Citation: ☼ R. v. Munden
2021 BCPC 292

Date: ☼20211126
File No: 36175-1
Registry: Williams Lake

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

JOSEPH HARVEY MUNDEN

ORAL REASONS FOR SENTENCE
OF THE
HONOURABLE JUDGE P.D. WHYTE

Counsel for the Crown:	S. Mann
Counsel for the Defendant:	W. Herdy
Place of Hearing:	Williams Lake, B.C.
Date of Hearing:	October 26-27, November 26, 2020, January 18, October 27, 2021
Date of Sentence:	November 26, 2021

INTRODUCTION

[1] On February 10, 2021, following several days of trial on information 36175-1, I convicted Joseph Harvey Munden of the following offences:

> Count 1: Assault with Weapon contrary to s. 267(a);
>
> Count 2: Operating a Motor Vehicle in a Manner Dangerous to the Public and Causing Bodily Harm, contrary to s. 320.13(2); and
>
> Count 3: Failing to Remain at the Scene of an Accident, contrary to s. 321.16(2).

[2] The matter was adjourned for sentencing, and was subject to a number of delays. Mr. Munden finally appeared before me on October 27, 2021 for a sentencing hearing. At the conclusion of counsel's submissions, I reserved my decision. These reasons are my decision regarding sentence.

POSITION OF THE PARTIES

[3] The Crown sought a term of imprisonment between three and six months for Mr. Munden, suggesting one to four months for each of the Assault with Weapon and Dangerous Driving Causing Bodily Harm charges, to be served concurrently; and a further one to two months for the Failure to Remain at the Scene of an Accident. The Crown further sought the mandatory $1000.00 fine that attaches to Failing to Remain at the Scene of an Accident; a weapons prohibition; and a discretionary DNA order. The Crown opposed a Conditional Sentence in the circumstances.

[4] The Defence submitted that a Conditional Sentence of between four and 12 months was appropriate, to be followed by probation on the terms and conditions recommended in the Pre-Sentence Report.

[5] Additionally, the Defence submitted that Counts 1 and 2 on the information should be subject to the rule against multiple convictions, and should result in a conditional stay of proceedings entered against Mr. Munden for Count 1.

[6] This is not a joint submission on sentence. Rather, this is a sentencing hearing after a trial, and not the result of a plea resolution. Accordingly, the principles set out by the Supreme Court of Canada in *R. v. Anthony-Cook,* 2016 SCC 43 are not engaged.

CIRCUMSTANCES OF THE OFFENCES

[7] Mr. Munden and the victim Ephrahim Barnett knew each other, but were not on good terms. They had been neighbours in the past, but did not care for one another. On May 8, 2019, Mr. Barnett was riding his bicycle on 4th Avenue North toward the intersection of Proctor Street in Williams Lake. Mr. Munden was driving his motor vehicle east on Proctor Street. Mr. Munden turned left onto 4th Avenue, and accelerated directly at Mr. Barnett, who was turning his bicycle toward the sidewalk on the right side of the road. Mr. Munden struck Mr. Barnett, causing him to tumble off of his bicycle, which was thrown with significant force into a parking lot adjacent to the sidewalk.

[8] Following the collision, Mr. Munden drove his vehicle onto the sidewalk on 4th Avenue, narrowly missing a parked car before returning to the road and driving away. Mr. Munden did not stop his vehicle or even slow down before leaving the scene, despite being aware or reckless as to whether or not Mr. Barnett was injured. Much of the interaction between Mr. Munden and Mr. Barnett was caught on dashboard camera footage obtained from a vehicle parked on 4th Avenue North.

[9] Following his arrest, and among other statements made to police, Mr. Munden said he had tried to “confront” Mr. Barnett, but that he never stopped to speak with him.

CIRCUMSTANCES OF THE OFFENDER

[10] The Court had the benefit of reviewing a Pre-Sentence Report authored by Probation Officer Melanie Monds.

[11] Mr. Munden is 51 years of age. He was born in Alba Station, Nova Scotia, and is the youngest of four children. Both his father and step-father were described as alcoholics. As a child, Mr. Munden both witnessed and experienced violence.

[12] Mr. Munden is single, and has no children. He lives alone in a rental apartment. Although he has a small circle of friends he lives a generally solitary life.

[13] Mr. Munden is not currently employed, but is looking for work, particularly with OT Timber Frame. He has historically worked in the agricultural field, primarily as a ranch hand.

[14] At the time the report was prepared, Mr. Munden was taking medication to treat depression and anxiety. He had previously been connected to mental health supports. However, there was no suggestion that Mr. Munden was experiencing any significant mental or emotional deficits at the time of the offences. He currently suffers from arthritis and has significant hearing loss.

[15] There is no suggestion that Mr. Munden has any substance use issues. Nor was there evidence that substance use played any role in the commission of the offences.

