

IN THE COURT OF APPEAL OF MANITOBA

Coram: Chief Justice Marianne Rivoalen
Mr. Justice Marc M. Monnin
Mr. Justice James G. Edmond

BETWEEN:

<i>HIS MAJESTY THE KING</i>	)	<i>R. N. Malaviya, K.C.</i>
	)	<i>for the Appellant</i>
	)	
<i>Appellant</i>	)	<i>S. B. Simmonds, K.C. and</i>
	)	<i>S. Lozinski</i>
<i>- and -</i>	)	<i>for the Respondent</i>
	)	
<i>B. S. H.</i>	)	<i>Appeal heard:</i>
	)	<i>May 27, 2026</i>
<i>(Accused) Respondent</i>	)	
	)	<i>Judgment delivered:</i>
	)	<i>August 13, 2026</i>

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EDMOND JA

Introduction

[1] After a trial in the Provincial Court, the accused was convicted of criminal harassment, being unlawfully in a dwelling-house, sexual assault and assault (the offences). The sentencing judge imposed a global sentence of two years less a day to be served as a conditional sentence order (CSO), followed by one year of unsupervised probation and ancillary orders.

[2] The Crown seeks leave to appeal the sentence imposed and, if granted, seeks a sentence of four years.

[3] The Crown filed a motion to suspend the CSO pursuant to section 683(5)(f) of the *Criminal Code*, RSC 1985, c C-46 [the *Code*] and to release the accused on bail pending appeal. The Crown's motion was granted on February 12, 2026.

[4] As I will explain, since 2022, a CSO has been available for the offence of sexual assault, and while some judges have imposed CSOs for such an offence, others have rejected that sentence as not consistent with the fundamental purpose and principles of sentencing. This appeal turns on the deference owed to the sentencing judge's decision to impose a CSO for the offences in the circumstances of this case.

[5] For the reasons that follow, I would grant leave to appeal the sentence, but dismiss the sentence appeal.

Background

Circumstances of the Offences

[6] The circumstances that gave rise to the offences occurred over two days, August 26 and 27, 2023. The accused and the victim had a domestic relationship that lasted for approximately ten months, during which time the victim had provided the accused with the keys to her home. On August 26, 2023, he let himself into her home and accused her of cheating on him. She asked him to return her keys but he refused and then left.

[7] On August 26, 2023, the victim was travelling, and during that day, the accused sent numerous text messages, again accusing her of cheating on him, which contained profane and threatening language. He also attempted to call her sixty-eight times. She did not respond to the text messages or answer or return any of the calls. The victim was afraid to go home that evening, as she feared the accused may show up at her home again. Eventually, she went home around 3:30 a.m. on August 27, 2023, locked her doors and latched the storm door because the accused had a key to the front door.

[8] Around 4:30 a.m., after the victim had fallen asleep, the accused forced the storm door open and used the key to let himself into the victim's home. He entered her bedroom and again confronted her about cheating on him. She covered her face with the blanket. He grabbed her wrist, removed the bed covers, pushed her head into the wall, repeatedly poked his finger forcefully into her forehead, called her a whore, threw a glass of water in her face and threatened to spit in her face. He made further accusations and poked her in the anus and vagina with his finger while using threatening language. He stated, "[s]ince everyone else has used you up I might as well too." The victim pleaded with the accused to stop and asked him to leave numerous times. Instead, the accused got into bed and continued to berate her.

[9] Eventually, the victim got out of bed, opened the front door and stood on the step screaming for him to go. The accused then left. The victim called a friend and then 911 at 7:51 a.m. to report the incident. Over the ninety minutes after he left, the accused phoned her fifty-two times. He also returned to her home and "knock[ed] very gently" on her back window. She called 911 again at 8:16 a.m. and the police arrived around 9:00 a.m.

Circumstances of the Offender

[10] The accused is forty-one years old and has no prior criminal record. He was raised on a farm with two younger siblings. The pre-sentence report (PSR) filed as an exhibit at the sentencing hearing described the accused as having had a close relationship with his mother until she passed away in April 2024. There was no violence in his childhood, but he expressed resentment towards his father, stating, “he only cared about himself; he wasn’t present”.

[11] The PSR also described the accused as having a pro-social background, a positive employment history and no substance use issues. The probation officer assessed the accused as a low risk to reoffend generally and an “[a]verage” risk for reoffending sexually.

[12] Collaterals referenced in the PSR, as well as reference letters filed at the sentencing hearing, all expressed that the accused’s behaviour that gave rise to the offences was out of character. The accused demonstrated a willingness to cooperate with any court-ordered conditions. The accused expressed remorse for his conduct, apologized for the grief he caused to the victim and advised the Court that he hoped they both could move forward.

[13] The accused is a heavy equipment operator and he is described by his previous employer as a responsible, hard working, reliable and diligent employee. The accused is an active member of his church and regularly attends church services. He was described by the sentencing judge as “gainfully employed, involved in the church and a positive community member.” He has complied with all the conditions of his release while on bail and with the conditions of his CSO.

