R. v. Ambrose, 2000 ABCA 264

Date: 20001005
Docket: 9803-0310-A

IN THE COURT OF APPEAL OF ALBERTA

THE COURT:

THE HONOURABLE CHIEF JUSTICE FRASER
THE HONOURABLE MR. JUSTICE CÔTÉ
THE HONOURABLE MADAM JUSTICE VEIT

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

- and -

BONNY ANN AMBROSE

Appellant

APPEAL FROM THE SENTENCE
BY THE HONOURABLE JUSTICE E. M. NASH
SENTENCE DATED JUNE 17, 1998

REASONS FOR JUDGMENT RESERVED

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE CÔTÉ
CONCURRED IN BY THE HONOURABLE MADAM JUSTICE VEIT

DISSENTING REASONS FOR JUDGMENT OF THE
HONOURABLE CHIEF JUSTICE FRASER

COUNSEL:

J. Watson, Q.C.
For the Respondent

M. T. Duckett, Q.C.
For the Appellant

REASONS FOR JUDGMENT OF THE HONOURABLE
MR. JUSTICE CÔTÉ

A. Introduction

[1] The appellant appeals from a sentence of two years less a day for public mischief. She falsely accused a police constable of sexually assaulting her. She invented a story of forcible sexual intercourse ("rape") while the constable had her locked in a holding cell. She was convicted of mischief by a judge and jury, and another panel of this Court affirmed her conviction.

B. Absence of Remorse Does Not Aggravate

[2] The appellant retained new counsel for her appeal, a point to keep in mind whenever the trial is described. Her new counsel seeks either a conditional sentence, or a shorter jail sentence. Doubtless recalling the standard of review, she alleges only two grounds to interfere with the sentence; two alleged errors:

1. wrongly treating lack of remorse as an aggravating feature;

2. wrongly thinking that the law excluded a conditional sentence.

[3] One cannot say that lack of remorse is irrelevant. I have reread the reasons for sentence by the trial judge, and cannot see that she made the mistake of confusing the absence of remorse, which is absence of a mitigating factor, with an aggravating factor. The one passage cited which might be read that way in isolation, must be taken in context. I read it as a mere recital of one of the prosecutor's sentencing arguments. Still less did the trial judge pick a starting point and then inappropriately increase it for lack of remorse. I am not aware of any authority fixing a starting point for mischief.

[4] Therefore, I find no error by the trial judge in this respect. I do agree with the Chief Justice that the topic is more complex than some people suggest. Merely buying a rubber stamp reading "lack of remorse is not aggravation" is not a sufficient way to deal with the topic. She points out a number of reasons why that is not so, and I agree with the general propositions of law in paragraphs [71] to [89] inclusive of her judgment.

C. Degree of Blame

[5] Though the appellant's counsel does not express it as a separate ground of appeal, she does argue that two years less a day was substantially too long a sentence. Furthermore, juries do not give reasons, and the *Criminal Code*'s (*Code*) section on public mischief can embrace a wide variety of offences. Therefore, I have read all the evidence given at this lengthy trial.

[6] The appellant suggested more than once that her accusations lasted for only a day or so before being withdrawn, and that that should shape the sentence. What she refers to is the following. The accusations were made toward the end of Friday, September 13. On Sunday September 15, the appellant left a message on the voice mail system of the detective investigating her sexual assault allegation. The appellant's message said that in view of her emotional condition, she did not want to proceed at this time with the matter. I emphasize those two qualifications. But as the trial judge correctly finds, that is not a withdrawal, or any kind of qualification, of the facts which had been alleged. After such a qualified message, no reasonable person would expect the police to start to ignore such serious factual allegations about a constable, and they did not. They proceeded with laboratory testing, and more interviews. The police tried several times to reach the appellant by phone, but they did not succeed in reaching her (or her brother). And it was several days after that before the constable accused got even an informal oral intimation that likely no proceedings of any kind would be launched against him.

[7] As will be seen, the accused has persisted in saying that her allegations are true. That may not aggravate, but it bars any suggestion that her allegations were promptly withdrawn.

[8] Nevertheless, I agree that whether a crime is a spur-of-the-moment thing, and not persistent, is often of considerable weight in sentencing. It is true that a sudden flash of anger can often lead to a quick act which can inflict great harm on others. But the moral fault there may be less than that of a calculating criminal who persists for some time, with many opportunities to desist. The fundamental principle of sentencing is that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1 of the *Code*. That has a number of aspects, but persistence and opportunity to reflect are two of them. That is another reason that I have read all the evidence given at trial.

[9] I must add a caveat. The trial evidence of the accused conflicts: internally, with every other witness' account of what the accused said earlier, with virtually every other witness' evidence of what happened, and with some objective or contemporary evidence. In my considered opinion, the appellant is a liar, and I am not surprised that the jury and the trial judge took the same view. But I do not treat that as an aggravating feature, and I am not saying that the appellant was, or should be, sentenced for her conduct at trial. I say this merely to explain why I do not accept at face value her trial statements about how she behaved on September 13, almost two years before the trial.

[10] It is quite true that the appellant committed the offence only on September 13 (and maybe a short time in the very early part of the 14th). She should not be (and was not) sentenced for an ongoing offence.

[11] But that is not to say that this offence was committed of a sudden, without any chance to calm down or to reflect. On the contrary. The offence did not begin while the appellant was ranting or in custody, which was well over an hour. The appellant was calm by the time that she left the police station, and the persons who saw her at the hospital found her calm and rational.

[12] The offence began when the appellant met her brother, who had been asked to come to police headquarters and see that she got home safely. She told him that she had been raped, so he naturally took her to the emergency ward of a large hospital. There she told the same thing to two physicians. By the time that she saw the second physician, she had been there quite some time. The second physician gave her choices: he asked her whether she wanted the police to come and get involved in the accusation, and whether she wanted to have internal sexual assault sampling done. She said yes to both. It is the doctor's policy never to do either unless the patient wants that, as half his patients do not. The doctor then called the police and passed on the request. A uniformed inspector came to the hospital, and the accused repeated the allegation to him, and identified the constable whom she accused. She then said that in view of her experience, she did not wish to speak any more to a uniformed officer. Some time later a plainclothes detective from the sexual assault unit came to the hospital, and the appellant then repeated the story to him in detail, in the presence of a relative and a friend. A police officer from the identification section took pictures of the accused at the hospital, with her consent. At some point later in the stay at the hospital, a physician administered the sexual assault kit's internal examination.

[13] The story which the appellant told that evening was clear and detailed, even to repeated assertions that a bespectacled “Oriental” janitor had walked in at the height of the forced sexual intercourse and had seen the actual assault. At one point, the appellant told one of the police officers investigating that she wanted the constable accused to lose his job.

[14] It must not be thought that the appellant's moral blame could be significantly ameliorated on psychiatric grounds. The psychiatrists found that she suffered from depression, but nothing else. All her thought processes were normal, except for unwillingness to admit any kind of shortcomings on her own part. That unwillingness is borne out by her initial reluctance at trial to admit that she and her life were not perfect up to the incident in question, or that she had been on anti-depressant medication before it.

[15] Any suggestion that the appellant suffered a concussion or a blackout must come purely from one of the versions of the story which the accused told. It not only has no corroboration or any kind, but the medical evidence shows that it is contrary to the usual course of such conditions. There is no indication that the trial judge accepted this part of the accused's evidence. The appellant’s counsel does not argue this point.

D. Individual Deterrence and Rehabilitation

[16] Section 718 of the *Code* requires that sanctions (sentences) have one or more of several objectives there described. One is to deter this offender from committing offences, and another is to assist in rehabilitating the offender. A third is to promote a sense of responsibility in the offender, and acknowledgment of the harm done to victims and to the community. A probation

report must comment (among other things) on the offender's attitude and willingness to make amends (s. 721(3)(a)). So Parliament must consider those factors relevant.

[17] In many cases, defence counsel justly point out that their client has already been largely rehabilitated by the time of sentencing (or the time of appeal). They say that individual deterrence is not needed in their case. Unhappily, none of those things can be (or is) said here. The whole approach of the appellant at trial was to repeat and support the accusations against the police constable. She watched her counsel accuse a host of unrelated Crown witnesses of fabricating key parts of their evidence, without any basis whatever. It is true that at trial, the appellant claimed to have been unconscious or concussed at the time of the sexual assault. But at trial she added an allegation of a vicious blow to the head, and recounted very graphic circumstantial evidence strongly suggesting forcible sexual intercourse. (The doctors at the hospital found no evidence of significant head injury, and heard no complaint of it.) This story cannot be blamed on defence counsel; this is the appellant's own trial evidence.

[18] What is more, on February 3, about 4-1/2 months after the events in question, the appellant sued the two constables concerned, the chief of police, and the police department, for $175,000 damages. That largely neutralizes any suggested balm to the constable in question from being told by his superiors they would not prosecute. Curiously, the details of the sexual assaults given in the Statement of Claim are very different from those which the appellant recounted either on the night in question, or at trial. The Statement of Claim was exhibited and discussed in testimony at the criminal trial. The appellant testified at trial that she issued it because she was a citizen who was wrongly abused and thought she should take on a lawsuit. She took some time to decide to sue. Later in the trial, she said that another reason that she sued was that she did not want what the constable did to her to happen to anyone else. Her trial evidence does not mention discovery for the criminal defence as a reason from suing. The procedure book "card" on the courts' computer shows more about this lawsuit. It went as far as case management and various forms of discovery. The suit remained active for about 16 months. The appellant changed solicitors some months after the criminal trial, and no more has occurred since. The suit cannot have been a mere attempt to get discovery to assist in the criminal defence, for the active step taken by the appellant in the suit was to request an affidavit of documents from the defendants. Automatic Crown disclosure in a criminal prosecution gives the same thing. The only appointments for examination for oral discovery, or notices of motion, were taken out by the defendants.

