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Good Kid, M.A.D.D. City:
Seeking Proportionality in Drunk Driving Sentencing

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Cases Commented On: *R v Lacasse*, 2015 SCC 64; *R v Sargent*, 2016 ABCA 104

> Constantly drinking and drive. Hit the powder then watch this flame that arrive in his eye. [...] I live inside the belly of the rough Compton, USA. Made me an angel on angel dust.
>
> -good kid m.A.A.d. city (Kendrick Lamar, 2012)

Despite the Supreme Court's recent consideration of the law governing sentencing appeals, such appeals remain a controversial area of legal analysis for our appellate courts. This persisting ambiguity, which is rooted in how the law is applied, rather than the law itself, motivates us to revisit the Court's leading decision in *R v Lacasse.* This comment summarizes the majority and dissenting judgments in *Lacasse*, notes the ambiguity left by the disagreement between those judgments, outlines a recent Alberta Court of Appeal decision – *R v Sargent*, 2016 ABCA 104 – which demonstrates that ambiguity, and discusses the significant policy consequences associated with the Supreme Court's unanimous holding that it is appropriate to more severely punish individuals with sympathetic mitigating factors (good kids) when they reside in communities with high crime rates (mad cities).

BACKGROUND: SENTENCING PRINCIPLES AND LOWER COURT DECISIONS

The facts underlying the offence in *Lacasse* are straightforward: the accused, Mr. Lacasse (who was only 20 years old at the time of sentencing), pled guilty to two counts of alcohol-impaired driving causing death contrary to the *Criminal Code*, RSC 1985, c C-46, s 255(3).

Given that Mr. Lacasse pled guilty, the key issue at trial and through each layer of appeal was the appropriate sentence. Accordingly, this post provides a brief overview of the sentencing process before discussing the trial, appeal, and Supreme Court decisions.

Sentencing Overview

The *Criminal Code* guides the process of judicial sentencing. In particular, it provides the following:

1. Purpose of Sentencing: to protect society and to contribute to respect for the law and the maintenance of a just, peaceful and safe society (*Criminal Code*, s 718).

2. Means of Achieving Purpose of Sentencing: imposing just sanctions that have one or more of the following objectives:

a. denouncing crime and its associated harms;

b. deterring crime;

c. separating offenders from society, where necessary;

d. rehabilitation of offenders;

e. providing reparations to victims and the community; and

f. promoting responsibility in offenders and acknowledgment of the harm they have caused.

(*Criminal Code*, ss 718(a)-(f)).

3. Requirement of Any Sentence: that it be proportional to:

   a. the gravity of the offence; and

   b. the degree of responsibility of the offender.

   (*Criminal Code*, s 718.2).

In sum, despite the variety of sentencing objectives listed above, the *Criminal Code* requires that every sentence be proportional.

In addition to the general statutory principles described above, courts in some jurisdictions have outlined specific sentencing guidelines to assist in judicial reasoning with respect to certain offences. Specifically, for impaired driving causing death, the Court of Québec outlined three ranges of sentences in *R v Comeau*, 2008 QCCQ 4804 at para 177, which were confirmed by the Québec Court of Appeal in *R v Paré*, 2011 QCCA 2047 at para 68, namely:

1. Lenient sentences: if the predominant factors favour the accused, then there should be a sentence varying between 18 months' and three years' imprisonment.

2. Harsh sentences: if the factors of deterrence and denunciation outweigh the personal factors of the accused, then there should be a sentence varying between three years' and six years' imprisonment.

3. Very harsh sentences: if personal factors are unfavourable to the accused, then there should be a sentence varying between six years' and nine years' imprisonment (and even more severe sentences are possible in "worst-case" circumstances).

   (The Sentencing Ranges).

Lacasse Trial Sentence

At trial, Judge Couture sanctioned Mr. Lacasse with a sentence of 6 years and 6 months for each count of impaired driving causing death to be served concurrently, minus one month for pre-trial detention. As Mr. Lacasse's sentence was for 6 years and 6 months, it was a "very harsh sentence" pursuant to the Sentencing Ranges.

