

Like A House of Cards: Sentencing *McKnight*

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Case Commented On: *R v McKnight*, [2020 ABQB 443 \(CanLII\)](#)

Law abhors a vacuum; to be meaningful, legal rules and principles must be tethered to reality. This means the law is animated by the factual circumstances of each particular case. Law garners *gravitas* or weight in the application of the law to the facts. In short, the law needs context. This basic proposition is particularly important in sentencing an offender after conviction by a jury. Once the jury trial ends, the trial judge is no longer the “judge of the law” (*R v Pan*; *R v Sawyer*, [2001 SCC 42 \(CanLII\)](#) at para 43) but transforms into the sentencing judge, who must work with both fact and law. The recent Alberta Queen’s Bench sentencing decision by Justice Sulyma in *R v McKnight*, [2020 ABQB 443 \(CanLII\)](#), highlights the difficulties inherent in this judicial transition and the need for clarification in this area. Not unlike the metaphorical “house of cards”, the decision also demonstrates the importance of the foundational facts to the integrity of the entire sentencing process.

The *McKnight* Conviction

Mr. McKnight was charged with multiple counts of sexual assault on numerous women he met at various night clubs. The jury convicted McKnight of five of these counts involving sexual intercourse with five women (at para 17).

Establishing the Foundational Facts on Sentence

There are multiple sources from which the factual foundation at the sentencing hearing is established. Foundational facts may arise from an agreed statement of fact, documents (e.g. presentence report), testimonial evidence, or from submissions of counsel (see ss 723 and 724(1)). The sentencing judge can accept hearsay evidence for the truth of its contents (see s. [723\(5\)](#)), providing those facts are not in dispute (see s. [724\(3\)](#)). Where there is a trial, the sentencing judge may also rely on “any information disclosed at the trial” (see s 724(1)).

The foundational facts on sentence must be relevant to the purpose and objectives of sentencing, creating a synergy between the law and fact (*R v Ferguson*, [2008 SCC 6 \(CanLII\)](#) at para 15. There are many sentencing principles found in both statutory (see ss [380.1](#), [716](#) to [761](#) of the Criminal Code, [RSC 1985, c C-46](#)) and common law. The law shapes the factual foundation requirements on sentence, making the sentencing process unique. This relationship between fact and law must be a balanced one; neither the law nor the facts should take over the sentencing process.

The factual foundation on sentence is further refined for a jury trial (see s [724\(2\)](#)). In those circumstances, the jury is the trier of fact, and the sentencing judge “shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilt” (see s [724\(2\)\(a\)](#)). There is no decision-making involved in the acceptance of the proven facts implicit in the jury’s verdict. Rather, the sentencing judge is elucidating “the facts the jury must have relied on to convict” (*R v Punko*, [2012 SCC 39 \(CanLII\)](#) at para 12). This deference to the jury’s verdict is essential to the integrity of the jury system. It maintains and protects the jury’s verdict, ensuring the verdict will not be undermined or reviewed at the sentencing stage.

There is room for judicial discretion under section [724\(2\)\(b\)](#) where the jury’s verdict of implied facts or “factual implications” are ambiguous (*Ferguson* at para 18). The sentencing judge “may” make factual findings based on the trial evidence, if relevant to the proceedings, “or hear evidence” at the sentencing proceedings on those facts (see s [724\(2\)\(b\)](#)). In this determination, the sentencing judge functions independent of the jury’s verdict (*Ferguson* at para 18). Despite this discretion, it is not a re-trial where the judge reviews the evidence *ab initio* to determine guilt or innocence. At all times, the judge must be firmly in the sentencing environment with the ultimate goal of crafting an appropriate sentence (*Ferguson* at para 16).

The sentencing judge, in establishing the factual foundation, must be cognizant of the defence and the prosecutor’s position. Section [724\(3\)](#) outlines the procedure where counsel disputes “any fact that is relevant to the determination of a sentence.” Generally, where a fact is in dispute, the party relying on the fact must prove it on a balance of probabilities (see s [724\(3\)\(d\)](#)). The exception is where the prosecutor relies on a disputed fact which may aggravate sentence; in those circumstances, the prosecutor must prove it beyond a reasonable doubt pursuant to section [724\(3\)\(e\)](#).

