SUPREME COURT OF YUKON

Citation: *R v Amin*, 2023 YKSC 75

Date: 20231215
S.C. No. 20-01515D
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

RUDRA PULASTYAKUMAR AMIN

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*. [This ban does not apply to Michelle Palardy.]

Before Chief Justice S.M. Duncan

Counsel for the Crown — Faiyaz Alibhai

Counsel for the Defence — Jennifer Budgell

This decision was delivered in the form of Oral Reasons on December 15, 2023. The Reasons have since been edited for publication without changing the substance.

REASONS FOR SENTENCE

[1] DUNCAN C.J. (Oral): Rudra Amin was found guilty by a jury on August 8, 2023, of four counts of sexual assault, one on each of Michelle Palardy and A.G., and two on S.G. I must now find the facts for the purpose of sentencing and impose a fit sentence

that is proportionate to the seriousness of the offences and the circumstances of Mr. Amin, including his degree of personal responsibility.

[2] Sentencing is an individualized process. There is no such thing as a uniform sentence for a particular crime. I will discuss briefly the facts of this case; then I will review the information about Mr. Amin's life and personal circumstances; next, I will discuss the impact of this offence on the victims; and finally I will review the law and apply it to the facts of this case.

[3] Much of this decision will be a discussion of the relevant legal principles, the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*" or "*Code*") provisions, and legal cases. This is necessary because the purpose of sentencing decisions is not only to speak to the offender and the complainants but also to speak to the lawyers and to other judges.

Circumstances of the offences

[4] Section 724(2) of the *Criminal Code* states that I must accept as proven all facts, express or implied, that are essential to the jury's verdict and then apply them when sentencing Mr. Amin. I must also find that any other relevant fact that was disclosed by the evidence at the trial to be proven. If the factual implications of the jury verdict are ambiguous, I must come to my own determination of the relevant facts.

[5] I make the following findings of material facts for the purposes of sentencing.

Count 2

[6] By September 2018, Michelle Palardy and Rudra Amin, who had been in an intimate relationship between September 2017 and March 2018 and then off and on again for a few months after that, were no longer in an intimate relationship.

[7] On September 28, 2018, Rudra Amin arrived at Michelle Palardy's home unannounced and said he wanted to talk to her. This was the second time he had appeared that day. The first time when he arrived she left the house in her car so she would not have to talk with him and drove around, telling him he could come back later. After she came home, he returned.

[8] She told him that they could talk on the front porch. He said he was thirsty. She told him to stay on the porch while she got him a glass of water, but he followed her into the house. He sat down on the couch. She sat down on the couch eventually. He began inching closer to the side of the couch where she was sitting. He sat next to her trying to kiss and touch her. She said, "I don't want to do this". He then got on top of her. He had one hand beside him, holding himself up, and the other hand on her breasts and then on her vagina. When he was touching her, she told him, "No, stop" and kept telling him, "No". Eventually, he pulled her pants down as well as his and began having sexual intercourse with her. She started to cry and told him to stop but he kept going. After about a minute and a half, he noticed she was crying and stopped. He told her he had not realized she was crying. He stood up, said, "Sorry", and then left.

Count 3

[9] A.G. and Rudra Amin met in late 2017 or early 2018 and dated casually for about six months- five or six dates in total until June 2018. A.G. left Whitehorse in June 2018 and said they decided at that time any romantic relationship was over and they would be "just friends".

[10] When she returned to Whitehorse in November 2018, Rudra Amin invited her to dinner at Boston Pizza. He said nothing about his relationship with Anjali Bali, now his

wife, which had started in October 2018. After dinner, he drove A.G. home. When they got to her home, Mr. Amin asked to come in. A.G. said at first it was not a good idea because her mom would be home soon but she eventually invited him in for tea. They smoked some marijuana. She then told him it was time for him to go.

[11] As she walked him to the front door, Mr. Amin pushed A.G.'s upper body against the wall of the stairs. He touched her breasts, grabbed her vagina, and stuck his tongue in her mouth. A.G. asked him to stop, saying she wanted to be just friends. She tried to push him away but he had pinned her against the wall. She said that her mom was coming home soon and she did not want her to see her like this. This was not true. He then stopped and left her house.

Count 6

[12] S.G. and her coworkers, including Mr. Amin, went bowling together in September 2017. At the end of the evening, S.G. offered Mr. Amin a ride home. He suggested they detour down Chadburn Lake Road before going to his home in Copper Ridge. They parked in a pullout on Chadburn Lake Road and talked for a while. He was in the passenger seat and she was in the driver's seat.

[13] Mr. Amin began to touch S.G. on her legs, her neck, and had his head in her face trying to kiss her. She told him, "no", "get off", "please don't touch me" and said she did not want to kiss him. She tried to back up and put her hands on him to get him off her. He stopped and she drove him home.

Count 7

[14] S.G. invited coworkers, including Mr. Amin, in October 2017 to a bonfire party while she was housesitting at her father's house located about 15 minutes outside of

town. At the end of the night, she told Mr. Amin he could stay over, not with her in her dad's bedroom but in another part of the house.