[16] Mr. Munden did not deny the collision occurred. He maintained a negative view of the victim, and was described by the PSR author as lacking in insight into the severity of his actions. Nor did he recognize the impact of the offence on the victim.

[17] These attitudes were articulated during the sentencing hearing, when Mr. Munden chose to address the court. He spoke about the impact of the offences on himself. He questioned whether the victim was afraid to ride a bicycle, because he had seen him riding one after the offences. He did not believe the victim was as injured as he claimed, because if he was, he would have been hospitalized. He continued to disparage the victim.

[18] Mr. Munden then went on to describe himself as the victim of the offences. He lamented the fact that he had not been able to use his car for several years, which did not allow him to continue his employment or visit his horse.

[19] In short, Mr. Munden displayed a shocking lack of insight, and an absence of remorse for the effect his behaviour had on the victim. Nor did he recognize the risk at which his conduct placed other members of the community. His focus was on himself,

and how he had been affected by his own actions, without acknowledging those actions as being fundamentally wrong.

APPLICATION OF THE *KIENAPPLE* PRINCIPAL

[20] The first consideration is whether Count 1 should be conditionally stayed pursuant to the operation of the principle against multiple convictions articulated in *R. v. Kienapple,* [1975] 1 S.C.R. 729 (SCC). The rule stipulates that an offender should not face multiple convictions where the same or substantially the same elements make up two or more of the offences charged: *R. v. Prince,* [1986] 2 SCR 480 at para. 13. The issue is not whether the offences charged were the "same offences", but rather whether the same "matter, cause or delict" was the foundation for two or more charges: *Prince* at para. 17.

[21] The rule is not engaged simply because the accused is charged with multiple offences arising out of the same incident. If the accused is guilty of several wrongs, there is no injustice in his or her record conforming to that reality: *Prince* at para. 28. The central question to be answered is whether the same act grounds each of the charges: *Prince* at para. 24.

[22] A factual nexus between the counts, while necessary, is insufficient to engage the rule against multiple convictions. If a factual nexus is found, there still remains to be determined whether there is a relationship between the offences themselves sufficient to substantiate a legal nexus: *Prince* at para. 26.

[23] The applicability of the *Kienapple* principle was discussed in *R. v. Loveys*, 2020 NLSC 13, in circumstances that resemble those of this case. The offender in *Loveys* entered guilty please to two counts of Aggravated Assault, and two counts of Dangerous Driving Causing Bodily Harm. The offender used his car to strike the victims, who were on a sidewalk.

[24] In *Loveys*, the court was tasked with determining if *Kienapple* applied to the offences of aggravated assault and dangerous driving causing bodily harm. While there was a clear factual nexus between the offences, the issue was whether there was a

sufficient legal nexus to support the operation of the *Kienapple* principle: *Loveys* at para. 13.

[25] The court ultimately determined that *Kienapple* did not apply. In contrast to aggravated assault, which required the intentional application of force without consent, the offence of dangerous driving required an assessment of whether the manner of driving was dangerous to the public. In the latter offence, the *mens rea* involved a determination of whether the accused's behaviour was a marked departure from the standard of care a reasonable person would observe in the same circumstances. The core of dangerous driving causing bodily harm was sufficiently distinct from aggravated assault such that the accused ought to face criminal sanction for each offence separately: *Loveys* at paras. 16-20.

[26] A different conclusion was reached in *R. v. McDermott*, 2004 BCPC 86, where the court faced an argument that convictions for dangerous driving causing bodily harm and failing to stop pursuant to what was then s. 249.1(1) of the *Criminal Code*. That section read:

> 249.1 (1) Every one commits an offence who, operating a motor vehicle while being pursued by a peace officer operating a motor vehicle, fails, without reasonable excuse and in order to evade the peace officer, to stop the vehicle as soon as is reasonable in the circumstances.

[27] The offender in *McDermott* participated in a failed robbery. During an attempt to evade police, he failed to stop at an intersection, where he collided with a vehicle that had the right of way, causing the passengers in the vehicle to sustain bodily harm: *McDermott* at para. 3.

[28] The court determined that there was a sufficient factual nexus between the counts, as well as a proximate connection, such that the *Kienapple* principal ought to apply, noting that the purpose for one offence was largely subsumed by the other: *McDermott* at paras. 7 – 10.

[29] I find I prefer the analysis in *Loveys*. I am persuaded by the substantial differences in the mental element between the offences of assault with weapon and dangerous driving causing bodily harm. One requires clear intent, while the other necessitates a consideration of whether the conduct constitutes a marked departure from the acceptable driving standard. While there is a proximate connection between the offences, I am of the view that the legal nexus is sufficiently distinct so as to preclude the operation of the *Kienapple* principle.

[30] While it was not specifically argued that Count 3 should be subject to the rule against multiple convictions, had it been, my conclusion would not change. Dangerous driving is clearly legally distinct from failing to stop and render assistance. One charge aims to hold drivers accountable to a minimum standard of conduct while driving. The other requires persons who have been involved in an accident to remain and render assistance. Despite the proximate connection between the offences, I conclude the requisite legal nexus is absent.