Sentencing Judge's Decision

[14] At the sentencing hearing, the Crown sought a sentence of four years' incarceration, broken down as three and one-half years for the sexual assault, assault and being unlawfully in a dwelling-house, and one-half year for the criminal harassment. The accused argued a CSO of two years less a day was fit and appropriate for the offences.

[15] On December 11, 2025, the sentencing judge gave oral reasons for decision, imposing a total sentence of two years less a day to be served as a CSO with strict conditions, including an absolute curfew, followed by one year of unsupervised probation and ancillary orders. She also ordered the accused to perform one hundred hours of community service work and made a ten-year order pursuant to the *Sex Offender Information Registration Act*, SC 2004, c 10.

[16] The sentencing judge made findings of fact respecting the offences, applied the correct sentencing principles and referenced the PSR and the case law relied upon by the Crown and defence.

[17] The sentencing judge recognized the need to account for the harmfulness of sexual offences against victims. She stated:

I have thoroughly read and reviewed all the case law provided to me. In imposing an appropriate sentence, it is key for the Court to take in account the wrongfulness and harmfulness of sexual offences against victims. All forms of sexual violence are moral - - morally blameworthy, precisely because they involve the wrongful exploitation of the victim by the offender, particularly in instances of domestic violence. The offender is treating the victim as an object and disregarding the victim's human dignity.

[18] As to the sentencing principles, the sentencing judge stated:

Denunciation and deterrence need to be a paramount consideration on this sentencing. This was an incident that happened in the victim's home. It was degrading, upsetting and scary. [The victim] should have never been made to feel like she was not safe in her own home. With that being said, [the accused] seems to have come to some -- come to terms with his wrongdoing. I note his absence of prior criminal record. He's a first-time offender and his family suffered a great deal of loss prior to this incident. Defence has focused on the fact that [the accused] has had no further involvement with the justice system and that he has changed a great deal since this occurred.

[19] The sentencing judge also stated:

While this is true, this cannot overshadow the offence and harm caused by [the accused]. Neither can the letters of recommendation overshadow what occurred on the day in question. When incidents like this come to light, people often say, you never know what goes on behind closed doors, and that sadly is quite often the case in relationships plagued with domestic violence. It takes strength for an individual to come forward, to break the cycle and to stand up for themselves and this is what [the victim] has done. This case is one that really rises and falls on its facts. There is no one case before this Court that is similar.

[20] On the issue of whether the appropriate sentence for the offences should be served concurrently or consecutively, she stated:

I believe that the criminal harassment, the unlawfully in the dwelling house, the assault and the sexual assault were all part of the same ongoing incident, one in which [the accused] felt powerless and wanted to assert whatever power he could. While the sexual assault certainly meets the definition of a sexual assault, this Court sees this as one domestic violent incident in which [the accused] wanted to degrade, humiliate and belittle [the victim], only to come back and try and ingratiate himself later. The Court does not say this to minimize what happened to [the victim] but to emphasize the inherent violence of the cycle of domestic violence.

[21] Further, the sentencing judge distinguished the facts in this case from the facts in *R v Bunn*, 2022 MBCA 34 [*Bunn*] and *R v Friesen*, 2020 SCC 9 [*Friesen*], and stated: “while not minimizing sexual assaults by trying to rank them by major or minor, the Court would be remiss if it did not assess the case on the individual facts.”

[22] The sentencing judge concluded by stating: “Balancing everything, I am of the view that the appropriate sentence for [the accused] is two years less a day to be served by way of a [CSO].”

[23] She then went on to impose strict conditions, including an absolute curfew, often referred to as house arrest.

Grounds of Appeal and Positions of the Parties

[24] The Crown raises two grounds of appeal:

- (1) The sentencing judge failed to appreciate the gravity of the offences and the moral blameworthiness of the accused.
- (2) The sentencing judge imposed a sentence that is demonstrably unfit.

[25] The Crown argues that the sentence is demonstrably unfit for the following reasons:

- (1) The sentence minimizes the seriousness of the intimate partner violence, including sexual violence and ongoing harassment.
- (2) The sentencing judge overemphasized the accused’s personal circumstances, focusing heavily on the fact that he had no previous criminal record, he was employed and expressed remorse. The

Crown argues that these factors should carry less weight in the circumstances of serious, violent offences.

- (3) The sentencing judge failed to properly analyze the fact that the accused was sentenced for multiple offences. Although there were four distinct offences, she failed to consider each of them on their own to arrive at a global sentence.
- (4) A CSO is not appropriate for offences of sexual violence and intimate partner violence.
- (5) The sentence fails to reflect an understanding of the harms of sexual violence and the seriousness of criminal harassment.

[26] The accused argues that the sentence imposed is fit, proportionate and entitled to deference. He submits that the sentencing judge did not commit a material error in principle and properly considered the aggravating factors of intimate partner violence, sexual assault in the victim's home, the degradation and humiliation suffered, as well as an abuse of trust. The sentencing judge also properly considered the mitigating factors of the accused having no previous criminal record, being gainfully employed, having expressed remorse, and being assessed as a low risk to reoffend generally and an "average" risk to reoffend sexually.

