NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. Espinosa Ribadeneira*, 2019 NSCA 7

Date: 20190208
Docket: CAC 471436
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Pedro Espinosa Ribadeneira

Respondent

Judge:	The Honourable Justice Linda Lee Oland
Appeal Heard:	September 14, 2018, in Halifax, Nova Scotia
Subject:	Sentencing – Conditional Discharge – General Deterrence – Exceptional Circumstances – s. 7l8, 7l8.1 and 7l8.2 of the *Criminal Code*
Summary:	A very intoxicated university student unlawfully entered two separate apartments and assaulted the occupants. He had been in an alcohol induced delirium. The respondent was 19 years old, had no criminal record, was remorseful, took counselling and treatment programs, and maintained sobriety. He plead guilty to one charge of assault with a weapon, two of assault causing bodily harm, and two of being unlawfully in a dwelling house. The Crown appeals the sentence of a conditional discharge and three years' probation.
Issues:	(1) Whether the sentencing judge erred in principle by not properly considering the need for denunciation and deterrence, while over-emphasizing the principle of rehabilitation

(2) Whether, given the gravity of the offences and the responsibility of the offender, he ordered a demonstrably unfit sentence

Result: Leave to appeal granted but appeal dismissed. While the sentencing judge erred by narrowing the target of general deterrence and not considering general deterrence and denunciation, he made no reviewable error in making an implicit finding that this was a case of exceptional circumstances. This finding meant that he could exercise his discretion to favour rehabilitation over deterrence and denunciation and impose the sentence he did.

Nor was the sentence demonstrably unfit. The judge gave reasons for imposing a sentence that could deviate from the range, and did not err in finding that, in the context of this case, the respondent's severely intoxicated state lessened his moral culpability. The sentence satisfies the fundamental principle of proportionality.

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Respondent

Judges:	MacDonald C.J.N.S., Oland and Fichaud, JJ.A.
Appeal Heard:	September 14, 2018, in Halifax, Nova Scotia
Held:	Leave to appeal granted and appeal dismissed, per reasons for judgment of Oland J.A.; MacDonald C.J.N.S. and Fichaud J.A. concurring
Counsel:	Timothy S. O'Leary, for the appellant Mark T. Knox, Q.C., and Michael J. Potter, for the respondent

Reasons for judgment

[1] A very intoxicated university student unlawfully entered two separate apartments and assaulted the occupants. Since the offences, which were committed in a severe state of inebriation and out of character, he has addressed his alcohol problem through treatment programs and counselling, and accepted responsibility for his actions in a public manner by telling his story and what he learned to other university students. He was sentenced to a conditional discharge and three years' probation. A conditional discharge means that no conviction is entered, and no criminal record is created.

[2] The Crown seeks leave to appeal and, if granted, appeals from sentence. It argues that the sentencing judge made errors in principle, the sentence is demonstrably unfit, and the offender should be sentenced to a term of imprisonment.

[3] For the reasons that follow, I would grant leave but dismiss the appeal.

Background

[4] The facts are undisputed. In the early morning hours of December 18, 2016, Pedro Espinosa Ribadeneira left his apartment and entered two others on another floor in the same high-rise building. He did not know the occupants.

[5] In the first apartment, Mr. Espinosa Ribadeneira walked into the bedroom and began yelling at Connor Cranstone. To Mr. Cranstone, the intruder appeared to be intoxicated. He closed the door but Mr. Espinosa Ribadeneira, a knife in his hand, forced his way in. Mr. Cranstone was able to grab the blade of the knife, push him away, and escape to the lobby.

[6] Mr. Espinosa Ribadeneira then entered a second apartment. He went into the bedroom where Samantha Paulin was sleeping, and pinned her to the bed. In the ensuing struggle, the two fell to the floor. He got on top of her, and choked her with his forearm. Ms. Paulin believed that she was going to die. Mr. Espinosa Ribadeneira punched her in the face several times, which caused bruises and lacerations to both her eyes. Her roommate, Deanna Wilson, entered screaming. She kicked the attacker, which allowed Ms. Paulin to break free and flee the apartment. The police found Mr. Espinosa Ribadeneira hiding in the closet of the bedroom, and arrested him.

[7] He pleaded guilty to five charges: one of assault with a weapon (s. 267(a) of the *Criminal Code*, R.S.C. 1985, c. C-46); two of assault causing bodily harm (s. 267(b)); and two of being unlawfully in a dwelling house (s. 349(1)).

The Sentencing Hearing

[8] The offender appeared before Judge William Digby of the Provincial Court on December 8, 2017 for sentencing. In addition to the written submissions of the Crown and defence counsel, the judge had the following:

- a pre-sentence report dated November 28, 2017;
- various diplomas and certificates Mr. Espinosa Ribadeneira had received;
- three reports from Dr. Grainne Neilson, a forensic psychiatrist;
- a report dated April 7, 2017 from Dr. David Gardner, a professor of psychiatry at Dalhousie University with a cross-appointment to that University's College of Pharmacy;
- an opinion letter dated April 10, 2017 from Blair Hodgman, an immigration lawyer;
- a letter dated January 20, 2017 from Angela Fischer, an addictions counsellor at the Crosbie House Society;
- four reference letters in support of Mr. Espinosa Ribadeneira;
- his academic record dated December 1, 2017 from Dalhousie University; and
- information concerning the family business in Ecuador.

[9] From this material, the sentencing judge learned that Mr. Espinosa Ribadeneira had come from Ecuador on a student visa to study commerce at Dalhousie University. He was 19 years old and in second year of university when he committed these offences. He had no criminal record whatsoever. He is from a good and stable family. His parents were shocked by what he had done, and have remained highly supportive of their son.

[10] What could explain the actions that were so uncharacteristic of this individual? The reports by Drs. Neilson and Gardner addressed this question.