[31] For these reasons, I decline to enter a conditional stay to either of Counts 1 or 3.

CONSIDERATIONS FOR A CONDITIONAL SENTENCE

[32] Section 742.1 of the *Criminal Code* lists criteria a judge must consider before imposing a conditional sentence, including:

i) the offence must not be punishable by a minimum term of imprisonment;
ii) the court must impose a term of imprisonment of less than two years;
iii) the safety of the community must not be endangered by the offender serving his or her sentence in the community; and
iv) a conditional sentence must be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[33] There is no minimum term of imprisonment for any of these offences when the Crown proceeds by way of summary conviction.

[34] Further, as I am considering a term of imprisonment of less than two years, a conditional sentence is available.

[35] I must also be satisfied that serving the sentence in the community would not endanger the safety of the community. It is the risk posed by the specific offender that I must consider, and not the broader risk of whether a conditional sentence would endanger the safety of the community because it would not provide sufficient deterrence, or would undermine general respect for the law. I must consider the risk of the offender re-offending, and the gravity of the damage done in the event of a repeat of the offence.

[36] After careful consideration, I find the safety of the community would not be subject to undue risk by Mr. Munden serving a conditional sentence. He appears to have performed well on bail, and has not incurred charges for breach of his undertaking. He has no history of convictions for breaches of court orders. While he has a related criminal history, there is no basis to conclude that he would not abide by terms of a community based order, including that he have no contact with Mr. Barnett. A lengthy driving prohibition would reduce whatever risk Mr. Munden might pose.

[37] The final precondition to assess is whether the imposition of a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. A conditional sentence can provide significant denunciation and deterrence. However, there will be circumstances where the need for denunciation and deterrence is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct, and to deter similar conduct in the future.

THE PURPOSE, OBJECTIVES AND PRINCIPLES OF SENTENCING

[38] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This is the fundamental principle of sentencing: s. 718.1, *Criminal Code*.

[39] The fundamental purpose of sentencing is 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: s. 718, *Criminal Code*.

[40] When considering a sentence, I must be mindful of the objectives of sentencing, as outlined in s. 718 of the *Criminal Code*. Particular to Mr. Munden, the objectives of sentencing in this case include:

i) denouncing unlawful conduct;
ii) deterring the offender and other persons from committing offences;
iii) to separate offenders from society, where necessary;
iv) assisting in rehabilitating the offender; and
v) promoting a sense of responsibility in the offender, and acknowledging the harm done to victims or to the community.

[41] A judge is also guided by a number of principles set out in s. 718.2, including the following, which I consider particularly relevant to Mr. Munden:

i) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
ii) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
iii) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;
iv) 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 paid to the circumstances of Aboriginal offenders.

[42] In cases of this nature, it is clear that the primary factors to be punctuated on sentence are denunciation and deterrence: see *Loveys* at paras. 71 & 73. Rehabilitation, while relevant, is a secondary consideration in sentencing Mr. Munden.

[43] The need to stop and render assistance following an accident is especially pressing. As noted in *R. v. Wieczorek,* [2010] OJ No. 5260 at para. 64:

> … The duty imposed by [then] s. 252 is not an onerous one – a person involved in an accident must remain at the scene, identify him or herself and give assistance to any injured party. This allows for any criminal investigation to occur without delay, [and] resolves issues of civil or criminal liability. Just as importantly, there is a simple duty as a human being to show care and respect for those who may have been injured or killed – to remain until authorities determine what has happened.

VICTIM IMPACT

[44] The Crown did not tender a Victim Impact Statement during the sentencing hearing. However, Mr. Barnett was injured as a result of the collision. During the trial, he described suffering broken fingers; injuries to his hip, knees and ankle; a bruised back and road rash. He suggested that surgery was required to repair some of the injuries, although he provided no specifics. He also described feeling paranoid and afraid to ride his bicycle. Pictures were tendered that supported Mr. Barnett's account of his injuries. Additionally, his bicycle was damaged to the point where it was inoperable.

[45] I conclude that the offences had a significant impact upon the victim, Mr. Barnett.

MITIGATING AND AGGRAVATING FACTORS

[46] I find the following to be aggravating factors in this case:

1. Pursuant to s. 320.22, it is a statutorily aggravating factor that the commission of the offences resulted in bodily harm to the victim;
2. Pursuant to s. 718.2(a)(iii.1), it is statutorily aggravating that the offence had a significant impact upon the victim;
3. Mr. Munden used his vehicle as a weapon. This is as deadly a weapon as any;
4. Mr. Munden drove on the wrong side of the road, and onto a sidewalk in the middle of the city. He placed the community at enormous risk, and showed a reckless disregard for the safety of others. Anyone unfortunate enough to have been walking there would have very likely suffered bodily harm or death as a result of Mr. Munden's conduct; and
5. Mr. Munden has a history of assaultive behaviour. This is his third conviction for assault in 10 years. The current matters before the court are undoubtedly the most serious examples of Mr. Munden's criminal conduct, but they are not the only examples of it.

