NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Hynes*, 2022 NSCA 51

Date: 20220708
Docket: CAC 506125
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Shawn Wade Hynes

Respondent

Judge: By the Court (Beveridge, Farrar, Bryson JJ.A.)

Appeal Heard: May 26, 2022, in Halifax, Nova Scotia

Subject: Criminal law: imposition of a conditional sentence order

Summary: A young Black apprentice suffered a significant injury when he was hit in the back by a nail. The trial judge found the respondent had intentionally pointed a nail gun at the victim but refused to find the respondent had discharged the nail gun intentionally. The act constituted both criminal negligence causing bodily harm and an assault with a weapon by virtue of having pointed it at the victim.

The Crown adduced no evidence at trial or at the sentence hearing that the offences were in any way motivated by racism. It accepted it could not establish bias or prejudice based on race, or any similar factor, as a statutory aggravating factor. The Crown nevertheless suggested the respondent was in a position of trust within the meaning of s. 718.2(a)(iii) of the *Criminal Code*. The Crown sought 12-15 months' incarceration, plus probation.

The respondent supported two dependent children who lived with him, had no prior record, a highly positive Pre-Sentence Report

bolstered by many character letters. He sought a purely probationary sentence.

The trial judge rejected a purely probationary sentence due to the need to emphasize denunciation and deterrence for violence motivated by discriminatory beliefs and the victim was vulnerable.

The judge struck down the statutory provisions that would have otherwise made a conditional sentence unavailable as unconstitutional. He imposed an 18-month conditional sentence with house arrest for 12 months with the mandatory statutory conditions and numerous optional ones, including the requirement to make restitution to the victim and perform 120 hours of community service.

The Crown does not challenge the availability of a conditional sentence order but seeks leave to appeal sentence on the basis the trial judge erred in principle when he determined a conditional sentence order would be appropriate, or such a sentence amounts to a manifestly unfit sentence.

Issues: (1) Did the trial judge err in principle?
(2) Is the sentence manifestly unfit?

Result: Leave to appeal is granted but the appeal is dismissed. The trial judge committed errors in principle. The errors benefitted the Crown. The respondent was not in a position of trust vis-à-vis the victim within the meaning of s. 718.2(a)(iii) of the *Code*; the Crown never alleged as aggravating factors that the offence was motivated by bias nor that the apprentice was a vulnerable victim. The trial judge did speculate about the impact on the respondent from being exposed to extremist beliefs if incarcerated, but this comment played no role in the judge's decision to impose a conditional sentence order. The trial judge made no reversible error in principle in his conditional sentence analysis, nor is the sentence manifestly unfit.

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Judges:	Beveridge, Farrar and Bryson JJ.A.
Appeal Heard:	May 26, 2022, in Halifax, Nova Scotia
Held:	Leave granted and the appeal dismissed, per reasons by the Court
Counsel:	Mark Scott, Q.C., for the appellant Zeb Brown, for the respondent

Reasons for judgment:

[1] The Crown seeks leave to appeal, and if granted, appeals from a trial judge's imposition of an 18-month conditional sentence order imposed on the respondent for criminal negligence and assault with a weapon.

[2] The Crown says the trial judge erred in principle when he determined a conditional sentence order would be appropriate, or it amounts to a manifestly unfit sentence.

[3] Although we grant leave to appeal, we dismiss the appeal.

OVERVIEW

[4] The parties have acknowledged these proceedings have attracted media attention. Why wouldn't they? The incident appears to be seen as a situation of a young Black man intentionally shot in the back with a nail gun by a racially-biased white co-worker.

[5] The problem is that portrayal is not accurate. The evidence at trial demonstrated the victim enjoyed a positive relationship with his co-workers with absolutely no racial overtones. The Crown did not adduce a scintilla of evidence of racial bullying or racism, nor did it ask any questions in cross-examination of the respondent at trial to in any way suggest biased behaviour, let alone anti-Black racism.

[6] There was no doubt the respondent had a nail gun, it discharged, and the victim suffered serious injuries as a result.

[7] The respondent testified the nail gun discharged as he was attaching a piece of 2x6 to the top of a wall, the nail deflected from its intended path, ricocheted, and struck the victim in the back. Another independent witness confirmed this version of events.

[8] The trial judge rejected the respondent's evidence. However, the trial judge refused to find the respondent had intentionally discharged the nail gun. Instead, he concluded the respondent had pointed the nail gun at the victim, it discharged, and this act amounted to criminal negligence as well as an assault with a weapon.

[9] At the sentencing hearing, the Crown argued for a period of incarceration of between 12 and 15 months followed by a 15-18 month probation order. The respondent initially acknowledged that Parliament's 2012 amendments to the *Criminal Code* precluded a conditional sentence order. The respondent requested a community-based disposition in the form of a suspended sentence and probation.

[10] The sentence proceedings were adjourned from time to time, mostly due to the exigencies of the COVID-19 pandemic. The legal landscape shifted. By a majority judgment, the Ontario Court of Appeal in *R. v. Sharma*, 2020 ONCA 478 struck down the provisions of ss. 742.1(c) and (e)(ii) of the *Criminal Code* as violating ss. 7 and 15 of the *Canadian Charter of Rights and Freedoms* and were not saved as being a reasonable limit pursuant to s. 1 of the *Charter*[1].

[11] This led to the respondent's application for the trial judge to declare ss. 742.1(e)(i) and (iii) unconstitutional as being overbroad and hence contrary to s. 7 of the *Charter*.

[12] The trial judge, the Honourable Del Atwood, delivered oral reasons on April 23, 2021. They are not reported. His reasons addressed both the constitutional challenge and sentence. The trial judge found the challenged provisions of the *Criminal Code* unconstitutional and a conditional sentence of imprisonment would be appropriate. The trial judge said this:

> However, I do find the constitutional-grounds application in this case not moot. I find the challenged provisions of the **Code** unconstitutional. Further, I find that conditional sentences of imprisonment would be appropriate punishments for Mr. Hynes.
>
> Accordingly the sentence of the Court will be to impose concurrent terms of imprisonment of 18 months for each count served in the community as a conditional sentence order followed by a term of probation of 12 months. There will be ancillary orders for DNA collection and weapons prohibition as are mandatory.

[13] The Crown has not appealed the trial judge's finding ss. 742.1(e)(i) and (iii) are unconstitutional and not saved by s. 1. Further, the Crown stipulates that even if this Court were to agree the trial judge erred in principle or imposed a manifestly inadequate sentence that we not order the respondent to be incarcerated in light of the time he has already served under the conditional sentence order.

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[1] As of the time of these reasons, the Supreme Court of Canada has granted leave to appeal ([2020] S.C.C.A. No. 311), the appeal has been heard, and the decision of the Court is on reserve.

[14] The respondent has not appealed from conviction nor sought leave to cross-appeal sentence.

[15] We will address the standard of review this Court must apply, the principles that guide conditional sentence orders, and the imposition of sentence in general.

STANDARD OF REVIEW

[16] Appeal courts are required to defer to lawful sentences imposed by trial judges unless the sentence is demonstrably unfit or they made an error in principle that materially impacted the type or length of the sentence imposed (*R. v. Lacasse*, 2015 SCC 64, at para. 11; *R. v. Parranto*, 2021 SCC 46, at para. 30).

[17] Derrick J.A., writing recently for the Court in *R. v. Cromwell*, 2021 NSCA 36, summarized the appropriate standard of review:

> [53] Sentencing decisions are accorded a high degree of deference in appellate review. Appellate intervention is warranted if (1) the sentencing judge has committed an error in principle that impacted the sentence or, (2) the sentence is manifestly unfit. Errors in principle include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor" (*R. v. Friesen*, 2020 SCC 9, at para. 26; *R. v. Espinosa Ribadeneira*, 2019 NSCA 7, at para. 34).

See also: *R. v. Laing*, 2022 NSCA 23

[18] This standard of review and limited role for appellate intervention applies equally to a trial judge's determination whether to order imprisonment be served by way of a conditional sentence order (see: *R. v. Wheatley*, 1997 NSCA 94, at para. 24; *R. v. Parker*, 1997 NSCA 93, at para. 21).