In awarding this very harsh sentence, Judge Couture weighed mitigating factors (*i.e.* factors favouring a more lenient sentence) and aggravating factors (*i.e.* factors favouring a harsher sentence).

Judge Couture attached less weight to several mitigating factors, including:

1. the fact that Mr. Lacasse pled guilty, because he had done so very late; and

2. the fact that Mr. Lacasse had no criminal record, because the offence was likely to be committed by people who do not have criminal records.

In contrast, Judge Couture attached more weight to several (purportedly) aggravating factors, including:

1. the fact that Mr. Lacasse had been intoxicated and had smoked cannabis;

2. the speed at which he was driving;

3. the fact that he had received previous speeding tickets; and

4. the number of victims (2) and the impact of the accident on the victims' families.

Lastly, Judge Couture justified imposing a very harsh sentence because of the frequency of impaired driving offences in Mr. Lacasse's region (the Beauce region). Specifically, Judge Couture indicated that nearly one in five cases in the Beauce region involves impaired driving, and held that this factor weighed in favour of a harsher sentence because it demonstrates a greater need for deterrence – one of the statutorily recognized objectives of sentencing – in the Beauce region. In addition, in his written reasons Judge Couture posed the question: "Might it be that driving in such a state is trivialized here more than elsewhere?" (at para 72).

Lacasse Appeal Sentence

On appeal, the Québec Court of Appeal reduced the length of the trial sentence to a sentence of 4 years' imprisonment, minus one month for pre-trial detention – shifting from a "very harsh sentence" to a "harsh sentence" pursuant to the Sentencing Ranges.

The Court of Appeal noted that a very harsh sentence generally requires personal factors unfavourable to the accused, and that, in this case, personal factors were not unfavourable to Mr. Lacasse (at paras 15-16). Further, the Court of Appeal held that Judge Couture should have placed greater emphasis on Mr. Lacasse's potential for rehabilitation and less emphasis on making an example of him for the purpose of deterrence (at para 17).

SUPREME COURT JUDGMENTS

This post discusses two issues considered by the Supreme Court in *Lacasse*, namely:

1. whether the Court of Appeal erred in overturning the length of sentence imposed by the Judge Couture; and

2. whether the frequency of impaired driving in the region where an offence is committed may be considered in sentencing.

These issues were considered in two Supreme Court judgments:

1. the majority judgment, authored by Justice Wagner and concurred in by Justices Abella, Moldaver, Karakatsanis, and Côté (the Majority), which restored the trial sentence and endorsed a legal framework that is more deferential to trial sentencing; and

2. the dissenting judgment, authored by Justice Clément Gascon and concurred in by Chief Justice Beverley McLachlin (the Dissent), which affirmed the appeal sentence and endorsed a legal framework that is more interventionist of trial sentencing.

Where the Judgments Agree

To effectively distill where the Majority and Dissent disagree, it is critical to first identify where they agree. In particular, the Majority and Dissent both agree that:

1. the *Criminal Code* guides the reasoning process for sentencing (Majority, at para 1; Dissent, at para 127);

2. the severity of a sentence weighs (1) the seriousness of the crime's consequences, and (2) the offender's moral blameworthiness (Majority, at para 12; Dissent, at para 127);

3. sentencing ranges are not binding on judges, but act merely as guidelines, such that judges may deviate from sentencing ranges in response to specific circumstances in individual cases (Majority, at para 60; Dissent, at para 143); and

4. appellate intervention is warranted if a sentence is demonstrably unfit (Majority, at para 11; Dissent, at para 136).

Where the Judgments Disagree

When read side-by-side, the Majority and Dissent tests for appellate intervention in sentencing appear quite different (see paras 11 and 136). But, when read as a whole, the two judgments' legal tests only differ in two narrow respects:

1. whether sentencing errors must be material before they can justify appellate reconsideration; and

2. how the local frequency of an offence may be considered in sentencing.

Disagreement Over Materiality Requirement

As indicated above, both the Majority and Dissent agreed that appellate intervention is warranted if a sentence is demonstrably unfit (Majority, at para 11; Dissent, at para 136). Accordingly, their disagreement in respect of the test for appellate intervention was limited to circumstances other than demonstrable unfitness, where appellate intervention is warranted.