[27] The accused submits that the sentencing judge conducted a comprehensive and contextual assessment of the circumstances and came to a sentence that reflects proportionality and individualization. Further, a CSO is compatible with denunciation and deterrence, and in this case, the accused argues public safety can be achieved without incarceration.

[28] Ultimately, the accused submits that the Crown is asking this Court to re-weigh the factors and come to a different conclusion on a fit sentence.

Standard of Review

[29] The standard of review of a sentence appeal is highly deferential.

[30] Appellate intervention is only justified where the sentencing judge has committed a material error in principle that impacted the sentence or where the sentence is demonstrably unfit. Errors in principle include an error of law, a failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor (see *R v Sheppard*, 2025 SCC 29 at paras 38-42; *R v Arac*, 2025 MBCA 54 at para 6; *Friesen* at para 26; *R v Lacasse*, 2015 SCC 64 at para 49 [*Lacasse*]).

[31] This deferential standard applies to the decision to order a concurrent or consecutive sentence and concerning the length of the sentence ordered (see *R v Wozny*, 2010 MBCA 115 at para 10 [*Wozny*]).

[32] In *R v Houle*, 2016 MBCA 121 at para 11, Mainella JA explained the meaning of demonstrably unfit:

A sentence will be demonstrably unfit where it unreasonably departs from the principle of proportionality taking into account the individual circumstances of the offence and the offender and the acceptable range of sentence for similar offences committed in similar circumstances (see *Lacasse* at paras 52-55; and *R v Ruizfuentes (HS)*, 2010 MBCA 90 at para 7, 258 ManR (2d) 220).

[33] The Supreme Court of Canada reminds appellate courts of some of the reasons for showing deference to a trial judge's exercise of discretion as follows (see *Lacasse* at para 48):

- (1) The trial judge has the advantage of having observed the witnesses in the course of the trial and having heard the parties' sentencing submissions.
- (2) Sentencing judges are usually familiar with the circumstances in the district where he or she sits and therefore, with the particular needs of the community in which the crime was committed (see *R v M (CA)*, 1996 CanLII 230 at para 91 (SCC) [*M (CA)*]).
- (3) Appellate intervention in the exercise of judicial discretion is a misuse of judicial resources.

[34] Further, the Supreme Court states that an appellate court may not intervene simply because it would have weighed the relevant factors differently (*Lacasse* at para 49):

For the same reasons, an appellate court may not intervene simply because it would have weighed the relevant factors differently. In *Nasogaluak*, LeBel J. referred to *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, in this regard:

To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle. [para. 46]

[35] Where appellate courts intervene to vary sentences that they consider too lenient or too harsh, their interventions potentially undermine the credibility of the criminal justice system and the authority of trial courts. The Supreme Court determined, in *Lacasse*, that the Court of Appeal was wrong to reduce the sentence imposed by the trial judge by basing its intervention on the fact that the trial judge had departed from the established sentencing range (see paras 12, 16, 60-61; see also *Friesen* at para 37).

[36] The choice of sentencing range or the category within the range falls within the trial judge's discretion and cannot in itself constitute a reviewable error (see *Lacasse* at para 51).

Sentencing Principles

[37] As emphasized by the Supreme Court in *Lacasse* at para 1:

Sentencing remains one of the most delicate stages of the criminal justice process in Canada. Although this task is governed by ss. 718 et seq. of the [*Code*], and although the objectives set out in those sections guide the courts and are clearly defined, it nonetheless involves, by definition, the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.

[38] Proportionality is the fundamental sentencing principle under the *Code*. Proportionality means “a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender” (the *Code*, s 718.1). A trial judge achieves a proportionate sentence by balancing the various sentencing objectives, including: denunciation; deterrence; separation of offenders from society, where necessary; rehabilitation; reparation of harm done to victims or to the community; the promotion of a sense of

responsibility in the offender; and the acknowledgment of the harm done to victims or to the community (see *ibid*, s 718).

[39] In the recent decision *R v OCFG (No 2)*, 2026 MBCA 12 [*OCFG*], Pfuetzner JA dealt with multiple offences of sexual assault and assault and stated as follows about sentences for intimate partner abuse (at para 18):

Turning to the count of assault, sentences for intimate partner abuse range widely, “from suspended sentences to incarceration” (*R v Francisco*, 2005 MBCA 110 at para 22), as the circumstances relating to assaults can vary significantly. Having said that, society’s growing awareness of the wrongfulness and lasting harm caused by assaults on intimate partners, together with Parliament’s directions in the *Code* that such offences are statutorily aggravating, illustrates the high moral blameworthiness of such conduct. Domestic violence offences should attract meaningful sentences. The words of the Alberta Court of Appeal in *R v AD*, 2024 ABCA 178 at para 57, are apt:

The [*Code*] provisions regarding domestic violence, abuse of trust positions, and the vulnerability of certain populations are reminders to sentencing courts to recalibrate and to overcome the underreaction to family violence cases that might result from familiarity. Family violence, like violence in any other context, should be shocking every time.