[15] At some point during the night, Mr. Amin came to her bedroom and asked if they could cuddle. At first she said, "No" but after he persisted, she finally agreed that he could sleep in the bed. She told him that nothing else was going to happen, that he could not touch her. He agreed he would not touch her.

[16] Mr. Amin got into bed and got close to S.G. He began touching her with his hands in her crotch area, her breasts, her inner thighs, hips, and moved her hand towards his erection. When Mr. Amin started touching S.G., she told him, "no", "stop touching me", "I don't want to touch you". She then got out of bed and said to him, "You need to leave right now". He left the bedroom.

[17] This incident occurred after S.G. had already said no to his sexual advances in the car on the Chadburn Lake Road and had told him that October night that he was not to touch her.

Evidence of the Offender

[18] Mr. Amin testified about each of the counts on which he was convicted. He claimed either that the events did not occur as described by the complainants or that the sexual contact was consensual. The verdicts on these counts show that his evidence was rejected by the jury.

Circumstances of the Offender

[19] Mr. Amin is 28 years old. He was 22 and 23 at the time of the offences. He was born in Gujarat, India, and came to Canada in December 2014 after completing high school. His parents and younger brother went to the United States and settled there.

[20] Initially, Mr. Amin was in Toronto pursuing post-secondary studies. He obtained a diploma. He moved to Whitehorse in April 2016 on the encouragement of his cousin who was here. Mr. Amin was accepted into the Yukon nominee program, which allowed him to be fast-tracked for permanent residence.

[21] In Whitehorse, he worked at several jobs: Sports Experts, Coast Mountain, Walmart, Staples, security guard, which overlapped with the Staples job, and Toronto-Dominion Bank where he was a customer service representative. He sent money to his family members who were still in India. He obtained his Canadian permanent resident status in 2021.

[22] Mr. Amin left Whitehorse in October 2022 to go to India to get married to Anjali Bali, whom he met in Whitehorse and who is now a Canadian citizen. They had become romantically involved in or around October 2018. They stayed in India until February 2023, and on their return to Canada decided to settle in Calgary. Mr. Amin worked as a delivery driver for Old Dutch Foods in Calgary until August 2023. His employment was then terminated as a result of his convictions in this case. He is now looking for work. His wife works as an executive assistant for GrainsConnect Canada. Her parents and cousin currently live with them in Calgary.

[23] Mr. Amin has been undergoing counselling. Initially, he became connected with a counsellor through his lawyer for stress. The original charges in this matter were laid in 2020 and the first trial of this matter ended in a mistrial in October 2022, because of impermissible comments made by the Crown in their closing address to the jury. These convictions occurred as a result of a second jury trial that began on July 31, 2023. As a result of his counselling at the Calgary Counselling Centre, Mr. Amin was referred to

courses offered by Recovery College operated by the Canadian Mental Health Association. He completed a two-hour course over Zoom called “Intro to Boundaries” on October 31, 2023, and repeated it as a refresher on November 22, 2023. He is registered to take the follow-up course, “Building Better Boundaries”, from December 14, 2023 to January 4, 2024, consisting of four two-hour Zoom sessions.

[24] Mr. Amin is also seeing a counsellor on an individual basis approximately once a month to discuss issues such as his past relationships, respect in relationships, and appropriate and inappropriate behaviours, to assist him in understanding what gave rise to these charges, and how to develop and maintain healthy relationships in future.

[25] Mr. Amin submitted 10 letters of support. They were all from family members and friends, mainly from Whitehorse, Calgary, and Ontario, and they included a letter from his wife. Several of the letters were from coworkers who were also friends. Some had known him for many years, as they were family friends, and others had met him within the last several years. The letters contained similar information: he was a caring, kind, compassionate, honest person; a dependable person who often helped out others; and dedicated to his family and friends. He was described as responsible, hard-working, reliable, and respectful to others. The overall message that emerged from the support letters is that he is a man of good character. These offences were extremely surprising to all of his supporters and were described as inconsistent with his character.

Victim Impact

[26] Two of the victims filed and read victim impact statements describing the effect the offences had on their lives.

[27] S.G. noted she was 18 years old in 2017. She suffered anxiety because of the repressed trauma resulting from the assaults when she went away to school in 2018. She had nightmares about the assaults. The anti-depressants and anxiety medications prescribed for her made the nightmares more vivid. She became sleep-deprived and her schoolwork suffered. She failed one course and withdrew from another, which put her behind in her studies. She began drinking more alcohol because of the pain and trauma. She was able eventually to get herself off the medications and begin therapy. She said the offences made her feel scared for her safety, question her self-worth, and question whom she could trust.

[28] Michelle Palardy described how the assault left her in a constant state of anxiety and depression. She was diagnosed with post-traumatic stress disorder, in addition to anxiety, depression, and suicidal thoughts. She was prescribed medication and therapy. She was unable to work and had to rely on Unemployment Insurance which caused financial stress.

[29] A.G. did not file a victim impact statement.