In the Majority's view, the only additional circumstance warranting appellate intervention is an error of law or principle "that has an impact on the sentence" (at para 11). By requiring that the error of law or principle impact the sentence, the Majority created what we will call a "materiality requirement" for errors of law or principle to justify appellate intervention in

sentencing *i.e.* the requirement that such an error must be "material" to permit appellate intervention.
In contrast, the Dissent held that there are three circumstances warranting appellate intervention other than demonstrable unfitness, namely (at para 136):

1. an error in principle;

2. failure to consider a relevant factor; and

3. overemphasis of a relevant factor.

At first blush, the Dissent provides for a much broader scope of appellate intervention, by casting a net of intervention wider than errors in principle. But this impression is quickly corrected by a review of the Majority reasons. Later in its reasons, the Majority also writes that "an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating factor or mitigating factor can justify the intervention of an appellate court" (at para 43). Presumably, then, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor are examples of "errors of law" which, according to the Majority's test, can justify appellate intervention. Arguably, the Majority's phrasing ("erroneous consideration" of a relevant factor) displays a subtle divide with the Dissent's phrasing ("overemphasis" of a relevant factor), which could be interpreted as a further disagreement between the judgments. But the Majority expressly endorses the language of "overemphasis" of relevant factors in its reasons as a legitimate circumstance of appellate intervention (at para 41).

Given the above, the Majority and Dissent tests for appellate intervention in sentencing are near identical, and may be put as follows: that appellate intervention in sentencing can only be justified if:

1. the sentence is demonstrably unfit; or

2. the trial judge commits (1) an error in principle, or (2) an error of law (which includes failing to consider a relevant factor, overemphasizing a relevant factor, or erroneously considering an aggravating or mitigating factor).

In consequence, the only difference between the judgments' tests for appellate intervention is that the Majority holds that errors under item 2 must be material to warrant appellate intervention (at paras 43-44), whereas the Dissent holds that the error itself warrants appellate reconsideration of the fitness of the sentence (at para 139).

With the above difference between the Majority and Dissent distilled to simply being the materiality requirement, the judgments are much easier to compare. In particular, the Majority and Dissent do not disagree about the Court of Appeal's intervention in this case because their tests for intervention are different, but rather, because they apply their similar tests in different ways. A review of the two judgments' views on the Court of Appeal and trial judgments illustrates this point.

According to the Majority, the Court of Appeal erred when it overturned the trial sentence because the basis for that intervention was the mere fact that the trial judge deviated from the established Sentencing Ranges (at para 12). But both judgments agree that mere deviation from the Sentencing Ranges is insufficient to warrant appellate intervention (Majority, at para 60; Dissent at para 143). Indeed, the Dissent's reason for upholding the Court of Appeal's

intervention was because, in the Dissent's view, Judge Couture made multiple reviewable errors pursuant to the test outlined above, not because Judge Couture simply deviated from the Sentencing Ranges (at para 164).

Similarly, the bulk of the Majority and Dissent's disagreement over the trial judgment relate to how they characterize the reasons of Judge Couture rather than the appropriate legal test for overruling them. According to the Majority, Judge Couture properly emphasized deterrence in this case, and the Dissent's real concern with Judge Couture's reasons was that he mis-weighed certain factors (at paras 72 and 77-78). But, again, the Dissent indicates that merely mis-weighing relevant factors does not warrant appellate intervention. To the contrary, the Dissent criticizes Judge Couture's reasons for the multiple reviewable errors summarized below (at para 164).

A review of the *Lacasse* decision leaves the impression that the Majority and Dissent attended different appeals. To correct the "two ships passing in the night" that these judgments appear to be, a more granular analysis of the specific errors of Judge Couture identified by the Dissent is necessary. This analysis will also isolate the narrow instance where the materiality requirement divided the Court.

The Dissent's endorsement of the Court of Appeal's intervention (at para 164) is based on multiple alleged reviewable errors, namely:

1. erroneous consideration of aggravating/mitigating factors, including:

    a. considering an element of the offence – impairment – an aggravating factor (Dissent, at paras 146-47), and

    b. discounting certain factors – Mr. Lacasse's youth and expressed remorse – which are generally considered mitigating factors (Dissent, at para 143);

2. failure to consider a relevant factor *i.e.* Mr. Lacasse's favourable presentence report (Dissent, at paras 149-50); and

3. overemphasis of a relevant factor *i.e.* exemplarity and deterrence (Dissent, at para 151-163).

