A SUMMARY OF RECENT JUDGMENTS IN CRIMINAL CAUSES OR MATTERS

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JUDGE WAYNE GORMAN
PROVINCIAL COURT OF NEWFOUNDLAND AND LABRADOR

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THE OFFENDER'S HEALTH AS A MITIGATING FACTOR IN SENTENCING

R. v. SALEHI, 2022 BCCA 1, JANUARY 4, 2022.

FACTS: The accused, who suffers from Parkinson's disease, pleaded guilty to two counts of second degree murder. The murders involved the accused having stabbed and killed two people. The Court of Appeal's only reference to the circumstances was the following brief comment (at paragraph 15):

> *It suffices to say the appellant murdered two people, Ms. Gabalis and Mr. Faktorovski, in Ms. Gabalis's home, at night, for reasons apparently related to the appellant's obsession with Ms. Gabalis, his former domestic partner.*

The accused was sentenced to life imprisonment with parole ineligibility set at twenty years.

The accused appealed from sentence, arguing in part, that the sentencing judge "erred in principle by failing to properly consider the appellant's medical condition as a mitigating factor".

HELD: The appeal was allowed and the period of parole ineligibility was reduced to fifteen years. Interestingly, the Court of Appeal makes no reference to either section 718.2(a)(ii) or section 718.201 of the *Criminal Code*.

Health as a Mitigating Factor in Sentencing:

The British Columbia Court of Appeal indicated that "[i]t is clear that medical conditions that make imprisonment more onerous should be considered in sentencing…It is an error not to consider the effect of an offender's proven ill health where the offender is suffering from a medical condition that is likely to result in hardship exceeding the normal consequences of a conviction and sentence…The principle of parity demands that a sentencing judge consider particularly harsh conditions of imprisonment…Where there is evidence at the time an offender is sentenced that at some point his continued confinement will constitute an excessive hardship, that evidence must be weighed in sentencing the offender" (at paragraphs 65 to 67).

However, the Court of Appeal also indicated that [i]n cases where a life sentence is not mandatory and with no period of court-imposed parole ineligibility, appreciation of the court's limited ability to see into the future calls for progressive illness to be addressed by the correctional authorities rather than the sentencing judge. In such

cases that limited ability weighs against adjusting sentences to account for medical conditions" (at paragraph 93).

Life Imprisonment and Parole Ineligibility Orders:

The Court of Appeal suggested that this does not apply "when imposing a minimum life sentence and setting a period of parole eligibility" (at paragraph 94):

> In my respectful opinion, the sentencing judge erred in principle by not distinguishing between the weight to be afforded to evidence of illness in sentencing generally, and the weight such evidence should be afforded when imposing a minimum life sentence and setting a period of parole eligibility. She relied primarily on the description of the consideration of an offender's health in sentencing in *R. v. Auckland*, 2018 BCCA 171, *Swope*, *Potts* and *R. v. Babcock*, 2013 BCCA 368. In none of those cases was parole ineligibility addressed. In none was the parole board precluded from granting exceptional parole before the offender was eligible for parole. In my opinion, the sentencing judge exercised her discretion unreasonably.

Conclusion:

The Court of Appeal concluded that the period of parole ineligibility should be set at fifteen years (at paragraph 99):

> For those reasons, I would grant leave to appeal the sentence, admit the fresh evidence, allow the appeal, and substitute for the sentence imposed a sentence of life imprisonment with no possibility of parole for 15 years. That sentence will reflect the view of the sentencing judge that the appellant's brutal crimes called for significant denunciation, but impose fewer limitations on the ability of the prison authorities to address damage to the appellant's physical and mental health and exceptional hardship that is likely to arise during the appellant's continued confinement.

SENTENCE-BREAK AND ENTRY, THEFT, BREACH OF RELEASE ORDER, BREACH OF PROBATION

R. v. NEWELL, 2021 NLPC 0620A00195, DECEMBER 23, 2021.

FACTS: The accused pleaded guilty to thirty counts of theft, twenty-six breaches of release orders, four breaches of probation and a break and entry into a commercial establishment. The accused was thirty-eight years of age and had an extensive criminal record.

The break and entry involved the accused "breaking into the business premises of Colonial Auto Parts in Clarenville on the 5th of July 2016. The office was ransacked, glass smashed and $50 in cash was taken" (at paragraph 6). With "one exception [the thefts] all involve thefts of alcohol. On each occasion, Mr. Newell entered a store and stole a quantity of alcohol taking several bottles at a time. The thefts of alcohol were not small amounts; he stole more than a thousand dollar's worth of alcohol on more than 12 occasions. The total value for all offences was approximately $20,000.00… In addition, the release orders he breached contained the condition that he remain away specifically from these locations and he was bound by a probation order when all of the offences took place" (at paragraph 8).

HELD: Judge Orr concluded that a period of ninety days of imprisonment was appropriate for the break and entry offence, "though at the low end", periods of thirty days of imprisonment for each of the theft offences, and the breach offences (see paragraphs 17 and 21).

SENTENCE-ARSON, ASSAULT, BREACH OF RELEASE ORDER, UTTERING A THREAT AND BREAK AND ENTRY.

R. v. CONNORS, 2021 NLSC 178, DECEMBER 23, 2021,

FACTS: The accused assaulted his former intimate partner, breached a no-contact condition, threatened to set fire to her home, broke into her residence and set fire to it, and set fire to another residence. An agreed statement of facts was entered. It reads, in part, as follows:

> February 23, 2021 at 8:21 p.m. [B.P.] reported that her partner Terrance Connors had threatened to burn down her residence at 29 Bunkerhill Road in Fortune, NL. He had left the residence at 44 Bunkerhill Road and she was unsure if he was headed to her other residence at 29 Bunkerhill Road in Fortune. They were in the process of moving from 29 to 44 Bunkerhill Road. As police were enroute a call was received from [C.P.], daughter of [B.P.], that the Accused had returned and was assaulting her mom. [B.P.] called again to report that she and the children had left the residence and were safe. [B.P.] provided a statement that the Accused had been drinking and around 3:30 p.m. he had started to cause problems, pushing her and throwing things around. He was spoken to by the police about his behavior and left the residence only to return again and threaten to burn down 29 Bunkerhill Road. When she tried to leave the residence, after she called the police, the Accused blocked their exit and pinned her to the back of the closet in the porch. He has grabbed clothing around her collar bone and she had marks on her chest from struggling with him. Her 17 year old son [C.P], pulled Connors off her. The

> family went to [R.W.] house to wait for the police to arrive. Statements were obtained from [C.P.] (age 13) and [C.P.] confirming these events. Police attended at 44 Bunkerhill Road and located the Accused asleep on the couch. He was arrested for assault and Page 6 uttering threats, given his Section 10(b) rights to counsel. He declined to speak to counsel and understood the police Caution. Connors advised police he had consumed 30 to 40 beer that day.
>
> At 5:18 p.m. police were advised of a 911 call that the house at 44 Bunkerhill Road in Fortune was fully engulfed in flames. When they arrived at 5:27 p.m. the house [B.P.] had just purchased and moved into was on fire. Police were advised that 29 Bunkerhill Road, which [B.P.] had just sold to [S.L.] and [R.P.] had also been set on fire.
>
> March 1, 2021 Terrance Connors provided a video recorded Caution Statement to Cst. Mitchell at the Marystown RCMP detachment. In the statement he admitted being at [B.P.]'s residence while she was there in breach of his release conditions, assaulting the week before by throwing her across the kitchen and drinking alcohol in breach of his conditions. Terrance Connors mindset was that if he could not live in the house she would not live in the house. The first house he went to was at 44 Bunkerhill Road. He could not remember how he set the fires but thinks he must have broken the window to get into 29 Bunkerhill Road as he had cuts on his hand. Page 8 Photographs of the damage to the residence at 29 Bunkerhill Road in Fortune are attached as Appendix A.
>
> Photographs of the damage to the residence at 44 Bunkerhill Road in Fortune are attached as Appendix B. This property was found to be a total loss and has been demolished as it has to be re-built. The family cat was killed in the fire at 44 Bunkerhill Road.

The accused "has a criminal record that includes prior convictions for arson, assault, and breach of court orders" (see paragraph 14).

HELD: Justice O'Flaherty concluded that the following individual sentences were appropriate (at paragraph 46):

> I. For the incident on February 23, 2021:
>
> > 1. A sentence of three months imprisonment for the assault on B.P.; and,
> >
> > 2. A sentence of one month for threatening to burn the property of B.P. at 29 Bunkerhill Road.

II. For the incident on February 28, 2021:

1. A sentence of four years imprisonment for arson causing damage to property at 44 Bunkerhill Road;

2. A sentence of two years less a day for arson causing damage to property at 29 Bunkerhill Road;

3. A sentence of 12 months imprisonment for break and intent with intent at 29 Bunkerhill Road;

4. A sentence of two months imprisonment for each of the three breaches of the release conditions.

Based upon totality, he imposed a total sentence of four years and nine months of imprisonment (see paragraph 57).

SECTION 276 OF THE CRIMINAL CODE

R. v. WAY, 2022 ABCA 1, JANUARY 4, 2022.

FACTS: The accused was convicted of the offence of sexual assault. On appeal, he argued that the trial judge erred "in failing to issue a mid-trial instruction to the jury to disregard the complainant's evidence that it would be 'out of character' for her to have consented to sexual activity with the appellant".

The "out of character" reference arose in the following exchange between the complainant and defence counsel:

Q. Gift told you to rest and join him in the living room whenever you were ready?

A. I have no memory of that.

Q. You asked Gift to stay in the bedroom, so he did?

A. That does not sound like something I would say, but I don't remember.

Q. He covered you with a blanket and laid on top of the blanket?

A. I have no memory of that.

Q. You then started to cuddle and talk?

A. I wouldn't do that, so no.

Q. But you have no memory of that?

A. I don't, but that is so out of character for me that I can -- I'm sure I did not do that.

Q. But you don't remember?

A. Correct.

The accused argued that the complainant's evidence constituted "inadmissible evidence of her own sexual character 'for the purposes of supporting the inference the complainant was more likely not to have consented'". The accused argued that this evidence should have been the subject of a section 276 *voir dire* (see paragraph 62).