[11] Dr. Neilson assessed Mr. Espinosa Ribadeneira for the Crown while he was in custody after his arrest and before his release in December 2016. She conducted a psychiatric assessment and prepared a report dated January 13, 2017 for Dalhousie University, which had suspended him on December 20, 2016. She met with him twice in March 2017. In November 2017, she met and assessed him again, and spoke with, among others, his surety and his Alcoholics Anonymous sponsor. She prepared reports dated March 10 and November 21, 2017 for defence counsel.

[12] In her report to Dalhousie University, Dr. Neilson diagnosed Mr. Espinosa Ribadeneira with:

- Alcohol Use Disorder, mild severity, in early remission in controlled environment; and
- Marijuana Use Disorder, mild severity, in early remission in controlled environment.

In her rationale for her opinion, she wrote that Mr. Espinosa Ribadeneira has "what could be described as heavy episodic (binge) drinking," which she stated was "very common" among university students.

[13] Dr. Neilson assessed whether Mr. Espinosa Ribadeneira could engage in university activities without causing harm to himself or others. She wrote that his "risk of future violence is assessed as **LOW**" and continued:

> In my medical opinion, the circumstances under which Mr. Espinosa Ribadeneira is most likely to represent a significant threat to the safety of the public is if he relapsed into alcohol use, (specifically consuming large quantities of alcohol quickly, and/or on an empty stomach, such that his blood alcohol level rose dramatically over a brief timespan, while in a state of fatigue or sleep deprivation). This could potentially render Mr. Espinosa Ribadeneira so severely intoxicated that he would be unaware of, and incapable of consciously controlling, his behaviour (i.e. go into a state of automatism). Even though Mr. Espinosa Ribadeneira[']s actions would *seem* purposeful, they would not be conscious or intentional due to the automaton state.
>
> In my medical opinion, this is the most likely explanation for the events of Dec 18, 2016. This theory is supported by Mr. Espinosa Ribadeneira's own account of drinking large quantities of alcohol over a brief period of time, having not consumed much food beforehand on the day in question, while in a state of fatigue. It is also supported by the victim statement that suggests that Mr. Espinosa Ribadeneira smelled intoxicated, and was speaking in a confused manner about "*the two girls who sold his apartment*", yet behaving in what appeared to be a purposeful (albeit motiveless) manner. This is akin to

> a sleepwalker, who although perplexed and confused, can nevertheless interact with their environment in a limited way, albeit without conscious intent. While automatism is not a defence under the law for violent offences, it is the most plausible explanation for what are otherwise inexplicable crimes.
>
> Based on the above, in my opinion, Mr. Espinosa Ribadeneira's best insurance against future unpredictable violent behaviour is to refrain absolutely from alcohol, and other non-prescribed intoxicants on a long-term basis. This will enable Mr. Espinosa Ribadeneira to engage in university activities forthwith, with low risk of causing harm to himself or others.
>
> [Emphasis added]

[14] Dr. Neilson's diagnosis and assessment of future risk did not change after her subsequent meetings with the offender. Some ten months later, in her final report dated November 21, 2017, she stated that "[t]he risk to the safety of the public is low, and is currently very well managed."

[15] In his report, Dr. Gardner reviewed Mr. Espinosa Ribadeneira's "clear and relatively extended pattern of excessive alcohol intake on drinking days" which led to aggressiveness, near altercations, and one actual altercation with other intoxicated men. His summary of his professional impression included:

> Mr. Espinosa experienced a substance-induced delirious state that onset sometime late on Dec 17 or early Dec 18, induced primarily by a substantially large intake of alcohol and exacerbated by an intake of marijuana of an unclear quantity. The presence of alcohol likely enhanced the absorption of THC from the smoked marijuana leading to severe cognitive dysfunction presenting as a time-limited, drug-induced confusional state.
>
> [Emphasis added]

[16] Dr. Gardner explained:

> Delirium (severe confusion with a profound loss of cognitive functioning) is a well described consequence of severe alcohol-related intoxication. As with other medically-induced forms of delirium, individuals lose all insight and judgment, losing the ability to recognize friends or surroundings. Delirium (from alcohol, other substances, or medical causes) is often associated with aggressive behavior as a consequence of the person's severely confused state.
>
> …

[17] Material before the sentencing judge spoke of Mr. Espinosa Ribadeneira's activities and progress since the offences. The letter from the addictions counsellor

confirmed that he started the Crosbie House Society's 28-day residential addiction treatment program on December 21, 2016; completed all its aspects, including group work and one-on-one counselling; and was discharged on January 20, 2017. It appeared that he had learned about addiction, was willing to work on his recovery, and was aware that abstinence from all mood altering chemicals was the goal and his only option. The counsellor also stated that if the aftercare program was followed and Mr. Espinosa Ribadeneira addressed issues as they arose, he should be able to live a clean, productive, and sober life.

[18] Every one of the reference letters reported that Mr. Espinosa Ribadeneira no longer drinks alcohol. Two described his active and regular involvement in Alcoholics Anonymous, and the 7th Step Society which is dedicated to preventing recidivism. One added that Mr. Espinosa Ribadeneira had been elected group service representative for one of the weekly meeting groups of another addiction recovery group, a position which required at least six months' sobriety and completion of a 12-step program. He would represent his group at monthly Atlantic Canada Area meetings during his one-year term.

[19] At the sentencing hearing, the judge heard the Crown's submissions; the victim impact statements of Samantha Paulin and her roommate, Deanna Wilson, both of whom were university students, and that of Ms. Paulin's mother; the testimony of Dr. Neilson; and the submissions of counsel for Mr. Espinosa Ribadeneira. Mr. Espinosa Ribadeneira also addressed the judge.

