In the Court of Appeal of Alberta

Citation: R v K.A., 2023 ABCA 333

Date: 20231130
Docket: 2203-0050A
Registry: Edmonton

Between:

His Majesty the King

Respondent

- and –

K.A.

Appellant

The Court:

The Honourable Chief Justice Ritu Khullar
The Honourable Justice Jack Watson
The Honourable Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Justice D. Valgardson
Dated the 23rd day of October, 2020
(Docket: 181580796P1)

Memorandum of Judgment

I Introduction

[1] The appellant was sentenced to two years less one day imprisonment plus ancillary orders on his guilty plea to assault causing bodily harm under s 267(b) of the *Criminal Code*. The offence date was November 16, 2018, about two years before sentencing. The victim was the appellant's then 7-year-old son, who was taken into social care and, we were told, remains with a foster mother now. The appellant was 42 years old on the date of the offence. He was an educated man and sought to upgrade his education in Canada since arriving in April of 2018 with his wife from Côte D'Ivoire. The mother of his son and of another daughter are still in that country.

[2] The appellant served his prison sentence before launching his appeal from sentence by Notice of Appeal filed on March 14, 2022. The Crown consented to an extension of time for the appellant to file his appeal. The appellant did not challenge any features of the sentence except for the length of the prison term.

[3] In sum, the appellant seeks to have the quantum of his sentence reduced to six months less one day because he now faces the risk of a removal order under section 63(2) of the *Immigration and Refugee Protection Act*, S.C 2001, c 27 (IRPA), although he had achieved status as a permanent resident in Canada. By virtue of his prison term being longer than six months, the appellant became disqualified from a right of appeal to the Immigration Appeal Division from a finding of inadmissibility in Canada due to his "serious criminality" within the meaning of section 64 of the *IRPA*. His counsel submits that his risk of deportation is significant.

[4] Accordingly, we take the Crown to not invoke the delay or mootness in answer to the appeal but to respond to the submissions made on the appeal for the appellant. In sum, the Crown position is that the sentencing judge gave due regard to proper considerations and principles and did not impose a sentence which was disproportionate or unreasonable or based on any material error in principle.

II Circumstances

[5] The proceedings in the Court of Justice included testimony from the appellant and stretched over a period from January 7, 2020, to sentencing on October 23, 2020. The services of a French language interpreter were used for the appellant during those proceedings. At the hearing of the appeal in this Court, the appellant waived the need for French proceedings and counsel addressed the Court and filed their materials in English. The Court did arrange for a French interpreter to sit with the appellant at counsel table in case he wished clarification or translation of any aspect of the proceedings.

[6] Some evidence was heard in a trial before the guilty plea was ultimately entered and an Agreed Statement of Facts was presented to the Court. Although the guilty plea was not immediate, the sentencing judge did accept that the guilty plea was a mitigating factor [AT 409/41-410/29].

[7] At the stage of the guilty plea, counsel for the appellant advised the sentencing judge that the appellant was aware that the guilty plea could have quite a negative impact on his immigration status in Canada. Trial defence counsel made submissions and offered evidence to justify a non-custodial sentence disposition, some of which was found to be inadmissible (and there is no issue on this ruling on appeal). Trial defence counsel proposed a form of discharge. The appellant's counsel on appeal does not seek to sustain that unrealistic trial position. For its part, trial Crown counsel sought a substantial federal penitentiary sentence of 5 to 6 years. The Crown also steps back from that position on appeal.

[8] As noted, the appellant had immigrated to Canada with his son and his wife from the Côte D'Ivoire in April of 2018. The mother of his son and another daughter were still there. The appellant's counsel summarizes the facts of the offence as follows:

> [7] On Friday, November 16, 2018, the Appellant assaulted his son, [E], who was 7 years old at the time. He was angry about what he perceived to be a serious disciplinary matter and struck his son repeatedly with a damaged broomstick in the stomach, left arm, and groin. [E] suffered numerous injuries from the Appellant's assault, including to his face, neck, chest, stomach, arm, back, groin, and legs. Some of the injuries to his face were observed by his teacher when he returned to school on Monday, November 19, 2018. [E] reluctantly lifted his shirt to show his stomach and complained that his back and shoulder were sore. The Edmonton Police Service was contacted, and [E] was taken to the hospital.
>
> [8] In addition, the Appellant admitted that he used water and menthol powder to wash [E]'s wounds, which caused [E] further pain. This caused his wounds to bleed, and [E] yelled for the Appellant to stop, which he did not. [Footnotes omitted]

