Court of Queen's Bench of Alberta

Citation: R v Sandhu, 2022 ABQB 332

Date: 20220506
Docket: 200127124Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Ramjit Sandhu

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Sentence
of the
Honourable Justice A. Loparco

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1. Overview

[1] This decision was delivered orally, in abbreviated form, on May 6, 2022, with written reasons to follow. These are those written reasons.

[2] On July 2, 2021, a jury convicted Mr. Sandhu of two offences, that he:

> On or about the 26th day of August, 2018, at or near Edmonton, Alberta, did unlawfully commit a sexual assault upon CO, contrary to section 271 of the *Criminal Code of Canada* (Count 1); and
>
> On or about the 26th day of August, 2018, at or near Edmonton, Alberta, was in committing a sexual assault upon CO, a party to the said sexual assault with another person, contrary to section 272(1)(d) of the *Criminal Code of Canada* (Count 2).

[3] During the Crown's closing submissions at trial, the third count of kidnapping was narrowed to the included offence of unlawful confinement. Mr. Sandhu was acquitted of this count:

> On or about the 26th day of August, 2018, at or near Edmonton, Alberta, did unlawfully kidnap CO with intent to cause her to be confined or imprisoned against her will, contrary to section 279(1.1)(b) of the *Criminal Code of Canada* (Count 3).

[4] Mr. Sandhu testified at trial, claiming that certain events alleged by the CO did not occur, and that, contrary to the CO's testimony, all sexual contact was consensual. The verdicts demonstrate that Mr. Sandhu's testimony was wholly rejected by the jury for the first two counts.

[5] After hearing counsel's sentencing submissions on November 2, 2021, Mr. Sandhu asked that I delay my sentence as his wife was about to deliver their first child. I agreed to adjourn until a date in January 2022. The delivery of my sentence was subsequently adjourned on account of the COVID-19 pandemic and Master Order #6. Two adjournments were required because an

interpreter was not present. As previously indicated, I delivered an oral abbreviated version of this decision on May 6, 2022.

[6] A victim impact statement from the CO was read into the record and marked as an exhibit. Many supporting letters from third parties respecting Mr. Sandhu's character were marked as an exhibit.

[7] Despite his right to do so under s 726 of the *Criminal Code*, RSC 1985, c C-46 (*Criminal Code*), Mr. Sandhu declined to make a statement prior to my rendering this sentencing decision.

[8] Sentencing is a complex and multi-factored analysis, and finding a fit outcome is a difficult task for any trial judge. My two primary duties are: 1) to determine what facts the jury relied upon for its verdict; and 2) to determine the appropriate sentence to impose upon Mr. Sandhu in light of those facts and any further facts and factors established during the sentencing proceeding.

2. Jury Verdict

i. What facts are essential and relevant to the jury's verdict?

[9] Each of the offences occurred in an SUV occupied by 7 passengers and the driver during the transport of the CO and her two friends back to their Airbnb in Beaumont after a night out at a bar on Whyte Avenue in Edmonton.

[10] Both the CO and Mr. Sandhu had consumed alcohol throughout the evening. It was not argued that either was incapable of understanding the nature of the sexual acts in question.

[11] Section 724(2) of the *Criminal Code* provides as follows:

> (2) Where the court is composed of a judge and jury, the court
>
> > (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
> >
> > (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[12] At the sentencing hearing, Counsel disagreed on the facts that underpinned the jury's verdict.

[13] As such, I must turn to the rules in s 724(3) of the *Criminal Code*, which governs the process where there are disputed facts.

> (3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,
>
> > (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;

> (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
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> (c) either party may cross-examine any witness called by the other party;
>
> (d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and
>
> (e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender.

[14] Defence Counsel argued that in this case, the jury verdicts were inconsistent. It was submitted that Count 3 was central to the Crown's theory that the unlawful confinement was to facilitate the sexual assault. Reciting verbatim the position of the Crown, my final jury charge delivered on July 2, 2021, included the following:

> At no time did the CO consent to the Accused engaging in any sexual activity with her or to touching her in a sexual manner. The Accused was in the presence of two males during the sexual assaults on the CO. The males physically restrained the CO in the vehicle contrary to her wishes. She was unable to move and was intentionally confined for the duration of [the] approximately 20–30-minute drive from Edmonton to Beaumont (jury charge 17/14-17).

[15] Defence Counsel juxtaposed this instruction with the instructions with respect to the essential elements of the offences captured in Counts 2 and 3:

> Count 2
>
> In this case, there [is] more than one way for Crown counsel to prove the accused's guilt of the crime of party to sexual assault, that Mr. Sandhu committed a sexual assault or that he aided another person to commit the sexual assault. Crown counsel does not have to prove each or both. One, any one, is enough (jury charge 13/29-32).
>
> A person commits an offence if he, alone or along with somebody else (another) or others, personally does everything necessary to constitute (amount to) the offence. You may find Mr. Sandhu guilty because he personally did everything necessary to commit the offence of sexual assault either alone or with someone else who participated in the same way (jury charge 13/37-40).
>
> Count 3
>
> So, did Mr. Sandhu intentionally confine the CO? To intentionally confine another person is to physically coercively restrain that person contrary to his or her wishes, thereby depriving that person of his or her liberty to move from one place to another. Confinement is an unlawful restriction on liberty for some period of time. It does not have to be in one particular place. Mr. Sandhu must intend to restrict the CO's freedom to move about. Confinement does not have to but may involve physical restraint. It may be affected by fear, intimidation, psychological, or other means (jury charge 14/28-34).

> In other words, a confinement is without lawful authority if our law does not allow Mr. Sandhu to do what he did in the circumstance in which he did (jury charge 15/14-16).

[16] Given the inconsistent verdicts between Count 2 and Count 3, Defence Counsel urged me to find there was an ambiguity in the jury's logic in convicting on Count 2.

[17] Defence Counsel further argued that since the jury acquitted on Count 3, they must have rejected the Crown's theory that a group sexual assault occurred and therefore, any facts underpinning Count 2 -that Mr. Sandhu was a party to a sexual assault in any way – must be rejected.

[18] Further, Defence Counsel argued that I should not permit any speculative facts, namely that it was a *planned* "gang sexual encounter," to be accepted for sentencing purposes.

ii. Analysis

[19] The seminal case on the topic of factual findings of a jury is ***R v Ferguson***, 2008 SCC 6. Chief Justice McLachlin outlined the principles as follows at paras 16-18 and 21:

> [16] This poses a difficulty in a case such as this, since, unlike a judge sitting alone, who has a duty to give reasons, the jury gives only its ultimate verdict. The sentencing judge therefore must do his or her best to determine the facts necessary for sentencing from the issues before the jury and from the jury's verdict. This may not require the sentencing judge to arrive at a complete theory of the facts; the sentencing judge is required to make only those factual determinations necessary for deciding the appropriate sentence in the case at hand.
>
> [17] Two principles govern the sentencing judge in this endeavor. First, the sentencing judge "is bound by the express and implied factual implications of the jury's verdict": *R. v. Brown*, 1991 CanLII 73 (SCC), [1991] 2 S.C.R. 518, p. 523. The sentencing judge "shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty" (*Criminal Code*, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown; R. v. Braun* (1995), 1995 CanLII 16075 (MB CA), 95 C.C.C. (3d) 443 (Man. C.A.).
>
> [18] Second, when the factual implications of the jury's verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown; R. v. Fiqia* (1994), 1994 ABCA 402 (CanLII), 162 A.R. 117 (C.A.). In so doing, the sentencing judge "may find any other relevant fact that was disclosed by evidence at the trial to be proven" (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner***,** 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368; *R. v. Lawrence* (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only

> those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.
>
> [...]
>
> [21] However, the trial judge did not stop with these conclusions. He went on to make detailed findings of fact on Constable Ferguson's conduct. It was open to him under s. 724(2)(b) of the Criminal Code to supplement the jury's findings insofar as this was necessary for sentencing purposes. However, it was not open to him to go beyond what was required to deal with the sentencing issues before him, or to attempt to reconstruct the logical process of the jury: *Brown; Fiqia*. Nor was it open to him to find facts inconsistent with the jury's verdict or the evidence; a trial judge must never do this. The trial judge in the case at bar committed both these errors.
>
> [Emphasis added]

[20] It is accepted in Canadian Courts that if the "basis of the jury's verdict is unclear, the correct principle is that the sentencing judge should make his or her own independent determination of the facts, consistent with the jury's verdict": ***R v Roncaioli***, 2011 ONCA 378 at para 59 cited in ***R v Pettitt***, 2021 ABQB 773 at para 6 [***Pettitt***].

[21] Defence Counsel cited ***R v Munoz***, 2006 CanLII 3269 (Ont Sup Ct J), at para 25, for the proposition that "[a]n inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation."

[22] Defence Counsel further argued that the confinement was the only method by which any group activity could have occurred and that the jury must therefore have rejected any forced conduct by parties other than the accused.

[23] In response to this argument, I note that the jury heard evidence that the CO entered the vehicle willingly and did not ask to leave at any point during the ride. I therefore find as a fact, consistent with the not guilty verdict rendered on Count 3, that the CO was not unlawfully confined in the SUV.

[24] I further disagree with the contention that the jury could only have convicted on Count 2 if they found as a fact the CO was unlawfully confined. Unlawful confinement, which the jury rejected, is not an essential element of the offence of being a party to a sexual assault, under s 272(1)(d) of the *Criminal Code*.

[25] In response to this argument, I note that the jury heard evidence that the CO agreed to accept a ride from the men. The evidence suggests that the CO was reluctant, but in the end, entered the vehicle willingly. The evidence also suggests that the CO did not ask or try to leave the vehicle at any time during the 20 – 30-minute ride to Beaumont. Further, the jury heard evidence that the CO was pushed out of the vehicle upon arrival at the Airbnb in Beaumont.

[26] In my charge to the jury on Count 3, I advised the Crown must prove that Mr. Sandhu intentionally confined the CO, and that Mr. Sandhu intended to restrict the CO's freedom to move about. I did not instruct the jury on what to consider if the other men confined the CO, with Mr.

Sandhu being a party to the confinement. The evidence that I suggested would assist the jury on Count 3 included the CO's evidence that she was lifted up and plopped into the vehicle, and that one of the other women saw the CO being lifted, pushed, or guided into the vehicle. There is nothing in the evidence that specified that Mr. Sandhu was the one who did those things. I therefore find as a fact, consistent with the not guilty verdict rendered on Count 3, that the CO was not unlawfully confined by Mr. Sandhu in the SUV.

