

In the Court of Appeal of Alberta

Citation: R. v. Jefferson, 2008 ABCA 365

Date: 20081103

Docket: 0701-0332-A

Registry: Calgary

Between:

Her Majesty the Queen

Appellant

- and -

Andrew Aurie Jefferson

Respondent

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The Court:

**The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Carolyn Phillips
The Honourable Mr. Justice Patrick Sullivan**

**Memorandum of Judgment of The Honourable Mr. Justice Berger
Concurred in by The Honourable Madam Justice Phillips**

**Memorandum of Judgment of The Honourable Mr. Justice Sullivan
Concurring in the Result**

Appeal from the Sentence by
The Honourable Mr. Justice A.G. Park
Dated the 14th day of November, 2007
(Docket: 061550307Q1)

Memorandum of Judgment

Berger J.A. (for the Majority):

[1] The central issue in this appeal by the Crown is whether this Court should set a “starting point” for sexual assault with a weapon.

[2] The Crown questions the fitness of the sentence following a guilty plea by the 21 year old Respondent on charges of sexual assault, threat to cause death/bodily harm, unlawful confinement, sexual assault with a weapon and common assault. The Respondent had been in custody for 2.5 years prior to the disposition. A sentence of 6.5 years imprisonment was imposed with the result that four years remained to be served.

[3] The factual underpinnings are summarized in the following fashion by the Crown Appellant:

“The offences occurred over an eight-week period. Each involved the Respondent accosting a woman who was walking on the street. They progressed from an unsuccessful attempt to seize a young woman off the street (L.B.) with the threat of having a weapon although none was present; to an abduction and a sexual assault that involved actual sexual intercourse that lasted for three to four minutes (J.H.); to an abduction and sexual assault that involved the use of a knife which lasted in the neighbourhood of one hour and involved the Respondent subjecting the victim to a number of degrading assaults (K.B.).”

(Factum of Crown Appellant, p. 3)

[4] The detailed matrix of evidence is attached as Appendix A to this judgment.

[5] The Appellant sought a global sentence of ten years less 30 months credit for pre-trial custody. The Respondent argued that a sentence of 6.5 years less thirty months credit was appropriate. The sentencing judge acceded to the Respondent’s submission.

[6] The thrust of the Crown’s argument is that while *R. v. Sandercock* (1985), 22 C.C.C. (3d) 79 established three years as the “guideline” for a sexual assault of a major nature “assuming a mature accused with previous good character and no criminal record” (*R. v. Sandercock* at para. 17), the Court in *Sandercock* specifically excluded planned and deliberate attacks. The passage relied upon is the following:

“... On the other hand, we emphasize that the typical case just described does not include a major aggravating factor which is present sufficiently often that it could almost be called a secondary

category; this is where the attack is planned and deliberate, whether the offender has stalked his victim or chosen her at random. ...”
(*R. v. Sandercock* at para. 17)

[7] The Appellant further submits that *Sandercock* does not set out the “guideline” for the assault on K.B. involving as it does a sexual assault with a weapon. The Crown asserts that this Court has never established a “starting point” for cases of that sort, citing also the following observation of this Court in *R. v. A.A.B.* (1997), 209 A.R. 315 (C.A.) at para. 10:

“We have not been invited on this appeal to give consideration to a starting point sentence or to discuss an appropriate range of sentences for the offence of using a weapon in the commission of a sexual assault. We leave that task to another day and therefore decline to comment on what would be the appropriate starting point, other than to say that the starting point for a sentence following conviction for sexual assault with a weapon should, in the usual course, substantially exceed the starting point established for major sexual assaults in *Sandercock*. ...”

[8] In support of its position, the Crown argues that three cases: *R. v. Thomson* (1988), 84 A.R. 159 (C.A.); *R. v. Morales* (1995), 169 A.R. 311 (C.A.) and *R. v. Jivani*, [1983] A.J. No. 204, are of assistance in determining what a fit and proper sentence would be in the circumstances of this case. (Factum of Crown Appellant, paras. 33 and 34).