HELD: The Alberta Court of Appeal rejected these propositions, concluding that section 276 of the *Criminal Code* was not applicable, though it cautioned the Crown from leading such evidence from complainants (at paragraphs 65, 66 and 68):

> In our view, the testimony given by the complainant to the effect that the appellant's version of events would have been "out of character" for her, and that she "would not" have done the things put to her, was admissible as found by the trial judge. The testimony was not evidence of prior sexual conduct raising the danger of distorting the truth-seeking process by raising the "twin myths" (more likely to consent, less worthy of belief), which is what the restrictions in s 276 are aimed at preventing. Rather, the complainant blurted the "out of character" evidence not to support an inference that she was "more likely to have consented", but rather the opposite. In the context of this case, the evidence was relevant to the material issue of consent, and its probative value exceeded its prejudicial effect: *R v Vant*, 2015 ONCA 481 at para 66.
>
> The Crown must be careful about introducing evidence from a complainant that she "would not" have consented, because it can prejudice the defence who face difficulties in cross-examination because of s 276. However, it is less prejudicial here having arisen spontaneously when the complainant was being cross-examined about the defence's version of the events; specifically, the initiating sexual behaviour she was said to have performed. Cross-examination about an accused's version of events may well leave the door open for such a response by a complainant with no memory, but it cannot reasonably be argued the evidence in this matter was deliberately adduced by the complainant solely to bolster her own credibility. Moreover, the complainant did not make a blanket statement of her character, but one responsive to the appellant's evidence about her sexual conduct with him.

The complainant's "out of character" statements were not evidence as to her memory of the events, but rather circumstantial evidence related to the issues of consent and capacity to consent. There is no rule excluding such evidence where it is relevant and probative. Moreover, where a complainant attests to lack of memory due to intoxication, evidence of what she believes she would or would not have done may be all she has to offer, and the jury will assess its credit and weight. Here, the jury was entitled to weigh this testimony together with all the other evidence, including the complainant's repeated answers during the same cross-examination that, in fact, she could not remember one way or the other.

TRIALS-STEREOTYPICAL REASONING

R. v. D.R., 2022 NLCA 2, JANUARY 7, 2022.

FACTS: The accused was charged with the offence of sexual assault, in relation to his granddaughter. After a trial, he was acquitted. The Crown appealed from acquittal, arguing that the trial judge erred in "assessing the complainant's credibility by engaging in impermissible stereotypical reasoning". In acquitting the accused, the trial judge made reference to the complainant having a strong and normal relationship with her grandfather.

HELD: The appeal was allowed and a new trial was ordered. The Court of Appeal indicated that "stereotypical reasoning in judicial decision-making rests on preconceived notions, assumptions or expectations, in other words, stereotypes or myths, about how people behave or ought to behave in given situations. The stereotype is essentially used as a standard against which a complainant's behavior is measured and judged, and if the behavior does not conform to the stereotype, the complainant's evidence can then be regarded as suspect, incredible, unreliable, or cause for reasonable doubt" (at paragraph 31).

The Court pointed out that the trial judge "rested his reasonable doubt on his conclusion that ABR had a strong and normal relationship with her grandfather up until she gave her statement in December 2016 and that their strong and normal relationship meant that her grandfather could not have been sexually abusing her" (at paragraph 34).

The Court of Appeal held that the trial judge's "introduction of the strength and normality of ABR's relationship with her grandfather as a step in his analysis of whether DR committed the offences as charged is obfuscating and diversionary. It has no place in determining whether alleged sexual abuse has occurred" (at paragraph 37).

The Court of Appeal concluded that the judge's reasoning was based on stereotypical assumptions (at paragraphs 39 and 40):

> I agree that the Judge's reasoning was based on a stereotype. The stereotype is that a victim cannot be happy to see her abuser if she is being abused by him. The stereotype is based on the assumption that a victim is unable to have any kind of "normal" relationship with her abuser respecting other interactions and activities unrelated to the abuse because the sexual abuse pervades all aspects of the relationship in a negative way, leaving no room for any positive, tolerant, or other feelings a victim may have about her abuser. The assumption fails to recognize the circumstances of the relationship between the particular victim and abuser. It also fails to recognize that a victim may take time to appreciate that what is happening is abuse (Benedet, at para. 28 above) or that a victim may deliberately act normally around the abuser, due to embarrassment, guilt, or denial (*D.D.*, at para. 65), so as not to alert others to the abuse. Moreover, the stereotype has not been shown to have any foundation in evidence or principle.
>
> Reliance on this stereotype when assessing the credibility of a complainant is particularly concerning when the sexual abuse is alleged to have taken place within a family or other close relationship that typically involves love and trust, and even more concerning when the complainant is a young child. Victims of sexual assault in these situations often attempt to normalize the sexual activity so as to be able to continue to cope within the family or other close relationship. Victims young and old may experience confusion and conflict between their feelings of discomfort with the abuse and dislike of their abusers, and their feelings of love and trust for their abusers. The stereotype is particularly invidious when the victim is a young child, who may not appreciate that the sexual activity is abuse.

OFFENCES-SECTION 162(1)(A) OF THE CRIMINAL CODE (VOYEURISM)

R. v. DOWNES, 2022 BCCA 8 JANUARY 11, 2022.

FACTS: The accused was convicted of the offence of voyeurism contrary to section 162(1)(a) of the *Criminal Code*. This section states as follows:

> *162 (1) Every one commits an offence who, surreptitiously, observes — including by mechanical or electronic means — or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if*
>
> > *(a) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity.*

The offence involved the accused "surreptitiously taking photographs (and thereby made a visual recording) of adolescent male hockey players (T.R. and G.C.) in stages of undress in a dressing room while he was coaching spring hockey teams".

The accused appealed from conviction. The British Columbia Court of Appeal described the primary issue raised by the appeal as being (at paragraph 39):

> …does one who surreptitiously takes a still photograph (by, for example, using a cellphone) of a fully clothed person in a dressing room when no one else is present or expected to be present commit the offence described by s. 162(1)(a)?

HELD: A majority of the Court of Appeal decided that the conviction should be set aside and a new trial ordered. The majority held that "[i]n order to characterize the place at which the impugned conduct occurs, it is necessary to consider the manner in which the place is expected to be used. If a place is one where nudity may normally be expected (in a shower or toilet, for example) the characterization is easy. If, as in the case at bar, there is inconsistent use and the observation is not continuous and protracted, the expected use at the time of observation or recording must be addressed. The relevant inquiry, in my opinion, is whether the place can accurately be characterized, at the time of the use in question, as a place in which a person can reasonably be expected to be nude. If so, then the section applies even if there is no nudity…But if there was no nudity, and nudity could not reasonably be expected during the course of the relevant use, then it is a different matter" (at paragraph 40).

The Majority concluded that "[w]hile it was open to the trial judge to find nudity was expected in the dressing room in which the offences were found to have

occurred, the conflicts in the evidence regarding whether nudity was expected at the time the photos were taken were not addressed. In my opinion, a conviction cannot be founded solely upon evidence that at some time nudity was expected in the dressing rooms in question. For that reason, I would allow the appeal, set aside the conviction, and order a new trial" (at paragraph 55).

The Dissent:

Justice Dickson dissented. She would have upheld the conviction. Justice Dickson held that for section 162(1)(a), "the relevant inquiry" is "whether the place in which the impugned conduct occurred is a place in which a person can reasonably be expected to be nude, exposing intimate body parts or engaging in sexual activity, regardless of the expected use of that place specifically when the conduct occurred" (at paragraph 56).

Justice Dickson disagreed with the majority's conclusion that "the accurate characterization of 'a place' under s. 162(1)(a) involves a temporal use component if the place in question is predictably used for multiple purposes. With the possible exception of a shower, almost all places are predictably used for more than one purpose. I do not accept that, as a result, 'a place' can only be characterized accurately by its expected use at a specific time under s. 162(1)(a). Rather, in my view, a multi purpose place may be characterized accurately as a place in which a person can reasonably be expected to be in a state listed in s. 162(1)(a) even if its predictable use when the impugned conduct occurred did not involve nudity, exposure of intimate body parts or sexual activity. As I see it, the words of the provision and the judgment in Jarvis support the view that the use being made of a place when impugned conduct occurs is simply one circumstance for consideration when the Court determines whether the subject was then in circumstances that gave rise to a reasonable expectation of privacy and, if so, the nature and extent of that expectation" (at paragraph 57).

CHARTER-SECTIONS 8, 10(B), AND 24(2)

R. v. MURPHY, 2022 NLSC 2, JANUARY 10, 2022.

FACTS: The accused was charged with the offence of impaired operation causing bodily harm and dangerous operation causing bodily harm.

The accused had been involved in an accident. An ambulance attended the scene. A police officer entered the ambulance and the officer and the accused were transported to a hospital. At the hospital, the officer entered a treatment room while the accused was being examined. The officer requested that a laboratory technician secure a sample of blood that had been taken from the accused. The police

subsequently obtained a search warrant and seized the container of blood that had been stored by the hospital and the accused's medical records.

The accused argued in a pre-trial application that the evidence obtained by the police should be excluded at his trial pursuant to section 24(2) of the *Charter* on the basis that the actions of the police violated sections 8 and 10(b) of the *Charter*. Justice O'Flaherty summarized the arguments raised, in the following manner (at paragraphs 4 to 6):

> … First, the Applicant argues a detention resulted when the police officer entered the ambulance, and that his right to counsel under s. 10(b) of the *Charter* was breached because the officer did not read him his *Charter* rights. Secondly, the Applicant argues that s. 8 was breached when hospital staff permitted the police officer to observe his treatment in the hospital and gather evidence. Thirdly, the Applicant argues that when his blood was drawn by the hospital staff for medical purposes and secured for the police it was seized in a manner that breached s. 8.
>
> The Applicant seeks an Order under s. 24(2) of the *Charter* excluding the following evidence he alleges was obtained in a manner that infringed or denied his rights or freedoms: the verbal utterances he made to a paramedic and the officer's observations of his impairment in the ambulance (the "ambulance evidence"); the verbal utterances he made to a physician during an examination in the treatment room (the "treatment room evidence"); the sample of his blood and the medical records of his treatment in the hospital on July 13–14, 2019 (the "hospital evidence"); and, the certificate of analysis of his blood sample (the "certificate").
>
> The Applicant argues for the exclusion of the hospital evidence and certificate on the basis of the unreasonable seizure of his blood under s. 8. He also argues that if the ambulance evidence and treatment room evidence is excised from the Information to Obtain (the "ITO"), there would have been insufficient reliable information for the authorizing Justice to issue the Warrant, resulting in the authorization of an unreasonable search and seizure of the hospital evidence on July 16, 2019, and the hospital evidence and the certificate of analysis must be excluded on that basis.

HELD: The application was granted, in part. Justice O'Flaherty concluded as follows (at paragraphs 8 to 14):

> I have decided that the Applicant has not established that he was detained at any time on July 13, 2019. This means there was no breach of the Applicant's rights under s. 10(b) of the *Charter*, and s. 24(2) has no application.

