In the Court of Appeal of Alberta

Citation: R. v. Gashikanyi, 2017 ABCA 194

Date: 20170621
Docket: 1301-0290-A
Registry: Calgary

Between:

Her Majesty the Queen

Appellant

- and -

Pascal Moussa Gashikanyi

Respondent

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that may identify the complainant must not be published, broadcast, or transmitted in any way.

NOTE: This judgment is intended to comply with the restriction so that it may be published.

The Court:

The Honourable Mr. Justice Ronald Berger
The Honourable Madam Justice Patricia Rowbotham
The Honourable Mr. Justice Brian O'Ferrall

Reasons for Judgment of the Honourable Justice Ronald Berger
Concurring Reasons for Judgment of the Honourable Justice Brian O'Ferrall

Dissenting Reasons for Judgment of the Honourable Madam Justice Patricia Rowbotham

Appeal from the Sentence by
The Honourable Madam Justice M.C. Erb
Sentenced on the 24th day of September, 2013

(Docket: 101154771Q2)

Reasons for Judgment of
The Honourable Justice Ronald Berger

INTRODUCTION

[1] The Crown appeals a sentence of two years less a day plus 12 months probation for sexual interference with a minor. The Crown relies on the majority judgment of a five member panel of this Court, ***R. v. Hajar***, 2016 ABCA 222, which considered the same sentencing issues as are engaged in this appeal. ***Hajar*** established a starting point sentence of three years for major sexual interference by an adult offender with no prior record. The starting point assumes no "gratuitous violence" and is not based on a guilty plea.

[2] The Crown maintains that ***Hajar*** is binding, citing ***R. v. Arcand***, 2010 ABCA 363 for the proposition that appellate courts follow their own precedents and that "subject to a few exceptions or procedures, appellate authority binds all judges and panels of that court." (at paras. 185-186). I respectfully disagree. I contend that ***Hajar*** need not be followed for the following reasons which will be elaborated upon later in this judgment:

A. ***Hajar***, in my opinion, was wrongly decided. The majority in ***Hajar*** misapprehended, misconstrued or simply overlooked the Reasons of the sentencing judge, rendering problematic the precedential value of the majority decision.

B. The majority judgment rests upon a precarious legal foundation and erroneous assertions and propositions which, in the result, fail to satisfy the test for a rationally designed starting point that provides meaningful guidance to sentencing judges.

C. A judicially imposed starting point in this jurisdiction constrains the "wide latitude" and "broad discretion" accorded to sentencing judges by the Supreme Court of Canada, stifles that sentencing discretion and results in a chilling effect on the ability of sentencing judges to craft individualized dispositions.

[3] At the conclusion of this Judgment, I observe that the Court of Appeal of Alberta does not adhere to a protocol for the random assignment of judges to sentence appeal panels; nor does the Court have transparent, objectively defined automatic systems for determining panel compositions and case assignments. That failure exposes the Court to perceptions, whether accurate or not, of having violated the principles that are the heart of adjudicative fairness.

STARE DECISIS

[4] As noted above, the Crown maintains that the doctrine of precedent compels adherence to the majority judgment of this Court in ***Hajar***.

[5] Precedent involves using past decisions as guides for decisions to follow. *Stare decisis* concerns the binding nature of the earlier decision.

[6] I appreciate full well the argument of those who consider the doctrine of horizontal *stare decisis* to be the "bedrock" of our judicial system. They submit that the quest for certainty, predictability, and stability is achieved by strictly following precedent.

[7] The overarching principle governing the reasoning process of a judge is that he or she "should individually decide that which overall justice requires in respect of [an] appeal": B.V. Harris, *Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle,* (2002) 118 L.Q.R. 408 at 421. Harris explains:

> "... The court would be embarking down a slippery and dangerous slope were it to countenance judges deciding cases other than how they thought they should be decided. If judges did not decide cases as they thought they should be decided, the whole judicial system would be flawed at its heart and community confidence totally undermined."

[8] "Finality is a good thing", Lord Atkin declared in 1933, "but justice is a better": ***Ras Behari Lal v. King Emperor***, [1933] All E.R. Rep. 723, 726. As Carleton Kemp Allen put it in *Precedent and Logic* (1925), 41 L.Q. 329 at 334:

> "For the English judge is not merely a mechanical device to broadcast rules of law to the community. To administer law is, or ought to be, to administer justice; and justice is, was, and ever will be, wider than law. ..."

[9] A "precedent" may be nothing more than the product of the assignment of a like-minded three or five person panel to hear an appeal. Judges of a particular "doctrinal disposition" will set the precedent simply because the panel was "first at bat". As B.V. Harris explains at p. 419:

> "Arguably an element of arbitrariness is present in appellate court decision-making if subsequent courts of last resort are locked into the 'doctrinal disposition' manifested by the court initially setting the precedent. The earlier court is able to perpetuate in law its doctrinal disposition merely because of the fortuity that it was the first court that had the opportunity to set a precedent in respect of the issue. Obviously such an approach may prevent later courts from achieving an improved quality of justice in respect of the issue. Doctrinal approaches and justice are

> inextricably intertwined, the quality of the latter being inevitably linked to the nature of the former."

[10] Indeed, there is quite a history in Alberta and elsewhere in Canada of appellate judges following their legal conscience and refusing to follow their court's previous decisions, particularly so in criminal cases. In ***R. v. Hartfeil***, 1920 3 W.W.R 1051 (in rejecting the Court's previous decision in ***R. v. Schmolke***, [1919] 3 W.W.R 409), Beck, J. stated (at p. 1062):

> "I feel bound not to refrain from expressing my real opinion upon questions of substantial importance notwithstanding a decision of this division to the contrary.

[11] When the liberty of the subject is involved the doctrine of *stare decisis* is not as rigidly applied. See: ***R. v. Hartfeil,*** *supra*, in which Stewart, J. expressed the view that "the scope of the principle of *stare decisis* had been practically confined to civil cases." See also: **Ex *parte Yuen Yick Jun***, *supra*; ***R. v. McInnis***, [1974] C.C.C. (2d) 471 and ***R. v. Govedarov et al*** (1974), 1974 CanLII 33 (ON CA), 16 C.C.C. (2d) 238 at p. 251. In ***R. v. McInnis***, Martin, J.A., speaking for a unanimous five person panel of the Ontario Court of Appeal, said (at p. 481):