[9] The latter submission raises a second significant issue in this appeal. *R. v. A.A.B.*, *supra*; *R. v. Jivani*, *supra*; and *R. v. Thomson*, *supra*, cited by the Crown, are all memoranda of judgment issued by this Court. *R. v. Morales*, *supra*, is a memorandum of judgment delivered from the bench. In a recent sentencing decision released by a panel of this Court chaired by Cote, J.A., the following observation appears in the opening sentence:

“This memorandum (like any sentencing memorandum) will not be appropriate to cite as authority”: *R. v. D.S.*, 2008 ABCA 117 at para. 1.

[10] This is an echo of the Court’s Practice Note which purports to diminish the efficacy of the Court’s considered pronouncements premised only on a panel’s decision to circulate or not to circulate a draft judgment to members of the Court off the panel (Practice Note A4). Only “Reasons for Judgment Reserved” are circulated. However, judges off the panel may or may not comment on a circulated draft; they may or may not agree with the reasoning; their views, whatever they may be, may not find expression in the judgment that is finally issued; indeed, “Reasons for Judgment Reserved” may not enjoy the support of the majority of the members of the Court. The issue is canvassed at length in *R. v. Beaudry*, [2000] A.J. No. 1086 at paras. 34 to 40. We endorse those reasons.

[11] It is not at all surprising that neither the Crown nor the defence bar in this jurisdiction adheres to the Practice Note. For that matter, nor does the Supreme Court of Canada (see *R. v. McDonnell*, [1997] 1 S.C.R. 948) where the Court looked to memoranda of judgment and judgments delivered from the bench to properly assess the range of sentencing for sexual assault in Alberta.

[12] The sentencing pronouncements of this and other courts tend to use the terms “starting point”, “guideline” and “range of sentences” as if they were synonymous and readily interchangeable. They are not. The binding pronouncements of the Supreme Court of Canada encourage appellate courts in the interests of parity in sentencing to carefully delineate the range of sentences typically imposed for certain crimes within an appellate court’s jurisdiction. The admonition of the country’s highest court is that a range of sentences serves as a guideline for lower courts. As noted by Bastarache, J., speaking for the majority, in *R. v. Stone*, [1999] 2 S.C.R. 290 at paras. 244-245:

“One function of appellate courts is to minimize disparity of sentences in cases involving similar offences and similar offenders; see *M. (C.A.)*, *supra*, at para. 92 and *McDonnell*, *supra*, at para. 16, *per* Sopinka J. In carrying out this function, appellate courts may fix ranges for particular categories of offences as guidelines for lower courts. However, in attempting to achieve uniformity, appellate courts must not interfere with sentencing judges’ duty to consider all relevant circumstances in sentencing; see *McDonnell*, *supra*, at para. 43, *per* Sopinka J.; and para 66, *per* McLachlin J. In *Archibald* [(1992), 15 B.C.A.C. 301], McEachern C.J. clearly stated, at p. 304, that it would be wrong to assume that there is any ‘precise range that will apply to every case’. In my opinion, this qualification reveals that the Court of Appeal in *Archibald* correctly intended for trial judges to balance uniformity in sentencing with their duty to consider the circumstances of the particular case.

This Court’s decision in *McDonnell*, *supra*, highlights the need for clarity on the part of appellate courts in setting ranges for offences.
...” [emphasis added]

[13] It is understandable that the Supreme Court of Canada would sound such a cautionary note. Clarity in fixing the range is essential.

[14] In addition, this Court has made clear that although the principle of parity is widely recognized (see for example *R. v. Christie*, 2004 ABCA 287 at para. 31), “parity is not an overriding sentencing consideration.” (*R. v. Ellahib*, 2008 ABCA 281 at para. 10). Indeed, mindful that fitness takes precedence over parity, the Supreme Court has held that disparity is available for the same offence where warranted: *R. v. L.M.*, 2008 SCC 31. That is not surprising given the advantages

enjoyed by sentencing judges and the deference that must be accorded to them in assessing all of the circumstances.

[15] The binding pronouncements of this Court inform the significant role that deference plays in appellate review of sentencing dispositions: **R. v. Rahime** (2002), 286 A.R. 377 at para. 17:

“In **R. v. Proulx**, [[2000] 1 S.C.R. 61], Lamer C.J.C., underscored the standard of deference which must be applied to the review of sentencing decisions at paras. 125-126: [emphasis added]

‘[125] ... Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit.

