R. v. Bremner

Regina v. Bremner

146 C.C.C. (3d) 59

British Columbia Court of Appeal
Court File No. CA026498 Vancouver Registry
Southin, Huddart and Proudfoot JJ.A.

May 5, 2000;
JUNE 2, 2000

Sentence — Procedure — Victim impact statements — Fairness of sentencing proceedings adversely affected by victim impact statements which inappropriately urged particular sentencing options, used psychiatric diagnostic terms in relation to accused and sought personal revenge — Cr. Code, s. 722.

Sentence — Sexual offences — Historical offences — Accused convicted of four counts of indecent assault alleged to have occurred approximately 30 years previously — Fairness of sentencing proceedings adversely affected by Crown's submissions characterizing accused as paedophile, given trial judge's previous finding that accused was not paedophile — Fairness of sentencing proceedings also adversely affected by victim impact statements which inappropriately urged particular sentencing options, used psychiatric diagnostic terms in relation to accused and sought personal revenge — Lack of remorse or apology not precluding conditional sentence — In view of passage of time since offences, finding that accused not a paedophile, accused's exemplary life since offences, and community support for accused, conditional sentence appropriate — Eighteen-month sentence of incarceration varied to conditional sentence — Cr. Code, s. 722.

The accused was convicted of four counts of indecent assault. The offences occurred between 1969 and 1972 when the accused was a sea cadet officer. The complainants were sea cadets between the ages of 13 and 16. The accused, who was between 23 and 26 years of age at the time of the offences, was now 54 years of age, ***[page60]*** and married with two grown sons. The accused had a stable employment history, a record of community service and no other criminal record. The accused had the support of his family and friends, and there was no evidence of any similar type of conduct having occurred since these offences. A report from a psychologist indicated that the accused was a low risk for any sexual recidivism. The trial judge made a finding of fact that the accused was not a paedophile. The trial judge imposed four concurrent sentences resulting in a total sentence of 18 months' incarceration.

On appeal from the accused from the sentence imposed, held, the appeal should be allowed and the sentence of incarceration varied to a conditional sentence.

Per Proudfoot J.A., Huddart J.A. concurring: The victim impact statements, and one in particular, went well beyond what can be brought to the court's attention in sentencing proceedings. The statements contained inappropriate material, particularly with regard to recommendations for sentence and the use of psychiatric diagnostic terms. Sentencing proceedings are between the convicted person and the state. A victim is not permitted to have a role in suggesting the length or kind of sentence to be imposed, and the Criminal Code provisions with respect to victim impact statements are not intended to erode the usual rules of expert evidence. Furthermore, some of the statements also inappropriately sought to achieve personal revenge. The fairness of the sentencing proceedings was adversely affected by these statements. As well, the trial judge should have intervened when Crown counsel submitted that harsh sentences were required to deter paedophiles. In light of the trial judge's finding in his reasons for conviction that the accused was not a paedophile, this reference was inappropriate and should not have been permitted.

The first three criteria for a conditional sentence were satisfied, in that the offences were not punishable by a minimum term of imprisonment, a term of imprisonmentof less than two years was imposed, and the safety of the community would not be endangered by a conditional sentence. This case turned on the fourth condition, of whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the Criminal Code. The absence of an apology from the accused was not determinative that a custodial sentence was required. There were a significant number of factors that contributed to a finding that exceptional circumstances existed, such that conventional general deterrence need not be given priority over other considerations in the imposition of sentence. These factors included the involvement with the media since the matter first arose and the stigma and shame attached, which would be a powerful deterrent to people in the general community. The trial judge failed to appreciate that a conditional sentence of imprisonment can satisfy general deterrence. While the fact that the accused was in a position of trust was an aggravating factor, this did not preclude a conditional sentence, which was the proportionate response in this case.

Per Southin J.A.: The reasons of Proudfoot J.A. were agreed with. Sentencing in historic sexual assault cases is disturbing and requires the court to address many considerations which are often conflicting. There was no compelling answer in this case to the questions of why the complainants had chosen to come forward now or of what social purpose had been served by bringing obloquy on the appellant whose ***[page61]*** life had been exemplary for nearly 30 years. On the continuum of sexual crimes, these offences were not among the most serious. In matters of sentencing, the crime must be appraised objectively. The subjective impact on the particular victim is essentially irrelevant, as the doctrine of the eggshell personality is not a proper subject of investigation in sentencing proceedings for a criminal offence.

Cases referred to

By Proudfoot J.A.

R. v. Coelho (1995), 41 C.R. (4th) 324, 27 W.C.B. (2d) 397 -- refd to

R. v. Friginette (1994), 87 W.A.C. 153, 53 B.C.A.C. 153, 26 W.C.B. (2d) 89 -- refd to

R. v. Gabriel (1999), 137 C.C.C. (3d) 1, 26 C.R. (5th) 364, 43 W.C.B. (2d) 147 -- refd to

R. v. Gallacher (1991), 12 W.C.B. (2d) 632 -- refd to

R. v. M. (D.E.S.) (1993), 80 C.C.C. (3d) 371, 21 C.R. (4th) 55, 40 W.A.C. 305, 19 W.C.B. (2d) 267 -- refd to

R. v. Proulx (2000), 140 C.C.C. (3d) 449, 182 D.L.R. (4th) 1, [2000] 1 S.C.R. 61, 30 C.R. (5th) 1, 49 M.V.R. (3d) 163, [2000] 4 W.W.R. 21, 212 W.A.C. 161, 142 Man. R. (2d) 161, 249 N.R. 201, 44 W.C.B. (2d) 479, 2000 SCC 5 -- refd to

