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Supreme Court Denies Leave to Appeal in Marital Rape Sentencing Case

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Case commented on: *R v QJK*, [2013 ABCA 244](#); leave to appeal to [SCC dismissed](#) November 21, 2013

On November 21, 2013 the Supreme Court of Canada (McLachlin CJ, Cromwell J and Wagner J) dismissed a leave to appeal application by the defence for a sentence handed down by the Alberta Court of Appeal in *R v QJK*. The Supreme Court's [summary](#) of the case frames the issue on which leave to appeal was sought as "Whether the Honourable Court of Appeal erred in not giving deference to the Learned Sentencing Judge as he did give proper weight to the gravity of the offense and properly considered the principles of denunciation and deterrence and imposed a fit sentence." In a very brief Memorandum of Decision delivered from the bench, the Court of Appeal had increased the sentence imposed by the sentencing judge from 6 months to 20 months imprisonment. The Court of Appeal noted that the circumstances of the case – forced sexual intercourse by the accused on his spouse – amounted to a major sexual assault necessitating a 3 year starting point (2013 ABCA 244 at para 1). According to the Court of Appeal, the sentencing judge "overemphasized the mitigating circumstances and underappreciated the gravity of the offence as well as the need that the sentence reflect an appropriate degree of denunciation and deterrence" (at para 1).

The Court of Appeal decision did not cite any case law, but was no doubt mindful of cases such as *R v Sandercock*, [1985 ABCA 218](#), which established a 3 year starting point for cases of major sexual assault, and *R v Arcand*, [2010 ABCA 363](#), the Court's most recent decision on sentencing starting points in sexual assault cases (for a comment on these cases see Joshua Sealy-Harrington's post [Blurred Lines: The Need for Clear Criteria in the Sentencing of Sexual Assaults](#)). The Court could also have referred to past cases dealing with sentencing in the context of spousal sexual assault such as *R v OFB*, 2006 ABCA 207 at para 12, where Justice Sheila Greckol (sitting as an *ad hoc* member of the Court of Appeal) stated that "Sexual assault committed by a domestic partner or former domestic partner violates the victim's emotional, psychological and physical autonomy in a way that may permanently harm her intimate and trust relationships; relationships that most view as integral to a fulfilled life." Nor did the Court of Appeal reference section 718.2(a)(ii) of the *Criminal Code*, RSC 1985, c C-46, which provides that abuse of a spouse is an aggravating factor that shall be taken into consideration in sentencing an offender. The Court did note the presence of several mitigating factors, however, including the accused's guilty plea, as well as the fact that this was "an isolated and out of character act by an individual without a record" (at para 2). It also indicated that at the time of sentencing, even defence counsel had submitted that a sentence of 1 to 2 years was appropriate in the circumstances.

As noted in an [abstract](#) for a forthcoming publication on marital rape, "Intimate Partner Sexual Violence (IPSV) is the most common type of sexual violence and a common component of

domestic violence, yet most cases go unreported ...” (Louise McOrmond-Plummer, Patricia L. Easteal, and Jennifer Y. Levy-Peck, *Intimate Partner Sexual Violence: A Multidisciplinary Guide to Improving Services and Support for Survivors of Rape and Abuse* (London: Jessica Kingsley Publishers, 2014 forthcoming). In a [report](#) I wrote for the [equality effect](#) in 2010, I analyzed the approximately 300 decisions in spousal sexual violence cases that had been reported across Canada since the immunity for marital rape was repealed in 1983. This small number of reported decisions confirms the low reporting rates for spousal sexual assault. The report also found also that sentencing in spousal sexual violence cases is widely divergent, with some courts recognizing the gravity of such offences and applying section 718.2(a)(ii) of the *Criminal Code*, while other courts emphasize the relationship between the parties and factors such as consensual sex following the sexual assault as mitigating factors (see p 47-53).

Given the small number of marital rape cases that end up before the courts and the wide diversity in sentencing in such cases, it is regrettable that the Supreme Court did not take this opportunity to provide some principled guidance in this area. Perhaps in future decisions the Alberta Court of Appeal itself will provide such guidance, as it did in *Sandercock* and *Arcand* with sexual offences more broadly.

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