Critically, all of the above errors fall within the scope of the Majority and Dissent's test for appellate intervention in sentencing (subject, of course, to the Majority requiring that such errors must be material to warrant appellate intervention).

The first error identified by the Dissent – considering impairment (an element of the offence) to be an aggravating factor – is refuted by the Majority on a legal basis (on the basis of materiality). In essence, the Majority acknowledges that Judge Couture committed a legal error in this instance, but overlooked that legal error because, in the Majority's view, it did not have "an actual impact on the sentence" (at para 83).

The other errors, in contrast, reflect a disagreement between the Majority and Dissent with respect to how their similar tests should be applied. Specifically, while the Dissent considered all of the above errors as justifying appellate intervention in sentence, the Majority explained otherwise, finding:

1. That the trial judge did not err when considering the mitigating factors. In particular:

    a. Mr. Lacasse's youth was properly discounted as a mitigating factor because (1) young people are most affected by impaired driving; (2) there is a need to emphasize deterrence of impaired driving; and (3) there were dire consequences in this case (at para 79); and

    b. Mr. Lacasse's expressed remorse was properly discounted because his guilty plea was delayed (at para 81).

2. That the trial judge did not err when considering the relevant factor of the presentence report, but rather, simply allocated little weight to it (at para 82).

3. That the trial judge did not err when emphasizing deterrence given (1) the particular importance of deterrence in the context of impaired driving offences (at paras 5-9); and (2) the "scourge" of impaired driving in the Beauce region (at paras 97-99 and 103).

In sum, the *Lacasse* judgments display far more disagreement in the application of the law than in the law itself. Admittedly, the judgments disagreed about whether legal errors must be material to justify appellate intervention. But that materiality requirement only explains the disagreement between the judgments for one of the four errors relied upon by the Dissent in upholding the Court of Appeal's intervention – the improper consideration of intoxication as an aggravating factor. In contrast, the remaining three errors display a surprising amount of disagreement within the Supreme Court regarding how to apply its own test for appellate intervention in sentencing.

Disagreement Over How Local Frequency May Be Considered in Sentencing

The disagreement between the judgments over how the local frequency of an offence may be considered in sentencing is also surprisingly narrow.

Short of making certain "comments" qualifying the Majority's strong views, the Dissent conceded that the local frequency of an offence in the judge's home district may be considered in sentencing (see Majority, at para 90; Dissent, at para 154) and even that judicial notice of such local frequency is permissible, though "not without limits" (Majority, at para 95; Dissent, at para 158).

Given the above, the actual disagreement between the Majority and Dissent with respect to considering the local frequency of an offence in sentencing was limited to two narrow points:

1. With respect to the legal principles at stake, the Majority held that a trial judge may take judicial notice of the frequency of a crime in other judicial districts (at para 98), whereas the Dissent held that a trial judge's judicial notice of the frequency of a crime should be limited to that judge's own judicial district (at para 158).

2. With respect to applying those legal principles, the Majority held that Judge Couture did not take judicial notice of the frequency of impaired driving outside the Beauce region in this case (at para 97), whereas the Dissent interpreted Judge Couture's remarks about whether impaired driving is trivialized in the Beauce region more than elsewhere as the Judge inappropriately taking judicial notice of facts outside his judicial district (at paras 158 and 163).