[47] I find the following to be mitigating factors:

6. Mr. Munden has been compliant while before the court on bail;
7. Mr. Munden had a troubled childhood, which included witnessing and being the object of violence from his father and/or step-father. This may reduce his moral blameworthiness to some extent. However, at age 51, Mr. Munden has had ample time to address any anger or other mental health issues that might have contributed to these offences.

[48] The Crown submitted that Mr. Munden made admissions that reduced the number of witnesses the Crown was required to call at trial. I do not find this to be a compelling mitigating factor on sentence.

[49] Mr. Munden did not enter guilty pleas. He chose to exercise his rights under the *Charter* and pursued the matter to trial. He cannot be penalized for doing so. However, I note here the absence of the mitigating effect of a guilty plea.

[50] Importantly, Mr. Munden displays neither insight nor remorse. He continues to take no responsibility for his behaviour; for the injuries to Mr. Barnett; or for how he placed others in the community at risk. I consider this to be an absence of a mitigating factor, rather an aggravating factor. However, his complete indifference, coupled with his view that he is the real victim, leads me to conclude that his attitude toward the offences is a significant factor to be considered when crafting a fit and appropriate sentence.

CASE LAW

[51] The Crown tendered 11 cases during the sentencing hearing. Some of these cases were in support of the Crown's opposition to Mr. Munden's application for a conditional stay to count 1 pursuant to the rule in *Kienapple*. One case, *R. v. Naziel,* 2018 BCPC 146, was relied upon by both Crown and defence.

[52] The defence submitted one other case, *HMTQ v. Khosa and Bhalru*, 2003 BCSC 221 in support of its position.

[53] *R. v. Loveys,* 2020 NLSC 13 was of assistance, both as a sentencing precedent and for its analysis of the *Kienapple* principle. The facts, as previously outlined, are similar to those of Mr. Munden, with certain distinguishing factors:

1. the offender in *Loveys* pleaded guilty to two counts each of aggravated assault and dangerous driving causing bodily harm;
2. one of the victims was an intimate partner; and
3. the offender in *Loveys* expressed remorse for his actions, and had no prior criminal history or history of violence.

[54] The court reviewed a number of sentencing precedents before concluding that the range of sentence for dangerous driving causing bodily harm was between six months and two years incarceration. The court determined that denunciation and deterrence were the primary sentencing objectives to consider: *Loveys* at paras. 71 & 73. The offender was ultimately sentenced to 20 months imprisonment for each count of dangerous driving causing bodily harm: *Loveys* at para. 77.

[55] The facts in *Loveys* are more aggravating than those of Mr. Munden. There were two victims, and their injuries were substantial, and the pleas were to aggravated assault. Additionally, the Crown elected to proceed by indictment, as opposed to summarily as is the case with Mr. Munden. However, the offender in *Loveys* was a youthful first time offender who pleaded guilty and expressed genuine remorse. The dangerous driving sentences were served concurrent to the aggravated assault sentences, which were each 26 months in jail.

[56] *R. v. J.A.R.,* [2001] O.J. No. 6011 and *R. v. McDermott,* 2004 BCPC 86 dealt with the *Kienapple* principle, and have no applicability to the fitness of sentence.

[57] The offender in *R. v. Dawydiuk,* 2008 BCPC 495 was convicted of criminal negligence causing bodily harm, two counts of assault causing bodily harm, dangerous driving causing bodily harm, assault with weapon, and “hit and run”. The court determined that *Kienapple* applied to some, but not all counts. Sentencing proceeded for criminal negligence causing bodily harm; assault with weapon; and “hit and run”: *Dawydiuk* at para. 9. The Crown sought a global term of 18-24 months imprisonment,

as well as probation, a lengthy driving prohibition, a weapons ban and an order for DNA analysis. The defence argued that a Conditional Sentence was appropriate.

[58] The offender was involved in a physical altercation outside of a bar that he did not initiate. He was blocked from exiting the parking lot, and chose to drive his vehicle onto the sidewalk to escape. He accelerated while on the sidewalk, and did not use his horn to warn pedestrians. Various pedestrians were required to jump out of the offender's path. The offender struck one person on the sidewalk, throwing him into the air and causing him bodily harm. Despite being aware that he had struck a pedestrian, the offender drove home without stopping. He turned himself into police a week later.

[59] The offender was 36 years of age. He was employed, had no driving record and a limited, unrelated criminal history. He was described in a Pre-sentence report as a difficult and uncooperative client with a poor record of reporting. The offender attended some counselling prior to his sentencing hearing, and showed some degree of insight. There was no indication of remorse in the Pre-sentence Report, although the offender was noted to take full responsibility for what happened.