R. v. Shore (1999), 200 W.A.C. 140, 42 W.C.B. (2d) 99, 1999 BCCA 227 -- refd to

R. v. Swietlinski (1994), 92 C.C.C. (3d) 449, 119 D.L.R. (4th) 309, [1994] 3 S.C.R. 481, 24 C.R.R. (2d) 71, 33 C.R. (4th) 295, 75 O.A.C. 161, 172 N.R. 321, 24 W.C.B. (2d) 589 -- refd to

Statutes referred to Criminal Code, R.S.C. 1970, c. C-34 -- now R.S.C. 1985, c. C-46 s. 148 [repealed 1980-81-82, c. 125, s. 8] Criminal Code, R.S.C. 1985, c. C-46 s. 722 [re-enacted 1995, c. 22, s. 6; am. 1999, c. 25, s. 17] s. 735(1.1) to (2) [enacted R.S.C. 1985, c. 23 (4th Supp.), s. 7 -- re-enacted 1995, c. 22, s. 6 (see s. 722)]

APPEAL by the accused from the sentence of 18 months' incarceration imposed upon the accused's conviction for four charges of indecent assault.

B.H. Ralston, for accused, appellant.

A. Budlovsky, for the Crown, respondent.

PROUDFOOT J.A. (HUDDART J.A. CONCURRING)

SOUTHIN J.A.

¶ 1 PROUDFOOT J.A. (HUDDART J.A. CONCURRING):--The appellant applies for leave to appeal a sentence pronounced by a Judge of the Provincial Court of British Columbia in Vancouver on November 4, 1999. In effect, he appeals four concurrent sentences that result in 18 months of incarceration.

¶ 2 On August 4, 1999, after a four-day trial by judge alone, at which the appellant pleaded not guilty to charges related to events that occurred over a brief period sometime in the late 1960s or early ***[page62]*** 1970s, he was convicted of four counts of indecent assault (s. 148 of the Criminal Code, R.S.C. 1970, c. C-34, at the time of the offences). The same judge presided at the sentencing hearing and he delivered oral reasons (the following is reproduced from the

Particulars of Conviction and Sentence):Count 1: Indecent assault 3 months incarcerationCount 5: Indecent assault 6 months incarcerationCount 9: Indecent assault 1 year incarcerationCount 11: Indecent assault 18 months incarceration.All sentences to be served concurrently.

The appellant was in custody when the sentences were pronounced.

¶ 3 The assaults took place sometime between 1969 and 1972 while the appellant was an officer in a quasi-naval organization. At the time, the complainants were Sea Cadets between the ages of 13 to 16 while the appellant was about 23 to 26 years of age.

¶ 4 The reasons went into considerable detail, so I will simply deal with the facts on the basis of the judge's summary at sentencing: The first conviction was on Count 1, and that was a charge of indecent assault of another male person, D.R. And in summary, that incident involved three youths, Sea Cadets being in the aft cabin of a ship that was used by the Sea Cadets and Mr. Bremner coming in and attacking D.R. and grabbing his genitals down his pants. The next conviction is on Count 5. That is indecent assault of another person, D.N., and in summary, was grabbing of a penis in a sleeping bag, while the Sea Cadet was sleeping in a room next to the drill hall. Count 9 was the next conviction. The complainant R.S. The incidents involved, indecent assaults, were two incidents, masturbation on a camping trip and at the home of the accused, where he apparently lived with his parents. Count 11, the complainant was A.H., and the incident again, indecent assault and it would be described as a mutual masturbation in the bunk area in the forward cabin of the same ship I mentioned previously.

I note that now the appellant is 54 years old, is married, and has two grown sons. He has had stable employment and no other criminal record.

¶ 5 There is ample evidence to indicate that in the ensuing years, the appellant has had an impressive personal history and record of community service. His family has been very supportive and he is well regarded by his friends, which is attested to by the many letters submitted on his behalf. There is also no evidence that any similar type of conduct has occurred since these offences. There were no ***[page63]*** physical injuries to the complainants at the time these offences took place; however, the complainants have suffered psychologically.

¶ 6 The trial judge had the benefit of a report from Dr. Karl M. Williams, a psychologist, prepared for sentencing purposes. I have read the report and, like the trial judge, I note that Dr. Williams indicates that the appellant is a "very low" risk for any sexual recidivism and that Dr. Williams does "not consider him to represent a danger to society". It is significant that the trial judge made a finding of fact that the appellant was not a paedophile.

¶ 7 In addition, the trial judge had before him several Victim Impact Statements, one of which was particularly long, wide-ranging and detailed. Since I discuss the law governing victim impact statements and the relevant provisions of the Code in more detail below, I will not discuss them now except to note that the wide-ranging victim impact statement was read into court and that another statement included a victim's requests that a harsh sentence -- which was not available to the court in law -- be pronounced against the appellant.

¶ 8 At sentencing, the judge concluded that the situation was somewhat similar to the authority a teacher has over his or her students, placing the appellant in a position of trust vis-a-vis the Sea Cadets. However, the trial judge pointed out that the majority of the actions were impulsive and little, if any, premeditation was involved, except "some form of premeditation" in one incident in which the appellant invited a young man over to mow the lawn. The trial judge considered the appellant's history since the events and concluded that he was a "solid citizen" and a "responsible family man". He referred to his "good employment record" and his "very good public service record". Also, he observed that these offences were committed when this appellant was "relatively young" and that in the last thirty years there have been no other offences. Finally, he concluded that the appellant was not a paedophile.