[19] After conviction, the appellant again asserted the truth of her allegations against the constable to the trial judge. She was remanded to a psychiatric hospital for examination, with defence concurrence. She was adamant in yet again repeating the allegations against the constable to the psychiatrist who was preparing the report for court.

[20] I repeat that the foregoing paragraphs are not designed to suggest that the appellant should be, or was, sentenced for an ongoing or repeated offence, or for exacerbating her original offence. Instead, I recite them to show that there was no remorse, reparation, or similar

mitigating circumstance. The crime was thought out, and not impulsive. No restitution or apology of any kind was ever so much as suggested to any degree. So individual deterrence is still necessary, and there is no degree whatever of self-rehabilitation.

[21] Section 718(f) of the *Code* says that one of the fit objectives of a criminal sanction is to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and the community. That sense is strikingly absent from the appellant, so here either weak medicine, or voluntary or cooperative measures, plainly would not meet this statutory objective.

E. Denunciation and General Deterrence

[22] Section 718 also sets some other objectives for a sentence. The sentence may denounce unlawful conduct, and deter other persons from committing offences. The offence in question is that one, with intent to mislead, causes a peace officer to enter on or continue an investigation by reporting a nonexistent offence. When prosecuted by indictment (as here), it carries a sentence of up to five years' imprisonment (s. l40(1)(c)). It is in Part IV of the *Code*, offences against the administration of law and justice.

[23] Is mischief a serious crime? The appellant’s counsel does not argue that it is not. In my view, offences against the administration of justice have great potential to be serious because they pervert the whole regulating system for behaviour of everyone in Canada. The effect is like a hacker who gains access to the central operating systems of a computer: any and every bad and malicious result can flow from that. If one looks at the range of maximum sentences in Part IV, one sees that the 5-year maximum for mischief comes about in the middle of the range of maxima there. Where a crime has a 5-year maximum, I cannot say that 2 years is prima facie an unusually severe sentence for that crime.

[24] Furthermore, the sting of the offence here is not causing the police to waste their time (though that may be a necessary element of the crime). The real harm done is the danger that innocent persons might be prosecuted and lose their livelihoods. Even if no perjury were ever committed, the victims of such scheming might undergo many months of fear, and incur heavy legal expenses. Someone publicly accused of a crime also runs the risk that many people will think that the smoke did indicate a fire. In my respectful opinion, the seriousness of mischief can vary a great deal from case to case; the question is highly fact-sensitive.

[25] Should deterrence and denunciation be predominant sentencing objectives for the crime of mischief? In my view they are where the mischief is an offence against the administration of justice. But of course the facts of the individual case have weight too. The appellant's counsel cites ***R.*** v. ***Hudon*** (1996) 187 A.R. 345 (C.A.). In its paragraph [9], our Court speaks of "the important consideration of deterrence", though I admit that that is a mere sentencing memorandum of judgment and so of little weight.

F. Harmful Results

[26] Some violations of s. 140(1) would not be very harmful, and would only lead to the police wasting their time and resources. For example, one might report a case of arson, yet a visit to the scene would show that no building revealed any signs of fire damage.

[27] This case is very different. It is usually impossible to prove conclusively that sexual activity did not occur at all; very commonly the person accused has but his or her own denial to offer against the accusation. Had it not been for the lucky fact that the cell in question was monitored by television from three locations, and that at least one monitor was watched much of the time, the constable accused would likely not have been actually cleared.

[28] It is true that further investigation might have left the alleged sexual assault too uncertain to prosecute, but the constable could well have remained under a cloud of suspicion forever. Many of the things which served to discredit the appellant's story so conclusively were lucky happenstance, such as the fact that the janitors with access to the relevant cell area neither wore glasses nor were “Oriental”. Had one or two coincidences left any shred of evidence which seemed to confirm the appellant's story, the constable might well have had to undergo a disciplinary or a criminal trial. Had he been convicted, he would beyond a doubt been sentenced to a number of years in a federal penitentiary. The constable accused here was so junior that he was still a probationary constable, fresh out of training. Had the matter been left cloudy, and he not been positively cleared, his career might well have foundered there. The trial judge so finds in her reasons for sentencing. In sentencing, the trial judge properly considered the victim impact statement by the young constable. I will not expand upon it, but it is significant.

[29] One of the appellant's arguments has been that little harm was done because the police decided after 9 hours that she was lying. I cannot accept that as an accurate summary of the evidence. The only foundation for it which I can find is a very brief passage in the cross-examination of one officer, Det. Bonetto. He refused to say that any group, let alone the police force, had made any decision by then. He did say that he then told the group that he felt that she had fabricated the story. But the police still continued with their very elaborate investigation. Nor can I see how they could have done otherwise, without neglecting their duty.

[30] Nor is it true that not much happened before Sunday's voice mail message. The police acted most energetically as soon at the allegations were made. A considerable number of senior officers were called out in the middle of the night to coordinate efforts. Other police conducted searches and interrogations. Janitors were rousted out of their residences in the very early hours, after they had gone off duty. The constable accused was roused early in the morning, his clothes were seized, and he was taken down to police headquarters for extended questioning. So was the other constable who had worked with him in the arrest of the appellant.

[31] The harm to the public is even worse. Our whole system of courts and justice depends heavily upon truthful accounts of past occurrences. We have dismantled most of the legal requirements for confirmatory evidence. Heavy punishment for very serious crimes (other than treason and perjury) may be levied on one person's word. Even if an accused is ultimately

acquitted, he or she will likely suffer mental tortures for several years, and have to pay huge sums of money to retain lawyers. Even legal aid is not really free; one is required to repay it when one can afford to do so.

[32] If the criminal law were seen to convict the innocent, respect for law and punishment would evaporate. If judges and juries became unwilling to convict without confirmatory evidence, then they would silently reintroduce all the requirements of confirmatory evidence which Parliament and the Supreme Court of Canada have repealed in the last fifteen years. The evils of such a requirement for confirmation have been well described by the Supreme Court, on a number of occasions. If complainants were thought often to "cry wolf" (in the words of the old fable), then few complainants would be believed. And a host of crimes would go unpunished and (ultimately) undeterred.

[33] Section 718 of the *Code* says that the fundamental purpose of sentencing is 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.

G. Proportion

[34] The fundamental principle of sentencing is set by s. 718.1: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Parts E and F above show that the offence here is grave. The earlier discussion in parts C and D about chance to reflect and lack of remorse show that the appellant’s degree of responsibility is high.

[35] The appellant conceived and carried out this scheme on her own. She was in no sense a follower. She was a well-educated fully mature woman experienced in how society functions. She has three university degrees and parts of a fourth, the latter in education administration. This was not a pathetic attempt at deception by a teenager or an uneducated naïve person. It is just possible that the scheme was an attempt to mount a defence to a drinking and driving charge, by a strong fabricated offence. But it seems much more likely that it was an attempt to gain revenge. The trial judge so finds, and there is explicit evidence as well as proper inference to support that finding. The scheme was directed against a young constable who was only trying to do his duty when faced with a very uncooperative abusive apparent drunk. Whatever the appellant’s precise motive, it was calculated.

[36] For all practical purposes, the accused is of previous good character. Her trial counsel pointed out a previous conviction, but it was many years before and not of the same type, so the Crown and the trial judge very properly ignored it. The very experienced trial judge was well aware of the accused's previous good character, and expressly took it into account. She made no error in principle there, and I do not feel that I can or should re-weigh this factor and substitute my own weight for it.

[37] As for the fact that the accused is an extremely able teacher, I doubt that this should count for much, when it is distinguished from good moral character. I doubt that professional people should get different sentences from those given to those with humble or no jobs, or that good surgeons or mechanics should get different sentences from incompetent surgeons or mechanics, (where the crime is unrelated to surgery or mechanical repairs).

[38] There were other bad consequences to the accused from this conviction, such as loss of her job. Trial counsel pointed out this factor to the sentencing judge, who cannot have overlooked it. I am not convinced that the trial judge gave this the wrong weight, or that I can or should re-weigh that factor. Furthermore, this was not argued on appeal, and indeed the appellant's counsel declined to make this a separate point during oral argument on appeal.

[39] At the end of very full reasons for sentencing, the trial judge concluded that general deterrence and denunciation should have the heaviest weight on the facts of this case. There was ample evidence to support that.

[40] The judge would have imposed penitentiary time, were it not for the fact that the appellant had been of previous good character and had no criminal record upon which the Crown chose to rely.

[41] I feel neither inclined, nor legally able, to assess the fit sentence at a different figure. The two years less a day is well within the proper range, and I cannot simply re-weigh it on appeal.

H. Miscellaneous

[42] I have looked at some other decisions on mischief: ***R.*** v. ***Lukasik*** (1982) 22 Alta. L.R. (2d) 222 (C.A.), ***R.*** v. ***Hudon***, *supra*, ***R.*** v. ***Gill*** (1994) 162 A.R. 163 (C.A.), ***R.*** v. ***Tesar*** [1991] N.W.T.J. No. 151 (Terr. Ct.) (Quicklaw) and ***R.*** v. ***Waiting*** 2000 A.B.C.A. 208. I do not find them very helpful, for a number of reasons. Some are sentencing memoranda, which our Court has often said have limited precedential value. A number give very sparse details. Citing factual precedents is much less helpful than looking for statements of principle. Some of these cases were appeals by the accused, and so can at best set a floor, not a ceiling. They are no authority for the proposition that the sentence should not have been any higher. At least one case says that there were very unusual circumstances present there, without explaining what they were. One case involved a guilty plea. Another involved a global sentence for a whole bundle of crimes.