I have decided that the Applicant has established that his reasonable expectation of privacy was interfered with by the police officer's search while the Applicant was being examined by a doctor behind a curtained off area of the treatment room, which amounted to an unreasonable search under s. 8 of the *Charter*.

I have decided that the Applicant has not established that when his blood was drawn by the hospital staff for medical purposes and secured for the police it was seized in a manner that breached s. 8 of the *Charter*. It follows that no breach of the Applicant's rights under s. 8 of the *Charter* resulted and s. 24(2) has no application.

On the s. 8 breach that has been established I am ordering exclusion of the treatment room evidence obtained during the unreasonable search under s. 24(2) only. I am satisfied that the police conduct was not particularly egregious, it had a significant impact on the Applicant's privacy interests, and the relevance and reliability evidence of the treatment room evidence is low. I have decided that the admission of the treatment room evidence at the trial would in all the circumstances bring the long-term administration of justice into disrepute. As to the hospital evidence and the certificate, which would have existed regardless of what happened in the treatment room, I have decided that to order the exclusion of highly relevant and reliable evidence of the serious offences as a result of a *Charter* breach resulting from police conduct which was not particularly egregious, and thereby gut the prosecution case, would bring the long-term administration of justice into disrepute.

On the Applicant's alternative argument for exclusion of the hospital evidence and certificate, I have decided that when the treatment room evidence is removed from consideration the authorizing Justice could still have validly issued the Warrant based on the remaining information he was provided with under oath or affirmation. Page 6

I am therefore ordering only the exclusion of the treatment room evidence at trial under s. 24(2) of the *Charter*.

The application is otherwise dismissed.

EVIDENCE-INSTRUMENTS COMMONLY IN USE

R. v. Hogan, 2022 ABCA 5, January 11, 2022, at paragraphs 7 to 10:

The appellant argues that the trial judge improperly relied on location evidence from the complainant's smartphone, without forensic confirmation

of this information. Mr. Guse described how his smartphone had been damaged during the incidents. Constable Ferri found a smartphone that matched the description at a location connected to the appellant. Mr. Guse directed Constable Ferri to information in the smartphone which showed its location during the events, and that corroborated Mr. Guse's evidence about his kidnapping. Based on what he observed in the smartphone, Constable Ferri testified that the smartphone appeared to have moved from Edmonton to Thorsby and then back to Edmonton.

Both parties analysed this issue as being a form of hearsay, although it is more correctly seen as a form of circumstantial evidence. Constable Ferri was not repeating information conveyed to him by a third party, which would be captured by the hearsay exclusion, but rather was reading data automatically collected and displayed by the smartphone. Machines do not talk or testify: ***Kon Construction Ltd. v Terranova Developments Ltd.***, 2015 ABCA 249 at para. 14, 20 Alta LR (6th) 85, 602 AR 327. The issue here is not "hearsay" but the admissibility of data that is automatically collected, stored, and reported by an electronic instrument.

A trial judge is entitled to rely on data that is automatically collected and displayed by instruments in common use, at least in the absence of any formal objection: ***Kon*** at paras. 15-18, 22; ***R. v Murray***, 2013 ONCA 173 at para. 7, 42 MVR (6th) 175. For example, if a witness testifies as to the time of an event because he looked at his watch, the Crown does not have to prove the operation of watches. It would be similar if the witness checked the time on his smartphone. Images from surveillance systems are routinely admitted in evidence without proving the background technology: ***R. v Brar***, 2020 ABCA 398 at para. 59, 14 Alta LR (7th) 24, leave to appeal refused May 6, 2021, SCC #39519. Whether the trial judge will hold a *voir dire* and the weight to be given to such evidence is within the mandate of the trial judge.

Smart telephones are now sufficiently ubiquitous that, in the absence of a specific objection, trial judges are entitled to take notice of their capabilities and the reliability of the information they generate. The inherent reliability of such automatic devices rests in their scientific design and testing, and it is confirmed by the fact that they are routinely used millions of times every day: ***Kon*** at para. 17. Any inherent flaw in their operation would be exposed. When Constable Ferri testified that the smartphone showed that it had been at locations consistent with the evidence of the complainant, that was admissible evidence that the trial judge was entitled to rely on.

EVIDENCE OF PRIOR SEXUAL ACTIVITY- SECTION 278.93

R. v. D.S., 2021 NLSC 69, MAY 26, 2021.

FACTS: The accused is charged with the offence of sexual assault. He applied to adduce evidence of prior sexual activity with the complainant. A threshold hearing was held, pursuant to section 278.93. The application judge indicated that "[w]ith regard to relevance, the applicant maintains that the evidence of prior sexual activity in paragraphs 3(iv) and (v) is relevant to a determination of whether the complainant consented to the alleged sexual activity which is the subject of the charges against him and/or the formation of his honest but mistaken belief in communicated consent. He argues that that evidence of the alleged sexual encounter in paragraph 3(vii) is relevant to the complainant's credibility, by reason of her denial of any consensual sexual activity with him since January 2018" (at paragraph 11).

HELD: The application was allowed and a hearing pursuant to section 278.94 was ordered to be heard. Justice Burrage held that the "evidence at the s. 278.94 hearing will be limited to that in paragraphs 3(iv) and (v) of the within application, with regard to the applicant's assertion of an honest but mistaken belief in communicated consent" (at paragraph 32).

EVIDENCE OF PRIOR SEXUAL ACTIVITY- SECTION 276

R. v. D.S., 2021 NLSC 69, MAY 26, 2021.

FACTS: The accused is charged with the offence of sexual assault. He applied to adduce evidence of prior sexual activity with the complainant. The application judge indicated that "[t]he thrust of the Applicant's submission is that throughout their relationship he and the complainant would engage in what might appear as non-consensual sex as a means of arousal. At times this would be communicated by the complainant stating that she wished to be 'raped', and then feigning disinterest in the encounter. The willingness to engage in consensual sex was thus, paradoxically, communicated by what might appear as lack of consent" (at paragraph 11).

HELD: The application was allowed. Justice Burrage indicated that he was "satisfied that the evidence the Applicant wishes to adduce is relevant to the formation of what he claims to be an honest but mistaken belief in communicated consent" (at paragraph 14).

JOINT SUBMISSIONS AND BEING THE VICTIM OF INTIMATE PARTNER VIOLENCE AS A MITIGATING FACTOR IN SENTENCING

R. v. NASLUND, 2022 ABCA 6, JANUARY 12, 2022.

FACTS: The accused pleaded guilty to the offence of manslaughter. She killed her intimate partner (Miles). A joint submission seeking the imposition of a period of eighteen years of imprisonment was presented. The joint submission was endorsed. The Court of Appeal noted that the "marital relationship involved many incidences of physical and emotional abuse, including extreme controlling behaviour by Miles towards Ms. Naslund" (at paragraph 102).

The accused appealed from sentence, arguing that the sentence was excessive and the joint submission should not have been accepted by the sentencing judge.

HELD: The appeal was allowed. A majority of the Court of Appeal concluded that the sentence imposed should be reduced to a period of nine years of imprisonment.

The Majority:

The majority noted that "[n]otwithstanding the obvious benefits of joint submissions, sentencing judges may nevertheless depart from them" (at paragraph 56). The majority held that "the same 'public interest' test applies regardless of whether the joint submission is being accepted or rejected" (at paragraph 61).

The majority concluded that because the sentencing judge did not consider whether "an 18-year sentence was proportionate" he was not in a position to determine "whether the sentence was sufficiently 'unhinged from the circumstances of the offence and the offender' (at paragraph 94).

Being the Victim of Intimate Violence as a Mitigating Factor in Sentencing:

The majority held that "a woman who has been subjected to domestic violence is entitled to raise that history as 'a relevant factor in evaluating her subsequent actions' outside of self-defence. The psychological effects of domestic abuse are likewise relevant to sentencing – in particular, the question of moral blameworthiness, a component of the proportionality analysis. This explains why, as we shall see, sentences in these circumstances are almost invariably on the lower end of the spectrum" (at paragraph 98).

The majority concluded that "it is beyond time for this Court to explicitly recognize that cases of battered women killing abusive partners involve unique circumstances that must be considered by the sentencing judge, particularly where "battered woman syndrome" is involved" (at paragraph 115).

Conclusion:

In reducing the sentence to 9 years of imprisonment, the majority concluded that "the 18-year joint submission proposed by counsel and accepted by the sentencing judge in this case is 'so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down'. As a result, it must be rejected" (at paragraph 173).

The Dissent:

Justice Wakeling, dissenting, would have dismissed the appeal and affirmed the sentence imposed. Justice Wakeling suggested that the "test that a sentencer must meet before imposing a sentence at odds with a joint-submission sentence is very onerous and will seldom be met. As a result, a joint-submission sentence is almost immune from appellate review" (at paragraph 272).

Justice Wakeling concluded that the affirmation of the sentence imposed would not bring the administration of justice into disrepute (at paragraphs 327 and 328):

> There is no doubt whatsoever in my mind that reasonable members of the public, aware of all relevant facts, would not believe that Ms. Naslund's sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest. I am satisfied that the notional reasonable observer would conclude that Ms. Naslund has no good reason to complain about this bargain. It has probably saved her many years of prison time.
>
> The notional reasonable observer would understand that this is not a battered-woman syndrome case. Experienced defence counsel with access to Ms. Naslund's medical records and her family and friends expressly rejected the battered-woman syndrome as a relevant consideration with respect to the severity of her sentence. He must have had a good reason for adopting this position. Ms. Naslund informed us in oral argument that she does not challenge the quality of the legal advice her counsel provided.

SEXUAL ASSAULT-*MENS REA*-DEFENCE OF HONEST BUT MISTAKEN BELIEF IN COMMUNICATED CONSENT

R. v. H.W., 2022 ONCA 15, JANUARY 13, 2022.

FACTS: The accused was charged with the offence of sexual assault. At his trial, the complainant testified that she did not consent to the sexual activity that occurred. The accused testified that she did consent. The defence of an honest but mistaken belief in communicated consent was not left with the jury. In instructing the jury on the elements of the offence, the trial judge indicated that the Crown had to prove that that the accused "knew of, or was wilfully blind or reckless as to, the absence of the complainant's consent (the 'knowledge element')" (see paragraph 4).

The accused was acquitted. The Crown appealed. The Ontario Court of Appeal described the issue raised in the following manner:

> This Crown appeal raises the question of how a jury should be instructed on the *mens rea* requirement for sexual assault when the defence of honest but mistaken belief in communicated consent is not available to the accused. That question is part of a broader one concerning the extent to which the knowledge element of the offence — that the accused knew of, or was wilfully blind to or reckless as to, the absence of the complainant's consent to the sexual activity — is to be considered when the accused has no defence of honest but mistaken belief in communicated consent.

