



## R. v. A.C., 2017 ONCJ 317 (CanLII)

Date: 2017-05-16

Docket: Brampton 15-10536

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### WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under [subsection 486.5\(1\) or \(2\)](#) of the *Criminal Code*. These subsections and [subsection 486.6\(1\)](#) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under [subsection 486.5\(1\) or \(2\)](#), read as follows:

#### **486.5 ORDER RESTRICTING PUBLICATION — VICTIMS AND WITNESSES —**

(1) Unless an order is made under section 486.4, on application of the prosecutor in respect of a victim or a witness, or on application of a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

(2) **JUSTICE SYSTEM PARTICIPANTS** — On application of the prosecutor in respect of a justice system participant who is involved in proceedings in respect of an offence referred to in subsection (2.1), or on application of such a justice system participant, a judge or justice may make an order directing that any information that could identify the justice system participant shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is in the interest of the proper administration of justice.

...

**(2.1) OFFENCES** – The offences for the purposes of subsection (2) are

(a) an offence under section 423.1, 467.11, 467.111, 467.12, or 467.13, or a serious offence committed for the benefit of, at the direction of, or in association with, a criminal organization;

(b) a terrorism offence;

(c) an offence under [subsection 16\(1\) or \(2\)](#), [17\(1\)](#), [19\(1\)](#), [20\(1\)](#) or [22\(1\)](#) of the *Security of Information Act*; or

(d) an offence under [subsection 21\(1\)](#) or [section 23](#) of the *Security of Information Act* that is committed in relation to an offence referred to in paragraph (c).

(3) **LIMITATION** – An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice if it is not the purpose of the disclosure to make the information known in the community.

...

**486.6 OFFENCE** — (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or [\(3\)](#) or [486.5\(1\) or \(2\)](#) is guilty of an offence punishable on

summary conviction.

## ONTARIO COURT OF JUSTICE

**CITATION:** *R. v. A.C.*, 2017 ONCJ 317

**DATE:** May 16, 2017

**COURT FILE No.:** Brampton 15-10536

**B E T W E E N :**

**HER MAJESTY THE QUEEN**

**— and —**

**A. C.**

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Before Justice M. M. Rahman  
Heard on February 7, April 18, and May 9, 2017  
Written Reasons for Sentence released on May 16, 2017<sup>[1]</sup>

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**Robin Prihar..... counsel for the Crown**  
**Ayeman Kenawy..... counsel for the offender A.C.**

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**RAHMAN J.:**

### **I. Overview**

[1] When most people search their names using Google, they might find pictures of themselves from various social media websites, or photos taken at a public event. In June 2015, when C.S. Googled her name, she found private videos of herself having sexual intercourse, and private nude photos of herself with her face visible. Those private images were available for anyone with an internet connection to see because the offender, A.C., had uploaded them onto various websites in April and May of that year.

[2] Because the offender shared these private images with the world, without C.S.'s consent, he was charged with sharing intimate images, under s.162.1 of the *Criminal Code*. He pleaded guilty before me to that single count, almost a year and a half after being charged.

[3] The Crown seeks a six-month custodial sentence, followed by probation for eighteen months. The Crown also seeks an order under s. 162.2 prohibiting the offender from using the internet for one year. The offender seeks a conditional discharge followed by a three-year probation order with punitive terms, including house arrest and a curfew. The offender also suggests that his probation

order carry with it a requirement for him to perform 100 hours of community service. He takes no issue with the internet prohibition.

## II. Facts of the Offence

[4] The offender was in a relationship with C.S. from October 2010 to July 2014. During their relationship, the offender took intimate videos of C.S. with her consent. He also took nude photos of her, and she sent nude photos of herself to him. C.S. never gave the offender permission to share any of these videos or photos with anyone else or to post them online.

[5] Several months after their relationship ended, the offender posted five videos of C.S. to the website "Xvideos.com." The videos were accompanied by titles which included C.S.'s first and last name. The titles included "[C.S.] rides cock" and "[C.S.] in [reference to ethnic background] Girl Gets Fucked." C.S.'s face was visible in at least one of the videos. C.S. is nude in the videos. The offender also posted seventeen nude photos of C.S. on another website with her name attached. Many of the photos also had her face visible.

[6] The offender also posted videos of C.S. to the website "Myex.com." Her name (including a middle name), her age and her city and country of birth appeared on the website as well. Underneath this identifying information appeared a comment posted by the offender. Under the heading "Slut Train," the comment contained a number of vulgar and degrading statements about C.S. starting with the phrase "will fuck anyone who pays her nice compliments and will do as she says." The offender also suggested that C.S. suffered from depression and bipolar disorder. He made several other degrading comments, which I will not repeat. The offender also said "I have full length videos buy cant [sic] upload them here because of restrictions on uploads...any suggestions of where I can upload them."

[7] On June 24, 2015, C.S. became aware that these private videos and photos of her were online. The next day she reported the matter to the Peel Regional Police and asked that the content be removed. When police contacted the offender on June 25, he took steps to remove the content that day.