[20] Each of Ms. Paulin and Ms. Wilson described how the assault on Ms. Paulin had created a sense of great insecurity, of always being unsafe. According to Ms. Paulin, the incident had "seeped its way into every part of my life" so that she could "hardly recognize or remember the person I was before the break-in." Ms. Wilson stated that she had never before feared for her life and that of her friend, and afterwards her independence was "completely forfeit."

[21] The roommates had immediately no longer felt safe in their apartment. They had to break the lease, find a new place and pay for moving expenses, all on short notice and therefore costly. Both had needed months of counselling, and their ability to attend classes and study had been seriously affected. For example, during the university winter semester of 2017, there were times when Ms. Paulin was too afraid to leave her locked room and, after Mr. Espinosa Ribadeneira's return to campus, she felt she had to be constantly on alert.

[22] Ms. Paulin suffered three orbital fractures around her left eye, a fractured nose, and a concussion. Concussive symptoms, including a lack of concentration and increased sensitivity to light and noise, lasted at least three months, and her left eye still flared up with pain from time to time.

[23] Dr. Neilson testified that on all occasions that she saw Mr. Espinosa Ribadeneira, including the day after the assaults, he had expressed genuine remorse for the victims and accepted responsibility for his behaviour. When he addressed the judge, Mr. Espinosa Ribadeneira stated that he was "truly sorry" for what happened to the victims, "there's really no words to express the guilt and regret" he felt, and he understood how much harm he had caused.

[24] The Crown asked the sentencing judge to impose a sentence of five years concurrent for each of the offences, along with a DNA order, a weapons prohibition order, and a restitution order. It stressed that the court was dealing with two incidents of unlawful entry at night and attacks on the occupants. Mr. Cranstone suffered a laceration to his hand, and Ms. Paulin suffered severe injuries.

[25] Defence counsel did not object to the DNA, weapons prohibitions, and restitution orders. He described how Mr. Espinosa Ribadeneira was not in his conscious state of mind when he committed the offences, and emphasized what he had done afterwards and his desire to finish his university degree and help others. There was no need to deter Mr. Espinosa Ribadeneira and general deterrence in this case was "not very practical" and "really doesn't work." He asked for a conditional discharge.

The Sentence and Appeal

[26] The sentencing judge gave his decision from the bench. Early in his reasons, he commented that it was "very rare that recommendations for sentence from Crown and defence are so far apart."

[27] He then reviewed the sentencing principles set out in the *Criminal Code*, and considered specific and general deterrence. He was not satisfied that a period of incarceration would make our society safer, and felt that a sentence which emphasizes rehabilitation would do so. He then considered whether to grant a conditional discharge. In his view, Mr. Espinosa Ribadeneira's state of mind at the time diminished his moral culpability. The judge granted a conditional discharge

and placed him on three years' probation with certain conditions, and issued certain orders. Later, I will examine his reasons in detail.

[28] The Crown argues that the sentencing judge made errors in principle and ordered a demonstrably unfit sentence. It asks this Court to grant leave to appeal sentence, allow the sentence appeal, set aside the conditional discharge, and substitute 10 to 24 months' incarceration followed by a period of probation. The respondent asks that leave to appeal be refused or, if granted, that this Court dismiss the appeal.

The Fresh Evidence Motion

[29] At the sentencing hearing, Mr. Espinosa Ribadeneira's lawyer told the judge that enquiries had been made about the availability of restorative justice post-sentencing. In his decision, the judge mentioned that he had very little way of addressing the harm caused to the victims who had lost their sense of safety and security.

[30] On appeal, the respondent brought a motion to produce fresh evidence pertaining to the restorative justice process. The fresh evidence he wanted to introduce was an affidavit sworn on August 29, 2018 by William G. Middleton, a Probation Officer with the Department of Justice (Nova Scotia). Attached was a letter by the affiant stating that Mr. Espinosa Ribadeneira had reported as directed, already completed 200 hours of community service work, and paid $792.50 restitution to the court. The letter added that he had maintained long term sobriety and, on his own initiative, spoken to an academic class at St. Mary's University about his issues with alcohol. It advised that he had sought a referral to the restorative justice program for a post-conviction circle with the victims of his offences.

[31] The Crown and the respondent agreed that this Court could consider the fresh evidence contained in Mr. Middleton's letter, and the following points would have come from cross-examination of that affiant:

1. Restorative justice can be entered post-conviction. When it is, in the vast majority of cases, the process is entered before sentencing, and the sentencing is usually adjourned. If the process is completed, the judge can consider that in the sentencing and it is usually a mitigating factor;

2. Whether restorative justice is requested pre-conviction, post-conviction, or post-sentence, it is not mandatory for any victim to take part in the process;
3. In this case, there is no indication whether or not the victims, or any of them, want to take part in the restorative justice process requested; and
4. If a convicted person asks for restorative justice post-sentence, the type of sentence does not foreclose the restorative justice process.

[32] I accept the fresh evidence without Mr. Middleton having to be cross-examined on his affidavit.

Issues

[33] On this appeal, the issues are:

1. whether the sentencing judge erred in principle by not properly considering the need for denunciation and deterrence, while over-emphasizing the principle of rehabilitation; and
2. whether, given the gravity of the offences and the responsibility of the offender, he ordered a demonstrably unfit sentence.

The Standard of Review

[34] Sentencing involves the exercise of discretion by the sentencing judge. An appellate court should only interfere if the sentence was demonstrably unfit or if it reflected an error in principle, the failure to consider a relevant factor, or the over-emphasis of the appropriate factors. An error of law or an error in principle will only justify appellate intervention if the error had an impact on the sentence. An appellate court is not to interfere with a sentence simply because it would have weighed the relevant factors differently. See *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at ¶90; *R. v. Nasogaluak*, 2010 SCC 6 at ¶46; *R. v. Lacasse*, 2015 SCC 64 at ¶43-44 and ¶49.