See also *R v Cunningham*, 2023 ONCA 36 at paras 48-52.

[40] Justice Mainella made similar observations in *R v Buboire*, 2024 MBCA 7 at para 35:

Unfortunately, domestic violence is an all-too-common problem in our society. Such crimes are disproportionately gendered offences that have long-lasting negative individual and systemic consequences. Courts have few tools to address this corrosive threat to social order; however, in clear and egregious cases such as this one, the message to offenders, victims and the public generally must be that such conduct will not be tolerated and the

consequences for those who abuse their intimate partners will be significant (see *R v GGS*, 2016 MBCA 109 at paras 41-42 [*GGS*]).

[41] As to the offence of criminal harassment, Greenberg J, in *R v Hyra*, 2016 MBQB 171 at para 16, aptly emphasized the applicable sentencing principles as follows:

Denunciation and deterrence, both general and specific, are paramount sentencing objectives in cases of criminal harassment. In *R. v. Bates* (2000), 134 O.A.C. 156, [2000] O.J. No. 2558 (QL), after noting Parliament's intent in enacting s. 264 to protect the security of women and other victims who experience harassing conduct and to restrain the behaviour of offenders before it escalates to physical violence, the court commented:

42 The number of recent cases continuing to reach this court emphasizes the extent of the problem of criminal harassment and the need for sentencing courts to respond to this type of offence in the most forceful and effective terms, sending the message of denunciation and general deterrence to the community, and specific deterrence to individual offenders.

[42] Where the sentencing principles of denunciation and deterrence are paramount, the personal factors of the offender, while important, “necessarily take on a reduced role” in arriving in a fit sentence (*R v KNDW*, 2020 MBCA 52 at para 21; see also *R v Hanna*, 2025 MBCA 47 at para 32 [*Hanna*]; *R v Hiebert*, 2024 MBCA 26 at paras 15-18).

[43] Giving primacy to the principles of denunciation and deterrence “does not mean that weight cannot be given to compelling personal circumstances or mitigating factors in assessing proportionality provided the record reasonably supports such an exercise of discretion” (*Hanna* at para 34; see also *Friesen* at paras 91, 104).

Analysis and Decision

Sentencing for Multiple Offences

[44] The Crown submits that while the sentencing judge described the circumstances of the offences, there was no meaningful acknowledgement of the fact that there were four separate offences. The Crown argues that the sentencing judge was required to consider each of the offences on their own and to arrive at a global sentence that did not result in a “free ride” (*R v SCC*, 2021 MBCA 1 at para 26 [*SCC*]). The Crown submits that the sentencing judge’s failure to do so was an error.

[45] In *Wozny*, MacInnes JA described the first step for a sentencing judge, when required to sentence on multiple offences, as determining whether any or all of the sentences are to be served concurrently or consecutively. This first step does not relate to the overall length of sentence. Rather, it pertains to the nature and circumstances of the criminal activity under consideration and the connectedness of the offences to each other (see *ibid* at para 45).

[46] Further, MacInnes JA stated (*ibid* at para 63):

It is essential to remember that a sentence must be imposed for each offence. Failure to do so may amount to reversible error. In so doing, it may be that in order to comply with the proportionality principle in the case of a concurrent sentence or with the totality principle in the case of a consecutive sentence, a sentence which would ordinarily be ascribed to an individual offence will have to be adjusted.

[47] Justice MacInnes also emphasized the need for transparency in the sentencing process, both from the standpoint of ensuring that the accused is

sentenced for the entirety of the criminal misconduct and has thereby been held to account and has received a sentence that is proportionate. Transparency is also essential to permit appellate review, if required. In keeping with the need for transparency, MacInnes JA stated (*ibid* at para 68):

While there would appear to be a discretion permitted sentencing judges to impose one sentence for a series of offences (see s. 728 of the *Code*), it is preferable that a separate sentence be imposed for each conviction, and the sentences may, of course, be made concurrent. See this court's decision in *R. v. Thorpe* (1976), 32 C.C.C. (2d) 46. In Manitoba, it is not enough to simply impose a "global" sentence for a series of offences. Rather, the sentencing judge must indicate the specific penalty for each offence. The reason for this was explained by Chartier J.A. in *Traverse*, at paras. 36-41, and by Steel J.A. in *Draper*, at paras. 32-33.

[48] More recently, in *SCC* at para 27, leMaistre JA described the process applicable to sentencing for multiple offences:

When sentencing for multiple offences, the first step is to determine whether the offences will be served concurrently or consecutively by examining the degree of nexus between the offences. When imposing concurrent sentences, the judge determines a fit sentence for the most serious offence and imposes a lesser sentence for the remaining offences, or determines a single sentence for the set of offences to ensure that the length of the sentence does not give an offender a "free ride" for any criminal conduct (see *RJ* at para 13).

