any lessons were learned, how they relate to the sexual assault that he committed. The offender should not have received any credit for any such lessons learned. It is not clear what role, if any, this factor played in the sentence, but it appears to be yet one more example of the "mitigating factors [that] are powerful and beyond dispute".[FN43]

34 The lack of acceptance by Mr. Andersen of responsibility for his criminal behaviour is, however, a factor that must be considered when assessing whether this is an appropriate case for a conditional discharge.

f) Likelihood to re-offend

35 Generally, a failure to acknowledge having done anything wrong is inconsistent with reformation or rehabilitation. Nevertheless, in the Sentencing Decision the Provincial Court Judge expressed several times the view that the accused is "neither dangerous, or a likely person to commit another criminal offence."[FN44]

36 At paragraph 30 he says, "What is not reflected in his failure to express remorse is any intent or predisposition to repeat his crime, or to bother this victim ...".[FN45] It is unclear what this means. It is one thing to make a positive statement of an intention to repeat a crime and another to deny it (which the offender did), but it is something different altogether to infer from a failure to express remorse a lack of any intention or predisposition to re-offend.

37 Furthermore, in the pre-sentence report there is a statement attributed to Tony Andersen, First Minister of the Nunatsiavut Government, that the offender experienced personality changes when under the influence of alcohol, especially towards women. It states that the offender has a reputation and women are fearful of him when he is under the influence of alcohol. While the Crown did not want to make too much of this, given its hearsay nature, it is interesting to note that Tony Andersen's statement was not challenged by the accused or his counsel at the sentencing hearing. Importantly, however, it is not referred to in the Sentencing Decision.

38 Consequently, given the accused's lack of remorse and the trial judge's failure to refer to at least some indication of a propensity in these regards, the certainty that the trial judge showed in the accused's low likelihood to re-offend is unwarranted. This amounts to yet another mitigating factor that was overstated in the Sentencing Decision and another factor that must be considered in assessing the appropriateness of a conditional discharge.

Did the trial judge err in granting a conditional discharge?

a) Cases relied upon by the trial judge

39 In the Sentencing Decision, the trial judge referred to certain decisions that guided his consideration of the appropriate sentence. He stated:

> The defence provided me with a number of cases where conditional discharges were granted by the court. These cases, although not binding on me, are helpful for their statement of the applicable principles and also for comparing factual situations. *R. v. Alves*, *R. v. Graham*, and *R. v. J.J.W.L.L.* [citations omitted] all involve more serious sexual assaults with more serious injuries and other effects than does the present case." [FN46]

40 In only one of the cases cited was a conditional discharge granted. That is *R. v. J. J.W.L.L*[FN47] , where the accused was a youthful first offender who apologized before the complainant even went to the police and then entered a guilty plea at or near his first appearance. That accused and the complainant had been in a previous sexual relationship. The accused's remorse and guilty pleas were significant factors in the judge's decision to grant a conditional discharge.

41 In *R. v. Alves*,[FN48] following a guilty plea, the sentencing judge declined to grant a conditional discharge and imposed a conditional sentence of nine months. In *R. v. Graham*,[FN49] the trial judge imposed a suspended sentence and placed the accused on probation for 18 months.

42 None of the three cases referred to by the trial judge in the Sentencing Decision supports the imposition of a conditional discharge on these facts.

b) Collateral impact of the sentence

43 The overarching mitigating factor considered by the trial judge in the Sentencing Decision appears from the following:

> This pre-sentence report makes it clear that this criminal prosecution may limit any political future that the offender may wish to have. The policy of the Nunatsiavut Government prevents him from holding office with that organization for five years after any "conviction". It is unclear how that policy would apply to a discharge, which does not involve a conviction.[FN50]

It seems that the trial judge considered the mitigating factor of the offender potentially losing his ability to earn a livelihood through his public office as outweighing the aggravating factors, including those mentioned by him although downplayed.

44 Collateral impacts can be taken into account in mitigation when sentence is imposed. In *R. v. Azarsina*, [FN51] Judge Orr, P.J.C. quotes from the *Law of Sentencing*:

> The mitigating affect [sic] of indirect consequences must be considered in relation both to future reintegration and to the nature of the offence. Burdens and hardships flowing from a conviction are relevant if they make the rehabilitative path harder to travel. ... People lose jobs; families are disrupted; sources of assistance disappear. Notwithstanding a need for denunciation indirect consequences which arise from stigmatization cannot be isolated form [sic] the sentencing matrix if they will have bearing on the offender's ability to live productively in the community. The mitigation will depend on weighing these obstacles against the degree of denunciation appropriate for the offence.
>
> Some indirect consequences are so inevitably linked to an offence that they seem to be part of the punish-

> ment and cannot be considered mitigating. Realism has to be brought to the analysis. For example, losing a year in school is a relevant and mitigating indirect consequence when it is put in context of a short custodial sentence, but if the exclusion from school arises from the assault on a teacher it has little or no mitigating effect.[FN52]

45 There, Judge Orr found "the consequence of the commission of this assault has had on his academic career are inextricably linked with the offence [which occurred on campus] and as a result cannot in all the circumstances be considered mitigating".[FN53]

46 There are many cases where the loss of employment or employment prospects has resulted in a conditional discharge being granted.[FN54] What is common to most of these, however, is a guilty plea and acknowledgement of the crime.

