

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Moustakas*, 2018 NSPC 80

Date: 20180522

Docket: 8231313, 8231316

Registry: Dartmouth

Between:

Her Majesty The Queen

v.

Alexandros Moustakas

Judge: The Honourable Judge Frank P. Hoskins

Decision June 22, 2018

Charge: Section 7.41(1)(a) of the Aeronautics Act
Section 7.41(1)(b) of the Aeronautics Act

Counsel: Marian Fortune-Store for the Crown
Kishan Persaud for the Defence

By the Court: (Orally)

Introduction:

[1] This is the sentencing decision in the matter of *The Queen v. Alexandros Moustakas*, who pleaded guilty to two offences under s. 7.41(1) of the *Aeronautics Act*, R.S.C. 1985, c. A-2.

[2] These offences arise from vile and disturbing circumstances where Mr. Moustakas and two accomplices while in a state of intoxication uttered insulting and degrading threats to a flight crew when the aircraft was in flight. Within the confines of the plane, with over two hundred passengers, Mr. Moustakas became increasingly aggressive with the flight crew which culminated in him becoming verbally abusive and violent towards them. He made explicit sexualized threats to a flight attendant which were vile and violent and he physically assaulted another flight attendant. It is reasonable to infer that Mr. Moustakas' offensive conduct left an indelible imprint on the memories of the flight crew who did not want to provide any information to the authorities that could disclose their identities because they were fearful of him - given his violent behavior towards them.

Circumstances Surrounding the Offences

[3] The circumstances surrounding the commission of the offences were clearly and succinctly articulated by Crown Counsel. The facts were not disputed by the Defence. They are as follows:

On June the 3rd, Condor Airlines, which was on route from Frankfurt, Germany to Varadero, Cuba. During the course of that flight, the activities and behaviours of three of the passengers, namely Mr. Moustakas, who is before the Court, Mr. Hieronymous, who is also before the Court, and Niko Moustakas, the 24 year old son of Mr. Moustakas, who is before the Court. Mr. Niko Moustakas was sentenced last week by Judge MacRury and the representations were that Niko Moustakas was the lesser of the three participants in the conduct. He was sentenced to time served (arrested on June 3 – sentencing date June 8).

The Court now has before it the two more significant individuals and particularly Mr. Moustakas' behaviour. As I've indicated, late on June 3, early morning of June 4, as a consequence, particularly Mr. Moustakas' behaviours, the Captain of flight made the decision that for the security and safety of passengers that the flight had to be diverted to Halifax. On board were 200 passengers. During the course of the flight Mr. Moustakas and his two companions became quite intoxicated and had brought alcohol onto the plane when that alcohol, when they were advised that they could not longer drink that alcohol, they continued to order. At one point Mr. Moustakas deliberately smashed his iPad and when the purser took it away from him.

The events started to unfold when in an intoxicated state, Mr. Moustakas smashed his iPad, at that point the purser took his iPad from him because there is a risk that the batteries could explode. Mr. Moustakas became verbally aggressive toward her and after that point a different flight attendant advised him that he would no longer be served alcohol. His son and Mr. Hieronymous continued to purchase alcohol for him. As he became more intoxicated he went into the galley in a highly agitated state and at that point, although he could not see the purser he made a series of threats against her. I will give you examples of the threats. Out of the translation that I'm using, because everything is in German the summary of the threats are "this bitch, you purser, I can destroy everything I want. This dirty whore, I hit her in her stupid foreign face, I don't care if I break her jaw. As soon as we land on Cuban soil, I hit her in the face as there is no German law anymore.

She has to take my 18 centimetre big dick in her mouth which she can't handle anymore. I will not tell anything by this Filipino cunt. You have no idea what I'm able to do. I know enough Albanian who can find out your address and I will send them immediately. I hit this Filipino to the hospital, there will be blood and I will kill her.”.

He went on then and with respect to that shortly after when he was in the galley he took control of another attendant and put her arm up behind her back and forced her head down to her knees.

