

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Thompson*, 2017 NSPC 18

Date: April 6, 2017

Docket: 2723111

Registry: Halifax

Between:

Her Majesty the Queen

v.

Caitlin Faye Thompson

Sentencing Decision

Judge: The Honourable Judge Anne S. Derrick

Heard: March 9, 2017

Decision: April 6, 2017

Charges: Section 140(1)(b) of the *Criminal Code*

Counsel: Erica Koresawa, for the Crown

Luke Craggs for Ms. Thompson

By the Court:*Introduction*

[1] On December 16, 2016 I convicted Caitlin Thompson of misleading police by making an intentionally false statement that protracted the investigation into the homicide of Matthew Penney. (2016 NSPC 77)

[2] The Crown wants Ms. Thompson sentenced to an eight-month Conditional Sentence followed by ten months' of probation. In Mr. Craggs' submission the appropriate sentence is an eighteen-month conditional discharge.

Facts Found at Trial

[3] Ms. Thompson misled police investigators on January 5, 2014 when they questioned her in relation to Matthew Penney's homicide. Mr. Penney had been found dead outside the city. He had been shot in the head. Police knew Mr. Penney had attended a New Year's Eve party at the home Ms. Thompson shared with her partner, Jason MacKenzie. Tyler Berry and Keisha Slawter-Vassell were also at the small house party. Although Ms. Thompson told police Mr. Penney had left sometime after midnight – she could not remember when – in fact he had been shot dead by Mr. Berry in the living room while Ms. Thompson was upstairs checking on her sleeping children.

[4] A day or two later Mr. Berry and Mr. MacKenzie came up with a plan to divert police suspicion away from the house party. The story would be that Mr. Penney had left the party and no one knew where he had gone. The goal was to have the police conclude there was nothing to learn from Ms. Thompson or any of the others about Mr. Penney's homicide. Ms. Thompson went along with the plan.

[5] Ms. Thompson's defence at trial did not involve a denial that she had misled the police. Her defence had two prongs: that there was reasonable doubt about the effect her false story had on the police investigation and that her role could not be disaggregated from the role Mr. Berry, Mr. MacKenzie and Ms. Slawter-Vassell played in how the police conducted their investigation.

[6] I rejected those arguments and, in convicting Ms. Thompson found that:

...some investigative steps were taken because Ms. Thompson had told investigators that Mr. Penney left 3 Springhill Road. The fact that investigative decisions were also influenced by others who had spun the false story does not impair the Crown's ability to prove its case against Ms. Thompson. (*paragraph 37*)

Aggravating Factors

[7] I find the following are aggravating factors in this case: Ms. Thompson's false story was not a spontaneous lie. She misled police conducting a homicide investigation. Her false statement contributed to the investigation being protracted: for over two months the police pursued unnecessary inquiries as Mr. Penney's family coped with having no answers about what had befallen him. Police resources were expended on trying to figure out where Mr. Penney had gone when he hadn't in fact gone anywhere.

Mitigating Factors

[8] Mitigating factors also have to be taken into account. Ms. Thompson was not the driving force behind the false story. She went along with it in a state of shock and fear, which I will discuss further. She admitted responsibility for lying when interrogated by police on March 20, 2014. She cooperated with the prosecution of Mr. MacKenzie and Mr. Berry by testifying at their preliminary inquiry. She was 23 at the time and has done much to rehabilitate herself. She is genuinely very remorseful.

The Victim Impact Statements

[9] Victim impact statements were filed by Matthew Penney's mother, Jane Penney, and his ex-partner, Rachel Maher, the mother of his young son. I was satisfied that in the circumstances of this administration of justice offence – there were individual victims – Ms. Penney and Ms. Maher – who were entitled to share their experiences of emotional harm at sentencing. (*R. v. Thompson, 2016 NSPC 75, paragraph 27*)

[10] The victim impact statements reveal that the diverted police investigation caused additional grief to Ms. Penney and Ms. Maher who were already struggling to cope with the tragedy of Mr. Penney's homicide. Jane Penney said: "The police were kept from doing their job and me from finding Matthew's killers." Ms. Maher described how the police investigation "took 3 long, agonizing months with questions left unanswered" and the perpetrators of Mr. Penney's homicide at large. She said in her statement: "What happened had significant consequences and impact on the investigation and its victims." Ms. Thompson misleading the police prolonged the suffering of Mr. Penney's loved ones.