[126] As explained in **M. (C.A.)**, [[1996] 1 S.C.R. 500] at para. 91:

‘This deferential standard of review has profound functional justifications. As Iacobucci J., explained in **Shropshire** [[1995] 4 S.C.R. 227] at para. 46, where the sentencing judge has had the benefit of presiding over the trial of the offender, he or she will have had the comparative advantage of having seen and heard the witnesses to the crime. But in the absence of a full trial, where the offender has pleaded guilty to an offence and the sentencing judge has only enjoyed the benefit of oral and written sentencing submissions (as was the case in both **Shropshire** and this instance), the argument in favour of deference remains compelling. . . . *The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community.* The discretion of a sentencing judge should thus not be interfered with lightly.’ [Emphasis added.]”

See also **R. v. Sand** (2003), 317 A.R. 328 at p. 330; **R. v. North** (2002), 303 A.R. 321 at p. 325; **R. v. H.P.W.** (2003), 327 A.R. 170 at pp. 174-175; and **R. v. Point**, [2003] A.J. No. 1307 at para. 11 where this Court stated:

“... [S]entencing is a highly individualized process based upon the circumstances of the offence and the offender. Indeed, this is the bedrock for the principle of deference in appellate review.”

[16] Most recently this Court noted the limited effect of appellate precedent on the deference accorded sentencing judges who pronounce sentences within the range specified by Parliament:

“The Supreme Court has recently re-affirmed the policy that sentencing decisions of trial judges are entitled to deference. When Parliament sets out a broad discretionary spectrum of potential dispositions, ... it can be taken that Parliament recognizes that no single acceptable and rational outcome will be mandated by appellate precedent within the spectrum between any minimum and maximum that Parliament specifies. ... *R. v. M. (L.)*, (2008) 293 D.L.R. (4th) 1, [2008] S.C.J. No. 31 (QL), 2008 SCC 31 at paras. 17 to 23.”
(*R. v. Wharry*, 2008 ABCA 293 at para. 4)

[17] The appellate imposition of a “starting point”, **without more**, does nothing to inform the range of sentences. In fact, in our opinion, it sacrifices deference on the altar of parity. It pays lip service to the individualized process of sentencing as “the bedrock for the principle of deference in appellate review” (*R. v. Point, supra*, at para. 11) while severely constraining the exercise of sound discretion by sentencing judges who are entitled to “tremendous deference” (*R. v. W.G.*, [1999] 3 S.C.R. 597 at para. 18 and *R. v. D.M.F.*, 2000 ABCA 244 at para. 8.). It offends the principles so carefully enunciated by the Court in *R. v. Proulx, supra*; *R. v. McDonnell* and *R. v. Stone, supra*.

[18] A “starting point” that fails to delineate the range with clarity is no guideline at all.

[19] Accordingly, we reject the Crown Appellant’s call for this Court to set a “starting point” for sexual assault with a weapon or premeditated sexual assault on the basis of the record before us. One can readily contemplate the myriad of factual underpinnings that may present under the rubric of sexual assault with a weapon and premeditated sexual assault. Clarity in setting the range and, in the result, the guideline, requires more by the Crown than the arbitrary selection of a starting point based on three or four appellate rulings. In so holding, we are not to be taken to have endorsed the proposition that the parameters of sentencing fixed by Parliament can be readily narrowed by appellate pronouncement of a starting point. On the contrary, for the reasons recited above, we are of the view that deference to the legislative choice is to be preferred given the plethora of circumstances that may present on a charge of sexual assault with a weapon.