HELD: The appeal was allowed and a new trial ordered.

The Ontario Court of Appeal concluded that it "was not an error of law to instruct the jury that the charge of sexual assault required that the Crown prove that the respondent knew of, or was wilfully blind or reckless as to, the complainant's non-consent, even where the defence of honest but mistaken belief in communicated consent was unavailable to the respondent" (at paragraph 11). However, the Court of Appeal also concluded that it agreed "with the Crown that in the circumstances, the trial judge's instruction to the jury had to provide guidance as to what the jury could and could not properly consider on the knowledge element of the offence. The jury instruction had to ensure that the respondent was not effectively given the benefit of a defence that was not available to him…The instruction in this case did not do so. It did not instruct the jury that the respondent's evidence of a mistaken perception or belief that the complainant had consented was not a defence and should

not be considered. Instead, it directed the jury to consider that very evidence. Moreover, it failed to guide the jury as to how to approach the knowledge element issue on the evidence they could consider" (at paragraphs 12 and 13).

The Court of Appeal held that "the trial judge was required to ensure that the jury considered only evidence that was relevant to that issue, in a way that inoculated them from legal error. He had to ensure that any evidence of the respondent's mistaken belief in consent was removed from the factual mix the jury considered on this issue, so as not to allow an unavailable defence in through the back door. And he had to guide the jury as to how to approach the knowledge element on the basis of the evidence they could properly consider" (at paragraph 86).

A Summary:

The Court of Appeal summarized the applicable principles in the following manner (at paragraph 98):

> In sum, to guide the jury on the knowledge element in a case where the defence of honest but mistaken belief in communicated consent is unavailable, the trial judge should proceed as follows:
>
> > a. The jury should be instructed that, as a matter of law, the accused cannot rely on a defence that the accused mistakenly believed the complainant consented to the sexual activity. Therefore, the jury is to proceed on the factual premise that the accused did not affirmatively believe that the complainant was consenting or communicating consent.
> >
> > b. The jury should be instructed that they should not rely on evidence if it is only relevant in supporting an inference that the accused believed that the complainant was consenting or had communicated consent, and the trial judge should provide guidance in this regard by identifying for the jury the type of evidence it should not consider.
> >
> > c. If there is an air of reality to a defence that the accused did not know of the lack of the complainant's consent on a basis other than a belief in consent (for example, the type of situation envisaged in the *MacIntyre* hypothetical), the jury should be directed to the evidence that they should consider on this issue.

> d. Where there is no air of reality to the defence of honest but mistaken belief in communicated consent, and no air of reality to a defence that the accused did not know of the absence of consent by the complainant on another basis, the trial judge may tell the jury that it should not be difficult for them to find that the accused knew that the complainant was not consenting, or was reckless or wilfully blind to the absence of consent.

SENTENCE-ATTEMPTED MURDER

Director of Public Prosecutions -v- Benko, [2022] IECA 3, January 13, 2022, at paragraphs 56 and 57:

> Having regard to the above cases, and emphasizing again that this is a very small sample of cases from which to draw general conclusions, one can discern the factors which a court should take into account in a case of attempted murder, as set out below; although to a large extent, they mirror the kinds of factors that are relevant in all sentencing cases. We would suggest they are as follows:
>
> > (1) The extent of the victim's injuries; this is particularly relevant in attempted murder cases (as it is, for example, also in assault-type offences). This is because the offence ingredients are defined by reference to the intent of the offender, thus leaving room for a wide variety of outcomes in terms of the injuries caused; ranging all the way from a victim who escapes without injury to a victim who suffers serious and long-term injuries. While the intent to kill is common to all attempted murder cases, the outcome of the accused's conduct may vary widely, and the actual outcome in terms of the impact on the victim's physical and mental health is highly relevant to sentencing. This is not of course to say that it must outweigh all other factors, but it must be properly weighted in the sentencing exercise within the parameters of proportionality laid down in the sentencing authorities in this jurisdiction.
> >
> > (2) Whether the offence was committed in the context of a criminal enterprise or other criminal offences (such as a robbery, or possession of a firearm) and/or whether there were multiple victims;
> >
> > (3) Whether the offence was committed alone or with another;

(4) The venue of the crime (for example, a victim's home where they are entitled to feel safe or where children might witness the event, or a crowded public place where others might be also put at risk, and so on);

(5) The overall context or motivation for the offence, insofar as this can be gleaned from the circumstances and/or admissions made;

(6) Whether or not there was a guilty plea and/or the manner in which the accused ran the trial;

(7) Whether or not there were indications of genuine remorse after the offence, and when these first manifested themselves. For example, immediate remorse and actions indicating that such remorse was genuine would be expected to be given greater weight in sentencing than an expression of remorse which first emerges in the mitigation speech of counsel at the sentencing hearing;

(8) Providing assistance to the Gardai, making admissions, and so on;

(9) The personal circumstances and background of the accused person.

We do not suggest this list to be comprehensive, but merely a brief summary of the kinds of factors that were referred to in the five authorities cited to the Court as well as in the facts before the Court in the present case.

INVESTIGATIVE DETENTIONS AND SEARCHES INCIDENTAL THERETO

R. v. MCKENZIE, 2022 MBCA 3, JANUARY 13, 2022.

FACTS: The accused was convicted of drug and firearm offences. The primary evidence was obtained after an investigative detention and search occurred.

The accused appealed from conviction. The Manitoba Court of Appeal indicated that "[t]his case is about whether common law police powers were exercised lawfully and reasonably in a dynamic situation" (at paragraph 1).

HELD: The appeal was dismissed.

The Circumstances of the Detention and Search:

The Court of Appeal described the circumstances involved in the following manner (at paragraphs 6 to 9):

> On a winter evening, Constables Beattie and Kraychuk were dealing with a motorist in a back lane of a residential neighbourhood in Winnipeg. The accused was observed to be jogging through nearby back yards. Beattie described it as "really weird"; Kraychuk said it was "a little bit unusual." The accused was clenching the left side of his body with his elbow. Beattie thought he might be injured and called out to him asking if he was okay. When the accused made eye contact, Beattie recognized him. From police intelligence reports, Beattie knew that the accused was a long-time member of a street gang and was known to carry a weapon.
>
> The accused "appeared startled or frightened" at seeing the police and "immediately increased his pace to a full out sprint" (at para 7). Both officers formed the belief that the manner in which the accused was holding his left side was an effort to conceal something.
>
> Beattie had extensive training and experience with weapons offences including the manner in which people carry weapons. He believed the accused's mannerism was an attempt to conceal a weapon between his left arm and his body. At this point, he decided to detain the accused for an investigative purpose related to a weapons offence and yelled at the accused to stop. The accused did not comply and a short foot pursuit ensued. During the chase, the accused's jacket was open and Beattie observed the fanny pack. It occurred to him that the accused "was probably running a load of drugs and the fanny pack likely contained drugs" (at para 9). He testified that he thought the fanny pack would contain "one of the two" (drugs or a weapon).
>
> Beattie caught the accused and pinned him against the wall of a house. He observed that the zipper to the fanny pack was about 75% open. He lifted the flap on the fanny pack to fully open it, shined his flashlight and immediately observed the handgun. The accused was arrested and the drug evidence in his jacket was subsequently discovered.

Investigative Detentions:

The Court of Appeal indicated that "[a] police officer may detain an individual for investigative purposes "where they have reasonable grounds to suspect that the

individual is connected to particular criminal activity and that such a detention is reasonably necessary in the circumstances" (at paragraph 13).

The Court of Appeal concluded that there was "no basis to interfere with the trial judge's finding that the accused's section 9 *Charter* right was not violated" (at paragraph 30).

The Court indicated that "if the sum of the objectively discernable facts support the conclusion of possible recent or ongoing criminal behaviour by the individual to be detained, then the standard of reasonable suspicion is met" (at paragraph 19):

> Because the reasonable suspicion standard is invariably fact-driven, there is little in the way of guidance as to when the threshold will be met. However, what is not disputed is that, if the sum of the objectively discernable facts support the conclusion of possible recent or ongoing criminal behaviour by the individual to be detained, then the standard of reasonable suspicion is met even if there is a reasonable innocent alternative in the circumstances. There is no duty on police to undertake further investigation to seek out exculpatory factors or to rule out possible innocent explanations (see *Chehil* at para 34). The nature of the judicial inquiry does not require a court to choose between competing inferences or assess which was the most likely possibility at the time. While the courts have an important duty to protect the rights and freedoms of everyone, they must be mindful in an after-the-fact assessment of the reality that police often have to make quick decisions in dynamic, unpredictable and dangerous situations based on imperfect, evolving or even wrong information. The Supreme Court has accepted that "more innocent persons will be caught" under the reasonable suspicion standard than the reasonable grounds standard (*MacKenzie* at para 85; and see *Chehil* at para 28).

The Manitoba Court of Appeal held that the trial judge "was correct that there was a constellation of objective facts that gave rise to a reasonable suspicion to detain the accused for a weapons offence investigation, namely, the accused was holding his body in a manner consistent with his carrying a weapon, while running, in the absence of any reasonable explanation; upon seeing the police, he attempted to flee; and he had a criminal reputation and a propensity to carry weapons. In assessing the possibilities from the sum of these factors, the trial judge correctly considered the circumstances through the lens of Beattie's extensive training and experience, but did not do so uncritically" (at paragraph 27).

The Search of the Fanny Pack:

The Manitoba Court of Appeal noted that "[i]n *Mann*, the Supreme Court recognized that, based on the *Waterfield* framework, police have a warrantless search power at common law incident to a lawful investigative detention (see paras 36-44). A police officer may conduct a protective pat-down search for weapons incident to an investigative detention where the officer has reasonable grounds to believe that his or her safety or that of others is at risk (see *Mann* at para 40; and *Clayton* at paras 29-30). This search power is more circumscribed than the common law search power that police have incident to a lawful arrest" (at paragraph 32). However, the Court of Appeal also suggested that "[t]he language in *Mann* as to the threshold for this warrantless search power was, with respect, imprecise" (at paragraph 35).