The Purpose and Principles of Sentencing

[35] The purpose and principles of sentencing have been codified in ss. 718, 718.1, and 718.2 of the *Criminal Code*. Judges are directed to consider its

fundamental purpose and the imposition of sanctions that reflect an array of objectives:

> 718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
>
> (c) to separate offenders from society, where necessary;
>
> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[36] Section 718.1 mandates that a sentence must respect the fundamental principle of proportionality:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[37] Section 718.2 provides additional sentencing principles for consideration, including that of restraint in the use of incarceration. It reads in part:

> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> …
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
>
> …
>
> shall be deemed to be aggravating circumstances;

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> …
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[38] In *Nasogaluak*, the Supreme Court of Canada reiterated that sentencing is an individualized process and described the extent of a sentencing judge's discretion:

> [43] The language in ss. 718 to 718.2 of the *Code* is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case (*R. v. Lyons*, [1987] 2 S.C.R. 309; *M. (C.A.)*; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.)). No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the *Code* and in the case law.

The Sentencing Judge's Reasons

[39] Which of the sentencing objectives and principles did the judge determine merited the greatest weight in the case before him? His decision reads:

> The difficulty with this case is that Mr. Espinosa Ribadeneira, according to the expert reports, in particular Dr. Neilson, who saw him the day after and has seen him subsequently, states her opinion that he was in a state of alcohol induced delirium.
>
> The facts of the circumstances, although understandably terrifying to the victims, would suggest that Mr. Espinosa Ribadeneira was not in full possession of his rational faculties. The question, of course, in this case is what weight is to be given to that and what difference it makes.
>
> …

I'm satisfied, based on the reports that I have and the material presented to me, which it seems the Crown doesn't particularly take issue with, that Mr. Espinosa Ribadeneira is at low risk of reoffending. Given that, how does one apply the principles of sentencing set forth in section 718 which I read out a few moments ago?

The goals and principles set out there can in some cases be reconciled by a combination of different aspects of sentencing, in some cases they cannot. This is one of the cases where the principles can't all be addressed equally and that emphasis will have to be placed on some principles at the expense of other principles.

…

Having found that Mr. Espinosa Ribadeneira is at low risk of offending, how do I apply section 718(a) and (b)? Because, although denunciation can be achieved by means other than incarceration for offences of violence, the normal response from the courts is to impose periods of incarceration. That also incorporates subsection (c), to separate offenders from society where necessary.

Having been advised by experts whose opinion I respect, I find that Mr. Espinosa Ribadeneira is at low risk to reoffend.

I don't find that it is necessary that Mr. Espinosa Ribadeneira be incarcerated for the purpose of deterring him.

…

Having found that it's not necessary in order to protect the public from Mr. Espinosa Ribadeneira specifically, because he is at low risk to reoffend, there is still the issue of general deterrence, whether sentences should be imposed as a warning to others who might engage in such activity. With respect to that there's section 718.2(b):

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

And that is where the cases presented by the Crown become important, because one of the chief elements in those lengthy sentences is not only to deter the individual but other individuals who might be like minded. However, as I said moments ago, the mental element in terms of an operating mind or rational logical mind is different in Mr. Espinosa's situation from those other people who, though if not sober, simply had their inhibitions reduced by alcohol and still were able to think clearly. To put it another way, to put it simply, if a person, his mind is so affected by drugs they're incapable of logical thought, the principle of general deterrence is unlikely to work because they're not thinking logically. So they wouldn't even be thinking that, "Well if I do this, I'm going to get a lengthy period of incarceration," so deterrence, in my view, for someone in the mental state that Mr. Espinosa Ribadeneira was on that night, according to the evidence that's been presented to me, would not have the desired result on that person.

> …
>
> Having considered the matter, I know this will not sit well with the people who have been victimized by Mr. Espinosa Ribadeneira, that, based on the principles of sentencing, I'm not satisfied that a period of incarceration serves the overall goal, the principles of sentencing, which is to make our society safer. I feel that an application of a sentence which emphasizes rehabilitation and gives Mr. Espinosa Ribadeneira a chance to give back to the community and to help others who might fall by the wayside in the way that he has done would make society safer, rather than putting him in jail.
>
> Accordingly, I feel that a period of three years probation … will be the best answer in terms of ensuring the safety of society based on the application of the principles. …
>
> [Emphasis added]

[40] The judge then proceeded to consider whether or not to grant a discharge. In his view, the respondent's mental state at the time he committed the offences diminished his moral culpability. He granted a conditional discharge and placed him on three years' probation with certain conditions, including abstention from alcohol and other intoxicating substances, completion of 200 hours of community service work within the probationary period, a curfew from 11:00 p.m. to 6:00 a.m., restitution to Ms. Paulin and Ms. Wilson, and presence on the campus of Dalhousie University only as permitted by the university. He also issued a DNA order and a weapons prohibition order.

Denunciation and Deterrence

[41] The Crown stresses that Mr. Espinosa Ribadeneira entered two homes and committed serious acts of violence against vulnerable victims. It faults the sentencing judge for not emphasizing general deterrence and denunciation, and says that instead, he focused too greatly on the respondent's personal circumstances and rehabilitation.

[42] The sentencing objectives of specific deterrence and general deterrence appear in s. 718(b) of the *Code*. In *R. v. B.W.P.*, 2006 SCC 27, the Supreme Court of Canada explained deterrence and the difference between general and specific deterrence:

> 2 Deterrence, as a principle of sentencing, refers to the imposition of a sanction for the purpose of discouraging the offender and others from engaging in criminal conduct. When deterrence is aimed at the offender before the court, it is called "specific deterrence", when directed at others, "general deterrence". The focus of

> these appeals is on the latter. General deterrence is intended to work in this way: potential criminals will not engage in criminal activity because of the example provided by the punishment imposed on the offender. When general deterrence is factored in the determination of the sentence, the offender is punished more severely, not because he or she deserves it, but because the court decides to send a message to others who may be inclined to engage in similar criminal activity.