[20] We turn, accordingly, to the Crown’s contention that the sentence is unfit. The sentencing judge was alive to the factual underpinnings. He properly characterized the assault as “serious attacks”. He made specific reference to the traumatic effect upon the victims and appreciated full well that the most important concerns are denunciation and deterrence; stating in no uncertain terms that: “Women in our community should not have to worry about walking the street to be attacked from behind by a person with a knife.” (SAB 68/25-27)

[21] The sentencing judge had the benefit of a FAOS report including a risk assessment. He understood that without treatment the Respondent was a moderate to high risk to re-offend violently. He noted that the FAOS report diagnosed the accused as having a polysubstance dependency, personality disorders and anger problems. He agreed with the assessment in the report that the Respondent was a danger to the community and said that lengthy sentences needed to be imposed. (SAB 69/9-18) He had the benefit of Dr. David Tano's observations that:

“In his favor however despite the above significant risk factors for future violent recidivism, Mr. Jefferson did present throughout his stay when he was able to tolerate discussion, he was able to express significant remorse for his actions as well as the desire to learn how to control his temperament. Issues regarding chronic low self-esteem, loss of control, vulnerabilities and high rejection sensitivity can be addressed via extensive psychotherapy. He will require appropriate treatment during his incarceration including sex offender treatment program, anger management programs and individual psychotherapy to address family of origin issues, coping strategies, tolerance to frustration as well as issues regarding past abuse and neglect in childhood. Finally, he will have to remain sober from all substances and would benefit from an intensive substance abuse counselling program.” (SAB E8)

[22] The very thorough pre-sentence report also included the following:

“... Allegedly Mr. Jefferson's father was a violent man who was emotionally and physically abusive and struggled with alcohol dependence. The children were frequently witnesses to domestic violence perpetrated upon their mother. ... The early family history was remarkable for extreme dysfunction and trauma. His mother struggled with serious drug and alcohol dependence issues. ... Reportedly, his mother was also involved in prostitution, sometimes bringing men home. ... [H]is mother had numerous men living in the home many of whom perpetrated violence on her in front of the children. ... It was also noted that throughout the years Mr. Jefferson would also have to intervene when his mother would attempt suicide. ... (SAB E2)

There is also a history of suicidal ideations and attempts in the past with one episode around the age of 9 or 10 where he ripped his clothes and scratched himself to the point of bleeding. Approximately 2 years ago he slashed his wrists while intoxicated. He has done this many times and on one occasion ... he slit his throat requiring 16

stiches. On one other occasion he attempted to hang himself by tying his shoe lace around his neck and he kicked the chair out, however, his friend cut him down. (SAB E3)

...

Although Mr. Jefferson reports that he loves women, and feels horrified how he hurt these victims, some collaterals report that Mr. Jefferson has an extremely low opinion of women which they attribute to his mother's history of violent relationships and repeated neglect. (SAB E4)

...

Mr. Jefferson did appear to be genuinely remorseful regarding how he had hurt and disrupted the lives of these victims and their loved ones. (SAB E5)

...

At times when he was settled he was able to verbalize his remorse over the index offenses and understand the ramification that had resulted from his actions to the victims. In addition he could understand that he had significant issues regarding anger management, abandonment and other issues such as these stemming from childhood." (SAB E6)

[23] The sentencing judge found that the Respondent was truly remorseful to the harm and hurt that he caused his victims and his family. (SAB 69/19-25)

[24] He took into account that only one of the victims was required to testify at the preliminary inquiry and that none of the victims were required to testify at trial. (SAB 69/31-36 and SAB 70/2-3) He also considered that no victims were under the age of 18 and the accused was under no type of mandatory supervision or judicial interim release when he carried out these offences. (SAB 69/37-41)

[25] We are not persuaded that the sentence imposed is demonstrably unfit. Nor do we discern any error in law or principle. The sentencing judge did not fail to consider a relevant factor or over-emphasize the appropriate factors. The appeal must be dismissed.

Appeal heard on May 21, 2008

Memorandum filed at Calgary, Alberta
this 3rd day of November, 2008

Berger J.A.

I concur:

As authorized by: Phillips J.

Sullivan J. (concurring in the result):

[26] I concur with Justice Berger’s finding that the sentence imposed by the trial judge was not demonstrably unfit. There was no error of either law or principle. Justice Berger confirmed the role of courts of appeal in delineating the range of sentences typically imposed for crimes within the court’s jurisdiction, serving as a guideline for lower courts. However, in the case at bar the Crown did not provide the evidence required to establish a guideline. In any event, the sentence provided by the trial judge was not unfit in the circumstances; he properly considered the relevant factors and did not over-emphasize any factor. In the result, the appeal must be dismissed.

