Citation: R v OCFG (No 2), 2026 MBCA 12
Date: 20260212

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner
Mr. Justice James G. Edmond

***B E T W E E N**:*

	)	***R. N. Malaviya, K.C.** and*
	)	***J. R. Negrea***
HIS MAJESTY THE KING	)	*for the Appellant*
	)	
Appellant	)	***K. D. Morgan***
	)	*for the Respondent*
- and -	)	
	)	*Appeal heard:*
O. C. F. G. (aka J. H.)	)	***September 19, 2025***
	)	
(Accused) Respondent	)	*Judgment delivered:*
	)	***February 12, 2026***

NOTICE OF RESTRICTION ON PUBLICATION: No one may publish, broadcast or transmit any information that could disclose the identity of the victim or a witness (see *Criminal Code*, RSC 1985, c C-46, s 486.4).

PFUETZNER JA

Introduction

[1] These reasons explore the determination of a fit sentence for one count of sexual assault and one count of assault, both involving intimate partner abuse.

[2] The accused was convicted of both counts after a jury trial. The victim, who was his wife, testified to four incidents of sexual assault and three

incidents of assault. Certain comments made to the victim by the accused in voluminous text exchanges were the subject of one count of uttering threats. He was acquitted of that count.

[3] In sentencing the accused, the trial judge was required to determine the factual basis for the jury's verdict (see *Criminal Code*, RSC 1985, c C-46, s 724(2) [the *Code*]). He found that only one incident of sexual assault and two incidents of assault had been proven beyond a reasonable doubt. The trial judge imposed a conditional sentence order of four months for the sexual assault count and a consecutive conditional sentence order of two months for the assault count (the original sentence) followed by six months of supervised probation. He also made ancillary orders.

[4] The Crown sought leave to appeal and appealed the sentence. In *R v OCFG (No 1)*, 2025 MBCA 27 [*OCFG No 1*], this Court concluded that the trial judge had made material legal errors in assessing the credibility of both the victim and the accused in determining the facts for sentencing and that each of the four incidents of sexual assault and the three incidents of assault had been proven.

[5] This Court directed that a further hearing be held. The panel received from the parties further written and oral submissions on the fitness of the original sentence and the appropriate remedy in the event that this Court was of the view that the accused should be re-sentenced.

[6] In my view, the original sentence is owed no deference due to the material errors in principle that occurred in determining the facts for purposes of sentencing. Moreover, the original sentence is demonstrably unfit in light

of the factual basis for the jury's verdict. Accordingly, this Court must re-sentence the accused.

[7] For the reasons that follow, I would vary the original sentence and impose a sentence of sixty months' incarceration for the charge of sexual assault and a consecutive sentence of twenty-four months' incarceration for the charge of assault. After taking a last look for totality, I would reduce the sentence for sexual assault to fifty-four months and the consecutive sentence for assault to twelve months, for a total sentence of sixty-six months' incarceration. As the accused has already completed the original sentence, that time is to be deducted from his incarceratory sentence, leaving him with a combined sentence of sixty months' (or five years') incarceration to be served going forward. I would not disturb the ancillary orders, nor would I stay execution of the sentence of imprisonment.

Relevant Sentencing Principles

[8] The fundamental sentencing principle under the *Code* is proportionality: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (s 718.1). Achieving a proportionate sentence requires the balancing of various sentencing objectives, including: denunciation; deterrence; separation of offenders from society, where necessary; rehabilitation; reparation for harm done to victims or to the community; the promotion of a sense of responsibility in offenders; and the acknowledgment of the harm done to victims or to the community (see *ibid*, s 718).

[9] Where the offence involves intimate partner abuse, judges have long recognized that the principles of denunciation and deterrence are of

paramount significance. The *Code* recognizes abuse of an intimate partner as a statutorily aggravating factor in sentencing (see s 718.2(a)(ii)). In addition, the Court is to consider, as aggravating, "evidence that the offence had a significant impact on the victim" (*ibid*, s 718.2(a)(iii.1)). Furthermore: "A court that imposes a sentence in respect of an offence that involved the abuse of an intimate partner shall consider the increased vulnerability of female persons who are victims, giving particular attention to the circumstances of Aboriginal female victims" (*ibid*, s 718.201).

[10] Particular attention is to be given to the circumstances of Indigenous offenders in considering sanctions other than imprisonment. Such sanctions, however, must be "reasonable in the circumstances and consistent with the harm done to victims or to the community" (*ibid*, s 718.2(e)).