[49] In this case, the sentencing judge determined that the offences were all part of the same ongoing incident and, therefore, that the offences should be served concurrently. Although it is not entirely clear from her reasons for sentence, it appears that she determined that the sexual assault offence was the most serious offence.

[50] The sentencing judge referenced this as a domestic violence incident in which the accused wanted to degrade, humiliate and belittle the victim only to come back and try to ingratiate himself later. In this case, the sentencing judge did not specifically impose a lesser sentence for the remaining offences. She determined that concurrent sentences for all the offences were appropriate. Exercising her discretion, she determined that the total length of sentence would be two years less a day.

[51] The decision to sentence the accused such that the offences would be served concurrently is based on the sentencing judge's view of the degree of nexus between the offences. She was in the best position to make that determination, and her finding is owed deference. I am not satisfied she erred in her approach.

[52] Unlike the circumstances in *SCC*, the sentencing judge in this case did reference all four offences when she made the determination that the offences should be served concurrently. That finding was reasonably open to her on the evidence. However, in my view, it was an error for the sentencing judge not to impose a separate sentence for each conviction (see *Wozny* at para 68). To be transparent, the sentencing judge should have stated that she considered the sexual assault offence to be the most serious, imposed a sentence for that offence and then imposed sentences for each of the remaining offences. It was also necessary for the sentencing judge to make clear what, if any, adjustments were made in order to comply with the principle of proportionality (see *ibid* at para 69).

[53] That said, I am not satisfied the failure to follow the guidance provided in the authorities amounts to a material error in this case. I say that

because, based on the facts reviewed by the sentencing judge and a reasonable review of the reasons, she clearly imposed a global sentence for all of the offences, and it can be inferred that she would have imposed lesser sentences for each of the remaining offences. I am not persuaded that the global sentence imposed amounts to a free ride for any of the offences.

Proportionality/Demonstrably Unfit

[54] Consistent with the authorities referenced earlier, I start my review of the sentencing decision by considering the sentence imposed for the most serious offence, which in this case is the offence of sexual assault.

[55] The sentencing judge determined that a sentence of two years less a day was fit for the offences. In my view, the sentencing judge appropriately recognized that denunciation and deterrence were paramount considerations. She appreciated that the incident happened in the victim's home, was degrading, upsetting, harmful and scary. She stated that the victim should never have been made to feel like she was not safe in her own home. While she did take into account the personal circumstances of the accused, I am not satisfied that she inappropriately focused on them. She recognized the serious harm done to the victim in this case and I am not persuaded that she minimized the sentencing objectives of denunciation and deterrence.

[56] The sentencing judge referenced the sentencing principles enunciated in section 718 of the *Code* generally, but did not specifically reference aggravating factors in the *Code* that address that abuse of an intimate partner is aggravating (s 718.2(a)(ii)) and that sentencing judges are mandated to "consider the increased vulnerability of female persons who are victims" of intimate partner violence (s 718.201). She referred to a number of authorities,

including *Bunn*, where this Court referenced the aggravating circumstances identified in the *Code* and emphasized the harmful effects of intimate partner violence on victims.

[57] While the sentencing judge did not specifically reference these sections of the *Code*, she did specifically state that “[a]ll forms of sexual violence are . . . morally blameworthy, precisely because they involve the wrongful exploitation of the victim by the offender, particularly in instances of domestic violence.” I am satisfied she recognized the correct sentencing principles and took them into account in her sentencing decision.

[58] Although the sentence imposed is at the low end of the range for the offences in all of the circumstances, I am not satisfied that the sentencing judge made a material error in her approach to sentencing. As previously indicated, to maintain deference to the sentencing judge’s exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review.

[59] The fact that I may have weighed factors somewhat differently and potentially imposed a higher sentence does not mean the sentencing judge has erred in principle. The test is one of reasonableness or, put another way, only if the sentencing judge failed to give enough weight to the appropriate sentencing principles such that she exercised her discretion in an unreasonable fashion should this Court interfere with the sentence on the ground that the sentencing judge erred in principle (see *Lacasse* at para 49). I am not persuaded the sentencing judge exercised her discretion in an unreasonable fashion.

[60] I am also not persuaded that the sentencing judge imposed a demonstrably unfit sentence. The Crown has not satisfied me that the sentence is clearly unreasonable, clearly inadequate or unreasonably departs from the principle of proportionality.

[61] The starting point sentencing range of three years' imprisonment for one count of sexual assault upon an adult victim remains relevant (see *OCFG* at para 11; *R v GGS*, 2016 MBCA 109 at para 32).

[62] It is important to emphasize that what amounts to a fit sentence is determined on a case-by-case basis after a review of the circumstances surrounding the offence, the personal circumstances of the offender, the relevant aggravating and mitigating factors, the community context in which the offence occurred and the sentencing judge's application of the legal principles that govern the sentencing process. The individualized nature of sentencing means that two cases will rarely be exactly alike and, even where there are similarities between cases, the outcomes may very well be different. (see *R v Maslehati*, 2024 BCCA 207 at para 5 [*Maslehati*]).