Mr. Moustakas continued with his verbal assault aggression and at one point when he was returning to his seat, I believe with the assistance of Mr. Hieronymous. Mr. Hieronymous was with Mr. Moustakas at one point in the galley when some of these events occurred. When Mr. Moustakas got back to his seat, he then threatened to open the emergency window and threatened to light up the whole airplane. At that point he also gave what has been described as the “Hitler greeting”. When the decision to divert was made and the plane, the announcement was made, the three individuals went back into the galley where preparations were being made for landing. At that time they rushed into the galley complaining about the diversion demanding to be able to smoke and demanding liquor. Mr. Moustakas grabbed a drink that had been prepared for another passenger out of the attendant's hand and drank it. When Mr. Moustakas returned to his seat he was also verbally assaultive to passengers and indicated to one passenger he would finish him off when he got to Cuba.

The Aggravating Circumstances Surrounding the Offences

[4] There are several *aggravating factors* surrounding the commission of the offences which must be emphasized. They include the following:

- (1) With respect to the role of each offender in this case, the actions of Mr. Alexandros Moustakas were the most egregious as he was both verbally abusive and physically violent. His persistent violent outbursts were much more intense and aggressive towards the flight crew than the other two co-accused's actions.

- (2) Mr. Moustakas' actions were extra-ordinary; in that, while the aircraft was in flight, he became very intoxicated, aggressive and violent both verbally and physically towards the flight crew.
- (3) While in a highly intoxicated and agitated state, he went into the galley in a violent manner and hurled sexualized threats of violence towards the purser.
- (4) He took control of another flight attendant by grabbing her by the arm and forcing it up behind her back, which forced her head to her knees.
- (5) He threatened to open the emergency window, and threatened to light up the whole cabin; the aircraft and then gave a Hitler salute.
- (6) After an announcement was made that the aircraft was being diverted to Halifax, Mr. Moustakas, again, became outraged and rushed back into the galley with his two cohorts complaining about the aircraft being diverted; while demanding cigarettes and liquor.
- (7) When Mr. Moustakas returned to his seat, he was verbally abusive towards the passengers and indicated to one passenger he would finish him off when they got to Cuba.

[5] Having reviewed the case law, it appears that alcohol is usually involved in these type of cases; where intoxicated people are verbally abusive and disorderly or ignore the instructions of the flight crew. For example, in *R. v. Campbell*, [2013] B.C.J. No. 479, the accuseds drank alcohol and took sleeping pills before boarding an aircraft. They continued to drink, and then started yelling, swearing, and kicking other passengers' seats. Mr. Campbell threw himself on the floor of the plane and in a tantrum. Another co-accused fell into a flight attendant and passenger. Both were restrained with plastic restraints.

[6] I am mindful that Mr. Moustakas is not being sentenced today for having committed assault and uttering threats, but nevertheless, his actions are relevant because it provides the basis for the underlying facts of the two offences under s 7.41(1) of the *Aeronautics Act*.

[7] As the Crown stressed, Mr. Moustakas' behavior caused the flight to be diverted. Indeed, the consequences of his behavior is relevant to demonstrate for the purposes of sentencing the nature of the conduct that resulted in the interfering and lessening of the crews' ability to carry out their lawful duties.

Mitigating Factors Surrounding the Circumstances of Mr. Moustakas

[8] There are several mitigating factors surrounding Mr. Moustakas' personal circumstances which have been ably emphasised by Mr. Persaud, on behalf of Mr. Moustakas, which include the following:

1. Mr. Moustakas has pled guilty and has accepted responsibility for the offences, thereby saving substantial resources to the justice system. The guilty pleas saved the state considerable expense and the witnesses further inconvenience, including travel.

It is fair to say that being a witness in a criminal proceeding is often stressful and demanding, especially for vulnerable witnesses. The uncertainty and apprehensiveness of testifying in a trial is enveloped in the context of an adversarial process. Testifying in the cold and sterile atmosphere of the courtroom that imbues sedateness and formality can be a daunting task for any witness.