PERSISTING AMBIGUITY IN SENTENCING PRINCIPLES: R V SARGENT

The persisting ambiguity following *Lacasse* is demonstrated in the recent Alberta Court of Appeal decision in *Sargent*. In *Sargent*, just as in *Lacasse*, the Alberta Court of Appeal was divided on how to apply the governing legal principles. Both the majority and dissenting opinions recognized that *Lacasse* (a Supreme Court decision from only 5 months prior) was the governing decision on sentencing appeals. Nonetheless, the majority substituted Ms. Sargent's initial 90-day intermittent sentence for two counts of possession for the purpose of trafficking with a sentence of 12 months in prison (at paras 1 and 20) on the basis that the initial sentence was demonstrably unfit (at para 12). In stark contrast, the dissent of Justice Berger would have maintained the initial sentence which, while lenient, was based on a number of sympathetic mitigating factors, including:

- Ms. Sargent's lack of a criminal record (at para 25).
- Ms. Sargent's diagnosed Post-Traumatic Stress Disorder and depression (at para 25).
- The fact that Ms. Sargent was recovering from an opioid addiction and was on methadone treatment at the time of the incident (at para 25).
- The fact that Ms. Sargent's presentence report recommended community service and mental health counselling (at para 26).
- The fact that the offence was out of character for Ms. Sargent and that she was clearly remorseful (at para 26).
- The fact that Ms. Sargent was threatened by her incarcerated boyfriend and felt pressured by him to bring the drugs into the prison (at para 27).
- The fact that Ms. Sargent had considerable family support, was living with her parents, and was employed as a manager at Pet Smart at the time of her sentencing (at para 29).

The palpable division at the Court of Appeal in respect of sentencing appeals is best put in Justice Berger's own words:

> The majority opinion reflects the persistent disregard in a number of judgments that this Court has issued of the clear and unequivocal directions of the Supreme Court of Canada that emphasize the importance of individualized sentencing and limit appellate intervention in the exercise of sentencing discretion by trial judges.
>
> […]
>
> With great respect, my colleagues minimize the significance of the mitigating factors relied upon by the sentencing judge for which there is ample support in the record. […] Such parsing of factors and weighing one against the other by the appellate court is a flagrant usurpation of the role of the sentencing judge and a clear breach of the admonition of the Supreme Court of Canada (at paras 22 and 32).

Interestingly, despite the differences between *Lacasse* and *Sargent*, the outcome was the same: the imposition of a harsh criminal sentence on an accused with sympathetic personal factors.

These similar strict sanctions occurred in opposing circumstances, with the court in *Lacasse* imposing a harsh sentence by deferring to the trial judge and the court in *Sargent* imposing a harsh sentence by disregarding the trial judge. While these two examples fall well short of a scientific trend, they raise a significant concern, namely, the lack of clarity in the law with respect to sentencing resulting in the imposition of excessively harsh sentences because such sentences can always be defensibly imposed.

COMMENTARY

As discussed above, a narrow divide differentiates the Majority and Dissent in *Lacasse*. Still, this narrow divide has tangible consequences. Indeed, this narrow divide extended Mr. Lacasse's sentence from 4 years to 6 years and 6 months (an increase of 62.5%) and, indirectly, extended Ms. Sargent's sentence from 90 days to 12 months (an increase of 300%).

Given the significant consequences of the currently unsettled law on sentencing appeals, this comment will explore what we consider the most significant issues that arise from the Court's decision in *Lacasse*:

1. Should there be a materiality requirement in sentencing appeals?

2. Should the local frequency of an offence impact sentencing?

Should There Be a Materiality Requirement in Sentencing Appeals?

In our view, the Majority describes three different interpretations of the materiality requirement (at paras 11, 83, and 43), and whichever interpretation is followed results in a flawed approach to sentencing appeals. Specifically:

1. Interpretation 1: The initial legal principle described by the Majority (at para 11) is flawed because it lacks effect.

2. Interpretation 2: How the Majority later applies that legal principle (at para 83) is flawed because it is excessively deferential.

3. Interpretation 3: When the Majority alludes to a subjective materiality requirement (at para 43) it is flawed because it is analytically confusing.

Interpretation 1: The "Principled" Materiality Requirement Lacks Effect

The Majority initially described the materiality requirement in the following terms: that an error only warrants appellate intervention if it "has an impact on the sentence" (at para 11). The lack of effect from this principled materiality requirement is apparent in its operation. Specifically, this materiality requirement precludes appellate intervention when the error justifying that intervention has no impact on the sentence imposed. But, if the error had no impact, then a review of that error should not alter the sentence whether or not a materiality requirement exists. In other words, this materiality requirement, as it was initially described by the Majority, is self-defeating. It permits intervention when an error impacts a sentence and it precludes intervention when an error does not impact a sentence – the same approach a court would take if it completely disregarded the materiality requirement.