The Pre-sentence Report

[11] Ms. Thompson's pre-sentence report is very positive. It confirms she has no substance abuse or anger issues and no criminal record. Ms. Thompson is described in glowing terms by people close to her.

[12] Ms. Thompson's teenage years included verbal and physical abuse and early motherhood. She is credited by her sister, Justine, for being a wonderful mother to her two daughters, aged six and seven, and is described as loving, kind and sensitive. She is said to "sometimes trust others to a fault." She is equally well regarded by Lori Walsh, who is Jason MacKenzie's mother. Ms. Walsh relocated from the west coast to support Ms. Thompson and her grand-daughters. In the pre-sentence report Ms. Thompson referred to Ms. Walsh as "my rock."

[13] Both Justine Thompson and Ms. Walsh referred to Ms. Thompson's remorse. Justine told the author of the pre-sentence report that her sister "is emotionally devastated, it's not who she is and she has a lot of remorse...she continues to experience tremendous guilt and anxiety." Ms. Walsh noted that Ms. Thompson is "maturing, taking responsibility, and has learned from this present offence."

[14] Ms. Thompson and her daughters have been living with Ms. Walsh for the past three years. She and Mr. MacKenzie separated two years ago while he was incarcerated for his role in Matthew Penney's homicide. (Mr. MacKenzie pleaded guilty as an accessory after the fact to Tyler Berry's criminal negligence in the shooting of Mr. Penney.) Now out of jail, Mr. MacKenzie is involved in parenting his daughters and minds them while Ms. Thompson is at work. He does not provide financial support because he is unemployed.

[15] The pre-sentence report indicates that Ms. Thompson completed a ten-month hair design course in September 2016 and was employed as a hair stylist full-time from October until very recently. At the time of the sentencing hearing Ms. Thompson was laid-off but had an upcoming interview with another salon.

[16] Ms. Thompson has had a history of anxiety which led to panic attacks and hospitalizations although her anxiety abated about four years ago. For two years following Mr. Penney's homicide she took medication for depression until she and her physician concluded she no longer needed it. She did receive counselling for a couple of months in 2014 via Skype from a retired medical doctor, Gabor Maté, in British Columbia. Ms. Thompson told the author of the pre-sentence report that the sessions with Dr. Maté were beneficial as they focused on the trauma and subsequent mental health issues she was having.

[17] Ms. Thompson expressed remorse in her pre-sentence report interview. She is reported as saying: "I wish the night had never happened. I was scared, ignorant of the law, and wish I never gave a false statement. I'm glad I eventually told the truth. Matt Penney was a good fellow, miss him a lot, awfully sorry it happened, and regret I didn't call 911."

The Letters of Support

[18] Mr. Craggs filed two letters of support on Ms. Thompson's behalf (*Exhibit 1*) – from each of Dr. Maté and Ms. Walsh. Dr. Maté advised that Ms. Thompson was referred to him by Ms. Walsh. He indicates he is a medical doctor, retired from clinical practice, "...with a special interest in childhood development, trauma, addictions, mental health issues, and childhood behavioural problems" and advises that he is an author, and a speaker and seminar leader on "these and related topics, nationally and internationally." He is also an Adjunct Professor in the Faculty of Criminology at Simon Fraser University.