[27] My instructions in my final jury charge on the elements of the three offences in Counts 1 to 3 were clear. Several drafts of the jury charge were reviewed by both the Crown and Defence Counsel (at the time) before they were finalized. A hard copy of my final jury charge was provided to the jury for its review and consideration. During the oral delivery of my jury charge, I specified for which Count my instructions applied. (See jury charge 9/25; 13/22; and 14/12).

[28] I did not suggest that the alleged unlawful confinement (Count 3) included Mr. Sandhu holding the CO down while he sexually assaulted her or holding the CO down while the others sexually assaulted her. That evidence and reasoning was specified for a finding of guilt on Count 2. Had I given instruction that the jury could find that the CO was confined for the purpose of Count 3 by being held down during the sexual assaults either by Mr. Sandhu or the other men, there may have been an inconsistency. But those were not my instructions.

[29] I interpret the paragraph commencing with "At no time did [the CO] consent to the Accused…," under the heading Position of the Crown (Jury Charge 17/12-17), as summarizing the Crown's position on each of the three Counts. The comments with respect to males having physically restrained the CO in the vehicle and to the CO having been intentionally confined for the duration of the drive to Beaumont were with respect to Count 3. These comments are consistent with my instructions to the jury on Count 3 that "[t]o intentionally confine another person is to physically (coercively) restrain that person, contrary to his/her wishes."

[30] I find that the primary facts accepted by the jury include that Mr. Sandhu, who was sitting behind the driver, either pushed or held down the CO, he attempted to or did in fact take off her pants and underwear, he assisted the other two men sitting in the middle row of seats to commit a sexual assault against the CO, *and* that he sexually assaulted the CO with the assistance of others. All these facts support the guilty verdict on Count 2 without the need for a finding of unlawful confinement. Moreover, it is not inconsistent for the jury to have accepted that the CO was held down for the purpose of facilitating the sexual assault, while at the same time not concluding that the holding down of the CO was sufficient to constitute a physical restraint for the purpose of a guilty verdict on Count 3 (unlawful confinement). Finally, these facts are not based on speculation but rather evidence that I find the jury accepted; no inferential gap exists.

[31] Finally, I agree with Defence Counsel that it was not proven beyond a reasonable doubt that this was a *planned* "gang sexual encounter" and therefore, as discussed below, I do not find any alleged planning to be an aggravating factor.

iii. Conclusion on Findings of Fact

[32] Accordingly, I find the facts accepted by the jury to be as set out below.

[33] On Friday, August 24, 2018, the CO (aged 18) and her two friends (aged 18 and 19) drove from Prince Albert, Saskatchewan to Edmonton for a short visit. They rented an Airbnb in Beaumont. On Saturday evening, they went back to the Airbnb to get ready to go out. They drank alcohol while getting ready. They took an Uber to Beercade Bar on Whyte Avenue. While at the bar they drank more alcohol and danced.

[34] Just before the bar closed, the CO was surrounded by a group of males on the dance floor. The males insisted on giving the ladies a ride. The CO did not want to go with them but followed her friends. The CO was intoxicated.

[35] The group walked from the bar to the vehicle. The males walking with the CO tried to remove her cardigan. She was stumbling and the men helped her stand. When they arrived at the vehicle, a large suburban style SUV, the CO sat in the middle row of seats with three males, one on her left, Mr. Sandhu, and two other men on her right.

[36] Once the vehicle began to move, the CO was sexually assaulted by the three males who were sitting with her in the middle row of seats, including by Mr. Sandhu. She was pushed down such that she was laying on the seat with her neck against the seat back in a position the CO described as being "weird", and then the man next to her attempted to remove her belt and propped her up and pulled her pants and underwear off. She said, "no, stop it," struggled to prevent the assault, and said "no" throughout.

[37] All three males forced vaginal/penile penetration on the CO.

[38] Once the SUV arrived near the condo building (the Airbnb in Beaumont), the SUV stopped to let the CO and her friends out on the side of the roadway past the entry for the building. She was in a state of undress and did not have her cell phone. The CO retrieved her phone the next day from a stranger.

[39] The girls drove back to Prince Albert the next day. The CO immediately reported the incident to the Prince Albert police and provided a video-recorded statement. Additionally, the CO went to the hospital and underwent a Sexual Assault Response Team (S.A.R.T.) examination. Forensic swabs were taken and processed.

[40] The CO was administered six photo line-ups. She positively identified Mr. Sandhu in one of the photo line ups. She also identified another male in the photo line-ups. That male was identified by the EPS as Harpeet Kaila. According to his testimony during the trial, Mr. Kaila was the driver of the vehicle that night.

[41] On September 3, 2019, a DNA concluding report from the National Forensic Laboratory in Edmonton was received by the EPS. The conclusion of the report indicated a match to Ramjit Sandhu with a 1 in 2.9 quadrillion ration.

3. Kienapple Principle

[42] ***R v Kienapple***, [1975] 1 SCR 729, 1974 CanLII 14 [***Kienapple***] established a long-standing principle that prohibits multiple convictions for different offences arising out of the same occurrence.

[43] Defence Counsel argued that my jury instruction was unclear and did not properly set out the s 272(1)(d) charge (Count 2). As such, he asked that I apply the ***Kienapple*** principle such that the Accused be sentenced on the s 271 charge (Count 1) alone.

[44] The ***Kienapple*** principle generally provides that if one of two counts is more serious, then the charge in respect of the less serious offence is stayed and a conviction is entered on the more serious offence. The seriousness of a charge is often determined by a comparison of the associated maximum penalties: ***R v Noseworthy***, 2000 NFCA 45 at para 46 and ***R v Ketcheson***, 2005 ABCA 380 at para 13.

[45] In this case, the charge under s 272(1)(d) of the *Criminal Code* (Count 2) carries a maximum penalty of 14 years, which is greater than the maximum penalty of ten years provided for on conviction of a s 271 offence.

[46] Defence Counsel cited the case ***R v TQ***, 2019 NUCJ 5 at para 48 for the proposition that the severity of the penalty is not always the measure of seriousness and that a more principled approach requires the Court to consider the "specificity and insidious nature of the crimes involved, as well as the impact of a conviction upon the individual offender."

[47] In this case, the more serious of the two offences, and the one the Crown seeks sentencing for, are the same: the charge under s 272(1)(d) of the *Criminal Code* (Count 2).

[48] I conclude that the conviction on Count 2 best captures the nature of the offence.

[49] Moreover, I reject the suggestion that the jury was confused in this case. The jury received a copy of the final jury charge and raised no questions, despite being advised they may raise questions. Further, the instructions were organized by heading such that they would have understood that the instructions relating to the s 272(1)(d) charge (Count 2) were separate from those for the s 271 charge (Count 1).

[50] In relation to the s 272(1)(d) charge (Count 2), specific facts were selected from the evidence (and others rejected) and the jury understood that they could convict if they found that Mr. Sandhu either committed the sexual assault on his own with the assistance of others, or that he assisted others to commit the sexual assault. The jury was advised that the Crown did not have to prove both events occurred (a sexual assault by Mr. Sandhu and a sexual assault by others), and that they could convict under both s 271 and s 272(1)(d) of the *Criminal Code.*

[51] The reference to the three men (which included Mr. Sandhu) at page 14, lines 6-7 of the transcript of the final jury charge, was in relation to the s 272(1)(d) charge (Count 2) – i.e., all participated in some way in pushing the CO down and attempting to take her belt and pants off. Moreover, the language on page 13, lines 29-35 of the transcript was derived from s 21 of the *Criminal Code*, which defines how one can become a party to an offence.

[52] Defence Counsel further argues that the s 272(1)(d) charge (Count 2) is only being faced by Mr. Sandhu and that he maintains he was not a participant in the sexual relations between the CO and the other two men. His testimony at trial was that he was the first to have sex with the CO, he then pulled up his pants and sat stoically in the vehicle facing forward for the remainder of the ride.

[53] I conclude that the jury did not accept Mr. Sandhu's evidence on this point. Throughout his evidence, Mr. Sandhu consistently minimized his involvement and culpability in these offences. The CO testified that the men seated next to her removed her belt, pants, and underwear, after which all three men sexually assaulted her. At the very least, Mr. Sandhu assisted the other two by removing the CO's clothing, and instigated the sexual assault by being the first of the three men to engage in penile/vaginal intercourse with the CO. Further, the likely reasons why the other two men are not facing criminal charges, despite being allegedly parties to the offence, is because the CO could not identify the other two men in the photo line-ups and Mr. Sandhu could not remember their names.

[54] Returning to the application of the ***Kienapple*** principle, I find that the charge under s 272(1)(d) of the *Criminal Code* (Count 2) reflects the more egregious and humiliating aspect of the offences committed against the CO. The charge under s 271of the *Criminal Code* (Count 1) is stayed.

[55] I will now proceed to sentence on the more serious charge under s 272(1)(d) of the *Criminal Code* (Count 2).

4. Positions on Appropriate Sentence

[56] The Crown seeks a custodial sentence of 6 years in addition to ancillary orders including a mandatory 20-year SOIRA order pursuant to ss 490.012(1) and 490.013(2)(b) of the *Criminal Code*, a DNA order pursuant to s 487.051, and a weapons prohibition order of 10 years pursuant to s 109(1)(a). The Crown also seeks a no contact order with the CO for the period of the custodial sentence.

[57] The Crown states that there are no mitigating factors. The aggravating factors include the facts of the offences, namely, that there were six males in the SUV, three of whom assaulted the CO in the middle row of seats. They were all strangers to the CO and knew that she was very intoxicated.

[58] The Crown also argues that the CO was young (18 at the time), vulnerable, and an Indigenous woman, which are further aggravating factors to be considered.

[59] The Defence submits that 2-3 years is the appropriate sentence. In terms of mitigating factors, it is submitted that Mr. Sandhu is a young person with no prior criminal record and that his judgment was impaired by alcohol consumption. The Defence refutes the Crown's submission that the nature or elements of the offence can be aggravating and cites the Supreme Court of Canada in ***R v Lacasse***, 2015 SCC 64 at para 146 [***Lacasse***].

[60] Finally, the Defence argues that collateral consequences apply in this case given that Mr. Sandhu is likely to be deported, and that given his lack of English skills, imprisonment will be difficult for him as he is more vulnerable to harm.