[30] At the sentencing hearing, defence counsel asked that I disregard certain parts of both victim impact statements. The Crown did not object. In S.G.'s statement the objections were:

- the statements in para. 2 referring to things she was not allowed to say, were speculative;
- in para. 4, S.G. referred to three assaults — Mr. Amin was convicted of two not three;

- in para. 5, she referred to details of an offence of which he was not convicted;
- in para. 3, on page 2 of the statement, she referred to the difficulty of court proceedings and spoke how hearing him lie at trial made her feel.

[31] I agree with defence counsel that these were not appropriate comments for the victim impact statement, and I have disregarded them.

[32] In Ms. Palardy's statement she spoke about the trial process causing her stress and stated that Mr. Amin deserved to pay and suffer for what he did. She also attributed rumours in the community about her to Mr. Amin. Defence counsel's objection was that I cannot make factual findings about the rumours in the context of sentencing.

[33] I agree with defence counsel's concerns in this case as well, and I have disregarded all parts of Ms. Palardy's statement to which defence counsel has objected.

Principles of Sentencing

[34] The *Criminal Code* sets out the purposes and principles of sentencing that must be applied by sentencing judges. The fundamental purpose of sentencing, as set out in s. 718 of the *Code*, is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. A sentencing judge is required by the law to impose a just sanction that meets one or more of the following six objectives:

- denouncing unlawful conduct and the harm to victims or community caused by that unlawful conduct;
- deterring the offender and other persons from committing offences;
- separating the offender from society where necessary;
- assisting in rehabilitating offenders;

- providing reparations for harm done to victims or the community; and
- promoting a sense of responsibility in offenders and acknowledging the harm done to victims or the community.

[35] The judge must also consider any aggravating or mitigating circumstances as well as objective and subjective factors related to the offender's personal circumstances.

[36] No one sentencing objective is more important than the others and it is up to the judge in each case to determine which objectives merit the greatest weight in the circumstances of each case.

[37] As noted by the Supreme Court of Canada in the decision of *R v Parranto*, 2021 SCC 46 ("*Parranto*"):

> [10] The goal in every case is a fair, fit and principled sanction. Proportionality is the organizing principle in reaching this goal. …

[38] Proportionality means that courts must work hard to ensure that the sentence imposed is proportionate to the gravity or seriousness of the offence and the degree of responsibility of the offender. "Proportionality is 'closely tied to the objective of denunciation', promotes justice for victims, and seeks to ensure public confidence in the justice system." (*R v Blagdon*, 2013 NSPC 93 at para. 10). Where consecutive sentences are imposed, proportionality requires that the combined sentence should not be unduly long or harsh.

[39] The sentence should also have parity — meaning similarity — to other similar offences, offenders, and circumstances.

[40] The judge must also consider the principle of restraint. Section 718(c) of the *Criminal Code* states that separation of the offender from society is only to be ordered "where necessary". Restraint in sentencing means an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. All available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered for all offenders. This is an important consideration here because defence counsel has asked that I impose a conditional sentence of imprisonment that Mr. Amin can serve in the community.

[41] A fit sentence is always defined by the totality of circumstances, and again, this is relevant here because of the multiple counts with different victims. If I find after determining sentences for each of the counts, that the global sentence is not fit, then on the principle of totality, it may be reduced.

[42] As one judge described the process of sentencing in *R v Gabriel*, 2017 NSSC 90, sentencing is a synthesizing, more than a balancing.

> [92] … It is not a matter of weighing one factor favouring a lighter sentence against another that favours a harsher one. It is a matter of bringing together a number of considerations some of which may compliment [as written] each other, some of which may militate toward different outcomes and some of which may help to inform and provide context for the others.

Maximum Penalty

[43] The maximum penalty for the offence of sexual assault when proceeded by way of indictment, as the offences were in this case, is 10 years' imprisonment.

Positions of Crown and Defence

[44] The Crown seeks a global sentence of four to five years time in custody. The Crown says this is appropriate because of the four assaults involving three women on

four occasions within a 14-month period. They also say it is appropriate because of Mr. Amin's imposition of his will on the women when it was clear they did not want to interact with him in that way, his disregard for their feelings, the location of three of four assaults in the victims' homes where they are meant to feel safe, and the violation of the victims' bodily and psychological integrity through his actions. The victim impact statements detail the serious effects of the offences on two of the victims. Denunciation and deterrence are the primary sentencing objectives to be emphasized here, according to the Crown.

[45] The Crown argues that while the reference letters show Mr. Amin has family and friends willing to support and help him, thus contributing to his prospects of rehabilitation, little weight should be given to the content that Mr. Amin is always honest, truthful, caring, and that these offences are completely out of character. His actions as described in the evidence at trial contradict the content of these letters, according to the Crown. The Crown acknowledges Mr. Amin's recent counselling but says it shows minimal steps taken to address the issues that caused the problems leading to the offences.