[9] The Crown's summary on appeal adds that the mentholated water was poured onto the boy over his head in a manner that it also irritated his eyes. However, the sentencing judge does not appear to have relied on the use of exclusively hot water, or, implicitly, on this additional element, as she concluded that the Crown was obliged to prove any unadmitted features of that aspect of the abuse under s 724(3)(e) of the *Criminal Code*:

> … L'utilisation de l'eau chaude dans la salle de bain n'était pas essentielle à la condamnation. De plus, seul le fait de faire témoigner la victime aurait pu résoudre le problème. Il n'est pas surprenant que le ministère public ait décidé de ne pas appeler de preuve additionnelle sur ce point. Par conséquent, je ne tiens pas compte de la référence à l'eau "chaude" dans l'exposé des faits convenus. [AT 409/32-37]

[10] The Crown notes that the appellant did not seek medical attention for his son. This factor was accepted by the trial judge: "Aucun autre traitement médical n'a été fourni." [AT 405/20]. The appellant was twice interviewed by the police. Initially the appellant was not forthcoming about what happened. The sentencing judge summarized this aspect of the circumstances thus:

> Les blessures, les abrasions, les éraflures, les galles et les ecchymoses ne s'expliquent pas par des causes accidentelles. Le rapport d'expertise du Dr. Dibden, Pièce 3, indique que les blessures sont expliquées par un traumatisme infligé. L'accusé a d'abord déclaré que les blessures de la victime étaient dues à sa chute sur la glace, alors qu'il transportait des assiettes. Il admet maintenant que ce n'est pas la vérité. Lors de son arrestation, l'accusé a fait plusieurs aveux confirmant qu'il avait causé les blessures de la victime. [AT 405/34-39]

[11] The sentencing judge also referred to observations of the child's body by a foster care mother when the child was in care of Social Services:

> Une déclaration de la victime, consignée comme Pièce 14, a été déposée à la cour en août 2020, par Natasha Daniel, la mère d'accueil qui s'occupe de la victime depuis qu'il a été appréhendé par le personnel des services à l'enfance et de la famille (Child and Family Services), le 19 novembre 2018. Dans cette déclaration, Madame Daniel décrit le traumatisme subit par [E] comme incluant, non seulement les blessures physiques, qui ont laissé des cicatrices une fois guéries, mais aussi les effets émotionnels et psychologiques plus durables et plus graves de l'infraction. [E] a des difficultés à socialiser et à faire confiance aux autres. Il est renfermé et il a peur de faire des erreurs. Il est clair qu'il faudra beaucoup de temps à [E] pour se remettre de la violence qu'il a subie au mains de l'accusé. [AT 406/2-11]

[12] Evidence was presented in mitigation on behalf of the appellant as to the effect of his own experiences of physical abuse as a child. Judicial notice can be taken that there are long-term traumatic effects upon children subjected to significant physical abuse inflicted by those who are expected to care for them: compare ***R v Friesen***, 2020 SCC 9 at paras 6-69, [2020] 1 SCR 424.

[13] As discussed below, the case of ***Friesen*** is also an example of the vicious cycle of child abuse over generations: ***Friesen*** at paras 14-15. Judicial notice is possible for "notorious and undisputed facts, or of facts which are capable of immediate and accurate demonstration, by resorting to readily accessible sources of indisputable accuracy": ***R v Sharma***, 2022 SCC 39 at para 55(b), 420 CCC (3d) 1. While it is not appropriate to take judicial notice of the extent of specific impact upon a particular person without evidence, the reality of trauma, including intergenerational trauma particularly for indigenous people, is now more widely understood: see ***R v Ipeelee***, 2012 SCC 13 at para 60, [2012] 1 SCR 433.