See also Clayton C. Ruby et al., *Sentencing, 9th ed.*, (Toronto: LexisNexis Canada, 2017) at §1.24.

[43] In this case, the sentencing judge decided that there was no need to specifically deter Mr. Espinosa Ribadeneira. The Crown does not ask that this determination be disturbed.

[44] This Court has repeatedly described deterrence as paramount in sentencing for crimes of violence. In the often cited case of *R. v. Perlin* (1977), 23 N.S.R. (2d) 66, Macdonald, J.A. writing for the Court stated:

> 8 In my opinion the overriding consideration in sentencing with respect to crimes of violence must be deterrence and it is for such reason that save for exceptional cases substantial terms of imprisonment must be imposed.

[45] Deterrence and denunciation are emphasized in cases where the offender entered a home and committed violence against an occupant. For example, in *R. v. Vickers*, 2007 BCCA 554, the British Columbia Court of Appeal wrote:

> 12 This Court has repeatedly stated that deterrence and denunciation are the primary factors in sentencing for violent crimes, particularly when these crimes violate the safety and security of a person's home. As Madam Justice Saunders recently stated in *R. v. Meigs*, 2007 BCCA 394 at para. 25, "it is a grave offence to enter another person's home without permission, and graver to enter the home and violate the occupant. The courts must and do impose stern sanctions for such crimes."

[46] This Court reiterated that position in *R. v. Best*, 2012 NSCA 34 where the accused entered the victim's home while the victim slept, and participated in an assault that seriously injured the victim. The trial judge found him guilty of break and enter, and aggravated assault. Based in part on the accused's positive pre-sentence report and secondary involvement, he sentenced him to a 90-day intermittent sentence followed by a two-year term of probation.

[47] On appeal, this Court held that the judge had erred in principle by failing to impose a sentence that adequately reflected denunciation and deterrence.

MacDonald, C.J.N.S. on behalf of the Court emphasized the priority to be given to those sentencing objectives in a case where the victim was asleep in his own home when attacked and was seriously injured:

> [13] In both his oral and subsequent signed decision, the judge downplayed the need to emphasize denunciation and deterrence. For example, in his oral decision he said:
>
> > For the reasons stated, I do not believe that this is a case where denunciation and deterrence are particularly pressing.
>
> [14] Then, in his signed version, the judge repeated:
>
> > ... I do not believe this is a case where denunciation and deterrence need to be emphasized. ...
>
> [15] Respectfully, this reflects error. Simply put, for Mr. Best to enter Mr. Robson's home while he is sleeping and to participate in an assault that results in serious injury, deterrence and denunciation must be emphasized. There is no way around this <u>despite the fact that Mr. Best did not land any blows or despite the fact that he had a positive pre-sentence report. This is just too serious a crime. This and other appellate courts have made it clear that, save very exceptional circumstances which do not exist here, such conduct must be seriously denounced with a message to other would-be offenders that serious jail time will result</u>. See: *R. v. Foster*, [1997] N.S.J. No. 392 (C.A.), at para. 39; *R. v. Goulette*, 2009 NBCA 49, at para. 44; *R. v. Joyce*, [1998] N.B.J. No. 312 (C.A.), at para. 37; *R. v. Peciukaitis*, 2008 ONCA 672, at para. 11; *R. v. Pakoo*, 2004 MBCA 157, at para. 49; *R. v. Wright* (2006), 218 O.A.C. 215, at paras.13-15; *R. v. Morash*, 2006 SKCA 59, at para. 16; *R. v. Sharphead*, 2004 ABCA 338 at para. 10.
>
> [Emphasis added]

[48] The Crown submits that the sentencing judge failed to emphasize both general deterrence and denunciation. The Supreme Court in *R. v. M.(C.A.)*, explained denunciation as follows:

> 81 … The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's <u>conduct</u>. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. As Lord Justice Lawton stated in *R. v. Sargeant* (1974), 60 Cr. App. R. 74, at p. 77: "society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass." …
>
> [Emphasis in original]

[49] In his decision, the sentencing judge mentioned denunciation in passing. However, nowhere in crafting the sentence did he explicitly consider that objective or condemn the respondent's conduct.

[50] I turn then to general deterrence. In considering that sentencing objective, the judge focused on deterrence of those in the same state of mind as Mr. Espinosa Ribadeneira had been. For ease of reference, I repeat the relevant portion of his reasons:

> And that is where the cases presented by the Crown become important, because one of the chief elements in those lengthy sentences is not only to deter the individual but other individuals who might be like minded. However, as I said moments ago, the mental element in terms of an operating mind or rational logical mind is different in Mr. Espinosa's situation from those other people who, though if not sober, simply had their inhibitions reduced by alcohol and still were able to think clearly. To put it another way, to put it simply, if a person, his mind is so affected by drugs they're incapable of logical thought, the principle of general deterrence is unlikely to work because they're not thinking logically. So they wouldn't even be thinking that, "Well if I do this, I'm going to get a lengthy period of incarceration," so deterrence, in my view, for someone in the mental state that Mr. Espinosa Ribadeneira was on that night, according to the evidence that's been presented to me, would not have the desired result on that person.
>
> [Emphasis added]

[51] With respect, the sentencing judge erred in principle by limiting the target of general deterrence to those in a similarly intoxicated state as Mr. Espinosa Ribadeneira. The objective of general deterrence is intended to deter those who may be considering committing similar offences as an accused, not just those in the same state of mind.

[52] By excessively narrowing this objective as he did, the sentencing judge effectively concluded that general deterrence did not apply in this case. He did not simply reduce the weight given to it; rather, he discounted it entirely.