[8] On June 29, 2015, C.S. did a Google search and discovered that the content was still available online. Between June 24 and August 12, C.S. contacted various websites to request that the pictures and videos of her be removed. Despite the offender's earlier efforts to remove all the images, the images remained available on the internet in the form of torrents.

[9] On August 12, 2015, C.S. attempted to have a private information laid against the offender. She was advised to report the matter to the police. The offender was arrested by Peel Regional Police on August 14. He gave an inculpatory statement to police in which he admitted uploading four videos of himself and C.S. without her consent. He also admitted that he uploaded nude photos of her without her consent. The offender told police that he uploaded the content in April and May 2015.

## III. Circumstances of the Offender<sup>[2]</sup>

[10] The offender is thirty-two years old and has no criminal record. He is a college graduate who currently works full time as a production supervisor at Hunter Douglas. He had previously worked at Hewlett Packard for five years, but lost his job because of these criminal charges.

[11] Mr. Kenawy, the offender's lawyer, informed the court that the offender had been very much in love with C.S. He said that the offender had discovered C.S. had been unfaithful to him during

their relationship. He also learned through C.S.'s friend that she had an abortion during their relationship, without his knowledge. When he learned this information he went "into a dark place, psychologically." He posted the intimate images when he was in this depressed state. Mr. Kenawy made it clear that he was not providing this information as a justification for what the offender did, but rather to provide insight into what was going on in the offender's mind at the time he committed the offence. I should be clear that none of this information about C.S. was provided under oath and there is nothing to suggest that it is actually true. However, for the purpose of sentencing I will assume that this is what the offender believed to be true and that he was depressed as a result.

[12] Mr. Kenawy said that he has had in-depth conversations with the offender about the repercussions of his actions. Mr. Kenawy said that the offender has expressed a great deal of remorse to him and that he now realizes the impact his actions have had on C.S. The offender has also discussed his crime with his mother and sister several times and recognizes what a tremendous mistake he made.

[13] When he addressed the court directly, the offender said that, in addition to having been cheated on, he had been physically abused during his relationship with C.S. and that his mother had been ill when he committed the offence. He stated that he was "one-hundred percent sorry," that he had made a "horrible mistake," and that he just wanted a second chance.

#### **IV. Impact on C.S.**

[14] Not surprisingly, this offence has had a devastating impact on C.S. In her victim impact statement, C.S. described how the offender's disregard for her privacy has affected her. After discovering the images, C.S. suffered a severe case of depression. She spent hours trying to have the images removed by contacting various websites, and soon realized that "everyday people were downloading and uploading my pictures and images." C.S. had to take time off work, affecting her income and causing her to have difficulty paying bills. She was unable to focus on her studies, which caused her grades to suffer.

[15] C.S. said that she will never trust anyone again and knows that this will affect all her future relationships with her family and friends because she is afraid what people have seen of her. C.S. continues to receive messages on social media from strangers who ask her to perform sex acts for them. She is concerned that future employers might come across these images should they decide to Google her name. C.S. said that "[w]ith everything that I had experienced I didn't feel like a person anymore."

#### **V. The Provision Prohibiting Sharing Intimate Images**

[16] Sharing an intimate image is an offence under s. 162.1 of the *Criminal Code*. The provision is set out below:

162.1 (1) Everyone who knowingly publishes, distributes, transmits, sells, makes available or advertises an intimate image of a person knowing that the person depicted in the image did not give their consent to that conduct, or being reckless as to whether or not that person gave their consent to that conduct, is guilty

(a) of an indictable offence and liable to imprisonment for a term of not more than five years; or

(b) of an offence punishable on summary conviction.

(2) In this section, intimate image means a visual recording of a person made by any means including a photographic, film or video recording,

- (a) in which the person is nude, is exposing his or her genital organs or anal region or her breasts or is engaged in explicit sexual activity;
- (b) in respect of which, at the time of the recording, there were circumstances that gave rise to a reasonable expectation of privacy; and
- (c) in respect of which the person depicted retains a reasonable expectation of privacy at the time the offence is committed.

[17] [Section 162.1](#) is a relatively new offence. It was part of Bill C-13, *Protecting Canadians from Online Crime Act*, and was proclaimed into force on March 9, 2015.[\[3\]](#) The bill was part of the federal government's initiative against cyberbullying. It was introduced after two high profile incidents of young women taking their own lives after intimate images of them had been shared without their consent.[\[4\]](#) Then Minister of Justice, the Hon. Peter MacKay, described the impetus behind Bill C-13 this way:[\[5\]](#)

We are all aware of the issues of bullying and cyberbullying and how they have become priorities for many governments around the world. Cyberbullying is the use of the Internet to perpetrate what is commonly known as bullying, but it is of particular interest and concern of late. This interest is due in no small part to the number of teen suicides over the past few years in which cyberbullying was alleged to have played a part.