[43] There is no suggestion by counsel that the trial judge relied upon facts not in evidence. I can see nothing in her reasons to support such a conclusion. It must be recalled that this was not a guilty plea, but the end of a long trial, and the trial judge saw and heard all the evidence. Juries do not give reasons, and so a trial judge is perfectly entitled to find what facts underlay the conviction.

[44] Whether or not the accused was actually guilty of refusing to blow or not seems to me irrelevant. I have no doubt whatever that the police constables acted fully within the law in detaining and arresting her. But even if they did not, for some reason which has escaped me, that is no ground to invent a grave and totally unfounded allegation against them of sexual assault. In my view the two topics are completely distinct. The appellant's counsel does not argue this point.

[45] It is true that people often get less than 2 years in jail for other offences which are quite different from mischief, but I find that fact of very little assistance or relevance here.

[46] The bruising got at the hands of the police does not, in my respectful view, justify or mitigate the offence here. I doubt that that would be true even in a civil suit. It seems to me especially inapt under Part IV of the *Code*.

I. Pretrial Custody

[47] The one concern which I have about the sentence is this. The appellant spent 36 days remanded to a mental hospital between conviction and sentencing. While that had some therapeutic effects, it was ordered to get psychiatric reports. The appellant was not free to leave. No one seems to have mentioned this during the sentencing process, and the trial judge does not say that she took it into account. Therefore, I would deduct something to allow for that. I would make the sentence 11 weeks less than 2 years, rather than 1 day less. That would be a net sentence of one year and 41 weeks.

J. Conditional Sentence

[48] Should the appellant serve a jail term, or get a conditional sentence?

[49] For the principles involved, one must look at the recent Supreme Court of Canada decisions, especially ***R.*** v. ***Proulx*** [2000] 1 S.C.R. 61, 140 C.C.C. (3d) 449. In addition, one must also see how those decisions have treated ***R.*** v. ***Brady*** (1998) 209 A.R. 321, 121 C.C.C. (3d) 504 (C.A.). That is because counsel for the appellant suggests here that the trial judge gave a jail sentence only because she felt constrained to do so by ***Brady***, and that ***Proulx*** has since overruled ***Brady***. I disagree with both suggestions.

[50] It is evident from a review of ***Proulx*** that the Supreme Court of Canada gave considerable weight to ***Brady*** with the result that many of the principles laid down by this Court in ***Brady*** have now been endorsed by the Supreme Court. However, the impugned passage from ***Brady***, which the trial judge is said to have relied upon to the appellant's detriment, reads as follows (at 519 C.C.C.):

> For some crimes, this Court has previously stated that general deterrence and denunciation are paramount sentencing aims, so

> that a term of actual imprisonment is called for (barring exceptional circumstances). For such crimes, conditional sentences will not be appropriate in the usual case.

[51] This appeal is based on the argument that since ***Proulx*** clearly rejects offence-specific presumptions against conditional sentences, ***Brady's*** reference to "exceptional circumstances" wrongly operates as a limiting factor on the granting of conditional sentences in cases where deterrence and denunciation are paramount sentencing aims. Hence, the argument continues, the trial judge's denial of a conditional sentence in this case, relying as she did on ***Brady***, runs afoul of ***Proulx***.

[52] So the two questions to answer flow from the appellant's two suggestions:

1. Did or does ***Brady*** mandate a presumption against a conditional sentence in certain cases?

2. Did this trial judge feel bound by ***Brady*** not to consider a conditional sentence on its merits?

[53] In answer to the first question, ***Brady*** did not mandate that any category of offence be presumed to bar a conditional sentence. What ***Brady*** said was that for those offences where denunciation and deterrence were the paramount sentencing considerations, "conditional sentences will not be appropriate in the usual case." The conclusion that conditional sentences would not be usual where denunciation and deterrence were the primary sentencing considerations was not intended as a rigid sentencing rule, but as a statement of sentencing reality. In fact, ***Proulx*** states the correlative to this generalization (at 496 C.C.C.):

> Where punitive objectives such as denunciation and deterrence are particularly pressing, such as in cases where there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence.

[54] Both statements therefore reflect a common resulting effect of applying all relevant principles. That is, where denunciation and deterrence are the predominant sentencing objectives of a case, a conditional sentence will not commonly be the norm in the result. Whether these generalizations prove out in sentencing practice under this new sentencing regime remains to be seen. However, they do not foreclose consideration of a conditional sentence in an individual case. In other words, the distinction is between what may happen in an individual case (where all sentencing alternatives are on the table at the start of the sentencing exercise) as opposed to what will generally happen in practice in the result, in cases where deterrence and denunciation are the primary sentencing objectives.

[55] With respect to each case before a sentencing judge, ***Proulx*** clearly rejects the notion of a presumption against conditional sentences for certain offences (at 485 C.C.C.):

> In my view, ... it would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences.... Such presumptions do not accord with the principle of proportionality set out in s.718.1 and the value of individualization in sentencing, nor are they necessary to achieve the important objectives of uniformity and consistency in the use of conditional sentences.

[56] So, if the prescribed statutory considerations have been met, a sentencing judge must give serious consideration to the possibility of a conditional sentence by examining whether a conditional sentence would in that case be consistent with the fundamental purpose and principles of sentencing in ss. 718 to 718.2 of the *Code* (***Proulx***, paragraph [127], at 502 C.C.C.). Accordingly, it would be inappropriate for a sentencing judge automatically to dismiss a conditional sentence as an option because on its face, the crime falls into a particular category of offence. But equally it does not follow that simply because the statutory prerequisites to the granting of a conditional sentence have been met that a sentencing court should presume the reverse, namely that those committing certain offences or offence categories become entitled to conditional sentences.

[57] The Supreme Court's comments about not foreclosing any category of offence from consideration for a conditional sentence are no invitation to necessarily impose one. The Supreme Court specifically rejected the notion of presumptions in favour of, as well as against, conditional sentencing for any category of offence. Instead in each case the sentencing court must consider all relevant sentencing principles, that Court says. As always, it remains a question of balance and judgment, bearing in mind the fundamental sentencing principle in s. 718.1, that the sentence imposed be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[58] An offender's degree of moral culpability is the stated rationale for the Supreme Court's decision not to automatically exclude those convicted of certain offences from the possibility of receiving a conditional sentence so moral culpability is particularly noteworthy. As stated by Lamer, C.J.C.:

> My difficulty with the suggestion that the proportionality principle presumptively excludes certain offences from the conditional sentencing regime is that such an approach focuses inordinately on the gravity of the offence and insufficiently on the moral blameworthiness of the offender. This fundamentally misconstrues the nature of the principle. Proportionality requires that *full consideration* be given to both factors.

- ***Proulx*** at 486 (C.C.C.)

[59] The corollary of this position is that an otherwise serious offence and moral blameworthiness which is not low but relatively high, mean two factors weighing heavily on the incarceration side of the scale. The justification for usually considering all offences for a possible conditional sentence is the possibility of relatively low moral culpability. So it also follows that as the degree of moral culpability increases, so too does the likelihood of attracting real jail. To take one example only, a high degree of moral culpability arises when a crime is planned, deliberate, and for profit.

[60] The Supreme Court confirmed that a conditional sentence might provide sufficient denunciation and deterrence depending on a number of factors, including the nature of the conditions imposed, and the circumstances of the offender and community in which the conditional sentence is to be served. In so doing, the Supreme Court endorsed the principle in ***Brady*** that properly crafted conditional sentences should impose significant restrictions on an offender: ***Brady,*** *supra,* at 540 (C.C.C.), ***Proulx*** at paragraph 127(3). Or to put the matter the way that the Supreme Court did in ***Proulx***:

> Inadequate sanctions undermine respect for the law. Accordingly, it is important to distinguish a conditional sentence from probation by way of the use of punitive conditions.
>
> - ***Proulx,*** at paragraph [30]

[61] Returning then to the first question posed, ***Brady*** did not dictate an offence-specific presumption against conditional sentences where the primary sentencing considerations are denunciation and deterrence. If some may have treated the comments in ***Brady*** as a sentencing rule which operated as an offence-specific presumption against conditional sentences from the outset of the sentencing process, that would be an error in principle. It would also be an error to require that "exceptional circumstances" exist as a *condition precedent* to considering the possibility of a conditional sentence even where deterrence and denunciation are the primary sentencing considerations. It does not, however, invariably follow that simply because a sentencing judge looked for "exceptional circumstances" or something comparable in deciding whether, in the result, to impose a conditional sentence, that of itself, warrants appellate intervention. That will depend on whether in the result, applying the correct principles, the sentence imposed is nevertheless a fit and proper one despite the sentencing judge's erroneous initial inquiry.

[62] The second question is whether this trial judge thought that ***Brady*** took the question of a conditional sentence off the map. The trial judge never said that, and indeed, the trial judge gave jail "having regard to all of the circumstances." That is just what ***Proulx*** now tells trial judges to have regard to. Indeed the trial judge thought that only the appellant's good character and lack of record saved her from penitentiary time.