2. He has expressed remorse for having committed the offences and has apologized for his actions;
3. Mr. Moustakas is a first-offender, who suffers from a compulsive disorder and has issues relating to the consumption of alcohol, which has caused him to behave in the manner that he did; or at least, contributed to his misconduct. Thus, his medical condition is a mitigating factor that must be considered.

4. Mr. Moustakas has been in custody in a foreign state and has felt the effect of public shame for having committed the offences, as he is a first-time offender.

[9] It is reasonable to infer from the totality of the circumstances as described by the Crown that the fear and degradation experienced by the flight crew was aggravated by Mr. Moustakas' persistent and aggressive violent conduct.

[10] There are, undoubtedly, a plethora of adjectives that could be used to describe the circumstances surrounding this case. The most obvious that comes immediately to mind is - vile and disturbing.

[11] The vile infliction of sexualized verbal and physical violence against helpless and defenseless flight crew members, while in flight, thousands of miles in the air over the Atlantic Ocean, restricted in the small confines of an aircraft, with over two hundred passengers on board, is extremely aggravating as it put the safety and security of the flight crew and passengers at risk.

[12] An in-flight aircraft is in a vulnerable state and chances cannot be taken with the lives of passengers and crew, the aircraft itself or property and persons on the ground.

[13] In this case, a decision was made by those responsible for the aircraft's safety to divert to Halifax because of Mr. Moustakas' misconduct. The decision was not made unreasonably or in bad faith.

[14] As stated by the Newfoundland Court of Appeal, in *R. v. Minot*, [2011] N.J. No.10, at paras. 61 to 62:

The real intention of section 7.41(1) of the Aeronautics Act must surely be to regulate the behaviour of people so that airlines can safely transport people and goods. Bearing in mind this purpose of the legislation, the phrase "endangerment to the safety and security" cannot be said to be an element of the offence requiring actual proof of endangerment, as long as the risk of endangerment can reasonably be inferred from the context of the situation without doing violence to the objectives of the statute. Proper statutory interpretation including the interpretation of penal statutes supports an interpretative approach that best assures the attainment of the legislation's objects (*R. v. Hasselwander*, [1993] 2 S.C.R. 398).

It is not necessary for the Crown to prove that the flight was actually endangered by the Appellant's behaviour as long as the risk of endangerment can be reasonably inferred from the facts. It is enough to prove the deliberate conduct which creates a situation that has the potential or is reasonably thought to have the potential to endanger the safety and security of an aircraft.

[15] Notwithstanding that the circumstance of these offences has all the hallmarks of a very frightening experience for both the flight crew and the passengers, I am mindful that the sentence that this court imposes must derive from the application of the purpose and principles of sentencing, rather than from a reactive, emotional, impulse. To put differently, a just and appropriate sentence for an offence and offender, derives from an objective, measured and reasoned

determination of an appropriate punishment which properly reflects the moral culpability of the offender. Although anger and violence were the motivating factors behind Mr. Moustakas' conduct in committing the offences against the victims, vengeance and anger have no place in sentencing. As Lamer, C.J., as he then was, observed in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at paras. 80-81, wherein he wrote:

But it should be clear from my foregoing discussion that retribution bears little relation to vengeance, and I attribute much of the criticism of retribution as a principle to this confusion. As both academic and judicial commentators have noted, vengeance has no role to play in a civilized system of sentencing. See *Ruby*, Sentencing, *supra*, at p. 13. Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm inflicted upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. ...

Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass". The relevance of both retribution and denunciation as goals of sentencing underscores that our criminal justice system is not simply a vast system of negative penalties designed to prevent objectively harmful conduct by increasing the cost the

offender must bear in committing an enumerated offence. Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*.

[16] The sentence imposed must bear some relationship to the offence; it must be a fit sentence proportionate to the seriousness of the offence. Only if this is so the public be satisfied that the offender deserved the punishment he or she received and feel a confidence in the fairness and rationality of the system.

[17] The offences for which Mr. Moustakas pled guilty are very serious summary offences. The seriousness of these offences is reflected by Parliament's imposition of a maximum punishment of \$25,000 fine and 18-month period of imprisonment, when proceeded summarily.