[19] Lamer C.J., for the unanimous Court, in the seminal case on the conditional sentence regime of *R. v. Proulx*, 2000 SCC 5, acknowledged the discretionary essence of the question facing trial judges whether a conditional sentence should be imposed:

> [116] Sentencing judges will frequently be confronted with situations in which some objectives militate in favour of a conditional sentence, whereas others favour incarceration. In those cases, the trial judge will be called upon to weigh the various objectives in fashioning a fit sentence. As La Forest J. stated in *R. v. Lyons*, [1987] 2 S.C.R. 309, at p. 329, "[i]n a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will

> vary according to the nature of the crime and the circumstances of the offender". There is no easy test or formula that the judge can apply in weighing these factors. Much will depend on the good judgment and wisdom of sentencing judges, whom Parliament vested with considerable discretion in making these determinations pursuant to s. 718.3

[20] The Court unanimously endorsed a deferential standard of review:

> [124] Several provisions of Part XXIII confirm that Parliament intended to confer a wide discretion upon the sentencing judge. As a general rule, ss. 718.3(1) and 718.3(2) provide that the degree and kind of punishment to be imposed is left to the discretion of the sentencing judge. Moreover, the opening words of s. 718 specify that the sentencing judge must seek to achieve the fundamental purpose of sentencing "by imposing just sanctions that have one or more of the following objectives" (emphasis added). In the context of the conditional sentence, s. 742.1 provides that the judge "may" impose a conditional sentence and enjoys a wide discretion in the drafting of the appropriate conditions, pursuant to s. 742.3(2).
>
> [125] Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant intervention by appellate courts. Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit.
>
> [Emphasis in original]

THE CONDITIONAL SENTENCE REGIME

[21] Parliament codified the principles of sentencing in 1996 (S.C. 1995, c. 22). The provisions introduced a new option: a conditional sentence order (CSO). As others have pointed out, the term "conditional sentence" is a bit of a misnomer (*R. v. Arsiuta*, [1997] M.J. No. 89 (C.A.)).

[22] The most accurate way to view a CSO is that it is a sentence of imprisonment, but if the offender complies with the conditions set out in the order, they may serve it in a place other than a penal institution.

[23] A CSO is only available if the statutory requirements are met. Originally, s. 742.1 of the *Criminal Code* prescribed three: the offence is not one punishable by a minimum term of imprisonment; the sentence of imprisonment is less than two years; and, serving the sentence in the community would not endanger the community's safety.

[24] In 1997, Parliament mandated a court must also be satisfied a CSO would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 (S.C. 1997, c. 18, s. 107.1).

[25] Statutory disqualifications were added in 2007 (S.C. 2007, c. 12) and 2012 (S.C. 2012, c. 1). None of these are relevant here in light of the trial judge's declaration of invalidity of ss. 742.1(e)(i) and (iii).

[26] If a judge exercises their discretion and imposes a CSO, there is no parole. There are mandatory conditions as well as the power to prescribe others. If a court is satisfied an offender has breached a condition, it enjoys wide latitude to excuse or mandate a remedy, which can include a direction the offender serve the remainder of the unexpired sentence in custody.

[27] As noted above, the seminal case on the conditional sentence regime is the unanimous decision of the Supreme Court of Canada in *R. v. Proulx*. There, Lamer C.J. carefully pointed out a CSO is not a probation order—it is a sentence of imprisonment that helps achieve Parliament's objectives of reducing incarceration and promoting restorative justice. These objectives were described by the Chief Justice:

> [17] Parliament has sought to give increased prominence to the principle of restraint in the use of prison as a sanction through the enactment of s. 718.2(*d*) and (*e*). Section 718.2(*d*) provides that "an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances", while s. 718.2(*e*) provides that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders". Further evidence of Parliament's desire to lower the rate of incarceration comes from other provisions of Bill C-41: s. 718(*c*) qualifies the sentencing objective of separating offenders from society with the words "where necessary", thereby indicating that caution be exercised in sentencing offenders to prison; s. 734(2) imposes a duty on judges to undertake a means inquiry before imposing a fine, so as to decrease the number of offenders who are incarcerated for defaulting on payment of their fines; and of course, s. 742.1, which introduces the conditional sentence. In *Gladue*, at para. 40, the Court held that "[t]he creation of the conditional sentence suggests, on its face, a desire to lessen the use of incarceration".

[28] With respect to restorative justice, the Chief Justice wrote:

> [18] Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community, and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done to victims and to the community.

[29] The availability of a conditional sentence promotes these objectives through a punitive sanction which also permits emphasis on rehabilitation, as well as reparations for both the victim and the community:

> [21] The conditional sentence was specifically enacted as a new sanction designed to achieve both of Parliament's objectives. The conditional sentence is a meaningful alternative to incarceration for less serious and non-dangerous offenders. The offenders who meet the criteria of s. 742.1 will serve a sentence under strict surveillance in the community instead of going to prison. These offenders' liberty will be constrained by conditions to be attached to the sentence, as set out in s. 742.3 of the *Code*. In case of breach of conditions, the offender will be brought back before a judge, pursuant to s. 742.6. If an offender cannot provide a reasonable excuse for breaching the conditions of his or her sentence, the judge may order him or her to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence.
>
> [22] The conditional sentence incorporates some elements of non-custodial measures and some others of incarceration. Because it is served in the community, it will generally be more effective than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and community, and the promotion of a sense of responsibility in the offender. However, <u>it is also a punitive sanction capable of achieving the objectives of denunciation and deterrence</u>. It is this punitive aspect that distinguishes the conditional sentence from probation, and it is to this issue that I now turn.
>
> [Emphasis in original]

[30] Since 1997, there are four criteria for a conditional sentence order. Lamer C.J. identified them as follows (para. 46):

> (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
>
> (2) the court must impose a term of imprisonment of less than two years;
>
> (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and

> (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[31] It is the latter two criteria that usually attract the most controversy—and coincidentally, where the Crown says the trial judge here went astray.

[32] There are two factors in play to assess danger to the community: the risk of re-offending; and, the gravity of the damage that could be caused. Lamer C.J. explained:

> [69] In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.

[33] To assess the risk of re-offence, the court should consider the track record of the offender in terms of compliance with previous court orders and criminal antecedents, if any. Lamer C.J. observed the list of factors to consider is not closed and that the risk a particular offender poses to the community must be assessed in each case, on its own facts (para. 71).

[34] As to the gravity of potential damage, Lamer C.J. commented:

> [74] Once the judge finds that the risk of recidivism is minimal, the second factor to consider is the gravity of the potential damage in case of re-offence. Particularly in the case of violent offenders, a small risk of very harmful future crime may well warrant a conclusion that the prerequisite is not met: see *Brady*, *supra*, at para. 63.

[35] Often the appropriateness of a CSO stands or falls on the issue whether such a disposition would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the *Criminal Code*. These directives determine not just the type and length of sentence, but also whether an offender should serve their sentence in jail or in the community and under what conditions (*Proulx*, paras. 77-78). It is appropriate to turn to those principles.

PRINCIPLES OF SENTENCE

[36] The relevant statutory directives in force at the relevant time were:

> **Purpose**
>
> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> > **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
> >
> > **(b)** to deter the offender and other persons from committing offences;
> >
> > **(c)** to separate offenders from society, where necessary;
> >
> > **(d)** to assist in rehabilitating offenders;
> >
> > **(e)** to provide reparations for harm done to victims or to the community; and
> >
> > **(f)** to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
>
> […]
>
> **Fundamental principle**
>
> **718.1** A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> **Other sentencing principles**
>
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> > **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > > **(i)** evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation, or gender identity or expression, or on any other similar factor,
> > >
> > > **(ii)** evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,
> > >
> > > **(ii.1)** evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

> **(iii)** evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
>
> **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> **(iv)** evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,
>
> **(v)** evidence that the offence was a terrorism offence, or
>
> **(vi)** evidence that the offence was committed while the offender was subject to a conditional sentence order made under section 742.1 or released on parole, statutory release or unescorted temporary absence under the *Corrections and Conditional Release Act*
>
> shall be deemed to be aggravating circumstances;
>
> **(b)** a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> **(c)** where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[37] In *R. v. Gladue*, [1999] 1 S.C.R. 688, the Court labelled these new provisions as a "watershed", demonstrating Parliament's two principal objectives of reducing prison as a sanction and placing greater reliance on restorative principles in sentencing (para. 39).

[38] The reasons in *Proulx* not only addressed the new conditional sentence option but also the provisions that codified the purpose and principles of sentence and how they informed the decision on whether to impose a conditional sentence.

[39] Lamer C.J. explained the newly emphasized role of restorative justice and rehabilitation reflected in the codified sentencing regime:

(2) Expanding the Use of Restorative Justice Principles in Sentencing

[18] Restorative justice is concerned with the restoration of the parties that are affected by the commission of an offence. Crime generally affects at least three parties: the victim, the community, and the offender. A restorative justice approach seeks to remedy the adverse effects of crime in a manner that addresses the needs of all parties involved. This is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community, and the promotion of a sense of responsibility in the offender and acknowledgment of the harm done to victims and to the community.