[11] The starting point sentencing range of three years' imprisonment for one count of sexual assault upon an adult victim was established in *R v Sandercock*, 1985 ABCA 218 [*Sandercock*]. This assumes a mature offender with no criminal record and prior good character (see *ibid* at para 17). While *Sandercock* is dated, the starting point it sets out remains relevant (see *R v GGS*, 2016 MBCA 109 at para 32).

[12] However, as the *Code* provisions referred to above imply, a sexual assault committed against an intimate partner is more morally blameworthy than one committed in other circumstances. This is not intended to minimize the seriousness of sexual assaults committed by offenders against acquaintances or strangers.

[13] As will be explained, in the present case, four separate incidents comprised the one count of sexual assault. In these circumstances, it is

appropriate for the sentence to reflect the increased moral blameworthiness that attaches to the infliction of repeated unwanted sexual touching on the victim (see *R v Buboire*, 2024 MBCA 7 at para 32 [*Buboire*]). This does not mean, however, that each incident is to be treated like a separate count with individual sentences added up in a mathematical exercise. One must bear in mind that the maximum sentence for the sexual assault of a person over the age of sixteen is ten years' imprisonment (see the *Code*, s 271(a)).

[14] Two of the incidents of sexual assault involved withdrawn consent that was ignored by the accused, who continued to sexually touch the victim. This raises the question of whether the two incidents of sexual assault involving the victim withdrawing her consent to the sexual activity are less serious than the incidents where no consent was ever given.

[15] Under the *Code*, sexual assault occurs where an offender touches another person for a sexual purpose without their consent (see s 265(1)). Section 273.1(2)(e) clarifies that "no consent is obtained if" the complainant, "having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity." In *R v JA*, 2011 SCC 28, the Supreme Court of Canada stated, "[section 273.1(2)(e)] indicates that Parliament wanted people to be capable of revoking their consent at any time during the sexual activity" (at para 40). The offence essentially crystallizes when the offender knows that the complainant has withdrawn their consent and continues the sexual touching.

[16] I acknowledge that there is a limited body of case law from other jurisdictions indicating that withdrawn consent can, in some circumstances, be mitigating at sentencing. For example, in *R v Decelles*, 2013 ABPC 85

[*Decelles*], the judge wrote that: "While the fact that the sexual act began with consent may not always constitute a mitigating factor, I am of the view that in the circumstances of this case, it is a mitigating factor" (at para 22). Without wading into the unfortunate details of *Decelles*, I do not agree that the initial granting of consent by the complainant was, or could be, mitigating. Rather, the mitigation in that case arose from the fact that the accused was a youthful first-time offender who showed immediate and genuine remorse.

[17] In my view, there is no principled basis to treat a sexual assault involving withdrawn consent as less grave for sentencing purposes than an offence where no consent was given at any point.

[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 *Criminal 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.

The Circumstances of the Offences

[19] The nature of the relationship between the accused and the victim was described as follows in *OCFG No 1* at paras 11-12 and 15:

> The accused and the victim met in January 2016 and began living together in February 2016. They married on April 2, 2016 and separated on August 10, 2020. They have two children together: a daughter born on [redacted] 2016 and a son born on December [redacted] 2019.
>
> The couple had a tumultuous relationship. They argued constantly. The accused often made vulgar statements to the victim or comments to her suggesting he would use violence against her. He often said he would leave the victim unless she conformed to his demands.
>
> The victim said she eventually became "desensitized" by the accused's frequent verbal abuse. The relationship was further strained because the accused was a problem gambler. Given the couple's tight finances, the accused's gambling problem was a constant source of tension. Noteworthy is that, in addition to gambling with the couple's wages during the time they lived together, the accused also gambled away approximately $100,000 that the victim's mother had advanced to the couple for necessities.

The Sexual Assaults

[20] As previously indicated, there were four incidents of sexual assault. The first occurred around the time of the marriage (the anal intercourse incident) (*ibid* at paras 18-19):

> The victim testified that, around the time of their marriage in 2016, the accused asked her to participate in anal sex. The couple had not tried this before. The victim agreed. When the anal intercourse began in the couple's bedroom, the victim said it started to hurt "a

> lot" and she told him, more than once, to "[s]low down" and eventually to "stop". The accused ignored the victim and she began to cry. He eventually stopped the sexual touching after ejaculating inside the victim.
>
> The victim continued to cry after the anal intercourse ended. The accused said to her: "Jesus Christ, are you trying to make me feel like I raped you?" The accused was angry with the victim and then said: "It's okay if you don't like anal sex. I'll find someone else to do it with." The victim testified that she felt "[b]roken" by the anal intercourse incident and said she was confused by the accused being angry with her.