[18] While there is a dearth of reported cases in this area, I am indebted to Counsel for their able submissions, which were clear, concise, and thoughtful.

[19] It is important to emphasize that Mr. Moustakas is not charged with *Criminal Code* offences such as assault or uttering threats, but rather with regulatory offences under the *Aeronautics Act*.

[20] In assessing the issue of what is the appropriate and just disposition for these offences and offender, Mr. Moustakas, I have carefully considered and reflected on the following:

1. The circumstances surrounding the commission of the Offences and the Offender, Mr. Moustakas;
2. The relevant *Criminal Code* provisions, including ss. 718, 718.1, and 718.2;
3. The viva voce evidence of Mr. Moustakas;
4. The case law;
5. The sentencing decisions of the other two co-accused, for parity reasons;
6. The time that Mr. Moustakas spent in pre-trial custody; and
7. The submissions of Counsel.

[21] The Supreme Court of Canada has enunciated the correct approach to sentencing in *M. (C.A.)*, and Parliament has enacted legislation which specifically sets out the purpose and principles of sentencing. Thus, it is to these sources, and the common law jurisprudence that courts must turn in determining the proper sentence to impose.

[22] It is trite to say that the imposition of a just and appropriate sentence can be difficult a task as any faced by a trial judge, as it was in this specific case.

[23] However, as difficult as the determination of a fit sentence can be, that process has a narrow focus. It aims at imposing a sentence that reflects the circumstances of the specific offence and the attributes of the individual offender. Indeed, sentencing is not based on group characteristics, but on the facts relating to the specific offence and offender as revealed by the evidence adduced in the proceedings.

[24] Generally, it is recognized that a fit sentence is the product of the combined effects of the circumstances of the specific offence with the unique attributes of the specific offender.

[25] Although the sentencing process is highly contextual and necessarily an individualized process, the judge must also take into account the nature of the offence, the victims and community. As Lamer C.J. (as he then was), noted in *M.(C.A.)*, sentencing requires an individualized focus, not only of the offender, but also of the victim and community as well.

[26] As stated, sentencing is governed by the specific purpose and general principles of sentencing provided for in the *Criminal Code* under s. 718.

[27] In addition to complying with these principles of sentencing, dispositions or sentences must promote one or more of the six objectives identified in s. 718, (a) to (f), inclusive.

[28] The purpose of sentencing is achieved by blending the various objectives identified in s. 718(a) to (f). The proper blending of those objectives depends upon the nature of the offence and the circumstances of the offender. Thus, the judge is often faced with the difficult challenge of determining which objective or combined deserves priority. Section 718.1 directs that the sentence imposed must fit the offence and offender. Section 718.1 is the codification of the fundamental principle of sentencing which is the principle of proportionality. This principle is deeply rooted in notions of fairness and justice.

[29] I have considered the fundamental purpose of sentencing as clearly and succinctly expressed in s. 718, of the *Criminal Code*, the fundamental principle as stated in s. 718.1 of the *Criminal Code*, and the other sentencing principles as set out in 718.2 the *Criminal Code*, which stipulates that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or offender.

[30] I am also mindful of the principle of restraint which underlies the provisions of s. 718 of the *Criminal Code*.

[31] Accordingly, in accordance with s. 726.2 of the *Criminal Code*, what follows are my reasons for imposing the sentence that I view as a just and appropriate, for Mr. Moustakas and for these offences.

Positions of the Crown and Defence on Sentence

[32] The Crown contends that the appropriate disposition for these offences and offender, Mr. Moustakas, is a custodial sentence in the range of three to six months.

[33] The Defence submits that given the number of mitigating factors, which includes Mr. Moustakas mental illness, consideration of the parity principle, and case law, a period of one month incarceration is a fit and proper punishment for the offences and for the offender.

Section 719 of the *Criminal Code*: Credit for Pre-Sentence Custody

[34] The Crown and Defence agree as to the amount of credit Mr. Moustakas is entitled to receive under s. 719 of the *Criminal Code*. Their calculation included credit at 1.5 days per day of detention. Therefore, given that Mr. Moustakas has

been on remand for 20 days, he is entitled to a credit of 30 days to be deducted from the global sentence.