[53] Mr. Espinosa Ribadeneira acknowledges that general deterrence and denunciation are ordinarily the priorities in the sentencing for serious violent crimes. He responds with two arguments. First, he submits that for first-time, youthful offenders, such as himself, sentences which focus on rehabilitation and reformation, rather than general deterrence, are appropriate. Second, he argues that

exceptional circumstances that would reduce the weight to be given to deterrence can be inferred from the judge's reasons.

[54] With regard to youthful offenders, Mr. Espinosa Ribadeneira referred to statements in *R. v. Jacko*, 2010 ONCA 452 and *R. v. Gannon*, 2015 NSPC 97. With respect, neither of these decisions is helpful.

[55] In *Jacko*, two 18-year-old status aboriginals with criminal records committed various offences during a home invasion on the Wikwemikong Reserve. Penitentiary sentences of four years each were reduced to a conditional sentence and imprisonment respectively, each for two years less a day. While Watt, J.A. wrote in ¶52 that restorative objectives are of particular importance in determining sentence for youthful offenders, it is apparent from ¶51 that this decision focuses on the application of these objectives for immature recidivists and for aboriginal offenders. The respondent is neither.

[56] In *Gannon*, an intoxicated 20-year-old man without a criminal record had joined in assaulting a Good Samaritan. He pleaded guilty to assault causing bodily harm. Provincial Court Judge Frank P. Hoskins reasoned:

> [121] As previously stated, I have carefully considered that sentences for youthful offenders should be directed at rehabilitation and reformation, not only general deterrence. However, in cases of serious violence; such as the violence perpetrated by Mr. Gannon against a helpless and defenceless victim, requires a sentence that emphasizes denunciation and deterrence.
>
> [122] Thus, given the gravity of the offence, and degree of Mr. Gannon's responsibility in such circumstances, deterrence and denunciation must be reflected in the sentence imposed.
>
> [Emphasis added]

He decided at ¶124 – 125 that a conditional sentence of 12 months, coupled with 18 months' probation, was a sentence which emphasized deterrence and denunciation but not to the detriment of rehabilitation.

[57] In my view, *Gannon* read in its entirety simply reiterates that, where the crime was one of violence, the objectives of rehabilitation and reformation may not be entitled to the priority they would otherwise be accorded in sentencing first-time, youthful offenders. It accords with what the Ontario Court of Appeal said in *R. v. Priest* (1996), 30 O.R. (3d) 538 (C.A.) where Rosenberg, J.A. wrote:

> Youthful First Offender
>
> The primary objectives in sentencing a first offender are individual deterrence and rehabilitation. Except for very serious offences and offences involving violence, this court has held that these objectives are not only paramount but best achieved by either a suspended sentence and probation or a very short term of imprisonment followed by a term of probation. In *R. v. Stein* (1974), 15 C.C.C. (2d) 376 (Ont. C.A.) at p. 377, Martin J.A. made it clear that in the case of a first offender, the court should explore all other dispositions before imposing a custodial sentence:
>
> > It is the view of the Court that the sentence imposed upon the appellant does reflect an error in principle. In our view, before imposing a custodial sentence upon a first offender *the sentencing Court should explore the other dispositions which are open to him and only impose a custodial sentence where the circumstances are such or the offence is of such gravity that no other sentence is appropriate.* In our view, this offence does not fall within the category of offences where a custodial sentence is the only appropriate sentence to be imposed upon a first offender, nor are there other circumstances which require the imposition of a custodial sentence. [emphasis added]
>
> [First emphasis added; second in original]

See also *R. v. Johnas*, 1982 ABCA 331 at ¶14 – 15.

[58] I turn then to Mr. Espinosa Ribadeneira's submission that exceptional circumstances can be inferred from the judge's reasons.

[59] The concept of "exceptional circumstances" is a common-law sentencing principle. Its practical effect is that "it acts as a safety valve for the justice system in the 'rare case' where the circumstances are 'above and beyond the norm'." See *R. v. Burnett*, 2017 MBCA 122 at ¶22 and *R. v. Voong*, 2015 BCCA 285 at ¶59. While both *Burnett* and *Voong* relate to sentencing ranges rather than to exceptional circumstances in the context here, in my view the same considerations would apply.

[60] In *Burnett*, the judge found exceptional circumstances and imposed a 90-day intermittent sentence followed by two years of probation for breaking, entering and stealing a firearm. In allowing the appeal, Mainella, J.A. wrote:

> 30 Where there is an arguable case of exceptional circumstances, two themes are common in the case law that sentencing courts focus on: has the accused concretely demonstrated that he or she has turned his or her life around since his or her arrest, and would the fundamental purpose of sentencing (see section 718

> of the *Code*) be better served by a custodial or non-custodial sentence for someone who has proven to have turned his or her life around since his or her arrest (see *Peters* at para 28).

He cautioned at ¶33 that sentencing courts must not conflate "sympathetic circumstances" with "exceptional circumstances", as the two are distinct in legal effect.

[61] In *Voong*, Bennett, J.A. writing for the British Columbia Court of Appeal provided this explanation and description of exceptional circumstances

> 45 The exceptional circumstances must engage principles of sentencing to a degree sufficient to overcome the application of the main principles of deterrence and denunciation by way of a prison sentence.
>
> …
>
> 59 … Exceptional circumstances may include a combination of no criminal record, significant and objectively identifiable steps towards rehabilitation for the drug addict, gainful employment, remorse and acknowledgement of the harm done to society as a result of the offences, as opposed to harm done to the offender as a result of being caught. This is a non-exhaustive list, but at the end of the day, there must be circumstances that are above and beyond the norm to justify a non-custodial sentence. There must be something that would lead a sentencing judge to conclude that the offender had truly turned his or her life around, and that the protection of the public was subsequently better served by a non-custodial sentence. …

[62] Mr. Espinosa Ribadeneira relied on this Court's decision in *R. v. Bratzer*, 2001 NSCA 166. There, an 18-year-old, together with others, robbed two gas stations and a convenience store. He pleaded guilty to three counts of robbery and one of committing an offence while having his face masked. The Crown appealed from the conditional sentences of two years less a day for each offence, to be served concurrently, arguing that they were manifestly inadequate and disproportionate to the gravity of the offences, and should not be served concurrently.