[60] The court determined that a conditional sentence would not meet the sentencing objectives of denunciation and deterrence. Nor would a conditional sentence match the gravity of the offences and the degree of responsibility of the offender. The offender was sentenced to 12 months jail for criminal negligence causing bodily harm; 12 months for assault with weapon (served concurrently); and six months consecutive for the "hit and run" charge. The total sentence was 18 months.

[61] Mr. Munden's circumstances are more aggravating than the offender in *Dawydiuk*. There was no conduct by Mr. Barnett that was remotely threatening toward Mr. Munden at the time of the offences. Additionally, Mr. Munden has a related record for violence. He otherwise possesses a similar lack of insight and remorse as the offender in *Dawydiuk*.

[62] *R. v. Gill*, 2010 BCCA 388, was an appeal from a 12 month jail sentence for dangerous driving causing bodily harm, and 18 months consecutive for failing to stop

and render assistance. The appellant was driving a truck between two Christmas parties when he took his eyes off the road after dropping a lighter. He crossed over four lanes of traffic and struck a vehicle nearly head on, causing the other driver serious injury. Neither the appellant nor his passenger rendered assistance, although they stopped briefly to survey the damage. Two months later, the appellant turned himself in to police. The appellant was convicted after trial. He was 51 years of age, had no prior criminal history, and an established work history. He apologized in court for his behaviour.

[63] The appellant first argued that the sentences should have been concurrent. The Court of Appeal rejected this argument, noting that the dangerous driving was completed at the time he struck the oncoming vehicle, and caused bodily harm to the driver. The Court further dismissed the appellant's argument that the sentencing judge did not adequately consider mitigating factors.

[64] As to the fitness of sentence, the Court of Appeal found no error in the trial judge's sentence. In so doing, it remarked that the one year sentence for dangerous driving was not demonstrably unfit. Further, the court found an acceptable range of three and 12 months of jail for the offence of leaving the scene without rendering assistance, noting some courts have found sentences of 18 months to be appropriate. Having found the aggregate 30 month sentence not to be unfit, a conditional sentence was not available to the appellant.

[65] Similar to Mr. Gill, Mr. Munden made no effort to stop and render assistance. Mr. Gill eventually turned himself in to police. Mr. Munden was arrested the day of the incident, but demonstrated neither a willingness to, nor an interest in, taking responsibility for his criminal conduct.

[66] In *R. v. Etifier*, 2008 BCPC 449, the offender was convicted after trial of robbery, dangerous driving causing bodily harm, assault with weapon, and leaving the scene of an accident without rendering assistance. The judge described the circumstances as a scam to rip off the victim for $20 which resulted in the victim being dragged behind the offender's car and run over. The offender maintained his innocence throughout, asserting that he was not driving the vehicle that struck and injured the victim.

Consequently, he neither took responsibility for the offences nor expressed remorse for his conduct, although he expressed some empathy toward the victim. The Crown sought a jail term of two years, while the defence strongly advocated for a conditional sentence.

[67] The offender was noted to be youthful, and to have no prior criminal history. However, the court determined that a conditional sentence would not provide the requisite measure of denunciation and deterrence.

[68] The judge sentenced Mr. Etifier to one year for the robbery conviction, and one year less a day for the driving offences, to be served consecutively. The jail term was followed by one year of probation and a two year driving prohibition.

[69] Mr. Munden shares a good deal in common with the circumstances of the offender in *R. v. Etifier*. He similarly expresses no remorse, and he takes no responsibility. His conduct was equally as reprehensible as that of Mr. Etifier. Moreover, he is not a youthful offender, and has two convictions for violent offences. In short, Mr. Munden's circumstances are not as favourable as the offender in *Etifier*.

[70] *R. v. Bradley*, 2016 ONSC 2003 is an appeal of an effective 120 day jail sentence following convictions after trial for dangerous operation of a motor vehicle and assault with weapon. The court entered a conditional stay against the assault with weapon charge pursuant to the operation of the *Kienapple* principle. The appellant and victim in *Bradley* worked together at a Ford motor vehicle plant. The two had an exchange of words at the end of a shift. As the victim walked through a dark employee parking lot, the appellant accelerated his vehicle at high speed toward the victim, striking him and running over his foot, which was encased in a steel-toed boot. The victim suffered minor injuries after being thrown to the ground.

[71] The appellant had 18 prior criminal convictions, none of which was for violence. He suffered a history of substance abuse. The Crown initially sought a three to four month jail term, while the defence argued for a suspended sentence.

[72] The court ultimately found the sentencing judge erred by not explaining why he did not consider the three month range submitted as appropriate by the Crown, which would have allowed the sentence to be served intermittently. The court reduced the sentence to 90 days, and ordered that it be served intermittently.

[73] *Bradley's* value as a sentencing precedent is limited, given the unique facts, and its lack of reliance at the trial level on any case law to determine the fitness or range of sentence. Additionally, the appellant's conduct was less egregious than that of Mr. Munden. Finally, it was not a case where the court considered the appropriateness of a conditional sentence.