[19] Canadian sentencing jurisprudence has traditionally focussed on the aims of denunciation, deterrence, separation, and rehabilitation, with rehabilitation a relative late-comer to the sentencing analysis: see *Gladue*, at para. 42. With the introduction of Bill C-41, however, Parliament has placed new emphasis upon the goals of restorative justice. Section 718 sets out the fundamental purpose of sentencing, as well as the various sentencing objectives that should be vindicated when sanctions are imposed. In *Gladue, supra*, Cory and Iacobucci JJ. stated (at para. 43):

> Clearly, s. 718 is, in part, a restatement of the basic sentencing aims, which are listed in paras. (*a*) through (*d*). What are new, though, are paras. (*e*) and (*f*), which along with para. (*d*) focus upon the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender. The concept of restorative justice which underpins paras. (*d*), (*e*), and (*f*) is briefly discussed below, but as a general matter restorative justice involves some form of restitution and reintegration into the community. The need for offenders to take responsibility for their actions is central to the sentencing process... . Restorative sentencing goals do not usually correlate with the use of prison as a sanction. In our view, Parliament's choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing analysis for all offenders. [Emphasis added; citation omitted.]

[20] Parliament has mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society. By placing a new emphasis on restorative principles, Parliament expects both to reduce the rate of incarceration and improve the effectiveness of sentencing. During the second reading of Bill C-41 on September 20, 1994 (*House of Commons Debates*, vol. IV, 1st Sess., 35th Parl., at p. 5873), Minister of Justice Allan Rock made the following statements:

> A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place

> for those who commits offences but who do not need or merit incarceration.
>
> …
>
> Jails and prisons will be there for those who need them, for those who should be punished in that way or separated from society... . [T]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done.
>
> It is not simply by being more harsh that we will achieve more effective criminal justice. We must use our scarce resources wisely.
>
> [Emphasis in original]

[40] The new s. 718.2(e) directs courts to consider "all available sanctions other than imprisonment that are reasonable in the circumstances". Yet s. 742.1 defines a conditional sentence as a sentence of imprisonment. What role, if any, could s. 718.2(e) play if a court has already rejected probation or a fine? To resolve this apparent paradox, Lamer C.J. turned to the equally authoritative French version:

> [93] The language used in the French version avoids this difficulty. The French version reads as follows:
>
> > **718.2** Le tribunal détermine la peine à infliger compte tenu également des principes suivants:
> >
> > ...
> >
> > *e*) l'examen de toutes les sanctions substitutives applicables qui sont justifiées dans les circonstances, plus particulièrement en ce qui concerne les délinquants autochtones. [Emphasis added.]
>
> [94] The use of "*sanctions substitutives*" for "sanctions other than imprisonment" in the French version of this provision means that s. 718.2(*e*) plays a role not only in the decision as to whether imprisonment or probationary measures should be imposed (preliminary step of the analysis), but also in the decision as to whether to impose a conditional sentence of imprisonment since conditional sentences are clearly "*sanctions substitutives*" to incarceration.
>
> [95] The French version and the English version of s. 718.2(*e*) are therefore in conflict. In conformity with a long-standing principle of interpretation, to resolve the conflict between the two official versions, we have to look for the meaning common to both: see for instance *Kwiatkowsky v. Minister of Employment and Immigration*, [1982] 2 S.C.R. 856, at pp. 863-64; *Gravel v. City of St-Léonard*, [1978] 1 S.C.R. 660, at p. 669; *Pfizer Co. v. Deputy Minister of National Revenue for Customs and Excise*, [1977] 1 S.C.R. 456, at pp. 464-65; *Tupper v. The Queen*, [1967] S.C.R. 589, at p. 593; *Goodyear Tire and Rubber Co. of Canada v.*

> *T. Eaton Co.*, [1956] S.C.R. 610, at p. 614; P.-A. Côté, *Interprétation des lois* (3rd ed. 1999), at pp. 412-15. **Accordingly, the word "imprisonment" in s. 718.2(*e*) should be interpreted as "incarceration" rather than in its technical sense of encompassing both incarceration and a conditional sentence. Read in this light, s. 718.2(*e*) clearly exerts an influence on the sentencing judge's determination as to whether to impose a conditional sentence as opposed to a jail term.**
>
> [Emphasis added]

[41] Lamer C.J. recognized the gravity of an offence is an important consideration whether a conditional sentence is appropriate but cautioned against judicially created presumptions against a conditional sentence order for specific offences or the adoption of starting points for certain offences (paras. 81, 87-88). He summarized the analytical framework as follows:

> [113] **In sum, in determining whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing, sentencing judges should consider which sentencing objectives figure most prominently in the factual circumstances of the particular case before them. Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration.** In determining whether restorative objectives can be satisfied in a particular case, the judge should consider the offender's prospects of rehabilitation, including whether the offender has proposed a particular plan of rehabilitation; the availability of appropriate community service and treatment programs; whether the offender has acknowledged his or her wrongdoing and expresses remorse; as well as the victim's wishes as revealed by the victim impact statement (consideration of which is now mandatory pursuant to s. 722 of the *Code*). This list is not exhaustive.
>
> [114] **Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction.** This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.
>
> [115] **Finally, it bears pointing out that a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender. Aggravating circumstances will obviously increase the need for denunciation and deterrence. However, it would be a mistake to rule out the possibility of a conditional sentence ab**

> **initio simply because aggravating factors are present. I repeat that each case must be considered individually.**
>
> [Emphasis added]

[42] Before summarizing the trial judge's reasons on sentence and the Crown's complaints of error, it is useful to set out the essence of the trial proceedings to understand the circumstances of the offences.

THE TRIAL

[43] The offence happened on September 19, 2018, on a PQ Properties job site. Paul Quinn is the principal of PQ Properties. He had nine employees. His safety officer was Stephanie Cunningham. Ms. Cunningham reached out to the victim, Nhlanhla Dlamini on August 27, 2018, to offer him a job with PQ Properties.

[44] Ms. Cunningham knew Mr. Dlamini previously when she worked on the contractor's desk at the local Home Hardware. She knew he had been enrolled at NSCC in the carpentry program.

[45] Mr. Dlamini emigrated from South Africa with his family in 2013 when he was 17 years of age. He graduated from high school in 2016 and then attended NSCC for their two-year carpentry program. He was unemployed when Ms. Cunningham called him. Mr. Dlamini met with Mr. Quinn and Ms. Cunningham and started work with PQ Properties on Tuesday, September 4, 2018.

[46] At trial, the key factual witnesses called by the Crown were Nhlanhla Dlamini (referred to throughout the proceedings simply as NH), Mr. Quinn, Ms. Cunningham, and crew members Keith Jordan and Robert MacFarlane. For reasons that will become obvious, the Crown declined to call crew member Dan Clarke.

[47] When Mr. Dlamini met the crew, rather than struggle with his name, as was his practice, he invited them to just call him NH. Keith Jordan was NH's foreman. NH described Keith as a really funny guy. It was Keith who would assign NH jobs and provide on-the-job instruction.

[48] Mr. Jordan testified he gave NH cigarettes, coffee and took him to lunch. After one week on the job, Jordan gave NH a nickname – "Squiggy". He explained he gave all apprentices nicknames. Mr. Jordan told the judge there was

nothing racial about the nickname "Squiggy". It was based on a character of that name in the now somewhat ancient sitcom "Laverne and Shirley":

> Q. No. We heard evidence from NH that he got a nickname.
>
> A. Yeah.
>
> Q. Where did that come from and who gave it to him?
>
> A. I gave him the nickname.
>
> Q. Right.
>
> A. I called him Squiggy, not the other name that's in the press and stuff like that, not knowing there was anything racial about it.
>
> Q. Okay.
>
> A. Shawn is six-four or something. NH is this big. It just looked like Lenny and Squiggy.
>
> Q. Okay.
>
> A. And I ... all the apprentices, I always give them all nicknames.
>
> Q. Okay.
>
> A. So it wasn't a racist thing. I mean ...
>
> Q. So you gave him ...
>
> A. But I did it.
>
> Q. Yeah. You gave him the nickname Squiggy.
>
> A. I did.
>
> Q. Okay. And Lenny and Squiggy, where does that come from?
>
> A. Laverne and Shirley, from an old television show 40 years ago.

[49] NH confirmed Keith Jordan gave him the nickname and that is what NH was then called. There was no evidence during the trial or sentence proceedings that NH was in any way offended by the nickname.

[50] As for the day of the offence, Keith Jordan assigned NH to set up staging ahead of the team of Shawn Hynes and Dan Clarke who were installing 2x6 as a top plate on the walls. Clarke would handle the wood, and Hynes would nail the 2x6 in place with a nail gun.

[51] There were two completely different version of events as to what happened to NH. Everyone agreed nail guns are dangerous. The ones on the job site operated with 90 lbs of air pressure. With the trigger depressed, they shoot a nail

when the safety plunger is pushed back as it is pressed against wood or any object. Everyone also agreed that NH was struck in the back with a 3½ inch nail, but how that happened was the central issue at trial.