We have heard of cases involving Rehtaeh Parsons in my province of Nova Scotia, Amanda Todd on the west coast, a young man named Todd Loik in Saskatchewan recently, and countless others. It is clearly a case of the worst form of harassment, intimidation and humiliation of young people, which resulted in a feeling of hopelessness, that there was no other way out, and they took their lives.

...

Canadians want to know what we can do to deal with cyberbullying. Questions have been raised about whether the [Criminal Code](#) deals adequately with this type of behaviour and recent technological advances.

Currently, the [Criminal Code](#) can in fact address most of the serious forms of cyberbullying through, for example, existing offences of criminal harassment per [section 264](#), uttering threats per [section 264.1](#) or identity fraud, found in [section 403](#). However, there is no offence in the [Criminal Code](#) that specifically addresses the contemptible form of cyberbullying that has emerged, involving the distribution of sexual images without the consent of the person depicted in that image.

[18] The provision is designed to capture exactly the type of conduct in this case, what is colloquially known as "revenge porn." The Minister described the typical means of committing an offence under [s. 162.1](#) as follows:[\[6\]](#)

It may be useful to better understand how this behaviour typically comes about. It usually begins, in some sense, with a non-criminal context of perfectly lawful, consensual recording of intimate images in a private setting. I specifically set aside any images depicting an underage youth. These images may be subsequently transmitted electronically to a partner, a practice commonly known as "sexting". Upon the breakdown of the relationship, however, one of the known partners may

distribute these images to third parties without the consent of the person depicted in the image. It is now commonly known as “revenge porn.”

[19] The provision captures a broad range of conduct that may constitute sharing. For example, it criminalizes the sending of a single image of an unidentifiable person by text message to a single recipient.<sup>[7]</sup> It also prohibits sharing an image using a social media application with a limited audience capable of viewing the sharer’s account. Finally, as in this case, it includes non-consensual uploading of photos and videos through a more generally accessible medium such as a website.

[20] The provision protects privacy. At its core, privacy is about a person’s ability to control access to something, whether it is private information or a private image. As in this case, someone like C.S. may agree to have private photographs or videos taken that will not be seen by anyone apart from a romantic partner. Where someone shares an intimate image without consent, he violates the depicted person’s privacy because he has gone beyond that limited, consensual use. The more people to whom the image is exposed, the greater the invasion of privacy and the greater the harm caused to the victim.

## VI. Positions of the Parties

[21] It would be an understatement to say that the parties are far apart in their respective positions.

[22] As mentioned above, Ms Prihar, on behalf of the Crown, asked that I impose a six-month custodial sentence; an eighteen-month term of probation; and an order under s. 162.2 prohibiting the offender from accessing the internet for one year.

[23] Ms Prihar cited a number of aggravating factors including the fact that C.S.’s face is visible in many of the photos and at least one of the videos; that her name, age, ethnicity and place of birth are attached to the images; that this was a planned and deliberate act motivated by the desire to humiliate C.S. for ending their relationship; the breach of trust in uploading photos was meant to remain private within the relationship; that the offender expressed a desire to share more content but was prevented only because of upload restrictions; and the devastating emotional impact this has had on C.S. and the continuing harassment she has to endure from strangers who continue to message her.

[24] Ms Prihar acknowledged that a conditional sentence is available in this case but argued that only a custodial sentence would give proper effect to general deterrence and denunciation, which she said ought to be the paramount sentencing principles in this case.

[25] Mr. Kenawy, on behalf of the offender, asked me to impose a conditional discharge with a three-year term of probation. He suggested that, to make the sentence more punitive, the probationary term should contain a six-month period of house arrest, followed by a six-month curfew. He also suggested that the probation order should carry with it a requirement that the offender perform one hundred hours of community service. Mr. Kenawy urged me not to saddle his client with a criminal record because it may affect employment opportunities. Mr. Kenawy said that the offender has recognized that he made a tremendous mistake and that he just wants an opportunity to get back to his everyday life. He said that his client is a productive member of society who committed this offence while dealing with severe depression.

[26] Mr. Kenawy relied heavily on the *R. v. Calpito* case (discussed below) to support his position. He argued that the house arrest and curfew he is proposing as part of the probation order will adequately address general deterrence and denunciation and give effect to the more serious nature of the conduct in this case.

## VII. Sentencing Authorities

[27] Because s. 162.1 is a relatively new provision, there is a dearth of sentencing case law for this offence. The Crown provided me with the only three reported cases that deal with this conduct. Only two of them deal specifically with s. 162.1. The third case involves a charge of criminal harassment that was committed by sharing intimate images. The conduct in this latter case occurred before s. 162.1 was proclaimed into force.

[28] The facts of the three cases are very different than this case. The offenders' conduct in those cases was much less serious than what is before me. The common theme in all three cases is the prominence given to general deterrence and denunciation. The sentencing judges in all three cases found that, in the particular circumstances of those cases, general deterrence and denunciation could be achieved using non-custodial sentences (although in two of the cases, the offenders had served some pre-sentence custody).