Range of Sentences

[35] It is very difficult to identify a range of sentences for these offences, given the limited number of cases reported. However, it appears from the few that I have read, that usually the offences involve disorderly conduct fueled by alcohol, which attract a fine, coupled with restitution, and in some cases short period of custody deemed time served.

[36] In fact, if one could place these type of cases on a scale, then it might be fair to say that the extreme aggravating circumstances surrounding the commission of these offences, which caused the aircraft to divert and land in Halifax, would place it at the higher end of the range. Indeed, but for the mitigating factors of this case, including Mr. Moustakas medical condition, the sentence would have been much higher than what I am about to impose.

Principle of Restraint

[37] I have also considered the principle of restraint which underlies the provisions contained in s. 718 of the *Criminal Code*, particularly as it relates to first offenders, such as Mr. Moustakas.

The Parity Principle

[38] I have considered and applied the parity principle in s. 718.2(b) of the *Criminal Code*. Parity means that the sentence must be similar to those sentences imposed for similar offences on similarly situated offenders. In addition to the consideration of what Mr. Moustakas' accomplices received as punishment for their involvement in the commission of these offences, I must also consider other similar cases committed by similarly situated offenders. This necessarily requires a review of the sentences approved or imposed by other courts. In doing that, I am aware of what the Supreme Court of Canada stated in *M.(C.A.)*, at para. 92:

[92] It has been repeatedly stated that there is no such thing as a uniform sentence for a particular crime. ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic exercise.

[39] In this case, I am mindful that Mr. Moustakas' co-accused, his son, received one day in court deemed served by the four days he spent in pre-trial custody. The

Crown and Defence agreed that he was the least culpable of the three accused. They also agreed that Mr. Heironymous was less culpable than Mr. Moustakas Senior. I agree.

[40] It should be noted that a sentence will be justifiably disparate between the persons who play different roles in the offence. Indeed, in this case, it is necessary to imposed different sentences upon the three accused to adequately reflect their degree of moral blameworthiness.

[41] Courts have repeatedly stated that in cases such as this, denunciation and deterrence, both specific and general are the objectives to be emphasized.

[42] The inherent nature of these offences as it relates to the flight crew and passengers involves placing their safety and security of person at risk of harm; both physical and psychological.

[43] In fact, the purpose of the *Aeronautics Act* is to regulate the behavior of people so that the risks of harm are reduced, and people can travel safely and without fear of being harmed.

[44] The vulnerability of the crew and passengers while an aircraft is in flight cannot be over stated.

[45] These offences caused, at the very least, significant inconvenience and distress to hundreds of people, and potentially placed hundreds of lives in danger. The crew and passengers who had to deal with the three men were at a direct risk of harm, and the potential for the situation to escalate was ever present.

[46] This is also an offence that attracted public attention. General deterrence is achieved when the public is also apprised of the consequences. Thousands of people fly on airplanes every day. Many consume alcohol prior to boarding and during the flight.

[47] While most behave properly, the sentence sends a message to those who may be inclined to disrupt a flight by unacceptable behaviour.

[48] Mr. Moustakas' conduct was, very clearly avoidable. The conduct of the accused, brought on by self-induced intoxication, caused significant distress to the passengers and crew. It caused untold inconvenience to the other passengers, who may have needed to be in Cuba for some other reasons than a vacation; such as meetings, weddings, or funerals.

[49] Considering the conduct of the accused, their moral culpability and the consequences to the other passengers and crew, denunciation and both specific and general deterrence must be emphasized. The accused does not have a criminal

record, in my view, that prevents him from facing a much more substantial sentence.

[50] While the Crown did not file any victim impact statements, I can reasonably infer from the circumstances that the impact on the other passengers included inconvenience, frustration, anxiety, and fear. The accused's obnoxious and unruly behavior bothered passengers and crew. Their sexualized threatening conduct was clearly criminal by nature and frightening to the crew who did not want their names disclosed or other personal information that may identify them disclosed. In my view, that level of fear speaks to the degree of violence that the accused inflicted upon the crew members, who have a right to work in a safe and secure workplace.