[52] NH testified he had made a teasing remark to the respondent "you ain't done with that" as he moved to set up more staging. It was, in his view, work teasing. The respondent is said to have replied "you ain't going any faster". NH placed Dan Clarke over by the saw, well away from the staging. As NH turned, he said he saw the respondent pointing the nail gun at him as the respondent went to pull the safety plunger back—NH turned to take cover but heard the nail gun discharge and was struck in the back. NH testified the respondent ran to him and said he did not think it would get you:

> …And that's when he said ... he came running down and jumped next to me, and he goes, I didn't think I'd get ya, man. I'm sorry. And he pulls the nail out. He's like, I thought it would have ricocheted on the wall, like, in the ... before the door opening or something, like, to scare ya.

[53] Dr. Dwayne Coad confirmed seeing NH the evening of September 19, 2018, observing the small puncture wound in NH's back. He also had suffered a pneumothorax whereby the lung had been punctured which allowed air to escape into the potential space between the outer lining of the lung and the inside of the chest wall. NH was described as very stable. A surgeon inserted a catheter to drain the air in that space. The remaining Crown witnesses testified to uncontested matters of no relevance to any trial or sentence issues.

[54] Strangely, without objection by the Crown, the trial judge twice prevented the respondent from cross-examining or leading evidence that NH originally thought the discharge had been an accident.

[55] The respondent called evidence. Dan Clarke had given a statement to the police on September 26, 2018 about the incident. Originally scheduled and subpoenaed to be a Crown witness, the prosecutor demurred. The respondent called him.

[56] Mr. Clarke had started with PQ Properties just days prior to NH. Clarke testified he was on the staging with the respondent handling the 2x6 top plate which the respondent would nail in place using the nail gun. He said there was no conversation between NH and the respondent.

[57] As the respondent used the gun, the 2x6 splintered and the nail ricocheted into the house. Clarke had no idea where it had gone. They finished with that piece of top plate. When he got down from the staging, he alerted the respondent to NH laying on the ground outside the patio door. At first, he thought NH had twisted his foot. When they got to NH, it became clear the nail had struck him. NH asked the respondent to pull it out, which he did.

[58] The respondent voluntarily gave a statement to the police on September 27, 2018 in which he explained what had happened. The Crown chose not to introduce that statement. The respondent testified at trial. He explained it was normal practice to have nail guns set up with a trigger so that the gun discharged when the plunger (sometimes described as the teeth of a gun) depressed on contact with the wood. Further, the teeth of the gun are not sharp and can slip on cold or wet wood. It had rained that day. When he was attaching the top plate with Dan Clarke, the nail gun slipped as he tried to "toe-nail" the 2x6 into place and the nail went out the side of the piece of wood and ricocheted into the inside of the house. This took a chip off the side of the 2x6.

[59] The respondent, as well as others, identified the chip out of the 2x6 caused by the slip of the nail gun in photographs taken by Ms. Cunningham.

[60] The respondent denied any bantering with NH during his work on the top plate, and that he said to NH, "I didn't think I'd get you. I thought it would ricochet off the wall".

[61] The respondent gave detailed evidence of the good relationship he and the other crew members had had with NH. The respondent had taught him how to read blueprints and lay out walls. He had given NH a brand-new imperial tape measure to replace his metric version.

[62] The respondent and every crew member confirmed they would never pull back the safety plunger on a nail gun due to the inherent danger, including the high probability they would injure themselves if they attempted to do so.

[63] At the end of the evidence on September 19, 2019, and before closing submissions as to whether the Crown had established the respondent's guilt beyond a reasonable doubt, the trial judge ill-advisedly asked counsel to make submissions on whether the court ought to make factual findings on the existence of aggravating factors relevant to sentence:

> And I would invite ... well, and more than just invite, **I'm going to require counsel to make submissions to the Court that if the Court should, should record verdicts of guilty in relation to either of the offences or any legally admissible included offences, whether the Court ought to make findings of fact in accordance with the provisions of section 724 of the *Criminal Code* and section 718.2 of the *Criminal Code* as to the existence of any aggravated ... statutorily aggravating circumstances.** Because in my view, that is a matter that, that should be addressed at the earliest possible opportunity. Any issues that counsel wish to raise prior to the recess?
>
> [Emphasis added]

[64] Later that day, defence counsel, after completing his submissions on guilt or innocence, said he understood that the Crown would not be asserting any statutory aggravating factors. The Crown confirmed it would not be relying on any of the statutory aggravating factors set out in s. 718.2:

> MR. GORMAN: ... oh, I understand that. But the interrelationship between 718.2 and, and 724, should you so find that aggravating feature to exist in making your findings at trial, then you could consider that in examining 718.2 as I understand the interrelationship.
>
> It's a bit of a moot point in any event because I would submit, Your Honour, that there is not evidence which rises to the level of proof beyond a reasonable doubt of the aggravating features in 718.2, specifically as it may relate to race, religion, ethnic origin, and the likes of those listed factors. It doesn't rise to that level. There's been some suggestion or inference, but I submit it doesn't rise to that level.
>
> Subject to any questions on that discrete point, that, that would be my thoughts with respect to the aggravating features in 718.2.

[65] Mr. Scott, at the hearing of this appeal, properly and fairly conceded that there was in fact no evidence these offences were motivated by bias, prejudice or race.

[66] The trial judge delivered oral reasons on September 26, 2019. They are also unreported. The judge made numerous findings of fact. Many were extraneous to the adjudicative task he faced and unsupported by the evidence. Many were not pertinent to any of the issues relevant to sentence. We will only refer to the ones that were.

[67] The trial judge accepted NH's version of events and rejected the respondent's assertion he had not pointed the nail gun at NH. What is important is that the trial judge refused to find that the respondent intentionally fired the nail

gun at NH. In other words, he had a reasonable doubt the respondent had discharged the nail gun intentionally. The intentional pointing of the nail gun was sufficient to constitute the offence of assault with a weapon. His key findings were:

> For the reasons that follow, I find that the prosecution has proven each and every one of the necessary elements of both charges beyond a reasonable doubt. I base this on my belief and the strong credibility of the evidence of N.H.
>
> While I accept some of the evidence of Mr. Hynes on certain uncontroversial points, I do not believe his account that this was an accident. Further, that account does not leave me in a state of reasonable doubt as to any of the elements of the two offences before the Court.
>
> Accordingly, based on the evidence, which I do accept, I find the prosecution to have proven all of the elements of each charge beyond a reasonable doubt and I record findings of guilt in relation to Case Numbers 8319389 and 8319390.

[68] The judge elaborated:

> At this point, Mr. Hynes had had enough from the new guy. As N.H. described it, Mr. Hynes faced N.H. and pointed the nail gun at him. N.H. saw Mr. Hynes reaching for the plunger to pull it back. At this point, N.H. felt that his safety was in jeopardy and he turned to run away. He headed for the patio door opening where the Sea Can [ph.] was located. I'm convinced that Mr. Hynes wanted to scare N.H. by pointing the nail gun at him. Seeking to scare someone by pointing a potentially dangerous power tool is a real threat. A reasonable person, aware of the risk of injury, of pointing a tool of this nature, would immediately perceive this as a threat of bodily harm. […]
>
> As Mr. Hynes faced N.H. and proceeded to point the nail gun, he proceeded to rotate it sideways so that the grip of the gun was oriented horizontally, not vertically. It is clear to me from my observation of the construction of the plunger, that this sideways orientation allowed Mr. Hynes to handle the plunger more easily and manipulate it without putting his fingers in the way. Still intending to scare N.H., Mr. Hynes pulled back the plunger. But recall how Mr. Hynes had been using the gun in nailing the top plate, he was keeping continuous pressure on the trigger. In the result, as soon as Mr. Hynes pointed the nail gun at N.H. and drew back the plunger, the nail gun fired. Did Mr. Hynes intend to fire the gun? Had he forgotten that he had kept the trigger depressed? In my view, it is not necessary for the Court to decide these questions to render a verdict as a I shall explain shortly.

[69] The trial judge said he did not discount the good character evidence the respondent used nail guns safely, but reasoned anyone is prone to "bad judgment" when "one acts on the spur of the moment".

[70] With respect to the charge of criminal negligence causing bodily harm, this was made out by the pointing of the nail gun and its discharge when the respondent pulled back on the plunger, perhaps having forgotten the trigger was depressed:

> I find that the prosecution has proven beyond a reasonable doubt that Mr. Hynes pointed the nail gun at N.H. When he did so, he had the trigger depressed from the last use of the gun so that it was in a dangerous and ready-to-fire condition. This was a marked and substantial departure from the standard of care of a reasonable person in the circumstances and it showed a wanton or reckless disregard for the safety of N.H.
>
> The facts speak for themselves, given the firing potential and the danger potential obviously inherent in a nail gun that is armed with sealing spikes. The gun discharged when Mr. Hynes pulled back the plunger. **Whether he intended to fire the gun or had forgotten that the trigger was depressed is immaterial**. He had markedly and substantially breached the [standard] of care called for in the handling of a nail gun. He pointed it at N.H .. The spike was fired, struck N.H., and caused him significant bodily harm.
>
> Mr. Hynes' breach of the standard of care was the substantial cause of this injury. The criminal negligence count is proven beyond a reasonable doubt,
>
> [Emphasis added]

[71] As for elements of the offence of the assault with a weapon:

> Furthermore, Mr. Hynes did this without N.H.'s consent. He did it to scare N.H .. That intent to scare constituted a threat by gesture to apply force to N.H., which caused N.H. on reasonable grounds, to believe that Mr. Hynes was going to fire the nail gun at him. Any reasonable person would have realized the risk of bodily harm inevitably and unavoidably inherent in the pointing of a nail gun at another. The nail gun was a weapon, as Mr. Hynes used it to threaten N.H.. Even if Mr. Hynes had not fired the gun, the mere pointing of it to scare was sufficient to constitute an assault as comprehended in paragraph 265(1) (b) of the *Code*, and the use of the nail gun in committing that assault constitutes the offence of assault with a weapon.