[63] Throughout this judgment I have reviewed the seriousness of the offence, when and how it was committed, the attitude and character of the appellant when she committed it, and her attitude since. She views herself as justified in her actions, and any sentence as an imposition, according to the evidence. She would view a conditional sentence as simply absence of jail and partial vindication of herself. It would be the absence of repentance, whether public or private. It would do nothing for the individual deterrence and rehabilitation which she still needs. Her attitude throughout precludes any appeal to restorative justice.

[64] And in my view a conditional sentence would do nothing for public deterrence, denunciation, or reparations. Jail is needed here.

[65] In any event, my views are of minor importance. What is much more important is that the trial judge thought that those facts called for jail. Subject to the moderate correction in Part I, she committed no error, and there is no ground for a Court of Appeal to upset her weighing of the relevant factors. Her decision to impose jail must stand.

K. Conclusion

[66] The only change which I would make to the sentence reflects pretrial custody. I would give leave to appeal, allow the appeal, and substitute a sentence of actual imprisonment of one year plus 41 weeks.

APPEAL HEARD on May 15, 2000

REASONS FILED at Edmonton, Alberta,
this 5th day of October, 2000

_____
CÔTÉ J.A.

I concur: _____
VEIT J.

DISSENTING REASONS FOR JUDGMENT
OF THE HONOURABLE CHIEF JUSTICE FRASER

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[1] I have had the advantage of reading the Reasons for Judgment Reserved of Côté, J.A. I take no issue with the facts relating to the public mischief offence as outlined by my colleague. However, in my view, this is a case in which the sentence imposed, two years less a day, is demonstrably unfit. For the reasons that follow, I would have allowed the appeal and imposed a one year conditional sentence of imprisonment.

I. Did the Trial Judge Err in Her Treatment of the Appellant's Lack of Remorse?

[2] The appellant contends that the trial judge erred in treating her lack of remorse as an aggravating factor. Her position is that she is not to be punished for her conduct of the trial, nor for the manner in which she testified, nor for continually maintaining her innocence. It is clear from the record that Crown counsel expressly advanced lack of remorse as an aggravating factor in sentencing. However, the Crown's position is that the trial judge did not misuse this factor in concluding that a sentence of two years less a day imprisonment was fit and proper.

[3] Essentially, the Crown argument is twofold. First, the trial judge's numerous references to the appellant's failure to accept responsibility for her actions and her failure to recant were detailed by the trial judge only as an essential part of the trial judge's recitation of the fact findings made by her for sentencing purposes. This was required since this had been a jury trial. In other words, in describing the appellant's conduct, the trial judge's focus was not on lack of remorse itself but on the substantive character and elements of mischief and, in particular, the use of a sexual assault allegation to ruin the reputation of the arresting constable.

[4] Second, according to the Crown, the appellant's conduct in continuing to assert that she was sexually assaulted by the constable goes beyond lack of remorse and extends to furtherance of the crime. In other words, it is iterative conduct – a repetition of her unfounded allegations – and constitutes, therefore, an extension of the original offence. All this being so, the Crown contends that it was not an error for the trial judge to have considered the appellant's continuing lack of remorse as an aggravating factor in these circumstances and, in any case, the trial judge did not overstate this factor or misapply it.

[5] Remorse has consistently been treated as a mitigating factor: ***R. v. Sawchyn*** [1981] 5 W.W.R. 207 (Alta. C.A., leave to appeal refused [1981] 2 S.C.R. xi); ***R. v. Anderson*** (1992) 74 C.C.C. (3d) 523 (B.C.C.A.). But the absence of a mitigating factor does not necessarily translate into an aggravating factor. The oft-cited general principle is that a sentence higher than appropriate for the offence should not be imposed for lack of remorse, but that factor

might well disentitle an accused to leniency which might otherwise have been extended: ***Sawchyn***, *supra*.

[6] Two different rationales have been offered in support of this approach. One is linked to the right of an accused to make full answer and defence. The theory is that if lack of remorse were to be treated as an aggravating factor, this would in effect punish those who choose to rely on their constitutional rights. Every accused has the constitutional right to make full answer and defence and to require the Crown to prove its case beyond a reasonable doubt: ***R. v. Kozy*** (1990) 58 C.C.C. (3d) 500 (Ont. C.A.); ***R. v. Valentini*** (1999) 132 C.C.C. (3d) 262 (Ont. C.A.).

[7] The other rationale is the proposition that an accused should not be sentenced for an offence for which he or she has not been convicted. This theory rests on the principle that if an accused misconducts himself or herself in their defence by, for example, lying on the witness stand, the proper course of action is to charge that person with perjury rather than increasing the sentence for the offence in question: ***R. v. Vickers*** (1998) 105 B.C.A.C. 42; 171 W.A.C. 42. In that decision, the British Columbia Court of Appeal specifically rejected the suggestion that the applicable principle is grounded in the right to make full answer and defence pointing out that there is no constitutional right to lie.

[8] The English authorities have consistently declined to take into account the manner in which an accused has conducted his or her defence as a factor in sentencing: ***R. v. Dunbar*** (1966) 51 Cr. App. R. 57; ***R. v. Skone*** (1966) 51 Cr. App. R. 165; ***R. v. Harper*** (1967) 52 Cr. App. R. 21; and ***R. v. Blaize*** [1997] E.W.J. No. 3640 (C.A.) (Quicklaw). This view has been accepted in Alberta: ***Sawchyn***, *supra*. To suggest therefore that an accused should be subject to an aggravated sentence simply because of the way in which he or she has conducted their defence – or for that matter misconducted it – would be erroneous.

[9] However, it does not follow that an accused receives, or should receive, the same sentence whether or not he or she is remorseful. To the contrary. As explained by Laycraft, J.A. (as he then was) in ***Sawchyn***, *supra* at 218:

> ... an accused who shows no remorse will, all other factors being equal, receive a higher sentence than an accused who does not.

[10] While an accused who shows no remorse therefore loses the benefit of remorse as a mitigating factor, the sentencing judge must "ensure that the resultant sentence is not higher than that which is appropriate for the offence involved": ***Sawchyn***, *supra* at 218. However, this invites the next question: what is an "appropriate" sentence for the offence involved? Specifically, in undertaking that task, what role, if any, may lack of remorse play, especially given the recent sentencing amendments to the *Code*?

[11] One of the difficulties in determining how lack of remorse potentially impacts on sentencing is the failure to distinguish precisely what is meant by the term. Lack of remorse is

sometimes equated with conduct of the defence and the two concepts treated as if they were synonymous or alternatively, as if they overlapped one another completely. But lack of remorse potentially encompasses conduct spanning a wide range. At one end is the person who continues to maintain his or her innocence throughout criminal proceedings. If finally convicted, there are two possibilities. Either the person had remorse but chose to stand on his or her constitutional rights to require the Crown to prove its case; or the person had no remorse and also relied on his or her constitutional rights. Either way, an accused is entitled to rest on his or her constitutional rights. Therefore, lack of remorse ought not to be equated with, or inferred from, the way in which an accused conducts his or her defence.

[12] At the opposite end is the offender who admits that he or she has committed the crime in question but who has no remorse whatever about those victimized, even in the face of overwhelming evidence of harm. In these circumstances, there will be, by the time of sentencing, no possible overlap with any constitutional rights of full answer and defence or otherwise. The mind-set of an offender in this category can be summed up simply: "I did it and I don't care about what happened to the victims." See for example comments made by the accused in ***R. v. Young*** (1983) 21 Sask. R. 308 (C.A.) as cited in C. Ruby, *Sentencing*, 5th ed. (Toronto: Butterworths, 1999) at 190. For an offender in this category, an expression of this kind of lack of remorse may aggravate sentence. I say may aggravate sentence because the offender's admission to the crime will presumably be reflected in a guilty plea. Therefore, while lack of remorse in these circumstances speaks to the degree of entrenchment of the criminal behaviour, the need to denounce that behaviour, and the enhanced importance of specific deterrence in sentencing that offender, it may be offset by the mitigating effect of a guilty plea.

[13] This is not the only situation in which lack of remorse may be relevant in sentencing. Sentencing for any crime involves a mix of many principles and factors. Apart from the gravity of the offence, one of the most significant factors influencing sentencing is the state of mind of the accused at the time of commission of the offence. In other words, how blameworthy was the offender when he or she committed the crime? This assessment is now expressly mandated by the overarching sentencing principle in s.718.1 of the *Code*:

> A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[14] In this regard, expressions of lack of remorse, whether through actions or words, may be evidence of a higher degree of moral blameworthiness at the time of commission of the offence. In the same way that stealing a million dollars is more blameworthy than stealing one dollar, so too a hardened attitude towards one's victims is more blameworthy than a temporary lapse in judgment. In other words, lack of remorse as reflected in actions or words may simply be further evidence of the offender's continued indifference to the plight of his or her victims at the time of committing the criminal offence. Manifestations of that type of lack of remorse may accompany the offence as for example where the offender after having abducted a victim

compounds the abduction with another offence, such as robbery. This presupposes of course that the time frame over which the offence is committed has been such as to permit the offender to reflect on the consequences of his or her actions before engaging in the further conduct said to evince lack of remorse.

[15] The display of lack of remorse may also follow the offence. Take for example the offender who assaults a person because he or she is gay or black, and then boasts about this after the fact to friends. Or the offender who, after committing one assault, then proceeds to assault a new victim the next day or the next month. These actions compellingly demonstrate lack of remorse in respect of the first offence as reflected in the continuing indifference to the victims. If an offender's post-offence expressions of lack of remorse could not be taken into account in sentencing under any circumstances simply because the offender subsequently pled not guilty, then this would mean that an offender could effectively sweep off the sentencing table all negative post-offence conduct which might help explain his or her actions during commission of the offence.