¶ 9 After setting out the above background, he considered the application of the principles of sentencing, focusing most significantly on denunciation, general deterrence and restitution, which he characterized as follows: The main factors in sentencing that I'm left to look at are these. Denunciation of these offences and that's denunciation on behalf of the community, proclaiming that these offences are deplorable and absolutely not to be tolerated. I have to think of general deterrence, that is sending a message to the community ***[page64]*** that, once again, these offences are not to be tolerated and if they are committed, there are going to be significant consequences. I have to think about what is usually called restitution. Now, in this case, there are victims involved. Four Sea Cadets were named in the counts, those associating with them, the whole organization, really the whole community. Especially for the four named victims, there has been considerable emotional distress and for many years, feelings of guilt, coping problems. There were victim impact statements filed and some discussion of this by counsel, with mention of it at the trial, and certainly in this case, the impact on the victims was at least what one would normally expect and, if anything, the 30 years which have passed have aggravated the situation.

I note that at law, neither vengeance nor revenge has any place in sentencing principles.

¶ 10 Next, the trial judge referred to the combination of factors required for the appellant to serve his sentence by incarceration: Some of the factors I have to consider in determining whether a jail sentence is necessary are those that I've already mentioned, the seriousness of the offence, the background of the accused. I consider these aspects of the matter that the offences were committed over a relatively brief period of time, certainly less than two years. My impression was that these incidents all took place within a few months. Of course, when we're talking about incidents 30 years ago, no one can be entirely precise. So the offences were committed over a relatively brief period of time, certainly compared with many of the other cases that I had to refer to. There has been no repetition of this sort of behaviour since, and that's for 30 years since. Mr. Bremner has no criminal record at all, and as I mentioned, otherwise, has gone beyond that and has an almost exemplary background in all respects. I mentioned that the assaults were not serious physically, but emotionally, they were very traumatic and continue to be. And I mentioned that a breach of trust situation existed, and that's a consideration. So as a general proposition here, I conclude that these offences remain offences where jail sentences are necessary . . .

¶ 11 Finally, in specifically addressing whether to impose a conditional sentence, the trial judge said that:. . . I have to consider, and Mr. Ralston has certainly asked, that I determine whether

these sentences be served as conditional sentence orders, conditionally in the community. My conclusion is the release of the accused into the community would not endanger the safety of the community from him directly. I have concluded that he's not a pedophile. My conclusion is he doesn't require rehabilitation. I think I have to conclude he wouldn't be responsive to that if that were required, in any event, but he doesn't require it. He doesn't require specific deterrence. I must also consider whether a conditional sentence would detract from the intended general deterrence of the sentences. The intention of jail sentences is ***[page65]*** to stand as an example to others of what will happen if you commit these offences. In other words, would a conditional sentence order negative the denunciation, would it impair any restitution to the victims. I have said there's no remorse for Mr. Bremner here. It would be very difficult for someone in his position to admit to his family and his friends these terrible offences. As his psychologist, Dr. Williams, has said in his opinion letter:"Given his personality type, it is quite possible that upon a conscious level, he sincerely believes himself to be innocent of these charges. At this stage, to believe otherwise, would tend to go against the principles that he holds dearest in his life."

Then the trial judge concluded his reasons with the following passage: His insistence on continuing to put forward this position only further victimizes the victims. It certainly aggravates the situation. It gives absolutely no satisfaction to the requirement for restitution. The question I have to ask then is this. If I allowed Mr. Bremner to simply walk from this court on a conditional sentence order, proclaiming to the world that he was the real victim, himself, would this send the correct message of general deterrence to the community? Would this be any effective denunciation of these offences? Would it be anything but an insult to the other interested parties in these proceedings? It's obvious I'm asking those as rhetorical questions. My conclusion, Mr. Bremner is this. You must serve the sentences I have imposed as straight jail sentences . . . [Emphasis added.]

I note that the trial judge did comment that while remorse may be a mitigating factor, a "lack of" remorse is not an aggravating factor that affects either the length or type of sentence imposed.

¶ 12 In the discussion of the duration or range of sentence that should be imposed, the judge referred to adverse media coverage and the appellant's poor health. Regarding the media, the trial judge noted that:. . . There has been media coverage and certainly not inappropriate or unexpected media coverage for this type of offence, but it is something that is a consequence that Mr. Bremner has borne.

The trial judge found that appellant has a heart condition that had resulted in a minor heart attack and has diabetes but concluded that the appellant's health was a consideration, but was "not a serious situation". In addition, I note that Dr. Gerretsen, the appellant's family physician, submitted a letter which states that certain medical facilities would have to be available if the appellant were to spend time in a correctional facility. ***[page66]***

Argument on Appeal

¶ 13 In argument, the Crown pressed this Court to uphold the prison term on the basis of two submissions. The first was that the appellant showed no remorse and the second was that the seriousness of the offences warranted incarceration. The appellant, of course, argued that this

case had exceptional circumstances and that indeed some form of penalty other than a custodial sentence was in order.

¶ 14 At the hearing before us, the appellant made two major arguments in support of a conditional sentence. The first was that the trial judge erred in law when he overemphasized the principles of general deterrence and of denunciation by stating that a conditional sentence would not achieve the purposes of those sentencingprinciples. The second was that he overemphasized the absence of remorse as a factor when he decided not to impose a conditional sentence.

¶ 15 In addition, the appellant made a third argument, which was emphasized less than the other two. This argument concerns the Victim Impact Statements read into the record at the sentencing hearing. I will discuss this argument first.