> "**...in criminal cases where the liberty of the subject is involved, the Court is not bound by its previous decisions to the same extent as in civil matters.** In ***Regina v. Gould***, [1968] 2 Q.B. 65, 52 Cr. App. R. 152, [1968] 1 All E.R. 849, Diplock L.J. said at pp. 68-69:
>
> > 'In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as in its civil jurisdiction.'
>
> I refer also to ***Regina v. Newsome***; ***Regina v. Browne***, [1970] 2 Q.B. 711, 54 Cr. App. R. 485, [1970] 3 All E.R. 455; ***Regina v. Northern Electric Co.***, 1955 CanLII 392 (ON SC), [1955] O.R. 431, 21 C.R. 45, 111 C.C.C. 241, [1955] 3 D.L.R. 449; ***Rex v. Taylor***, [1950] 2 K.B. 368, 34 Cr. App. R. 138, [1950] 2 All E.R. 170; Cross, Precedent in English Law, p. 113; ***Regina v. Merriman***, [1972] 3 W.L.R. 545 at 563, [1972] 3 All E.R. 42, per Diplock L.J." (Emphasis added)

[12] Four years later, Brooke J.A. for himself, Dubin, J.A. (as he then was) and Houlden, J.A. said in ***R. v. Santeramo*** (1977), 36 C.R.N.S. 1 at p. 13:

> "In the result then, with greatest deference, I have come to the conclusion that the judgments of this court in ***Regina v. Caccamo*** and ***Robinson v. The Queen***, insofar as they relate to the questions above referred to, are wrongly decided and should not be followed... **I do not feel bound by a judgment of this court where the liberty of the subject is in issue if I am convinced that that judgment is wrong**." (emphasis added)

[13] The latter considerations are particularly significant for courts of last resort. Provincial appellate courts are in reality the *de facto* courts of last resort for the vast majority of cases coming before them. (George Curtis, "Stare Decisis at Common Law in Canada" (1978) 12 UBCL Rev. 1.))

[14] In their seminal work, *Stare Decisis in Commonwealth Appellate Courts*, (Toronto: Butterworths, 1981), J. David Murphy and Robert Reuter note that for the vast majority of litigants the so-called intermediate appellate court is effectively the court of last resort. They opine at p. 112:

> "A forceful argument therefore arises that as courts formally of last resort unanimously have found compelling arguments against rigid adherence to *stare decisis*, intermediate appellate courts which are effectively courts of last resort in all but a minuscule number of cases, must equally be freed from the shackles of *stare decisis* **in order that justice not be subordinated to precedent**." (Emphasis added)

[15] My colleague, Justice Rowbotham, suggests that judgments that are circulated to all members of this Court (and labelled "Reasons for Judgment Reserved") enjoy greater precedential value and support her conclusion that horizontal *stare decisis* compels adherence to the majority judgment in ***Hajar***. I respectfully disagree. The label tells the reader that the draft judgment was circulated to all judges of the Court off the panel. It does not tell us how many of those judges, if any, commented on the draft. Nor does it indicate how many of those judges who did elect to comment, agreed with the reasoning and the outcome, and how many did not. Moreover, even if all judges off the panel were to disagree with the reasoning and outcome of a circulated draft judgment, the panel that heard the appeal would be perfectly at liberty to issue the judgment as drafted. The judgment would still be labelled "Reasons for Judgment Reserved." I suggest that the label does in no way enhance the precedential value of such a judgment. Reliance on the label in support of my colleague's adherence to the doctrine of *stare decisis* is, with respect, erroneous.

SENTENCING RANGES AND STARTING POINTS

[16] It is well established that appellate courts may fix ranges for particular categories of offences as guidelines for lower courts. In carrying out this function, however, as noted by Bastarache, J., speaking for the majority, in ***R. v. Stone***, 1999 2 SCR 290 at para. 245:

> "This Court's decision in ***R. v. McDonnell*** , [1997] CanLII 389 (SCC), highlights the need for clarity on the part of appellate courts in setting ranges for offences..." (emphasis added by Bastarache, J).

[17] It follows, as the majority judgment of this Court in ***R. v. Jefferson***, 2008 ABCA 365 at para. 17 made clear:

> [17] The appellate imposition of a "starting point", without more, does nothing to inform the range of sentences. In fact, in our opinion, it sacrifices deference on the altar of parity. It pays lip service to the individualized process of sentencing as "the bedrock for the principle of deference in appellate review" (***R. v. Point***, supra, at para. 11) while severely constraining the exercise of sound discretion by sentencing judges who are entitled to "tremendous deference" (***R. v. W.G.***, [1999] 3 S.C.R. 597 at para. 18 and ***R. v. D.M.F.***, [2000] A.J. No. 1085, 2000 ABCA 244 at para. 8.). It offends the principles so carefully enunciated by the Court in ***R. v. Proulx***, *supra*; ***R. v. McDonnell*** and ***R. v. Stone***, *supra*.

[18] A "starting point" that fails to delineate the range with clarity is no guideline at all.

[19] It is in this latter regard that the majority reasons in ***Hajar*** fail to provide meaningful guidance to sentencing judges in Alberta. The abandonment of sentencing ranges and substitution by this Court of starting points without first determining the "acceptable range of sentence" before fixing the starting point, operates in practical terms as a constraint on the discretion afforded to sentencing judges to impose individualized sentences. After all, sentencing ranges are, as the Supreme Court of Canada has made clear, "historical portraits" for the use of sentencing judges whose discretion should not be interfered with absent demonstrable unfitness:

> "Sentencing ranges are nothing more than summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives. However, they should not be considered "averages", let alone straitjackets, but should instead be seen as historical portraits for the use of sentencing judges, who must still exercise their discretion in each case."
>
> ***R. v. Lacasse***, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 57

[20] The majority in ***Hajar*** not only failed to conduct a detailed, comprehensive review of the minimum and maximum sentences for sexual interference imposed in the past by both trial and appellate judges, but also summarily resiled from the established sentencing range with the admonition that "…the Reasons [of the sentencing judge] overlook the fact that sentencing precedents from this Court are of limited precedential value." (at para. 150)

[21] Both the majority in ***Hajar*** and the Crown in the case at bar relied upon the majority decision in ***Arcand*** which, it will be remembered, suggested that starting point sentencing is "effectively neutered" or rendered "meaningless in practice" unless elevated to a rule of law (at paras. 99 and 110 of the ***Arcand*** majority judgment).

[22] As I made clear in ***R. v. Lee***, 2012 ABCA 17 at para. 61:

> [61] The failure of the majority opinion in ***Arcand*** to recognize that starting points are guidelines and are not to be elevated to the status of legal imperatives is, with respect, a serious error, as is its suggestion that deviation from a starting point constitutes reversible error. The result is that the majority in ***Arcand*** relegates to insignificance the rich trove of trial and appellate pronouncements that deviate from starting points but inform the range of sentence that may properly be imposed for various crimes. (emphasis added)

[23] In the result, as did the majority in ***Arcand***, the collection of trial and appellate pronouncements that deviate from the starting point was again relegated to insignificance by the majority in ***Hajar***.