[61] I will provide a brief overview of the relevant sentencing principles, the sentencing starting point for major sexual assaults, and the impact of the Supreme Court's decision in ***R v Friesen***, 2020 SCC 9 [***Friesen***] on sexual offences against adults. I will then consider the gravity of Mr. Sandhu's offence, his degree of blameworthiness, and the aggravating, mitigating, and

collateral factors applicable to the circumstances of this case. Finally, I will review similar fact cases to assist me in ensuring sentence parity.

5. Sentencing Considerations

i. Sentencing principles

[62] Section 718 in the *Criminal Code* sets out the fundamental purpose of sentencing:

> The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> > (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> >
> > (b) to deter the offender and other persons from committing offences;
> >
> > (c) to separate offenders from society, where necessary;
> >
> > (d) to assist in rehabilitating offenders;
> >
> > (e) to provide reparations for harm done to victims or to the community; and
> >
> > (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[63] Sentencing is a highly individualized process in which proportionality is the fundamental principle. This was articulated by the Supreme Court of Canada in ***R v Ipeelee***, 2012 SCC 13 at para 37 [***Ipeelee***]:

> The fundamental principle of sentencing (i.e., proportionality) is intimately tied to the fundamental purpose of sentencing—the maintenance of a just, peaceful and safe society through the imposition of just sanctions. Whatever weight a judge may wish to accord to the various objectives and other principles listed in the *Code*, the resulting sentence must respect the fundamental principle of proportionality. Proportionality is the *sine qua non* of a just sanction.

[64] This fundamental principle of sentencing is captured in s 718.1 of the *Criminal Code*: "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender." See: ***R v Safarzadeh-Markhali***, 2016 SCC 14 at paras 70-71; ***Friesen*** at paras 5, 75, 30; ***Lacasse*** at para 12; ***Ipeelee*** at paras 36, 37; ***R v Arcand***, 2010 ABCA 363 at para 48 [***Arcand***]; ***R v Hajar***, 2016 ABCA 222 at para 136; ***R v Hamlyn***, 2016 ABCA 127 at para 7.

[65] In ***Pettitt***, Renke J explained "[t]he 'gravity' aspect of proportionality focuses on the act and its consequences or on what was done" and the responsibility aspect "focuses on the actor, the offender's level of fault in committing the offence, how the act was done, why the act was done, and by whom the act was done" (para 28). He further stated that a proportionate sentence must fit the crime and be neither excessive nor inadequate (para 28).

[66] I have considered the following in assessing proportionality in this case:

- The gravity of the offence and the degree of responsibility of the offender as informed by the relevant aggravating or mitigating circumstances relating to the offence and the offender, including pre- and post-offence conduct;
- Any collateral consequences occasioned as a result of the offence or the sentence imposed;
- Section 718.2(b) – the principle of parity – which requires that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." See also: ***R v Pham***¸ 2013 SCC 15 at para 9 [***Pham***];
- Sections 718.2(d) and (d) - principle of restraint – which require that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances" and "all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders"; and
- The highly individualized nature of sentencing. Sentences should be tailored to the personal circumstances of the offender as necessary. See also: ***R v Nur***, 2015 SCC 15, McLachlin CJC at para 43; ***Arcand*** at para 66.

ii. Major sexual assault, starting point, and primary objectives of sentencing

[67] The Alberta Court of Appeal in ***Arcand*** defines a "major sexual assault" at para 171 as:

> [a] sexual assault ... of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus.

[68] It is understood that sexual assaults are grave and serious acts of violence: ***Arcand*** at para 175. More specifically, the harm inherent in the offence, regardless of actual effects on particular victims, is high: at para 174. The absence of physical injury is irrelevant: para 274.

[69] The primary objectives of sentencing for major sexual offences are denunciation and deterrence: ***Arcand*** at para 274; ***R v Glessman***, 2013 ABCA 184 at para 8; ***Sandercock*** at para 14; ***R v Shrivastava***, 2019 ABQB 663 [***Shrivastava***] at para 30.

[70] The Alberta Court of Appeal has established a sentencing starting point of three years' imprisonment for a "major sexual assault" where there has not been a guilty plea: ***Arcand*** at para 169; ***R v Sandercock***, 1985 ABCA 218 at para 17. The three-year starting point "assumes a person with no record and of good character": ***Arcand*** at para 132.

[71] A sentencing judge may refine the starting point in light of the specific facts of the individual case and the offender, including aggravating and mitigating circumstances, and collateral consequences: ***Arcand*** at para 105. Deviating from the starting point in and of itself is

not an error unless the sentence deviates significantly and for no reason from the contemplated range: ***R v Parranto,*** 2021 SCC 46 at para 32.

iii. Friesen's relevance in sentencing sexual offences against an adult

[72] Although the CO is an adult, the Crown relied on ***Friesen***, which decision recently modified the sentencing landscape for sexual offences against children. Defence Counsel rejects any interpretation of the law of sexual assault based on ***Friesen***, contending the decision focuses on abuse of children or restates the law on other principles, some of which do not apply in the circumstances of this case.

[73] I adopt the analysis of Renke J in ***Pettitt*** on the role of ***Friesen*** in sentencing for sexual offences committed against adults:

1. Although ***Friesen's*** focus was on the sentencing of sexual offences against children, and much of the basic sentencing principles were restated, the understanding of and proper approach to the gravity of sexual offences, including the "fundamental wrongfulness, harm, and blameworthiness of sexual offences" applies to offences committed against adult victims: ***Pettitt*** at paras 41-44.
2. At para 118, ***Friesen*** clarified that "nothing in these reasons should be taken either as a direction to decrease sentences for sexual offences against adult victims or as a bar against increasing sentences for sexual offences against adult victims." While alluding to the need to review starting points in the appropriate case, Renke J confirmed that ***Arcand*** and its starting point sentence for major sexual assaults remains binding law in Alberta after ***Friesen***: ***Pettitt*** at paras 45-48.
3. ***Friesen*** provides guidance regarding the principles applicable to sentencing sexual offences committed against adult victims, although the violation has a different meaning for children. These include the spectrum of blameworthiness, the wrongfulness and harm of sexual assault, factors that bear on fit sentences (likelihood of re-offending, abuse of trust position, duration and frequency, degree of physical interference, and victim impact statements): ***Pettitt*** at paras 50-62.

4. Gravity of the Offences

[74] I will start with a description of the sexual assault, and the aspects impacting the harm caused to the CO, before addressing any aggravating or mitigating circumstances and Mr. Sandhu's culpability or blameworthiness.

i. The serious nature of the sexual assault

[75] The CO was an 18-year-old Indigenous woman who came to Edmonton to enjoy a weekend away with her friends. After a night of drinking and dancing with two of her friends at a bar on Whyte Avenue, the CO was surrounded by a group of men on the dance floor and offered a ride back to her Airbnb in Beaumont. Once the SUV started moving, the CO, who was sitting in the middle row of seats flanked by 3 men, was pushed down, her clothing removed, and forced to engage in vaginal intercourse without her consent with each of the three men.

[76] The offences committed by Mr. Sandhu profoundly violated the CO's personal autonomy, her dignity, her physical integrity, and her sexual integrity. They involved a measure of violence: pushing the CO's body into a contorted position, pulling her pants and underwear off, and forcing the CO's legs open despite her repeated objections. What followed was a series of degrading and terrifying acts committed by all three men in the middle row of seats in an extremely confined area.

ii. Victim Impact Statement

[77] In her Victim Impact Statement, the CO wrote that she has not been able to trust anyone other than her family since the sexual assault. She feels disgusted with her body to this day. She does not feel safe in big crowds and has a panic attack if a group of guys look at her. The victim further describes reliance on alcohol and requiring antidepressants to sleep.

[78] Defence Counsel suggested that the Victim Impact Statement does not demonstrate harm on the serious end of the scale.

[79] Crown counsel took exception to the submission that a Court should be invited to place a victim's words on a continuum to assess the gravity of the offence.

[80] Unless properly challenged, a judge may regard filed victim impact statements as evidence of the actual impact on a victim of a sexual offence: ***R v BRS***, 2020 ABCA 29 at paras 24-25 and 28 ("the trial judge was entitled to accept the contents of the victim impact statement as proof of the harm suffered"). I am also cognizant of the caution pronounced by Justice Di Luca in ***R v Theriault***, 2020 ONSC 6768, aff'd 2021 ONCA 517, at para 17, that victim impact statements cannot be used to increase a sentence to an inappropriate level.

> .... victim impact statements provide important and potentially aggravating context to the sentencing process. They inform the seriousness of the offence committed and the harm caused. However, they cannot be used to *improperly* aggravate or increase the length of sentence ...

[81] Proportionality remains a governing sentencing principle.

[82] As such, victim impact statements cannot be used to *improperly* aggravate or increase the length of sentence or *improperly* mitigate or decrease the length of the sentence. Victims do not all express themselves in the same manner and should not be judged by their ability to find the right words to express the level of harm they have suffered.

[83] ***Friesen*** and ***Arcand*** recognized that psychological and emotional injury are intrinsic to sexual assault, even without proof of specific injury: ***Friesen*** at 56, 79, 85; ***Arcand*** at paras 174-176, 274. Thus, this Court can assume that serious harm is inherent in the acts committed against the CO.

[84] In this case, there is actual evidence of serious harm to the CO. The CO was sexually assaulted successively by three separate men in a confined space. The confined space and domination by the three men created an atmosphere conducive to the application of physical force and psychological fear. I can also infer serious harm from the acts of violence as the CO felt

compelled to not scream for fear of further repercussions to her and her friends. This terrorizing effect on a victim was best described by Kearns J in ***Sandercock***: "[t]his harm includes not just the haunting fear of another attack, the painful struggle with a feeling that somehow the victim is to blame, and the sense of violation or outrage, but also a lingering sense of powerlessness."

[85] In addition, the Victim Impact Statement describes the ongoing harm that the CO has suffered because of these offences, including having trust issues, experiences of panic attacks, alcohol dependency, and possible insomnia and depression.

5. Aggravating Factors

i. Vulnerability of Complainant

[86] The victim was a young (18 years of age), vulnerable Indigenous woman, visiting from out-of-town. It was her first-time attending a bar in Edmonton. She had an expectation that she would be transported safely back to her Airbnb in Beaumont.

[87] The offences also exploited the CO's physical vulnerability (being intoxicated). Mr. Sandhu and the driver of the SUV acknowledged at trial that they knew the CO was extremely intoxicated.