Legislative History

¶ 16 In order to address the appellant's argument concerning the Victim Impact Statements filed with the court, including a particularly long, detailed statement filed by A.H., I must turn to the relevant sections of the Code [R.S.C. 1985, c. C-46].

¶ 17 The Code was amended to include this procedure in 1988 with the addition of s. 735(1.1) (as numbered on the 1988 general statutory revision) proclaimed sometime later, which reads as follows: 735(1.1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 736 in respect of any offence, the court may consider a statement, prepared in accordance with subsection (1.2), of a victim of the offence describing the harm done to, or loss suffered by, the victim arisingfrom the commission of the offence. (1.2) A statement referred to in subsection (1.1) shall be (a) prepared in writing in the form and in accordance with the procedures established by a program designated for the purpose by the Lieutenant Governor in Council of the province in which the court is exercising its jurisdiction; and (b) filed with the court. (1.3) A statement of a victim of an offence prepared and filed in accordance with subsection (1.2) does not prevent the court from considering any other ***[page67]*** evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 736. (1.4) For the purpose of this section, "victim", in relation to an offence, (a) means the person to whom harm is done or who suffers physical or emotional loss as a result of the commission of the offence, and (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1.1), includes the spouse or any relative of that person, anyone who has in law or in fact the custody of that person or is responsible for the care or support of that person or any dependent of that person. (2) Where a report or statement is filed with the court under subsection (1) or (1.2), the clerk of the court shall forthwith cause a copy of the report or statement to be provided to the offender or counsel for the offender and to the prosecutor.

¶ 18 The relevant part of the Code was repealed and replaced in 1995, again coming into effect sometime later. The relevant section is now s. 722, which at the time of sentencing read as follows: 722(1) For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the

court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence. (2) A statement referred to in subsection (1) must be (a) prepared in writing in the form and in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction; and (b) filed with the court. (3) A statement of a victim of an offence prepared and filed in accordance with subsection (2) does not prevent the court from considering any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender or whether the offender should be discharged pursuant to section 730. (4) For the purposes of this section, "victim", in relation to an offence, (a) means the person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence; and (b) where the person described in paragraph (a) is dead, ill or otherwise incapable of making a statement referred to in subsection (1), includes the spouse or any relative of that person, anyone who has in law or fact the custody of that person or is responsible for the care or support of that person or any dependant of that person. ***[page68]***

¶ 19 Parliament made another amendment adding s. 722(2.1), but these amendments were not operative in this case. This further amendment came into force in December 1999 and now permits the victim to read her or his statement into court; however, that change to the Code does not permit, in the words of Madam Justice Ryan's additional comments concurred in by the majority in R. v. Friginette (1994), 53 B.C.A.C. 153, "the attitude of the victim towards the length of the sentence" to be taken in account.

The Procedure Used At Trial

¶ 20 As noted above, the 1999 amendment was not yet in force when Crown counsel applied under s. 722(3) to have A.H. read his statement to the court from the witness box. Both the trial judge and the defence expressed concern with this procedure, with defence arguing, correctly in my view, that the statement did not comply with s. 722(2). After some discussion, the application was granted and A.H. read in his statement.

¶ 21 Let me say at the outset that s. 722(3), as it read at the time of the appellant's sentencing hearing, did not in my view either anticipate or authorize any further evidence from the victim beyond what was adduced at trial. The relevant portion of the section reads: ". . . does not prevent the court from considering any other evidence concerning any victim . . .". The evidence referred to would be that given by a psychiatrist, psychologist, doctor, social worker or some similar type of witness; thatis, someone with knowledge and expertise to testify as to the harm done to the victim. The use of the words "other evidence" changed the permissible procedure to allow a court to hear expert evidence.

¶ 22 The problem in this case arose because the Victim Impact Statements, particularly that of A.H., went well beyond what can be brought to the court's attention. Unfortunately, the editing or summarizing that occurred did little to make the statements any more acceptable.

¶ 23 The statements submitted to the court contained much that in my view was not appropriately before the court, particularly with regard to recommendations for sentence and the use of psychiatric diagnostic terms made by victims. There is nothing in the sections of the Code that permits a victim to have a role in suggesting the length of sentence or kind of sentence to be imposed. Similarly, there is nothing in the relevant sections that erodes from the usual rules of ***[page69]*** expert evidence. I do not wish to detract in any way from victims' ability to put forward to the court "the harm done" or "the physical or emotional loss as a result of the crime" but the Code does not enable a tripartite procedure with regard to recommendations for sentencing. The parties on sentencing remain the same as at the trial.

Case Law Concerning Victim Impact Statements

¶ 24 Several cases make the point very clearly that a sentencing hearing is not a tripartite process, both with regard to s. 722, which is operative in this case, and its predecessor, s. 735. Madam Justice Saunders, when her Ladyship was a trial judge, considered s. 735(1.1) in R. v. Coelho (1995), 41 C.R. (4th) 324 (B.C.S.C.). Faced with dealing with whether the victim had the "right to be heard on a sentence" regarding the sentence severity, her Ladyship concluded to the contrary, commenting that (at 330): I find that Mr. Coelho's rights to fully express his strongly held views by all lawful means does not give him the right to audience in a court of law. While he is a victim of this crime, neither the Criminal Code nor the Charter of Rights and Freedoms requires that he be permitted to speak, in addition to Crown counsel, on the severity of penalty to be imposed.