[24] The ***Hajar*** majority reasons, while citing ***Lacasse*** for other purposes, seems not to have appreciated ***Lacasse's*** focus on the increased force of appellate deference and ***Lacasse's*** reminder that reliance on the proposition "that an appellate court is to defer to a sentencing decision absent an error in principle, failure to consider a relevant factor, [or] an overemphasis of the appropriate factors" needed to be clarified and qualified (***Lacasse*** at para. 47) With that in mind, Justice Wagner reminded both trial and appellate courts that departure from sentencing ranges or starting points are not only permitted but to be expected. He cautioned against "trivialization" of the term "error in principle", emphasizing that an appellate court may not intervene simply because it would have weighed the relevant factors differently. (***Lacasse*** at para. 49)

[25] The majority reasons in ***Hajar*** also run afoul of ***Lacasse*** by failing to appreciate that the choice of a sentencing range [or a starting point] or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reversible error. (***Lacasse*** at para. 51)

[26] The majority judgment in ***Lacasse*** took pains to emphasize (and the majority in ***Hajar*** failed to recognize) that the principle of parity of sentences is secondary to the principle of proportionality and must not be given priority over the principle of deference to the trial judge's exercise of discretion. The majority failed to appreciate ***Lacasse's*** lesson that "individualization and parity of sentences must be reconciled for a sentence to be proportionate" (***Lacasse*** at para. 53) and that individualization takes priority over parity.

[27] The foregoing clarifications and qualifications seem to have eluded the ***Hajar*** majority. That is not surprising given its view that the role of an appellate court is to stamp out "caprice" and to "act as a buffer against outliers of sentencing outcomes." (***Hajar*** at paras. 47, 50)

[28] I turn, accordingly, to a consideration of the establishment and selection of the starting point.

[29] There is an important distinction between the justification that may be proffered for the establishment of a sentence starting point and the selection of the appropriate starting point itself. As to the former, the majority in ***Hajar*** considered it "most compelling and "vital" to establish a starting point in circumstances "where, as here, unjustified disparity in sentencing stares us in the face." This was an echo of this Court's denunciation in ***Arcand*** of "unbridled sentencing discretion" and "impressionistic sentencing [practices]." The majority, without further elaboration, simply cited six appellate judgments which they declared "typify the widely disparate views amongst judges as to the gravity of the crime and the *mens rea* degree of responsibility of the offender where the acts involved sexual intercourse and the child was considered a willing participant." The majority pointed to "the very fact that sentencing for cases in this category has been all over the place itself makes the case for a starting point." (all quotations at para. 72 of ***Hajar***)

[30] In fact, a careful examination of the cases cited by the majority reveals no evidence of "unjustified disparity" nor of "widely disparate views amongst judges as to the gravity of the crime and the *mens rea* degree of responsibility of the offender..." Indeed, in ***R. v. Pritchard***, 2005 ABCA 240, the Court stated: "...in our view, the sentence suggested by the Crown at trial – 14-18 months' imprisonment – was, in all of the circumstances, reasonable" and in ***R. v. Feng***, 2011 ABCA 172, the Court sustained a sentence of 17 months' imprisonment – within the range established six years earlier in ***Pritchard***. The following year in ***R. v. Bjornson***, 2012 ABCA 230 the majority of the Court held: "This Court's decision in ***Feng*** upholding a 17 months' sentence where the facts and circumstances were similar provides a more appropriate guide as to a fit sentence in this case." (at para. 12) The Court proceeded to impose a term of imprisonment of 17 months. In ***R. v. King***, 2013 ABCA 3 a unanimous panel confirmed that "we are not persuaded that the difference between the sentence in this case and the sentences in ***Feng***, ***Pritchard*** and ***Bjornson*** constitutes the sort of disparity which raises a need to intervene to ensure conformity with a parity principle in s. 718.2(b) of the ***Code***." ***R. v. Pudwell***, 2013 ABCA 88 though cited by the majority as supportive of the need to establish a starting point for sexual interference, was in fact a unique case in which the Court declined to grant leave given "the very significant and relevant oppressive mental illness of some years standing" of the respondent and given that "[committal] to prison would have the gravest consequences." The last case cited, ***R. v. Sam***, 2013 ABCA 174 involved a perpetrator who "had a maturity level of around 14 at the date of the offence." Significantly, the Court in ***Sam*** noted that the cases relied upon by the sentencing judge "…have either been overtaken on appeal or have been explained by this Court" citing ***Pritchard***, ***Feng***, ***King***, ***Bjornson*** and ***Pudwell***.

[31] The Court's assertion of "unjustified disparity in sentencing staring the panel in the face" is not borne out by the very cases cited by the ***Hajar*** majority. The ***Hajar*** sentencing judge had no difficulty ascertaining the range of sentence in this jurisdiction for sexual interference of a minor, relying in part on a number of the same cases cited by the majority. The range was readily ascertainable. Simply put, there was no justification for the establishment of a starting point.

[32] I turn to the selection by the ***Hajar*** majority of the starting point itself. In ***R. v. Law***, 2007 ABCA 203 at para. 57, this Court stated:

> Courts are to impose sentences that are fit to the offender and the offence within the meaning of s. 718.1 of the ***Criminal Code***. To get to a "fit" sentence, a judge does not throw a dart at a board setting out a space between the statutory minimum and maximum. Penological objectives and social values could not be consistently or predictably served or asserted by a forensic lottery associated with idiosyncratic impulses of specific courts.

[33] With great respect, and to adopt the ***R. v. Law*** metaphor, I suggest that the majority in ***Hajar*** on the basis of sheer arbitrariness selected a starting point without careful regard to the "historical portraits", but rather, by throwing a dart at a board. In the result, the starting point arrived at by the majority provides little, if any, proper guidance to sentencing judges.

[34] There is yet another reason not to follow ***Hajar***. In this jurisdiction starting points often function as a form of mandatory prescription for the imposition of minimum sentences below which sentencing judges fear to tread. I am reminded of Chief Justice Lamer's statement on behalf of a unanimous Court in ***R. v. Proulx***, 2001 SCR 61 at para. 88 of the real risk posed by starting points: judicially imposed minimum sentences:

> "The minimal benefits of uniformity in these circumstances are exceeded by the costs of the associated loss of individualization in sentencing. **By creating offence-specific starting points, there is a risk that these starting points will evolve into de facto minimum sentences of imprisonment**." (emphasis added)

[35] Notwithstanding this Court's disclaimers to the contrary, sentencing judges in Alberta know that departure from a starting point facilitates appellate intervention in this jurisdiction and constrains their discretion. Simply put, they know it is much easier to upset a sentence of, say, 15 months' imprisonment when the starting point is 3 years than it is when the range is 12 months to 3 years. The departure from the low end of the range may be seen on appellate review as acceptable while the departure from the starting point is more readily adjudged to be reversible error.