[74] *R. v. Jamal-Al-Deen*, 2011 ABPC 187 is a case tendered by the Crown where a conditional sentence was deemed appropriate. The offender entered a guilty plea to dangerous driving and assault with weapon, to wit a motor vehicle. The offender and one of the victims were previously in a romantic relationship that had ended. The offender confronted the victim, who had been driven to her house by her friend and co-victim. The victims drove away, and were pursued at high speed by the offender, who eventually rammed their vehicle from behind. The pursuit continued; the offender again struck the victim's vehicle, causing it to lose control and smash through a fence. Upon arrest, the offender confessed and took immediate responsibility. His actions were borne out of jealousy brought on by the demise of the relationship. The Crown submitted a jail term of six to nine months was appropriate, while the defence argued for a conditional sentence.

[75] The offender was noted to have taken responsibility immediately. He repaired the damage to the victim's vehicle, and stopped drinking. He was very remorseful. He was judged by his Probation Officer to be an appropriate candidate for community supervision "...as he has accepted responsibility for his offence and expressed remorse.": *Jamal-Al-Deen* at para. 6. A psychiatrist who assessed the offender agreed, opining that the behaviour was an isolated incident, and the offender was at low risk to re-offend.

[76] The court found that, without question, denunciation and deterrence were significant sentencing objectives. While incarceration would usually result in greater denunciation, a properly crafted conditional sentence could provide the necessary denunciation if it included stringent conditions and was of a sufficient length.

[77] The court referenced *R. v. Ambrose*, 2000 ABCA 264, where the Court of Appeal commented that conditional sentence orders may not be appropriate where the offender fails to demonstrate regret or repentance following conviction.

[78] Ultimately the court determined an 18 month conditional sentence was appropriate. In doing so, it focused on the following factors:

1. the offender expressed true remorse for his actions;
2. there were no injuries, and the offender repaired all property damage;
3. the offender had no prior criminal record; and
4. the court judged the offender to be at low risk for re-offending.

[79] Mr. Munden's circumstances are significantly more aggravating than those of the offender in *Jamal-Al-Deen*. He has expressed no remorse, and taken no responsibility; the victim was injured as a result of his conduct; he has a prior criminal history for assault; and there was no opinion that he is at low risk to re-offend.

[80] In addition to relying on *Jamal-Al-Deen*, the defence tendered two further cases: *R. v. Naziel*, 2018 BCPC 146; and *HMTQ v. Khosa and Bhalru*, 2003 BCSC 221.

[81] The offender in *Naziel* was convicted after trial of Failure to Stop at the Scene of an Accident; Assault Causing Bodily Harm; Operating a Motor Vehicle while Disqualified; and Driving While Prohibited. The Crown sought a 6 month jail term, while the defence argued for an 18 month Conditional Sentence.

[82] The offender was driving with friends around Moricetown, BC. All occupants of the vehicle were drinking, including the offender, who was described as being intoxicated. An argument ensued between the offender and one of the passengers, causing the latter to exit the vehicle, and kick the front bumper. The offender

accelerated into the passenger, striking him and throwing him some five feet toward a ditch. The offender then drove off without stopping. The passenger suffered an injury that persisted at the time of trial. The offender had a criminal history that included convictions for impaired driving and “over .08”; failure to appear and driving while prohibited.

[83] The Crown argued as mitigating factors that the offender was of Indigenous heritage, which engaged the operation of s. 718.2(e) of the *Criminal Code*. Additionally, the offender was described as having quit drinking and being “generally sober”: *Naziel* at para. 21.

[84] Judge Doulis reviewed *R. v. Howey*, 2007 BCCA 323 at length. *Howey* was a Crown initiated appeal of a 22 month Conditional Sentence imposed after Mr. Howey pleaded guilty to one count of dangerous driving, and one count of leaving the scene of an accident. At paragraph 19, Madam Justice Ryan described Mr. Howey as follows:

> The sentencing judge was faced with a young man who had a discouraging record of driving offences, the most serious of which were associated with the consumption of alcohol. The pre-sentence report presented a dismal picture of his understanding of what he had done, a lack of interest in the harm he had caused his victims and a history of unwillingness to confront his problems.

[85] The Court of Appeal found that the sentencing judge had failed to adequately consider whether serving the sentence in the community would endanger the safety of the community; or whether a conditional sentence was consistent with the purpose and principles of sentencing. The court substituted the 22 month conditional sentence with an 18 month period of incarceration.

[86] The offender in *Naziel* was a 51 year old person of Indigenous heritage whose home life was plagued by alcoholism and violence. He was the victim of physical and mental abuse as a child. He was an alcoholic, and described using alcohol as a means to deal with childhood memories of abuse. Most of the offender’s criminal history was related to his alcohol use.