[88] Taking advantage of the CO's vulnerability, considering her youth and level of intoxication, aggravated the gravity of the offences.

ii. Indigenous Victim

[89] In this case, the fact that CO is a young, vulnerable Indigenous woman is one factor that places denunciation and deterrence as primary sentencing considerations.

[90] Section 718.04 of the *Criminal Code* states:

> When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence

[91] Section 718.04 of the *Criminal Code* came into force in September of 2019 in response to the Supreme Court of Canada's pronouncement in ***R v Barton***, 2019 SCC 33 [***Barton***] at para 204 that:

> … to better ensure Indigenous women and girls receive the full protection and benefit of the law in sexual assault cases, our criminal justice system should take reasonable steps to address biases, prejudices, and stereotypes against Indigenous women and girls openly, honestly, and without fear.

[92] Section 718.04 of the *Criminal Code* is a parliamentary signal that society will not tolerate violence against Indigenous women, and that the vulnerability of the victim will be considered aggravating.

[93] Section 718.04 was not in force on the date that Mr. Sandhu committed these offences. In ***R v Kolola***, 2021 NUCA 11, the Nunavut Court of Appeal declined to overturn a sentencing decision that applied s 718.04 to an offence that was committed prior to that section's enactment. While the Court of Appeal found the sentencing judge erred in referring to a statutory provision not in force on the offence date, his reliance on the common law principle was appropriate. At para 34, the Court stated:

> Section 718.04 codified the long standing and well-established common law principle where Courts have considered denunciation and deterrence the primary sentencing considerations in cases involving the abuse of a victim who is vulnerable because of their personal circumstances.

[94] Prior to the enactment of s 718.04 of the *Criminal Code*, courts were increasingly taking notice of the vulnerability of Indigenous women in considering a fit and proportionate sentence. In ***R v AD***, 2019 ABCA 396 [***AD***], the Court of Appeal emphasized that the fundamental purpose of sentencing is to protect society and the public and recognized the disproportionate impact of violence against Indigenous women (at paras 25, 26 and 29). At paragraph 26, the Court remarked:

> The sad fact is that Aboriginal women are disproportionately affected by domestic violence and violence in general and this reality should inform the sentencing process if there is to be any hope of achieving the fundamental purpose of sentencing and meeting the objectives set out in section 718 of the *Criminal Code*, which include denunciation and deterrence.

[95] In ***R v Morin***, 2021 ABQB 433, Clackson J commented on the application of ***AD*** more broadly and went as far as suggesting there is an automatic increased starting point when an offender commits an offence against an Indigenous woman (at para 5). I find it appropriate to apply this same reasoning in this sentencing decision.

[96] I will now turn to factors that may mitigate Mr. Sandhu's blameworthiness, as argued by Defence Counsel.

6. Possible Mitigating Factors

i. Self Induced Intoxication

[97] Defence Counsel raises Mr. Sandhu's self-induced intoxication as a mitigating factor affecting his blameworthiness on account of his reduced judgment. Mr. Sandhu testified to having drank approximately 10 whiskies prior to attending the bar and consuming more drinks at the bar.

[98] Defence counsel cited the case of ***R v Longboat***, [2003] OJ No 598, aff'd [2004] OJ No 934, 2004 CanLII 25541 [***Longboat***], where the Court found that the use of alcohol, while not a defence, was mitigating in that there was probably no pre-meditation to the crime (para 8).

[99] In ***R v Sandercock***, 1985 ABCA 218 [***Sandercock***], the Alberta Court of Appeal was clear that intoxication generally should not be a mitigating factor, but it may support an argument that the attack was spontaneous, or that the likely consequences were not fully appreciated (paras 27 and 36).

[100] More recently in ***R v Cabrera***, 2021 ABCA 291, the Court of Appeal held at para 71 that: "[f]or sentencing purposes, intoxication is not a mitigating factor. At most, intoxication can – in certain circumstances – be indicative of spontaneity rather than planning."

[101] In the context of sexual assault, the Alberta Court of Appeal has held that the seriousness of a sexual assault "is not lowered because an offender was intoxicated by drugs or alcohol while committing it. Intoxication should not generally be a mitigating factor in sentence": ***Arcand*** at para 291. In ***Arcand***, the Court noted that intoxication could be a factor in the spontaneity of a crime, but explained that "pushing in the other direction, however, is the fact that this offender deliberately took advantage of the CO's being unconscious to inflict himself on her" (at para 291).

[102] Some Canadian courts have considered voluntary intoxication to be an aggravating factor. For example, the British Columbia Court of Appeal in ***R v Badhesa***, 2019 BCCA 70 held at para 39 that self-induced intoxication that leads to violence is typically "the product of intentional risk-taking, which conduct is itself dangerous, irresponsible and blameworthy."

[103] If an accused voluntarily consumes or ingests a substance that they knew or ought to have known could cause intoxication, the accused assumes the risk that intoxication could make them do what they otherwise would not normally do with a clear mind: ***R v Penno***, [1990] 2 SCR 865 at 885. An objectively foreseeable risk of intoxication is sufficient. Foreseeability of an exact level of intoxication is not required: ***R v Brown***, 2021 ABCA 273 [***Brown***] at para 30, quoting ***R v Bouchard-Lebrun***, 2011 SCC 58 at para 91, ***R v Chaulk***, 2007 NSCA 84 at paras 45 – 47, and ***R v Krewson***, 2019 BCCA 34 at para 24.

[104] Where criminal conduct follows voluntary intoxication, the conduct can still be criminal even if consuming alcohol or drugs, in the abstract, is not criminal. Criminal responsibility results from the harm actually caused: ***Brown*** at para 35. If, at the time that the person consumes the intoxicating substance it was objectively possible for him to appreciate the risk that he was creating by doing so, a person is criminally responsible for the conduct that follows: ***Brown*** at para 36. Those who voluntarily deprive themselves of the normal powers of perception, self-control, and self-awareness to such an extent that they act violently towards others are not morally innocent: ***Brown*** at para 45, quoting ***R v DeSousa***, [1992] 2 SCR 944 at 967, 1992 CanLII 80.

[105] Mr. Sandhu testified about having perfect recollection of the events and did not indicate that his judgment was impaired, that he had a problematic dependency on alcohol, or a mental illness. See in contrast: ***R v Forner***, 2020 BCCA 103. There was no evidence from other witnesses suggesting he was intoxicated to the point of serious impairment or reduced judgment on the night in question. I cannot find as a fact that Mr. Sandhu was intoxicated as such a state is not solely dependent on the number of drinks a person consumes. In any event, the Alberta Court of Appeal has made it clear that intoxication is not a mitigating factor in sentencing.

[106] Moreover, even if Mr. Sandhu was intoxicated, in reviewing the applicable principles from the jurisprudence, I do not infer that it led to the spontaneity of the offence in a way that could be mitigating in this case. The CO and her friends were surrounded by several men at the end of the night. The males doggedly followed them around and urged them to accept a ride to their Airbnb in Beaumont, there was a lengthy walk to the SUV vehicle during which an attempt was made to remove the CO's cardigan, and the sexual exploitation occurred immediately after the vehicle was

in motion. All the men, except the driver, engaged in sexual acts with two of the women in the vehicle. I do not see how Mr. Sandhu 's level of intoxication, which cannot be determined in any event, contributed to a spontaneous reaction in the circumstances.

[107] I conclude that Mr. Sandhu's level of intoxication does not mitigate the degree of his responsibility or blameworthiness for the offences for which he has been found guilty.

ii. Factors specific to Mr. Sandhu

[108] Additional factors unique to the offender may be considered relevant to the offender's blameworthiness or to the sentencing objectives, even though they do not relate directly to the offender's degree of responsibility in committing the offence.

a. Age

[109] The age of an offender may be a mitigating factor, particularly the youth of an offender: ***Friesen*** at para 174; ***R v Shrivastava***, 2019 ABQB 663 at paras 52-55 [***Shrivastava***].

[110] Mr. Sandhu is currently 33 years of age. He was 29 years of age at the time of the offence and therefore was not a young man. His age is not a mitigating factor.

b. Family and Social History

[111] Mr. Sandhu was born in Punjab, India and moved to Canada in June 2018, just over two months before the sexual assault on the CO. He has a stable home life and is pro-social in his community. He was married on December 22, 2019, and on the date of the sentencing hearing, I was advised his wife was expecting their first baby any day.

[112] Mr. Sandhu has a grade 12 education and a diploma in computer science. He started a Bachelor of Technology program in India in 2012 but he did not complete it prior to moving to Canada. His employment history started with assisting his father in India with farming. He has had various jobs in the trucking industry since moving to Canada. He currently works as a truck driver.

[113] He lives in a close-knit family. His parents moved from India and now live with him. His father was a farmer in India but is now retired and has a heart condition. Mr. Sandhu supports his parents. His brother also works as a truck driver and resides with Mr. Sandhu and his wife in Edmonton. His sister is a bus driver for the City of Edmonton and has two kids. She is a great source of support for the family, being the first to immigrate to Canada in 2006. She sponsored the rest of the family.

c. Criminal Record

[114] Mr. Sandhu has no criminal record in Canada or in India.

[115] A lack of a criminal record is not a mitigating factor. See: ***R v MGF***, 2010 ABCA 102 at para 7. It may go to rehabilitative potential or to restraint in punishment as the offender may be deterred by a lighter penalty: ***Shrivastava*** at para 71. It may also support an inference that Mr.

Sandhu is of "previous good character" for at least starting point purposes. See: ***R v JAS***, 2019 ABCA 376 at para 15. However, "[t]he absence of a criminal record cannot be used to adjust the sentence below a starting point that is premised on the absence of a criminal record": ***Shrivastava*** at para 71.

d. Good Character letters

[116] Mr. Sandhu offered 24 letters of support, many of which were translated by a Court Interpreter.

[117] The letters are from his employer, family, friends, and community members. They all speak to his good moral character, his dedication to his family, and to his work. His wife describes the shock she felt when he was arrested because she feels he respects women. She states they came to Canada with hopes for a better future. She was 8 months pregnant at the time of writing the letter and describes the tremendous stress on her family that the charges have caused including financial stress as she is on maternity leave. She states her full support and faith in Mr. Sandhu.

