2015 ABCA 182
Alberta Court of Appeal

R. v. Alcorn

2015 CarswellAlta 948, 2015 ABCA 182, [2015] A.W.L.D. 2473, [2015] A.W.L.D. 2475, [2015] A.W.L.D. 2484, [2015] A.J. No. 583, 123 W.C.B. (2d) 84, 323 C.C.C. (3d) 444

Her Majesty the Queen, Respondent and Steven Edward Alcorn, Appellant

Jack Watson, Patricia Rowbotham, Russell Brown JJ.A.

Heard: May 4, 2015
Judgment: June 1, 2015
Docket: Calgary Appeal 1401-0319-A

Counsel: M. Dalidowicz, for Respondent
L.S. Faught, for Appellant

Subject: Criminal; Property

Headnote

Criminal law --- Sentencing — Evidence

Accused pleaded guilty to cruelty to animal, assault and breach of recognizance — Accused was sentenced to 24 months' imprisonment together with 3 years' probation — Accused appealed sentence — Appeal dismissed — It was error on part of sentencing judge to rely on expert reports as basis for description of animal cruelty and assault counts — There was major amplification in character and in particulars of those offences in relation to actus reus and mens rea — Judges are expected to consider pre-sentence reports or similar material placed before them but reports may paint inaccurate or confused picture — Accused should not have been sentenced for his mental disorders, however this was not case where mental disorder was operative as mitigating factor — Sentencing judge's error was significant, but was error of wrong reasoning and interfering with sentence ordered was not justified.

Criminal law --- Offences — Assault — Common assault — Sentencing — Adult offenders — Spouse or partner

Accused pleaded guilty to cruelty to animal, assault and breach of recognizance — Accused was sentenced to 24 months' imprisonment together with 3 years' probation — Accused appealed sentence — Appeal dismissed — There was no error in 3 month sentence imposed for assault conviction — Sentence was grounded in intimate relationship between parties which brought into consideration parliament's policy statement about domestic violence — Accused grabbed complainant by hair and neck when she rebuffed him, this was not minor even if no consequential harm ensued.

Criminal law --- Offences — Cruelty to animals — Killing, injuring or endangering animals other than cattle — Sentencing

Accused pleaded guilty to cruelty to animal, assault and breach of recognizance — Accused admitted that he obtained cat in order to cut its throat as part of sexual ritual — Accused was sentenced to 24 months' imprisonment together with 3 years' probation — Accused appealed sentence — Appeal dismissed — Twenty month prison term and three years' probation was substantial sentence for cruelty to animal but was not excessive or unfit — Accused's motive of self-gratification, sadism inherent in his methodology and degree of pre-meditation and planning involved called for denunciatory and deterrence sentence — Objective of deterrence should not be set aside merely because court was unaware of prevalence of specific offence — Actions which are vicious, cruel or sexually motivated should be deterred whether or not animals are involved.

Table of Authorities

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Statutes considered:

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

s. 145(3) — pursuant to

s. 266 — pursuant to

s. 445.1 [en. 2008, c. 12, s. 1] — considered

s. 445.1(1)(a) [en. 2008, c. 12, s. 1] — pursuant to

s. 447.1(1) [en. 2008, c. 12, s. 1] — considered

s. 687 — considered

s. 718.1 [en. R.S.C. 1985, c. 27 (1st Supp.), s. 156] — considered

s. 718.2 [en. 1995, c. 22, s. 6] — considered

s. 718.2(a)(ii) [en. 1995, c. 22, s. 6] — considered

s. 726.1 [en. 1995, c. 22, s. 6] — considered

s. 732.2(3) [en. 1995, c. 22, s. 6] — referred to

s. 732.2(4) [en. 1995, c. 22, s. 6] — referred to

APPEAL by accused from sentence imposed on convictions for cruelty to animal, assault, and breach of recognizance.