[72] With these circumstances of the offences in mind, we can now turn to the sentencing proceedings and the trial judge's reasons.

SENTENCE PROCEEDINGS

[73] Originally, the judge set November 15, 2019 for the sentence hearing. A Pre-Sentence Report was in hand, along with a Victim Impact Statement from NH. Community impact statements were prepared by Raymond Sheppard dated September 18, 2019, and one by Angela Bowden dated November 13, 2019. The defence requested an adjournment due to the late receipt of the Community Impact Statements and to complete assembly of letters of references for the respondent.

[74] The sentence proceedings were adjourned for a variety of reasons, including the exigencies of the COVID-19 pandemic. There is no need to recount the various dates.

[75] The parties filed written briefs respectively on January 26 and 28, 2020. The Crown stressed the moral blameworthiness of the respondent's actions in intentionally pointing the nail gun to frighten NH and the physical and psychological harm caused by this reckless behaviour. The Crown suggested that the respondent, as a senior employee with PQ Properties, was in a position of trust and authority vis-à-vis NH—as such, his acts constituted a breach of trust and hence were a statutory aggravating factor pursuant to s. 718.2(a)(iii) of the *Criminal Code*. The Crown recommended a sentence of 12-15 months "real jail", to be followed by probation in the range of 15-18 months.

[76] The defence urged a suspended sentence and probation. Since the Crown led no evidence that race played any part in the offence, counsel asked the court to disregard the Community Impact Statements which referenced "racism", "racial abuse", and "white supremacy" to the extent that they suggested the respondent's actions were motivated by bias, prejudice or hate based on race.

[77] The respondent was then 44 years of age, and he had never been before the courts. He was a law-abiding citizen, a well-respected member of society, and supported his two dependent children who lived with him.

[78] The trial judge heard sentence submissions on February 26, 2020. Mr. Sheppard and Ms. Bowden read their respective Community Impact Statements. Mr. Sheppard offered his opinion that the offence happened for two reasons, jealousy and race. He referenced the historical acts of racism and violence against African people in Nova Scotia and the sentiment in the African-Nova Scotian community of having been traumatized by this offence. Ms. Bowden identified herself as one of the lead advocates and activists with Mr. Sheppard. She echoed

Mr. Sheppard's comments about the community's emotional and psychological wound caused by the offence.

[79] The Crown again acknowledged it did not rely on racism as being an aggravating factor. Nonetheless, he then made this seemingly offhand comment:

> But what I do draw to Your Honour's attention is that in considering the purposes and principles of sentencing in 718 and 718.1 and 718.2, you can rely upon the provisions of Section 726.1 and consider all evidence that you deem relevant.

[80] The Crown argued the trial judge needed to emphasize denunciation and deterrence as the "primary focus" given the high moral blameworthiness of the respondent, an experienced individual who would have been well aware of the inherent danger of a pneumatic nail gun and what might happen if it were recklessly discharged. He also pointed out this Court's historic emphasis on denunciation and deterrence for crimes of violence.

[81] Defence counsel highlighted the following mitigating factors:

- The respondent had never been charged before with a criminal offence;
- He is the father of three children, two of which remain in his primary care;
- After graduating from High School, he completed a NSCC auto mechanics and small engine repair program. He owned and operated a successful siding company in British Columbia for 19 years before returning to Nova Scotia;
- Since his return to Nova Scotia, he has been continuously employed with P.Q. Properties, and valued by Mr. Quinn as one of the best employees he has ever had;
- The PSR and the 20 letters of reference from family, friends, acquaintances, co-workers confirm he is a quiet, non-violent, non-aggressive soft spoken individual;
- The respondent had been greatly impacted by the incident and resulting court processes, having been on bail for 18 months—and had to go on stress leave for 7 weeks;

- The media stories that had painted the offence as motivated by race had led to threats of "payback" by email and other communications that have created a real and reasonable fear for his safety; included were obscene labels and that "someone will get you and your kids". The respondent is afraid to leave his house. He goes to work and then home.

[82] As for the issue of race, defence counsel emphasized, despite allegations being made outside of court, there was no evidence the respondent's actions were in any way motivated by racism:

> As the Crown has confirmed today quite fairly, the Crown is not alleging that racism is an aggravating factor for the Court's consideration in sentencing. I would submit, Your Honour, that there was no evidence led during the trial to establish that Mr. Hynes's actions were in any way motivated by racism.

[83] The trial judge interjected; he would not be influenced by allegations made outside of court:

> THE COURT: Well, I can respond to that very briefly, Mr. O'Blenis.
>
> MR. O'BLENIS: Sure.
>
> THE COURT: The Court is entitled to know only what is presented to the Court in Court. Certainly there are concepts of judicial notice in relation to legislative facts and social facts. But allegations that might have been outside the Court, I can assure you, are not known to the Court because I am prohibited from knowing them.

[84] At the end of the sentence hearing, the trial judge, as the *Code* requires, asked the respondent if he had anything to say (s. 726). He offered the following brief comments:

> MR. HYNES: I'd just like to say … well NH himself is not here. I'd like to say I'm sorry for any pain and suffering that this situation has caused him or the community ... the black community themselves.

[85] The trial judge reserved. As noted earlier, he delivered oral reasons on April 23, 2021. Before analyzing those reasons, it is useful to focus on what the Crown says are the issues.

ISSUES

[86] Originally, the Crown's Application for Leave to Appeal proposed the following four grounds of appeal:

1. The Learned Trial Judge erred in law in his assessment of the appropriateness of a conditional sentence of imprisonment.
2. The Learned Trial Judge erred in law by speculating about the effects of imprisonment on the offender.
3. The Learned Trial Judge erred in law by considering a case in his assessment of parity without bringing it to the attention of counsel and without inviting submissions on its applicability.
4. The Learned Trial Judge erred in law in ordering a manifestly unfit sentence.

[87] The Crown's factum reduced these grounds to two:

1. That the Learned Trial Judge erred in law in his assessment of the availability and appropriateness of a conditional sentence of imprisonment.
2. Regardless, the Learned Trial Judge erred in law in ordering a manifestly unfit sentence.

[88] We agree the trial judge erred in law in a variety of ways. The problem for the Crown is that these errors favoured the Crown's request for a sentence of imprisonment as opposed to a purely probationary sentence.

[89] With respect, we see no reversible error in the trial judge's conditional sentence assessment, nor is that sentence manifestly unfit.

TRIAL JUDGE'S SENTENCE REASONS

[90] We will first address the trial judge's errors and then turn to his conditional sentence analysis. The most significant errors are his findings that are completely unsupported by the record and reliance on non-existent aggravating factors.

[91] The trial judge found that imprisonment, as opposed to probation, was required because of the existence of aggravating factors of anti-Black racism; the respondent being in a position of trust; and, NH was a vulnerable victim.

[92] The judge reasoned:

> I find that imprisonment is required in this case. NH is black. The history of anti-black discrimination in Nova Scotia is a historic fact which is continuing. Discrimination and intimidation of racialized and marginalized persons will occur in many locations including workplaces, and it happened to NH.
>
> NH came to Canada from a developing country. Immigrants and refugees arriving in Canada may experience many forms of social and structural prejudice. They face housing and income insecurity. They encounter barriers to employment. When they find work, it is often in risky, underpaying occupations where they are not accorded respect, dignity, and support. And again, this was NH's experience with Mr. Hynes.

[93] There was absolutely no evidence at trial that NH suffered any form of discrimination or intimidation in the workplace due to his racial background. Although new Canadians may experience social and structural prejudice or barriers to employment, save risky underpaid occupations without respect, dignity and support, that potential social context factor had no role to play in this case.

[94] Furthermore, to say that this was NH's experience with the respondent is directly contradicted by the evidence of every crew member, including NH himself—evidence the trial judge accepted. In his trial reasons, the trial judge found as a fact the absence of any animus: "In fact, to the contrary. Everyone at the work site got along well with each other".