¶ 25 Two additional passages from that judgment about the standing of victims to address the court are useful (at paras. 14 and 16): Prior to the passage of 735(1.1), the victim of a crime was held have no standing to make submissions to the court against the accused. For example, in R. v. Antler (1982), 69 C.C.C. (2d) 480 [29 C.R. (3d) 283] (B.C. S.C.), Madam Justice McLachlin summarized the law [at pp. 283-84 C.R.]:"The conduct of criminal trials in Canada is governed by the Criminal Code, R.S.C. 1970, C-34. The Criminal Code contemplates protection of the accused by the Crown. It does not accord to persons affected by an offence status as parties to the proceeding against the accused, apart from the provisions relating to restitution of property found in ss. 645 to 657. Nor does it grant to them the right to make representations against the accused independent of those which the Crown chooses to put forward. This court cannot accord status which the Criminal Code does not accord; that must be left to Parliament." . . . . . Madam Justice Ryan [of the British Columbia Court of Appeal] in R. v. Friginette (November 29, 1994), Vancouver Registry No. CA019359 (B.C. C.A.) [reported at 53 B.C.A.C. 153] recently described the role of a victim in sentencing at p. 5 [p. 155 B.C.A.C.]:"Although the effect of a crime on a victim is often taken into account when sentence is imposed, the attitude of the victim towards the length of the sentence cannot be taken into account. When the state intervenes and ***[page70]*** an accused's conduct is deemed criminal, his conduct is a crime against society and it is therefore the public, not the private interest which must be served by the sentencing process."

In short, sentencing proceedings are between the convicted person and the state.

¶ 26 In the case of R. v. Gabriel (1999), 137 C.C.C. (3d) 1, 26 C.R. (5th) 364 (Ont. S.C.J.), Mr. Justice Hill, in a very comprehensive judgment dealing with all aspects of Victim Impact Statement under s. 722 (the successor to the section considered by Madam Justice Saunders) said the following (at para. 22): Without, in any fashion, diminishing the significant contribution of victim impact statements to providing victims a voice in the criminal process, it must be remembered that a criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime -- an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing.

I agree with that general statement by Mr. Justice Hill that sentencing hearings are not tripartite proceedings, rather they are a proceeding between society, as represented by the Crown, and a convicted person.

¶ 27 In Gabriel, Mr. Justice Hill set out what should be presented to the court when victim impact statements are submitted. I reproduce them here as I think they are extremely useful (at paras. 29-33): Impact statements should describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence". The statements should not contain criticisms of the offender, assertions as to the facts of the offence, or recommendations as to the severity of punishment. Criticism of the offender tilts the adversary system and risks the appearance of revenge motivation. Attempts to state, or presumably to restate, the facts of the offence usurps the role of the prosecutor and risks inconsistency with, or expansion of, prior trial testimony, or facts read in, and agreed to, on the guilty plea appearance. Such was the case in R. v. McAnespie (1993), 82 C.C.C. (3d) 527 (Ont. C.A.) (reversed (1993), 86 C.C.C. (3d) 191 (S.C.C.)) where additional disclosure by the complainant, relating to the offence, was made by the complainant in her victim impact statement. The Attorney General represents the public interest in the prosecution of crime. Recommendations as to penalty must be avoided, absent exceptional circumstances, i.e., a court-authorized request, an aboriginal sentencing circle, or as an aspect of a prosecutorial submission that the victim seeks leniency for the offender which might not otherwise reasonably be expected in the circumstances. The freedom to call for extraordinary sentences, beyond the limits of ***[page71]*** appellate tolerance, unjustifiably raises victim expectations, promotes an appearance of court- acceptance of vengeful submissions, and propels the system away from necessary restraint in punishing by loss of liberty (s. 718.2(d) of the Code; R. v. Gladue, supra, at para 40, 41, 57, 93). It has been suggested that frequently the victim's limited knowledge of available sentencing options may lead the victim to rely on more severe options: H.C. Rubel, "Victim Participation in Sentencing Proceedings" (1985-86), 28 C.L.Q. 226 at 240-241. The independent neutrality of the judiciary requires that the court not react to public opinion as to the severity of sentences: R. v. Porter (1976), 33 C.C.C. (2d) 215 (Ont. C.A.) at 220, per Arnup J.A. [Footnotes omitted.]

Regrettably, when taken together, the statements before the trial judge contained all those matters referred to by Mr. Justice Hill, matters that should not have been before the court at a sentencing hearing.

¶ 28 Those victim impact statements (including that of A.H.) which urged particular sentencing options on the court were clearly not appropriate to be presented at a sentencing proceeding.

Moreover, more than one statement sought to achieve personal revenge, something that is not appropriate in the sentencing process.

Fairness

¶ 29 I am compelled to address yet another issue. The trial judge in his August 4, 1999 reasons for conviction and the November 4, 1999 reasons for sentence made a clear finding of fact that the appellant was not a paedophile. Unfortunately, at the sentencing hearing, the term "paedophile" was used both by A.H. and, more seriously, by Crown counsel.

¶ 30 In R. v. Swietlinski (1994), 33 C.R. (4th) 295, 92 C.C.C. (3d) 449, the Supreme Court of Canada, in a case involving s. 745 (parole eligibility) stressed the necessity for the fairness of Crown counsel. The same need for fairness applies in sentencing hearings and, in this case, the reference at the sentencing hearing to the appellant as being a paedophile was unfair in the extreme.