### *R. v. Calpito*[8]

[29] The defence relied heavily on the most recent of the three cases, *R. v. Calpito*. In *Calpito*, the offender sent nude photos of the victim to several friends using the social media application, Instagram. As in this case, the victim had taken nude photos of herself and sent them to the offender during their relationship. The twenty-one-year-old offender shared the images because he wanted revenge. He also breached his undertaking not to have contact with the victim.

[30] The sentencing judge, Harris J., imposed a conditional discharge with three years of probation. [9] He noted that the offender repeatedly expressed remorse since being charged and that he appeared to "fully appreciate the impact that [the offence] had on the victim." Harris J. made it clear that deterrence and denunciation were the most important sentencing principles and, in the circumstances, both could be given effect through a strict probation order. The offender's probation included a combination of house arrest and a curfew for the first six months.

### *R. v. P.S.D*[10]

[31] The offender in *P.S.D.* took two photos of the victim, partially clothed, without her consent. He sent the pictures to two friends with instructions to save them and with the intention to cause the victim emotional harm. The pictures were blurry and included portions of the victim's bare breasts. It was also somewhat difficult to recognize the victim in the pictures. The offender had spent sixty actual days in pre-sentence custody.[11]

[32] In suspending the passing of sentence and imposing a two-year term of probation, the sentencing judge described the non-consensual taking of the photos as a rash act. The sentencing judge also considered the "relatively low level of harm" and the offender's positive rehabilitative prospects in finding that a jail sentence was not necessary.

### *R. v. Zhou*[12]

[33] The offender pleaded guilty to one count of criminal harassment. The offender had taken pictures of the victim during their relationship. The offender placed nude and semi-nude pictures of the victim on a public website without her consent, and attached a comment "Rate and what would you do to her, Cum on her pics?" Seven of the photos showed the victim's breasts and four exposed her pubic area. Her face was also visible, although her name was not attached to the photos. The photos were available for two years while the offender and victim were in a relationship. The victim had the photos removed when she learned about them.

[34] The sentencing judge, Ray J., noted that the comment the offender included with the photos was intended to degrade and humiliate the victim. She found that the offender breached the victim's trust by continuing to engage in a relationship with the victim while violating her sexual dignity and privacy rights. Ray J. also found that the offender had been remorseful and candid about what happened from the beginning and that he participated in counselling to gain insight into what he had done. The sentencing judge also noted that there was no evidence of secondary distribution of the images.

[35] Ray J. highlighted the need for general deterrence and denunciation "given the affront to the high value society places on human dignity and privacy within the context of close intimate relationships." She observed that a short period of custody would have been appropriate but that, since the offender had served the equivalent of six days of pre-sentence custody, she would suspend the passing of sentence. The offender was placed on probation for twelve months. As in the previous two cases, the sentencing judge gave primacy to general deterrence and denunciation, particularly because of the deceit and breach of trust involved.

### VIII. Sentencing Principles

[36] The fundamental purpose of sentencing is set out in [s. 718](#) of the *Criminal Code*.<sup>[13]</sup>

**718.** The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce 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 and to the community.

[37] According to [s. 718.1](#) of the *Criminal Code*, the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality is central to the sentencing process. In *R. v. Nasogaluak*, the Supreme Court explained the dual role of restraint and censure that proportionality plays in sentencing offenders:

[42] For one, it requires that a sentence not *exceed* what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused...Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus converge

in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.<sup>[14]</sup>

[38] Section 718.2 sets out a non-exhaustive list of secondary sentencing principles that a court must consider in determining the appropriate sentence. Subsection 718.2(a) states that “a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.” Seven factors are listed under subsection (a). The Crown relied on one of those statutory aggravating factors, namely s. 718.2(a)(iii), that the offender “in committing the offence, abused a position of trust or authority in relation to the victim.”

[39] Finally, ss.718.2(b)-(e) set out the following four sentencing principles:

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

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(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 should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

## IX. Mitigating and Aggravating Factors

[40] The mitigating factors here include the fact that the offender has no criminal record. He has also pleaded guilty to this offence, although as Ms Prihar observed, his is not an early guilty plea, coming about eighteen months after he was charged. Nonetheless a guilty plea is entitled to credit, even if it is not an early plea.

[41] The amount of credit a guilty plea receives cannot be reduced to a formula, but will vary with the circumstances of each case.<sup>[15]</sup> Even where the guilty plea is not a genuine sign of remorse, it is entitled to some credit. As the Court of Appeal stated in *R. v. Faulds*:

The effect of a guilty plea in setting the appropriate sentence will vary with the circumstances of each case. In some cases, a guilty plea is a demonstration of remorse and a positive first step towards rehabilitation. In other cases, a guilty plea is simply a recognition of the inevitable. That is this case. Even where a plea is not a manifestation of genuine remorse, it may still save valuable judicial resources and provide a degree of finality from the perspective of the victims which would not exist without the plea. Those features are present in this case and should be taken into consideration in assessing the appropriate sentence.<sup>[16]</sup>

[42] The offender has not shown a great deal of remorse here. His guilty plea also came in the face of what Ms Prihar observed was a Crown case that included his confession that he uploaded the images. I did not understand Mr. Kenawy to dispute that assertion. However, as explained in *Faulds*, the offender’s guilty plea is entitled to some credit, even in the absence of remorse, because it saves valuable judicial resources and because of the finality it provides to the victim.