[16] Moreover, given the recent sentencing amendments to the *Code*, including s.718.2 (outlining certain statutorily prescribed aggravating and mitigating circumstances) and s.743.6 (dealing with the power to delay parole), these expressions of lack of remorse, whether part and parcel of the original offence, or made post-offence, are potentially directly relevant to both the gravity of the offence and the degree of culpability of the offender as well as to the offender himself or herself. Thus, they may, depending on the circumstances, be admissible in evidence and, in turn, relevant as legitimate factors in sentencing.

[17] In taking lack of remorse expressed after the offence into account in these circumstances, the judge is not, to be precise, sentencing for purely post-offence behaviour but for a higher degree of moral culpability during the commission of the offence, as evidenced by the post-offence expressions of lack of remorse. It may as well go to the offender's character which the sentencing judge is expressly authorized to consider in exercising the discretion conferred under s.743.6. All this explains why lack of remorse may also be relevant to an assessment of an offender's likelihood of future dangerousness: ***Valentini***, *supra*, at 296.

[18] But a caution applies here. It would not be proper to take the way in which an accused has chosen to conduct his or her defence, equate this with lack of remorse and use it to buttress a finding that at the time of commission of the offence, that person's moral blameworthiness was therefore relatively high or to justify a higher sentence than would otherwise be appropriate in all the circumstances. Instead, what a sentencing judge will be looking for are any expressions of lack of remorse by the accused either during or after the offence which are unrelated to the manner in which the defence is conducted, or misconducted, and which evince a higher degree of moral culpability at the time of commission of the offence or are otherwise relevant to a sentencing judge's permitted assessment of the offender or his or her character.

[19] The results of these considerations may be summarized as follows. Lack of remorse should not be used to impose a sentencing surcharge on top of what would otherwise be an appropriate sentence. However, to the extent that lack of remorse evidences a higher degree of criminal culpability at the time of commission of a crime, it may be taken into account as a potentially aggravating factor in sentencing and may in turn influence a sentencing judge's assessment of what an "appropriate sentence" would be. Similar considerations apply where a sentencing judge is entitled to assess the offender and his or her character in determining both the length and venue of sentence. Thus, a statement that lack of remorse is not an "aggravating" factor in sentencing is an oversimplification. If this is intended to mean that the sentence imposed cannot be higher than what a remorseful person would receive, it is incorrect. Further, and in any event, if it is intended to mean that lack of remorse cannot be evidence of a more blameworthy state of mind at the time of commission of the crime, which in turn may well influence what is considered to be an "appropriate sentence", it is also incorrect. However, in no event should a trial judge equate the way in which an accused has chosen to conduct his or her defence with lack of remorse. Nor should the trial judge then aggravate the sentence imposed based on that lack of remorse.

[20] Quite apart from the role which lack of remorse may play in fixing the length of sentence, the recent *Code* sentencing amendments, and in particular ss.718(d), (e) and (f), raise another issue. That is whether lack of remorse may properly be taken into account in determining how that sentence will be served, that is the venue of the sentence. Conditional sentences are rooted in large part in restorative justice sentencing objectives. Central to these objectives is the need for an offender to take responsibility for his or her actions: ***R. v. Gladue*** [1999] 1 S.C.R.688. For example, s.718(f) of the *Code* provides that one of the objectives of sentencing is "to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community." In fact, a condition precedent to the imposition of a conditional sentence is the requirement that serving the sentence in the community be consistent with the principles of sentencing set out in ss.718 to 718.2.

[21] This leads to the question whether and when it is appropriate to impose a conditional sentence on an offender who fails to accept responsibility for the crime for which the offender has been convicted. In particular, in what way can promotion of a sense of responsibility, or reparation for harm done to victims, or rehabilitation – all restorative justice objectives – be achieved with an offender who fails to demonstrate regret or repentance following conviction? An accused's entitlement to stand on his or her constitutional rights cannot be equated with lack of remorse. But it does not follow that the flip side is true. Resting on those constitutional rights cannot be equated with remorse. Nor does it demonstrate that the offender is a suitable candidate for a restorative justice sentence. When it comes to conditional sentencing, restorative objectives figure prominently in the sentencing equation. The absence of any indication of willingness to accept responsibility arguably militates against a conditional sentence. One of the rationales for a conditional sentence is that the offender will use his or her time in the community constructively for rehabilitative and restorative purposes. But if the offender is not motivated because he or she will not acknowledge the existence of any

problem, much less contrition about what he or she has done, then a legitimate question arises about the likelihood of the offender's being committed to, or serious about, taking advantage of the rehabilitative options available in the community.

[22] Indeed, s.721(3)(a) of the *Code*, enacted in 1996 as part of the new sentencing amendments, now specifically instructs a probation officer, unless otherwise specified by the court, to include, where possible, in a presentence report, information on the offender's character, attitude and "willingness to make amends". Quaere whether willingness to make amends includes a consideration of the absence of remorse: See Case Comment by Renaud, P.C.J. on ***R. v. J.M.*** (1998) 160 Nfld. & P.E.I.R. 38; 494 A.P.R. 38 (Nfld. C.A.) entitled "'Willingness to Make Amends' and the Contents of a Probation Officer's Report"at 163 Nfld. & P.E.I.R. and 503 A.P.R. 82.

[23] However, since the issue about the possible impact of lack of remorse on choice of sentencing options was not fully argued before this Court, it should await resolution another day.

[24] To return to the central point, I am satisfied that the trial judge used the appellant's lack of remorse as an inappropriate aggravating factor, thereby committing an error in principle. I accept that it was necessary for the trial judge to refer to lack of remorse in reciting the relevant facts with respect to the offence of mischief. But it is clear that her mention and use of lack of remorse went far beyond her summary of the evidence and extended to her reasons for judgment in sentencing. In that regard, the trial judge repeatedly emphasized the appellant's lack of remorse, refusal to accept responsibility for her actions and her failure to recant the allegation made against the arresting constable, concluding (at Sentence Appeal Book (S.A.B.) 64):

> To this day, Miss Ambrose has displayed no remorse. Her only concern has been for herself, and she has refused to accept responsibility for her actions.

[25] The inevitable inference is that the appellant's lack of remorse figured prominently in the sentencing judge's decision to impose a sentence of two years less a day. Although the Crown refers to perjury and obstruction of justice in the context of defending the length of sentence imposed, the appellant has not been charged with, nor convicted of, either of these offences. Therefore, neither can be used by analogy to defend the sentence imposed. In the context of this case, where the fact that the appellant made the false claim that she did is itself the foundation for the criminal offence, I fail to see how persisting in that claim, no matter that it has been adjudged false, can or should be used as an aggravating factor in sentence. The fact that the appellant has chosen to persist in her assertion cannot aggravate sentence; otherwise, every accused who continues to deny that he or she committed the offence of which they have been convicted should receive an aggravated sentence. To do so in these circumstances is tantamount to doing what is not permitted by law, that is imposing an aggravated sentence

because of the offender's conduct or behaviour during the course of the proceedings against him or her.

[26] Nor is there any reason, on the findings made by the trial judge, for concluding that the appellant's continued denial that events occurred as the Crown has now proven, evinces, by itself, a higher degree of moral culpability at the time of commission of the offence. She has denied – and continues to deny – that for which she has now been convicted. This is a position which she was entitled to advance and for which she cannot now be punished through an increased sentence. Accordingly, I am of the view that the sentencing judge erred in using lack of remorse as an aggravating circumstance, meaning therefore that this Court should determine what would be a fit and proper sentence in all the circumstances: ***R. v. Shropshire*** [1995] 4 S.C.R. 227; ***R. v. M.(C.A.)*** [1996] 1 S.C.R. 500; and ***R. v. McDonnell*** [1997] 1 S.C.R. 948.

II. Did the Sentencing Judge Err in Concluding that this was not an Appropriate Case for a Conditional Sentence Order?

[27] The appellant asserts that the trial judge erred in rejecting a conditional sentence because the trial judge wrongly assumed, relying on ***R. v. Brady*** (1998) 121 C.C.C. (3d) 504 (Alta. C.A.), that where the primary sentencing objectives were deterrence and denunciation, conditional sentences could only be imposed in "exceptional circumstances". In particular, the appellant contends that any such limitation on the granting of conditional sentences would be inconsistent with ***R. v. Proulx*** [2000] 1 S.C.R. 61, a decision of the Supreme Court of Canada issued after the appellant had been sentenced.

[28] Two questions arise from the appellant's submission that the trial judge's reference to ***Brady*** makes the rejection of a conditional sentence an error in principle:

1. Does ***Brady*** prescribe offence-specific presumptions against conditional sentences in certain cases?

2. In any event, did the trial judge interpret ***Brady*** in a manner which precluded serious consideration of a conditional sentence?

[29] On the first question, I agree with Côté, J.A. that ***Brady*** did not prescribe offence-specific presumptions against conditional sentences. I also agree with his analysis and conclusions contained in paragraphs [49] to [61] inclusive.

[30] However, on the second question, did the trial judge here actually apply ***Brady*** in a manner which precluded serious consideration of a conditional sentence, the answer, in my view, is Yes.

[31] In her sentencing reasons, the trial judge concluded that general deterrence and denunciation should have the heaviest weight on the facts of this case. After reaching this point and deciding therefore that a period of probation would be inappropriate, the trial judge then turned her attention to whether a conditional sentence of imprisonment would be consistent with the fundamental purpose and principles of sentencing as set out in ss.718 to 718.2 of the *Code*. At this stage, she cited the following quote from ***Brady*** (at S.A.B. 65):

> For some crimes this court has previously stated that general deterrence and denunciation are paramount sentencing aims so that a term of actual imprisonment is called for (barring exceptional circumstances). For such crimes, conditional sentences will not be appropriate in the usual case.