[27] Though I agree with these ultimate conclusions there are issues which arise in the judgment of Justice Berger, the analysis of which turns upon fundamental legal principles at the foundation of our criminal justice system, that cannot be over-emphasized or over-clarified. I write these reasons for the purpose of addressing these principles.

Principles of Sentencing

[28] Though our basic notion of fairness demands that every sentence be primarily and essentially appropriate to the offence committed, the manner in which an appropriate sentence is to be arrived at is a matter less settled. In Canada, the standard of fairness as well as the means of achieving it are established by the *Criminal Code* (R.S.,1985, c. C-46). Section 718.1 of the *Code* states that the fundamental principle behind sentencing is that of proportionality—the relation of means to ends. Section 718.2 sets out a number of additional principles relevant to achieving proportionality, including the competing principles of contextualization and parity. The *Code* requires judges to increase or reduce sentences in favour of aggravating or mitigating circumstances and also to ensure that similar offenders are dealt with justly.

[29] The fundamental principle of sentencing in 718.1 and the additional principles in 718.2 ensure that the values of liberty, equality, and the rule of law--elemental to our criminal justice system and our legal system more broadly--are sustained. The increase or decrease of a sentence based upon context ensures that the law is not applied in a vacuum, and that proper consideration is given to ensuring sentences remain relevant and purposeful. The principle of parity, more than standing for the coarse notion of equal treatment, supports a uniformity “whereby sentences for similar offences committed by similar offenders in similar circumstances are understandable when viewed together” (*R. v. Christie* 2004 ABCA. 287, at para. 42). Parity further encourages respect for the rule of law through certainty, accessibility, intelligibility, clarity and predictability in the case of sentencing (*R. v. Ferguson* [2008] S.C.C. 6 at para. 68). The combined effect of these considerations protects Canadians’ right to liberty, arguably the primary objective of proportionality.

[30] While individualized sentencing and sentencing parity are undoubtedly competing principles, they are not incompatible. Each supports the recognition that all members of society are “equally deserving of concern, respect and consideration” (*Andrews v. Law Society of British Columbia*

[1989] 1 S.C.R. 143, at 171). The comparable but distinct value of each principle is revealed through a brief examination of the diverse roles of the various courts to the end of just sentencing.

[31] In recognition of the importance of contextual factors in sentencing the trial judge, who has first-hand access to relevant details, is awarded considerable discretion. “The sentencing judge has “served on the front lines of our criminal justice system” and possesses unique qualifications in terms of experience and the ability to assess the submissions of the Crown and the offender” (*R. v. L. (M.)*, [2008] S.C.J. 31, at para. 15; *R. v. M.(C.A.)* [1996] 1 S.C.R. 500, at para. 91).

[32] The role of appellate courts is not to second guess a trial judge’s assessment of relevant details in the process of sentencing, but rather to “delineate and refine legal rules and ensure their universal application” (*Housen v. Niolaisen*, [2002] 2 S.C.R. 235 at para. 9). This can be accomplished at the appellate level through encouraging sentence parity--establishing guideline sentences, where appropriate, which “enable a sentencing judge to determine where on the continuum of seriousness the particular offence lies and to what objectives a sentence for that offence should be tailored” (*R. v. S.(M.F.)* 2008 ABCA 157 at para. 10).

[33] While clearly the offender is the most interested party in the sentencing process, victims of crime and the public more generally are also affected in cases where the delicate balance of sentencing principles is ignored (*R. v. Christie*, at para. 47). When consideration of context in sentencing eclipses the principle of parity, judicial discretion appears to the public as judicial inclination. This can only hamper public respect and public confidence, necessary conditions for maintaining the rule of law.

Reasons v. Memorandum of Judgment

[34] The precedential value of the case law cited by the Crown is another issue which touches upon the most basic principles of criminal justice. The question is as to whether memoranda of judgment, as opposed to reasons for judgment, are appropriate authority to cite (see *R. v. D.S.*, 2008 ABCA 117, at para. 1). A Court of Appeal Practice Note supports the sentiment that “previous memoranda of the Court in sentencing have little weight as precedent” (Practice Note A4).