[19] Dr. Maté identifies "childhood trauma" as informing "much of this young woman's life and relationships" and says "it was trauma that undermined her capacity for healthy decision making after the tragic events that led to her criminal charges." He characterized Ms. Thompson as,

...a well-meaning but emotionally confused young woman caught between her loyalty to the father of her children and her own need to be an independent, self-motivated, self-respecting person. As often is the case with young women from extremely troubled childhood backgrounds, reconciling the two goals of relationship and self-respect was not always possible. (*Exhibit 1*)

[20] Dr. Maté goes on to make some important observations about Ms. Thompson and her capacity for rehabilitation:

From the beginning of our counselling interactions Caitlin showed great willingness to learn, openness to consider her own responsibility for her actions, a willingness to face deeply painful emotional issues, and a determination to learn from her very difficult life experiences, both in childhood and since. In brief, she is an excellent candidate for full rehabilitation. In fact, my sense has been that, given the opportunity to educate herself, she could be eventually of great service to other troubled human beings, in whatever capacity she is able to work. (*Exhibit 1*)

[21] Lori Walsh has known Ms. Thompson since she was 17 when Ms. Thompson and Mr. MacKenzie were expecting a child. She says she has “loved her like a daughter from the very beginning”, referring to Ms. Thompson as “bright, caring and truly wants to help people...” (*Exhibit 1*)

[22] Ms. Walsh’s letter offers some relevant insight into Ms. Thompson’s childhood which she describes as follows:

Caitlin had a very difficult childhood. She grew up in the north end of Dartmouth, with very little support from parents who were so caught up in their own pain and stress that they were not able to be present to her in the way that every child needs. Living in a neighbourhood where violence and poverty are the norm, Caitlin lived with the harsh reality that guns and violence were part of life, in a neighbourhood where her cousin was shot dead while delivering pizza. (*Exhibit 1*)

[23] Ms. Walsh's commitment to Ms. Thompson and her two grand-daughters is remarkable. By June 2014 she relocated from British Columbia and found a home for the four of them in Halifax. She expressed high praise for how Ms. Thompson has handled herself and her responsibilities over the past three years:

...I have seen a lot of changes in Caitlin during this time. She struggled through a terrible depression, sought counselling to help her grapple with her emotions, and emerged with a deep inner strength, looking towards the future. With the knowledge that she would never be able to follow her dream of being a nurse with a criminal record, she found a 10 month intensive school program in hair design and applied for a student loan. She graduated from the program with high honours and immediately found work...She did all this while being a single mother to two small children, and as I travel quite a bit, did a lot on her own. Her strength and resilience are inspiring. (*Exhibit 1*)

[24] Ms. Walsh, while expressly not excusing Ms. Thompson's decision to lie to the police, locates her doing so in the context of her being "someone who had never been given support from outside of her troubled peer group." She described the circumstances of Ms. Thompson's offending:

...She lacked healthy guidance, and had no support to find her own voice in the face of something of such magnitude. All of this, combined with ill advice from her spouse, the unbearable amplitude of the events of this case, and the sheer terror she felt in believing she would lose her children, led to the poor choice that she made. (*Exhibit 1*)

[25] Ms. Walsh has no illusions about the seriousness of Ms. Thompson's offence and indicates that "the objective of this letter is not to excuse Caitlin's actions." She comments on Ms. Thompson's own recognition of the harm she caused, saying: "Caitlin has spoken of her regret about not coming forward sooner extensively, and about how afraid she was." (*Exhibit 1*)

Ms. Thompson's Statement in Court

[26] When Ms. Thompson was asked, pursuant to section 726 of the *Criminal Code*, if she had anything to say concerning the issue of her sentence, she used the opportunity to speak directly to the Penney family seated in the back of the courtroom, saying:

...I was a coward that day and I don't live a day that goes by that I don't think about it. And I am sorry for dragging it on - you did not deserve that. And I hope one day you could forgive me but I don't expect it.