[118] The Crown argues that many of the character letters are inappropriate as they continue to deny the criminal convictions. In my careful review, I do note that while most of the letters speak to disbelief that Mr. Sandhu could have committed an act that is so out of character, some do indeed reject the verdict. His sister states: "But he is not the person who commit any kind of crime. There must be some kind of misunderstanding ... Please give him at least a chance. This is going to be ruined his, his wife's, and his child's whole future." His mother states: "I am very sure he can't do anything like that." Several friends also state outright that he is innocent and that it is Mr. Sandhu who deserves justice.

[119] While I can see that many of Mr. Sandhu's supporters disagree with the guilty verdict and believe there is an error, I also note that they appear to not understand the legal process and plead for a reconsideration of the case.

[120] I find that all the letters are consistent in demonstrating that Mr. Sandhu is a hard-working, respected, and loved member of his family and community. Evidence of pro-social activity and community support can support rehabilitative potential. Good character can show that an offender has the capacity and inclination to take responsibility for repairing his or her life and to return to a law-abiding life. Community support, support from others, can aid an individual's rehabilitative efforts. It can be hard to repair one's life on one's own. This sort of evidence, for similar reasons, can also show that punishment is not required to secure specific deterrence.

[121] However, in ***Shrivastava*** Antonio J pointed out that being of good character and obeying the law, an obligation we all bear, cannot be taken to earn credit against punishment for commission of a serious offence: ***Shrivastava*** at para 78; see ***Arcand*** at para 136. As well, even if one goes beyond being merely law-abiding and performs "abundant good deeds," there is no obvious compelling argument that those goods deeds should constitute banked credit that may be drawn down to excuse wrongdoing, even by way of mitigation of penalty.

[122] ***Arcand*** leaves open the possibility of an offender demonstrating extraordinarily good character, but that possibility raises two difficulties. First, the criteria or tests for extraordinary good character, as opposed to ordinary good character, are not clear: ***Arcand*** at para 135.

[123] Second, and more fundamentally, it is not clear why even extraordinary good character should mitigate blameworthiness for committing a sexual offence. The good character did not prevent the commission of the offence. It does not appear to have any bearing on the gravity of the offence committed or on the responsibility for committing the offence. See: ***Pettitt*** at para 141.

[124] In ***R v Hepburn***, 2013 ABQB 520, at paras 36-37, Justice Jeffrey advised evidence of good character has low probative value in sexual offence cases:

> [36] In respect of the extensive letters attesting to Hepburn's otherwise stellar character and conduct, I am mindful of these further comments of the Alberta Court of Appeal in *BSM*, at para 16:
>
> > Turning to mitigating circumstances, the Reasons mention good character. Likely it existed here …. But previous good character is common in child sexual assault cases. So previous good character would not take one much below the starting point, nor significantly reduce what would otherwise be a higher sentence.
>
> [37] These crimes are committed by people from all walks of life, out of the public eye, clandestinely and secretly, often to the surprise of people who thought they knew the perpetrator best. It cannot be that because of a person's abundant good deeds and potential for societal contribution that they are given a free pass on a crime against another, that they can in a secret double life victimize the vulnerable of our society with impunity.

[125] The difficulty with positive reference letters is that self-presentation in public and conduct in private may not be aligned: see ***Shrivastava*** at paras 77-78; ***R v Jonat***, 2019 ONSC 1633 at para 63. Good people in positions of trust commit crimes and it is sometimes their publicly stellar reputation that allows for the crime to go undetected by their families. The fact that a person was of previous "good character" cannot equate to a conclusion that if that person committed a crime, it must have been "out of character."

[126] In ***Pettitt***, the Court reviewed 30 letters of support, including from the offender's family, customers, and community members. Justice Renke noted that while evidence of pro-social activity can support rehabilitative potential, ordinary good character is assumed in the starting point sentence for major sexual assaults: para 139 citing ***Arcand*** at para 133 and ***Shrivastava*** at para 71. He further remarked at para 141 that it is not clear why even extraordinary good character should mitigate blameworthiness as it has no bearing on the gravity of the offence or the responsibility for committing it.

[127] Overall, I conclude the character letters have little mitigating effect on the determination of the appropriate punishment to impose on Mr. Sandhu. I am not prepared to decrease Mr. Sandhu's sentence in any significant way because of the letters.

iii. Guilty Plea

[128] A guilty plea is a recognized mitigating factor: ***Friesen*** at para 164. See also ***R v TF***, 2019 SKCA 82 at paras 44-46; ***R v Cowell***, 2019 ONCA 972at para 102; ***R v SLW***, 2018 ABCA 235 at paras 32-35.

[129] Mr. Sandhu did not plead guilty. He exercised his constitutional right to a trial. There is no mitigation on account of a guilty plea.

iv. Cooperation with the Authorities

[130] Mr. Sandhu was cooperative with the police throughout the process. However, I draw a distinction between him being minimally cooperative and polite with whether he was forthcoming in providing them with information necessary to their investigation. I do not view his cooperativeness with the authorities as having any mitigating effect because his denial of all responsibility was ultimately rejected by the jury. In addition, as discussed below, it is simply not credible that he could not recall or find out the names of the other men in the SUV. He testified to the fact that they were all relatives and yet he made no attempt to assist police in their investigation so that their identities could be discovered.

[131] Mr. Sandhu complied with his bail conditions. However, compliance with release conditions is not a mitigating factor. See: ***R v Sarrasin***, 2021 ABCA 253 at para 30. The Alberta Court of Appeal in ***R v Gandour***, 2018 ABCA 238 at para 43:

> The trial judge also considered the respondent's compliance with the conditions of his recognizance for the past 23 months to be a mitigating factor. While failure to comply with the terms of a recognizance is an aggravating factor, compliance is expected and does not constitute a mitigating factor.

v. Remorse and Rehabilitative Steps

[132] Alberta's leading case on the role of remorse in sentencing is ***R v Ambrose***, 2000 ABCA 264 [***Ambrose***]. The reasoning of Fraser CJA, dissenting in the result, was adopted by the majority at para 4. The Supreme Court of Canada in ***Friesen*** confirmed that remorse is a mitigating factor; its weight increases when "paired with insight" and with signs that the offender has changed his attitude and has taken steps to reduce the likelihood of further offending: at para 165. An offender may have on their own, taken rehabilitative steps to address the "root causes" of their offending, for example, by attending addictions treatment or counselling.

[133] While the expression of remorse and pursuit of rehabilitative steps are mitigating factors, an offender's lack of remorse and failure to take rehabilitative steps are not aggravating factors: ***Ambrose***; ***R v TWS***, 2018 ABQB 870. Lack of remorse "should not be used to impose a sentencing surcharge on top of what would otherwise be an appropriate sentence": ***Ambrose*** at paras 71, 85.

[134] Moreover, an offender's choices about conducting their defence, for example their choice to plead not guilty, must not be equated with lack of remorse, and must not be used to aggravate the sentence: ***Ambrose*** at paras 77, 80, 83, 85; ***Shrivastava*** at para 48.

[135] That said, lack of remorse remains a relevant sentencing consideration: ***R v Tate***, 2005 ABCA 217 at para 5. It can show an offender's "continued indifference to the plight of his or her victims": ***Shrivastava*** at para 48.

[136] Here, there is no evidence that Mr. Sandhu has taken responsibility for his conduct, that he has expressed remorse, whether through actions or words, or that he has taken any rehabilitative steps. Mr. Sandhu did not offer a s 726 statement.

[137] There is further no indication on the evidence submitted for the sentencing hearing that Mr. Sandhu acknowledges the harm that he caused the CO. Rather, based upon the character letters this Court received, it appears that Mr. Sandhu continues to relay a narrative to his family and friends that he is innocent. He does not appear to have any insight into the criminal nature of his actions.

[138] The expression of remorse and pursuit of rehabilitative steps are therefore not mitigating factors present in this case.

vi. Risk of Re-Offending

[139] One of the fundamental purposes of sentencing is the protection of the public by separating offenders from society, where necessary: s 718(c) of the *Criminal Code* and ***R v Lyons***, [1987] 2 SCR 309 at 329. Therefore, the higher the risk of the offender re-offending, the greater the concern for sentencing purposes.

[140] No expert evidence formally assessing Mr. Sandhu's risk of re-offending was provided.

[141] Mr. Sandhu has not completed any programs or taken any counselling that might have reduced any risk of re-offending that he poses.

[142] I do note that Mr. Sandhu has abided with his release conditions without incident. I also note that there was no evidence of any prior or post-offence sexual offending, which I partly gleaned from the character letters.

[143] I find the character letters provide very little assistance in determining Mr. Sandhu's risk of re-offending. On the one hand, the character letters speak to how this offence has shocked the community. They also speak to the devastating impact the charges have had on Mr. Sandhu's family and his strong desire to maintain his reputation and honour and work for a better future. It is obvious he is an integral part of a close network of family and friends and has many people depending on him.

[144] On the other hand, I cannot ignore the fact that the character letters further Mr. Sandhu's narrative that he did not commit these criminal acts. Moreover, he was a member of a tight knit family and was highly regarded at the time when he committed the acts. That did not prevent him from committing the offences.

[145] Mr. Sandhu has not acknowledged any responsibility for the offences to the members of his family, to his community, to the victim, or to himself, which suggests that he continues to try to hide his bad behaviour from his own family and community and that he has done nothing to address the underlying reasons for why he committed these offences. Without some acknowledgement of his wrongful behaviour, there is no way to evaluate his risk of re-offending.

[146] I am unable to assess Mr. Sandhu's risk of re-offending on the evidence before this Court.

7. Collateral Consequences

[147] Collateral consequences, being the actual impact of the sentence on the offender is a relevant factor in sentencing. Peculiar effects on the offender may be taken into account in reducing a sentence, so long as the sentence remains proportional: ***Pettitt*** at para 160 citing ***R v Morrisey***, 2000 SCC 39 at para 41; ***SLW*** at para 39; ***Shrivastava*** at paras 61, 64, 66, 67.

[148] The concept of collateral consequences and their impact on sentencing flow from the application of the principles of individualization and parity—in accordance with the individual offender's personal circumstances: ***Pham*** at para 11. By examining collateral consequences, a sentencing judge is able to craft a proportionate sentence by taking into account all of the relevant circumstances related to the offence and the offender: ***R v Suter***, 2018 SCC 34 at para 46 [***Suter***].

[149] A collateral consequence includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence that impacts the offender: ***Suter*** at para 47.