[63] This Court granted leave but dismissed the appeal. At ¶37 and ¶38, Bateman, J.A. writing for the Court observed that, objectively, the sentence was lenient and at the low end of the range for robbery, and recounted the aggravating circumstances of the offences. She then continued:

> [39] Clearly central to this disposition were Mr. Bratzer's youth and, quite unique to this case, the very considerable evidence led as to his substantial

> progress while on interim release. In this regard the judge identified several relevant factors: Mr. Bratzer was not plagued by alcohol or drug addiction which so often defeats an offender's attempt at reformation; he was a person with identified potential who had attracted the confidence of his superiors; he had a longstanding and attainable career objective; he had a good relationship with a loving and very supportive family; his family was prepared to supervise him if on conditional release and had a demonstrated ability to provide effective oversight; he was a youthful offender without a serious or longstanding past record; he had received psychiatric counseling to address his feelings of anger and inadequacy and, in that regard, had received a positive report from his doctor; he had successfully completed his Grade 12 equivalency; perhaps most importantly, he had displayed a willingness and an ability to abide by stringent conditions over the 13 months of interim release.
>
> [40] There is ample authority for the proposition that sentences for youthful offenders should be directed at rehabilitation and reformation, not general deterrence. (**R. v. Leask** [1996] M.J. No. 587 (Q.L.)(C.A.); **R. v. Demeter and Whitmore** (1976), 32 C.C.C. (2d) 379 (Ont.C.A.); **R. v. Casey**, [1977] O.J. No. 214 (Q.L.)(Ont.C.A.)) This is common sense. A youthful offender, particularly one such as Mr. Bratzer, who has an interest in a vocation and can be equipped with the tools to earn an honest living, is more likely to be diverted from a life of crime than would a career criminal.
>
> …
>
> [42] … the many positive factors identified by the judge, coupled with Mr. Bratzer's youth supported a lenient sentence directed at rehabilitation.
>
> [43] It is difficult to imagine what more Jesse Bratzer could have done to turn his life around in the time available to him before sentence. All information supported the judge's conclusion that he was not the callous and brazen offender revealed in the interview immediately following his arrest.

[64] The Court reiterated at ¶15 that "[t]hese … crimes … attract denunciatory and deterrent sentences" and, at ¶62, that its affirmation of the conditional sentence should "in no way detract[] from the guidance that this Court [has] given about … the need for a deterrent emphasis." It was not just the offender's young age, but a constellation of factors, that justified the conditional sentence in *Bratzer*. It is considered an exceptional case (see *R. v. Griffin*, 2011 NSCA 103 at ¶36).

[65] The sentencing judge in the case before us did not make an explicit finding that this was a case of exceptional circumstances which could reduce the importance of deterrence and denunciation. In such circumstances, a review of the decision as a whole in the context of the record can be undertaken. If it contains an implicit finding of exceptional circumstances, that finding by the judge is entitled to significant deference. See *Burnett* at ¶20 and 31.

[66] Reviewing the judge's reasons to see if he made such an implicit finding is also in keeping with *R. v. Sheppard*, 2002 SCC 26. There, although in the context of sufficiency of reasons, the Supreme Court at ¶24 – 33 stated that an appellate court does not have jurisdiction to intervene simply because the reasons are, in some respects, deficient and could have been better articulated. In the context of this appeal, the Court should determine whether the judge made that finding, albeit implicitly.

[67] In his decision, the sentencing judge characterized the entries into homes and the harm done to the occupants as "serious offences that placed the public at great risk." He referred to cases where homes were entered which resulted in lengthy periods of incarceration in a federal penitentiary. He noted that, in virtually all of them, the offenders "knew very well what they were doing," while in this case, according to the expert reports, the respondent had been in a state of alcohol induced delirium.

[68] According to the judge, the case before him was one where the sentencing principles in s. 718 could not be addressed equally and where emphasis would have to be placed on some principles at the expense of others. He observed that for offences of violence, the normal response from the courts is to impose periods of incarceration and thus separate the offenders from society, where necessary. He then continued with respect to the respondent:

> All of the material before the courts shows that he feels sincere remorse, that he has done what he feels he could do and what would be demanded of him in that he has addressed his alcohol problem by taking a 28-day residential treatment program. He has continued with that, taking counselling from a psychologist. He's had some further contact with Dr. Neilson. He attends AA meetings and 12-step meetings. All of those things are things which would be considered as being ordered with respect to paragraphs (d), (e) and (f) which are:
>
> > (d) assist in rehabilitating offenders;
> >
> > (e) provide reparation for harm done to victims or to the community; and
> >
> > (f) promote a sense of responsibility in offenders and acknowledgement of the harm done to victims or to the community.
>
> And with reference to that, I note his assistance to others who have problems with substances.

[69] The sentencing judge was not satisfied that a period of incarceration would serve the overall goal of sentencing in s. 718, which is to protect society and keep it safe. He stated:

> I feel that an application of a sentence which emphasizes rehabilitation and gives Mr. Espinosa Ribadeneira a chance to give back to the community and to help others who might fall by the wayside in the way that he has done would make society safer, rather than putting him in jail.