The Purpose and Principles of Sentencing

[27] The Supreme Court of Canada has described sentencing as “one of the most delicate stages” of our criminal justice process. (*R. v. Lacasse*, 2015 SCC 64, para. 1) It is a “profoundly subjective process” (*R. v. Shropshire*, [1995] S.C.J. No. 52, para. 46) which requires the careful balancing of “the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence ...” (*R. v. C.A.M.*, [1996] S.C.J. No 28, para. 91) An appropriate sentence cannot be determined in isolation. Regard must be had to all the circumstances of the offence and the offender. (*R. v. Nasogaluak*, [2010] S.C.J. No. 6, para. 44) It is a “profoundly contextual” process in which the judge has broad discretion and must balance “all the relevant factors in order to meet the objectives being pursued in sentencing.” (*R. v. L.M.*, [2008] S.C.J. No. 31, para. 15; *R. v. Lacasse*, para. 1)

[28] Section 718 of the *Criminal Code* sets out the objectives a sentence must achieve: denunciation, deterrence – both specific and general, separation from society where necessary, rehabilitation of the offender, reparations by the offender, and the promotion of a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[29] Assessing moral culpability is a fundamental aspect of determining the appropriate sentence: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. (*section 718.1, Criminal Code*) Proportionality is “closely tied to the objective of denunciation”, promotes justice

for victims, and seeks to ensure public confidence in the justice system. The principle of proportionality,

...ensures that a sentence does not exceed what is appropriate, given the blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other. (*R. v. Ipeelee*, [2012] S.C.J. No. 13, para. 37)

[30] The principle of restraint operates in the sentencing analysis so that what is imposed is “a just and appropriate punishment, and nothing more.” (*R. v. M.* (C.A.), [1996] S.C.J. No. 28, para. 80)

A Conditional Sentence

[31] A conditional sentence is a sentence of imprisonment served in the community. (*R. v. Proulx*, [2000] S.C.J. No. 6, para. 29) A judge imposing a conditional sentence must have decided that neither prison nor probation are appropriate dispositions. (*Proulx*, para. 58)

[32] In support of a conditional sentence in Ms. Thompson’s case, Ms. Koresawa submits that denunciation and general deterrence must be emphasized. Misleading the police is to be condemned and the sentence must demonstrate there will be heavy consequences if police are misled, particularly in the context of investigations into very serious offences. Ms. Koresawa also referred to the importance of the sentence instilling a sense of responsibility in Ms. Thompson and representing an acknowledgement of the emotional harm done to the victims who were deprived of timely information about what had happened to Mr. Penney.

[33] Ms. Koresawa does not view specific deterrence as an issue in this case. She accepts that Ms. Thompson does not pose a risk of committing an offence like this again. Ms. Koresawa indicated it is the circumstances of the offence, not the offender, that the Crown is most concerned about.

A Conditional Discharge

[34] A conditional discharge - the sentence Mr. Craggs advocates is appropriate for Ms. Thompson - while at the more lenient end of the sentencing spectrum, still imposes burdens and obligations on the offender in the form of conditions, much in the same way that probation does. The most significant difference is that once the conditions of a conditional discharge have been satisfied and the term of the discharge is completed, no conviction is recorded against the offender. Only a discharge achieves this result: any other sentence leaves an offender with a record of conviction.

[35] For a conditional discharge to be granted, it must be in the offender's best interests and not contrary to the public interest. The Crown accepts that the first criterion is not an issue here and acknowledges that a conditional discharge is in Ms. Thompson's best interests. At 26 she has an unblemished record and is of previous good character. It is not necessary to enter a conviction against her to deter or rehabilitate her. (*R. v. Fallofield, [1973] B.C.J. No. 559 (C.A.), para. 21*)

[36] I also find it is in Ms. Thompson's best interests to be free of the adverse consequences a criminal record could have on her prospects for undertaking an alternative career path to hairstyling. Lori Walsh mentioned in her letter of support that a career in nursing had been an aspiration for Ms. Thompson before all this happened. Ms. Thompson talked about this during her police interrogation on March 20, 2014. (*Exhibit 2, Transcript of March 20, 2014 Police Interrogation, page 25*)

[37] It is the "not contrary to the public interest" component of the test for a conditional discharge that Ms. Koresawa argues Ms. Thompson cannot satisfy. In Ms. Koresawa's submission, a conditional discharge in this case will not adequately address denunciation and general deterrence. Ms. Koresawa says that the principles of denunciation and general deterrence will only be served if Ms. Thompson is sentenced to a conditional sentence with house arrest, and receives a criminal record.