[63] Following the guidance of the Supreme Court, an appellate court may not intervene simply because it would have weighed the relevant factors differently. As noted above, to do so would be tantamount to abandoning deference altogether. In this case, the sentencing judge weighed the relevant factors and, while the Crown argues the sentence imposed is too low, the Crown has not pointed to a material error in principle in the sentencing judge's weighing of the sentencing factors. Instead, the Crown is asking this Court to re-weigh the sentencing principles and impose a higher sentence. That is simply not our role.

[64] The observations in *Bunn* at para 128, quoting Monnin JA in *R v Murphy (MP)*, 2011 MBCA 84, are apt:

As was stated by Monnin JA in *R v Murphy (MP)*, 2011 MBCA 84, “[C]hoosing not to interfere with the discretion exercised by the sentencing judge, is not an endorsement of the specific sentence” (at para 20). Rather, “[i]t is but another example of applying a deferential standard of review” (*ibid*).

Intimate Partner Abuse and CSOs

[65] The Crown made an impassioned plea to this Court to intervene in the sentence because imposing a CSO is not appropriate for offences involving sexual violence and intimate partner abuse. The Crown submits that the sentence fails to reflect an understanding of the harm of sexual violence and the seriousness of criminal harassment. It asserts that the accused’s high moral culpability, as well as the gravity of the offences, including the harm done to the victim, demand that a significant incarceratory sentence be imposed, thus making a CSO unavailable.

[66] The Crown relies on authorities in Manitoba and in other provinces in which appellate courts have held that, in cases involving a sexual assault upon an adult victim with aggravating circumstances, a CSO will rarely be available, even for offenders without a criminal record (see *Hanna* at para 20; *Maslehati* at paras 11, 115; *R v Henry*, 2024 BCCA 132 at para 32; *R v TH*, 2024 BCCA 123 at paras 6, 60 [*TH*]; *R v Merasty*, 2023 SKCA 33 at para 8; *R v AJK*, 2022 ONCA 487 at para 77; *R v Bear*, 2022 SKCA 69 at paras 126, 128 [*Bear*]).

[67] The Crown submits that the CSO was demonstrably unfit for two primary reasons: (1) a proportionate sentence required the sentencing judge to impose a sentence in excess of two years and, in the Crown's view, a total sentence of four years was fit; and (2) even if a sentence under two years was based on sound reasoning, the sentencing judge was still required to justify that the CSO was consistent with the fundamental purpose and principles of sentencing set out in sections 718-718.2 of the *Code*. The Crown argues that the sentencing judge offered no such justification.

[68] On the other hand, the accused argues that the sentencing judge's decision is owed deference and whether a CSO is consistent with the fundamental purpose and principles of sentencing is a question of judgment for the sentencing judge (see *R v Proulx*, 2000 SCC 5 at para 116 [*Proulx*]).

[69] This issue requires a brief review of section 742.1 of the *Code* and the changes that were made to that section in 2022. In November 2022, Parliament amended the *Code* to reinstate the availability of a CSO for certain offences, including sexual assault prosecuted by indictment (see *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, SC 2022, c 15, s 14(2) [the *amendments*]).

[70] Prior to the *amendments*, section 742.1 of the *Code* included subparagraph (e), which excluded offences that resulted in bodily harm prosecuted by indictment for which the maximum term of imprisonment is ten years; and subparagraph (f), which excluded certain offences prosecuted by indictment, including at subparagraph (iii), sexual assault from the CSO sentencing regime. CSOs had not been available for the offence of sexual assault since at least 2012 (see *Maslehati* at paras 1-3).

[71] Section 271 of the *Code* provides for a maximum term of imprisonment of ten years but does not contain a minimum term of imprisonment. As a result, since 2022, a CSO has been available for a sexual assault upon an adult victim, provided the sentencing judge finds (1) a sentence of less than two years' imprisonment falls within the available range of sentences for the offence; (2) serving the sentence in the community would not endanger the safety of the community; and 3) imposing a CSO would be consistent with the fundamental purpose and principles of sentencing set out in sections 718-718.2 (see the *Code*, s 742.1(a)).

[72] As reviewed earlier, every sentencing judge must impose a sentence that is “proportionate to the gravity of the offence and the degree of responsibility of the offender” (*ibid*, s 718.1). As pointed out in *R v Parranto*, 2021 SCC 46: “The goal in every case is a fair, fit and principled sanction” (at para 10).

[73] Clearly, the availability of a CSO does not mean that a CSO is a fit sentence for every sexual assault where the sentencing judge imposes a term of imprisonment of less than two years. It simply means that, if the conditions are met, then the sentencing judge may exercise their discretion to impose a CSO if that sentence is found to be a fair, fit and principled sanction.