[87] Judge Doulis determined that Mr. Naziel's *Gladue* factors diminished his moral culpability for the offences, and justified a different sentence than that which the court would otherwise impose: *Naziel* at para. 70.

[88] Judge Doulis referenced *R. v. Nelson*, 2017 BCSC 1050, in which an unrepentant offender convicted after trial of assault with weapon and causing bodily harm, to wit a motor vehicle, received a sentence of 21 months jail for each conviction. She agreed with the finding in *Nelson* that the intentional use of a motor vehicle as a weapon against an unprotected person carries a great deal of moral culpability: *Naziel* at paras. 72-74. Ultimately, the offender in *Naziel* was sentenced to concurrent conditional sentences of six, six and 18 months, followed by 12 months of probation.

[89] Mr. Munden's circumstances are clearly distinguishable from the offender in *Naziel*. Mr. Munden's conduct was more serious, as it involved driving on a sidewalk. Moreover, Mr. Naziel's constellation of mitigating factors, including *Gladue* factors, were far more compelling than those of Mr. Munden. Mr. Naziel had taken steps to reduce his alcohol consumption, albeit in the face of increasingly severe medical consequences. Given that virtually all of Mr. Naziel's convictions were related to his alcohol consumption, this was a relevant factor. In contrast, Mr. Munden's conduct was not affected by intoxication, addiction or mental health issues.

[90] The defence's final case was *HMTQ v. Khosa and Bhalru*, 2003 BCSC 221, a decision of Justice Loo. The offenders in *Khosa* were convicted for criminal negligence causing death after a street racing incident that resulted in Mr. Khosa striking and killing a pedestrian. The offenders were noted to be travelling at speeds in excess of 120 km/hr when the accident occurred. Alcohol was not a factor.

[91] The Crown sought a sentence of four to seven years jail, while the defence argued a conditional sentence in the 18 month range was appropriate. The offenders were 18 and 21 years old respectively at the time of the offence. Neither had a criminal history, and were described as otherwise prosocial, responsible young men who supported their immigrant families. Each expressed remorse, which was accepted by

the sentencing judge as genuine (despite the Crown's assertion that Mr. Khosa displayed no remorse).

[92] A good deal of the discussion in *Khosa* focuses on the dangers of street racing, a factor that distinguishes it from Mr. Munden's circumstances.

[93] The Court reviewed *R. v. Proulx*, noting that conditional sentences can have a deterrent effect when punitive conditions are imposed. Justice Loo commented that courts should not underestimate the stigma and shame associated with a conditional sentence with house arrest, particularly when offenders live in a small community.

[94] Justice Loo concluded that conditional sentences were available for the offenders, who were described as "hard working, law abiding persons and good sons": *Khosa* at para. 58.

[95] I find *Khosa* to be of little assistance in determining a fit and appropriate sentence for Mr. Munden. While the offence in *Khosa* was more serious, and still resulted in the imposition of conditional sentences, the case is dissimilar to Mr. Munden's circumstances. Mr. Munden is not a young man; he is not without a criminal history; he is not described as remorseful. His offences were deliberate, rather than the tragic result of negligent behaviour.

[96] I infer from the cases tendered by Crown and defence that conditional sentences, while available for these offences, are appropriate only in specific circumstances. Generally, offenders who received conditional sentences for similar offences had a constellation of mitigating factors that supported a community based disposition. These include: the expression of remorse; a demonstration of insight; the lack of a related criminal history; youth; reparations made prior to sentencing; or substantial *Gladue* factors.

[97] Mr. Munden possesses none of these mitigating features. I am particularly troubled by his lack of insight, and the absence of any expression of remorse. Mr. Munden does not deny that he struck Mr. Barnett. He does not deny that he drove on the sidewalk, or that he failed to stop and render assistance. Yet he cannot, or will not,

accept that his behaviour at the very least placed the community at exceedingly high risk. His enmity toward Mr. Barnett appears to impair his ability to look outside himself. He displays a callous disregard for the victim of his offences. He remains unapologetic, even defiant, in the face of his clearly inappropriate behaviour.

[98] Mr. Munden's prospects for rehabilitation remain dim, so long as he declines to accept responsibility for the harm done to the victim, and to the community. It is axiomatic that denunciation and deterrence are the principal factors to punctuate on sentence for offences of this kind. Rehabilitation, while not ruled out, is distant and secondary as a principle of sentencing in Mr. Munden's case.

[99] Having regard to the offences, Mr. Munden's aggravating and mitigating factors, and the sentencing precedents supplied by counsel, I find a conditional sentence would not meet the pressing need for denunciation and deterrence in this case. I agree with the comments, albeit in dissent, of Chief Justice Fraser (as she then was), in *R. v. Ambrose*, 2000 ABCA 264 at para. 87:

> … When it comes to conditional sentencing, restorative objectives figure prominently in the sentencing equation. The absence of any indication of willingness to accept responsibility arguably militates against a conditional sentence. One of the rationales for a conditional sentence is that the offender will use his or her time in the community constructively for rehabilitative and restorative purposes. But if the offender is not motivated because he or she will not acknowledge the existence of any problem, much less contrition about what he or she has done, then a legitimate question arises about the likelihood of the offender's being committed to, or serious about, taking advantage of the rehabilitative options available in the community.