[46] More specifically, the Crown seeks three years for the assault against Michelle Palardy, six months consecutive for the assault against A.G., six months consecutive for the Chadburn Lake Road assault against S.G., and one year consecutive for the assault against S.G. in her home, for a total of five years. Applying the principle of totality, the Crown submits it would also be reasonable to impose a sentence of four years.

[47] The Crown seeks a firearms prohibition order under s. 109 of the *Code* for 10 years, a DNA order, and a 20-year *Sex Offender Information Registration Act* ("*SOIRA*") order.

[48] The defence seeks a sentence of two years less a day to be served in the community. Defence counsel focuses on the rehabilitation objective of sentencing. She notes that this is Mr. Amin's first criminal offence; there were no further incidents after 2018; he has attended counselling, both on an individual basis and through courses, to help him with respectful and healthy relationships; and he has complied with all release conditions since June 2020.

[49] Defence counsel also references the many support letters which indicate that these offences were out of character, notes that the offences spanned a relatively short period in his life, and that he has otherwise been a loving, respectful, supportive, hard-working friend, family member, and coworker. She observes he came to Whitehorse alone without supports and he now has an extensive support network.

[50] Defence counsel argues that the collateral immigration consequences of these convictions may be taken into account as part of the offender's personal circumstances. As a permanent resident and not a citizen, Mr. Amin will be deemed inadmissible to Canada on the grounds of serious criminality because he has been convicted of an offence with a maximum sentence of 10 years or more. He will be subject to an order removing him from Canada as a result. The *Immigration and Refugee Protection Act*, SC 2001, c 27 (the "*IRPA*") further provides that if Mr. Amin receives a term of imprisonment for six months or more, he loses his right to appeal that removal order to

the Immigration Appeal Division on the basis of humanitarian and compassionate grounds.

[51] Defence counsel seeks a conditional sentence order to be served in the community not just because of the collateral immigration consequences but because she says it is an appropriate and proportionate sentence, given the gravity of the offences. While a conditional sentence order for convictions on multiple sexual assaults is rare and outside the range of sentence in similar cases, defence counsel argues that ranges and starting points are guidelines, not hard and fast rules or straitjackets.

[52] Here, the defence says the statutory preconditions for a conditional sentence order have been met. Mr. Amin should not receive a sentence of more than two years less a day in all the circumstances, there is no minimum penalty, and he poses no risk to public safety as evidenced by the absence of any breaches of conditions over his three years on release into the community.

[53] Defence counsel argues that a conditional sentence order can achieve the sentencing objectives of denunciation and deterrence. The stigma, shame, and impact on liberty of house arrest, for example, cannot be underestimated. It is also consistent with the principle of restraint, a relevant principle in the case of a first-time offender.

[54] Defence provides several examples from the case law where conditional sentence orders were imposed in sexual assault conviction matters to show that it is not unusual or unprecedented.

The Appropriate Sentence

[55] As has been stated by many other judges, the main question in sentencing is: what should **this** offender receive for **these** offences, committed in the circumstances in which they were committed?

[56] The primary sentencing objective in sexual assault cases is denunciation and deterrence. Denunciation acts as a condemnation of certain conduct by punishing people who disobey or disregard society's basic values. Deterrence is important not only to deter the offender (specific deterrence) but also to deter others who may commit such offences (general deterrence). These objectives are emphasized in sexual assault cases because of the seriousness of the offence of sexual assault and the higher degree of responsibility associated with committing this kind of offence.

[57] Rehabilitation is also a relevant sentencing objective in sexual assault offences.

[58] Restraint must be considered, particularly as Mr. Amin is a first-time offender.

[59] An appropriate sentence also requires the application of the parity principle. This means that within reason, similar offenders who commit similar offences should receive similar sentences. Although sentencing is an inherently individualized and subjective process, reflecting the unique circumstances of the specific offence and offender, there are limits to the sentencing judge's discretion. That discretion may be fettered in certain circumstances by case law that sets out the general range of sentences or starting points for particular offences. By situating a case within the range of sentences for that same offence, some rationality, fairness, and even consistency can be achieved (see *R v Laing*, 2021 NSPC 14 at para. 66). This advances the principle of parity. However, a

judge can order a sentence that falls outside of the range as long as it is in accordance with the principles and objectives of sentencing. Parity is secondary to proportionality.

[60] Certain principles have developed in the case law to apply to sentencing ranges and starting points. They are set out in *Parranto* as follows:

- ranges and starting points are not binding on judges in theory or in practice;
- they are guidelines, not hard and fast rules, and it is not an error in principle to depart from or fail to refer to a range of sentence or starting point;
- sentencing judges have discretion to individualize sentencing both in method and outcome and different methods may be required to account properly for relevant systemic and background factors; and
- the focus should be on whether sentence is fit and whether the judge applied the right principles, not whether the judge chose the right starting point or category.

[61] Put another way, sentencing ranges are tools, “not judicial straitjackets, and sentencing is an individual process that takes account of the unique circumstances of the offence and the offender, and how the objectives of sentencing can best be achieved in a given case” (*R v Choi*, 2022 BCCA 90 at para. 3).