[35] The reasons canvassed in *R. v. Johnas* ((CA 1982) 41 AR 183, at 196), suggest that a “Memorandum of Judgment” carries less weight than “Reasons for Judgment” as the former are generally intended as a referent to the parties only and so are more brief and do not set out the facts. Despite this conclusion there are examples of important principles of law articulated in memoranda of judgment. For example, in *R. v. Wells* ((1998), 61 Alta. L.R. (3d) 377 (Alta. C.A.)) new principles of law related to the sentencing of aboriginal offenders were addressed.

[36] As the role of appeal courts “is to minimize disparity of sentences in cases involving similar offences and similar offenders” (*R. v. M.(C.A.)* at para. 92), any published material which provides clarity concerning this Court’s view of appropriate sentences or sentence guidelines should be considered relevant. Memoranda of judgment are printed and widely disseminated as with other

judgments of the Court of Appeal. As Justice Berger has noted in his reasons: neither the Crown nor the defence bar in this jurisdiction adhere to the Practice Note, which is not legally binding. Further, the Supreme Court of Canada referenced memoranda of judgment in assessing the range for sexual assault in Alberta in the case of *R. v. McDonnell* ([1997] 1 S.C.R. 948).

[37] Defence counsel and the Crown should have the benefit of any and all reasons of the Appellate Court in building their cases; trial judges should have the benefit of the same in establishing fair sentences. The idea that all of the Court's reasoning is legally relevant stands for the principle of equality and the rule of law as previously articulated.

Appeal heard on May 21, 2008

Memorandum filed at Calgary, Alberta
this 3rd day of November, 2008

Sullivan J.

Appearances:

B.R. Graff
for the Appellant

A.A. Sanders
for the Respondent

APPENDIX A

FACTS

Victim 1 (L.B.)¹

The facts of the incident involving L.B. were:

- The offences occurred on March 18, 2006. The victim finished work at the 7-Eleven at about 6.30 a.m. The trial judge was not advised of her age, but was told that she was a young woman and over 18 years of age. After her shift ended she left work to walk to her home which was about three blocks away.
- The attack occurred as she was walking home, shortly after 7.00 a.m., just at the break of dawn. The Respondent approached her from behind and grabbed her from the waist. She was surprised and turned around to see a man she did not recognize. She asked him what was going on and he put his arm around her. He told her “Come with me, like play cool, play cool.”² He wanted her to walk with him. He told her that he had a knife to her back. She told him that she had no money. He wrapped his arm around her and was up close to her. When he was in this position she felt that he had his hand pointing into her back, not a knife.
- At that time she had her hands on his shoulders and began to fight with him. She had a cigarette in her hand and went to burn him on his neck. She went to knee him and he pushed her away. They wrestled, he tried to push her to the ground but she brought him with her to the ground. She screamed for help but no one was around. She finally broke away from him, ran back to the 7-Eleven and contacted the police. The Respondent ran away in the opposite direction.

Victim 2 (J.H.)³

The facts of the incident involving J.H. are as follows:

¹ Sentence Appeal Book, 22/14-23/38

² Sentence Appeal Book, 23/28-29

³ Sentence Appeal Book, 23/47-25/15

- The offences occurred on April 8, 2006, three weeks after the attack on L.B. The victim is slightly older than L.B. On that date she left her house at 6.25 a.m. to catch a bus. She was walking along wearing headphones and listening to music when a man (the Respondent) grabbed her from behind in a bear hug and told her not to scream or he would kill her. She begged him not to hurt her and he told her that he would not if she kept quiet. He kept his arm around her and walked her to a dumpster shed in a condo complex. He took her into the shed and told her to walk to the back. He then told her that it was too tight a space between the dumpster and the shed wall and had her back up.
- When she reached the front of the dumpster, he told her to drop the bags she was carrying. He led her to the back of the condos in a green space. He told her to get on the ground on her stomach. He then laid on top of her and started rubbing his body against her. He told her to take off her shorts but she refused. He then grabbed her shorts and pulled them off with her underwear. He laid on top of her and got up and pulled his pants down. He told her to stick his penis inside her but she squeezed her legs together. He flipped her over, laid on top of her and told her not to look at him. He lifted up her shirt and touched her breast and she pushed his hand away. He then penetrated her vagina with his penis for three to four minutes. During this she begged him to get off and not to hurt her. He tried to kiss her and then stuck his tongue in her mouth.
- When he was done he got up and told her to turn around. He then asked her for her I.D. She told him that she didn't have any and he told her not to get up and not to tell anyone. He ran away to the south down the green space area. She got up, got dressed, picked up her bags, ran to the bus stop and left a message on her boyfriend's cell phone. She then called her mother who picked her up and they called the police.