[95] As for the aggravating factor of an offence motivated by bias or racial prejudice, the trial judge appeared to accept this was a non-factor, but reasoned it did not matter because he considered a substitute aggravating factor—NH was a vulnerable victim. The judge said this:

> Defence counsel has reminded the Court that the Prosecution conceded at trial that it could not rely on the aggravating bias, prejudice, hatred-motive factor under paragraph 718.2(a)(i) of the *Criminal Code*.
>
> **It is a nice point whether that concession would operate as a conclusive and formal admission of the fact as contrasted with a legal issue. In my view, it is unnecessary for the Court to resolve this point as I am satisfied that the evidence establishes conclusively that NH was a vulnerable victim.**
>
> [Emphasis added]

[96] It was far from a "nice point". If the Crown asks a judge to impose a harsher or different sentence due to the presence of aggravating factors, it has the burden to establish those factors. The offender then must be given the opportunity to provide input by evidence or submissions. Neither of these things happened.

[97] Here, the Crown never alleged NH was a vulnerable victim. Nonetheless, the trial judge reasoned:

> Victim vulnerability as an aggravating sentencing factor was recently codified in Section 718.04 of the **Criminal Code** enacted in 2018 SC 25, Section 292.1 that came into force on the 19th of September 2019, and so after the date of these offences.
>
> However, it is a factor that has long been recognized by Courts. So the statute merely codified a long-recognized aggravating sentencing factor, and I would refer specifically to **The Queen and Butler** out of our Court of Appeal and **The Queen and Charlette** out of the Manitoba Court of Appeal, cases that underscored the fact that vulnerability might arise due to the circumstances of a victim's work.

[98] There is no doubt that our Court, and others, have long accepted that taxi drivers, convenience, and fast-food store operators are particularly vulnerable to attacks by offenders looking for easy cash. Crimes that prey on such victims demand emphasis on denunciation and deterrence (see, for example: *R. v. Charlette*, 2015 MBCA 32, at para. 37; *R. v. Butler*, 2008 NSCA 102, at para. 25). Other examples of vulnerable victims include children, the elderly, persons with disabilities—in essence, those less able to protect themselves.

[99] Not only did the Crown not allege the victim was a vulnerable individual, but there was also no evidence of NH's vulnerability because of personal circumstances or his work. NH was a fellow employee. Granted, he was the most junior member of the crew, but it was legally wrong for the trial judge to find vulnerability as an aggravating factor.

[100] The only attempt by the Crown to uphold the trial judge's finding of vulnerability as an aggravating factor was NH's youth. The victim, at the time of the offence, was 22 years of age. A young man to be sure, but that does not equate to vulnerability in these circumstances.

[101] The *Criminal Code* directs the procedure for hearing evidence and resolving factual disputes relevant to sentence. The judge must give the Crown and the offender an opportunity to make submissions with respect to facts relevant to the sentence to be imposed. If there is a dispute on those facts, the judge can hear evidence and make findings—normal facts on a balance of probabilities, but the Crown must establish any aggravating fact beyond a reasonable doubt. The relevant provisions are:

Submissions on facts

723 (1) **Before determining the sentence, a court shall give the prosecutor and the offender an opportunity to make submissions with respect to any facts relevant to the sentence to be imposed**.

Submission on evidence

(2) The court shall hear any relevant evidence presented by the prosecutor or the offender.

Production of evidence

(3) The court may, on its own motion, after hearing argument from the prosecutor and the offender, require the production of evidence that would assist it in determining the appropriate sentence.

Compel appearance

(4) Where it is necessary in the interests of justice, the court may, after consulting the parties, compel the appearance of any person who is a compellable witness to assist the court in determining the appropriate sentence.

Hearsay evidence

(5) Hearsay evidence is admissible at sentencing proceedings, but the court may, if the court considers it to be in the interests of justice, compel a person to testify where the person

(a) has personal knowledge of the matter;

(b) is reasonably available; and

(c) is a compellable witness.

Information accepted

724 (1) In determining a sentence, a court may accept as proved any information disclosed at the trial or at the sentencing proceedings and any facts agreed on by the prosecutor and the offender.

Jury

(2) Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

Disputed facts

(3) Where there is a dispute with respect to any fact that is relevant to the determination of a sentence,

> (a) the court shall request that evidence be adduced as to the existence of the fact unless the court is satisfied that sufficient evidence was adduced at the trial;
>
> (b) the party wishing to rely on a relevant fact, including a fact contained in a presentence report, has the burden of proving it;
>
> (c) either party may cross-examine any witness called by the other party;
>
> **(d) subject to paragraph (e), the court must be satisfied on a balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence; and**
>
> **(e) the prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating fact or any previous conviction by the offender**.
>
> [Emphasis added]

[102] The Crown, when invited by the trial judge to make submissions on statutory aggravating factors prior to conviction, said there were none. During the sentence proceedings, the Crown reiterated it could not establish the offences were motivated by bias or prejudice based on race, national or ethnic origin, or any similar factor.

[103] The trial judge said it was unnecessary for him to resolve this relevant aggravating fact due to his view the victim was a vulnerable individual. As we have outlined, this constituted legal error.

[104] Moreover, the trial judge found as an aggravating factor that the offences were motivated by implicit bias.

[105] The judge reasoned:

> **There is a strong need for the denunciation of workplace violence motivated by implicit bias. Violence of this nature in the workplace** operates to perpetuate structures of inequality of access to employment for communities that have experienced generations of formal and informal discrimination. It can lead to and in this case led to loss of employment or, if not a total loss, then under-employment.
>
> [Emphasis added]

[106] No one provided an explanation for the trial judge's statement the offences were aggravated by having been motivated by "implicit bias". The *Shorter Oxford English Dictionary*[2] provides the following about the meaning of "implicit":

> **Implicit 1.** Entangled, entwined; involved—involved in each other; overlapping, … **2**. Implied though not plainly expressed; naturally or necessarily involved in something else. …

[107] The online version of the Merriam-Webster Dictionary defines "implicit bias" as a noun:

> **implicit bias** noun
>
> : a bias or prejudice that is present but not consciously held or recognized

[108] In *R. v. Chouhan*, 2021 SCC 26, the Court recognized the critical role jury instructions play in deliberations free from implicit bias—biases which are unconscious such that individuals do not recognize they hold a particular bias and would honestly deny having if asked (para. 49). If the trial judge used the term in this sense, we would see no error in principle.

[109] However, later in his reasons, the trial judge erred when he viewed the offence as having been motivated by discriminatory beliefs:

> These factors combine to satisfy the Court that a purely probationary sentence would not accomplish the necessary degree of denunciation and general deterrence needed to send a clear and unmistakable message to the public that workplace conduct, **especially when motivated by discriminatory beliefs, will not be tolerated in a just society based on equality and equity.**
>
> [Emphasis added]

[110] Historical or current anti-Black racism, or any racism, is to be deplored. Offences motivated by racism are egregious and deserve unmitigated denunciation and deterrence.

[111] Canadian courts have recognized the need to squarely address racial prejudice and discrimination in jury selection (*R. v. Parks* (1993), 15 O.R. (3d) 324 (Ont. C.A.); *R. v. Spence*, 2005 SCC 71) and it can inform the sentence to be imposed on Black or other racialized minorities (*R. v. Anderson*, 2021 NSCA 62; *R. v. Morris*, 2021 ONCA 680).

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[2] *The Shorter Oxford English Dictionary on Historical Principles*, 3rd ed, *sub verbo* "implicit".

[112] Social context, including anti-Black racism, should not be ignored or downplayed, but the mere fact the offender is white and the victim Black does not permit a trial judge to find, without evidence or submissions, that the offence was motivated by bias or discriminatory beliefs.

[113] As previously noted, the Crown told the trial judge it was not suggesting any statutory aggravating factors. Nonetheless, in its sentencing brief, the Crown suggested the respondent was in a position of trust vis-à-vis the victim and this constituted a statutory aggravating factor pursuant to s. 718.2(a)(iii). Unfortunately, the respondent's counsel (not Mr. Brown) made no submissions on this issue to the trial judge.

[114] Section 718.2(a)(iii) did not apply. The section provides as follows:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> > (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
> >
> > …
> >
> > (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

[115] The trial judge reasoned:

> Mr. Hynes breached his duty under the **Occupational Health and Safety Act** to take reasonable precautions to protect NH's safety, **particularly as NH was following his directions. This constitutes the aggravating factor of breach of trust or authority under 718.2(a) (iii) of the Criminal Code**.
>
> [Emphasis added]

[116] This analysis is legally and factually flawed.

[117] The evidence was uncontested—the foreman, Keith Jordan, gave directions that day to NH to set up the staging ahead of the respondent and Dan Clarke affixing the top plate. The respondent gave no directions to the victim that day. Even if he had, it did not create a position of trust or authority which he then abused.

[118] Every citizen has a duty to their fellow citizens not to commit offences. If they do so, they breach their duty to them and to society. It is when an offender

voluntarily assumes a position of trust and then uses that position to commit an offence, it is an aggravating factor on sentence.