Cases of Public Mischief (Misleading the Police)

[38] Public mischief cases – cases where the police were misled by false statements – have attracted both non-custodial and custodial sentences. Mr. Craggs provided me with four cases – *R. v. B.B., [2012] N.J. No. 80 (P.C.)*; *R. v. Gerl, 2014 SKQB*

292; *R. v. Roth*, [2004] A.J. No. 1634 (P.C.); and *R. v. T.S.*, 2011 ONCJ 233. Ms. Koresawa submitted *R. v. Delacruz*, 2010 ONSC 3060.

[39] The *B.B.*, *Gerl* and *T.S.* cases share the typical public mischief case profile – false statements made to police about another person with the intention of getting that person into trouble. *B.B.* falsely complained to police that her boyfriend, *K.W.*, assaulted her. *K.W.* was arrested and taken into custody. *Gerl* made false threat allegations to police supported by fabricated emails about two women who had become intimately involved with her husband. The women were arrested, one of them on four separate occasions as *Gerl* continued to falsely report threats. This led to her victim being held in custody overnight and then for several days before she was released on strict conditions. *T.S.* made a false complaint to police that her partner, who had been charged with sexually assaulting her, had breached his conditions of release. *T.S.* backed up her false claim with a manufactured photograph. Her partner spent four days in custody.

[40] In *Roth*, the misleading statement to police was a false description of a suspect. *Roth* had overheard a confederate provide the false description and offered the same description when she gave her statement. The police were not thrown off the scent for long although before the lie was exposed, investigators had sent the description out to all the patrol units on duty in an effort to locate the suspect.

[41] *B.B.*, *Gerl*, *T.S.* and *Roth* all received conditional discharges. Only in *B.B.* did the Crown seek a conditional sentence. In *Gerl* and *T.S.* the Crown asked for a suspended sentence with conditions. In *Roth*, the Crown did not oppose the Defence request for a conditional discharge.

[42] In her submissions, Ms. Koresawa referred me to *R. v. Delacruz*, 2010 ONSC 3060, a case involving false allegations by *Delacruz* that his former wife's new boyfriend had sexually assaulted *Delacruz's* daughter. *Delacruz* directed that his allegations be forwarded to the local Children's Aid Society who, in turn, contacted police. A joint investigation by the police and Children's Aid determined that the allegations had no foundation. (*paras.* 3 – 5)

[43] The Crown sought a penitentiary sentence for *Delacruz* of three years. He was sentenced to 18 months in jail followed by one year of probation. The Court described *Delacruz's* false allegations as “another example of a prolonged and

vicious campaign against his former wife.” (*para. 22*) It was aggravating that although Delacruz had been “stopped in his tracks before any real damage was done”, he had nonetheless “caused extensive police, prison, and Children’s Aid resources to be wasted...” His daughter and ex-wife were subjected to “needless interviews by police and Children’s Aid representatives.” The wasteful diversion of limited police resources was noted. (*paras. 25 and 33*)

[44] I note this was Delacruz’s second conviction for public mischief and the fourth occasion of targeting his ex-wife. His crime was described as “highly calculated and diligently pursued” and he offered no apology and expressed no remorse. (*para. 33*)

[45] Ms. Koresawa referenced *Delacruz* for the principles addressed by the court, and not because the sentence itself has any precedential value in relation to Ms. Thompson.

[46] The sentencing court in *Delacruz* identified “two categories of public mischief.”

...The first is where the offender attributes a crime to some anonymous individual, in order to evade his own liability. The second is like this case, where the offender directly impugns a named individual, out of a desire to punish or avenge them. Courts understandably treat the second category more seriously, as it implicates an innocent person in a criminal act, with potentially disastrous consequences. (*para. 28*)

[47] The serious consequences that may be caused by implicating an innocent person in a criminal act are also commented on in a case cited in *Delacruz, R. v. Ambrose, 2000 ABCA 264*, where the Alberta Court of Appeal said the following:

24 Furthermore, the sting of the offence here is not causing the police to waste their time (though that may be a necessary element of the crime). The real harm done is the danger that innocent persons might be prosecuted and lose their livelihoods. Even if no perjury were ever committed, the victims of such scheming might undergo many months of fear, and incur heavy legal expenses. Someone publicly accused of a crime also runs

the risk that many people will think that the smoke did indicate a fire. In my respectful opinion, the seriousness of mischief can vary a great deal from case to case; the question is highly fact-sensitive.