[62] Ranges reflect the gravity of the offence and if there is to be a departure from the range, there must be reasons why a departure can still be a proportionate and fit sentence. Exceptional circumstances are not necessary to justify a departure from the range, but there must be enough personal or other circumstances in order to do so.

[63] I will address each of the counts separately, reviewing the ranges for each where they exist, and determining where the circumstances of this case fit. I will also address the aggravating and mitigating factors for each count.

[64] In the Yukon, a sentencing range has been described as a continuum within which cases may be placed depending on their facts and their relationship to the principles of sentencing. At one end of the continuum lie the truly serious offences with particularly egregious circumstances. At the other extreme are those offences where there are significant mitigating circumstances. In the middle would be the more typical cases where there are a mixture of aggravating and mitigating circumstances (see *R v White*, 2008 YKSC 34 ("*White*")). A range does not preclude a higher sentence if warranted by denunciation or deterrence or the gravity of the offence; nor does it preclude a lower sentence if personal circumstances warrant it.

Count 2

[65] In *White*, Gower J. comprehensively reviewed sexual assault case law from the Yukon and the Northwest Territories. He concluded from that review that the sentencing range for non-consensual sexual intercourse with a sleeping or unconscious victim is 12 to 30 months. This was approved by the Court of Appeal of Yukon in *R v Rosenthal*, 2015 YKCA 1 ("*Rosenthal*"), a case decided in January 2015.

[66] I now turn to the facts and sentencing dispositions of similar Yukon cases where there was a conviction for full sexual intercourse. In *White*, the offender brought the victim, who was drunk, back to his dormitory room with her agreement. They talked on the bed and the victim then went to sleep on one side of the bed, because she had to get up early for school. During the night, she woke up to find the offender on top of her.

He had removed her pants and his pants and had forced sexual intercourse with her over her objections. After 10 minutes, he stopped and she escaped to her aunt's room in the same dormitory. She had a quarter-inch perineal abrasion. The offender had several serious *Gladue* factors, a criminal record including aggravated assault, and an addiction to cocaine and alcohol. He received a psychological assessment of a moderate risk of sexual offence re-offending and a high risk of violent re-offending. He showed no remorse. He had some support letters from people in the community for whom he had volunteered and from his landlord. The Court imposed a sentence of 26 months' imprisonment.

[67] In *Rosenthal*, the Court of Appeal of Yukon granted an appeal from a suspended sentence and probation for a conviction of sexual assault where the offender digitally penetrated the victim's vagina while she was sleeping. She had asked to share his bed after a night of drinking because it was too late for her to go home. She told the offender she was not interested in having sex. The Court of Appeal said the sentence was a significant departure from the range, based mainly on cases outside the Yukon. The Court of Appeal said the offence was a serious invasive sexual assault. There were no factors that justified going outside the range and a suspended sentence did not serve the principles of denunciation and deterrence. This was especially important in the Yukon where there was a prevalence of assaults on sleeping or unconscious victims. The Court of Appeal varied the sentence to 14 months' imprisonment.

[68] In *R v BAL*, 2022 YKTC 11 ("*BAL*"), a Territorial Court of Yukon decision from March 2022, the offender pled guilty to one count of sexual assault that was proceeded with by way of indictment. The court adopted and acknowledged the range set out in

White of 12 to 30 months. The offender was a family friend of the victim and while staying at the victim's house engaged in non-consensual penetrative sexual intercourse with her while she was sleeping. The impact on her was profound: depression, anxiety, feelings of being unsafe. It affected her employment. The offender was Indigenous and had significant *Gladue* factors, no criminal record, and good insight into the harm he had caused. He was engaged in counselling, had support, and a stable work history. He pled guilty and showed remorse. The court imposed a custodial sentence of 15 months. The court considered the imposition of a conditional sentence to be served in the community but decided the circumstances of the offence made it inappropriate.

[69] Here, in Count 2, Mr. Amin committed the offence of sexual assault against Michelle Palardy of penetrative sexual intercourse over her objections and while she was crying. This was a serious invasive sexual assault. Michelle Palardy was a former intimate partner and the effects of the offence on her caused her depression, anxiety, employment loss, and financial stress. She required medication and therapy, and had trust and self-esteem issues. Both her bodily integrity and psychological integrity were detrimentally affected. The assault occurred in her home, where she is meant to feel safe. Denunciation and deterrence principles are paramount.

[70] On the other hand, Mr. Amin is a first offender. He has been compliant with all release conditions imposed on him. Until recently, when his employment was terminated because of the convictions in this case, he held steady, stable employment. He has the support of family and friends who believe these offences are out of character. He has recently commenced counselling to become educated on boundaries and respect in healthy relationships, and to examine past relationships.

[71] He will also be subject to the immigration consequences of removal from Canada and, depending on whether there is a custodial sentence of more than six months, a loss of the ability to appeal the removal order on humanitarian and compassionate grounds to the Immigration Appeal Division. The Supreme Court of Canada has held that collateral immigration consequences of an offence may be taken into account as personal circumstances of the offender (not aggravating or mitigating circumstances as they are related to the gravity of the offence or the degree of responsibility of the offender).