¶ 31 To provide context, I reproduce the portion of the transcript in which Crown counsel mentioned paedophiles: When you look at the victim impact statements, and I'll have a couple of comments on some parts of the victim impact statements, it's apparent the destruction that is wreaked by sex offenders such as Mr. Bremner. He doesn't do just damage to those who you saw give evidence, but it negatively affects in serious ways the lives of family members and everybody close to them, so in my submission, this past ambivalence has to be addressed through dealing with these very seriously. Sociologists and criminologists will argue either way, but in my submission, fairly harsh sentences should and should well deter ***[page72]*** paedophiles and other people who might wish to abuse a position of trust, to do these things to children . . .

The only inference that could be drawn was the appellant was a paedophile. In view of the trial judge's finding that the appellant was not a paedophile, this reference was inappropriate and should not have been permitted. In such circumstances, it is incumbent on the court to intervene.

¶ 32 The need for fairness is related to the dangers of a runaway model of victims participating in the sentencing process, detracting from the reasoned, proportionate response of Mr. Justice Hill in R. v. Gabriel, supra, articulated so clearly. In my opinion, this is what occurred in the case at bar.

General Sentencing Principles and Conditional Sentences

¶ 33 As I stated above, the argument made to the trial judge placed too much emphasis on the principles of general deterrence and of denunciation, but placed insufficient weight on the fact that the appellant did not have a criminal record, was young when the events occurred, has been free of any trouble with the law for 30 years, used no physical violence, had been rehabilitated, and was a useful member of society for the long period after the offences. The appellant's counsel argued that, taken together, all the factors that were minimized by the trial judge should weigh in favour of a conditional sentence. Also, counsel emphasized at this late date, no useful purpose could be served by sending this man to jail since he is not a risk to the public.

¶ 34 Indeed, general deterrence and denunciation are the paramount principles in circumstances presented by this case. This court is faced with the question of whether a conditional sentence would satisfy these principles.

¶ 35 The issue of whether conditional sentences can satisfy two of many sentencing principles, general deterrence and denunciation, has been addressed in other court decisions. The Supreme Court of Canada's decision in R. v. Proulx (2000), 140 C.C.C. (3d) 449, 30 C.R. (5th) 1, 2000 SCC 5 (S.C.C.), which post-dates the trial judge's decision, considers the factors that go into assessing the appropriateness of a conditional sentence. Proulx sets out four criteria that a court must consider when assessing the appropriateness of a conditional sentence (para. 46): ***[page73]*** This provision lists four criteria that a court must consider before deciding to impose a conditional sentence: (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;(2) the court must impose a term of imprisonment of less than two years;(3) the safety of the community would not be endangered by the offender serving the sentence in the community; and(4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

¶ 36 It is important to note the Supreme Court of Canada said, in principle, a conditional sentence is available for all offences in which the statutory prerequisites are satisfied. Put another way, once the first three conditions have been satisfied, the analysis moves to the fourth criterion. In the case at bar, in my view, the first three criteria have been met. The fourth condition governs the case at bar and the matters of denunciation and general deterrence fall within that fourth category.

¶ 37 The Supreme Court of Canada, in Proulx, addressed the principle of denunciation, saying that (paras. 105-106): The stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can province ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison. The amount of denunciation provided by a conditional sentence will be heavily dependent on the circumstances of the offender, the nature of the conditions imposed, and the community in which the sentence is to be served.

Also, the court discussed the question of deterrence (para. 107): Incarceration, which is ordinarily a harsher sanction, may provide more deterrence than a conditional sentence. Judges should be wary, however, of placing too much weight on deterrence when choosing between a conditional sentence and incarceration: see Wismayer, supra, at p. 36. The empirical evidence suggests that the deterrent effect of incarceration is uncertain: see generally Sentencing Reform: A Canadian Approach: Report of the Canadian Sentencing Commission (1987) at pp. 136-37. Moreover, a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences. There is also the possibility of deterrence through the use of community service orders, including those in which the offender may be obliged to speak to members of the community about the evils of the particular criminal conduct in which he or she engaged, assuming the offender were amenable to ***[page74]*** such a condition. Nevertheless, there may be circumstances in which the need for

deterrence will warrant incarceration. This will depend in part on whether the offence is one in which the effects of incarceration are likely to have a real deterrent effect, as well as on the circumstances of the community in which the offences were committed. [Emphasis added.]

¶ 38 Clearly, conditional sentences are capable of meeting the principles of denunciation and of general deterrence. The issue before the trial judge is whether a conditional sentence is appropriate in a particular case. Further passages from Proulx give guidance to judges in the process of a particular sentencing proceeding (paras. 113-115): In sum, in determining whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing, sentencing judges should consider which sentencing objectives figure most prominently in the factual circumstances of the particular case before them. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration. In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the Code). This list is not exhaustive. Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which 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. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served. Finally, it bears pointing out that a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender. Aggravating circumstances will obviously increase the need for denunciation and deterrence. However, it would be a mistake to rule out the possibility of a conditional sentence ab initio simply because aggravating factors are present. I repeat that each case must be considered individually.

¶ 39 I do not read the reference to "victim's wishes" as giving a victim any part in recommending sentence, as the Code clearly has not made this a tripartite process. Also, the presence of aggravating ***[page75]*** circumstances or factors do not prevent a court from imposing a conditional sentence.

¶ 40 The Crown argued that the principle of restorative justice in sentencing has not been met because of the absence of an apology. Proulx says the following concerning restorative justice (paras. 98 and 100): The conditional sentence, as I have already noted, was introduced in the amendments to Part XXIII of the Code. Two of the main objectives underlying the reform of Part XXIII were to reduce the use of incarceration as a sanction and to give greater prominence to the principles of restorative justice in sentencing -- the objectives of rehabilitation, reparation to the victim and the community, and the promotion of a sense of responsibility in the offender. . . . . .However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the

objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to incarceration where appropriate in the circumstances.