[150] Collateral consequences are not necessarily aggravating or mitigating factors under s 718.2(a) of the *Criminal Code* because they do not relate to the gravity of the offence or the moral blameworthiness of the offender. Instead, collateral consequences are relevant to the personal circumstances of the offender: ***Suter*** at para 48. The key question to be asked is whether the effect of the consequence means that a particular sentence would have a more significant impact on the offender because of his or her circumstances: ***Suter*** at para 48.

[151] In ***Pham***, Wagner J approvingly cited Professor Manson (*The Law of Sentencing*, Toronto: Irwin Law, 2001 at pages 136-137) to outline how such consequences should be weighed at para 12:

> The … effect of indirect consequences must be considered in relation both to future re-integration and to the nature of the offence. Burdens and hardships flowing from a conviction are relevant if they make the rehabilitative path harder to travel. Here, one can include loss of financial or social support. People lose jobs; families are disrupted; sources of assistance disappear. Notwithstanding a need for denunciation, indirect consequences which arise from stigmatization cannot be isolated from the sentencing matrix if they will have bearing on the offender's ability to live productively in the community. <u>The mitigation will depend on weighing these obstacles against the degree of denunciation appropriate to the offence.</u> [Emphasis in original]

[152] In ***Suter***, Moldaver J explained at para 49:

> Collateral consequences do not need to be foreseeable, nor must they flow *naturally* from the conviction, sentence, or commission of the offence. In fact, "[w]here the consequence is so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished" (Manson, at p. 137). Nevertheless, in order to be considered at sentencing, collateral consequences must relate to the offence and the circumstances of the offender.

[153] Thus, when consequences can be expected as a result of the commission of the offence, the weight given to collateral consequences may be reduced: ***R v Baltazar***, 2021 ABQB 879 at para 61.

[154] When considering collateral consequences, the Supreme Court of Canada was careful to note in ***Suter*** that the fundamental principles of proportionality must prevail in every case. Moldaver J declared that collateral consequences cannot be used to reduce a sentence to a point where the sentence becomes disproportionate to the gravity of the offence or to the moral blameworthiness of the offender (at para 56).

[155] Mr. Sandhu raises two types of collateral consequences: that any prison sentence will be made more difficult by his inability to speak English fluently, and the deportation consequences.

i. Language barriers and inability to fit into prison culture

[156] Defence Counsel argued that Mr. Sandhu is primarily a Punjabi speaker with limited English language skills, which will make his imprisonment particularly difficult. Defence Counsel noted that he would not have the language skills to protect himself from harm while in prison, to communicate with the prison officials responsible for his care, or to apply for programming. Counsel also noted the lack of any programming available in Punjabi. Lastly, Defence Counsel noted Mr. Sandhu 's prospective difficulty fitting in and forming a community while in prison because of his insufficient language skills.

[157] The Crown submitted that Mr. Sandhu's language skills are not a factor to be considered, and even if they were, it is not clear what difference this would make. The Crown also noted that Mr. Sandhu 's English skills have been sufficient to maintain employment in Canada since 2018 and were sufficient to socialize at the bar on the night of the offence.

[158] A sentencing judge must consider how the offender will be personally affected by the actual punishment imposed: ***R v Morrisey***, 2000 SCC 39 at para 41. In this context, language barriers faced while in prison could be considered.

[159] There are a few Appellate decisions which suggest that an offender's spoken language, ability to communicate, and cultural differences or barriers may render a term of imprisonment more difficult for some than others. See for example: ***R v Nuttall***, 2001 ABCA 277; ***R v Fireman*** (1971), 3 OR 380, 1971 CanLII 450 (Ont CA) [***Firearm***]; ***R v Sriskantharajah***, 1994 CanLII 631 (ON CA), 90 CCC (3d) 559 (Ont CA) [***Sriskantharajah***].

[160] However, most of these cases consider this issue alongside other significant factors, including a disability or serious mental health issues. They also do not provide detailed guidance on how to apply this factor or how much weight it ought to be given. I also note that ***Firearm*** and ***Sriskantharajah*** are dated decisions.

[161] This Court found one recent decision where the offender's language skills were taken into consideration as a mitigating circumstance. In ***R v Navarathinam***, 2021 ONSC 4241, Roberts J noted:

> Mr. Navarathinam's time in custody will be particularly harsh because he does not speak English. While I am optimistic that he will be given some English training in custody, the reality is that most programming will be unavailable to him because he does not speak English. He will be isolated and marginalized. His time will be particularly harsh as a result.

[162] The onus is on the offender to establish collateral consequences on a balance of probabilities. No evidence was provided to allow me to adequately assess Mr. Sandhu 's language proficiency or the potential impact of incarceration on him due to his language skills.

[163] There was further no evidence that the correctional authorities could not accommodate Mr. Sandhu's language impediments. Mr. Sandhu is an educated person who already has a track record of functioning as a long-haul truck driver who crosses provincial boundaries. While his lack of fluency in English will perhaps cause some challenges with other inmates, in my opinion, on the evidence, his language skills do not rise to a level of detrimental consequence that would warrant any mitigation of his sentence.

[164] To address Defence Counsel's safety concerns, the responsibility for the offender's safety in the institution rests with the prison authorities, and they must take all necessary steps to ensure that the offender is not harmed while in the institution: ***R v Rafuse***, 2004 SKCA 161 at para 17. In any event, the offender's safety risk in the institution is not a factor to be taken into account in imposing a fit sentence: *ibid*.

ii. Risk of Deportation

[165] Secondly, Defence Counsel noted that Mr. Sandhu is not a Canadian citizen and is therefore likely to be deported upon completion of his sentence with little to no possibility of return. Scarce details were submitted with regards to his immigration status or the specific grounds on which he may face deportation.

[166] In accordance with s 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*), a permanent resident ("PR") or foreign national becomes inadmissible to Canada on grounds of serious criminality if convicted in Canada of an offence punishable by a maximum term of imprisonment of at least 10 years, or for an offence for which a term of imprisonment of more than six months has been imposed.

[167] Under s 44 of the *IRPA*, an immigration officer who is of the opinion that a PR is inadmissible, may prepare a report to be shared with the Minister. If the report is deemed well-founded by the Minister, the report may be referred to the Immigration Division for an admissibility hearing in most cases. At the conclusion of a hearing, the Immigration Division is statutorily obligated to issue a removal order if satisfied that the person is inadmissible.

[168] Under the terms of s 64 of the *IPRA*, a person loses the right to appeal a removal order if found to be inadmissible on grounds of serious criminality, as defined in s 36(1)(a) of the *IRPA*. Prior to legislative changes in 2013, an offender had a right to appeal a removal order if the sentence imposed on them was less than 2 years' imprisonment. Section 64 removes the possibility of the Appeal Division's comprehensive consideration of social and individual interests, including humanitarian and compassionate considerations at any stage of the process.

[169] The Crown noted that Mr. Sandhu would only be able to appeal a deportation order if he was sentenced to less than six months' imprisonment. The Crown submitted that the appropriate range of sentence in the circumstances of this case is not anywhere near to less than six months and therefore argued there is nothing that can be done or considered in this regard.

[170] The Supreme Court of Canada in ***Pham*** is clear that collateral consequences related to immigration may be relevant in tailoring the sentence, but the sentence that is ultimately imposed must be proportionate to the gravity of the offence and the degree of responsibility of the offender: ***Pham*** at para 14.

[171] This discretion to consider collateral consequences is not to be misused by imposing inappropriate and artificial sentences to avoid collateral consequences flowing from a statutory scheme in a way that circumvents Parliament's will or otherwise skews the process either in favour of or against deportation. Nor should it lead to a separate sentencing scheme with de facto special ranges where deportation is a risk: ***Pham*** at para 15-16.

[172] Ultimately, collateral immigration consequences are meant to be one relevant factor amongst many others related to the nature and the gravity of the offence, the degree of responsibility of the offender, and the offender's personal circumstances: ***Pham*** at para 20.

[173] Where the discretion is exercised, the "closer the varied sentence is to the range of otherwise appropriate sentences, the more probable it is that the reduced sentence will remain proportionate, and thus reasonable and appropriate": ***Pham*** at para 18.

[174] A review of Alberta Court of Appeal decisions shows a clear awareness regarding the potential loss of appeal rights in the face of deportation when offenders receive a sentence longer than six months. However, particularly since the 2013 amendment, except for the case ***R v Mohammed,*** 2022 ABCA 69[1], which had unique circumstances, the Court of Appeal has consistently declined to drastically reduce sentences solely on the grounds of allowing the offender to retain a right to appeal a deportation order. Sentence reduction requests of between 8-18 months have been refused.

[175] In ***R v Gittens***, 2019 ABCA 406, the offender sought to reduce his sentence to 6 months less 1 day to maintain the right to appeal a removal order. He was originally sentenced for 18 months for one count of trafficking in cocaine. The Court of Appeal acknowledged that collateral consequences could influence sentencing in the search for proportionality but dismissed the appeal as the sentencing judge did not err in concluding that the immigration consequences could not justify the sentence reduction proposed by the offender.

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[1] In ***R v Mohammed,*** 2022 ABCA 69, the Court of Appeal substituted a two-year sentence for one that was six-months less a day. In doing so, the Court relied upon ***Pham*** and considered the immigration consequences of a sentence more than six months. The appellant had initially received a global sentence of ten year's imprisonment for four convictions, but had successfully appealed three of these convictions, with a new trial scheduled for May of 2023. The fourth conviction, carrying a concealed weapon under s 90(1), had not been appealed: ***R v Ochelo et al,*** 2021 ABCA 380 at para 4. With the three other convictions being reheard, the immigration consequences of the two-year conviction for carrying a concealed weapon were essentially moot at the sentencing hearing.

[176] In ***R v Mbachu***, 2016 ABCA 270, the Court of Appeal refused to reduce the offender's sentence from 2 years less a day to 6 months less a day in consideration of the immigration consequences. The Court found the sentence imposed was fit and "to drastically reduce that fit sentence to less than six months in order to ameliorate the immigration consequences of the sentence would have been inappropriate" (para 34).

[177] In ***R v Le***, 2013 ABCA 232, the offender was sentenced to 28 months, less 4 months credit for pre-sentence custody, resulting in a net sentence of 2 years plus 1 day. He sought a reduction by a mere 2 days to preserve his right to appeal a removal order. For immigration purposes, however, the Court of Appeal noted that time served in pre-sentence custody would be considered as a part of the sentence. For this reason, the sentence would have to be reduced by 8 months to maintain his right to appeal which would not be considered a fit sentence in the circumstances. The Court of Appeal dismissed the appeal.