As regards the scope of such searches, the Court of Appeal indicated that the "starting point" is that the police are not required "to put their lives or safety on the line if there is even a low risk of weapons being present" (at paragraph 47):

> The starting point is the observation of Cameron JA in *R v Okemow*, 2019 MBCA 37 that "[t]he Supreme Court of Canada has reinforced that section 8 [of the *Charter*] does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present" (at para 66; see also *Mann* at para 43). Here, the trial judge made no error in concluding that Beattie had reasonable grounds to believe there was an imminent threat to his safety that made it reasonably necessary to conduct a protective search of the accused's fanny pack. Protecting life and property is an important police duty that necessitates some interference with individual liberty. The situation presented to Beattie was volatile and uncertain. Beattie had cause to have concern for his personal safety given the accused's unusual mannerisms suggested he may be carrying a weapon. Beattie was by himself in a dark area as Kraychuk had not yet arrived. Although the accused was cooperating, he had just recently attempted to evade the police. Beattie knew that the accused was a gang member with a propensity to carry weapons. Finally, the extent of the infringement (opening the remaining 25% of the fanny pack to shine a flashlight in) was focused entirely on a protective function.

The Manitoba Court of Appeal concluded that "the trial judge was correct that the search of the fanny pack was reasonably necessary to eliminate an imminent threat to Beattie's safety" (at paragraph 48).

SECTION 8 OF THE CHARTER-WARRANTLESS ENTRY INTO A RESIDENCE TO EFFECT AN ARREST

R. v. LEGACY, 2022 SKPC 1, JANUARY 7, 2022.

FACTS: The accused was charged with the offences of impaired operation of a conveyance and refusing to comply with an approved instrument demand. After receiving a complaint, the police (Cst. Gnanathayalan) went to the accused's residence, entered it and arrested the accused. The officer testified that he had been "invited" to enter the residence by the accused's partner (Ms. Macaloney).

The accused argued that "the police officer's warrantless entry into Mr. Legacy's house was an unreasonable search contrary to his right to be protected from this under s. 8 of the *Canadian Charter of Rights and Freedoms* [*Charter*]. As a result, under s. 24(2) of the *Charter*, the defence seeks to exclude all the evidence which arose following Cst. Gnanathayalan's entrance into this house" (see paragraph 4).

HELD: The application was dismissed.

Judge Green concluded that the "officer received a valid consent from Ms. Macaloney to enter this residence; and…As a result, both the officer's entrance into this residence and his subsequent arrest of Mr. Legacy were lawful…Taken together, I am not satisfied that this police officer's entrance into Mr. Legacy's residence constituted a breach of Mr. Legacy's rights under s. 8 of the *Charter*. Mr. Legacy's application under s. 24(2) of the Charter is dismissed, and all of the evidence from the *voir dire* is applied to the trial on all of the charges" (at paragraphs 27 and 29).

WEAPON PROHIBITION VARIATIONS-SECTION 113, *CRIMINAL CODE*:

R. v. HAWRYLUK, 2022 ONCA 36, JANUARY 17, 2022.

FACTS: The accused was convicted of the offence of trafficking in a controlled substance. A judge of the Ontario Superior Court of Justice imposed an absolute discharge and imposed a section 109 *Criminal Code* weapon prohibition. The accused, a Metis, appealed from sentence, arguing that "the sentencing judge erred by failing to consider s. 113(1)(a) of the *Criminal Code* which provides an exemption to prohibition orders where the person subject to the order requires a firearm or restricted weapon in order to hunt for sustenance".

Sections 113(1) and (5) state as follows:

> (*1) Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that*
>
> > *(a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or*
> >
> > *(b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,*
>
> *the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.*
>
> *(5) In this section, competent authority means the competent authority that made or has jurisdiction to make the prohibition order.*

HELD: The appeal was dismissed. The Ontario Court of Appeal held that the sentencing judge did not committed "any errors in principle that warrant appellate interference. A sentencing judge is not required to consider s. 113 when imposing a s. 109 order. There were sufficient reasons to order the forfeiture of the shotgun: as pointed out by the Crown, the appellant resides in a city and does not require the use of a shotgun at present. The appellant is free to bring an application under s. 113 before a competent authority whenever he chooses, and, in our view, nothing in the wording of s. 113 suggests that the dismissal of the appeal would preclude the appellant from bringing such an application" (at paragraph 7).

As to what constitutes a "competent authority", the Court of Appeal concluded that "[i]n the present case, the competent authority is the Superior Court of Justice. Contrary to duty counsel's concerns, nothing precludes the appellant from bringing an application seeking an exception under s. 113 before a judge of that court" (at paragraph 9).

SENTENCING-DISCHARGES

R. v. Turner, 2022 ABCA 11, January 14, 2022, at paragraph 34

> A discharge, either absolute or conditional, is an extraordinary disposition – to be granted sparingly – not to be utilized in the absence of compelling reasons that make it obvious the offender's personal interest in avoiding a criminal record is far more important than the community's interests in convicting criminals. Promotion of the community's interests requires that there be a public record of those who commit crimes and a formal state denunciation of criminal conduct. The latter achieves the primary statutory objective of sentencing – "to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct".

IF A THE MINIMUM MANDATORY SENTENCE PRESCRIBED FOR WHEN THE CROWN PROCEEDS BY WAY OF INDICTMENT VIOLATES SECTION 12 OF THE CHARTER, THEN THE MINIMUM MANDATORY SENTENCE PRESCRIBED FOR WHEN THE CROWN PROCEEDS BY WAY OF A SUMMARY CONVICTION WILL DO SO AS WELL.

R. c. H.V., 2022 QCCA 16, January 12, 2022 [translation]

Application for leave to appeal from a sentence. Granted. Appeal from the sentence and from a declaration of constitutional inoperability of s. 172.1(2)(b) of the *Criminal Code* (R.S.C. 1985, c. C-46) (*Cr.C.*). Dismissed.

Following the respondent's guilty plea on a summary conviction charge of luring a child, the trial judge declared the mandatory minimum sentence under section 172.1(2)(b) *Cr.C.* to be inoperative against him, suspended the sentence, and ordered 2 years of probation. The Superior Court, sitting on appeal, the Superior Court ruled that the mandatory minimum sentence was constitutionally invalid and substituted 90 days of intermittent imprisonment with 3 years of probation for the sentence imposed at trial. The appellants submit that the sentence is demonstrably unfit and that the mandatory minimum sentence is constitutional. They do not argue that the sentence is saved by s. 1 of the *Canadian Charter of Rights and Freedoms* (R.S.C. 1985, App. II, No. 44, Schedule B, Part I).

Although the severity of a sentence does not raise a question of law when taken alone, it is in this case an integral and essential element of the constitutional analysis.

Analysis of that element, however, invites the application of the standard of palpable and overriding error, which calls for deference, unless the sentence is demonstrably unfit or calculated on the basis of an error in principle.

The appellants erroneously argue that the offence of luring a child is punishable by a range of 12 to 24 months, which argument, at least with respect to summary convictions, finds little support in the case law. The offence covers a wide range of conduct. This is what prompted the Supreme Court to state in *R. v. Morrison* (S.C. Can., 2019-03-15), 2019 SCC 15, SOQUIJ AZ-51577366, 2019EXP-778, [2019] 2 S.C.R. 3, in obiter, that the mandatory minimum sentence for luring a child is vulnerable to constitutional challenge. Furthermore, the ranges are merely guidelines, and the choice to deviate from them is discretionary. Alone, the choice to do so does not justify appellate intervention. As stated in *R. v. Friesen* (S.C. Can., 2019-10-16), 2020 SCC 9, SOQUIJ AZ-51680674, 2020EXP-902, notwithstanding the importance of denunciation and deterrence, rehabilitation and the low likelihood of recidivism may in some cases, like the one before us, weigh in favour of a more lenient sentence. There is no reviewable error in the sentencing judge's calculation of the appropriate sentence.

Since the minimum sentence for luring a child prosecuted by way of indictment was declared invalid in *R. c. Bertrand Marchand* (CA, 2021-08-24), 2021 QCCA 1285, SOQUIJ AZ-51790428, 2021EXP-2205, the possibility that an offender may have to serve a 6-month sentence when the offence is prosecuted summarily, whereas another offender prosecuted by way of indictment may receive a lesser sentence, could potentially lead to unfair and inconsistent situations. Although the mode of prosecution falls within the Crown’s discretion, this state of affairs contradicts the notion of consistency with the principles of parity and individualization of sentences. It may also have collateral consequences entirely unrelated to the circumstances of the commission of offences, for example, on the right of an accused to appeal a deportation order in an immigration context. Where there is no reviewable error, there is no reason to intervene.

SECTION 8 OF THE CHARTER AND THE OPENING OF MAIL PURSUANT TO SECTION 41(1) OF THE *CANADA POST CORPORATION ACT*

R. v. GORMAN, 2022 NLSC 3, JANUARY 11, 2022.

FACTS: The accused was charged with the offence of trafficking, contrary to the *Controlled Drugs and Substances Act*. After a parcel addressed to the accused was

opened by a postal inspector, the police were contacted and a controlled delivery was made to the accused. The accused argued that the authority of postal inspectors to open mail pursuant to section 41(1)(c) of the *Canada Post Corporation Act* violated section 8 of the *Charter*. That section states:

> *The corporation may open any mail, other than a letter, to determine in any particular case*
>
> *(c) whether the mail is non-mailable matter.*

Section 3 of the *Non-mailable Matter Regulations*, indicates that "the items set out in the schedule are non-mailable matter". Item 4 of the schedule refers to "[a]ny item transmitted by post in contravention of an Act or a regulation of Canada".

HELD: Justice Boone held that section 41(1)(c) violates section 8 of the *Charter* and is not saved by section 1.

Section 8 of the Charter:

Justice Boone held that an "expectation of privacy in the mail arises from the basis for the constitutional right to privacy protected by the s. 8 guaranteed protection from unreasonable search or seizure…Therefore, in general there is a reasonable expectation of privacy in the mail that includes an expectation that the Crown Corporation that is delegated the privilege of operating the postal system will not search it" (at paragraphs 19 and 22).

Justice Boone held that the "search in this case was conducted pursuant to a statute governing the regulated postal scheme. However, that factor is not in and of itself sufficient to displace any reasonable expectation of privacy of those using the parcel post system. The values engaged in trusting parcels to the post office impact on the core aspects of identity protected by s. 8 of the *Charter*" (at paragraph 39). He concluded as follows (at paragraphs 68 to 70):

> In this case, prior judicial authorization ought not to be required. In this regard, I do consider the state objective in ensuring the safety of the mail system to be relevant. The possibility of toxic chemicals or explosives or other potentially harmful agents being shipped through the system requires an immediate response by postal officials, rather than a response delayed by the requirement for a warrant. As with the school officials in *R. v. M. (M.R.)*, postal officials are better placed than judicial officers to determine the possibility of packages containing such substances. Leaving aside the

> presence of contraband or dangerous goods, the other regulatory requirements (packaging, postage, etc.) against which postal officials can measure searched parcels are fairly mundane and do not require judicial attention. The efficient operation of the postal system requires that parcels move through the system with no more interference than necessary.
>
> However some form of objective standard ought to be required before a search can proceed. It is not a sufficient safeguard of postal users' constitutional rights to leave the decision whether to search a parcel entirely to the unfettered discretion of postal officials. The authority provided in s. 41(1) to search any or all parcels clashes with the reasonable expectation of privacy in the mail. I do not think that users of the postal system would expect that the post office could never search a parcel under any circumstance. However, they would expect that a search would only take place on the basis of an objective standard that the regulatory purpose of the search is engaged.
>
> Therefore, s. 41(1) violates the guarantee against unreasonable search in s. 8 of the *Charter*.