[43] There are several aggravating factors in this case. They include the following:

(1) C.S. is clearly identifiable because her face is visible in the pictures and at least one of the videos.

- (2) The offender attached C.S.'s name, age, ethnicity and place of birth to many of the images.
- (3) The offender engaged in a deliberate act motivated by a vengeful intention to humiliate C.S.
- (4) The offender expressed a desire to share more content online and was only prevented from doing so by upload restrictions.
- (5) The offence has had a devastating emotional impact on C.S. and she continues to face harassment from strangers.
- (6) This offence involved a breach of trust, because the offender uploaded images taken within an intimate relationship.

[44] Ms Prihar referred to the breach of trust as a statutorily aggravating factor under s.718.2(a)(iii). Strictly speaking, the conduct here does not fall squarely within the statutorily aggravating breach of trust described in s.718.2(a)(iii) because when the offender committed the offence he was no longer in a position of trust. Nonetheless, it does constitute a breach of C.S.'s trust that I find to be an aggravating factor. The *Criminal Code's* list of sentencing factors does not purport to be exhaustive. The images were created consensually in the context of a romantic relationship. C.S. believed that the images would not be shared beyond that relationship. It is no surprise that C.S. said "I will never trust anyone again."

[45] The aggravating factors here are significant. On the spectrum of conduct captured by s.162.1, the offender's falls at the high end.

## **X. The Appropriate Sentence**

### **A. Conditional Discharge**

[46] I will deal first with the offender's request that he receive a conditional discharge with a punitive three-year probationary term. He relied strongly on *Calpito* in support of his submission. I cannot accept the offender's request for a conditional discharge.

[47] The offender's reliance on *Calpito* is misplaced. The offender in *Calpito* shared the images with a group of people using Instagram. Harris J. was also satisfied that the twenty-one-year-old offender fully appreciated the impact his actions had on the victim, had attended counselling after the offence, and was open to attending further counselling.

[48] I have nothing before me that suggests the offender truly understands the impact this crime has had on C.S., apart from representations by his lawyer. Even taking that assertion at face value, I am not satisfied it demonstrates a very deep appreciation of the harm that he has caused. Indeed, in the offender's statement to the court, the first thing he mentioned was C.S.'s alleged infidelity and that she had been physically abusive towards him. Although he said he is "one hundred percent sorry," I have nothing before me that would suggest he appreciates just how seriously this crime affected C.S. His statement to the court speaks volumes about his attitude towards the offence and the degree of his remorse.<sup>[17]</sup> He mentioned himself. He did not mention C.S. I should also mention that whether C.S. was unfaithful or physically abusive is irrelevant, and does not justify uploading private images of her for the world to see.

[49] Moreover, the offender did not simply send a few images to a small group of people as did Mr. Calpito. He shared the images with the world. He chose to put them on more than one website, ostensibly to increase their availability. He included C.S.'s name, age, ethnicity and place of birth.

His conduct was far more blameworthy and caused more harm than occurred in *Calpito*. In *Calpito*, Harris J. specifically referred to the absence of circumstances that would have made the offence more aggravating.

85 I note the absence of circumstances that would be even more aggravating. Mr. Calpito posted the photographs once only. He circulated them amongst a rather small number of people. [The victim] was naked in the photographs but she was not involved in any sexual acts.

[50] All of the aggravating circumstances that were notably absent in *Calpito* are present here.

[51] A conditional discharge for the offender's conduct would be manifestly unfit, contrary to the public interest, and grossly disproportionate to his conduct and blameworthiness.

## **B. Suspended Sentence**

[52] For the same reason, I find that a suspended sentence, even with the maximum period of probation and community service, would not satisfy the fundamental principle of proportionality. It would not give proper effect to the principles of general deterrence and denunciation that should be paramount for this offence.