In the Proulx analysis, the absence of an apology need not be determinative that a custodial sentence is to be imposed; a conditional sentence may still be available. This sentencing analysis follows a framework constructed to achieve proportionate treatment of the various sentencing objectives.

¶ 41 Next, I refer to R. v. Shore, 1999 BCCA 227 [reported 200 W.A.C. 140]. In that particular case, although it did not concern a sexual assault, Madam Justice Southin provided insight into conditional sentences (paras. 33-34, and 39): To serve a sentence of "imprisonment" not behind locked gates may seem to some to be other than a true deprivation of liberty. But it must be remembered that a possible sanction for a breach of whatever conditions are imposed is to be put behind locked gates to complete the sentence imposed. Indeed, unless the courts take a stern view of offenders who breach conditions imposed under s. 742.1 and the following sections, the whole process will fall into such public disrepute as to defeat Parliament's purpose. The conditional sentence of imprisonment scheme may appear to some to be nothing more than a variation of suspended sentences. That is not the view of Parliament and it is the duty of judges to implement this scheme. . . . . I am satisfied that serving the sentence in the community would not endanger the safety of the community. ***[page76]***

¶ 42 Madam Justice Southin's comments allude to the balance struck by Parliament. When a convicted person serves a conditional sentence, there is the possibility of incarceration if that person breaches certain conditions or requirements. Thus, the Code enables a more graduated approach to dealing with offenders, as was noted also in Proulx (at paras. 38-39), which makes similar characterizations of the purpose of conditional sentencing.

¶ 43 Earlier cases also provide guidance in the context of historical sexual assaults. Some useful passages can be drawn from cases dealing with when non- custodial sentences may be appropriate. I refer firstly to the case of R. v. M. (D.E.S.) (1993), 80 C.C.C. (3d) 371 (B.C.C.A.), a case that also involved a sexual offence that occurred many years prior to conviction. In that case the Court issued reasons for a panel of five and made some comments that, in my opinion, are appropriate to consider in this case (at paras. 18-20, 22, 24, and 26-27): In our judgment, however, a conventional term in prison should not be the only possible response of society in requiring this accused to account for his misconduct, particularly after he has rehabilitated himself, and when such a response would not only be meaningless punishment but it would also seriously harm his fragile family unit, and could reverse or have a negative effect upon the rehabilitation which has been accomplished. It will be useful to considerwhat principle of sentencing would be advanced by a conventional sentence of imprisonment . . . It is obvious that a conventional term in prison is not required for the rehabilitation of the accused, and could be harmful to that endeavour which is always an ongoing process. There is no suggestion that the accused is a danger to anyone so he need not be isolated in order to protect the public . . . . . It is very difficult for a court to say what degree of punishment is likely in any particular class of case to be regarded as "sufficient" in the eye of the victim. While the factor is one which must be carefully considered in sentencing, it cannot be allowed to become the sole guiding principle . . .

. . . . . In the end, the objective of sentencing has to be the achievement of society's overall best interests. For this purpose it may be necessary for the court to balance conflicting considerations as best it can, rather than serve any single objective at the expense of all others. . . . . It is generally believed that general deterrence is a valid reason for the imposition of reasonable, conventional terms of imprisonment in some kinds ***[page77]*** of cases, but it is difficult to believe that that would be so in a case such as this one where the offence occurred many years ago.. . . . .Where there are special circumstances, such as demonstrated self-rehabilitation, risk of "dehabilitation" and real harm to an established family unit, conventional general deterrence need not be given priority in every case over all other considerations. [Emphasis added.]

¶ 44 The indecent assault and gross indecency case of R. v. Gallacher (April 3, 1991), Vancouver Registry (B.C.C.A) [summarized 12 W.C.B. (2d) 632] is useful in that it sets out what factors contribute to a court finding that exceptional circumstances exist. The Gallacher factors are not exhaustive or exclusive, and not all of the Gallacher factors have to be present for exceptional circumstances to exist. In the case at bar, a significant number of the Gallacher factors are present:

1 The offences occurred many years ago; approximately 30 years have passed since then.

2. There is no evidence of the offences being repeated since that time.

3. There is a finding that the appellant is not a paedophile.

4. The events involved did not include physical violence or threats of violence.

5. There is no record of any type of physical harm.

6. The appellant is married and has two adult sons. His family supports him.

7. The appellant has had an exemplary work record since these offences occurred and has been a "solid citizen" and a responsible family man.

8. There have been many letters of reference. This appellant is highly regarded both in his employment, among his friends and associates.

9. A psychologist's report says that there is a low risk of recidivism. The appellant was young when these offences occurred (23 to 26 years of age).

10. The trial judge concluded there was no need to deal with the sentencing principles of protection of the public, rehabilitation of the accused, or specific deterrence of the appellant since there is no realistic likelihood that the appellant will repeat the offence of which he was found guilty. ***[page78]***

11. As for general deterrence, the involvement with the media when this matter first arose, and the stigma and shame attached would be, as stated in Gallacher, supra, a powerful deterrent to people in the general community.

Again, I note that this is not an exhaustive or exclusive list, and even if a convicted person does not meet all of the criteria, Gallacher may still apply. In the case at bar, many of the Gallacher factors are relevant. I might add that a conditional sentence was not available at the time of Gallacher, but a fine was substituted and the Court considered that the principles of general deterrence would be satisfied with that disposition.