[36] I would add only that in a number of leading judgments of this Court including ***Hajar***, ***Arcand*** and ***R. v. Rahime***, 2001 ABCA 203 (all five person panel appeals), the ultimate disposition of the Court was viewed favourably by both Crown and defence – the Crown, because the Court endorsed the legal argument advanced by the Crown in fixing the starting point for future cases; the defence, because in each case, although the sentence below was adjudged inadequate, the accused was not re-incarcerated. Neither side would have any interest whatsoever in appealing the matter to the Supreme Court of Canada. In each case the Crown had its precedent and the accused had his freedom; in each case the Court's judgment was thereby rendered immune from further review by the Supreme Court.

R. v. Omar Abdallah Hajar (2016 ABCA 222)

THE APPEAL

[37] The ***Hajar*** appeal came before the Court on October 1, 2015. Hajar had been convicted of sexual interference with a person under the age of 16 years contrary to s. 151 of the ***Criminal Code*** and luring contrary to s. 172.1(1)(b). He was sentenced to 15 months incarceration on the first count and 3 months consecutive on the second, for a global sentence of 18 months imprisonment to be followed by three years' probation. Orders were made pursuant to ss. 161(1), 490.012 and 487.051 of the ***Criminal Code***. Having pled guilty in the Court below, ***Hajar's*** appeal as to sentence only was filed on September 26, 2014. The Crown also filed a sentence appeal on September 29, 2014.

[38] On April 10, 2015 Crown counsel wrote to the Case Management Officer of the Court requesting that the Crown appeal from sentence be heard by a five member panel noting that "...this has been done in other significant starting point cases such as ***R. v. Arcand***, 2010 ABCA 363 and ***R. v. Rahime***, 2001 ABCA 2003." The reason given was that "the Crown will be asking this Court to apply the 3 year major sexual assault starting point from ***R. v. Sandercock***, 1985 Carswell Alta. 190, and ***R. v. Arcand*** to cases involving victims under the age of 16 who *de facto* consent to sexual activity with adults in a non-trust relationship."

[39] The request was submitted to the Chief Justice who named a panel of five to hear the appeal. The appeal was heard on October 1, 2015. Judgment was delivered on July 25, 2016.

[40] Three of the judges, Fraser, C.J.A., Paperny, J.A. and Watson, J.A. (the majority), fixed three years as the starting point for major sexual interference. Another, Bielby, J.A., concurred in separate reasons. Slatter, J.A. dissented.

[41] The sentencing judge was respectful of and intent on following "the range that has been established", citing ***R. v. Bjornson*** and ***R. v. Feng***. As already noted, the majority in ***Hajar*** did not hesitate to summarily resile from such judgments with the admonition that "...the Reasons overlooked the fact that sentencing precedents from this Court are of limited precedential value (at para. 150).

[42] The majority judgment in ***Hajar*** stated that "the reasons here reveal certain critical errors, resulting in unfit sentences for both offences that warrant appellate intervention." The majority explained that "it is evident from reviewing the Reasons that they erred in principle by failing to give proper weight to the harm in this case. That includes both harm actually incurred by the child and the likelihood of continuing or further harm to the child in the future. This error led to giving inadequate weight to the overall degree of seriousness of the offences here." (at para. 138)

[43] The Court added: "the Reasons appear to have discounted the child's unchallenged and uncontradicted evidence about the harmful consequences of the sexual interference and luring offences on her." (at para. 141)

[44] The majority was of the view that "the reasons reveal that the gravity of the offence of major sexual interference was under-emphasized" (at para. 146)

[45] A careful review of the Reasons of the sentencing judge reveals no such errors. Indeed, much of the criticism of the majority ignores, misapprehends or overlooks the clear and unequivocal observations of the sentencing judge and renders problematic the precedential value of the majority opinion.

[46] Justice Macklin first considered the impact of consent on sexual interference. The judge made clear that "it is not a defence that the complainant consented to the sexual activity when the accused is more than five years older than a 14 year-old complainant." (at para. 28) He found that the 14 year old victim was legally incapable of consent regardless of what she may have said or done. He stated clearly and unequivocally that the consent of a minor is not to be considered a mitigating factor.

[47] Justice Macklin then turned his attention to an assessment of harm. He was alive to the legislative change to the age of consent. He appreciated that raising the age of consent was considered by Parliament as necessary to provide better protection to youth from sexual exploitation by adult predators and that a difference of five years of age between the perpetrator and the victim was considered to be inherently exploitive. He understood full well that children under the age of 16 "are vulnerable in the sense that they lack the emotional, physiological, physical, mental, psychological and spiritual maturity to make informed decisions concerning their participation in sex related activities." (***R. v. Hajar***, 2014 ABQB 550 at para. 37) With the foregoing in mind, he concluded that "whether a young person suffers harm as a result of a major sexual assault seems obvious." (at para. 38) He accepted and relied on the testimony of Dr. Boyes that "the early onset of sexual activity and involvement in sexual activities with an older partner "are both associated with significantly increased risk or odds of negative consequences or problematic developmental outcomes." (at para. 41)

[48] It emerges apparent that the majority misstated and misconstrued the Reasons of the sentencing judge. With respect, the reasoning of the majority is a dubious and precarious foundation underpinning the establishment of a starting point sentence for sexual interference.

[49] I turn to a consideration of the dissenting opinion in ***Hajar.***

[50] Mindful of the three characteristics of crime for purposes of categorization, namely, conduct, circumstances and consequences, Justice Slatter noted that "establishing a starting point sentence is only practical if it is possible to identify a sufficiently homogeneous category of case to which the starting point can apply." (at para. 259) In his opinion, sufficient uniformity in the

identified category was a condition precedent if transparency and consistency in sentencing for sexual interference was to be achieved.

[51] As did Slatter, J.A., I consider it useful to set out the view of the sentencing judge in ***Hajar*** that the offence of sexual interference is not amenable to a starting point:

> [50] Further, like the crime of manslaughter, an offence under s. 151 is not an archetypal offence that would lend itself to the establishment of a starting point. There are simply too many variables to be factored into a determination of an appropriate sentence in these types of cases to make a starting point truly useful. Circumstances may vary considerably, including the age difference between the parties, the number of offences and their degree of seriousness (see ***Bjornson*** at para 12), the relationship between the parties, the degree of any force or violence used, the length of time over which the offences occurred, the presence of luring or grooming, the use of contraceptives and any exposure to risks of pregnancy and disease, and the use of alcohol or drugs, to name the most obvious factors.