[48] By lying to the police Ms. Thompson committed a serious offence and caused harm to the administration of justice and the Penney family. It was not the harm of false and malicious implication in a crime as seen in the *Delacruz* and *Ambrose* facts.

When is a Conditional Discharge Appropriate?

[49] It is necessary for me to ask myself in this case - given this offence and this offender, what is the proportionate response? Is it a conditional sentence or a conditional discharge?

[50] In answering this question I have looked closely at the facts of this case, the purpose and principles of sentencing, and the “not contrary to the public interest” component of the test for a conditional discharge.

The “Not Contrary to the Public Interest” Criterion for a Conditional Discharge

[51] In *R. v. Sanchez-Pino*, [1973] O.J. No. 1903, the Ontario Court of Appeal held that the discretion to order a conditional discharge is “wide” and the sentencing judge “must consider all of the circumstances of the accused, and the nature and circumstances of the offence, against the background of proper law enforcement in the community, and the general criteria...” for discharges, including the “not contrary to the public interest” requirement. (*para. 19*)

[52] An offender does not have to establish that a discharge is in the public interest. (*R. v. Sellars*, 2013 NSCA 129, *para. 27* (C.A.)) Our Court of Appeal explained this in *Sellars* with reference to a decision of the Nova Scotia Supreme Court, *R. v. D’Eon*, [2011] N.S.J. 466, in which LeBlanc, J. said that the ‘not contrary to the public interest’ component of the test for a conditional discharge means that imposing the discharge would not be “deleterious” to the public interest. (*D’Eon*, *para. 25*) That is the hurdle an offender must be able to clear – persuading the sentencing judge that a discharge will not be deleterious to the public interest.

[53] A discharge will be deleterious to the public interest if it fails to satisfy the objectives being pursued in sentencing. In particular, where the principles of denunciation and deterrence can only be served by a custodial sentence, it will be deleterious to the public interest to impose a discharge.

[54] In *Sellars*, our Court of Appeal found that the factors to be considered in relation to the “public interest” component and the weight to be given to them “will vary depending on the circumstances of the offence and of the offender.” (*para. 37*) In making this statement, the Court referred to the often-cited decision of *R. v. Fallofield*, [1973] B.C.J. No. 559 where the British Columbia Court of Appeal held that the public interest in general deterrence should not preclude “the judicious use of the discharge provisions.”

[55] In *Sellars*, the Court also referenced the Newfoundland Court of Appeal’s comments in *R. v. Elsharawy*, [1997] N.J. No. 249 that the “public interest” component involves “a consideration of the principle of general deterrence with attention being paid to the gravity of the offence, its incidence in the community, public attitudes towards it and public confidence in the effective enforcement of the criminal law.” (*para. 3*)

[56] As I have already noted, in the Crown’s submission, Ms. Thompson’s deliberate misleading of the police in the context of a homicide investigation is too serious an offence to justify a conditional discharge. Ms. Koresawa says a discharge in this case will be deleterious to the public interest as it will not adequately emphasize denunciation and general deterrence and will not instill public confidence in the effective enforcement of the criminal law.

[57] It is not necessary for an offence to be trivial in order for a conditional discharge to be the appropriate disposition. (*Sellars, para. 34 citing R. v. Sanchez-Pino, para. 18 (C.A.): see also Sellars, para. 38*) As the cases I reviewed earlier indicate, even public mischief offences have been dealt with by way of a conditional discharge.