[53] A probation order is intended principally to focus on rehabilitation and the offender's reintegration into the community. It is not meant to fulfil the goals of general deterrence and denunciation. The following passage from *R. v. Taylor*,<sup>[18]</sup> adopted in *R. v. Proulx*,<sup>[19]</sup> explains the goals of sentencing that a probation order can, and cannot, fulfill:

Apart from the wording of the provision, the innate character of a probation order is such that it seeks to influence the future behaviour of the offender. *More specifically, it seeks to secure "the good conduct" of the offender and to deter him from committing other offences. It does not particularly seek to reflect the seriousness of the offence or the offender's degree of culpability. Nor does it particularly seek to fill the need for denunciation of the offence or the general deterrence of others to commit the same or other offences.* Depending upon the specific conditions of the order there may well be a punitive aspect to a probation order but punishment is not the dominant or an inherent purpose. It is perhaps not even a secondary purpose but is more in the nature of a consequence of an offender's compliance with one or more of the specific conditions with which he or she may find it hard to comply. [Emphasis added]

[54] Given the primary role that general deterrence and denunciation should play in sentencing for this offence, a suspended sentence and probation would not be appropriate. This is not a case like *P.S.D.* where the court described the conduct as a "rash act." Nor is this case like *Zhou*, where the offender demonstrated his understanding of the impact of his crime and was deeply remorseful.

[55] The offender's conduct in this case was extremely serious. I do not consider the offender's circumstances, nor the circumstances of his offence, similar to those in any of the three sentencing authorities to which I have referred. As mentioned above, on the spectrum of conduct proscribed by s. 162.1, it is clearly at the high end for its harmfulness and blameworthiness. It is difficult to imagine a more significant breach of C.S.'s privacy than occurred here. The offender set out to degrade and humiliate her. He ensured that her identity was attached to the images, meaning an internet user could find them unintentionally simply by searching her name.

[56] In my view, only a sentence of imprisonment would be proportionate to the gravity of this offence and would properly give effect to general deterrence and denunciation. In fact, I find it difficult to believe that anything other than a sentence of imprisonment could properly give effect to

deterrence and denunciation in circumstances where intimate images are disseminated over the internet and where the victim is identifiable.

### C. Conditional Sentence vs Custodial Sentence

[57] Given the summary election by the Crown, any sentence I impose will necessarily be below two years. Indeed, even if the Crown had proceeded by indictment, this offence would not have warranted a penitentiary sentence. Consequently, I must consider whether a conditional sentence is appropriate.

[58] There are five pre-conditions for the imposition of a conditional sentence.

- (1) The offender must be convicted of an offence that is not specifically excluded (e.g. sexual assault, when prosecuted by indictment).
- (2) The offender must be convicted of an offence that is not punishable by a minimum term of imprisonment.
- (3) The court must impose a sentence of imprisonment that is less than two years.
- (4) The safety of the community would not be endangered by the offender serving the sentence in the community.
- (5) The conditional sentence must be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[59] This case meets the first four pre-conditions. The real issue is whether a conditional sentence meets the fifth pre-condition -- whether it is consistent with the fundamental purpose and principles of sentencing.

[60] A conditional sentence can meet the objectives of deterrence and denunciation. The Supreme Court emphasized in *Proulx* that a conditional sentence is a “punitive sanction capable of achieving the objectives of deterrence and denunciation.”<sup>[20]</sup>

[61] In deciding whether to impose a conditional or custodial sentence I am also mindful of the principle set out in s. 718.2(d) that “an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances.” Further, s. 718.2(e) provides that “all available sanctions other than imprisonment<sup>[21]</sup> that are reasonable in the circumstances should be considered for all offenders.” Finally, because I am dealing with a first offender who has pleaded guilty, I must impose a sentence that recognizes the prospect of his rehabilitation.

[62] It is difficult to overstate the seriousness of this offence. The offender deliberately set out to violate C.S.’s privacy in a most obscene and far-reaching way. He did so, motivated by revenge, with the intent to degrade and humiliate her.

[63] The devastating impact this offence has on its victims is undeniable. It was recognized by the Minister of Justice when this legislation was introduced in Parliament, in the comments quoted above. It is set out in the victim impact statements from the sentencing authorities to which I have referred.

From *Zhou*:<sup>[22]</sup>

I sat in my chair frozen in disbelief...There was no way I could make the 1,300 people who viewed the thread “unsee” my naked underage body. There was no way I could erase the images off of the computers of the people who downloaded them. There was no way I could prevent these images from surfacing in the future and destroying my career and life that I have worked so hard to build. I have never felt more violated, belittled, and vulnerable.

From *Calpito*:[\[23\]](#)

He has shared my body with the entire world. Friends, colleagues, classmates, people who I interact and see everyday of my life....Honestly it's hard to gain trust in anyone because of my experience with him. I am very closed off; my self-esteem has gone down. I have limited trust in new relationships with new people including my new boyfriend

[64] As I have described above, the harm to C.S. is both significant and long-lasting. The following excerpts from C.S.'s victim impact statement spell out the indelible effect that this offence has had on her.

I gathered myself and did a Google search of my name. The results were shocking, plastered all over the first, second and third pages of Google were links, images and screenshots of the videos [the offender] had uploaded. In that moment I felt as if despair had a limit then I had found it.

...

To this very day I feel betrayed, I can't wrap my mind around the idea that someone I loved so much could do something like this.

...

To this very day I'm afraid to Google my name, knowing that I will see the very things that I don't want to see. Who I am, who I wanted to be, I don't think I can be any of that anymore, if people Google my name they won't see my achievements or strides I have made professionally, but instead videos and pictures that would make any potential employer disregard my application.