In *McKnight*, the prosecutor relied heavily on the trial evidence of the offender’s use of a date rape drug in the commission of the offences as an aggravating feature on sentence (at paras 22, 29, 41 and 47). This fact was disputed by the defence. Ultimately, Justice Sulyma found the fact was not proven to the requisite degree (at paras 22, 29, 41 and 47). Although the approach was correct, it is only disputed aggravating facts which must be proven beyond a reasonable doubt (see *R v Gardiner*, [1982 CanLII 30 \(SCC\)](#), [1982] 2 SCR 368 and s [724\(3\)](#)). At paragraph 20, the sentencing judge appears not to appreciate this difference when she finds “any” aggravating fact must be proved by the prosecutor beyond a reasonable doubt.

The Basis of the Jury’s Verdict

The sentencing judge’s determination of the express or implied facts essential to the jury’s verdict is easier said than done and is often open to debate by counsel. Does disagreement on this issue amount to ambiguity, thereby engaging section [724\(2\)\(b\)](#)? If that were so, then the jury’s verdict would be constantly open to independent determination by the sentencing judge. At some point, the sentencing judge is required to establish the factual foundation pursuant to the jury’s verdict. Keep in mind, this judicial determination occurs after the fact, looking back at the trial evidence. The judge at a jury trial is not hearing the evidence as the trier of fact and certainly not with a view to sentence.

Justice Sulyma, in applying section 724, found the express and implied facts essential to the jury verdict to be “straight forward” (at para 8). In her view, the “elements of the offence” of sexual assault are “not complex,” requiring “the physical elements and the presence of or lack of consent and intent” (at para 8). On this premise, Justice Sulyma found the “essential elements” of the jury’s verdict (at para 8). This finding by Justice Sulyma equates the essential elements of the offence, in this case sexual assault, with the facts “essential” to the jury’s verdict. In doing so, Justice Sulyma is binding herself only to the barest of facts, express or implied, by the jury’s verdict, namely that Mr. McKnight intentionally applied force, of a sexual nature, without the consent of the victims. By so narrowly confining the factual basis of the jury’s verdict, Justice Sulyma is over-reaching her discretion, making all other factual implications open to her independent judicial determination.

Justice Sulyma’s approach to the factual basis of the jury’s verdict does not do the jury’s verdict justice nor is it consistent with the spirit of section [724\(2\)\(a\)](#). Sexual assault is not legally simple, particularly on the issue of consent. A lack of consent can arise in a number of circumstances outlined under sections [273.1\(2\)](#) and [265\(3\)](#) of the *Code*. For instance, there is no consent where the victim was “incapable of consenting for any reason” (s [273.1\(2\)\(b\)](#)). Alcohol or drugs can render a complainant incapable of consenting. Consent can also be vitiated – meaning that even if consent is given at the time, circumstances dictate that the consent is ineffective. Under section [273.1\(2\)\(c\)](#), consent is vitiated where the consent is induced “by abusing a position of trust, power, or authority.” The purpose or aim of this subsection is to protect “the vulnerable and the weak and the preservation of the right to freely choose to consent to sexual activity” (*R v Snelgrove*, [2019 SCC 16 \(CanLII\)](#) at para 3). The sentencing judge found alcohol, vulnerability and control to be factors in the offences (at para 21) but she did not find these facts pursuant to her obligation under s [724\(2\)\(a\)](#). Rather, the sentencing judge made independent determinations as if the entire factual matrix of the offences were ambiguous, when in fact there was more to the jury’s verdict than the mere elements of the offence. What is “essential” to the jury’s verdict would include the elements of the offence but those elements would not be exhaustive. Although the averments of the charge is a starting point for determining the factual implications of the jury’s verdict, it is not the only consideration.