[21] The next incident took place in May (the facial ejaculation incident) (*ibid* at para 22):

> The victim testified that, on May 4, 2016, she woke up in the bedroom to find semen on her face. She was confused as to what had happened. The accused was nearby and was laughing. On May 5, 2016, the accused texted the victim a picture of her on her bed with her eyes closed with semen on her face (the picture).

[22] The facial ejaculation incident was the only incident of sexual assault found by the trial judge to have been proven for purposes of sentencing. He imposed a four-month conditional sentence order.

[23] The third incident of sexual assault occurred in the spring of 2019 (the breastfeeding incident) (*ibid* at para 26):

> The victim testified that, in the spring of 2019, she and the accused were having consensual vaginal intercourse in their bedroom. While they were having sex, the couple's two-and-one-half-year-old daughter woke up, crawled into the bed and began to breastfeed on the victim. While she was nursing their daughter, the victim told the accused to stop the intercourse because their daughter was awake. She repeated this on more than one occasion. The accused ignored the victim and continued to vaginally penetrate her faster with his penis until he ejaculated.

> The victim felt violated and asked the accused, "Why did you do that?" He said nothing.

[24] The fourth incident of sexual assault occurred a few months after the birth of the couple's second child (the vaginal tear incident) and the circumstances are as follows (*ibid* at paras 29-31):

> It was not disputed at the trial that the victim delivered the couple's eleven-pound son in the family residence without medical assistance. Due to this birth, the victim suffered a second-degree vaginal tear that she was still recovering from in the spring of 2020.
>
> The victim gave evidence that, on April 24, 2020, the accused asked her to have sex; they were in the living room. She said "no" as she was still healing from the vaginal tear and was not using birth control. He asked her again a second time and she said she did not want to. The accused then pulled down her pants and underwear and began to penetrate her vagina with his penis. The couple's children were sleeping nearby. The victim said, "What are you doing?" The accused ignored the victim and continued with the vaginal intercourse for about five minutes until he ejaculated inside her. The accused was not wearing a condom.
>
> The victim testified she was concerned about becoming pregnant from the intercourse and decided to obtain the emergency contraceptive pill, Plan B, at a local health clinic, the St. Boniface Access Centre.

[25] When the victim told the accused by text that she was considering obtaining emergency contraception, he responded by calling her a "[d]irty whore" (*ibid*).

The Assaults

[26] The three incidents of assault all occurred in the spring and summer of 2019 when the victim was pregnant with the couple's son. The first

incident the victim described occurred in April (the face-squeezing incident) (*ibid* at paras 38-39):

> The first non-sexual assault is alleged to have occurred on April 28, 2019. The victim and the accused were arguing and things escalated. The accused grabbed the victim's face and side of her neck "quickly and aggressively" with his hands during the argument. The victim eventually moved away from the accused (the face-squeezing incident).
>
> The victim testified that she was "shock[ed]" by the face-squeezing incident and felt sore afterwards.

[27] The second assault occurred during the following month (the first pushing incident) (*ibid* at paras 42, 44):

> The second non-sexual assault is alleged to have occurred on May 20, 2019. The victim testified that she and the accused had an argument in their residence. This argument was about money and gambling. During the argument, the accused pushed the victim down on her right shoulder, causing her to fall to her knees. The couple's daughter was present, playing with her toys when this occurred. When the victim was down on the ground, the accused bent down and said to her: "This is what you want, huh? This is what you want?" (the first pushing incident).
>
> The victim explained in her evidence that she often blamed herself for the arguments to attempt to calm the situation with the accused. The victim was sore after the first pushing incident but not injured.

[28] Finally, the last incident occurred on July 13, 2019 (the second pushing incident) (*ibid* at paras 47-48):

> The victim testified that the accused returned to the family residence and confronted her. She said, when he arrived, he was "pretty angry". The couple argued for ten to fifteen minutes. The accused then came at the victim, put his hands on her neck and

> pushed her back onto their bed. The victim fell backwards and her head struck the wall (the second pushing incident).
>
> The victim said there was a loud sound when her head hit the wall and that she yelled. The victim was down on the bed and the accused had his knee on her and his hands on her neck. She tried to push him away but could not. She yelled at him that he was going to give her a concussion. She was worried about the contact as she was four months' pregnant. The accused eventually released her. He packed his clothes and left to stay with a friend.