[14] Similarly, the pernicious effects of racism upon young people is also widely accepted although its individual effect requires evidence: compare ***R v Anderson***, 2021 NSCA 62 at para

111, 405 CCC (3d) 1; ***R v Morris***, 2021 ONCA 680 at paras 1 and 97, 74 CR (7th) 390; ***R v Abdisalam***, 2021 MBCA 97 at para 10, [2021] MJ No 329 (QL); ***R v S(M)***, 2023 ONCA 417 at para 27, [2023] OJ No 2658 (QL); ***R v Wournell***, 2023 NSCA 53 at paras 97-98, [2023] NSJ No 329 (QL); ***R v Pierre***, 2023 ABCA 300 at paras 6-7 [2023] AJ No 1072 (QL). Indeed, judicial notice of such effects on young people may be relevant in more than one context: compare ***R v Theriault***, 2021 ONCA 517 at para 144, paras 212-214, 157 OR (3d) 241.

[15] In sum, brutal or malicious abuse of children has grievous impacts which can be life long. In the case at bar, the appellant offered evidence at trial that he also had been personally subjected to corporal punishment in his own childhood, and that his experience should be taken as mitigating his sentence. His counsel on appeal summarized that evidence in this manner:

> [15] The Appellant gave extensive *viva voce* evidence during the sentencing proceedings. He explained the physical discipline that he received, primarily from his father, as a child in Côte d'Ivoire. He detailed incidents of corporal punishment including being whipped and having some form of chili "smeared" on his anus, which burned, after he stole a piece of meat out of a dish. He also recalled a time when an older cousin "gave [him] a blow". His mother told a teacher or teachers at school to engage in corporal punishment, and expressed that "these are the parents who are deemed worthy because they care about -- about their children's success."
>
> [16] According to the Appellant, reflecting on parenting practices in Côte d'Ivoire, "physical punishment is an integral part of our practices." In his evidence, the Appellant expressed that he learned the difference between Canadian and African disciplinary practices and, if he had to choose to utilize one, he would use the Canadian (non-corporal) practice. The Appellant outlined at length his newfound understanding of how to educate or discipline children in Canada, which he learned through his training programs and counselling. This included steps to take and resources available. He noted that social services do not exist in Africa, at least in the way they exist in Canada, such as counselling and therapists. [Footnotes omitted]

[16] The appellant's position included the element that there was a cultural dimension to his resort to violence against his son. While his defence counsel at sentencing referred to a form of error of law in not knowing that it was illegal to hit a child for the purposes of punishment or education, counsel on appeal underlines the appellant's efforts to better understand his actions according to Canadian norms and his asserted respect for Canadian society. We pause to observe that this Court received no independent evidence of parental attitudes or conduct in the Côté D'Ivoire and we are not prepared to presume it. The evidence of the appellant can only be taken as his description of a personal experience within his family.

[17] The appellant's counsel, properly, has moved from the untenable elements of the defence submissions made to the sentencing judge, and argues that the appellant had taken steps towards

rehabilitation, employment, and education both before his guilty plea and subsequently, and that the sentencing judge failed to give adequate effect to those considerations as well as failing to have regard to the immigration considerations which are at the heart of the present appeal. The appellant's counsel asserts that the appellant is remorseful, is completely deterred from future such conduct, and faces ongoing risks to employment as well as stigma in his community.

III Reasons for Sentencing

[18] The sentencing judge provided detailed reasons in the French language, including translations into French of quotations from some authorities which were originally published only in English. She itemized the mitigating factors placed before her as follows:

> L'avocat de la défense demande une absolution conditionnelle, avec une période de probation axée sur la réhabilitation. Il fait valoir qu'une telle décision est dans l'intérêt de l'accusé qui n'a pas de casier judiciaire et n'est pas contraire à l'intérêt public, car cette affaire est exceptionnelle. Il fait valoir que les circonstances suivantes soutiennent cette position:
>
> a) L'accusé a une bonne réputation antérieure.
>
> b) L'accusé a plaidé coupable.
>
> c) L'accusé a du remords.
>
> d) La victime ne souffre d'aucune incapacité permanente.
>
> e) Un casier judicaire va rendre difficile l'obtention d'un emploi à l'avenir.
>
> f) L'accusé a suivi des cours et a réussi à se réhabiliter.
>
> g) L'implication dans le système de justice criminelle a eu un effet dissuasif spécifique.
>
> h) L'accusé ne connaissait pas le droit canadien au moment de l'infraction. Il est maintenant informé et ne va donc pas répéter ce comportement.
>
> i) Une peine d'emprisonnement serait disproportionnée et aurait un effet négatif sur l'accusé et la cellule familiale. [AT 406/22-38]

[19] Related to the considerations and factors noted earlier in these reasons, the submissions of the appellant on appeal urge errors in principle grounded on failure of the sentencing judge to adequately account for the circumstances related to the objective of rehabilitation, to the lack of need of the objective of individual deterrence, and to the principle of restraint reflected in s 718(e)

of the *Criminal Code*. The sentencing judge did provide reasons for rejecting the submission that alleged cultural factors could operate in mitigation.

IV Grounds of Appeal and Standard of Review

[20] The appellant presents the following grounds of appeal:

A. The Sentencing Judge erred in not properly assessing the Appellant's potential for rehabilitation.

B. The Sentencing Judge erred in assessing the Appellant's degree of responsibility based on his personal background.

C. The Sentencing Judge erred in failing to consider the Appellant's immigration status as a collateral consequence.

[21] The Crown's submissions make some concessions but ultimately suggest that even if the sentence were reduced in length somewhat, it would not and should not be reduced to the extent of 6 months less 1 day to avoid the practical outcome as to immigration law effects.

[22] The standard of review as to sentence appeals is well established. The standard is deferential: see *eg* ***R v Suter***, 2018 SCC 34 at para 23, [2018] 2 SCR 496; ***R v M(L)***, 2008 SCC 31 at para 14, [2008] 2 SCR 163; ***R v Nasogaluak***, 2010 SCC 6 at paras 44-46, [2010] 1 SCR 206; ***R v Lacasse***, 2015 SCC 64 at paras 12, 42, [2015] 3 SCR 1089, and other decisions mentioned herein. Deference will be inappropriate where the sentencing disposition is "demonstrably unfit" or if it reflects an error in principle, fails to consider a relevant factor, or over-emphasizes a relevant factor: see ***R v M(CA)***, [1996] 1 SCR 500 at para 90. ***Suter***, ***Nasogaluak***, and ***R v Pham***, 2013 SCC 15, [2013] 1 SCR 739 are examples of cases where what are called 'collateral' factors may be considered as 'relevant' factors in this analysis.

[23] As explained in ***Lacasse***, loss of deference is only the first stage of the analysis. Appellate intervention is not justified unless the sentence is unfit under section 687 of the *Criminal Code*. Fitness requires, *inter alia*, that the sentence must be proportional to the offence under s 718.1 of the *Criminal Code*, meaning it must have proportionality related to the gravity of the offence and to the degree of responsibility of the offender. Proportionality is the fundamental principle of sentencing (***Friesen*** at para 30), the "cardinal principle that must guide appellate courts" (***Lacasse*** at para 12), and is the "*sine qua non*" of a just sanction (***R v Safarzadeh-Markhali***, 2016 SCC 14 at paras 70-71, [2016] 1 SCR 180).

[24] As stated in ***Parranto*** at para 40: "... the trial judge's reasons and the record must demonstrate why the sentence is proportionate to the moral blameworthiness of the offender and the gravity of the offence" and "the sentencing judge's reasons and the record must allow the reviewing court to understand why the sentence is proportionate ...".

[25] Departures from a fit sentence may also be indicated where the sentencing judge provides reasons which fail to reconcile the sentence chosen with the accepted norms of sentencing policy: see ***R v Phillips***, 2023 ABCA 210 at para 19, [2023] AJ No 719 (QL). For the case at bar, guidance for physical child abuse sentencing is provided by ***R v Nickel***, 2012 ABCA 158, 68 Alta LR (5th) 1 which was quoted as helpful in ***R v B(J)***, 2014 QCCA 92 at para 34, [2014] JQ No 204 (QL). Application of the guidance into specific outcomes appears in: ***R v G(BJ)***, 2013 ABCA 260, [2013] AJ No 746 (QL); ***R v Choy***, 2013 ABCA 334, 561 AR 99; ***R v Kunath***, 2013 ABCA 372, 561 AR 281; ***R v B(RG)***, 2017 ABCA 359, 60 Alta LR (6th) 213.