[58] In *Sellars*, a fraud case, a conditional discharge was substituted for the original three-year suspended sentence with the Court observing that, “We live in a compassionate society; one that recognizes that for some offenders, the full weight of a criminal conviction is not necessary...” (*paragraph 41*)

[59] Although that passage from *Sellars* reads as though the Court is talking about a conditional discharge being in the best interests of an accused, it is located in the Court's reasons dealing with what constitutes the "not contrary to the public interest" component. Beveridge, J.A. continued by saying: "I cannot help but think that a reasonable observer, with full knowledge of the documented psychiatric history of [Ms. Sellars], the role it played, and the other circumstances, would be moved to say a discharge is not contrary to the public interest." (*para. 41*)

[60] Ms. Sellars' crime was having fraudulently obtained money from her employer's health care plan using bogus claims submitted by her abusive partner. As the Court noted: Ms. Sellars "felt used and powerless" and "became more and more depressed." (*para. 9*)

Determining the Fit and Proper Sentence

[61] There is no disputing that Ms. Thompson lied to police conducting a particularly serious investigation - a homicide investigation - and as I found at trial, this did divert police efforts and resources. The Penney family was left to suffer in the dark. But it would be inconsistent with a proper application of the purpose and principles of sentencing to focus exclusively on the offence and fail to examine the context and circumstances in which Ms. Thompson's lie was made.

[62] A "full knowledge" of Ms. Thompson's circumstances, including her mental health profile, and the role various factors played in her offending, can be obtained from her pre-sentence report and the letters of support I referred to at the start of these reasons. That knowledge includes Ms. Thompson's history of anxiety and depression. It is the knowledge that she was in shock following the unimaginable events that had taken place in her home four days prior to the police interviewing her. It is informed by the fact that while in that state, she was presented with a plan intended by Mr. MacKenzie and Mr. Berry, who cooked it up, to avert the discovery by police of their role in Mr. Penney's homicide and disposal of his body.

[63] There is also another source that informs a full understanding of Ms. Thompson's circumstances at the time she misled the police. That source is Ms. Thompson's police interview of March 20, 2014 when she admitted to having lied to investigators on January 5. Not only was Ms. Thompson distraught throughout almost the entire lengthy interrogation, she talked about what affected her judgment.

She said she was “really, really scared” after Mr. Penney was shot and that Mr. Berry and Mr. MacKenzie walked her through the false statement to make sure she was “telling it right.” She was told to otherwise keep her mouth “shut”. (*Exhibit 2, Transcript of March 20, 2014 Police Interrogation, pages 143 – 144*)

[64] It is obvious from the March 20 interview with police that Ms. Thompson was extremely traumatized by Matthew Penney’s shooting. She was still struggling with the shock and horror of what had happened. She was frantic about the prospect of losing her children or being a single mother. Commenting on how distraught Ms. Thompson was, one of the police officers said to her: “You’re a mom trying to keep your family together, aren’t you?” (*Exhibit 2, Transcript of March 20, 2014 Police Interrogation, page 65*) Although obviously said to gain Ms. Thompson’s trust, it was an accurate observation.

[65] And it described Ms. Thompson’s circumstances on January 5 as well. She was the young stay-at-home mother of two little girls aged 3 and 4, and wholly dependent financially on Mr. MacKenzie. She had been thrown into an unimaginable event. As she repeatedly said in her March 20 police statement, she was terrified. She said about what happened: “And I think that’s why I didn’t really want to ask too much, because I didn’t want to know too much...I just wanted to focus on me and my kids...I had to be strong. Because I had to take care of my kids... (*Exhibit 2, Transcript of March 20, 2014 Police Interrogation, page 256*) In this context, Ms. Thompson did as she was told by Mr. Berry and Mr. MacKenzie and lied.

[66] I note that throughout Ms. Thompson’s March 20 police interrogation she talked about the remorse she felt for not telling the truth and not having contacted authorities right away: “I feel for his mom. I’m sorry I panicked and then I didn’t think to call. I panicked. I was scared...” (*Exhibit 2, Transcript of March 20, 2014 Police Interrogation, page 104*)

[67] Factors in play in Ms. Thompson’s case have been taken into account in determining that a large-scale fraud/forgery perpetrated against an employer should be dealt with by way of a conditional discharge: actions that were completely out of character and influenced by stress; an unblemished record and a productive life; true remorse; and humiliation. (*R. v. Snyder, [2011] O.J. No. 4904 (C.J.), paragraph 32*)

[68] The gravity of an offence does not preclude a conditional discharge. Parliament has not decreed that a conditional discharge is incompatible with the objectives of general deterrence and denunciation: it is only offences with a mandatory minimum sentence or punishable by imprisonment for fourteen years or life that are statutorily excluded from the discharge provisions.