[72] Further explanation of the use of collateral consequences was provided in the case of *R v Hoggard*, 2022 ONSC 5919 at paras. 48-49, where the court said that they are relevant because they increase the impact of the sentence. Further, in *R v Ali*, 2022 ONCA 736 ("*Ali*") at para. 23, the court said "collateral immigration consequences are to be considered in sentencing, they cannot reduce the sentence below what otherwise would be a fit sentence".

[73] Taking into account all of the circumstances and factors, I do not find there are any factors that would take this case out of the rather large range identified by Gower J. of 12 to 30 months. While the collateral immigration consequences are real and I have considered them, they cannot justify reducing the sentence outside of the range. The support letters that state that these offences were out of character for Mr. Amin, while sincere, do not counteract the facts on the counts on which he was found guilty- four assaults on three women within 14 months. It is possible for a person to show positive character traits to friends and family yet still be capable of committing offences such as this in other contexts.

[74] I assess the circumstances of this offence to place the matter on the middle of the continuum and I impose a sentence of 20 months for Count 2. Distinguishing factors from the *White* case, where 26 months was imposed, include: in *White*, there was injury to the victim's perineal area, the sexual intercourse lasted about 10 minutes, and the offender had a significant criminal record and was assessed at a moderate and high risk of reoffending.

Count 3

[75] This offence has some similarities to what occurred in the case of *R v Holland*, 2022 ONSC 1540 ("*Holland*"), where the victim, who was intoxicated, was invited into the VIP area of a nightclub that was being promoted by the offender. He brought her to an isolated area, grabbed her, began to kiss her neck, pulled down her pants, and penetrated her vagina from behind with either his penis or finger. The victim immediately said "stop" or "no". The incident lasted 10 to 15 seconds. In that case, the sentence was eight months to be served conditionally. The principal mitigating factor applicable to the offender was the absence of any criminal record. He also enjoyed the support of his family and suffered collateral consequences of being no longer able to work as a nightclub promoter.

[76] Here, in Count 3, A.G.'s upper body was pinned against the wall by Mr. Amin while he groped her breasts and her vagina and put his tongue in her mouth. This was after she had made it clear to him that she wanted to be just friends. The offence also occurred in A.G.'s home, a place where she should be entitled to feel safe.

[77] The same mitigating factors and collateral considerations apply to Mr. Amin as I have explained and described for Count 2.

[78] In the circumstances, including the fact that there was no victim impact statement from A.G., I assess the fit sentence for Count 3 at 60 days in custody.

Count 6

[79] I was not provided with any cases similar to the first offence against S.G. while they were in her car on Chadburn Lake Road. I located a case with some similarities from the Yukon – *R v Abdullahi*, 2010 YKTC 76 ("*Abdullahi*"), in which a taxi driver picked up the victim as she was walking home. The taxi driver turned away from the direction of her home. He then grabbed the victim's hand and put it on his upper thigh and groin area. She pulled her hand away but he again grabbed it and put it on his exposed penis. She removed her hand and asked him to drive her to a friend's residence, which he did. There was no victim impact statement. The Crown proceeded summarily. The offender was 48 years old, had no criminal record, was married, had a supportive community of friends, was classified as a low risk of reoffending, and had suffered collateral consequences of losing his ability to work as a taxi driver, and as well suffered some notoriety due to his status as a member of a visible minority. The court imposed a 90-day conditional sentence.

[80] In this case, S.G.'s age of 18, the impact of the unwanted touching on her that she described in her statement, are aggravating factors. They are distinguishing facts from the *Abdullahi* decision, where there was no victim impact statement. The mitigating factors in this count are the same as I have described.

[81] The appropriate sentence for this count is 90 days in custody.

Count 7

[82] There is a wide range of sentences in cases with similar facts to this count. In *R v Phillippo*, 2022 ONCJ 499 ("*Phillippo*"), the victim and the offender had returned to her room for some wine after a work Christmas party. They were talking on the bed and the victim fell asleep. She woke up to him fondling her left nipple. She turned her body and he withdrew his hand. Shortly after this, she felt his hand go up her T-shirt and down her shorts. He played with the elastic on her underwear, touched her on her hip towards her buttocks, and along her bikini line. She woke up, said she wanted to go to sleep, and he left. She began doubting herself and her self-worth, suffered anxiety and depression and panic attacks, and felt hopeless and sad. She did not feel safe while at home and she found it more difficult to begin new friendships. The offender was 40, had no criminal record, had not breached any conditions, was educated, lost his job because of the charges, and showed remorse. The court imposed a sentence of 90 days and allowed him to serve it in the community in addition to 12 months' probation.