[26] As reflected in ***R v Hills***, 2023 SCC 2 at paras 57-59, 422 CCC (3d) 1, the principle of individuality in sentencing, when correctly understood, should work with, and not contrary to, the principle of proportionality and the principle of restraint. Indeed, individuality forms part of the logical architecture of six key principles of sentencing which also include the principles of legality, rationality, and parity. As to this, see the discussion in ***R v Souvie***, 2018 ABCA 148 at paras 43-44, 72 Alta LR (6th) 217, where those principles were set out as part of an overall justice system where principles work with values, objectives, concepts, and factors. Balanced consideration of those principles in cases of individuals with challenging backgrounds can support deference: ***R v Mitchell***, 2018 ABCA 325 at paras 12-16, 35 MVR (7th) 36.

V Discussion

[27] The appellant's counsel's first ground of appeal is premised on a reminder of what this Court said in ***R v Okimaw***, 2016 ABCA 246 at para 90, 340 CCC (3d) 225: "Although denunciation and deterrence remain paramount in this case, those sentencing objectives cannot be allowed to obliterate and render nugatory or impotent other relevant sentencing objectives." That passage was quoted approvingly in ***Parranto*** at para 45. The principle is indisputably sound, but it does not assist the appellant on the facts of this case.

[28] While it can be said that the appellant has endeavoured to demonstrate pro-social behaviour and to show self-improvement since the offence, there was nothing unusual about his efforts, which largely consisted of what an intelligent and mature person aiming to fit within Canadian society would do consistently with his other conduct before the offence. His efforts are not to be trivialized, but they do not show that the objective of rehabilitation would be contradicted by condign punishment for his serious criminal conduct. Parliament has said that the objective set out in s 718(d) is "to assist in rehabilitating offenders". Lenience in and of itself is not what Parliament has specified in those words. The sentencing judge did not ignore the steps taken by the appellant:

> De plus, dans cette situation, l'accusé a participé à du counselling et à des formations recommandés par les services de l'enfance et de la famille. Il a également sollicité une aide supplémentaire pour se familiariser avec la culture et le droit canadiens. Il a donc entrepris des efforts qui ont pour but la réhabilitation

> et la restauration de l'unité familiale. Je prends en compte, comme facteur atténuant, le parcours de rehabilitation que l'accusé a entamé. [AT 410/31-36]

[29] Relatedly, the objective of rehabilitation under s 718(d) of the *Criminal Code* can be conceptually linked to the objective in s 718(f) of the *Criminal Code* "to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community". Rehabilitation is a form of re-engagement with society, and consequently one might expect to see acceptance of responsibility with it. The sentencing judge's findings do not support such a conclusion in this case. In the first place, she did not find relevant remorse:

> L'avocat de la défense a fait valoir que l'accusé a des remords. Le remords implique généralement une prise de conscience de son propre tort. Le remords est également exempt de minimisation et de reproche à la victime. Bien que l'accusé reconnaisse ce qu'il a fait était mal, il continue à minimiser et à détourner la responsabilité de ses actes en trouvant une justification dans le mauvais comportement de la victime. Par conséquent, le poids à accorder au remords est considérablement réduit dans cette affaire. [AT 410/38-411/3]

[30] The sentencing judge also found:

> L'accusé a témoigné que sa motivation pour battre la victime était de corriger la mauvaise conduite de la victime plutôt que de lui faire du mal. Cependant, après avoir admis qu'il avait causé les blessures au corps de la victime, et même démontrer comment il avait frappé la victime avec force, je conclus que l'accusé avait l'intention de faire subir les conséquences de ses actes à la victime lorsqu'il l'a battue. Logiquement, la conséquence a été que l'accusé a causé des blessures et des douleurs physiques à la victime. Cela est confirmé par les preuves présentées dans le rapport médical du Dr. Dibden, et les photographies des blessures de la victime.
>
> L'accusé s'est montré argumentatif et hostile, notamment lors du contre-interrogatoire. Il n'a pas pu ou n'a pas voulu répondre aux questions directes, même lorsqu'elles lui ont été posées par son propre avocat. Il était évasif et déterminé à présenter des preuves qui n'abordaient pas les questions posées. Il était particulièrement réticent lorsque on lui demandait d'expliquer en détail ce qu'il avait fait à la victime et d'expliquer sa motivation.
>
> Je constate que la nature de la mauvaise conduite de la victime n'est pas prouvée. En tout état de cause, elle n'est pas pertinente. L'accusé a déclaré que deux incidents similaires avaient eu lieu. Sa réaction violente, seulement à la deuxième occasion (le 16 novembre), si elle est mandatée par la culture est illogique. De plus, son explication de l'utilisation d'une arme pendant la volée de coups, parce que l'usage de sa main est offensant, est, à mon avis, improbable. Cela contredit aussi

> son témoignage au sujet d'avoir fessé la victime à d'autres moments. Tout au long de son témoignage, l'accusé présente la victime comme un enfant difficile. Il justifie sa violence comme une réponse disciplinaire nécessaire. Je n'accepte pas cette justification des actions de l'accusé. Son agression brutale de la victime était intentionnelle et motivée par la colère. [AT 408/33-409/17].

[31] These fact findings are entitled to deference. We are not persuaded that the appellant's submissions as to rehabilitation justify appellate intervention.

[32] The appellant's second ground of appeal contends that the sentencing judge:

> ".... failed to consider the Appellant's personal background of physical childhood abuse in assessing his moral culpability. The Appellant disclosed in his evidence that significant, and abhorrent, physical assaults were committed against him in Côte d'Ivoire by multiple family members. Those assaults, according to the Appellant's *viva voce* evidence, were conducted in the context of disciplinary actions, and, despite which, the Appellant loved and respected his family members. While the Sentencing Judge correctly held that the cultural differences in parenting practices are not a mitigating factor in sentencing, there was no meaningful analysis of how the Appellant's personal background as a repeated victim of physical assaults by caregivers as a child impacted upon his moral culpability." [Footnotes omitted]

[33] The passage from the sentencing judge's reasons just quoted above show that she was aware of the appellant's rationale for his violent assault on this very young child, and that, indeed, the attack had a measure of planning.

[34] As noted by counsel for the appellant, the sentencing judge concluded that cultural differences in parenting practices were not mitigating. After discussing what was provided to her on this topic, the sentencing judge referred, *inter alia*, to the early decision on domestic violence sentencing in ***R v Brown***, 1992 ABCA 132 at para 29, 73 CCC (3d) 242. There this Court, faced with defences submissions that it took to mean domestic violence "within Aboriginal communities" should be treated differently than such crimes in "non-Aboriginal society" opined that "neither a trial court nor an appellate court is likely to be impressed by some vague reference by counsel to cultural differences". The Court in ***Brown*** was concerned about "risk of moderating sentencing policy in such a case where to do so would mean that some women in Canadian society would be afforded less protection than others." This begs the question whether the sentencing judge erred in relying on ***Brown***.

[35] In reading ***Brown***, it must be noted that it was pronounced several years before the enactment of the major overhaul of the *Criminal Code* sentencing provisions in 1997 and before the line of authorities from ***R v Gladue***, [1999] 1 SCR 688 onward. ***Brown*** should be interpreted in the modern Canadian context. ***Gladue***, and the cases following it respond to clear directions

from Parliament in s 718.2(e) of the *Criminal Code* and to greater social understanding. They also apply judicial notice of Canadian social realities. Courts are not acting on "vague reference" when considering the situation of an indigenous person in this country.