[178] In ***R v Lopez-Orellana***, 2018 ABCA 35 [***Lopez-Orellana***][2], the Court of Appeal laid out the methodology to be applied when considering collateral immigration consequences, suggesting a two-step process at para 24:

> In our view, a sentencing judge should first determine what is a fit and proper sentence, irrespective of immigration consequences, and proceed from there. It is only once a fit and proper sentence has been determined that an analysis should proceed to consider the collateral immigration consequences.

[179] In ***R v Singh***, 2021 ABQB 966, Mah J recently articulated this process in three steps (at para 21):

> First, determine a fit and proper sentence, irrespective of immigration consequences.
>
> Second, consider whether to exercise discretion to take collateral immigration consequences into account; and
>
> Third, ensure that the sentence ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[180] In this case, to make a difference to Mr. Sandhu's immigration status, the reduction of his sentence would have to be substantial. I am not prepared to vary his sentence in any manner that would take it outside of the range of a proportionate sentence. I therefore decline to exercise any discretion in respect of his deportation consequence.

iii. Conclusion on Collateral Consequences

[181] The Supreme Court of Canada in ***Pham*** and ***Suter*** made it clear that collateral consequences ought to be considered in crafting a fit sentence. Doing so is pivotal to

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[2] In ***Lopez-Orellana***, the offender sought a reduction of his sentence by four months and one day so that he could avoid immigration consequences. The Court of Appeal reduced the sentence by one month as it felt any further reduction of the sentence would have made the sentence unfit.

proportionality as it takes the offender's personal circumstances into consideration to ensure that a similar sentence is imposed on similar offenders for similar offences committed in similar circumstances.

[182] If collateral consequences are absent from the analysis, sentencing judges run the risk of imposing sentences that may be disproportionately harsh on some offenders.

[183] It is important to bear in mind however, that these considerations should not outweigh other relevant factors. The ultimate sentence must remain within an appropriate sentencing range according to the circumstances to achieve an overall proportionate sentence.

[184] Regarding the two collateral consequences raised in this case – language barriers and inability to fit into prison culture, and deportation consequence – I do not find any reduction of Mr. Sandhu's sentence is warranted.

8. Determination of an Appropriate Sentence

[185] Having carefully reviewed the mitigating and aggravating factors presented by the Crown and the Defence in this case, along with any potential collateral consequences, I now turn to the task of determining an appropriate sentence to impose on Mr. Sandhu.

[186] It goes without saying that the vaginal intercourse forced upon the CO by Mr. Sandhu constituted a major sexual assault as described in ***Arcand***.

[187] The offences committed against the CO involved physical and sexual violations of an intensity and duration that could likely cause serious psychological or emotional harm, even without physical injury.

i. Degree of Responsibility and Blameworthiness of the Offender

[188] I find Mr. Sandhu's blameworthiness to be high. The CO was objectified for the purpose of sexual gratification and with complete disregard for the CO's bodily integrity: ***Friesen*** at para 89.

[189] Mr. Sandhu's actions demonstrate a degree of deliberateness or intentionality of great intensity. Mr. Sandhu committed these offences in a vehicle with nine people inside, including two of the CO's friends. As in ***R v Lepine,*** 2013 NWTSC 19, at para 44, he was "obviously determined to carry out this act regardless of who was present". The offences resulted in the destruction of the friendship between the three women.

[190] The presence of six men and the CO's two friends in the vehicle amplified the degradation and humiliation suffered by the CO. They may not have each witnessed or even been aware of what was happening to the CO, but the disregard for the CO's dignity in this situation is appalling. As Renke J noted in ***Pettitt*** at para 118: "the disregard for [the third-party male's] presence, in my opinion, demonstrates disregard for [the victim's] equality. She was not worthy of respect as between two men."

ii. Parity of Sentences

[191] Section 718.2(b) of the *Criminal Code* provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances." This paragraph evokes the principle of parity. See: ***Friesen*** at paras 31-33; ***Lacasse*** at para 2.

[192] I have considered the following cases, submitted by counsel, in determining the appropriate sentence to impose on Mr. Sandhu.

Crown cases

[193] The Crown has proposed a sentence of 6 years' imprisonment. In support of this proposed sentence, the Crown relied upon the below summarized cases.

[194] In ***R v Gendreau***, 1995 ABCA 481 [***Gendreau***], the Court of Appeal upheld the 5 ½ year sentences imposed on three offenders who participated in a major sexual assault on a 17-year-old victim. Only one of the offenders had engaged in the physical sexual assault on the victim who passed out after drinking excessively. The Court of Appeal noted that in other circumstances, disparate sentences might be appropriate for co-offenders who only incite or encourage others in assaults. However, in this case, all three offenders were parties to a serious sexual assault, and all three participated in acts of degradation, lewd incitement, and publicity of the acts before several partygoers in a small town.

[195] The case ***R v MacMillan***, 2020 ONSC 3299 involved what was referred to as a gang sexual assault involving two offenders. One offender was 45 years old and had no criminal record. The other was 31 years old and not a Canadian citizen. They were each found guilty by a jury of one count of sexual assault to which the other was a party, and one count of administering a drug with the intent to assist in the commission of a sexual assault. The jury was unable to reach a verdict on the count of unlawful confinement.

[196] The sentencing judge imposed a sentence of 7 years for each of the offenders. The judge noted that when sexual assault is committed with another person, the offence may be prosecuted only by indictment, and the maximum punishment is 14 years (s 272(1)(d) and s 272(2)(b) of the *Criminal Code*). The increased punishment (above sexual assault which carries a maximum of 10 years when prosecuted by inditement), was "... obviously intended to reflect the greater seriousness with which Parliament viewed the offence of sexual assault when committed jointly by more than one person...": para 53. See also the Court's comments at para 55.

[197] The Court found as mitigating factors the fact that they were first-time offenders and had the support of family and the potential for rehabilitation. The Court found the prolonged, violent, degrading acts by two mature men who took advantage of the victim's intoxicated state to the point of unconsciousness, and then forced her to ingest cocaine to keep her awake so they could continue the acts for many hours, along with the recording of the act for their future viewing, to be aggravating factors.

[198] In ***Pettitt***, cited extensively above, Renke J sentenced the offender to 6.5 years in total for sexual assaults involving three complainants and which involved breaches of trust or exploitation

of their vulnerability as they were clients of the offender's tattoo business. He expressed sincere remorse, but late in the process, and was noted to have good prospects, although his good character references were of limited mitigating weight.

[199] In ***R v Bohorquez***, 2019 ONSC 1643, the co-offenders were sentenced to 7 years, and 4 years' imprisonment respectively. The first offender was found to be the instigator with a higher degree of responsibility and more aggressive in his acts. The offenders were in their early 30s and found to be actively seeking out vulnerable women for rough sex. They were both found guilty of being a party to the offence of sexual assault contrary to s 272(1)(d) of the *Criminal Code*. The crimes were noted to be predatory and deliberate. Mitigating factors included that they were first-time offenders and showed some remorse, although little weight was placed on the latter factor as they both continued to lack insight. Aggravating factors included that the offenders overpowered the victim in a basement unfamiliar to her, the prolonged assault included forced fellatio that induced choking and gagging, vaginal, anal, and digital penetration with degrading acts, failure to use a condom, and the video recording of the acts for future use.

[200] The case ***R v Bagot***, 2000 MBCA 30 involved the appeal of a sentence for three counts of being a party to sexual assault in three different incidents involving different complainants, for which the offender pleaded guilty. The first two offences involved young female sex trade workers who agreed to perform sexual acts but then were driven to a remote location, threatened, physically assaulted, gang-raped, and forced to perform oral sex. The third offence involved a 15-year-old who was waiting at a bus stop, abducted, and subjected to the same offences as the previous two. The offender was 21 on the date of the offences, had a minor record for non-violent offences, and tendered supporting letters from family and friends attesting to his good character and from his church minister attesting to his remorse and rehabilitation. The trial judge's sentence of 3 ½ years consecutive for each of the first two victims and 5 years consecutive for the third, resulting in a global sentence of 12 years, was upheld on appeal.

[201] In ***R v Beaton***, 1991 CanLII 4522 (NSSC) [***Beaton***], the offender was sentenced to 6 years' imprisonment for being a party to a sexual assault. Three men forced the victim into a bedroom, and each had sexual intercourse with her while the others held her down. The acts took place over many hours, and she was prevented from leaving the house. The offender continued to deny any involvement even after conviction. The offender was 36 with no criminal record and noted to be well regarded and a productive member of society. The Court recognized that the more egregious nature of sexual assault when committed with other assailants is deserving of a harsher penalty. The Court held "[t]he appropriate sentence for this activity, sometimes referred to as "gang rape", should normally exceed the sentence range for sexual assault." Mr. Beaton was sentenced to a period of 6 years' incarceration.

Defence cases

[202] It is the Defence's position that a sentence of 2-3 years' imprisonment is appropriate, relying upon the decisions summarized immediately below.

[203] In ***R v EM***, 2020 ONSC 6356, two offenders were sentenced: 39-year-old FI for sexual assault including intercourse; and 36-year-old EM for party to sexual assault for taking photos and video of FI and the CO having sex. EM made no physical contact with the 20-year-old

complainant. The complainant was a vulnerable person being intoxicated to the point she passed out and could not consent. Aggravating factors for FI included the prolonged assault, unprotected intercourse, and the age difference. Mitigating factors for both offenders were found to be their lack of a criminal record[3], their prospects for rehabilitation, their steady work history, and that they were unlikely to reoffend. FI was sentenced to 32 months and EM two years.

[204] The case ***R v Badger***, 2019 ABQB 551 involved a 24-year-old female Indigenous offender who was sentenced to 32 months less 532 days for time served. The offender and her co-offender sexually assaulted a 14-year-old who fell asleep after drinking alcohol. Ms. Badger held the complaint's legs while the co-offender had sex with the complainant. The co-offender received a sentence of 4 years. In assessing Ms. Badger's moral blameworthiness, the Court took into consideration the existence of a power imbalance in the relationship with the co-offender, which relationship was marked by substance abuse and domestic violence. As well, Ms. Badger had significant *Gladue* factors and had expressed genuine remorse for her actions.