Victim 3 (K.B.)⁴

The facts of the incident involving K.B. are as follows:

- The offences occurred on May 10, 2006. The victim was older than the first two, believed to be in her 40's. She left her residence at approximately 12.30 a.m. to walk to the 7-Eleven. After making some purchases there she left the 7-Eleven at 1.02 a.m. As she was walking home the Respondent jumped out from in between a bike path and a condo complex. He had a knife with a curved six-inch blade in his right hand. He came up behind her and held the

⁴ Sentence Appeal Book, 25/24-29/34

knife out in front of her. He held on to her with his other hand. He told her not to speak and if she did what he said he would not hurt her.

- He took her to a walking path and told her to get on her knees. She asked him what he was doing and not to hurt her. She told him that she had two little girls at home. He told her he wouldn't hurt her, to do what he said and not make a sound. After she knelt down he put down the knife and put both his hands on her breasts. He began rubbing up against her from behind with his groin. They were both clothed at the time. He made a comment about the size of her breasts. He then pulled her shirt out of her jeans and she told him not to do this. He then started to pull her jeans down and she pulled them up telling him not to do this. He told her that if she didn't want to get hurt she had to be quiet. He was very calm when he said this.
- He then took her pants down and rubbed her breasts over her bra. He pulled down her pants and her underwear to her knees and began to rub her vagina with his hand. He then pulled one of her hands and placed it on his erect penis. He entered her vaginally from behind with his penis. This went on for 5 to 10 minutes. He stopped suddenly and pulled away from her and told her to get up and pull up her pants. After she did he got behind her and walked her to the end of the walking path and into an alley. He kept his left hand on her right arm and had the knife in his right hand. It was held about a foot from her stomach.
- She was scared that the accused was going to take her down the alleyway and kill her. Again she told him that she has little girls, that she is the only one they have and not to hurt her. He again told her that he would not hurt her. Halfway down the alley he told her to get on her knees and he took her pants down from behind. He tried to have anal sex with her and she screamed that it hurt. It hurt a lot. She could not say how far in he inserted his penis. He stopped when she yelled and again told her to be quiet and also told her that she doesn't want him to hurt her. He again entered her vaginally from behind. He unclasped her bra and reached underneath to touch her breasts with both hands. Then he told her that he thought he wanted to take her home. This terrified her. He said it a couple of times. He also asked her if she liked this. She didn't answer.
- He then told her to lay flat on her stomach and he then lay on her back. He then told her to turn onto her back, keep her eyes closed and turn her head to the side. She rolled over and had her hands over her eyes because she didn't want him to think that she was looking at him. He then pulled her pants and underwear further down her legs. He got on top of her, lifted up her shirt and kissed her breasts. He then told her that he wanted her to kiss him, to use her

tongue and kiss him like she meant it. He then kissed her and put his tongue in her mouth. He asked her to put her arms around him. The entire time he continued to have vaginal intercourse with her. It seems that this went on for a long time. Then he sat on her chest and said "*I have to fuck those tits*".⁵ He tried to kiss her several more times but she kept turning her head away.

- She noticed no odour of alcohol on his breath. Towards the end of the assault he put his penis between her breasts and moved forward and backward on them. Then he told her to suck his penis. He got it a little ways into her mouth and she moved her face to the side and told him no. She was crying and he told her to be quiet. He then went back to having vaginal sex with her. It was very humiliating. He asked her how old she was and asked if she had any I.D. She again told him that she had two little girls and that she was all on her own with them. He told her that he was going to come and asked her if she wanted him to come in her mouth or inside her. She told him not in her mouth and he ejaculated in her vagina. He did not use a condom. He laid on her for a few seconds after that and then got up and ran away in the direction they had come from. She ran in the opposite direction and called the police from her cell phone. She estimated that the second attack lasted for about 45 minutes.

⁵ Sentence Appeal Book, 28/20-21