[52] I fully agree. With great respect, I consider that the majority judgment in ***Hajar*** was wrong and should not be followed.

[53] With that in mind, I turn to a consideration of the sentence imposed upon Mr. Gashikanyi.

FITNESS OF THE GASHIKANYI SENTENCE

[54] The appellant was found guilty of sexual interference contrary to s. 151 of the ***Criminal Code*** and sexual assault contrary to s. 271. The latter was conditionally stayed. He was sentenced to two years less one day imprisonment to be followed by one year of probation. The sentencing judge also imposed a 10 year firearm prohibition and granted both a DNA and 20 year SOIRA Order. Sentence was imposed on September 24, 2013. The respondent was released in January 2015, having been in custody for a total of 16 months. The appeal came before this Court on December 15, 2015. Judgment was deferred on two occasions awaiting, *inter alia*, the judgment of the five person panel of this Court in ***Hajar*** heard on October 21, 2015 and filed on July 25, 2016, following which supplementary written argument was requested by the Gashikanyi panel in August, 2016 on whether ***Hajar*** is "...binding precedent and, accordingly, dispositive of the present appeal."

[55] The facts found by the trial judge were the following. On July 7, 2010, the respondent, age 33, was driving when he saw a young girl, age 14, and her female cousin, age 18, at a bus stop. The two girls had run away from home. The respondent offered to take the girls to his home and feed them. All three spent the night in the respondent's bed. He twice had protected sexual intercourse with each girl and the following morning had unprotected sexual intercourse with the fourteen year old.

[56] The Crown characterized the crime as a "serious sexual offence committed by an adult in a non-trust position upon a young person under the age of sixteen." The Crown submitted that notwithstanding that which the Crown described as "de facto consent" or "passive participation", the conduct constituted a major sexual assault to which a starting point should apply. The sentencing judge was asked to fix the starting point.

[57] The following factual underpinnings are not in dispute:

- The respondent had no criminal record.
- In addition to the sexual interference, no other force or physical violence was visited upon the two girls.
- No drugs or alcohol were consumed.
- The trial judge found that the eighteen year old was a "willing participant" and that "she was a prostitute." (SAR pg. 8, lines 24-25)
- The 14 year old was not a sex trade worker but "was a participant, but not as willing as her cousin having been told [by her cousin] to 'go with the flow.'" (SAR pg. 8, lines 25-26)

[58] The Crown sought a sentence "with the starting point of three years" (SAR pg. 104, lines 16-17); the defence submitted that the proper sentence is "in the eighteen month range in all of the circumstances" (SAR pg. 104, lines 27-28) which the sentencing judge took to mean "the absence of force or physical violence; the absence of grooming and stalking; the absence of a position of trust between the accused and the complainant; the absence of evidence that [the respondent] is a sexual predator of young people or a person who seeks them out for sexual intention." (SAR pg. 104, lines 28-31)

[59] The sentencing judge delivered detailed reasons explaining the sentence imposed. She thoroughly reviewed the case law in this area, considered the aggravating and mitigating factors, and identified the need for a sentence demonstrating denunciation and deterrence for serious sexual acts of the kind that occurred in this case. She recognized the need for a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender.

[60] The sentencing judge found that the respondent's risk of reoffending was moderate to low, that he had complied with conditions of his release pending trial, and had sought counselling for depression.

[61] At Sentence Appeal Record page 106 lines 13-15, the sentencing judge stated:

> "I do not accept that Parliament intended the sentencing process even in disturbing situations involving sexual offences against young persons to amount to an algorithmic approach."

[62] On appeal to this Court the Crown argues that (a) the starting point for sexual interference established in ***Hajar*** must be followed; (b) the sentence is disproportionate and unfit; and (c) the sentencing reasons are inadequate.

[63] The Crown relies upon the following aggravating factors:

- Age of the complainant, 14, as compared with the age of the respondent at the time of the offence, 33.
- The pre-sentence Report indicates that the respondent lacks insight into his conduct, has not acknowledged his responsibility, and casts himself as a victim of the justice system and the complainant.
- The complainant was extremely vulnerable, had no shelter and was hungry.
- The respondent had sexual intercourse with both the 18 year old and the 14 year old on the same night, thereby exacerbating the health risk.
- The respondent had sexual intercourse with the complainant without protection, thereby increasing the risk of sexually transmitted infections and pregnancy.

[64] The sentencing judge stated the guiding principles of sentencing for sexual assault of a minor, with denunciation and deterrence being a primary consideration. She pointed to the repugnance of sexual offences involving young persons under the age of legal consent, regardless of whether the encounter was brief or prolonged. In addition, she took account of the appellant's negligence in failing to ascertain the complainant's actual age. I am not persuaded that the sentencing judge failed to give proper weight to harm or to the gravity of the offence. The aggravating and mitigating facts were properly canvassed.

[65] Indeed, the sentencing judge was alive to the evidence of harm both in the form of social science articles and Parliamentary materials, and demonstrated an understanding of the need of the courts to protect children and young people from sexual exploitation. In that regard, she had the benefit of the expert evidence of Dr. Michal Boyes in regard to the reasonable likelihood of psychological or emotional harm visited upon the complainant. The sentencing judge stated in part: "there is little controversy over the fact that children exposed to sexual partners at an early age are exposed to harm" and that "there is little controversy over the fact that children exposed to sexual encounters with older males are harmed." There was no misunderstanding that the complainant was young and vulnerable and that the gravity of the offence was apparent.

[66] Moreover, the sentencing judge did not consider "*de facto*" consent nor "ostensible" consent to be a mitigating factor.

[67] Read as a whole, the thorough and careful review of the facts and application of sentencing principles by the sentencing judge expose no error justifying appellate intervention. I would dismiss the appeal.

CONCLUDING OBSERVATIONS

[68] The foregoing constitutes the ratio of the judgment. That which follows, though related, may be characterized by some as obiter. I offer these comments mindful that counsel were not invited to specifically address the observations that follow. Indeed, in my view, it would have been inappropriate to call upon counsel to make submissions on the composition of sentence panels and their effect on the jurisprudence of a court. To do so would arguably place them in a most difficult position.

[69] That said, it is the role of a judge in the interests of the integrity of the administration of justice to speak his or her mind when the failure to do so might well be seen in the passage of time as an abdication of his or her sworn duty.

[70] As noted in the introduction to this judgment, this Court has failed to establish and abide by a protocol that provides for the random assignment of judges to sentencing panels.