Application

¶ 45 In my view, the trial judge fell into error with this passage, which I will repeat:The question I have to ask then is this. If I allowed Mr. Bremner to simply walk from this court on a conditional sentence order, proclaiming to the world that he was the real victim, himself, would this send the correct message of general deterrence to the community? Would this be any effective denunciation of these offences? Would it be anything but an insult to the others interested parties in these proceedings? It's obvious I'm asking those as rhetorical questions. [Emphasis added.]

¶ 46 It is of significance that the trial judge did not have the benefit of Proulx. It appears to me from that passage just quoted, particularly from the words "to simply walk away from this court", the trial judge did not appreciate or deal with the point made in Proulx that a conditional sentence of imprisonment is not a "walking away". A conditional sentence is not a variation of the old suspended sentence. In saying that, in these circumstances, a conditional sentence is appropriate, I am mindful of the trial judge's finding that the appellant was in a position of trust which constitutes an aggravating factor. However, Proulx makes it clear that such a finding does not preclude imposing a conditional sentence, and in all the circumstances before the Court, a conditional sentence is the proportionate response.

¶ 47 In addition, the appellant's counsel states that aside from the procedural issues around Victim Impact Statements (discussed above), the way the trial judge incorporated the Victim Impact Statements into the analysis resulted in the trial judge overemphasizing the views of "interested parties" when he decided not to ***[page79]*** impose a conditional sentence. Of course, the Crown stressed the seriousness of the offences and maintained this lack of remorse is a significant reason why the appellant should not have a conditional sentence. The Crown was so insistent that at the very least an apology should have been forthcoming that its vigorous argument concerningthe lack of remorse nearly demanded the inference that "lack of remorse" was an "aggravating factor" that requires a court to impose a more severe sentence, a position which would be wrong in law.

¶ 48 To put this into context, I note that the matter of remorse was addressed in the psychologist's report. Dr. William's opinion is clear: an expression of remorse or an apology from this appellant is unlikely and the appellant may well need some assistance in order to come to an understanding of how to deal with this issue.

¶ 49 In my opinion, considering all the circumstances in this case, to which I have already referred, and arriving at a fair balancing of all principles involved, I am satisfied that a conditional sentence could satisfy the principles of deterrence and denunciation. A conditional sentence in this case would be a fit sentence.

¶ 50 I would grant leave and allow the appeal to that extent.

¶ 51 As for conditions; counsel, I am confident, will be able to agree on conditions to suggest we should impose. However, if that process proves unsuccessful, written submissions may be made to the Court.

¶ 52 SOUTHIN J.A.:--I have had the privilege of reading in draft the reasons for judgment of Madam Justice Proudfoot, with which I agree.

¶ 53 I add words of my own because, to my mind, the question of what sentences should be imposed in "historic" sexual assault cases is disturbing. In sentencing for such offences, the court must address many considerations, often conflicting.

¶ 54 By "historic", I mean those cases in which the victim does not complain to the authorities until long after the events in issue, although the identity of the perpetrator was known to the victim at the time.

¶ 55 In some situations such delay is understandable. A child of, say, eight or ten sexually interfered with by a stepfather or other male family member may feel, and indeed be, powerless to do ***[page80]*** anything. When that child reaches adulthood, ought he or she not then to complain and not wait another ten or twenty years? In my experience, what is rarely clear in cases of delays of such length is why now and not much earlier?

¶ 56 In the case at bar, the offences are alleged to have occurred in various periods between January 1st, 1968, and December 3rd, 1972. When the first complaint was made to the police, I do not know, but the Information bears date the 12th of July, 1999.

¶ 57 The evidence in the case at bar provides no compelling answer, either to the question "why now?" or to the question of what social purpose has been served by bringing obloquy on the appellant whose life, on the evidence, for nearly thirty years has been exemplary.

¶ 58 The only possible purpose is to appease the victim or victims -- to satisfy a demand for vengeance. I am happy to note, however, that not all the victims in the case at bar appear to want vengeance.

¶ 59 But even if vengeance were a permissible purpose in the fixing of sentences under our legal system, which it is not, the question would then arise whether the vengeance demanded was out of all proportion to the crime to be avenged.

¶ 60 If one looks at the particulars of the crime against A.H., who seeks a mighty vengeance, one finds that in the continuum of sexual crimes from, at one end, the brutal rape of a woman or the buggery of a little boy, to, at the other end, an unwanted touching by one adult of another, it is, looked at objectively, nearer the latter than the former.

¶ 61 In matters of sentencing, the court must appraise the crime objectively.

¶ 62 The subjective impact on the particular victim is essentially irrelevant. The doctrine of the eggshell personality, whatever part it properly plays in the assessment of damages in a civil case, is not a proper subject of investigation by a court carrying out the statutory duty of sentencing for a criminal offence.

¶ 63 There is in some of these cases a further aspect -- the relationship of the accused to the family and friends who, after the crimes were committed, became part of his life. I do not say it is so here, but it may be that what the learned judge saw as a lack of ***[page81]*** remorse was fear of loss -- fear on the appellant's part that his family would reject him if he told the truth about those years -- and a lack of the moral courage to risk that loss. To put it another way, it may be that he did not believe, whether rightly or not I cannot say, that his family, any more than the complainants or the courts, would judge him, as every man should be judged, whole -- his years of virtue weighed against his years of sin.Appeal allowed; sentence varied to conditional sentence.