[36] The same cannot be said about the appellant's argument that *parenting standards* were given to him in his country of origin. Indeed, even for indigenous offenders, this Court in ***R v Laboucane***, 2016 ABCA 176 at paras 63.3 and 63.4, 337 CCC (3d) 445, leave denied [2016] SCCA 374 (QL) (SCC No 37177) pointed out that while ***Gladue*** factors may be very material in serious violent offence cases, and while courts have a duty to consider s 718.2(e) of the *Criminal Code*, as well as taking judicial notice of surrounding context where appropriate, the materiality is individual, not generic:

> 3. Systemic and background factors ... provide the necessary context to enable a judge to determine an appropriate sentence": *Ipeelee* at para 83.
>
> 4. Unless the unique circumstances of the particular offender bear on his or her culpability for the offence or indicate which sentencing objectives can and should be actualized, "they will not influence the ultimate sentence": *Ipeelee* at para 83.

[37] More broadly, the Canadian context includes what was said about child correction and the duty of all Canadians to protect that "highly vulnerable group" as set out in ***Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)***, 2004 SCC 4 at para 56, [2004] 1 SCR 76. As pointed out at paras 31-40 in ***Canadian Foundation***, there is a consensus that what the appellant did here was unreasonable in Canadian law and outside international norms. Moreover, as pointed out by the sentencing judge here: "The gravity of the precipitating event is not relevant."

[38] Based on this, the sentencing judge's reliance on ***Brown***, was not misplaced in the limited way in which she used it. What she drew from ***Brown*** about recognizing the rights of family members to protection from violence and about not reducing fundamental Canadian values remains valid. As pointed out by the sentencing judge, this Court in ***R v Teclesenbet***, 2009 ABCA 389 at para 9, 469 AR 193, reinforced that aspect of ***Brown*** albeit in different language:

> [9] The law of Canada applies equally to all who are in Canada regardless of the length of time they have resided here. To suggest that it might be acceptable to beat one's wife with a stick elsewhere does not mitigate the seriousness of the offence and is contrary to the purpose of domestic violence laws. Such an interpretation would only exacerbate a very real problem for new immigrants - particularly women and children - the prospect of sustained abuse without the true protection of the law during the early days of arrival to Canada. While lack of knowledge of the law is a circumstance which can be considered, it does not weigh in favor of a conditional sentence.

[39] The protective purpose of the criminal law towards children retains its force: ***R v Turtle***, 2010 ABCA 334 at para 3, 502 AR 107. It has long been recognized: ***R v H(P)***, 1982 ABCA 151 at para 6, 69 CCC (2d) 76. Indeed, this protective policy towards children has been underlined by Parliament with the enactment of sections 718.2(a)(ii.1) and 718.2(a)(iii) of the *Criminal Code* as to sentencing factors and section 718.01 of the *Code* as to objectives. It can likewise be seen reflected in ***Friesen***.

[40] Reference was made at the hearing to ***R v Harris***, 2011 ABCA 41, 502 AR 101, which involved the Court varying a suspended sentence and probation to a 9-month sentence of imprisonment. We observe that ***Harris*** was a Crown appeal situation, which generally involves a reluctance by this Court to alter sentences upward and so may have been exercising constraint as a result. More concretely, the decision in ***Harris*** was before the decision in ***Nickel***, which was a reserved judgment of a 5-member panel of the Court. ***Harris*** was overtaken thereby. As noted in ***R v G(BJ),*** at para 27:

> 27 We agree with the Crown's submission that the pre-*Nickel* cases are of limited utility given the legal framework *Nickel* set out for sentencing those in a position of trust. That framework differs significantly from the earlier so-called *Evans* framework used explicitly or implicitly by the pre-*Nickel* cases.

[41] Furthermore, that the childhood abuse that the appellant alleged that he suffered is not operative *in mitigation* is revealed by other reasons related, as said in ***Laboucane,*** to the "particular offender". First, in the case at bar, this Court has no evidence to suggest that the cultural values in the Côte D'Ivoire would at any time, let alone presently, find the appellant's conduct to be an acceptable form of child discipline.

[42] Second, the appellant's conduct reflected in the agreed facts and relevant fact findings indicates this was not just a case of unskilled or mis-trained parenting. Rather, the reasonable inference is that, as a mature and educated man in Canada, the appellant prevaricated when the child's injuries were discovered *because* he knew that his conduct was not acceptable in Canadian society, even before any official told him that.