[71] The presence of individual discretion in a system of assignment poses a risk that some may think that panelists will be selected based on their perceived predispositions.[1] An appellate court that utilizes discretionary non-random methods to assign (or to replace an assigned judge) leaves open the potential for manipulation. It is this potential that is problematic because, even if manipulation is not actually occurring, the lack of objective guarantees or protections against such abuse can breed suspicions or perceptions of want of impartiality, thereby eroding the integrity of, and public confidence in, the administration of justice.

[72] Judges are no different than butchers, bakers, and candlestick makers. All are human beings with different backgrounds and life experiences, different views of the world, and different philosophies.

[73] Differing perspectives and insights on complex and difficult legal issues find expression when all members of an appellate court are afforded an equal opportunity to contribute to its jurisprudence. Failure to do so suppresses meaningful debate and, in so doing, impedes the healthy development of the law. On the other hand, the articulation of competing viewpoints contributes to

[1] Robert Brown Jr. and Allison Herren Lee, "Neutral Assignment of Judges at the Court of Appeals" (2000) 78: 5 Tex. L. Rev. 1037 at 1103.

the wisdom and richness of a court's opinions which, in turn, provide justification and respect for the binding nature of its judgments. The adoption of and adherence to a protocol of random assignments sends a clear message of a court's commitment to diversity of opinion and its determination to safeguard and enhance the integrity of its jurisprudence.

[74] Publicly accessible records of this Court demonstrate that the failure to implement and adhere to an objective protocol for the random assignment of judges has resulted in significant discrepancies in both the number of sentencing panels on which some judges of the Court sit and a marked difference in the number of sentence appeals heard by certain justices of the Court as compared with their colleagues. The result is a disproportionate opportunity afforded to certain judges to shape the jurisprudence of the Court.

[75] The inherent risk flowing from such non-random assignments is the perception, whether accurate or not, that the jurisprudence of the Court over time may be skewed by doctrinal considerations. The risk is that diversity of opinion, so vital to the healthy development of the law, may be relegated to the occasional murmur, particularly so if the very same judges who sit on a majority of sentence appeals insist on inflexible adherence to horizontal *stare decisis* and maintain that their judgments, being "first at bat", must be followed by their colleagues.[2]

Appeal heard on December 15, 2015

Reasons filed at Calgary, Alberta
this 21st day of June, 2017

Berger J.A.

[2] I have read the dissenting reasons of Rowbotham, J.A. With great respect, she misconstrues my Concluding Observations. They are in no way to be taken as commentary on the open-mindedness and impartiality of judges of this Court.

Concurring Reasons for Judgment of
The Honourable Justice Brian O'Ferrall

Fitness of Sentence

[76] I have read the decisions of both my colleagues and I agree with Justice Berger that the appeal should be dismissed. In my view, the sentence imposed by the trial judge was not demonstrably unfit for the reasons given by Justice Berger at paragraphs 54 to 67 of his judgment.

Starting Points

[77] In my view, this appeal turns on the fitness of the sentence imposed by the trial judge, not on whether the sentence would be approved or disapproved by the majority or the minority in *Hajar*. I disagree with the assertion that the doctrine of precedent required the sentencing judge to apply the starting point sentence pronounced in *Hajar*. To begin with, *Hajar* was decided subsequent to sentencing. But more to the point, while starting points may be helpful to sentencing judges, they are not binding in the sense that it is not an error for a sentencing judge to arrive at a fit sentence without regard to a prescribed starting point.

[78] The fundamental principle of sentencing is that the sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The problem is that only those possessed of infinite wisdom could truly know the gravity of most offences or the degree of responsibility of most offenders. And since no one is possessed of infinite wisdom, Parliament has decided to delegate the task of applying the principles of sentencing to trial judges who are in a better position than most others to apply those principles. Other systems of sentencing might have been adopted, but Parliament chose to delegate the task of sentencing the convicted to the trial judges who convict them. The appellate court's role is to interfere only if the sentence imposed is demonstrably unfit. It is not to dictate to sentencing judges how to do their sentencing.

Stare Decisis

[79] I also concur in Justice Berger's comments on *stare decisis* in paragraphs 4 through 15 of his judgment.

[80] My view is that courts and judges are much better at deciding cases than they are at expounding the law. That is, courts are pretty good at finding the facts and applying well-established legal principles to those facts. They are not as good at articulating what the law is or should be, or at laying down immutable legal principles or dictates. And the reason is that it is extremely difficult to articulate general principles of law on the basis of one case or even several

cases, much less to articulate principles which will apply to fact situations which have yet to present themselves.

[81] Concepts such as "overruling a precedent" or deciding that a prior case was "wrongly decided" are not helpful in discussions of *stare decisis*. Nor is parading the horrors of appellate courts not following their own precedents helpful.

[82] In discussing *stare decisis*, our colleague cites the Supreme Court of Canada in *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245 in holding that consistency, certainty, predictability and sound judicial administration are achieved with adherence to precedent. No one would argue with that. But that is not to say that consistency, certainty, predictability or sound judicial administration are sacrificed when a panel of this court distinguishes a decision of a prior panel or provides principled reasons for finding that prior decision inapplicable. Neither is consistency, certainty, predictability or sound judicial administration sacrificed when a lower court does the same.

Constituting and Assigning Appellate Panels

[83] With respect to Justice Berger's comments on the composition of appeal panels, paragraphs 68-75, I am of the view that there are situations in which it is imperative that a chief justice have the discretion to constitute panels and to assign panels to appeals. Indeed, I would go so far as to say that the proper assignment of judges to panels and panels to appeals is one of the critical responsibilities of a chief justice.

[84] No one would seriously question the proposition that panel composition and case assignments ought not to be manipulated in order to produce a desired result, if that were even possible on courts made up of fiercely independent individuals. However, it is important that a chief justice have the power to constitute panels and assign cases guided by considerations which are legitimate.

[85] One of those legitimate considerations, which this case engages, is expertise. In appropriate cases, a chief justice may be required to ensure that the necessary expertise is on a panel. For example, the suggestion that this Court has failed to adhere to a protocol for the random assignment of judges to sentence panels may be explained by a desire to have necessary criminal expertise on those sentencing panels. Many of our judges have limited criminal experience. In my view, it is critical that those judges who do have criminal expertise are assigned to sit on sentencing panels, not because they dictate the result, but because they provide those of us without that expertise with the tools necessary to independently and impartially decide whether the sentencing judge imposed an unfit sentence in any particular case. However, in assigning judges on the basis of expertise, the assignment should be random from those judges with the desired expertise.

[86] But expertise is not the only reason to preserve a chief justice's discretion to assign judges to panels. Random assignment can result in uneven workloads. A chief justice must retain the ability to ensure timely disposition of appeals and sometimes that means he or she must relieve a judge from sitting on a panel to which he or she was randomly assigned. Similar considerations apply in the case of judges who fall ill. Conflicts and apprehension of bias may also require a chief justice to depart from random assignment. Also, particularly in private law matters, the parties may request a particular panel make-up. A chief justice must have the ability to accommodate such requests if they are appropriate in order that the court may provide the service which the public properly expects of it.