[205] The case ***R v Icebound***, 2019 QCCQ 7986 involved an Indigenous offender who engaged in intercourse with an intoxicated complainant for 30 seconds to one minute while another held her body in place. The sentence imposed was 2 years' imprisonment. The offender had no criminal record, was working and stable, sought therapy, had significant Gladue factors, and had a low risk of re-offending.

[206] Finally, in ***Longboat***, the victim and the offenders, all Indigenous, were at a party consuming alcohol. The victim fell asleep. She awoke to find a co-offender having intercourse with her. Mr. Longboat also engaged in sexual intercourse with her while she was asleep and was present when his co-offender assaulted her. The mitigating factors noted by Bain J in para 8 included the use of alcohol, which was acknowledged to not be a defence, but rather an indication that there likely was no pre-meditation, the fact the victim was not physically injured, and the lack of threats. The offender had a minor criminal record not including sexual offences and was not at risk to re-offend. The aggravating factors were that the victim was asleep, and the two offenders acted in concert. The judge imposed a conditional imprisonment term of two years less a day.

Analysis of Jurisprudence

[207] I find most of the Crown cases have aggravating factors that are not present in this case – e.g., forced administration of drugs, extreme lewd and publicly degrading acts, a greater degree of violence, breach of a position of trust, or a prolonged time frame. However, I am cognizant of the fact that the lack of an aggravating factor is not mitigating. On the other hand, the decisions in ***Gendreau*** and ***Beaton*** long pre-date the Supreme Court of Canada's most recent admonishments of sexual assaults. It is possible that the circumstances in these two cases would attract a longer sentence if determined today.

[208] With respect to the Defence cases, they involve offenders who were found either guilty only of sexual assault (s 271 of the *Criminal Code*), of being a party to the sexual assault under s 272(1)(d) of the *Criminal Code* by reason of an act that involved holding the victim or video-

[3] The treatment by the Court of the lack of criminal record as a mitigating factor was improper; it is not a mitigating factor. As well, it is already assumed in the three-year starting point for major sexual assaults.

taping, but not by their own engagement in the physical sexual act, or they involved a much shorter duration and greater mitigating factors such as the offender being Indigenous and having significant *Gladue* factors.

[209] I reject any application of ***Longboat***. The decision long predates the Supreme Court of Canada's harsh admonition of sexual assaults generally, and particularly against young Indigenous women.

[210] Moreover, as discussed above, I disagree that these offences were spontaneous in nature on account of Mr. Sandhu's state of intoxication. Although I also rejected the suggestion that the jury found as a fact that it was a planned or pre-meditated gang rape, I nevertheless find Mr. Sandhu was deliberate and intentional in his commission of the offences. Mr. Sandhu and his companions surrounded the three women on the dance floor of the bar and insisted on giving them a ride back to their Airbnb in Beaumont in the SUV. They tried to take off the CO's cardigan on the walk to the SUV. The CO was pushed down, her clothing removed, and the sexual exploitation commenced immediately after the SUV was in motion with no attempt to communicate with the CO.

iii. The Fit Sentence for Mr. Sandhu

[211] Mr. Sandhu is convicted of an offence under s 272(d) of the *Criminal Code*, that he was a party to a sexual assault, as he committed the sexual assault in concert with others. As confirmed in the jurisprudence, Parliament recognizes and affirms that where there is more than one assailant involved in the assault, society has a greater condemnation of the act than the act of sexual assault alone and it is deserving of a harsher penalty. The humiliation, egregiousness, and brazen nature of the acts committed with others and in front of others increases the gravity of the offence; such an offence must be dealt with more severely by the courts than a sexual assault committed by a lone assailant.

[212] As I have already applied the ***Kienapple*** principle to the case, resulting in a stay of Count 1 and sentencing only on the more serious party offence charged in Count 2, I do not consider the collective nature of the offence to be aggravating. As noted by Defence Counsel, citing Clayton C. Ruby, *Sentencing*, 10th ed (Toronto: LexisNexis Canada Inc, 2020) at §6.59: "The offence itself is not an aggravating factor."

[213] In ***R v Johnston***, 2011 NLCA 56, the Newfoundland Court of Appeal noted at para 19 that:

> Since the nature of the offence itself is patently the same in every case, the nature, in and of itself, cannot be said to be aggravating ... the nature of the offence is reflected in minimum and maximum sentences set by Parliament, and ranges of sentences outlined in jurisprudence.

[214] See also: ***Lacasse*** at para 146: "In principle, s. 718.2 Cr. C. lists a number of what are to be considered aggravating factors. An element of the offence cannot constitute such a factor."

[215] Mr. Sandhu's conduct amounts to a major sexual assault. The starting point for sentencing for a major sexual assault is 36 months' or three years' imprisonment. The maximum penalty for a conviction under s 272(1)(d) of the *Criminal Code* is 14 years' imprisonment.

[216] I have not been able to ascertain on the evidence before this Court, any clear mitigating factors in this case. Mr. Sandhu's lack of a criminal record is not a mitigating factor. As in ***Pettitt***, and for the reasons stated above, any good character evidence has little mitigating weight in this case. Moreover, the three-year starting point already "assumes a person with no record and of good character": ***Arcand*** at para 132.

[217] Further, Mr. Sandhu's stable employment, family life, and good character are not determinative of his risk to re-offend because these factors were present on the date of the offence as well. The greatest indicator of Mr. Sandhu's likelihood of re-offending (a low risk of re-offending being a mitigating factor) would have been an expression of remorse for his offensive behaviour and rehabilitation efforts.

[218] Mr. Sandhu's offence was not mitigated by his age (he is in his 30s and just had his first baby), a guilty plea, or any significant cooperation with the authorities. Instead, Mr. Sandhu's denial of any wrongdoing, evident in the narrative he shares with his family and friends some of whom express disagreement with the verdict in the supporting character letters tendered, regrettably continues today. During his testimony in court, he denied knowing the names of his relatives who were in the vehicle with him that night, insisting he only knew their nicknames, which I find unbelievable.

[219] It is not clear to me whether Mr. Sandhu is unwilling to admit to his community that he engaged in such degrading behaviour toward a woman because he is highly regarded as being respectful and kind, or whether he truly lacks insight into what constitutes a sexual crime. He declined to exercise his allocution right; I acknowledge his lack of remorse is not aggravating.

[220] I reject the Defence's position that Mr. Sandhu, who drank about 10 whiskies that night, had reduced judgment that would be considered a mitigating factor and his reliance upon ***Longboat*** wherein the use of alcohol was referred to as a mitigating factor. It is an older case that should have no application to present-day understanding of sexual assault cases. Additionally, in my view, that case perpetuates prohibited myths and stereotypes by its reference to the lack of physical injury or threats as a mitigating factor. More importantly, the Alberta Court of Appeal has resoundingly rejected the notion that self-induced intoxication is a mitigating factor.

[221] Furthermore, contrary to the suggestion that this was a spontaneous act influenced by Mr. Sandhu's level of intoxication, I find that Mr. Sandhu intentionally identified a vulnerable person, isolated her, and perpetrated a sexual assault. He and his companions surrounded the CO at the end of the night. They were strangers to each other than having danced together earlier. The women repeatedly rejected the offer of a ride, but the men insisted. Beaumont was completely out of the men's way home. The sexual assault commenced as soon as the SUV vehicle was in motion. There was no other reason for them insisting on giving the girls a ride home.

[222] There are numerous significant aggravating factors in this case, including:

- The CO is Indigenous.
- The CO was vulnerable at the time of the sexual assault. She was only 18 years of age, and therefore much younger than Mr. Sandhu, was from out of town, and had never been to a bar in Edmonton before;

- The CO was also vulnerable due to her intoxicated state. Mr. Sandhu and his companions targeted the CO and her two friends and isolated the CO in the SUV with full knowledge that the CO was intoxicated;
- Mr. Sandhu and the other two men in the middle row of seats used some physical force against the CO in order to facilitate the sexual assaults;
- The sexual assaults on the CO involved penile/vaginal penetration by all three men who were seated in the middle row of seats and attempted forced fellatio by one of the three men;
- The CO was objectified during the sexual assaults in that the three men in the middle row of seats were in close proximity as each took their turn sexually assaulting the CO;
- The sexual assaults took place in the confined space of the middle row of the SUV, creating a terrifying situation for the CO;
- Mr. Sandhu was the first to have sex with the CO and therefore could be said to have instigated the sexual assault against her; and
- Mr. Sandhu did not use a condom.

[223] I recognize that some aggravating factors noted in other cases cited by the Crown are absent in this case, such as extreme violence, substantially prolonged assaults, or repeated assaults committed by Mr. Sandhu against the same CO, but the absence of these aggravating factors does not favour granting Mr. Sandhu a more lenient sentence.

[224] I also note and recognize there are potential collateral consequences that I have considered but rejected as having any impact on the sentence for the reasons stated above.

[225] Deterrence and denunciations are the primary sentencing principles applicable to this case. The circumstances of this case involved six males, three of whom took turns having sexual intercourse with the CO in the middle row of seats of an SUV with her two other friends in the vehicle, one of whom was also sexually assaulted by two men. She was in a tight, confined space, flanked by three men who, as soon as the vehicle was in motion, appeared to be acting in synchronicity when they collectively pushed her down into a contorted position and sexually assaulted her. Mr. Sandhu was aware of the CO's extreme level of intoxication and her vulnerable state, even if his English skills were poor and they did not speak to each other.

[226] In my opinion, the appropriate sentence to impose on Mr. Sandhu in all the circumstances is 5 years' imprisonment.

iv. Ancillary Orders

[227] I hereby grant the following ancillary Orders:

(a) A primary DNA order pursuant to s 487.051 of the Criminal Code;
(b) A prohibition order pursuant to s 109(3) of the Criminal Code. As Mr. Sandhu has been convicted of two offences, under s 109(1)(a), Mr. Sandhu is prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life. He is also prohibited from

possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition, and explosive substance for life;

(c) A mandatory SOIRA order pursuant to ss 490.012(1) and 490.013(2)(b) of the Criminal Code for 20 years; and

(d) A non-communication order with the victim pursuant to s 743.21 of the Criminal Code.

[228] The Crown sought no victim surcharge in the circumstances.

Heard on the 2nd day of November, 2021.

Delivered on on the 6th day of May, 2022.

Dated at the City of Edmonton, Alberta this 6th day of May, 2022.

A. Loparco

J.C.Q.B.A.

Appearances:

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for the Accused