Indeed, one of the decisions cited by the Majority in support of a materiality requirement – *R v Gavin*, 2009 QCCA 1 – demonstrates how this principled materiality requirement lacks effect. In *Gavin*, the Court of Appeal held that a trial judgment should not be overturned when a single misconstrued sentencing factor (1) was "nothing more than incidental"; (2) did not result in a harsher sentence; and (3) "had no real effect on the sentence" (at para 35). But if the Dissent had similarly considered Judge Couture's errors this trivial, it would have presumably left his sentence undisturbed (see para 139).

Further, the principled materiality requirement has no impact on judicial resources because both the Majority and Dissent tests involve reassessing the trial judge's reasoning. Admittedly, the Majority's test only intervenes when a trial judge's error is material to the sentence imposed. But that materiality can only really be determined if the appellate court reviews the trial judge's reasoning. In particular, whether an error has "no real effect" on a sentence requires a review of the basis for that sentence. In this way, the Majority's test still requires a review of the lower court's sentence, and merely characterizes that review differently, with the Majority reviewing the erroneous reasoning below for materiality (at para 44) and the Dissent reviewing the erroneous reasoning below for fitness (at para 139). In any case, the Majority must also review the sentence below for fitness since demonstrable unfitness requires intervention under either test.

Interpretation 2: The "Applied" Materiality Requirement Is Excessively Deferential

The materiality requirement actually applied by the Majority later in its reasons is stricter than the one described above. In application, the Majority changed the materiality requirement from requiring that a reviewable error "impact on the sentence" (at para 11) to requiring that a reviewable error "unduly" impact on the sentence (at para 83). As a consequence, the Majority's materiality requirement, in application, inappropriately insulates erroneous reasoning from appellate review.

This stricter materiality requirement is reflected in the reasons of the Majority. The Majority held that Judge Couture's erroneous characterization of impairment (an element of the offence) as an aggravating factor was non-reviewable because it was "a non-determinative error that did not unduly affect the sentence, given that Judge Couture identified other aggravating factors" (at para 83; emphasis added). In other words, the presence of other aggravating factors depreciated (but did not eliminate) the impact of this error on the ultimate sentence. Indeed, the Majority never pointed to language in Judge Couture's reasons to the effect that this specific error 'had no impact' or 'did not influence' the sentence ultimately imposed. As a consequence, the test actually applied by the Majority required that the error have an undue impact to warrant appellate intervention – a higher threshold than the materiality requirement initially described.

In our view, the Majority's stricter applied materiality requirement is unworkable. The exercise of sentencing almost always involves weighing various mitigating and aggravating factors. In consequence, the Majority's reasons essentially preclude appellate review of sentence wherever a judge "dilutes" various legal errors by surrounding them with other legal non-errors, an unconventional approach to appellate review which tolerates excessively harsh sentences stemming from recognized legal errors. A judge should not have to make, for example, "at least four errors in principle" (see para 47) that obviously affect their analysis to warrant appellate intervention.

Further, this unconventional approach to appellate review is particularly problematic in the context of sentencing. Any given sentence falls on a continuous spectrum of days that a judge

could impose as a final sentence. As a consequence, it is difficult to think of an express legal error in reasoning not impacting the final sentence, at least slightly. The Majority disregarded Judge Couture's error in characterizing impairment as an aggravating factor because it was surrounded by other legal non-errors. But that in no way disproves that this error extended the very harsh sentence ultimately imposed on Mr. Lacasse. In effect, the Majority permitted Mr. Lacasse's incarceration, a significant deprivation of liberty, to be extended by a recognized legal error.

Similarly, the fact that sentences inherently fall on a spectrum makes the Majority's statement that "non-determinative" errors cannot warrant appellate intervention difficult to understand. The Majority (and Dissent) repeatedly emphasized how the sentencing process involves the "weighing" of various considerations (see *e.g.* Majority, at para 54; Dissent, at para 164). By corollary, no single error could be ever be "determinative" of a sentence. Rather, the sentencing factors each independently contribute to the ultimate sentence. As a result, requiring that legal errors be "determinative" (of what?) to justify appellate intervention is a confusing standard.