[87] There may be other reasons for a chief justice to assign judges to panels; but in the absence of a specific provision in our *Court of Appeal Act* conferring upon the Chief Justice the responsibility for the assignment of judicial duties (as there is in Manitoba, Saskatchewan and Ontario), I am of the view that our Chief Justice's power to constitute panels and assign cases is nevertheless implicit in the office. Exercising this power should be and likely will be the exception rather than the rule, if for no other reason than the Chief Justice does not have the time to micro-manage the constitution of panels or the assignment of specific cases to particular panels. As a consequence, assignments will mostly be random as Justice Berger quite correctly says they should be.

Appeal heard on December 15, 2015

Reasons filed at Calgary, Alberta
this 21st day of June, 2017

O'Ferrall, J.A.

Dissenting Reasons for Judgment of
The Honourable Madam Justice Patricia Rowbotham

I. Introduction

[88] The respondent was sentenced to a period of incarceration of two years less a day plus twelve months' probation following his conviction for sexual interference of a person under the age of 16 years contrary to section 151 of the *Criminal Code*, RSC 1985, c C-46.

[89] I would allow the Crown's appeal and impose a term of imprisonment of three years.

II. Background

[90] In the early hours of July 8, 2010 the respondent, who was 33 years old at the time, picked up the complainant and her cousin at a bus stop. The complainant was one month shy of her 15th birthday. The cousin was 18. The two had run away from home. The complainant was wearing torn clothing and was shoeless. The girls were hungry and had no place to stay. The complainant was reluctant to go with the respondent but her cousin persuaded her to go. The respondent took the girls to his home, gave them some food and invited them to stay the night. His wife and daughter were away.

[91] All three spent the night in the respondent's bed. He had sexual intercourse with each girl twice. On the second occasion, he had unprotected intercourse with the complainant.

[92] The following morning the respondent drove the girls to the C-train station and gave them each $10 for food and fare. Acting on a report from her mother, the police located the complainant later that day. The officer testified that the complainant looked younger than her stated age of 14. She was taken to hospital and tests disclosed the presence of the respondent's DNA on her underwear.

[93] The respondent gave a statement to the police in which he admitted to having sex with both girls. At trial he denied having had sex with the complainant. His evidence was not believed and did not raise a reasonable doubt. The trial judge found that the respondent had failed to adequately explore the age of the complainant. He did not ask the complainant her age but asked the cousin how old the complainant was. The respondent acknowledged that when the cousin told him the complainant was of age, he suspected otherwise. He observed that the complainant looked younger than her cousin who disclosed her own age as 19.

III. Sentencing Decision

[94] The Crown sought a sentence of three to four years' incarceration, contending that this was a major sexual assault. The respondent argued for a sentence in the range of 18 to 24 months. The sentencing judge had the benefit of a presentence report, a Forensic Assessment and Outpatient Services (FAOS) report and the evidence of Dr Michael Boyes, a developmental psychologist. Dr Boyes gave evidence about the likelihood of psychological and emotional harm to young persons who engaged in sexual relations with older partners, regardless of whether there is consent. Dr Boyes did not have the opportunity to assess the specific harm to complainant as the complainant did not wish to be involved.

[95] The sentencing judge found the following factors to be aggravating. The complainant was 14 and the respondent was 33. The complainant was extremely vulnerable, had no shelter and was hungry. The presentence report indicated that the respondent lacked insight into his conduct, had not acknowledged his responsibility, and cast himself as a victim of the justice system and of the complainant. The fact that there were sexual relations with multiple partners on the same night increased the risk to the complainant's health. During the second occasion of intercourse, there was no protection, increasing the risk of sexually-transmitted infections and pregnancy.

[96] The sentencing judge said that she took into account "the following mitigating factors some of which are less mitigating than non-aggravating." There was no position of trust between the respondent and the complainant and no force or physical violence. There was no evidence that the respondent was a sexual predator. The incident was brief. The respondent did not have a criminal record. He had complied with the conditions of his release pending trial. There was a moderate to low risk of reoffending. The respondent had no mental health or substance abuse issues and had sought counselling for depression. He was aware of the importance of his employability.

[97] The sentencing judge concluded by observing that sexual offences involving those who because of their age do not have the legal capacity to consent are repugnant in any circumstances, be the encounter brief or prolonged. She commented that the respondent despite being much older than the complainant was careless to the point of negligence in failing to ascertain her age. She concluded that a fit sentence was a period of incarceration of two years less a day followed by 12 months' probation.

IV. Grounds of Appeal and Standard of Review

[98] The Crown submits that: (i) the sentencing judge failed to consider that this was a major sexual assault, attracting the three-year starting point; (ii) the sentence is disproportionate and unfit; and (iii) the sentencing reasons are inadequate.

[99] This court must defer to a sentencing decision absent an error in principle, a failure to consider a relevant factor, an overemphasis of the appropriate factors, or a demonstrably unfit

sentence: *R v CAM*, [1996] 1 SCR 500 at para 90, 105 CCC (3d) 327. The error must have an impact on the sentence: *R v Lacasse*, 2015 SCC 64 at para 44, [2015] 3 SCR 1089.

V. Analysis

[100] The sentencing judge did not have the benefit of this court's decision in *R v Hajar*, 2016 ABCA 222, 39 Alta LR (6th) 209. There, the majority found that sentencing for sexual interference is comparable to sentencing for sexual assault. Both offences involve a serious violation of the complainant's sexual integrity, privacy and physical integrity: para 51. Dr Boyes' evidence along with other expert evidence was thoroughly analyzed and led the court to definitively conclude that sexual interference is inherently harmful and exploitative, and that there is no mitigating role for *de facto* consent by the complainant. A complainant under the age of 16 is simply unable to consent. The majority concluded that there should be a starting point sentence for the offence of major sexual interference and confirmed a starting point of three years imprisonment. The starting point assumes no gratuitous violence or prior record. The three-year starting point is not based on a guilty plea: para 81.

[101] There are three judgments in *Hajar*: the majority, concurring reasons by one judge and a dissent. *Hajar* was a reserved judgment of the court which means each member of this court had an opportunity to comment on it.

[102] After the release of this court's decision in *Hajar*, this panel invited the respondent and the Crown to make further submissions. The Crown submitted that the panel was bound by the majority decision in *Hajar*. The respondent's approach was to demonstrate that the sentencing judge made none of the errors attributed to the sentencing judge in *Hajar*. In other words, this case was distinguishable.