The Independent Determination of the Sentencing Judge

A sentencing judge only enters into an independent determination of the facts to “fill the void” where there is ambiguity in the factual implications of the jury’s verdict (*R v Joseph*, [2020 ONCA 73 \(CanLII\)](#) at para 93). This issue brings us full circle to the problem of how section [724](#) is to be applied considering counsel will, no doubt, have their own interpretation or view of the factual implications of the jury’s verdict. Justice Sulyma’s restrictive view of the facts that she found bound to accept from the jury’s verdict compounded this problem. So much of the factual foundation on sentence was open to interpretation and determination that Justice Sulyma spent the better part of *McKnight* filling the factual void, and, in doing so was entirely guided by both counsels’ direction. Instead of developing the factual foundation needed to apply the sentencing principles, she filled the verdict’s factual void with the aggravating and mitigating facts relied upon by counsel.

The Factual Foundation as Aggravating and Mitigating Factors

Sentencing is a “judicial function” (*R v Nur*, [2015 SCC 15 \(CanLII\)](#) at paras 87 and 89). Counsel may make submissions but it is the judge who is the ultimate arbiter of what is the fit sentence in the circumstances. This requires the sentencing judge to be fully apprised of sentencing principles, guidelines and statutory requirements. Even if counsel does not highlight or rely upon certain facts, the sentencing judge is bound to do so if those facts are relevant to sentencing objectives. Otherwise, the sentence imposed will not accurately reflect sentencing principles and objectives. This holds for aggravating and mitigating factors; it is the judge’s responsibility, independent of counsel, to review the factual foundation on sentence to determine the presence and absence of mitigating and aggravating features of that evidence. In *McKnight*, the sentencing judge did not look far beyond counsel’s submissions, permitting the adversarial positions of counsel to drive the finding of facts.

The presence of aggravating or mitigating facts affects the quantum of sentence. According to section [718.2\(a\)](#), a sentence “should be” increased or decreased to account for relevant aggravating or mitigating facts relating to the offence and the offender. The *Code* outlines a number of factual circumstances where such aggravation may be found. Justice Sulyma made a particular point, in her cursory review of the evidence, to indicate whether there were aggravating or mitigating features, which would increase or decrease the sentence from the “starting point” of three years incarceration for major sexual assaults (at para 12).

Approaching this requirement mathematically, for each aggravating or mitigating feature found, Justice Sulyma mechanically deducted or added six months to a year from the three-year starting point. In count one, she added a year for the aggravating feature of no condom use (at paras 25 to 26). For count 6, she found no mitigating facts but failed to attend to any aggravating ones even though the victim was “young and inexperienced” (para 38). Justice Sulyma increased the sentence on count 7 by a year due to no condom use, but failed to take into account the violence used in the incident (at para 43 to 45). Finally, for count 12 she found a lack of condom use an aggravating feature (at para 42) and some evidence of lasting harm but declined to increase the sentence for these aggravating features (at paras 48-50). In fact, Justice Sulyma failed to appreciate the significance of the harm caused to all of the victims as an aggravating feature on sentence (at para 60 and see s [718.2 \(a\)\(iii.1\)](#)).

There were many other uncontroverted facts, all part of the factual foundation, which should have been considered in aggravation of sentence. For instance, sections [718.2\(a\)\(ii\)](#) and [718.201](#) indicates that an aggravating circumstance is the abuse of an intimate partner, particularly female partners, in committing the offence. The *Code* defines “intimate partner” as including “dating partner” (s 2). In the factual circumstances of *McKnight*, the offender met the victims at night clubs. Arguably, the situation was a date or “[a social engagement between two persons that often has a romantic character.](#)” In fact, Justice Sulyma described count 3 as a “dinner date” yet reduced the sentence (para 32). Additionally, she finds the offences involved young vulnerable women under the control of the offender (at para 21) but does not mention these facts in aggravation of the sentence. Although the court does not find the presence of a drug, intoxication of the victim as another aggravating factor, was present in four of the cases.