[29] In sentencing the accused, the trial judge found that the face-squeezing incident and the second pushing incident had been proven, but not the first pushing incident. He imposed a two-month conditional sentence order for the one count of assault, to be served consecutive to the sexual assault sentence.

Impact on the Victim

[30] The impact of the offences on the victim was poignantly described in the victim impact statement filed at the sentencing hearing before the trial judge: "I became a shell of a person by the end of the marriage with [the accused]. I lost my sense of who I was due to the abuse. I felt powerless and hopeless. . . . I needed a lot of therapy to work through the trauma I survived." The victim is of mixed Indigenous and African ancestry, as is the accused.

The Circumstances of the Accused

[31] In his reasons for sentence, the trial judge summarized the background and circumstances of the accused. At that time, he was thirty-seven years old (now forty) and a self-employed drywaller. He had a dated

criminal record with convictions for possession of a controlled substance and for assault.

[32] The accused had a difficult childhood marred by trauma and neglect—his pastor described the accused's family as "the most dysfunctional family I have ever worked with". The accused's mother, who is Indigenous, struggled with addictions and childhood abuse. He witnessed her attempt suicide on multiple occasions, as well as her engaging in prostitution and being sexually exploited by numerous men when his father was away from the home working. The accused's older brother was heavily involved in a criminal gang during the accused's childhood. The accused's father is from Ontario and is Black with Kenyan ancestry. Although he was employed during the accused's childhood, he struggled with a gambling addiction. The accused described being of mixed race as "a very complex experience" that included rejection and a perception that "he did not belong anywhere."

[33] As this Court is sentencing the accused afresh, I have taken into account an affidavit of the accused sworn on August 14, 2025. Since his arrest, the accused has been active with his church, has not reoffended, has shared custody of his two children with the victim and is providing them with support. He has taken an anger management course and counselling.

Positions of the Parties

[34] The Crown argues that the original sentence imposed by the trial judge is grossly inadequate in the context of the facts as found by this Court in *OCFG No 1*. It seeks a total sentence of eleven years—being ten years for the count of sexual assault and one year consecutive for the count of assault—

less six months as a credit for the time already served under the original sentence.

[35] The Crown recommends that this Court assign a sentence to each incident as they are clearly identified and discrete. It suggests that an alternative approach would be to take the most serious incident, attach a number to it and then increase it in order to reflect the number of incidents. However, the Crown characterizes this latter approach as arbitrary.

[36] The Crown asserts that if each of the incidents had been charged as separate counts, the following sentences would have been appropriate:

- Anal intercourse incident: 36 months
- Facial ejaculation incident: 30 months
- Breastfeeding incident: 36 months
- Vaginal tear incident: 48 months
- Face-squeezing incident: 6 months
- First pushing incident: 12 months
- Second pushing incident: 6 months

[37] The total resultant sentence would have been twelve and one-half years for the sexual assaults and two years for the assaults, or a total of fourteen and one-half years. Recognizing that the maximum sentence for sexual assault is ten years and that a fourteen and one-half year sentence would be crushing, the Crown proposed ten years for the sexual assault and one year consecutive for the assault for a total of eleven years.

[38] The accused agrees that, in the circumstances, the original sentence should be set aside and that he should be re-sentenced. He concedes that the fact that this was intimate partner abuse is aggravating. However, he asserts that the Crown's approach of stacking sentences for numerous incidents under one count is not appropriate. He submits that we need to be alive to the nuances and aggravating circumstances associated with multiple occurrences but that a straight mathematical exercise is not warranted. He also argues that the case law relied upon by the Crown is distinguishable, as these incidents did not involve extreme violence and domination and involved fewer incidents than *Buboire*, for example.

[39] The accused asserts that the victim regularly denied him access to their children, including for a period of about eighteen months after the jury's verdict was rendered. He argues that the actions of the victim were "a form of unofficial justice" that should be treated as a collateral consequence and factored into the sentence. On this point, the Crown responds that the denial of access to his children by the victim is not a collateral consequence relevant to sentencing as described in cases such as *R v Suter*, 2018 SCC 34.

[40] Ultimately, the accused recommends that a low penitentiary sentence of two to three years would meet the principles of sentencing and that it would be in the interests of justice for the sentence to be stayed (see *R v McMillan (BW)*, 2016 MBCA 12 at para 36).

Application of the Sentencing Principles

[41] To begin, I agree with the accused that the Crown's suggested approach to sentencing for multiple incidents charged under single counts should not be followed in the circumstances of the present case. The accused

was convicted of only one count of sexual assault and one count of assault. However, the fact that multiple incidents occurred does increase his level of moral blameworthiness and hence the seriousness of each of the offences.