[69] In *R. v. Fallofield*, the British Columbia Court of Appeal framed its decision to grant a discharge in these terms: “I find it difficult to believe that the deterrence of others will be in any way diminished by the failure to render a conviction against this accused.” (*paras. 21 and 22*)

[70] I find I have reached that same conclusion. I am not satisfied that Ms. Thompson’s actions, examined carefully, require the imposition of a conditional sentence and a criminal record. There is no question that Ms. Thompson failed in her moral and legal obligations but I am unable to see how a conditional discharge is contrary to the public interest in the unique circumstances of this case.

[71] I am satisfied that there will be no deleterious effect to the public interest by imposing a conditional discharge in this case. Setting aside legitimate skepticism about the effectiveness of general deterrence in the administration of criminal justice, I find it is not contrary to the public interest in general deterrence to grant Ms. Thompson a discharge. General deterrence supposes public awareness of the offending conduct and a calculation based on that awareness that crime does not pay. I see nothing about the circumstances of this case that makes it a particularly suitable candidate for emphasizing general deterrence through the imposition of a conditional sentence on Ms. Thompson. This would accord general deterrence too prominent a role in the sentencing calculus and marginalize other important sentencing considerations such as restraint and rehabilitation. As I have noted, sentencing must be tailored to the individual offender and the facts of her offence.

[72] If Ms. Thompson’s actions are or become publicly known – and this goes directly to the issue of general deterrence and public confidence in the effective enforcement of the criminal law – the public would be aware of the context in which her offence occurred. They would know that she has paid a heavy price. She has had to bear the stress and shame of being charged with a criminal offence and subjected to the criminal justice process over a long period of time, a public process that is

freighted with uncertainty. Imposing a conditional discharge does not diminish or dilute any of these consequences.

[73] Parliament has established that one of the fundamental purposes of sentencing is to contribute to respect for the law by imposing just sanctions. This is reflected in the *Criminal Code* sentencing provisions. Unduly harsh or oppressive sentences that fail to acknowledge the unique circumstances and facts of a case will not be seen as fair or rational. This is relevant to the issue of maintaining public confidence in the justice system. (*Lacasse, paragraph 3*)

[74] A conditional discharge in Ms. Thompson's case is a proportionate sentence that best serves the purpose and principles of sentencing and maintains the principles of sentencing in the appropriate balance. It is not contrary to the public interest. A conditional discharge acknowledges the unusual circumstances of Mr. Thompson's offending, her otherwise good character, and what she has done to rehabilitate herself. Its length and the conditions Ms. Thompson will be required to satisfy reflect the serious offence for which she is being sentenced.

[75] I am imposing an 18-month conditional discharge – a significant period of time to be under court-imposed conditions - with the usual statutory conditions:

- to keep the peace and be of good behaviour, appear before the court when required to do so by the court, and notify the court and probation officer, in advance, of any change of name, address, employment or occupation,
- and the following additional conditions:
 - Reporting within 2 business days to probation services and thereafter, as directed, by your probation officer;
 - Make reasonable efforts to locate and maintain employment or an educational program as directed by your probation officer;
 - Attend for assessment, counselling or a program directed by your probation officer;

- Participate in and co-operate with any assessment, counselling or program directed by your probation officer;
- Perform 50 hours of community service work by September 28, 2018. I have chosen this amount of time as I am informed by the pre-sentence report and Mr. Craggs that Ms. Thompson works full-time to support her two young daughters and has the primary responsibility for raising them.

[76] Currently the law requires me to impose a victim surcharge of \$200. Ms. Thompson will have until April 6, 2022 to pay.

Derrick, P.C.J.