[43] Third, the appellant's position was that he was personally maltreated as a child. It is difficult to lend credence to his assertion that he recalled his own experiences as a learning moment because what happened to him was appropriate education for a youngster. Rather, he would more likely have remembered the pain and fright inflicted upon him.

[44] Before leaving this ground, we note that the Crown's submissions here left open the prospect that a sentence of 12 to 18 months might have been consistent with case authorities and the guidance of ***Nickel.*** On the facts here, the sentence imposed by the sentencing judge was not demonstrably unfit.

[45] The second ground of appeal must be rejected.

[46] The third ground of appeal is that the sentencing judge erred in failing to consider the immigration consequences including the potential for deportation from Canada under the *Immigration and Refugee Protection Act*. The Crown concedes, and the record shows, that the sentencing judge did not discuss those immigration consequences at all. The Crown submits, however, that the absence of this discussion from her reasons does not make for reversible error in the outcome. We agree. Inasmuch as the sentencing judge settled on a fit sentence which could not avoid those immigration risks, her failure to discuss the point, if an error, was not an error which had a material impact on the sentence within the meaning of ***Lacasse***.

[47] Moreover, in that light, the appellant's position comes down to whether those immigration consequences, by themselves, alter the scope of a fit sentence for the appellant. The appellant's counsel ably sets out that collateral consequences such as these are relevant factors to consider, as reflected in ***Suter*** and particularly in ***Pham***, where the issue directly related to immigration consequences.

[48] Counsel for the appellant, quite properly, acknowledges that in in ***Suter***, at para 49, the Court said "[w]here the consequence is so directly linked to the nature of an offence as to be almost inevitable, its role as a mitigating factor is greatly diminished". In that respect, what ***Suter*** was saying corresponded with what the Supreme Court had also said in ***R v Malmo-Levine***, 2003 SCC 74 at para 174, [2003] 3 SCR 571, there will be "lingering and perhaps unfair consequences attached to a conviction ... [which] are part of the social and individual costs of having a criminal justice system."

[49] The immigration effect is a statutory one and is thus not the same as the collateral factors in ***Suter*** which were unique. As pointed out in ***Pham***, it is nonetheless a relevant factor to consider, and any consideration the sentencing judge may have given to that factor was not expressed in her reasons. Collateral consequences are to be considered whether or not they have an effect: ***R v C(CC)***, 2019 MBCA 76 at para 30, 379 CCC (3d) 137 (vigilante response not considered significant enough to affect sentence); ***R v W(SL)***, 2018 ABCA 235 at para 38-42, 363 CCC (3d) 446 (considerations not significant enough to affect sentence). But as also said in ***Pham***:

> 14 The general rule continues to be that a sentence must be fit having regard to the particular crime and the particular offender. In other words, a sentencing judge may exercise his or her discretion to take collateral immigration consequences into account, provided that the sentence that is ultimately imposed is proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 15 The flexibility of our sentencing process should not be misused by imposing inappropriate and artificial sentences in order to avoid collateral consequences which may flow from a statutory scheme or from other legislation, thus circumventing Parliament's will.

> 16 These consequences must not be allowed to dominate the exercise or skew the process either in favour of or against deportation. Moreover, it must not lead to a separate sentencing scheme with a *de [page747] facto* if not *a de jure* special range of sentencing options where deportation is a risk.

[50] The disposition of the appellant's case as proposed by the appellant would be "inappropriate and artificial". This ground of appeal must be rejected.

VI Conclusion

[51] The appeal is dismissed. The panel wishes to commend counsel for the appellant and counsel for the respondent for their good faith professionalism in their presentations. In particular, counsel for the appellant ably said as much as could be said for the appellant.

Appeal heard on October 17, 2023

Memorandum filed at Edmonton, Alberta
this 30th day of November, 2023

Khullar C.J.A.

Watson J.A.

Authorized to sign: Antonio J.A.

Appearances:

K.A. Joyce
for the Respondent

A.K. Seaman
for the Appellant