Lastly, the Majority's approach makes it too easy for sentencing judges to insulate their sentences from appellate review. In effect, pursuant to the Majority's test, a sentence cannot be appealed where the sentencing judge superficially mentions multiple sentencing factors. Indeed, such superficial analysis was upheld by the Majority in this case. Judge Couture's "consideration" of Mr. Lacasse's favourable presentence report consisted merely of noting that a sentence "should not be so long as to hamper the rehabilitation of the accused" (at para 82). As the Dissent observes, this remark fails to show that Judge Couture "really considered this important factor" (at para 159) in his ruling on sentence. In our view, the proper legal test should enable appellate courts to dig deeper into the analysis of sentencing judges to ensure that there is actual consideration of the relevant sentencing factors. Otherwise, judges will be free to impose erroneous sentences as long as they merely allude to relevant factors – too lenient a standard of appellate review.

Interpretation 3: The "Subjective" Materiality Requirement is Analytically Confusing

As a final point, the materiality requirement is analytically confusing. The Majority's requirement that a reviewable error must have impacted the sentence to warrant appellate intervention is meant to make its test more deferential to lower courts. But, as discussed above, that materiality requirement is ineffective (in principle) because the Dissent's test would similarly maintain a trial sentence if a trial judge's error had no impact on the sentence.

However, an alternative understanding of the Majority's test (interpretation 3) may explain why the Majority considers its test more deferential. Perhaps, by saying that an error is only material if it had "an impact on the trial judge's reasoning" (at para 43), the Majority is limiting appellate intervention to when the error was material <u>from the perspective of the trial judge</u> when imposing their sentence, not material <u>from the perspective of the appellate court</u> when reviewing that sentence. If this is the test advanced by the Majority, it is too confusing to support.

Such a test would be confusing because ascertaining whether an error was subjectively material to a trial judge's reasoning, when the trial judge themselves did not even realize they were making that error, is a highly theoretical exercise. It is difficult to understand the precise ways in which various listed factors independently influenced a judge below. For example, on the facts of this case, the counterfactual of what sentence Judge Couture would have awarded had he not considered an improper aggravating factor is, in our view, difficult to divine. It is quite possible that a proper balancing of aggravating and mitigating factors would have resulted in Judge

Couture imposing a lower sentence. The Majority's claim that the sentence would have "clearly" been the same notwithstanding this error (at para 16) is doubtful.

In contrast, the approach of the Dissent is more straightforward. Once a reviewable error is identified, the door is opened for the possibility (but not the certainty) of appellate intervention (at para 139) – an approach that explores the objective merit of the reasoning below, rather than the impact of that erroneous reasoning on the subjective mindset of the trial judge.

In addition to being confusing, this subjective materiality requirement is excessively deferential. In effect, the Majority's test insulates a trial judge from appellate intervention if they unknowingly make reviewable errors and volunteer that these errors were immaterial to the final sentence imposed. But how many reviewable errors can a trial judge make, and characterize as immaterial, before that trial judge's characterization of their own errors as immaterial itself amounts to an error? In other words: should a trial judge really be insulated from intervention when they rule that a harsh sentence will be imposed because of a single accurate aggravating factor as long as they characterize the remaining erroneously considered mitigating factors immaterial to their sentence?

Should the Local Frequency of an Offence Impact Sentencing?

Both the Majority and Dissent accepted that the local frequency of an offence may impact a sentence (Majority, at para 90; Dissent, at para 154). In our view, considering the local frequency of an offence has legal and policy consequences which, at a minimum, should have been more thoroughly considered by the Court (and, at a maximum, should have led the Court to reject the local frequency of an offence as a legitimate sentencing factor).

We have two concerns about considering the local frequency of an offence in sentencing:

1. from a legal standpoint, it conflicts with certain statutory provisions regarding sentencing; and

2. from a policy standpoint, it risks disproportionately impacting marginalized communities.