47 A sentencing judge, when considering the effect on Mr. Andersen of possibly losing the ability to hold public office for a period of time, must "weigh these obstacles against the degree of denunciation appropriate for the offence".[FN55] In this case, the trial judge has overemphasized the mitigating effects of a possible conviction on this offender, and has underemphasized the importance of denunciation and general and specific deterrence.

48 Given that the principle purpose of a sentencing in sexual assault cases is denunciation and deterrence, in only rare cases are conditional discharges appropriate, notwithstanding the collateral effects that a conviction may have on the offender. Here, those mitigating effects are more than offset by the offender's failure to acknowledge his crime and by his use of his position to try to intimidate the complainant. In this latter sense, the offender's attempt to intimidate the complainant based on his political office is inextricably linked with the potential loss of the ability to run for public office and, consequently, his possible inability to seek office in the future is of little or no mitigating effect.

c) Availability of Conditional Discharge

49 Mr. Anderson is eligible for a conditional discharge if the court before which he appears considers it to be in the best interest of the accused and not contrary to the public interest.[FN56]

50 Of course, it will generally be in the accused's best interest to receive a conditional discharge rather than be sentenced because, effectively, the conditional discharge will result in there being no conviction so long as the offender successfully complies with the conditions imposed. A conditional discharge will be granted principally where the consequences of a conviction are disproportionate to the offender and the offence.

51 Here, there are three factors that led the trial judge to grant the conditional discharge. The first that is the offender is a man in his sixties who has no prior record; the second is that the offence occurred in October of 2007 and he had complied with his release conditions up to the date of the sentencing in October 2010 (and continues to do so); and finally, and perhaps most importantly, the offender would be ineligible for public office within the Nunatsiavut Government for five years following a conviction. These are legitimate factors to be taken into account in considering a discharge. It may at first glance appear obvious that a discharge would be in this offender's best interest. Given his lack of acknowledgement of having done anything wrong however, it may be, that the specific deterrent effect of a custodial sentence would be in his best interest instead.

52 The trial judge also had to make careful consideration of whether it would be contrary to the public in-

terest to grant a conditional discharge in these circumstances. Militating against a conditional discharge are several factors. Although there have been conditional discharges granted in the cases of sexual assault, including more violent offences, I am not aware of any where a guilty plea was not entered. That is, at least as regards to sexual assault, the accused ought to have acknowledged the offence prior to a conditional discharge being ordered (although there is no prerequisite in this regard; each case turns on its own facts). Furthermore, in addition to the concerns about this offender's lack of remorse, there are the aggravating factors referred to above that were ignored or downplayed by the Provincial Court Judge. Most serious of these are the impact of the offence on the victim and his use of intimidation to attempt to deter her from reporting the crime. That intimidation is particularly deplorable where he compared his position as a male in a position of authority to her, a female victim of sexual assault, as being "nothing". Consequently, given the importance of denunciation and general and specific deterrence in sentencing sexual offenders, in ordering a conditional discharge the trial judge erred in failing to give proper consideration and emphasis to critical factors.

53 The appeal from sentence is allowed.

54 Before I consider what is a fit sentence in this case, a word on ordering this offender to speak publicly as a condition of his probation. Although in limited circumstances it may be appropriate as a condition of a conditional sentence or probation order to require a person to speak about his or her experiences that led to the involvement with the courts, this can never be the case where the offender has not acknowledged his guilt (whether before or after trial) and the effects of the crime on the victim. In addition, it is preferable for such an order to be made only where the offender specifically requests such a condition and makes out a case as to why it is appropriate. That is, it should be requested, not imposed. While the Provincial Court Judge was attempting to add restorative and rehabilitative aspects to the conditions imposed on probation,[57] a condition that the offender speak publicly is not appropriate for this unremorseful offender.

Fit Sentence

55 If a conditional discharge was based upon the misapplication of the principles of sentencing and is unfit, what is an appropriate sentence? Because sexual offenders and sexual assaults run the gamut of individuals and behaviours, the "range" of sentences for sexual assaults runs from a suspended sentence through to a long period of incarceration. Here, while a custodial sentence is required, it need neither be long nor served in an institution. Consequently, I substitute a conditional sentence of three months on the following conditions:

Mr. Andersen is to:

1) keep the peace and be of good behaviour;

2) appear before the court when required to do so by the court;

3) notify the probation officer in advance of any change of name or address, and promptly notify the probation officer of any change of employment or occupation;

4) report to a probation officer within 5 working days and thereafter when required and in the manner directed by the probation officer;

5) have no contact or communication in any manner with the victim, directly or indirectly, and remain away from her residence, place of employment or place of schooling, which condition is not intended to

disallow him from being in a public place at the same time she is in that place; and

6) attend and participate actively in such awareness or educational or assessment programs or counseling sessions to which he might be referred by the probation officer, and in particular any relating to:

a) alcohol, drug, or substance abuse or addiction; and

b) sexual offender recidivism minimization.