Section 1 of the Charter:

Justice Boone held (at paragraph 82):

> …although the Crown has demonstrated that effective security measures are necessary to ensure the safety and security of the parcel system, the unfettered search authority in s. 41(1) is not proportionately responsive to the intrusion on postal users' s. 8 rights. The statute is not saved by s. 1.

SECTION 8 OF THE CHARTER-STRIP SEARCHES (AND SECTION 24(2) IN A DISSENT)

R. v. ALI, 2022 SCC 1, JANUARY 19, 2022.

FACTS: The accused was convicted of the offence of possession of cocaine for the purpose of trafficking, contrary to the *Controlled Drugs and Substances Act*.

The evidence presented against him at his trial, included drugs found as a result of a strip search. The Alberta Court of Appeal noted (2020 ABCA 344) that "when he was strip searched three white baggies containing cocaine were found in his 'butt crack area'" (at paragraph 3).

The Court of Appeal indicated that on the *voir dire* to determine if the drugs found as a result of the search was admissible, Constable Darroch [the lead investigator] testified that he had been told by another officer (Constable Odorski) that he had seen the accused "reaching towards his nether region". Though Constable Odorski testified on the *voir dire*, he "was never asked any questions about these observations, either in chief or during his cross-examination. It was Constable Darroch who testified that he had obtained this information from Constable Odorski, and that he had relied on that information in deciding to recommend a strip search" (at paragraphs 9 and 10). Constable Darroch passed on the information he received from Constable Odorski to the Staff-Sergeant who made the decision to proceed with the strip search.

The accused appealed from conviction. The Alberta Court of Appeal (with Veldhuis J.A. dissenting), dismissed the accused's appeal from conviction. It concluded that the trial judge did not err in holding that the strip search was reasonable. The Court of Appeal indicated that the trial judge "was not required to find, as a matter of fact, that the appellant 'reached towards his nether region'. If such a finding had been necessary to sustain a conviction, it could only have been made based on admissible evidence. The trial judge, however, was only required to decide if, at the time the decision was made to conduct a strip search, the police team had 'reasonable and probable grounds' to conduct that search. That depended on the information known to, believed, and reasonably relied on by the police team, specifically the Staff Sergeant. The fact that some of it may have been inadmissible as evidence at a trial was irrelevant" (at paragraph 15).

The accused appealed as of right to the Supreme Court of Canada.

HELD: The appeal, with a dissent, was dismissed.

The Supreme Court held that the police had reasonable grounds to conduct the strip search and that Constable Darroch "could reasonably rely on the information from Cst. Odorski as a factor in deciding whether he had reasonable and probable grounds to request the strip search".

In a dissenting judgment, Côté J., concluded that the "Crown failed to discharge its burden of establishing the legal basis for the strip search of Mr. Ali in accordance with the principles set out by this Court in *Golden*". However, Justice Côté concluded that the evidence obtained as a result of the strip search was admissible and that the conviction should be affirmed.

The Supreme Court's decision was rendered orally in the following manner[1]:

> MOLDAVER J. (Brown, Rowe and Jamal JJ. concurring) — Mr. Ali appeals as of right to this Court. A majority of the Alberta Court of Appeal affirmed his conviction for possession of cocaine for the purpose of trafficking. They found that the trial judge did not err in determining that the police's strip search of Mr. Ali, incident to his lawful arrest, complied with s. 8 of the *Canadian Charter of Rights and Freedoms* in accordance with the principles governing strip searches set out by this Court in *R. v. Golden*, 2001 SCC 83, [2001] 3 S.C.R. 679.
>
> A majority of this Court agrees with the conclusion of the majority of the Court of Appeal and would dismiss the appeal. Where a strip search is conducted as an incident to a person's lawful arrest, there must be reasonable and probable grounds justifying the strip search, in addition to reasonable and probable grounds justifying the arrest (see *Golden*, at para. 99). These grounds are met for the strip search where there is some evidence suggesting the possibility of concealment of weapons or other evidence related to the reason for the arrest (see *Golden*, at paras. 94 and 111).

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[1] The manner in which this decision was rendered, is illustrative of a trend by the Supreme Court of Canada to routinely render brief oral decisions in cases of significance. For instance, in 2020, the Supreme Court of Canada rendered oral judgments in *R. v. Reilly*, 2020 SCC 27 (which involved the constitutionality of holding by the police of individuals charged with an offence in contravention of Canada's bail laws); *R. v. Li*, 2020 SCC 12 (dealing with the defence of entrapment); *R. v. Kishayinew*, 2020 SCC 34 (dealing with the issue of the capacity of an intoxicated complainant to consent to sexual activity); *R. v. Doonanco*, 2020 SCC 2 (which considered the requirement of the Crown to disclose expert medical reports to the accused); *R. v. Slatter*, 2020 SCC 36, (which considered how trial judges are to assess the evidence given by individuals who have an intellectual or developmental disability); and *R. v. Delmas*, 2020 SCC 39 (in which the issues of stereotypical reasoning and the consequences of failing to conduct a *voir dire* before considering a complainant's prior sexual activity with the accused were raised).

In 2021, this trend continued. See, for instance, *R. v. Lai*, 2021 SCC 52 (dealing with the right to be tried within a reasonable period of time as protected by section 11(b) of the *Charter*); *R. v. Reilly*, 2021 SCC 38 (dealing with the admissibility of evidence unconstitutionally obtained); *R. v. Dingwall*, 2021 SCC 35 (dealing with the admissibility of circumstantial evidence); *R v. Waterman*, 2021 SCC 5 (dealing with the requirement of expert evidence in sexual assault trials); *R. v. Strathdee*, 2021 SCC 40 (dealing with liability for group assaults leading to a death); and *R. v. Morrow*, 2021 SCC 21 (dealing with how the offence of attempting to obstruct the course of justice should be defined).

Like the majority of the Court of Appeal, we are satisfied that there were reasonable and probable grounds justifying the strip search: the police had confidential source information that their target was in possession of a large quantity of cocaine and that he kept most of his drugs on his person; Mr. Ali was found next to a table with drugs, other than cocaine, and with items consistent with drug trafficking, including a scale, money, and a ringing cell phone; Mr. Ali's pants were partially down as he was being arrested; and one of the officers reported seeing Mr. Ali reaching towards the back of his pants. Viewed in its totality, this was clearly some evidence suggesting the possibility that Mr. Ali had concealed drugs, particularly cocaine, in and around the area of his buttocks.

We would not give effect to Mr. Ali's argument that a hearsay error arose because the officer who requested the strip search, Cst. Darroch, testified that he was told by another officer, Cst. Odorski, that Mr. Ali was reaching towards the back of his pants, and Cst. Odorski did not refer to this in his testimony at trial. Mr. Ali now concedes that Cst. Darroch's testimony was not inadmissible hearsay because it was not entered for the truth of its contents; the question, he maintains, was whether Cst. Darroch could reasonably rely on the information from Cst. Odorski as a factor in deciding whether he had reasonable and probable grounds to request the strip search. Defence counsel chose not to cross examine either officer about this information. It stood uncontradicted. This tactical choice undermines Mr. Ali's submission that it was unreasonable for Cst. Darroch to rely on Cst. Odorski's information.

For these reasons, we would dismiss the appeal.

CÔTÉ J. — I agree with the majority's disposition of the appeal, but for different reasons.

In my view, the respondent Crown failed to discharge its burden of establishing the legal basis for the strip search of Mr. Ali in accordance with the principles set out by this Court in *Golden*. As such, I find that Mr. Ali's s. 8 *Charter* rights were violated, substantially for the reasons of Veldhuis J.A., at paras. 27-61.

However, I part ways with Veldhuis J.A. with respect to the proper remedy. Relying on *Golden*, at paras. 118-19, Mr. Ali argues that this Court should

substitute an acquittal because conducting an analysis under s. 24(2) of the *Charter* would be a mere theoretical exercise.

I disagree. As in Golden, I acknowledge that Mr. Ali has already served his custodial sentence. Nevertheless, he remains subject to restrictions to his liberty, including a firearms prohibition and a DNA order. As such, determining whether the evidence ought to be admitted will have tangible consequences, both for Mr. Ali and for the public.

Moreover, the facts of this case are plainly distinguishable from *Golden*. The strip search in *Golden* was coercive and forceful, conducted in a public area without authorization from a senior officer, and may have jeopardized the accused's health and safety. The search of Mr. Ali has none of these characteristics. It is undisputed that it was conducted in a reasonable manner. In my view, it is worthwhile to assess whether admitting evidence obtained as a result of the *Charter* breach would do further damage to the repute of the justice system.

I further acknowledge that, as the courts below found no breach of s. 8 in this case, they did not consider whether the evidence should be excluded under s. 24(2). However, I accept the Crown's submission that the record before this Court is sufficient to determine whether the admission of the evidence would bring the administration of justice into disrepute. Therefore, I see no utility in sending the matter back for redetermination. In these circumstances, it is open to this Court to conduct its own first-instance s. 24(2) analysis (*R. v. Spencer*, 2014 SCC 43, [2014] 2 S.C.R. 212, at para. 75).

Applying the three lines of inquiry from *R. v. Grant*, [1993] 3 S.C.R. 223, I would not exclude the evidence.

First, the seriousness of the police conduct in this case was at the lowest end of the spectrum. Cst. Darroch believed in good faith that he had the requisite grounds to strip search Mr. Ali. He relayed his grounds to his superior officer, who authorized the search at the police station. I see no basis to suggest that the police wilfully disregarded Mr. Ali's *Charter* rights. This factor favours admission.

Second, the impact of the strip search on Mr. Ali's privacy interests, while serious, was somewhat attenuated by the reasonable manner in which it was conducted. At trial, counsel for Mr. Ali noted the search was "as humane as

possible given the circumstances" (trial transcript, A.R., at p. 173). In my view, this factor tips only moderately in favour of exclusion.