[119] The well-established examples of breach of trust include: employers who sexually assault their employees; employees who steal or defraud their employers; financial managers; lawyers and judges or other court officials; doctors; parents and others in *loco parentis* to a victim. However, simply because a victim trusted an offender does not necessarily create an aggravating factor with respect to sentence (see, for example: *R. v. Oake*, 2010 NLCA 19; *R. v. Squires*, 2012 NLCA 20).

[120] Let us be clear—the respondent's actions were egregious. They constituted an assault and showed a wanton and reckless disregard for the life or safety of the victim. NH suffered serious injuries. The respondent obviously had a duty to take reasonable precautions to protect the health and safety of NH and other persons at or near the workplace. The respondent's actions clearly breached that duty, but they did not constitute an abuse of authority or trust in relation to the victim.

[121] Absent these three errors, the case for a non-custodial sentence, let alone a conditional sentence of imprisonment, becomes even stronger.

Assessment of a conditional sentence of imprisonment

[122] The Crown's first ground of appeal claims the trial judge erred in his analysis of the approach mandated by *R. v. Proulx*. This ground mushroomed into six complaints: the trial judge failed to consider the degree of damage in the event of re-offence; the trial judge oversimplified Parliament's move "away from the carceral state models"; denunciation and general deterrence mandated incarceration; the trial judge's emphasis on parity was misguided; the respondent's personal circumstances gained undue prominence; and, the trial judge speculated about the effects of incarceration on the respondent.

[123] With respect, we see no merit in any of these complaints—save the last. The judge did make comments that could be characterized as impermissible speculation about the effects of incarceration.

[124] Context is important. The trial judge had already concluded and announced the respondent was a proper candidate for a conditional sentence order. He explained what that entailed. The trial judge said he wanted to make an

observation about preventing and predicting when anyone might commit a violent act and the use of state surveillance. He then commented:

> Those sorts of things might not be predictive, but they are preventive. While we might not be able to forecast when someone will act violently, we do know that there are like circumstances that will make violence more likely and make it more likely to become normalized.
>
> And those circumstances include social isolation, family separation, income and housing insecurity, lack of primary medical and mental-health care, and most significantly exposure to violence. And yet these are the very effects that happen when someone is sentenced to serve a term in a prison or penitentiary. And so it is that imprisonment can lead to worse outcomes for communities.
>
> **Based on the experience of this Court dealing with institutional violence, the Court has some level of experiential evidence that institutions are places where persons may be exposed to extremist beliefs.**
>
> [Emphasis added]

[125] It is the bolded words that found the Crown's complaint. In its factum, the Crown puts it this way:

> 91. The Appellant acknowledges the observation that jail can be a breeding ground for criminals. This may be particularly so for young persons who are incarcerated, particularly when they already come from marginalized or disadvantaged circumstances. It appears, however, that the trial Judge placed emphasis on a risk that the Respondent, a well-adjusted person with significant community support, would somehow become a greater danger if he was incarcerated. This, the Appellant says, led the trial Judge to the binary conclusion that as long as a person does not need to be separated from society because of their level of danger, a CSO should be the norm.

[126] With respect, it would be wrong to focus on the trial judge's comment about the possible impacts of incarceration without due regard to the trial judge's careful analysis on why he thought a conditional sentence order was appropriate. It is to his analysis we turn.

[127] Just as *Proulx* directs, the trial judge was required to determine: if imprisonment were required, it would be less than two years; the safety of the community would not be endangered by the respondent serving it in the community; and a conditional sentence would be consistent with the fundamental purpose and principles of sentencing.

[128] First, the trial judge decided that probation alone would not be appropriate given the seriousness of the offence and the respondent's high level of moral responsibility:

> For the reasons that follow, I find that the circumstances of the offences before the Court to be of such a high level of seriousness and Mr. Hynes' moral responsibility sufficiently elevated that a sentence of probation alone would not be sufficient to denounce these acts or to deter others from repeating them.

[129] The Crown argued before the trial judge for a sentence of imprisonment of 12 to 18 months in a provincial institution, followed by probation and the requisite ancillary orders.

[130] This posed little difficulty for the trial judge:

> Would a penitentiary sentence be required? I'm able to rule that out at once. The Prosecution has advocated for a sentence of 12 to 18 months which would be a term of less than two years, and so below the upper limit for a conditional sentence if one were legal permissible.

[131] The Crown faults the trial judge's endangerment analysis because he failed to mention the gravity of the harm or damage that would be caused should the respondent re-offend. Lamer C.J.'s comments in *Proulx* were about the extent of the harm, particularly in the case of violent offenders (para. 74).

[132] That can be a legitimate concern in some cases. Not here. The trial judge found the respondent to be at a low risk of re-offending violently and, indeed, in general. This was amply supported by the record. The trial judge noted his blemish-free life, and the offence was out of character for the respondent. The judge said this:

> Mr. Hynes' Pre-Sentence Report contains evidence that would allow the Court to infer that he is at a low risk of re-offending violently and, indeed, at a low risk of re-offending generally. Mr. Hynes' conduct that led to the charges before the Court does not appear to be characteristic behaviour.
>
> Service of a sentence in the community, therefore, in my view would not endanger public safety. The Pre-Sentence Report leads me to conclude that Mr. Hynes would cooperate with the terms of a conditional sentence.

[133] As to the degree of harm to the community, it is essential to recall that this offence was not planned. The trial judge described it as a "spur of the moment", out-of-character act by the respondent to recklessly point the nail gun at the victim.

There is no basis to imagine anything other than a low risk the respondent would re-offend while serving the CSO such that grave harm would result.

[134] On appeal, the Crown accepts there is little chance the respondent is going to re-offend or breach the CSO's conditions. This is borne out by the Crown's advice the authorities were highly complimentary about the respondent's behaviour while serving the CSO.

[135] The trial judge specifically referenced the analytical framework summarized by Lamer C.J. in *Proulx* (paras. 58-60), which requires the judge to consider if a conditional sentence would be consistent with the fundamental purpose and principles set out in ss. 718 to 718.2. He did precisely that.

[136] The Crown suggests the trial judge gave insufficient weight to denunciation and deterrence, and instead focussed on the personal circumstances of the respondent. We agree with the respondent that it is overwhelmingly clear that denunciation and deterrence were at the forefront of the trial judge's analysis. The judge's references to denunciation and deterrence include:

> (a) … denunciation and deterrence must be given priority in imposing sentences for offences involving high levels of violence … denunciation and deterrence are top-ranked principles in this case …
>
> (b) There is a strong need for the denunciation of workplace violence motivated by implicit bias.
>
> (c) … this case calls for unequivocal denunciation and a sentence reflecting that imperative.
>
> (d) … a purely probationary sentence would not accomplish the necessary degree of denunciation and general deterrence needed to send a clear and unmistakable message to the public that workplace conduct, especially when motivated by discriminatory beliefs, will not be tolerated in a just society based on equality and equity.
>
> (e) Mr. Hynes has no prior findings of guilt. The stigma of a trial and conviction does operate as a major deterrent and may in appropriate cases satisfy the requirements of denunciation.
>
> (f) For other cases involving persons who have not ritualized violence and who are likely to cooperate with community-based sentence management, the conditional sentence order was designed as a restrained and restorative means of accomplishing real denunciation and deterrence for serious offences simultaneously moving the criminal justice system away from the carceral state models.

[137] As Derrick J.A. for a unanimous five-member panel of this Court observed in *R. v. Anderson*, 2021 NSCA 62:

> [154] Judges are accorded significant, although not unfettered, discretion in weighing the principles of sentencing in determining a fit sentence that accords with the overarching principle of proportionality. In this calculus, a properly crafted conditional sentence with appropriate conditions can achieve the objectives of denunciation and deterrence.
>
> [Footnotes omitted]

[138] The Crown also suggests the trial judge's emphasis on parity was "misguided". Section 718.2 directs that a court that imposes a sentence shall take into account an enumerated list of principles. One of them is parity—offenders convicted of crimes of similar seriousness deserve similar consequences absent different aggravating or mitigating circumstances. This is expressed in s. 718.2(b) as follows:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> …
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

[139] Twice in his sentence reasons, the trial judge referred to other sentence decisions. The first time was to recognize a number of reported cases that involved high levels of interpersonal violence or negligence, yet courts had imposed purely probationary sentences. The judge discounted these, and rejected just probation, despite the presence of numerous mitigating factors, because he reasoned the circumstances in this case called for a sentence that reflected the imperative of unequivocal denunciation.

[140] The second time was when he referred to an Alberta case where the court had imposed a conditional sentence on an offender who had assaulted a co-worker with an axe. The trial judge made the following brief comments about parity:

> And the imposition of a conditional sentence would accord with the principle of sentence parity. Although the Court was not pointed to any sentencing case of comparable seriousness and culpability, I was able to locate one out of Alberta, **The Queen and Jay (sp?)**, that involved an individual harbouring a grudge against a co-worker, returning to the work site with an axe and brandishing it over an extended period of time in a menacing fashion.