56 Normally, for a case such as this I would impose a condition akin to house arrest, i.e., some restriction on the liberty of the offender. Because this offence occurred at the end of October, 2007, I will not make such an order here.

57 Additionally, in these circumstances I would also normally place the offender on probation for 12 to 24 months following the expiry of his conditional sentence. Given that the offender has abided by his terms of release for almost 3 $^{1}/_{2}$ years, however, there is no requirement to impose conditions upon him beyond those contained in the conditional sentence. Consequently, no probation order is made.

Appendix

Correction made on April 15, 2011:

1. On page 5 in paragraph 8 the word difference is replaced with the word deference.

FN1 Sentencing Decision at paragraph 35.

FN2 *R. v. Harper*, [1982] 1 S.C.R. 2, 65 C.C.C. (2d) 193, 133 D.L.R. (3d) 546, 40 N.R. 255 (S.C.C.). at paragraph 5.

FN3 *R. v. Riggs*, 2011 NLTD (G) 26, at paragraph 8.

FN4 Verdict at paragraph 88.

FN5 *R. v. W. (D.)*, [1991] CarswellOnt 80, 63 C.C.C. (3d) 397 at paragraph 10.

FN6 *R. v. W. (R.)*, [1992] 2 S.C.R. 122 at page 4.

FN7 *Ibid*.

FN8 *White v. The King*, [1947] S.C.R. 268, at p. 272.

FN9 *R. v. M. (S.H.)*, [1989] 2 S.C.R. 446 at pp. 465-66.

FN10 *R. v. W. (R.)* at page 4.

FN11 Verdict at paragraph 84.

FN12 Verdict at paragraph 85.

FN13 Verdict at paragraph 86.

FN14 *Ibid.*

FN15 *Ibid.*

FN16 *R. v. W. (D)* at paragraph 10.

FN17 Verdict at paragraph 88.

FN18 See paragraphs 77 - 80 of the Verdict for the trial judge's exposition of the law in this regard.

FN19 Verdict at paragraph 87.

FN20 Verdict at paragraph 89.

FN21 *Ibid.*

FN22 Verdict at paragraph 90.

FN23 Verdict at paragraph 92.

FN24 Verdict at paragraph 93.

FN25 *Ibid.*

FN26 *R. v. Pressley* (1949), 94 C.C.C. 29at page 35.

FN27 *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paragraph 90.

FN28 *R. v. A. (K.J.)* (1988), 69 Nfld. & P.E.I.R. 99, at paragraph 48.

FN29 Sentencing Decision at paragraphs 17 - 20.

FN30 *R. v. Gladue*, [1999] 1 S.C.R. 688 at paragraph 83.

FN31 Sentencing Decision at paragraph 29.

FN32 Verdict at paragraph 82.

FN33 Sentencing Decision at paragraph 3.

FN34 Verdict at paragraph 22.

FN35 Sentencing Decision at paragraph 3.

FN36 Verdict at paragraph 23.

FN37 Sentencing Decision at paragraph 27.

FN38 Sentencing Decision at paragraph 25.

FN39 *R. v. B. (C.B)*, 1994 CarswellNfld 50 (C.A.) at paragraph 8; see also *R. v. A. (K.J.)* at paragraph 48 where among the factors to be considered in imposing sentence in a sexual assault case is "the impact of the crime upon the victim."

FN40 Sentencing Decision at paragraph 26.

FN41 *R. v. G. (R.)*, 2003, 232 Nfld. & P.E.I.R. 273 (N.L.C.A.), at paragraph 8.

FN42 Sentencing Decision at paragraph 30.

FN43 Sentencing Decision at paragraph 29.

FN44 Sentencing Decision at paragraph 29.

FN45 Sentencing Decision at paragraph 30.

FN46 Sentencing Decision at paragraph 16.

FN47 *R. v. J.J.W.L.L.*, [2004] O.J. No. 3137 (Ont. SCJ).

FN48 *R. v. Alves*, [2009] B.C.J. No. 2058 (BCPC).

FN49 *R. v. Graham*, [2008] A.J. 914 (ABPC). At paragraphs 13 to 15, A. J. Brown, Provincial Court Judge, addresses the problems that arise from the offender's continued denial of the offence.

FN50 Sentencing Decision at paragraph 23.

FN51 *R. v. Azarsina*, 2008 CarswellNfld 217, [2008] N.J. No. 25.

FN52 *Law of Sentencing*, Allan Manson, Erwin Law 2001, at page 137.

FN53 *R. v. Azarsina*, at paragraph 16.

FN54 See, for example, *R. v. Etienne* (1989), 49 C.C.C. (3d) 572 (B.C.C.A.).

FN55 *The Law of Sentencing* (Allan Manson, Irwin Law 2001) at page 137.

FN56 *Criminal Code*, section 730(1); *R. v. Follofield* (1973), 13 C.C.C. (2d) 450 (B.C.C.A.)

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