[74] I agree with the principle enunciated in the appellate decisions from this Court, British Columbia, Saskatchewan and Ontario referenced above that a CSO will rarely be available for an offence of sexual assault with aggravating circumstances, even for offenders without a criminal record (see *Hanna* at para 20; *Maslehati* at paras 11, 115; *TH* at para 60; *R v RS*, 2023 ONCA 608 at para 4 [*RS*]; *Bear* at para 126).

[75] However, I also agree with Paciocco JA's opinion in his concurring reasons in *RS*, where he stated: "It would be an error in principle to hold that conditional sentences are not available in sexual offence cases because denunciation and deterrence are the primary sentencing goals, or based solely on the kind of sexual intrusion that has occurred" (at para 78). (See also *Maslehati* at para 109; *TH* at para 60.)

[76] I also agree with the approach applied in *TH*, where the Court dismissed a Crown appeal from a sentence of two years less one day to be served as a CSO with punitive conditions, as well as three years' probation and a restitution order. The facts in *TH* briefly are that after a brief intimate relationship had ended, the accused sexually assaulted the complainant by forced vaginal penetration. The Court described the sentence as (*ibid* at para 6):

[A] borderline case, and a conditional sentence will rarely amount to a fit sentence for sexual assault of this nature. But ultimately, absent a material error in principle or a demonstrably unfit sentence, the test is not whether this Court would have imposed this sentence. I consider that the Crown is inviting us to reweigh the relevant sentencing principles and factors, which is not our role.

[77] I share the view of MacKenzie JA, in *TH* at para 61, that it is important to emphasize the observations of the Supreme Court in *Proulx* at para 116:

Sentencing judges will frequently be confronted with situations in which some objectives militate in favour of a conditional sentence, whereas others favour incarceration. In those cases, the trial judge will be called upon to weigh the various objectives in fashioning a fit sentence. As La Forest J. stated in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 329, "[i]n a rational system of sentencing, the respective

importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender”. There is no easy test or formula that the judge can apply in weighing these factors. Much will depend on the good judgment and wisdom of sentencing judges, whom Parliament vested with considerable discretion in making these determinations pursuant to s. 718.3.

[78] It is also important to emphasize the punitive nature of CSOs as Paciocco JA observed in *RS* at para 71:

It is important to appreciate that a conditional sentence is a sentence of imprisonment, albeit one that may be served entirely in the community. It is described as a sentence of imprisonment in s. 742.1 of the [*Code*]: *Proulx*, at para. 29. The punitive impact of a conditional sentence should not be understated, even though an offender may not experience institutional incarceration where a conditional sentence is imposed. Conditional sentences carry significant consequences, and they are punitive, not lenient, and can be as harsh in application as sentences of incarceration: *Proulx*, at para. 41.

[footnote omitted]

[79] Further, I agree that it is important not to underestimate the stigma associated with the imposition of a CSO, particularly in a smaller community. That stigma is heightened in this case, where the accused is under house arrest in a smaller community. This factor is best assessed by the sentencing judge, who is familiar with the circumstances in the district where they sit and, therefore, with the particular needs of the community in which the crime was committed (see *TH* at para 62; *Lacasse* at para 48; *Proulx* at para 105; *M (CA)* at para 91).

[80] Finally, it is important to remember that if the accused breaches the conditions of the CSO, he will presumptively be incarcerated for the remainder of the term of the CSO. The Crown must only prove breaches of a CSO on a balance of probabilities, not beyond a reasonable doubt, for this to occur (see *TH* at para 64; *RS* at para 72).

[81] I certainly agree with the Crown that whether the prerequisites for a CSO have been met in a case involving sexual assault must be assessed within the existing jurisprudential context as shaped by the decisions of the Supreme Court, including *Friesen* at paras 35, 50 and *R v Goldfinch*, 2019 SCC 38 at para 37, specifically recognizing society's understanding of the harmfulness and the wrongfulness of sexual violence against children and adults (see also *Maslehati* at para 111).

[82] The sentencing judge did give clear reasons recognizing the serious harm to the victim and wrongfulness of the sexual violence in this case. That said, I am not satisfied that the sentencing judge fully explained why she imposed the CSO, nor did she explicitly review section 742.1 of the *Code*.

[83] In my view, the sentencing judge should have expressly applied the appropriate framework for the imposition of the CSO as set out in *Proulx*, *R v Fice*, 2005 SCC 32 [*Fice*] and *R v Isaac*, 2025 MBCA 94. The two-stage approach is described by Bastarache J in *Fice* at para 13 as follows:

Of course, the overall approach to s. 742.1 suggested by Lamer C.J. still requires a sentencing judge to proceed in two stages: first, the judge must determine if a [CSO] is available; if it is, the judge must then determine if it is appropriate. However, at the first stage of this analysis, Lamer C.J. made it clear that the judge need not impose a term of imprisonment of a fixed duration; rather, the judge need only exclude two possibilities: (i)

probationary measures, and (ii) a penitentiary term. Lamer C.J. explained that “[i]f either of these sentences is appropriate, then a [CSO] should not be imposed” (para. 58). In making this preliminary determination, he noted that “the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence for the offender” (para. 59).