I will never trust anyone again. I know this will affect any sort of relationship I will ever have with my family and friends, everyday will be a struggle because I'm afraid of what people have seen and what they think of me. I just want my freedom and life back. It did not deserve to be snatched away because I loved the wrong person. Maybe one day I'll be okay, but not today.

[65] Uploading intimate images into the public domain clearly has lasting effects on victims. There is a popular saying that “the internet never forgets.” C.S.'s images became available as torrents. That means they remained available to others even though the offender removed them from the websites to which he had originally uploaded them. There is no way to know how many people have access to the images. Every time someone views one of these images, C.S.'s privacy and dignity are violated. C.S. must live with the knowledge that strangers anywhere in the world may view her private images whenever they choose to. She has lost control over a very private part of her life forever. She faces the potential violation of her privacy, by total strangers, in perpetuity. To add insult to injury, the messages she continues to receive from strangers act as a constant reminder of the invasion of privacy that the offender has caused her.

[66] Considering these significant aggravating factors, a conditional sentence would not be proportionate to the gravity of this offence, nor would it adequately fulfill the principles of general deterrence and denunciation. This is the type of case referred to in *Proulx* where the aggravating factors make the punitive objectives of denunciation and deterrence pressing enough to require a

custodial sentence.[24] To put it bluntly, I find it hard to believe that facing the prospect of house arrest would deter someone, like the offender, who is considering humiliating his former partner on the internet. I also find it hard to believe that a period of house arrest can express adequate denunciation of this extremely serious breach of C.S.'s privacy.

#### **D. The Proper Length of a Custodial Sentence**

[67] Having determined a conditional sentence is not appropriate, I must determine the length of custodial sentence that should be imposed in this case. Once again, I am mindful of the principles of restraint set out in ss.718.2(d) and (e) of the *Criminal Code*. I am also mindful of the related principle that a first sentence of imprisonment must be as short as possible while fulfilling the goals and principles of sentencing.

[68] The maximum sentence for this offence, when prosecuted by indictment, is five years imprisonment. Because the Crown elected to proceed summarily in this case, the maximum sentence the offender can receive is six months imprisonment.

[69] The aggravating factors, which I have described at length already, favour a significant jail sentence. Again, I stress that this is an egregious example of the conduct captured by s. 162.1. Short of having uploaded stolen images from a hacked server, or uploading the images of several victims at once, it is difficult to imagine a more serious way of committing this offence or a more significant violation of privacy.[25]

[70] The summary election by the Crown caps the maximum sentence I can impose at six months. Had the Crown proceeded by indictment in this case, I would have considered a sentence in the range of nine to twelve months to have been appropriate after a trial.[26] Had the offender not pleaded guilty in this summary conviction proceeding, I would have imposed the maximum six-month sentence and the maximum period of probation. Again, I will not repeat all the aggravating features of this offence and the significant harm caused to the victim that lead me to that conclusion.

[71] Therefore, I find that the appropriate custodial sentence in this case is one of five months. This gives the offender some credit for his guilty plea, but not more than it deserves. This sentence is also not so long that it crushes any prospect of the offender's rehabilitation. At the same time, it gives effect to the degree of censure required for this offence. It is proportionate to the gravity of the offence and the degree of the offender's responsibility.

#### **E. Probation Term**

[72] The Crown seeks an eighteen-month probation term. A probation order is a useful rehabilitative tool. However, a lengthy probation order is not necessary in this case, and in light of the guilty plea, I am willing to shorten it. I am satisfied that a twelve-month period of probation is sufficient. As part of that probation order I will also add a term requiring that the offender perform sixty hours of community service. The additional conditions are listed at the end of the judgment.

#### **F. The Internet Prohibition Order**

[73] Although offences such as this should normally attract an internet prohibition order, I am not ordering one in this case, particularly in light of the offender's guilty plea. Such a condition would be overly punitive. As the Court of Appeal observed recently, internet prohibition orders carry with them a significant impact on an offender's life.

[24] In modern life, at least some form of access to the Internet is simply unavoidable for innocent purposes such as accessing services and finding directions. In many homes the telephone operates using the Internet, rather than traditional telephone wires. Simply placing a phone call from one such residence would put the appellant in breach of the s. 161(1)(d) order. Further, as Karakatsanis J. stated in *K.R.J.*, at para. 54, “depriving an offender under s. 161(1)(d) of access to the Internet is tantamount to severing that person from an increasingly indispensable component of everyday life”. Internet is used for such commonplace activities as shopping, corresponding with friends and family, transacting business, finding employment, banking, reading the news, watching movies, attending classes and so on.