[83] By contrast, in *R v Cacdac*, 2022 ONCJ 492 ("*Cacdac*"), the offender and the victim were acquaintances through social media and were in the same bed because the victim had pre-arranged to sleep there when coming into town to visit friends. She made it clear that she did not want any sexual activity. While in bed, the offender grabbed and kissed her, put his tongue in her mouth, touched her breasts and buttocks, digitally penetrated her, and put her hand on his erect penis. He did this several times throughout the night. The Crown proceeded summarily. The offender had no criminal record, pled guilty, showed remorse, was attending counselling, was employed, and

showed positive prospects for rehabilitation. The court imposed a sentence of 16 months to be served in the community.

[84] Similar to Count 6, the aggravating factors here in Count 7 are the impacts of the offence on S.G., as well as her age of 18 at the time of the offence. The mitigating factors are the same as I have described above.

[85] I find the appropriate sentence for Count 7 is four months in custody.

Principle of Totality

[86] I have assessed the global sentence at two years and five months. Consecutive sentences must be imposed because the convictions are unrelated to one another and are not part of the same transaction. This is a factual assessment. Here, there is no question that the incidents giving rise to the convictions are separate from one another.

[87] Where sentences are imposed consecutively, the principle of totality must be considered. The overall sentence must not be unduly long or harsh. The judge must ensure the cumulative sentence rendered does not exceed the overall culpability of the offender. Where the total sentence is excessive, the individual sentences must be adjusted below the appropriate amount for each offence in isolation so that the total sentence is proper.

[88] Taking into account the totality principle, I consider the global sentence should be reduced by three months for a total global sentence of two years and two months. This sentence is proportionate to the gravity of the offences and the degree of responsibility of the offender.

Conditional Sentence Order

[89] Defence counsel spent significant time arguing that a conditional sentence order is appropriate in this case. A conditional sentence order is generally considered to be more effective than incarceration at achieving rehabilitation, reparations to the victim and the community, and the promotion of a sense of responsibility in the offender.

[90] The requirements for a conditional sentence are: first, no minimum penalty; second, the offender does not pose a danger to the safety of the public; and third, the sentence is less than two years.

[91] The global sentence I have assessed renders Mr. Amin ineligible for a conditional sentence because it exceeds two years. However, even if it did not exceed two years, I do not find that a conditional sentence to be served in the community would be appropriate in this case.

[92] As noted by the Territorial Court of Yukon in *R v RJN*, 2016 YKTC 55 ("*RJN*"), conditional sentence orders in sexual assault cases are rare. This is in part because of the emphasis on the principle of denunciation and deterrence, but also because of other factors, as is apparent from review of the cases provided by defence.

[93] Courts have accepted that a conditional sentence order can fulfil the objectives of denunciation and deterrence. This was explained thoroughly in *R v Proulx*, 2000 SCC 5, and has been followed in many cases, including in the Yukon. It is recognized that strict conditions of house arrest can be punitive and, in some circumstances, can be more so than incarceration. For example, the shame and the loss of esteem felt by an offender in a small rural community where everyone knows of his or her house arrest and the circumstances leading to it may be a significant psychological punishment.

[94] The principles of denunciation and deterrence are not adequately addressed through a conditional sentence order in this case.

[95] Mr. Amin has relocated to Calgary, a large city centre where he is relatively anonymous, unlike a small rural community in the Yukon. The stigma of house arrest would not be felt by him in Calgary in the same way as it would if he were in a small community where people knew his situation.

[96] There are other distinguishing factors from the cases provided by defence where a conditional sentence order was made. First, here, there are convictions on four counts of sexual assault on three women. In almost all the cases provided by defence counsel where a conditional sentence order was made, there was one count or, at most, two. For example, see: *R v LFW*, 2000 SCC 6 – one count indecent assault and one count gross indecency, *Ali*, which was aggravated assault and not sexual assault; and *R v Morgan*, 2021 ONCJ 100 ("*Morgan*"); *Holland*; *R v Dickson*, 2023 ONSC 2776 ("*Dickson*"); *Phillippo*; *Cacdac;* and *R v Browne*, 2021 ONSC 6097, all of which had a conviction on only one count of sexual assault.

[97] A further distinguishing factor between this case and the cases provided by defence is that the offender in many of the other cases had pled guilty and showed remorse, had apologized, and accepted responsibility. For example: *Ali*, *RJN*, *Morgan*, *Dickson*, *Phillippo*, and *Cacdac*. While the fact that Mr. Amin has not done so does not add to a sentence and, of course, he has the constitutional right to a trial, it is a distinguishing factor between his case and the cases where conditional sentence orders were ordered.

[98] In some of the other cases the court commented on how the offender showed insight into the problems that led to the offences — for example, *Morgan*. This has not occurred here.

[99] In one case, *Dickson*, the victim stated that she preferred that the offender not to go to jail.

[100] I accept that Mr. Amin is likely not a danger to the community and has some decent prospects for rehabilitation, assuming he continues with counselling and attempts to develop insight into the issues that led to these offences. However, I accept the comments made by the court in *BAL*, where the judge wrote at para. 38:

> … The gravamen of the index offence must result in a proportionate sentence in order to maintain the public's confidence in the administration of justice. While B.A.L., in the abstract, might be considered a good candidate for a conditional sentence, in my view it is the offence which would make this an inappropriate sentence …

— and in that case, I note that a conditional sentence order was not a lawful option.