[emphasis in original]

[84] The sentencing judge did not conduct the two-stage analysis to exclude the two possibilities: (i) probationary measures, and (ii) a penitentiary sentence. Instead, she concluded a term of sentence of less than two years was fit and imposed a CSO.

[85] The sentencing judge’s conclusory statement at the end of the sentencing decision is somewhat similar to what was reviewed by this Court in *Hanna*, where the trial judge reviewed the facts regarding a sexual assault and simply concluded: “Balancing everything I am of the view that a fit and proportionate sentence is . . . 2 years less a day [CSO]” (at para 22).

[86] Justice Mainella, for the Court, made a number of observations regarding the reasons provided by a sentencing judge, which apply here, including (see *Hanna* at paras 25-27):

- (1) The duty to provide reasons “is satisfied if the sentencing judge provides ‘an intelligible pathway to the result reached given the context of the specific case’ (*R v Ramos*, 2020 MBCA 111 at para 47 [*Ramos*], aff’d 2021 SCC 15)” (*Hanna* at para 25).
- (2) “Even where reasons are ‘objectively inadequate,’ the appellate court should not interfere with a decision where the basis for it is

apparent from the record, even without being articulated (*Ramos* at para 51)” (*Hanna* at para 25).

- (3) “[T]he role of this Court is not to ‘finely parse the trial judge’s reasons in a search for error’ (*R v GF*, 2021 SCC 20 at para 69 [*GF*]). A ‘[t]rial [judge] [is] presumed to know the law with which they work day in and day out’ (*R v Burns*, [1994] 1 SCR 656 at 664, 1994 CanLII 127 (SCC))” (*Hanna* at para 26).
- (4) This Court “cannot intervene simply because a ‘trial judge has done a poor job in expressing himself or herself’ (*Ramos* at para 50). As was explained in *GF*, ‘[w]here ambiguities in a trial judge’s reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error’ (at para 79)” (*Hanna* at para 27).

[87] I am satisfied that the sentencing judge here knew the law and the requirements to be met before imposing a CSO. While the sentencing judge did not make specific reference to section 742.1 of the *Code* or the two-stage analysis referenced in *Proulx* and *Fice*, it is apparent from the record that a CSO was being sought by the defence, and I am satisfied that the sentencing judge was well aware of the law and provided an intelligible pathway to the result reached given the context of the case.

[88] The sentencing judge clearly determined that a sentence of less than two years was fit and made various references to the PSR, stating that the accused was a low risk to reoffend generally and an average risk to reoffend sexually. She also referenced other mitigating factors, including: the accused had no criminal record, had not breached any conditions of his bail, had a

positive employment history, was remorseful and had no substance use issues. On the basis of the submissions received and a reading of the sentencing decision as a whole, it is apparent that the sentencing judge did determine that imposing a CSO would not endanger the safety of the community and would be consistent with the purpose and principles of sentencing. After weighing the relevant factors, the sentencing judge concluded by stating: “Denunciation and deterrence are paramount and they can be addressed by way of a [CSO].” She imposed strict conditions, including an absolute curfew.

[89] Without in any way minimizing the circumstances of the offences perpetrated in this case against a victim who was vulnerable in her own home, I am not satisfied the sentencing judge made a material error in principle that had an impact on the sentence. Nor am I satisfied that the sentence imposed was demonstrably unfit. I do not agree with the Crown that a conviction for offences involving sexual violence and intimate partner abuse must necessarily result in a penitentiary sentence. While I agree that a penitentiary sentence would be fit for most sexual assault offences with aggravating circumstances, that determination depends on the individual facts of each case, weighing the sentencing principles and the circumstances of each offender. If Parliament had intended to remove the offence of sexual assault from the CSO sentencing regime, it would not have repealed section 742.1(f) of the *Code*.

Conclusion

[90] In my view, while the sentence imposed is at the low end of the range for the offences, the sentencing judge did not make a material error in her approach to sentencing, and she did not impose a demonstrably unfit

sentence. In the result, I would grant leave to appeal the sentence, but dismiss the sentence appeal.

[91] One final issue must be addressed. On February 12, 2026, the CSO was suspended and the accused was granted judicial interim release (JIR) pending his appeal. Section 683(7) of the *Code* requires this Court to consider the terms of release while the accused was on JIR for approximately five months in deciding whether to vary the sentence. Had the CSO not been suspended, the accused would have served another five months of his sentence. Because the terms of the release were not as strict as the conditions imposed under the CSO and there is no suggestion of substantial hardship to the accused by the suspension of the CSO, I would vary the sentence to give the accused a credit of thirty-one days for the time spent on JIR after his CSO was suspended (see *Hanna* at paras 51-52).

[92] In my view, it is fair and just to provide a total credit of sixty-four days of time served on the CSO and a thirty-one-day credit for time served on JIR. The accused's go-forward sentence is therefore 634 days. All ancillary orders imposed by the sentencing judge shall remain.

Edmond JA

I agree: _____
Rivoalen CJM

I agree: _____
Monnin JA