[51] It should be stressed that everyone's travel plans were placed in jeopardy for an extended period. That said, there is no evidence that any passengers incurred out of pocket expenses.

[52] More importantly, it is well-known that air travel is a source of anxiety for many, the passengers learning of the diversion presumably would have been very concerned.

[53] The Crown argued that the primary sentencing principles at play in this case are general deterrence and denunciation. In support of that position, the Crown did not argue that this type of offence is very common in Canada, or that it is on the rise. Rather, the Crown properly relied on the fact that this case is not the first of its kind, and unfortunately may not be the last. However, what must be sent to similar like-minded individuals as the accused in this case is that this type of behavior will not be tolerated.

[54] In my view, cases such as this case, clearly call for a greater emphasis on denunciation and deterrence than most regulatory offences.

[55] The offences in this case are serious. The accused's behavior was not a mere annoyance or inconvenience. It increased the danger faced by the passengers and crew to some extent. It also caused the airline to suffer substantial losses.

[56] Having considered the seriousness of the offences, the moral blameworthiness of the accused's, and the aggravating and mitigating factors, I am of the view that a criminal record is not necessary to send the message to other law-abiding people that conduct like the Defendants engaged in will not be tolerated.

[57] The principles of general deterrence and denunciation are important. The Defendants' conduct has put their ability to work in their chosen field in question. They have been stigmatized by their portrayal in the media. That incomplete image will endure for the foreseeable future.

[58] This is not to say that the other objectives are not important or are not to be considered, however, I believe that because of the view which our courts and our society takes of brutal violent crimes committed with malice, the emphasis of denunciation and deterrence must necessarily be the primary focus. A sentence which is unduly lenient can provide neither the necessary deterrence nor denunciation required to meet the fundamental purpose of sentencing.

[59] In essence, while each case appears to turn very much on its own unique set of circumstances, and thus, it is often a difficult challenge to apply the principle that a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances, what emerges from the case law are several significant factors that are often considered and applied in determination of a fit and appropriate sentence.

[60] As previously mentioned, the purpose of sentencing is to impose just sanctions. A just sanction is one that is deserved. A fit sentence in that context is

one that is to commensurate with the gravity of the offence and the moral blameworthiness of the offender. In *R. v. Proulx*, [2000] 1 S.C.R. 6, at para. 82, Chief Justice Lamer reaffirmed that principle wherein he stated:

[82] Proportionality requires an examination of the specific circumstances of both the offender and the offence so that the punishment fits the crime. Disparity in sentencing for similar offences is a natural consequence of the fact the sentence must fit not only the offence but also the offender.

[61] The Ontario Court of Appeal in *R. v. Priest*, [1996] O.J. No. 3369, expressed the view that proportionality ensures that an individual is not sacrificed for the sake of the common good.

[62] An appropriate or reasonable disposition will depend on circumstances of the case in the context of all relevant considerations, which includes not only the personal circumstances of the offender and the degree of responsibility of the offender for the offence, but also the gravity of the offence itself.

[63] Proportionality means that the sentence must be proportionate to the gravity of the offence and the moral blameworthiness of the offender. Obviously this principle must also consider the presence of any aggravating or mitigating circumstances including those listed in s. 718.2(a).

Mr. Moustakas Personal Circumstances

[64] Mr. Moustakas is 48 years of age. He is not a youthful offender, but he is a first-time offender. Thus, the principle of restraint must be considered, which includes a sentence that reflects the potential for rehabilitation. Restraint means that sentencing courts should seek the least intrusive sentence and the least quantum that will achieve the overall purpose of being appropriate and a just disposition. Put differently, I am mindful that the rehabilitation of Mr. Moustakas must not be lost in the sentencing calculus, or role in fixing the length of any prison term given his age.