First, considering the local frequency of an offence in sentencing conflicts with certain statutory provisions underlying sentencing. The *Criminal Code* provides that "[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" (*Criminal Code*, s 718.1). The Majority and Dissent clearly endorsed this "fundamental principle" of sentencing (Majority, at para 12; Dissent, at para 127). But the local frequency of an offence does not really factor into either of these considerations, and accordingly, its consideration arguably contributes to disproportionate sentencing.

This disproportionality is best illustrated by example. Assume that Accused #1 drives drunk and kills two people in his community where drunk driving is infrequent and that Accused #2 drives drunk and kills two people in his community where drunk driving is frequent. Also assume that, besides their different communities, Accused #1 and Accused #2 are otherwise indistinguishable. The gravity of the offence (*i.e.* the seriousness of the crime's consequences) is identical in both scenarios – two people have died. Similarly, the offender's responsibility is identical – the two offenders are indistinguishable. And yet, considering the local frequency of the offence imposes a harsher sentence on Accused #2, contrary to the proportionality enshrined in the *Criminal Code*.

Admittedly, deterrence is a prescribed sentencing objective in the *Criminal Code* (s 718(b)), and such deterrence may be more required in specific communities where lower sentences have proven ineffective at deterring crime. But it is nevertheless difficult to fit a deterrence-based sentence within the rubric of proportionality required by the *Criminal Code*. Requiring proportionality between an offender's moral blameworthiness and the gravity of their specific offence demands an individualized sentencing process. And, as the Dissent explained: "[w]hen considered in the sentencing context, the frequency of a crime in a given region does not help paint a portrait of the accused, but instead reflects external factors" (at para 153). In our view, it would be an overstatement to claim that considering the local frequency of an offence in sentencing is wholly irreconcilable with the provisions on sentencing in the *Criminal Code*. That said, we think that the complexity involved in reconciling such consideration with the requirement in the *Criminal Code* of proportional sentencing merited more exploration by the Court.

Second, considering the local frequency of an offence in sentencing risks disproportionately impacting marginalized communities. A necessary consequence of considering the local frequency of an offence in sentencing is that defendants who live in areas with higher crime rates will receive higher sentences. But studies have found strong statistical associations between marginalized communities and high crime rates (see here at pg 66). Accordingly, considering the local frequency of an offence in sentencing may specifically increase sentences for marginalized citizens.

Again, an example illustrates the injustice of this approach. Assume that Accused #1 possesses illegal drugs in a community where drug possession is rampant and that Accused #2 possesses illegal drugs in a community where drug possession is rare. Also assume that, besides their different communities, Accused #1 and Accused #2 are otherwise indistinguishable. If Accused #1 resides in a community (like the downtown east side in Vancouver) where drug possession is both frequent and undeniably linked to economic and social conditions, the imposition of a stiffer sentence on Accused #1 merely reinforces the inequality she experiences, despite the offence's gravity and the offender's responsibility being indistinguishable from those of Accused #2. Marginalized and vulnerable populations are already likely to reside in communities with higher crime rates and greater policing. Adding harsher sentences to these factors only perpetuates and entrenches that marginalization.

CONCLUSION

Despite the Supreme Court's recent consideration of sentencing principles, our courts still struggle to apply those principles in a consistent and predictable manner. Indeed, the recent divide in *Sargent* reflects heated disagreement at the Alberta Court of Appeal on this very issue. Consequently, the ambiguities described above relating to how our courts should be applying the legal test for sentencing appeals should be clarified.

In addition, the consideration of an offence's local frequency merits further discussion by our courts. It is critical that individuals convicted of crimes in Canada receive individualized sentences that reflect their specific circumstances, and permitting the local frequency of an offence to justify harsher sentences necessarily generalizes the sentencing process. Further, it risks disproportionately impacting marginalized communities, who are already over-criminalized in the *status quo*. While these concerns may not justify a complete rejection of an offence's local frequency as a sentencing factor, they certainly justify further reflection on the implications

involved. Without that further reflection, too many "good kids" will be made examples of the "mad cities" in which they reside, and will be denied the individual sentence they deserve – an individual sentence which recognizes how mad cities explain criminal behavior, and understands how sensitivity to those environments is critical to effective criminal sentencing.

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