[70] In considering whether to grant a discharge, the judge referred to this Court's decision in *R. v. Sellars*, 2013 NSCA 129 which dealt with s. 730 and the two conditions that must be satisfied for such a sentence. In particular, he reviewed the second condition, which requires that the discharge be "not contrary to the public interest" and what factors should be considered in that regard. His reasons then quoted ¶41 of *Sellars*: "[w]e live in a compassionate society; one that recognizes that for some offenders, the full weight of a criminal conviction is not necessary." The judge was of the view that the respondent's state of mind at the time of the offences diminished his moral culpability. He sentenced Mr. Espinosa Ribadeneira to a conditional discharge and three years' probation with certain conditions.

[71] Reviewing the judge's reasons as a whole in the context of the entire record leads me to conclude that he made an implicit finding of exceptional circumstances. The judge was very aware that the offences committed were serious and usually called for a period of incarceration. Several of his comments described the harm that had been suffered. It is also apparent from his reasons that he saw a youthful offender who had never been in trouble with the law and had pleaded guilty; who had committed the offences when in an alcohol induced delirium; who was genuinely remorseful; who had done everything possible to address his addiction issues and had steadfastly maintained sobriety; who had volunteered to help others avoid problems with substance abuse; and who had continued to pursue the university education he had come to Nova Scotia to achieve. His decision shows that he considered the principles of sentencing and decided that, in this particular case, the primary objective for crimes of violence, namely, deterrence, should not be given its usual paramountcy over rehabilitation.

[72] The judge essentially determined that Mr. Espinosa Ribadeneira had truly turned his life around. In his view, the fundamental purpose of sentencing, namely the protection of the public, would be better served by a non-custodial sentence. In short, he implicitly found that this was a case of exceptional circumstances, one which met the criteria described in *Bratzer*, *Burnett* and *Voong*. After examining the record and considering the parties' submissions, I see no reviewable error in the judge's implicit finding of exceptional circumstances.

[73] While the judge erroneously narrowed the target of general deterrence and erred in principle by not considering general deterrence and denunciation at all in

crafting the sentence, I am satisfied that those errors did not impact the sentence considering all the circumstances. The judge's implicit finding—one with respect to which I see no error—that this was a case of exceptional circumstances meant that he could exercise his discretion to favour rehabilitation over deterrence and denunciation, and to impose a conditional discharge with three years' probation.

[74] I see no error in principle that would justify interference by this Court and would dismiss this ground of appeal.

Demonstrably Unfit Sentence

[75] The Crown argues that the sentence was unfit because it was too lenient given the seriousness of the offences and the degree of responsibility of the offender. It submits that a conditional discharge is outside the sentencing range for similar offences and that the judge erred in finding that the respondent's severely intoxicated state of mind diminished his moral culpability.

[76] The Supreme Court in *Lacasse* stated at ¶67 that "… a deviation from such a range or category is not an error in principle and cannot in itself automatically justify appellate intervention unless the sentence that is imposed departs significantly and for no reason from the contemplated sentences." As explained above, the judge had ample reason to impose the sentence he did, and did not otherwise err in principle in a manner that impacted the sentence.

[77] There is also no reviewable error in the sentencing judge's finding that, in the context of this case, the respondent's severely intoxicated state lessened his moral culpability.

[78] The impact, if any, of self-intoxication on moral blameworthiness depends on the circumstances. In this case, the judge's comments about Mr. Espinosa Ribadeneira's intoxicated state of mind were first made after considering cases wherein the offenders "knew very well what they were doing," that is, they knew that persons were in the dwelling house and intended to confront them for a particular reason. They were deliberate; the respondent, because of his state of mind, was not. The judge also noted in his decision that the respondent has addressed his alcohol abuse.

[79] While these circumstances do not lessen the seriousness of the offences nor affect the impact on the victims, I see no reviewable error in the judge's consideration of the respondent's severe intoxication, in this particular context, as

diminishing his moral blameworthiness to some extent. By "this particular context", I mean the combined effect of the facts that:

1. there was evidence that the judge accepted which showed that the respondent was not simply intoxicated but, rather, in an alcohol-induced delirium (*R. v. Hicks*, [1995] B.C.J. No. 545 (C.A.) at ¶15 (substance-induced psychosis));
2. this state of mind caused him to act out of character (*R. v. Hicks*, 2007 NLCA 41 at ¶17 citing *R. v. Breen* (1982), 37 Nfld. & P.E.I.R. 472 (Nfld. C.A.) at ¶7);
3. the evidence of such severe intoxication demonstrates a lack of planning (*R. v. Simcoe*, [2002] O.J. No. 884 at ¶25 (C.A.));
4. there was no other evidence suggesting even short-lived premeditation; and
5. the respondent has successfully addressed his issues with substance abuse which led to the criminal conduct (*R. v. Gaudet*, 2009 NSPC 54 at ¶34).

See also *R. v. Hall* (1986), 72 N.S.R. (2d) 148 at ¶10; *R. v. Blacksmith*, 2018 MBCA 81 at ¶23; *R. v. Wesslen*, 2015 ABCA 74; *R. v. Leslie*, 2016 BCCA 213 at ¶34 citing *R. v. Pop*, 2013 BCCA 160 at ¶28.

[80] An appellate court cannot vary the sentence just because it may have chosen a different one (*Lacasse* at ¶51). In all the circumstances described herein, I find that the sentence adheres to the fundamental principle of proportionality set out in s. 718.1. That said, I am not to be taken to saying moral culpability will always be reduced on the basis of severe intoxication. There is no blanket rule. It is highly contextual. See e.g. *R. v. Foster*, 2015 SKCA 114; *R. v. McKay*, 2017 MBCA 55; *R. v. S. (J.C.)*, 2017 BCCA 87; *R. v. Miller*, 2018 ABCA 356.

[81] I would dismiss this ground of appeal.

Disposition

[82] I would grant leave to appeal, but dismiss the appeal from sentence.

Oland, J.A.

Concurred in:

MacDonald, C.J.N.S.

Fichaud, J.A.