The final *Grant* inquiry strongly favours admission. Mr. Ali was in possession of 65 grams of crack cocaine. The Crown would have no case without this evidence. There is a strong societal interest in adjudicating this case on its merits.

On balance, I conclude that excluding the evidence would bring the administration of justice into disrepute. To be clear, I would emphatically re-affirm the principles arising from *Golden* and the high threshold the Crown must meet to justify a warrantless strip search. However, while the Crown failed to meet that threshold in this case, the conduct of the police did not undermine the integrity of the justice system. Therefore, I would not exclude the evidence.

For the foregoing reasons, I would dismiss the appeal and affirm the conviction.

TRIALS-SPECULATIVE REASONING

R. v. KRUK, 2022 BCCA 18, JANUARY 20, 2022.

FACTS: The accused was convicted of the offence of sexual assault. The essence of the conflicting evidence, presented at the trial, was set out by the British Columbia Court of Appeal in the following manner (at paragraphs 13 and 14):

Inside Mr. Kruk's home, the complainant eventually passed out or fell asleep in Mr. Kruk's bedroom. She testified that she woke up to find Mr. Kruk on top of her with his penis inside her vagina. Her pants were off. She did not think he was wearing a condom. She pushed him two times. The second time, she was able to push him off. She did not feel him moving when his penis was inside her and was unable to say whether he ejaculated. She was not asked to provide any other details of the assault.

Mr. Kruk denied having sex with the complainant. He testified that he had given her a glass of water which she spilled on herself. He then gave her some pyjamas to change into in the privacy of his bedroom. When he subsequently found her passed out on his bed with her pants around her ankles, he put a blanket over her. He was unable to wake her, even with the assistance of his father. He became annoyed with the situation. He wanted the complainant

> gone. He checked his phone but it was not charging due to a faulty charger. He then fell asleep. When he woke up, he again tried to waken the complainant. This time she came to in a startled fashion.

In convicting the accused, the trial judge described the complainant as being "an obviously unreliable witness because of her state of intoxication." However, on the issue of whether the accused had inserted his penis into the complainant's vagina, the trial judge stated:

> *[The complainant's] evidence is devoid of detail, yet she claims to be certain that she was not mistaken. She said she felt [Mr. Kruk's] penis inside her and she knew what she was feeling. In short, her tactile sense was engaged. It is extremely unlikely that a woman would be mistaken about that feeling.*

The accused appealed from conviction, arguing that the trial judge "erred in taking judicial notice of a 'highly contentious fact'".

HELD: The appeal was allowed and a new trial ordered. The British Columbia Court of Appeal concluded that the trial judge's conclusion "was not grounded in the evidence" (at paragraphs 66 to 69):

> The Crown never asserted at trial that the judge should accept the complainant's testimony because, as a matter of medical science or common sense, it was extremely unlikely that any complainant, even one who was highly intoxicated, would be mistaken about the feeling of a penis inside their vagina. The issue was never what any complainant would feel or even what this complainant would feel. The issue was always, appropriately, what this complainant did feel.
>
> After reviewing the whole of the record and the whole of the reasons, I am unable to find that the judge's conclusion regarding the extreme unlikelihood of any complainant, in all circumstances, being mistaken about the feeling of a penis in their vagina is the proper subject of judicial notice or common sense. It is a finding that was not sought by the parties, was not grounded in the evidence, and engages questions of neurology (the operation of the body's sensory system), physiology (the impact of alcohol on perception, memory and the body's sensory system) and psychiatry (the impact of alcohol and/or trauma on perception and memory).
>
> To be clear, I am not saying that highly intoxicated complainants are incapable of giving reliable testimony about the invasive feeling of penises in their

vaginas. I am simply saying that, in this case, the judge fell into error by engaging in speculative reasoning that was not grounded in the evidence.

In all of the circumstances, I am of the view that the judge erred in law. He did not grapple with the evidence and arguments of the parties on the central issue in the case. He did not make a finding that was tethered to the evidence. Instead, he engaged in speculative reasoning. He made an assumption on a matter that was not so well known as to be notorious, that was not capable of immediate and accurate proof by resort to a readily accessible source of indisputable accuracy, or that was a matter of common sense.

PREVIOUS SEXUAL ACTIVITY-SECTION 276 OF THE CRIMINAL CODE-THE ROLE OF THE TRIAL JUDGE WHEN COUNSEL CONSENT TO ADMISSION

R. v. R.K.K., 2022 BCCA 17, January 20, 2022, at paragraphs 4 to 7:

..I would note this is yet another of the many sexual assault appeals this Court has considered in which the trial judge failed to perform the gatekeeper function mandated by s. 276 of the *Criminal Code*. During cross-examination of J.K.R., the judge raised s. 276, but was assured by Crown and defence counsel they had discussed the issue and had determined J.K.R.'s sexual history as it pertained to her relationship with R.K.K. was relevant—as part of the narrative to provide context for credibility—and J.K.R. did not object. The judge accepted this position and did not pursue the issue.

The Supreme Court of Canada has addressed the trial judge's heightened role with respect to s. 276. As gatekeepers, trial judges "play an important role in keeping biases, prejudices, and stereotypes out of the courtroom": *R. v. Barton*, 2019 SCC 33 at para. 197. Two such biases, the twin myths of sexual assault, "have no place in a rational and just system of law": *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 630, 1991 CanLII 76. Section 276 set out to eradicate these myths in criminal trials, and "[t]he ultimate responsibility for enforcing compliance with the mandatory s. 276 regime lies squarely with the trial judge": *Barton* at para. 68.

A situation where evidence is led by agreement or without objection, even by the Crown, does not absolve the trial judge of their gatekeeping role: *Barton* at paras. 68, 80; *R. v. R.V.*, 2019 SCC 41 at para. 78; *R. v. Langan*, 2019 BCCA 467 at para. 66; *R. v. A.L.*, 2020 BCCA 18 at para. 150.

> The Supreme Court of Canada has mandated there is no room for counsel to agree as they did here. The judge must rule on the admissibility of the evidence relevant to s. 276. As "the ultimate evidentiary gatekeepers", trial judges "have a duty to vigilantly assess and exclude inadmissible evidence regardless of the positions taken (or not taken) by counsel": *R. v. Goldfinch*, 2019 SCC 38 at para. 75; *A.L.* at para. 150.

STEREOTYPICAL REASONING

R. v. R.K.K., 2022 BCCA 17, JANUARY 20, 2022.

FACTS: The accused was convicted of the offence of sexual assault. The complainant (J.K.R.) testified that non-consensual sexual intercourse occurred. The accused testified that the intercourse was consensual.

After the incident occurred, the accused took a photograph of the complainant. The Court of Appeal described what occurred in the following manner (at paragraph 27):

> R.K.K. took a photograph of J.K.R. on the bed with his cell phone and told her he would send it to her co-workers and relatives. The photograph depicts J.K.R. lying on the edge of a bed, her closed legs over the end of the bed, clothed from the waist up, clutching something covering her pelvic area. Her face is turned away from the camera so that her facial expression is not visible.

In convicting the accused, the trial judge made the following comments concerning the relevance of the photograph:

> *I believe the complainant's detailed description of what took place in the bedroom, including him positioning her at the corner of the bed, his holding of her arms, the weight of his body on her, the manner in which he used his legs, his animal like trance, and his repeated utterances of "let me feel you one time".*
>
> *The Photograph that the accused admittedly took of the complainant afterwards is consistent with that evidence and is inconsistent with the consensual love-making of a willing and sensual girlfriend.*

The Appeal:

The accused appealed from conviction. He argued that the trial judge "used speculation and stereotypes when he found the photograph was consistent with

J.K.R.'s evidence of sexual assault, and was inconsistent with 'consensual love-making of a willing and sensual girlfriend'".

HELD: The appeal was dismissed. The Court of Appeal concluded that the trial judge did not "use stereotypical reasoning in his analysis of the photograph" (at paragraphs 42 to 45):

> In my view, the judge did not use stereotypical reasoning in his analysis of the photograph. His reasoning did not amount to a subjective assessment of what a hypothetical young woman would have looked like, or done, or felt in the situation. The judge tethered his analysis of the sexual assault count to an evidentiary base. He made common-sense inferences grounded in the evidence and properly considered what J.K.R. looked like, did or felt given the context of the situation and her particular circumstances.
>
> During the Crown's cross-examination of R.K.K., Crown counsel drew R.K.K.'s attention to the photograph, noting it depicted J.K.R. lying on the bed with her legs closed and her face pointed away from R.K.K. The Crown asserted J.K.R. had just told him she was interested in someone else and did not want to be in public with R.K.K. without that person. The Crown then asked R.K.K. if this looked like a woman who wanted to have sex and whether he had asked her to consent. He responded by saying they were always together, she always consented to having sex, and he did not need to confirm she was consenting. In closing submissions, Crown counsel drew attention to the photograph as depicting the trauma J.K.R. said she felt as she lay on the bed after the sexual assault and pointed out "there's no compliant smiling sexy pose during sex … that [R.K.K.] testified to." (R.K.K. alleged he had taken photographs of J.K.R. smiling and looking at him, but none of these photographs were in evidence at trial.) Crown counsel submitted it belied common sense that the photograph depicted R.K.K.'s version of consensual sexual intercourse.
>
> Again, the judge did not find how a hypothetical woman, or a woman generally, would stereotypically look after consensual sex. Nor did he rely on such a finding to conclude that J.K.R. did, or did not, resemble this image to find R.K.K. guilty of sexual assault. The judge's comment that the photograph "is inconsistent with the consensual love-making of a willing and sensual girlfriend" was "infelicitous" and unnecessary in his analysis of the evidence, but was, in fact, drawn from and grounded in the evidence, and founded on J.K.R.'s particular circumstances.

I would not accede to this ground of appeal.

THE UNITED STATES SUPREME COURT CONSIDERS THE ADMISSIBILITY OF HEARSAY EVIDENCE

HEMPHILL v. NEW YORK, NO. 20–637 (2022), JANUARY 22, 2022.

FACTS: The accused was charged with murder. The victim was killed by a 9-millimeter bullet. Initially, the police had charged Nicholas Morris with the murder, but the State subsequently accepted a plea of guilty to a lesser charge.

At the accused's trial, the accused pursued "a third-party culpability defense" claiming that Morris had committed the murder. In support, he elicited evidence that the police had recovered 9-millimeter ammunition from Morris' nightstand during their investigation.

The state sought to introduce parts of the transcript of Morris' plea allocution as evidence to rebut the accused's defence. At the time, Morris was outside the United States and not available to testify. The trial judge allowed the State to introduce the evidence, holding that the accused's position had "open[ed] the door" to the introduction of the transcript. The trial judge held that though Morris could not be subjected to cross-examination, the evidence was admissible because it was "reasonably necessary" to "correct" the "misleading impression" created by the accused.