> The sentencing Court in that case imposed a conditional sentence of 12 months. The accused in that case appeared to have a blemish-free record and had no prior findings of guilty. And so I find that sentence parity would be fulfilled in imposing a conditional sentence in this case.

[141] Both parties now agree the trial judge's reference was likely to *R. v. Prasad*, 2018 YKTC 21. In that case, the 76-year-old offender became angry at a co-worker who had reported his behaviour to their supervisor. He went home, consumed alcohol, then returned to work with an axe hidden in a bag. The offender screamed explicit threats to kill the victim, held the axe to her neck, yelled profanities at her and threatened to cut off her head. The victim suffered ongoing psychological and emotional trauma. The offender had no prior record and pled guilty, but in his Pre-Sentence Report continued to describe the victim in a "wholly inappropriate manner".

[142] The Crown complains this case was not brought to its attention. If it had, distinguishing features could have been pointed out, such as the offender in that case had not been in a position of trust in relation to his co-worker, and there was no suggestion the victim was a vulnerable individual. For reasons already set out, the trial judge erred in law when he concluded the respondent abused a position of trust or that the victim was a vulnerable individual.

[143] The respondent argues *R. v. Prasad* served as a useful comparator and points out the similarities with the case at bar.

[144] Parity is established by a careful analysis of cases that have similar aggravating and mitigating factors. A failure to carry out a parity analysis can amount to legal error (see: *R. v. Hawkins*, 2011 NSCA 7; *R. v. White*, 2020 NSCA 33).

[145] The proper application of the parity principle can present a daunting task for busy trial courts. Here, the trial judge referred to three other cases: *R. v. Pottie*, 2013 NSCA 68; *R. v. Moore*, 2018 NSPC 48; *R. v. Fraser and Gardner*, 2020 NSSC 223.[3]

[146] In *Pottie*, the offender attacked another worker on the job site due to a taunt. He repeatedly punched the victim in the face and ribs. The attack ended when two others pulled the offender off the victim. The victim suffered bodily harm in the

[3] The offenders' convictions were quashed (2021 NSCA 52) and they were ultimately acquitted at their retrial (2022 NSSC 154).

form of swollen eyes, a sore chest and three separate fractures to a facial bone. The trial judge imposed a suspended sentence and placed the offender on 16 months' probation. The offender appealed, seeking a conditional discharge (i.e., no criminal conviction). The Summary Conviction Appeal Court dismissed the appeal. The offender sought leave to appeal to this Court. Leave was denied. Farrar J.A., for the Court, commented the purely probationary period fell within the appropriate range (para. 40)

[147] In *R. v. Moore*, Judge Atwood sentenced a young Aboriginal offender to 24 months' probation for an aggravated assault she had committed with a knife while intoxicated.

[148] In *Gardner and Fraser*, two special constables had been found guilty by a jury of criminal negligence causing the death of a prisoner who had been in their care. Despite the clear breach of trust inherent in the offence and the consequences, the trial judge suspended the passing of sentence and placed the offenders on probation for three years.

[149] The trial judge concluded that a purely probationary sentence would not accomplish the necessary degree of denunciation and deterrence for the respondent's conduct. We have not been asked to determine if he correctly rejected a purely probationary sentence.

[150] In any event, the cases the trial judge referred to inform the range of sentence for violent and serious conduct. The range is anywhere from a conditional discharge, a suspended sentence with probation, to imprisonment. The trial judge chose imprisonment, to be served by way of a conditional sentence order. In doing so, he did not place undue emphasis on parity.

Manifestly unfit sentence

[151] For a sentence to be manifestly harsh or inadequate, an appeal court must be satisfied it is unjustifiably outside the "acceptable range" of sentence. This was the approach long ago articulated by this Court in *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 and *R. v. Muise* (1994), 94 C.C.C. (3d) 119. The Supreme Court of Canada adopted this paradigm in *R. v. Shropshire*, [1995] 4 S.C.R. 227, where Iacobucci J. wrote:

> [47] I would adopt the approach taken by the Nova Scotia Court of Appeal in *R. v. Pepin* (1990), 98 N.S.R. (2d) 238 and *R. v. Muise* (1994), 94 C.C.C. (3d) 119. In *Pepin*, at p. 251, it was held that:
>
> > ... in considering whether a sentence should be altered, the test is not whether we would have imposed a different sentence; we must determine if the sentencing judge applied wrong principles or [if] the sentence is clearly or manifestly excessive.
>
> [48] Further, in *Muise* it was held at pp. 123-24 that:
>
> > In considering the fitness of a sentence imposed by a trial judge, this court has consistently held that it will not interfere unless the sentence imposed is clearly excessive or inadequate ...
> >
> > ...
> >
> > The law on sentence appeals is not complex. If a sentence imposed is not clearly excessive or inadequate it is a fit sentence assuming the trial judge applied the correct principles and considered all relevant facts. ... My view is premised on the reality that sentencing is not an exact science; it is anything but. It is the exercise of judgment taking into consideration relevant legal principles, the circumstances of the offence and the offender. **The most that can be expected of a sentencing judge is to arrive at a sentence that is within an acceptable range. In my opinion, that is the true basis upon which Courts of Appeal review sentences when the only issue is whether the sentence is inadequate or excessive.**
>
> ...
>
> [50] **Unreasonableness in the sentencing process involves the sentencing order falling outside the "acceptable range" of orders.** ...
>
> [Emphasis added]

[152] The appropriate range of sentence is determined by consideration of the nature of the offence and the circumstances of the offender. LeBel J. in *R. v. Nasogaluak*, 2010 SCC 6, explained the nature of a trial judge's discretion, and its limits:

> [43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest

> weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.

[153] However, LeBel J. carefully pointed out, a sentence that is outside the normal range of sentence is not necessarily unfit, so long as it is determined in accordance with the correct principles and objectives of sentencing:

> [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the *Code*. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. **A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.**
>
> [Emphasis added]

[154] This approach demands appellate courts afford deference absent legal error or a demonstrably unfit sentence:

> [46] Appellate courts grant sentencing judges considerable deference when reviewing the fitness of a sentence. In *M. (C.A.)*, Lamer C.J. cautioned that a sentence could only be interfered with if it was "demonstrably unfit" or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of a relevant factor (para. 90; see also *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 14-15; *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, at paras. 123-26; *R. v. McDonnell*, [1997] 1 S.C.R. 948, at paras. 14-17; *R. v. Shropshire*, [1995] 4 S.C.R. 227). As Laskin J.A. explained in *R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:
>
> > To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial

> judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

[155] In other words, a sentence, without sound reason, outside the appropriate sentence range can be viewed as unreasonable—that is, demonstrably unfit. The Supreme Court has consistently endorsed this approach (see: *R. v. Lacasse*, 2015 SCC 64; *R. v. Suter*, 2018 SCC 34).

[156] The appropriate range of sentence is determined by considering the nature and length of sentences imposed on similar offenders who commit similar offences. The parity principle is an expression of the fundamental requirement that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[157] The unanimous joint judgment of Wagner C.J. and Rowe J. in *R. v. Friesen*, 2020 SCC 9 explains the relationship between the fundamental principle of proportionality and parity:

> (1) Proportionality and Parity
>
> [30] All sentencing starts with the principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality has long been central to Canadian sentencing (see, e.g., *R. v. Wilmott*, [1966] 2 O.R. 654 (C.A.)) and is now codified as the "fundamental principle" of sentencing in s. 718.1 of the *Criminal Code*.
>
> [31] Sentencing judges must also consider the principle of parity: similar offenders who commit similar offences in similar circumstances should receive similar sentences. This principle also has a long history in Canadian law (see, e.g., *Wilmott*) and is now codified in s. 718.2(b) of the *Criminal Code*.
>
> [32] Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality (*R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 78-79).
>
> [33] **In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by**

> **reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.**
>
> [Emphasis added]

[158] The Crown does not cite one case, let alone numerous ones, to demonstrate actual incarceration is the appropriate range of sentence for similar offences committed by similar offenders in similar circumstances as the case before us.

[159] Instead, the Crown submits:

> 94. The sparsity of sentences on which to derive a range may offer less comfort to sentencing judges. The exercise should, then, go to first principles in arriving at a proportionate sentence …

[160] In addition to the cases referred to above, where serious cases of violence or criminal negligence have received non-custodial sentences, the respondent cited three more, from Nova Scotia alone, where conditional sentence orders of 9 to 15 months were imposed for such offences.

[161] The Crown has not demonstrated the conditional sentence imposed by the trial judge is demonstrably unfit.

[162] We would grant leave to appeal but dismiss the appeal.

Beveridge J.A.

Farrar J.A.

Bryson J.A.