[32] Immediately thereafter, she then stated:

> In my view, having regard to all of the circumstances, stand up, Miss Ambrose. In my view, an appropriate sentence is a period of imprisonment of two years less one day.

[33] It is true that at no time did the trial judge make a finding, specific to the offence before her, that a conditional sentence should only be considered in exceptional circumstances. But having regard to the portion quoted by her and her conclusion that in all the circumstances, a fit sentence is one of imprisonment for two years less a day, the inference is that she wrongly relied on ***Brady*** as a bar to giving serious consideration to whether deterrence and denunciation in this case could be satisfied through a conditional sentence. In this regard, I also acknowledge that the trial judge stated that she would have imposed a period of incarceration in a federal penitentiary had it not been for the fact that the appellant had no prior criminal record and had previously been of good character. However, since she then opted for a sentence of less than two years, the question nevertheless remains whether she gave proper consideration to the possibility of imposing a conditional sentence. In my view, she did not and consequently this constitutes another error in principle warranting appellate intervention: ***Proulx***, *supra*; ***Shropshire***, *supra;* ***M.(C.A.)***, *supra;* ***McDonnell***, *supra.*

[34] This then takes me to the next question. Given the failure to seriously consider a conditional sentence in this instance, is the sentence nevertheless fit and proper? This becomes the appropriate inquiry since a sentencing judge's erroneous formulation of the principles in ***Brady***, or for that matter other conditional sentencing cases, will not lead to reversal of the decision made if it is evident that, despite the error, the sentence imposed is nevertheless appropriate. The Crown concedes that the statutory prerequisites for a conditional sentence exist: the sentence imposed is less than two years; no minimum sentence is mandated for the offence of mischief; and the safety of the community would not be endangered by the appellant's serving her sentence in the community. Against this backdrop, therefore, I turn to the facts of this case

and the factors which should properly be weighed in assessing whether, in the result, the trial judge erred in imposing a sentence of two years less a day imprisonment.

III. What is a Fit and Proper Sentence in this Case?

[35] False allegations of criminal conduct of any kind are wrong. That is why the Crown has chosen to proceed with this case against the appellant. But with mischief, as with criminal offences generally, there are gradations of conduct. Just as assaults can range from a touch to serious bodily injury, so too false allegations involve a continuum of conduct and resulting harm which must be assessed as part of the sentencing process. What we are required to do in determining an appropriate sentence, both in terms of length of sentence and how it is to be served, is to consider a number of factors including: the nature and gravity of this offence; this particular offender; the sentences imposed for comparable offences; all relevant sentencing principles; and the Supreme Court of Canada's most recent sentencing decisions: ***Proulx***, *supra*; ***R. v. L.F.W.*** [2000] 1 S.C.R. 132; ***R. v. R.N.S.*** [2000] 1 S.C.R. 149; ***R. v. R.A.R.*** [2000] 1 S.C.R. 163; ***R. v. Bunn*** [2000] 1 S.C.R. 183; and ***R. v. Wells*** [2000] 1 S.C.R. 207. Viewed from this perspective, while the objective of protecting the administration of justice is indisputable, the reaction to this offence has been hyperbolic, both in terms of the way the offence has been dealt with and in terms of the length and type of sentence imposed.

[36] The starting point for the analysis must be the offence itself, the gravity of which should be evaluated both in relative and absolute terms. As a crime, mischief cannot be said to qualify as one of the more serious crimes under the *Code*. That this is so can be seen from any number of factors. I do not intend to catalogue all other criminal offences. Suffice to say that there are other relatively far more serious crimes than mischief, including for example, crimes of violence against the person such as manslaughter, aggravated assault, assault causing bodily harm, sexual assault and sexual exploitation, as well as other serious crimes involving varying degrees of violence such as impaired driving and dangerous driving causing death or bodily harm. And yet, there have been innumerable cases in this country in which far more blameworthy citizens who have committed much more serious offences have received conditional sentences of lesser terms than the two year less a day jail sentence imposed here. And while I would concede that there will never be perfect symmetry in sentencing and that possible mistakes in some cases do not justify perpetuating errors in later cases, it is difficult to understand why this appellant, with no record and whose crime is one of mischief which was found out within days, if not hours, following the offence, and who within two days of her original complaint, indicated she did not wish to pursue the complaint, should be singled out for exceptional punishment. Put simply, the facts of this case and the hefty punishment imposed do not fit together.

[37] In making these comments, I should not be taken as saying that false allegations are not serious. They are. But one must consider each particular allegation and where it falls in terms of degree of seriousness. Importantly, the extent to which the police have actually been misled by a false allegation will be relevant in sentencing: ***R. v. Bartoshewsky*** [1982] A.J. No. 104 (C.A.) (Quicklaw). If the police have not been misled or they quickly ascertain that the assertion is

false, then this will ordinarily be less serious than a case in which the false claim has led to a third party's actually being charged and arrested. And this in turn will be less serious than those in which an innocent third party is subjected to criminal proceedings. Here, the appellant's allegation was determined to be a fabrication at a very early stage. In other words, the mischief here was seen for what it was – an absolute fabrication – before any permanent harm occurred. To be precise, according to the testimony of Detective Bonetto, he had concluded by 5:30 a.m. the next morning, within 9 hours of the initial allegation, that the appellant's complaint was false (Conviction Appeal Book (C.A.B.) 708). No charges were ever seriously considered, much less laid, against the arresting constable. No formal action was taken against him after a single interview and surrender of clothing and the constable was told within a week that there would be no service level investigation or criminal charges against him and that he would remain on active duty (C.A.B. 220).

[38] The context in which these events took place is also significant. This is not a situation in which there was a high level of deliberation and planning involved in this offence. The allegations were made immediately following the appellant's arrest. It is certainly clear that she overreacted in a serious way and I am not condoning her response. However, the point is that this was not a premeditated action, but one in which the appellant, having overreacted to her arrest, made the patently false claims she did. Nor is it appropriate to equate her continued denial of any wrongdoing on her part with planning and deliberation. The offence here was making the false allegation, not persisting in it through to trial. Accordingly, when considering whether this offence was planned and deliberate, the relevant inquiry relates to when the false allegation was made and under what circumstances. Thus, it would be improper to infer planning and deliberation at the time of commission of the offence from the appellant's continued assertion that events happened as she claimed. The two are not the same and they cannot be treated as if they were. What this all means is that, relatively speaking, this offence is not at the more serious end of the gravity spectrum.

[39] Further, it is unfortunate that even at this stage, we do not yet know whether the appellant is guilty or not guilty of the alleged offence which initiated this sequence of events, that is the refusal to provide a breath sample. Understanding all the facts surrounding these events would have been helpful in evaluating the appellant's evident frustration at having been arrested.

[40] In addition, it is apparent from the trial judge's findings and from reviewing the relevant exhibits from the trial that the appellant sustained certain injuries on her arrest. According to the trial judge, they included a superficial laceration to her left ear, bruises on her elbow and wrist and a laceration on her knee (S.A.B. 54-55). While the trial judge finds that the police did not use excessive force, a finding I accept, it is nevertheless evident from the photographic evidence that the resulting bruising was extensive (C.A.B. 1159-1165). The fact that the force applied by the police was not excessive under the law does not minimize the impact of that force on the appellant. I mention this not as a criticism of police actions, nor as an excuse for what the appellant did, but again to place in context the appellant's actions having regard to the psychological and physical impact which the arrest evidently had on her.

[41] In any event, regardless of what motivated the complaint, the fact remains that the police quickly determined that the allegations were false. And while the appellant never formally retracted her complaint, she nevertheless did within a couple of days of making the complaint telephone one of the investigating constables to indicate that she did not want charges pursued. I also note from the Presentence Report that the appellant indicated that "she felt comforted by the Detective's compassion and appreciated that he respected [her] desire to not pursue an investigation" (S.A.B. 118). I concede that she never retracted the false allegation but short of admitting that she had lied, she at least went this far. Accordingly, her request not to pursue the charges is also relevant in sentencing.

[42] There is another problematic issue with respect to the way in which this sentencing proceeded. It is evident from reviewing the record that the sentencing proceeded on facts not properly proved by the Crown. I am speaking here of the assumption underlying this sentencing, namely that a proper demand for a breath sample had been made to the appellant and that she had been properly arrested after refusing to provide the same. For example, during sentencing argument before the trial judge, the Crown stated the following at S.A.B. 36:

> She was in a situation where she had done something wrong, she was in care and control of a motor vehicle in a state that caused some considerable concern to the people at Queen City Meats. She refused the Alco-sur demand and then was in a position where she was arrested and her way of coping with that was to find others to blame for entire set of circumstances.... [Emphasis added.]

[43] The inference therefore is that the appellant was guilty of the underlying substantive charge, that being the refusal to provide a breath sample. But at the time of sentencing for this offence, the appellant had not even been tried on that offence. A review of the chronology of events here reveals that the appellant's trial on the present charge, mischief, actually occurred prior in time to the appellant's trial for refusal to provide a breath sample. The mischief trial was May 13th, 1998 with sentencing completed on June 17th, 1998. It was not until the next month, on July 6th, 1998, that the appellant's trial for refusal to provide a breath sample even took place. As it turned out, the appellant was originally acquitted of that charge though that decision has now been overturned and a new trial ordered which has not yet been held: ***R. v. Ambrose*** (1999) 247 A.R. 78 (Q.B.).