The accused was convicted. His appeal to the New York Court of Appeals was dismissed. The accused appealed to the Supreme Court of the United States. The Supreme Court described the question raised by the appeal as being the following:

> The question is whether the admission of the plea allocution under New York's rule in *People v. Reid* violated Hemphill's Sixth Amendment right to confront the witnesses against him.

HELD: The Court concluded "that it did. Hemphill did not forfeit his confrontation right merely by making the plea allocution arguably relevant to his theory of defense". The conviction was overturned.

The Supreme Court's Ruling:

The Supreme Court noted that "[o]ne of the bedrock constitutional protections afforded to criminal defendants is the Confrontation Clause of the Sixth Amendment, which states: 'In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him'". The Court indicted that the "the Confrontation Clause bar judges from substituting their own determinations of reliability for the method the Constitution guarantees. The Clause 'commands',

not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination".

As a result, the Supreme Court concluded that the trial judge erred "by admitting unconfronted, testimonial hearsay against Hemphill":

> The trial court here violated this principle by admitting unconfronted, testimonial hearsay against Hemphill simply because the judge deemed his presentation to have created a misleading impression that the testimonial hearsay was reasonably necessary to correct. For Confrontation Clause purposes, it was not for the judge to determine whether Hemphill's theory that Morris was the shooter was unreliable, incredible, or otherwise misleading in light of the State's proffered, unconfronted plea evidence. Nor, under the Clause, was it the judge's role to decide that this evidence was reasonably necessary to correct that misleading impression. Such inquiries are antithetical to the Confrontation Clause.
>
> …
>
> The Confrontation Clause requires that the reliability and veracity of the evidence against a criminal defendant be tested by cross-examination, not determined by a trial court. The trial court's admission of unconfronted testimonial hearsay over Hemphill's objection, on the view that it was reasonably necessary to correct Hemphill's misleading argument, violated that fundamental guarantee. The judgment of the New York Court of Appeals is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

ADMISSIBILITY OF PRIOR SEXUAL ACTIVITY-SECTION 276 CRIMINAL CODE

R. v. RAVELO-CORVO, 2022 BCCA 19, JANUARY 26, 2022.

FACTS: The accused was charged with the offence of sexual assault. He applied to introduce prior sexual activity in support of a defence of mistaken belief in communicated consent. The evidence consisted of what purportedly occurred between the accused and the complainant (dancing and sexual touching) at a bar prior to sexual activity occurring at the accused's residence.

The trial judge dismissed the application. The accused was convicted. In dismissing the application, the trial judge held that the factors in s. 276(3) need only be considered "at the balancing stage in s. 276(2)(d), and only if the accused has met each of s. 276(2)(a), (b) and (c)". the accused appealed to the British Columbia Court of Appeal.

HELD: The appeal was dismissed, though the Court of Appeal disagreed with the trial judge's interpretation of section 276(3) of the *Criminal Code*.

The Court of Appeal held that Section 276(2) "expressly requires all four conditions for admissibility enumerated in paragraphs (a) to (d) to be met, and s. 276(3) expressly requires judges to take the enumerated factors into account in determining admissibility under s. 276(2)… the factors in s. 276(3) must be taken into account in assessing all of the requirements in s. 276(2). As the analysis required to assess relevance is closely connected to that required to assess probative value, the mandatory requirement in s. 276(3) to take the enumerated factors into account ensures that the legitimate purpose of any admissible evidence of prior sexual activity "is identified and weighed against countervailing considerations" (at paragraphs 34 and 40).

The Court of Appeal held that the proposed evidence in this case was "closely related in time to the incident in the apartment that forms the subject matter of both the sexual assault and the unlawful confinement charges. It is in essence part of the narrative of events leading up to the incident. That in itself does not render the evidence admissible, but in such circumstances, an analysis under s. 276 should not usually be a complex one. Provided this part of the narrative is relevant to an issue raised at trial, the evidence should meet the relevance threshold under s. 276(2)(b)" (at paragraph 41).

However, the Court of Appeal concluded that the proposed evidence of what occurred at the bar had "scant probative value in relation to the defence of honest but mistaken belief in communicated consent": (at paragraphs 51 and 52):

> As the trial judge found, the appellant failed to explain how and why the evidence of the sexual activity at the club informed his honest but mistaken belief that she communicated consent to the sexual activity in the apartment. His evidence in the application was silent as to how the complainant's "tug-of-war" between him and R affected his perception at the time of the incident. The suggestion in the appellant's application and his evidence that the complainant's alleged sexual conduct at the club led him to believe that she was interested in further, undefined sexual activity treads closely to the "forbidden territory of assumed or implied consent" and the false logic of twin-myth reasoning: *Barton* at paras. 92, 94.
>
> In these circumstances, the proposed evidence had scant probative value in relation to the defence of honest but mistaken belief in communicated consent, reflected discriminatory beliefs, and there was no reasonable prospect that it

would assist the trial judge in her task. Therefore, the judge's refusal to admit it did not deprive the appellant of the right to make full answer and defence.

DISPOSITIONS-NOT CRIMINALLY RESPONSIBLE ON ACCOUNT OF MENTAL DISORDER-SECTION 672.64(1)(b)-HIGH RISK ACCUSED

Lafrenière c. R., 2022 QCCA 96, January 24, 2022. [Translation]

Appeal from a finding of high-risk accused.
Dismissed.

The appellant was found not criminally responsible on account of mental disorder on a charge of second degree murder. He was found to be a high-risk accused solely on the basis of s. 672.64(1)(b) of the *Criminal Code* (R.S.C. 1985, c. C-46) (*Cr.C.*). The appellant argues that this section must be interpreted so as to require proof of a substantial likelihood that the accused will use violence that could endanger the life or safety of another person. Moreover, he submits that the judge placed too much emphasis on the criterion of brutality in her analysis, at the expense of the factors set out in s. 672.64(2) *Cr.C.*

Although the violence and brutality of the offence are not sufficient to support a finding of high-risk accused, as was established in *Gaudette c. R.* (C. A., 2021-06-29), 2021 QCCA 1071, SOQUIJ AZ-51776894, 2021EXP-1941, the appellant's actions and relentlessness in this case are almost inconceivable. Sections 672.64(1)(a) and 672.64(1)(b) *Cr.C.* have different objectives. While paragraph (a) requires the judge to be convinced of the existence of a substantial likelihood of the subsequent use of violence that could endanger the life or safety of another person, paragraph (b) is less exacting. It does not qualify the risk, but is satisfied by the judge's opinion that the acts giving rise to the offence are of such a brutal nature that there is a risk of grave physical or psychological harm to another person. The analytical framework is inevitably different. It is necessary to seek the intention of Parliament and give meaning to the two disjunctive aspects of s. 672.64(1) *Cr.C.*, while complying with the *Canadian Charter of Rights and Freedoms* (R.S.C. 1985, App. II, No. 44, Schedule B, Part I).

A finding based exclusively on s. 672.64(1)(b) *Cr.C.* creates a real possibility that, at the very first hearing before the Review Board for mental disorder, that body may refer the matter back to the Superior Court for review and the Superior Court may revoke the finding. This situation, however, does not lead to the conclusion that this provision is futile. Parliament was well aware of the distinction between paragraphs

(a) and (b) and its consequences on the review procedure, as it specifically refers to it in s. 672.84(1) *Cr.C.* It is therefore not an oversight or an error. For Parliament, the exercise that takes place before the Court is different from the exercise that takes place before the Review Board.

In s. 672.64(1)(b) *Cr.C.*, it is established that the gravity of harm may arise from the brutality of the acts giving rise to the offence, but the prosecution must demonstrate a real risk (not speculative or "minuscule") that such harm may occur. A risk of grave harm is very different from a substantial likelihood of violence that could endanger the life or safety of others. Accordingly, even though the trial judge found, under paragraph (a), that there was no substantial risk that the offender would reoffend, when she should have instead referred to a substantial likelihood of violence, she could nevertheless find the appellant to be a high-risk accused under paragraph (b) because she was of the view that, due to the brutality of the acts, there was a risk of grave harm.

Contrary to the appellant's submission, the judge assigned the proper weight to the factors set out in s. 672.64(2) *Cr.C.* in her analysis. The decision to set aside the opinion of the expert appointed by the appellant deserves a measure of deference, especially since it is reasoned and reasonable. Moreover, both experts found that the auditory hallucinations that led to the appellant's violent acts were still present, which is very relevant to the risk analysis. There is therefore no cause to intervene in this case.

THIRD PARTY EVIDENCE-NARRATIVE

R. v. CBP, 2022 ABCA 29, JANUARY 28, 2022.

FACTS: The accused was convicted of the offence of sexual assault in relation his former wife. He appealed from conviction, arguing, in part, that the trial judge erred in:

> Admitting and failing to instruct on the use of a third-party witness's evidence, where the effect was to invite speculation about CP's guilt.

The Trial:

At the trial, the complainant testified "that a third party, MC, contacted her on Facebook in May 2017. The complainant revealed '[MC] reached out to me and I didn't know them, and they said that they had met [the appellant]'…[T]he Crown

asked '*based on that conversation*, what did you do' [Court of Appeal's emphasis added]. The complainant responded that she 'went to the police'" (see paragraph 6).

MC was called as a witness by the Crown. In direct examination, the following exchange occurred:

> *Q: All right. Now after that night, did anything happen? What did you do?*
>
> *A: After that night?*
>
> *Q: Mm-hm.*
>
> *A: I waited a few days and I wanted to reach out to [CP's] wife.*

The Court of Appeal:

The appeal was allowed and a new trial ordered. The Alberta Court of Appeal concluded that MC's evidence was prejudicial to the accused (at paragraph16):

> It is true that the Crown did not specifically ask MC about the contents of her conversation with the appellant. It is also true that the Crown did not elicit evidence about what MC revealed to the complainant, which spurred her difficult decision to come forward and report to police. However, implicit in the question "after that night, did anything happen? What did you do?" is a suggestion that *as a result of* events which transpired on the night MC and the appellant were together, something happened or was said that led MC to reach out to the complainant. The two parties were unknown to one another. There is no apparent reason why a stranger would contact another person, out of the blue, and make comments leading the recipient of that message to speak with police, unless the person initiating contact came into possession of knowledge or information relating to the offence itself. This was the most obvious and seemingly only plausible inference to be drawn from the available facts. The potential for forbidden reasoning strongly called out for words of caution in the final instruction to the jury.