[100] I find that a sentence of incarceration is required in these circumstances. However, I find the Crown's position of four to six months jail to be inadequate to address the pressing need for denunciation and deterrence.

[101] Moreover, the proposed sentence is out of step with the Crown's own sentencing precedents. Only one of the Crown's cases, *R. v. Bradley*, supported a sentence in the three to four month range. As noted above, the case involved an employee of a Ford Motor Car plant striking a co-worker with his vehicle, clipping his body and running over

his steel toe boot clad foot. Importantly, the sentencing judge made no reference to the factors balanced in arriving at the sentence of 120 days.

[102] The Crown's other sentencing precedents established a range of sentence of between 12 and 30 months, depending on the specific charges, and factors particular to the offences and the offenders. A number of the sentences for either dangerous driving or criminal negligence causing bodily harm garnered at least 12 months jail (see *R. v. Etifier*; *R. v. Gill*; *R. v. Dawydiuk*). Others, including *R. v. Howey* and *R. v. Loveys* resulted in significantly longer sentences of incarceration for similar conduct.

[103] Sentencing is always an individualized process. It must be customized to the circumstances of the offence and of the offender. At the same time, sentences should be similar to those imposed on similar offenders for similar offences committed in similar circumstances.

[104] I find Mr. Munden's moral culpability to be high. The offences were grave. Mr. Munden is exclusively responsible for bringing about a series of dangerous events. His conduct was deliberate, cowardly, reprehensible and dangerous. As noted in *Dawydiuk* at para. 71, an offender's moral culpability is increased where the offender acts deliberately.

[105] In all the circumstances, again having regard to the offences, the aggravating and mitigating factors and Mr. Munden's particular antecedents, I am of the view that a significant jail term is required to meet the pressing need for denunciation and deterrence, both general and specific.

[106] For the offence of Dangerous Driving Causing Bodily Harm, I sentence you to a 15 month term of imprisonment, plus the mandatory $1000.00 fine.

[107] For the offence of Assault with Weapon, I sentence you to a six month term of imprisonment, to be served concurrent to the sentence for Dangerous Driving Causing Bodily Harm.

[108] For the offence of Failing to Stop at the Scene of an Accident and Offer Assistance, I sentence you to a six month term of imprisonment, to be served consecutive to the other two offences, plus the mandatory $1000.00 fine.

[109] The total term of imprisonment is 21 months.

TOTALITY OF THE SENTENCE

[110] I have considered whether this cumulative sentence exceeds the overall culpability of Mr. Munden, as discussed in *R. v. Gill*, with reference to *R. v. Miller,* (BCCA) [1987] B.C.J. No. 835 and others cases. Having regard to the range of sentence outlined in the various cases reviewed, I am of the view that the combined sentence of 21 months in these circumstances is not unduly harsh. Accordingly, I decline to reduce the cumulative sentence.

[111] A two year term of probation will follow the jail term, and will attach to Count 1 of the information.

[112] The terms of probation are as follows:

1. You must keep the peace and be of good behaviour.
2. You must appear before the court when required to do so by the court.
3. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the officer of any change of employment or occupation.
4. You must have no contact or communication, directly or indirectly, with Ephraim Barnett. There are no exceptions.
5. You must not go to any place where Ephraim Barnett lives, works, attends school, worships, or happens to be. If you see them, you must leave their presence immediately without any words or gestures.
6. You must report in person to a probation officer at the Williams Lake Community Corrections office within two business days after your release from unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different time frame. After that, you must report as directed by your officer.
7. When first reporting to your probation officer, you must provide them with the address where you live and your phone number. You must not

change your address or phone number without prior written permission from your officer.

8. You must attend, participate in and complete any intake, assessment, counselling, or education program as directed by your probation officer. This may include counselling or programming for: anger management; violence prevention.

ANCILLARY ORDERS

[113] Count one on Information 36175-1 is a primary designated offence. Pursuant to section 487.051(1) of the *Criminal Code*, I authorize the taking of samples of bodily substances from you.

[114] The samples will be taken from you while you are in custody and you must submit to the taking of the samples.

[115] Pursuant to section 110 of the *Criminal Code*, you are prohibited from possessing any firearm, cross-bow, restricted or prohibited weapon, prohibited device, ammunition, or explosive substance for two years following your release from prison.

[116] Further, pursuant to s. 320.24(5), you are prohibited from operating a motor vehicle for a period of two years, plus the entire period of imprisonment. The driving prohibition attaches to Count 2.

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The Honourable Judge P.D. Whyte
Provincial Court of British Columbia