[44] The problem which arises is this. The trial judge appears to have proceeded on the unproven foundation relied on by Crown counsel as part of the Crown's sentencing submissions. Specifically, the degree of the appellant's moral blameworthiness here has been assessed by the trial judge as if the appellant had received a proper demand to provide a breath sample, refused to do so and had thus been properly arrested. But in sentencing, if a fact is in dispute, it must be proven by the Crown beyond a reasonable doubt: ***R. v. Gardiner*** [1982] 2 S.C.R. 368; ***R. v. McDonnell, supra.*** And yet, it is clear that these issues were all in dispute at the time of

sentencing and in fact, as we now know, were then initially resolved in favour of the appellant. There is something fundamentally wrong therefore with the appellant's being sentenced on the mischief offence as though she were guilty of the underlying substantive offence. While I am not suggesting that prior events justify or excuse the appellant's conduct in making the allegation she did, again, knowing what did happen prior to the arrest would have been helpful in evaluating the appellant's actions and reactions and hence the degree of moral blameworthiness attached to them.

[45] In addition, while the appellant has persisted in her allegations even in the face of overwhelming evidence to the contrary, this appellant is not the first accused to deny that events happened as the Crown claimed nor even to point the finger of guilt at someone else. Therefore, one ought not to overreact and treat a persistent assertion, particularly one linked to maintaining one's innocence, no matter that it has been adjudged false, as a justification for making an example out of a person who continues to profess an untruth. That is especially so where, as here, the fact of the untruth is itself the very foundation of a criminal offence for which the accused is already being punished. Were this permitted, then an accused's willingness to persist in an untruth should be treated as an aggravating factor in sentencing every person convicted of a criminal offence who takes the stand and denies criminal responsibility for the crime in question and continues to deny responsibility even following conviction. But that position is not supported in sentencing law in Canada. As noted earlier, neither the way in which an accused has conducted his or her defence, or for that matter, misconducted the defence, justifies increasing a sentence beyond what would otherwise be appropriate. And yet, in my view, that is precisely what has happened in this case.

[46] Nor is there any reason for singling out someone who is convicted of a false allegation of a sexual offence for punitive treatment. It has been suggested that this is necessary because of the negative impact which false allegations may have on legitimate victims of sexual assault. But if this is so today, the root cause is not the fact that someone has made a false allegation. There is no evidence that false claims in this area are more prevalent than those made in other areas of the law. I cannot accept that it is valid to exact retributive punishment for a false allegation about a sexual offence on the basis that the public is incapable of understanding that one false allegation should not be used to impugn the credibility of an entire class of legitimate victims. Focussing on retribution and imposing disproportionately severe sentences for this kind of public mischief wrongly implies that the problem here is so prevalent that extraordinary measures are warranted. This is tantamount to falling into the same trap which Parliament, the judiciary and the public have sought to avoid the past twenty years, reinforcing as it does the very kind of thinking which prevented the effective prosecution of some grave crimes against women and children. I have already mentioned that the appellant is not the first accused to claim that events occurred differently than the Crown alleges. And yet no one would seriously suggest that it would be appropriate to presume that every accused lies and proceed to evaluate their credibility on that basis whenever they choose to take the witness stand. The answer therefore is not to overreact to false allegations of this kind but to judge every particular case on its own merits rather than

perceiving vast social consequences from something which seems to me on these facts to be unique.

[47] In ***R. v. Blaize, supra,*** the English and Welsh Court of Appeal had occasion to deal with an analogous situation. A black woman was convicted of assault occasioning bodily harm as a result of an altercation in a taxi queue. The victim was a white male. Race was raised as a factor in the defence on the basis that the victim had allegedly made provocative racist comments to the woman. The trial judge concluded that the woman had made false accusations of racial prejudice as part of her defence. On the sentence appeal, her position was that the trial judge had used the fact of the false allegations to aggravate sentence. In allowing the appeal and reducing the sentence imposed, the Lord Chief Justice, Lord Bingham, stated:

> By contesting any charge, a defendant loses the benefit of the discount which a plea of guilty should ordinarily earn, but by pleading not guilty a defendant does not run the risk of a sentence being increased. Similarly, false accusations of racial prejudice cannot serve to increase a sentence.
>
> Counsel submits that the impression must have been left in this case that the sentence was being increased for that reason. He submits that it was objectionable for the judge to hold against the appellant what others may or may not have done in the conduct of their defences. He suggests that it gives rise to a wholly unjustifiable and discreditable suggestion that black defendants are liable to lie and puts them at a disadvantage in defending a charge if this is an accusation they wish to make.

[48] I now turn to the civil suit and the suggestion, which I do not accept, that this somehow demonstrates a need for individual deterrence and by implication, a sterner sentence. Two points about the civil lawsuit must be understood. First, the civil action and these criminal proceedings were linked. That is, it is evident from a review of the court records that one of the reasons for the civil suit was to secure discovery of evidence considered potentially relevant to the criminal case but which could not be secured through Crown disclosure in the criminal case. This was a deliberate defence tactic. Even though it ultimately failed because the court in the civil action declined to require certain documents to be disclosed, it was nevertheless an integral part of the defence strategy. As such, therefore, it ought not to be used as a reason to aggravate sentence. Nor could the documents sought in the civil action – personnel records – have been secured through Crown disclosure in the criminal action. They were not disclosed in that action. Nor were they required to be. Second, in any event, the appellant has taken no further steps in the civil action since being convicted at trial.

[49] I also note that the appellant testified to a lack of memory of certain events on the evening in question. While one of the doctors who examined her concluded that her description

of the loss of her memory was not characteristic of concussion, it was in his view nevertheless consistent with some form of psychological blackout. Specifically, Dr. Wilson stated: "I would consider the type of memory loss for that interval to be more logically explained on the basis of psychological type of blackout"(S.A.B. at 125). In this regard, I note that the psychiatrist who interviewed the appellant on order of the court, Dr. Vijay Singh, supports this diagnosis. In his psychiatric report, he concludes at S.A.B. 126:

> In regard to the selective loss of memory for a defined period of time, in this case the most rational and viable explanation, in my opinion, would be psychological in nature.

[50] This too must be placed on the sentencing scale especially to the extent it might help explain why events have unfolded as they have. In this regard, therefore, I do not agree with the proposition that there is no psychological overlay here given the fact that two psychiatrists, one court-ordered, opined as to a psychological blackout by the appellant during the relevant time. The focus at trial was not the appellant's loss of memory but rather what caused it. The trial judge ruled out a concussion from an alleged blow to the head. But the fact that the memory loss was not caused by a blow does not mean that it did not occur.

[51] Equally important, it is clear that the appellant presently suffers from major depression due to post-traumatic stress disorder (Presentence Report at S.A.B. 120). Again, this diagnosis has been made not only by the appellant's treating psychiatrist, Dr. John O'Mahoney, but also by Dr. Singh. And while I concede that the major depression has occurred post-offence, it is nonetheless a consideration which influences an assessment of an appropriate sentence for this offence.

[52] In addition, quite apart from where mischief fits in comparison to other far more serious crimes, the sentence imposed here represents by itself 40% of the maximum sentence available for mischief. This makes it, by itself, in these circumstances, inordinately harsh and therefore inconsistent with the fundamental principle of sentencing, proportionality. Not only is it harsh in absolute terms, it is also harsh in relative terms compared to other sentences imposed for mischief, not to mention other far more serious offences. Section 718.2(b) of the *Code* specifically provides as a sentencing principle that a sentence for an offender should be similar to that which is imposed on similar offenders for similar offences committed in similar circumstances. Appellate Crown counsel fairly conceded that the sentence imposed on the appellant is higher than that found in existing precedents.

[53] I now turn to some of the few reported cases in this area. In ***R. v. Lukasik*** (1982) 22 Alta. L.R. (2d) 222 (C.A.), a young woman made a false claim of attempted rape against a man. As a result, he was charged. Matters proceeded to preliminary inquiry where the complainant repeated her assertions under oath. It was only at that stage that further investigations were carried out and charges withdrawn. As a consequence, Lukasik was convicted of both perjury and mischief. At trial she received a sentence of 45 days to be served intermittently and to be followed by 2 years

probation. The sentence was increased on appeal to 9 months in prison. The court did mention that there were extenuating circumstances and reference was made to psychological evidence of feelings of inadequacy. Nevertheless, that is a case where the accused was convicted of perjury as well as mischief and yet the total sentence imposed for both offences was only 9 months. Perjury is a particularly egregious offence against the administration of justice, reflecting as it does a very high degree of deliberation and planning along with determination to see the lie through no matter what. By contrast, the appellant's conviction is not for perjury. Further, the mischief in question, unlike the situation in ***Lukasik***, *supra*, did not involve anyone's being charged much less being required to proceed to an actual court hearing.

[54] The case with the highest sentence for mischief cited to the trial judge and this Court was ***R. v. Hudon*** (1996) 187 A.R. 345 (C.A.). In that case, this Court upheld a 15 month sentence imposed on an 18 year old young woman who had wrongly accused three men of sexual assault. One was arrested; one took a polygraph test; and all three were required to retain counsel before Hudon admitted that she had lied. It is evident that lack of remorse was treated as an aggravating factor in that case even in the face of a guilty plea and I note in that regard that no challenge to this approach was raised on appeal. I also note that the trial judge relied on ***Hudon*** in her sentencing reasons. The case before us, however, is distinguishable for several reasons. First, it is not proper to treat lack of remorse as an aggravating feature of this case for the reasons given. Second, again, in this case, no one was charged as a result of the complaint made by the appellant. Third, in ***Hudon***, as a consequence of the way in which the matter proceeded, the three men and their families suffered financially as well as emotionally. Fourth, it would appear that the conditional sentencing provisions were not raised on the sentence appeal having just come into effect about two weeks earlier.