Aggravating and Mitigating Circumstances

[42] The aggravating circumstances are, regrettably, plentiful. In addition to the statutorily aggravating factors of abuse of an intimate partner, who is also Indigenous, and the significant impact on the victim, several of the incidents took place in the presence of the couple's daughter and the assaults occurred when the victim was pregnant. A sexual assault on a sleeping victim, such as what occurred during the facial ejaculation incident, is aggravating.

[43] As earlier indicated, the repetitive nature of the sexual assaults and the assaults shows an increased level of moral blameworthiness—these were not isolated events—as does the domineering and misogynistic atmosphere created by the accused and reflected in the text exchanges described in further detail in *OCFG No 1*.

[44] On the other hand, there are mitigating factors that must be considered. First, the accused has taken steps towards rehabilitation and leading a pro-social life. He has completed the original sentence without further offending, he is working and he is supporting his children.

[45] The accused's pre-sentence report and his impact of race and culture assessment report provide insight into the historical and systemic factors that appear to have impacted the accused and contributed to his commission of the offences. Violence was a regular feature in the environment in which he grew

up. It is not a stretch to draw a connection between his direct exposure to the sexual exploitation of his mother and both his misogynistic attitude and the sense of sexual entitlement he displayed in his marriage. As repugnant as the accused's behaviour is in light of current societal attitudes to intimate partner abuse, his moral blameworthiness is attenuated somewhat because of how he was raised.

Collateral Consequences

[46] I agree with the Crown that the period of time during which the accused did not have access to his children due to the actions of the victim is not a collateral consequence and should not factor into the sentence. In my view, this is not analogous to violent actions (as a form of vigilante justice) visited upon the accused for his role in the commission of the offences and is not properly part of the circumstances of the offences or his personal circumstances.

Determination of Sentence

[47] There is no argument to be made, in my view, that the sentences for the two counts should be served concurrently. They arise out of different events occurring at different times (see the *Code*, s 718.3(4)).

[48] I now turn to the determination of a fit sentence for each count. While each incident of sexual assault could attract a penitentiary sentence on its own, they were all charged as one count. Taking into consideration the starting point sentence described in *Sandercock*, the number of incidents and the aggravating and mitigating factors, I would assign a sentence of sixty months' incarceration to the sexual assault count. If it had not been for the

reduced moral blameworthiness resulting from the particular circumstances of the accused's childhood, that sentence would have been at least six months longer.

[49] For the assault count, I would assign a sentence of twenty-four months' incarceration, consecutive to the sexual assault sentence. The significant aggravating features here are that the victim was the accused's wife, the victim was pregnant at the time of each assault and the couple's young daughter was present during at least one incident.

[50] Taking a last look for totality, in my view, the total eighty-four-month sentence should be reduced to better reflect the accused's current circumstances and prospects for rehabilitation. I would reduce the sexual assault sentence to fifty-four months and the assault sentence to twelve months consecutive, for a total sentence of sixty-six months. As the accused has already served the original sentence, that will be deducted from his sentence, leaving sixty months (or five years) left to serve. I would not disturb the ancillary orders.

Re-incarceration

[51] The accused seeks a stay of execution of any period of incarceration imposed, arguing that his imprisonment at this stage of the proceedings would create an injustice (see *R v Daniels*, 2023 MBCA 86 at para 20).

[52] He relies on the delays that have occurred since the first offence was committed in 2016, his conviction in 2022 and the pronouncement of the original sentence on July 5, 2023 (which has been served in full). While he concedes that the gravity of the offences "are no doubt serious", the facts are

less severe than those in *Buboire*. He also points out that he is on the path to rehabilitation, as he has continued to work in the community, there were no allegations of breach of the original sentence or probation order, and he has shared custody of his children with the victim. He submits that incarceration would create an injustice, as it would negatively impact his relationship with his children and reduce the financial support available to them.

[53] In my view, given the gravity of these intimate partner abuse offences, the paramountcy of denunciation and deterrence, and the fact that there is a large discrepancy between the original sentence and what is a fit sentence, incarceration of the accused is required in the interests of justice. Despite the length of time that has passed since his arrest, conviction and the imposition of the original sentence, I am not persuaded that a stay of the accused's sentence, as varied, is appropriate.

Conclusion

[54] I would sentence the accused to a combined term of imprisonment of sixty months as set out in these reasons and I would not disturb the ancillary orders imposed by the trial judge.

Pfuetzner JA

I agree: Mainella JA

I agree: Edmond JA