[103] The basis upon which my colleagues conclude that they are not bound by *Hajar*, was not argued by the respondent. Although the notion of precedent within the same court (or horizontal *stare decisis*) was present to Crown counsel's mind as her factum referred to this court's decision in *R v Arcand*, 2010 ABCA 363 at paras 185–194, 499 AR 1, the bulk of the authorities upon which Berger JA relies were never brought to the attention of the parties. While I do not suggest that this approach rises to the level of the Supreme Court's admonitions in *R v Mian*, 2014 SCC 54 at paras 39–41, [2014] 2 SCR 689, it is, in my view, unfair.

[104] I consider myself bound by the majority decision in *Hajar*. In *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, [2015] 1 SCR 245, Rothstein and Wagner JJ. (dissenting in part but not on this point) held that consistency, certainty, predictability and sound judicial administration are achieved with the adherence to precedent. "To overrule a precedent is to displace community expectations founded on that decision": para 137.

[105] As this court observed in *Arcand*, if appellate courts did not follow their own precedents, "then courts of appeal would remove predictability, not give it. In that event, trial judges lose all

motive to follow court of appeal decisions": para 185. "An appeal would be scarcely better than putting the dice back in the cup and shaking them again": *ibid*.

[106] The role of the sentencing judge and, on appeal, this court, is to first, determine whether the case requires the application of a starting-point sentence and, second, consider the factors that may lead to a sentence lesser or greater than that starting point.

[107] Doing so leads me to the conclusion that a sentence of two years less a day plus probation is demonstrably unfit. Moreover, the sentencing judge erred in her assessment of the mitigating factors.

[108] Turning to the aggravating and mitigating factors, there are considerable aggravating factors. The respondent was almost 20 years older than the complainant. She was a vulnerable youth in need of food and shelter. The respondent took no responsibility for the offence and indeed at the time of the presentence report continued to blame the complainant. He has no insight into the harm he has done. And, as recognized in *Hajar*, the sentencing judge failed to treat as aggravating the unchallenged psychological and emotional harm to the complainant from this offence. Section 718.2(iii.1) of the *Criminal Code* now deems, as aggravating, that the offense had a significant impact on the victim, considering their age and other personal circumstances. The respondent had intercourse with multiple partners. There were two acts of sexual interference and the second act took place without a condom, increasing the risk of sexual disease and pregnancy.

[109] In contrast, there are few if any mitigating factors. The respondent was employable but not employed. The respondent sought counselling for depression (his wife and child left him after learning of the offence). Notably, the counselling was not in relation to his lack of insight about the harm to the complainant. The sentencing judge noted that the respondent was at a low risk for reoffending and abided by the terms of his release. Neither of these factors is particularly mitigating. The remaining factors that the sentencing judge described as "mitigating or some less mitigating than non-aggravating ..." are not mitigating. The fact that there was no position of trust is the absence of an aggravating factor, as is the lack of force or violence. These are both assumed in the three-year starting point. The fact that the respondent is not a predator is not a mitigating factor and his lack of criminal record is also assumed in the three-year starting point. As for the brevity of the incident, it is difficult to see how this can be viewed as either brief, or mitigating. The complainant was there overnight and sexually assaulted twice. Indeed the sentencing judge stated that whether the encounter was brief or prolonged, it was repugnant.

[110] I conclude that these reviewable errors resulted in a sentence that is demonstrably unfit. It remains to determine a fit sentence for this offender, for this offence. The sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender. This is a serious offence. Two acts of full sexual intercourse constitute a major sexual interference.

[111] The respondent's degree of responsibility within the meaning of section 718.1 of the *Criminal Code* is revealed by his continued view that he is the victim. The author of the

presentence report noted that the respondent appeared to minimize his behaviour and rationalize his actions by placing blame on the complainant and the police. The author opined that the respondent did not show empathy towards the complainant, blamed her and showed no desire to make amends for his actions. The author of the FAOS report made similar observations noting that the respondent's strong desire to assert his innocence and to present himself as victimized, coloured the interview process. In sum, the respondent lacks any insight into the seriousness of his actions.

[112] The starting point sentence for this offence is three years: *Hajar*. The facts of this case clearly fall within the three-year starting point sentence. A 33-year old man picked up a 14-year old girl, took her to his home and had sexual intercourse with her twice. On the second occasion the intercourse was unprotected. In keeping with the assumptions of a three-year starting point, the respondent does not have a criminal record. The offence did not involve violence.

[113] Unlike in *Hajar*, in the present appeal there is no guilty plea or expression of remorse. To the contrary, the respondent continues to blame the complainant and others. The respondent is also much older than Hajar (where the age difference was 6 years not almost 20, as here). The respondent took advantage of a young girl who had no place to go and had sexual intercourse with her twice. As discussed earlier, there are virtually no mitigating factors and numerous aggravating factors. A fit sentence is three years.

VI. Assignment of Judges

[114] Berger JA opines in *obiter* that this court has failed to implement and adhere to an objective protocol for the random assignment of judges to sentencing panels. The only support for this proposition is found in para 74 where he states that "publicly accessible records of this court" demonstrate that a failure to adhere to such a protocol results in significant discrepancies in judicial assignments. In my view the failure to identify such "publicly accessible records" seriously undermines the foundation of this proposition.

[115] The more troubling aspect of my colleague's reasons is the contention that judicial assignments can result in jurisprudence which "may be skewed by doctrinal considerations" and that "diversity of opinion is relegated to the occasional murmur." The suggestion is that precedent may be nothing more than the product of the assignment of like-minded panels designated to hear appeals. I interpret the underlying theme of these assertions to include that judges of this court may not decide sentence appeals impartially.

[116] "Judges benefit from a presumption of integrity, which in turn encompasses the notion of impartiality": *R v Teskey*, 2007 SCC 25 para 19, [2007] 2 SCR 267. This was echoed in *Cojocaru v British Columbia Women's Hospital and Health Centre*, 2013 SCC 30, [2013] 2 SCR 357, in which the court held: "There is a presumption of judicial integrity and impartiality. It is a high presumption, not easily displaced": para 22.

[117] The suggestion that judicial assignments may not be impartial or that any member of this court (whether assigned to a sentence panel, a five member panel, or any panel), does not approach an appeal with an open mind is completely baseless. I reject any such suggestion in the strongest possible terms.

VII. Conclusion

[118] I would allow the appeal. A fit sentence for this offender for this offence is three years imprisonment.

Appeal heard on December 15, 2015

Reasons filed at Calgary, Alberta
this 21st day of June, 2017

Rowbotham, J.A.

Appearances:

J. Morgan
for the Appellant

J.A. Ouellette
for the Respondent