[55] In ***R. v. Gill*** (1994) 162 A.R. 163 (C.A.), as part of a 30 month sentence for extortion and fraud, a concurrent sentence of 6 months was affirmed for public mischief. The appellant had apparently planned to stage an accident and make an insurance claim. Practically, the 6 month sentence imposed had no meaningful impact on the time served because the sentence was made concurrent to the other sentence and not consecutive. That means, therefore, in the result, no extra jail time for the mischief offence.

[56] ***R. v. Tesar*** [1991] N.W.T.J. No. 151 (Terr. Ct.) (Quicklaw) was a decision of the Northwest Territories Territorial Court. As a direct result of the accused's actions, an innocent person was arrested, photographed and fingerprinted. This could have been avoided, according to the trial judge, by the simple communication of information which the accused had apparently deliberately withheld. She did not plead guilty, but was convicted after a trial at which the Crown proceeded by way of summary conviction rather than indictment. The trial judge, after characterizing the offence as "outrageous", imposed a fine of $1,000 together with a crime victim's surcharge of 15%.

[57] Finally, I refer to a recent decision of this Court, ***R. v. Waiting*** [2000] A.J. No. 849 (Quicklaw), (Alberta Courts' Website: www.albertacourts.ab.ca/ at ABCA 208 July 20, 2000). Waiting pled guilty to criminal harassment, counselling to commit public mischief and failure to

comply. He received a global 8 month conditional sentence for all offences plus 2 years probation and a 5 year weapons prohibition. Five months of that sentence was for both criminal harassment and the mischief offence. On appeal, the sentence was increased to an 18 month conditional sentence of imprisonment.

[58] Briefly, the circumstances were these. Waiting and the victim had lived together, had a child and then separated. There was acrimony over custody, access and support issues. This led to Waiting's making 40 harassing phone calls over a 6 month period, including hang-up calls and abusive and insulting calls. They caused the victim distress, affected her ability to work and disrupted her home life. After being charged with criminal harassment, Waiting decided to have the victim "set up" with cocaine by a third party so that she would be charged and he could secure custody of the child. The police became involved and Waiting was arrested right after a meeting with an undercover officer to discuss the terms of the set up. Released again on bail on three conditions, including that he not contact the victim, Waiting then breached all three conditions. The victim was forced to change her phone number several times, change her locks, screen all her phone calls, have people stay with her in her residence and have police escorts for her trips to court. As a consequence of what she went through, she became physically ill; her eating was affected; so too was her sleep due to nightmares; and she became very paranoid.

[59] At trial, both the Crown which asked for a sentence of three years and defence counsel who suggested a sentence in the range of 18 months to 2 years less a day were of the view that this was not an appropriate case for a conditional sentence of imprisonment. The trial judge disagreed and imposed, as noted, an 8 month conditional sentence. Regardless of the motivation for Waiting's criminal conduct (an obsession to have access to his daughter), Waiting committed three separate offences. The harassment involved many abusive calls over a six month period and this Court, along with others, has imposed significant periods of incarceration for criminal harassment where the circumstances were aggravating: ***R. v. Vollrath*** [1994] A.J. No. 511 (C.A.) (Quicklaw); ***R. v. Loutfi*** [1998] ABCA 59 (January 26, 1998) (Alta.C.A.) (www.albertacourts.ab.ca/); ***R. v. Theysen*** (1996) 197 A.R. 40 (Prov. Ct.); ***R. v. Pilch*** (1999) 141 Man. R. (2d) 283 (Q.B.); ***R. v. Davis*** [2000] M.J. No. 292 (C.A.) (Quicklaw). The counselling public mischief offence involved considerable planning and deliberation. It was also committed while Waiting was on bail on the criminal harassment charges.

[60] Contrast the facts of that case, including the extent of the planning that went into the mischief offence and the stage to which it was advanced, with the case now before this Court. While this Court increased Waiting's sentence to 18 months on appeal, it nevertheless remains a conditional sentence of imprisonment. Therefore, when one places these two cases on a relative scale, the one by the other, and compares the gravity of the three offences to the one offence here, it compellingly demonstrates the complete unfitness of the sentence imposed on the appellant.

[61] On this basis too, therefore, namely the need for a sentencing court to take into account the principle of parity in sentencing, appellate intervention is warranted because the length of the

sentence imposed – two years less a day – is so far out of the acceptable range as to make it demonstrably unfit. There are few things more troubling to the public and more capable of undermining public confidence in the justice system than unwarranted disparity in sentencing. And rightly so.

[62] One other point. The probation officer who prepared the Presentence Report inferentially recommended a community sentence of some kind. It is true that the officer did not expressly state this. But if a custodial sentence were thought appropriate, one would have expected to see a recommendation to that effect. No such recommendation was made. What the officer did state under the heading "Recommendation" is this:

> In light of the subject's stable and positive background in all aspects of her life, it is respectfully recommended that although the subject may be a suitable candidate for probation supervision, she does not require a period of supervision.

[63] The overall tenor and content of the Report coupled with this final recommendation that probationary supervision would not be required clearly points to a community sentence of some type. While it is certainly true that a sentencing judge is not bound by any recommendation so made, nevertheless the fact that a probation officer effectively endorses the possibility of a community sentence rather than a term of imprisonment remains a relevant factor to be placed on the sentencing scale.

[64] In this case, given all the circumstances, I am satisfied that a conditional sentence of imprisonment with relatively stringent conditions would be appropriate. Not only would a conditional sentence in these circumstances provide sufficient deterrence and denunciation given the nature and gravity of the offence, more basically, I do not accept that the emphasis in sentencing for mischief in these circumstances should be solely or predominantly on these objectives. In my view, insufficient emphasis was given to the restorative goals of sentencing. As explained by Cory and Iacobucci, JJ. in ***R. v. Gladue, supra,*** at 709:

> The availability of the conditional sentence of imprisonment, in particular, alters the sentencing landscape in a manner which gives an entirely new meaning to the principle that imprisonment should be resorted to only where no other sentencing option is reasonable in the circumstances. The creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration.

[65] Restorative justice goals must be a significant sentencing consideration where, as here, the crime is mischief; it was quickly detected before permanent harm could be done; it did not involve physical violence against a person; the appellant has otherwise led an exemplary life; and the appellant has no prior criminal record on which the Crown relied. With respect to the appellant's character, she is a highly educated school teacher who has dedicated her working life

and much of her personal time to public service, to her students and to her community. The eloquent letters of support from parents and students alike all attest to her outstanding teaching abilities. She has received a significant award for excellence in teaching along with several nominations for other awards and she enjoys the respect and support of many in her community. All these factors rank her as a prime candidate for a conditional sentence with a treatment régime aimed at addressing her apparent difficulties with alcohol and depression.

[66] It follows from what I have said that I do not agree that positive factors such as these are irrelevant in the sentencing process. What a person has done with his or her life can often be a sound predictor of future prospects, including the likelihood of complete rehabilitation. That is certainly so in this case.

[67] As explained by Lamer, C.J.C. in ***Proulx***, *supra* at paragraphs [82] - [83]:

> The conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders. ...
>
> The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, *it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence*.

[68] This Court recognized in ***Brady***, ***supra***, that sufficiently stern conditions in a properly crafted conditional sentence might be capable of achieving the objectives of denunciation and deterrence, depending in particular on the gravity of the offence and the degree of moral blameworthiness of the offender. Certainly, as far as individual deterrence is concerned, the appellant's public humiliation here has been profound. This is confirmed by the appellant's psychiatrist (S.A.B. 117). The appellant was arrested on this mischief charge while at her place of employment with her students present. Her case has received considerable media attention and publicity both at trial and on appeal. Her employment as a teacher is now in jeopardy as a consequence of these proceedings. These factors too are all relevant to the question of what is a fit sentence for her crime of mischief.

[69] For all these reasons, I am satisfied that deterrence and denunciation can be achieved in this case along with rehabilitation through the imposition of a conditional sentence of imprisonment. Therefore, I would allow the appeal and impose a one year conditional sentence of imprisonment on the following terms:

a) All compulsory conditional sentence conditions imposed by s.742.3(1), that is:

i) to keep the peace and be of good behaviour;
ii) to appear before the court when required to do so by the court;
iii) to report to a supervisor within 10 days and thereafter when required by the supervisor and in the manner directed by the supervisor;
iv) to remain within the jurisdiction of the court unless written permission to go outside this jurisdiction is obtained from the court or the supervisor; and
v) to notify the court or the supervisor in advance of any change of name or address and promptly notify the court or the supervisor of any change of employment or occupation;

b) The following optional conditional sentence terms permitted by s.742.3(2):

i) to abstain from the consumption of alcohol or other intoxicating substances and the consumption of drugs except in accordance with a medical prescription;
ii) to attend any alcohol treatment programs or counselling programs as may be directed or approved by the supervisor from time to time;
iii) to perform 240 hours of community service approved by the supervisor during the conditional sentence; and
iv) to remain at home and not to leave home except to the extent required to attend counselling, community service, church and medical or other health care appointments.

APPEAL HEARD on May 15, 2000

REASONS FILED at Edmonton, Alberta,
this 5th day of October, 2000

FRASER C.J.A.