[25] While I acknowledge, as noted by the Crown, that the court has the power to vary a s. 161 order on application of the offender or prosecutor, such a variation requires a change of circumstance and imposes a significant burden on the offender. Variation of prohibition orders under s. 161(3) is not a matter of course but requires a full hearing. The fact that s. 161 orders may later be varied does not justify imposing orders that create overbroad or unreasonable restrictions on an individual’s liberty.[27]

[74] A prohibition in this case could also hamper the offender’s ability to take part in activities required for his rehabilitation. He would be unable to answer online employment ads, or communicate by email with anyone. A prohibition order in these circumstances would be excessive.

## **XI. Conclusion**

[75] The offender is sentenced to five months imprisonment.

[76] After he serves his jail sentence he will be on probation for twelve months. In addition to the statutory terms, I add the following terms:

- (1) The offender will report in person to a probation officer within five (5) working days of his release from custody and after that at all times and places as directed by the probation officer or any person authorized by a probation officer to assist in your supervision.
- (2) He must not contact or communicate in any way, directly or indirectly, by any physical, electronic or other means with C.S;
- (3) He must not be within fifty (50) metres of any place that he knows C.S. to live, work, go to school, frequent, or any place that he knows her to be.
- (4) He must attend and actively participate in all assessment counselling or rehabilitative programs as directed by the probation officer and complete them to the satisfaction of the probation officer.
- (5) He must perform sixty (60) hours of community service work on a rate and schedule to be directed by the probation officer but must be completed within six (6) months of the start date of the order.

[77] I am also making an order s.743.21 of the *Criminal Code*, prohibiting the offender from having contact with C.S. while he serves his jail sentence.

**Released: May 16, 2017**

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Justice M. M. Rahman

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[1] I delivered reasons orally on May 12, 2017 and omitted certain portions of the judgment, such as quotations, for the sake of time. I explained that I would release my reasons in writing with those additional portions, and subject to stylistic and grammatical editing. This written version takes precedence over the oral reasons in the event of any discrepancy between the two.

[2] I accept Mr. Kenawy's provision of this information pursuant to s. 726.1 of the *Criminal Code*.

[3] S.C. 2014, c.31, s.3. The *Act* came into force three months after it received royal assent on December 9, 2014.

[4] I refer to the Parliamentary statements to provide some context for this relatively new provision. Given the dearth of sentencing authorities for this relatively new provision, it is important to understand the context for its enactment.

[5] Canada. Parliament. House of Commons. *Debates*, 41<sup>st</sup> Parliament, 2<sup>nd</sup> Session, 2013-2015, vol. 147, No.25, November 27, 2013. Ottawa: Canadian Government Publishing, 2013.

[6] *Ibid.*

[7] Arguably, the term "makes available" would not even require electronic transmission of the image but could be accomplished by one person passing her smartphone with the image to another person and allow them to look through the images.

[8] *R v. Calpito*, 2017 ONCJ 129 (CanLII).

[9] The defence had sought a conditional discharge with nine months of probation. The Crown had asked the trial judge to impose a six-month conditional sentence.

[10] *R. v. P.S.D.*, 2016 BCPC 400 (CanLII).

[11] It is unclear to what extent the sentencing judge took the pre-sentence custody into account in fashioning the sentence.

[12] *R. v. Zhou*, 2016 ONCJ 547 (CanLII).

[13] The *Canadian Victims Bill of Rights Act* amended ss. 718 and 718.2(e). The *Act's* transitional provisions state that the amendments only apply to conduct that occurred before the *Act's* proclamation on July 23, 2015. I am including the pre-amendment provisions in force at the time these offences were committed.

[14] *R. v. Nasogaluak*, 2010 SCC 6 (CanLII) at para. 42.

[15] *R. v. Daya*, 2007 ONCA 693 (CanLII) at para. 15.

[16] *R. v. Faulds* (1994), 1994 CanLII 770 (ON CA), 20 O.R. (3d) 13 (C.A.) at para. 14.

[17] A sentencing judge may assess the genuineness of offender's remorse during his allocution: see *R. v. Mulligan-Brum*, 2013 BCCA 231 (CanLII) at para. 20-23.

[18] *R. v. Taylor* (1997), 1997 CanLII 9813 (SK CA), 122 C.C.C. (3d) 376 (Sask. C.A.).

[19] *R. v. Proulx*, 2000 SCC 5 (CanLII) at para. 32.

[20] *Proulx*, *supra* at para 22.

[21] Although a conditional sentence is a sentence of imprisonment, for the purposes of s. 718.2(e), the Supreme Court defined "imprisonment" as "incarceration" see *Proulx*, *supra* at para. 95.

[22] *Zhou*, *supra* at para. 3.

[23] *Calpito*, *supra* at para 51.

[24] *Proulx*, *supra* at para. 114 "Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable


sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence.”

[25] Indeed, it is arguable that the offender’s breach of C.S.’s trust in this case is as serious as stealing images from a victim.

[26] I arrive at this range of sentence having regard to the maximum sentence for this offence and where this offender’s conduct falls within the range of conduct captured by the provision.

[27] *R .v Brar*, 2016 ONCA 724 (CanLII).

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