The *McKnight* decision reads as if the sentencing judge is parsing the facts for only those aggravating and mitigating features raised by counsel. For example, this undue focus on one aspect of sentencing principles leads Justice Sulyma to reduce the sentence on count 3 by six months without specifying any reason for the reduction (at para 32). Similarly, she labels the offender “youthful,” as a mitigating factor, although Mr. McKnight is a savvy 33-year-old. Instead of mining the facts for the aggravating and mitigating features submitted by counsel, the judge ought to have created the factual foundation, informed by sentencing objectives, in determining the sentencing outcome. This would include reviewing all of the relevant aggravating and mitigating factors as required by law.

Cumulative Effect on Other Sentencing Principles

The weakness in the foundational facts is a continuing issue throughout the *McKnight* decision, compounded by the application of the totality concept, and sentencing principles, such as the “starting point” for major sexual assaults.

Recently, the Alberta Court of Appeal in *R v Parranto*, [2019 ABCA 457 \(CanLII\)](#), commented on the “concept” of totality, which is concerned with the fitness of an aggregate sentence where there are convictions for multiple offences. In the decision, the five-member panel clarified totality as an overarching concept that may be used to achieve the objectives of sentencing principles but was not itself such a principle (*Parranto* at para 54). In other words, totality is not a standard by which an otherwise fit and proper sentence should be measured (at paras 57 and 59). Although in *McKnight*, the sentencing judge applied totality in conjunction with sentencing principles, she effectively articulated and used totality as a stand-alone “principle” (*McKnight* at paras 52 and 61) in “scrolling down” or reducing an otherwise fit sentence (*Parranto* at para 67).

As part of totality discussion, Justice Sulyma also erroneously took into account the acquittals rendered by the jury on eight of the thirteen counts of sexual assault. Although the factual foundation used at the sentencing hearing must not be inconsistent with the jury’s verdict, including any verdict of acquittal, the sentencing judge has otherwise “no duty to elucidate or make findings with respect to the jury’s verdict of acquittal” (see *Punko* at para 12). In *McKnight*, the acquittals impacted Justice Sulyma’s view of the offender’s moral culpability, an important factor on sentence (see *R v Friesen*, [2020 SCC 9 \(CanLII\)](#) and *McKnight* at para 55). It is difficult to see how an acquittal on one sexual assault diminishes the moral blameworthiness of McKnight on a conviction for another sexual assault, involving a different victim. As an aside, in finding the moral culpability of the offender was not “so grave,” Justice Sulyma improperly connected this personal blameworthiness to sentencing principles of general deterrence and denouncement (at para 55).

Finally, a word on “starting points” in sentencing. I have written extensively on the issue in previous blogs ([Sentencing to the Starting Point: The Alberta Debate](#) and [Binding The Courts: The Use of Precedent in Sentencing Starting Points](#)). Recently, the Supreme Court of Canada in *R v Friesen*, raised concerns with Alberta’s use of “starting points” in sentencing, reiterating that “starting points” are “guidelines, not hard and fast rules” (*Friesen* at paras 36 to 41). Specifically, the Court disapproved of the approach in *R v Arcand*, [2010 ABCA 363 \(CanLII\)](#), the very decision animating the sentencing in *McKnight* (*McKnight* at paras 3, 12 and 17). The

sentencing judge in *McKnight* failed to heed the court’s warning in *Friesen* by using the three-year sentencing starting point in *Arcand* as a talisman from which the sentence pivoted either upward or downward. This mechanical movement in the sentence was inextricably connected to the erroneous factual foundation created by the sentencing judge and requires appellate review.

Conclusion

Many of the problems identified in the *McKnight* sentencing arise from the lack of clarity in the law. In practice, it is difficult to delineate between the proven “express or implied” facts from the jury’s verdict and the factual gaps from circumstances of ambiguity. Further appellate clarity is needed on this issue including the role of counsel in this process. Without this clarity, the factual foundation for the sentencing of McKnight is suspect.

The *McKnight* sentencing is a lesson in the importance of the relationship between fact and law, so crucial in our justice system. Without a firm factual foundation, which is tethered to the purpose and objectives of sentencing, the sentence imposed will be suspect. A tenuous factual foundation, like the proverbial house of cards, cannot easily withstand scrutiny and may falter. When that happens, the law seems to be applied in a vacuum.

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