[65] Even in the most serious violent offences, courts have been sensitive to the principle of restraint in cases involving first-time offenders. For example, in the decision of the Nova Scotia Court of Appeal in *R. v. Colley*, [1991] N.S.J. No. 62, the Court endorsed the notion that if the need to protect society can be well served by a shorter sentence as by a longer one, the shorter is to be preferred. Similarly, the Ontario Court of Appeal in *Priest*, at para. 23, has expressed the view that:

[23] Even if a custodial sentence was appropriate in this case, it is a well-established principle of sentencing laid down by this court that a first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused rather than solely for the purposes of general deterrence.

[66] This sentiment is often expressed in cases involving youthful offenders who have acted out of character in committing serious violent offences.

Mr. Moustakas' Mental Health

[67] As observed in Clayton Ruby et al's, text, *Sentencing*, 6th ed. (Toronto: Butterworths, 2004), at p. 250:

There appears to be a number of conflicting judgments as to whether it is necessary to show that a psychiatric condition contributed to the commission of an offence before evidence of such a condition can be reflected in the sentence. The conflict may, however, be more apparent than real.

[68] In determining a sentence, by virtue of s. 724 (1) of the *Criminal Code*, the Court may accept as proved any information disclosed at the sentencing proceedings and any facts agreed upon by the Crown and the Defence. Where there is a factual dispute relevant to the determination of a sentence, however, the party wishing to rely on the relevant fact has the burden of proving it (s. 724(3)(b) of the *Criminal Code*). Furthermore, under s. 724(3)(d) of the *Criminal Code*, the Court must be satisfied on the balance of probabilities of the existence of the disputed fact before relying on it in determining the sentence. Under s. 724(1)(e) of the *Criminal Code*, the Crown must establish, by proof beyond a reasonable doubt, the evidence of any aggravating fact or any previous conviction by the offender.

[69] In this case, I am satisfied that the defence has established that Mr. Moustakas has a medical condition that is related to impulse control. Mr. Moustakas' evidence is supported, in part, by Exhibit 1, the photograph of his medical card.

[70] The mitigating effect of his mental illness, coupled with his amenability to treatment should be not be lost in the sentencing calculus, or his role in the determination of the appropriate disposition which strikes a just proportionality surrounding the commission of the offences and the offender, Mr. Moustakas.

[71] As previously stressed, given that sentencing is highly contextual and necessarily an individualized process, the Court must impose a sentence that addresses the two elements of proportionality, that is the circumstances of the offences and the circumstances of the offender and thereby reach a sentence that fits not only the offence but also the offender. The sentencing judge must fashion a disposition from among the limited options available which take both sides of the proportionality inquiry into account.

[72] Having carefully considered and weighed all the aggravating and mitigating factors as discussed in this case against the seriousness of the offences I am of the

view that a period of incarceration is a fit and proper punishment for these offences and offender, Mr. Moustakas.

[73] Notwithstanding the mitigating factors present in this case, these are very serious offences which require an appropriate disposition that effectively emphasizes the principles of deterrence and denunciation while at the same time balances the need to ensure the rehabilitation of Mr. Moustakas.

[74] A review of the case law which has considered and applied the statutory purposes and principles of sentencing suggests a period of incarceration given the seriousness of the crime is “unavoidable.” Indeed, this is one of those serious cases where it is necessary to separate a first-time offender for a period of incarceration because of the seriousness of the crime committed, and the pressing need to emphasize denunciation and general deterrence.

[75] As stated, the mitigating factors in Mr. Moustakas’ case include: his age, his guilty plea and acceptance of responsibility, his expression of remorse, and his mental illness. These have been considered.

[76] As well as the aggravating factors, as mentioned earlier which include the serious consequences of his actions.

[77] Thus, given the gravity of the offence, and degree of Mr. Moustakas' responsibility in such circumstances, deterrence and separation from society must be reflected in the sentence imposed.

[78] While a custodial disposition will address society's condemnation of the seriousness and gravity of the offences, a global disposition of 60 days less enhance credit of 30 days, resulting in an actual sentence of 30 days going forward, will also fulfill the objectives of rehabilitating, restoring and promoting a sense of responsibility in Mr. Moustakas.

Frank P. Hoskins, JPC