[101] Here, one of the aggravating factors is the existence of multiple assaults on multiple victims over a period of 14 months. If there had been convictions on one count of sexual assault, or even two, a conditional sentence order may have been appropriate. It is the existence of convictions on four counts with three women in a defined period that increases the seriousness of these offences and calls for a greater emphasis on denunciation and deterrence.

Ancillary Orders

[102] I will grant the DNA order, as sexual assault is a primary designated offence so it is mandatory under s. 487.015, as well as a 10-year firearms prohibition order under s. 109.

[103] The 20-year order requested under the *SOIRA* requested by the Crown requires some analysis, due to the recent changes in the *Criminal Code* introduced by Bill S-12 (*An Act to amend the Criminal Code, the Sex Offender Information Registration Act and the International Transfer of Offenders Act*, SC 2023, c 28), and the defence submission that this order not be made.

[104] Before the amendments, mandatory registration under *SOIRA* was required for a conviction of sexual assault. Registration compels the offender to report to a police station and to supply extensive personal information for entry on the national sex offender registry. *SOIRA* also imposes ongoing reporting obligations which are extensive and invasive, including updating personal information, disclosing plans for any absence from the offender's residence lasting one week or more, providing employment and volunteering information, and divulging any changes to residential and employment addresses. An offender must report annually to the police and remain subject to random police checks. Failure to comply with any of the reporting requirements carries the possibility of prosecution and a maximum penalty of two years in jail, a fine, or both: s. 490.031(1) of the *Criminal Code*.

[105] As a result of the Supreme Court of Canada's finding in *R v Ndhlovu*, 2022 SCC 38, that this section was unconstitutional, the mandatory registration section was struck down. The Supreme Court of Canada held that the impact of a *SOIRA* order on an offender's liberty was serious and registration had a serious impact on freedom of movement and of fundamental choices of people not at increased risk of reoffending. The Supreme Court of Canada found that the effect of registration was not minimally intrusive and instead this court said:

> [135] … To reiterate, *SOIRA*'s reporting requirements are not routine: the scope of the personal information registered, the frequency at which offenders are required to update their information and, above all, the threat of imprisonment make the conditions onerous. …

[106] Mandatory registration is now restricted to persons convicted of serious offences against minors and repeat offenders. In all other cases, under s. 490.012(3), while there is a presumption of registration, the courts can now exercise discretion not to order registration where the person establishes: first, there would be no connection between making the order and the purpose of *SOIRA*, which is helping police services prevent or investigate crimes of a sexual nature; or second, the impact of the order on the person, including on their privacy and liberty, would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature.

[107] To determine whether a *SOIRA* order should be made, the court must consider all relevant factors, including the following:

- the nature and seriousness of the designated offence;
- the victim's age and other personal characteristics;
- the nature and circumstances of the relationship between the person and the victim;
- the personal characteristics and circumstances of the person;
- the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing a crime; and
- the opinions of experts who have examined the person.

[108] I have already concluded that the offences here are serious. As the Supreme Court of Canada noted in *R v Friesen*, 2020 SCC 9 at para. 118:

> … our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened. …

[109] In this case, all of the victims were young, and S.G. was only 18 at the time of the assaults on her. She and Michelle Palardy suffered mentally, physically, and financially in Ms. Palardy's case, from the negative impacts of the offences as described in their victim impact statements. The victims were known to Mr. Amin, not strangers, and his relationship with each of them varied: coworker, casual dating, and intimate longer-term partner.

[110] The absence of any criminal record for Mr. Amin, the absence of any further offences for five years, his compliance with release conditions, his relatively young age, his employability, his family and friend support system, and his recent commencement of counselling to address boundaries and relationship issues are all factors that suggest he is at low risk to reoffend. Where an offender is not at an increased risk of committing sexual offences in future, there is less connection between making an order and the purposes of *SOIRA*, which is, as I said, to help police services prevent and investigate crimes of a sexual nature.

[111] I recognize that I have no risk assessment of any kind in front of me and no expert evidence was tendered. Despite the counselling Mr. Amin is undergoing, it is not clear yet whether he has insight into his behaviour. He has not expressed any remorse.

[112] However, on balance, I determine that there is an insufficient connection between a *SOIRA* order in this case and the purpose of the legislation.

[113] Given this finding on the no connection factor, it is not necessary for me to consider gross disproportionality.

[114] I decline to issue an order under *SOIRA*.

[DISCUSSIONS]

[115] Mr. Amin, would you please stand?

- On Count 2, I impose a sentence of 20 months.
- On Count 3, I impose a sentence of two months consecutive.
- On Count 6, I impose a sentence of three months consecutive.
- On Count 7, I impose a sentence of four months consecutive.

[116] Applying the principle of totality, the sentence is reduced by three months. The global sentence is two years and two months to be served in custody.

[117] There will also be a DNA order and a 10-year firearms prohibition order.

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DUNCAN C.J.