***The Court*:**

I Introduction

1 The appellant challenges his total sentence of imprisonment of 24 months together with 3 years of probation. He pleaded guilty to three counts: (1) cruelty to an animal under s 445.1(1)(a) of the *Criminal Code* (20 months imprisonment followed by 3 years' probation); (2) assault of ND under s 266 of the *Criminal Code* (3 months consecutive); and (3) breach of recognizance under s 145(3) of the *Criminal Code* (1 month consecutive). The Crown elected to proceed by indictment on all of the counts. The appellant had spent 67 days in pre-sentence custody for which the sentencing judge gave him credit at the rate of 1.5 to 1.

2 The sentencing judge specified a detailed list of conditions of probation. In addition, the sentencing judge made an order pursuant to s 447.1(1) of the *Criminal Code* prohibiting the appellant from owning, having the custody or control of, or residing in the same premises as an animal or bird.

II Circumstances of the Offences

3 When the appellant entered his pleas, he stipulated to the following facts. As regards the animal cruelty count:

> CROWN COUNSEL: The matter — the other matter, Sir, was a matter that occurred on the 15th of — of September 2012. This, again, was a situation when they were a couple. They had — they had spoken about a matter dealing with a cat. They were able to obtain a cat on Kijiji. The cat was brought back to the residence that they shared. It was kept there for a — a couple of days.
>
> On the particular day in question, they — they again were going to engage in sexual-type activity. The cat was strung up by its back legs over a rafter in the garage. A tarp was put down on the floor. Ms.[ND] the — the — was compliant.

> She was down on the floor on all fours and Mr. Alcorn cut the cat's throat and the cat bled on Ms. [ND] and was part of a sexual ritual. As a result of that the cat did die and the — therefore, the charges before the court.
>
> DEFENCE COUNSEL: That's admitted, Sir. [AB 4/2-15]

4 The assault offence occurred in the context of an ongoing intimate relationship between the appellant and ND. It took place several months after the animal cruelty offence.

> CROWN COUNSEL: Sir, dealing with the facts, the assault occurred on the 11th of December 2012. Mr. Alcorn and his on-again/off-again girlfriend, [ND] were at her — her place. Mr. Alcorn had been drinking. Apparently he was drinking vodka, straight vodka. They were at the place, got into an argument and then decided they would go to bed together. They went to bed together. They both fell asleep.
>
> At some point in town — time, she woke up to found that — find that he was behind her and was — was playing with her, trying to engage her in sexual activity. She pushed him away at this point. He grabbed her hair and placed his hand on her neck and squeezed it. She was able to push him away and they both fell back to sleep. And that matter was not reported to the police directly until the 14th of December. Those are the basis — that's the basis of that assault.
>
> DEFENCE COUNSEL: And the facts pertaining to the assault are admitted. [AB 3/24-39]

5 The appellant was assessed by two psychiatrists. Dr. Kenneth Hashman prepared a pre-trial fitness assessment dated March 4, 2013 and Dr. Meghan Davis prepared a post-plea forensic assessment on October 17, 2014. There was also a pre-sentence report prepared on April 29, 2014.

6 The appellant's first ground of appeal relates to the sentencing judge's use of Dr. Hashman's report as a basis for determining the circumstances of the offences. In effect, the appellant's position is that he was sentenced for crimes he did not commit.

7 In addition, the appellant contends that the opinions of Dr. Hashman and Dr. Davis may have been influenced in part by their understanding of the facts. As a consequence, the appellant urged the sentencing judge and this court to be wary of the content of those reports insofar as they may have been influenced by their understanding of the circumstances. There is force in this submission.

8 However, we note that counsel for the appellant at the trial level did not dispute that her client admitted to being a "sexual deviant" [AB 56/35-38]. Counsel there submitted that "not a lot of weight should be given to the October 17th report for the simple reason that it relied heavily on the March 4th of 2013 report" [AB 56/9-11]. Counsel submitted that the pre-sentence report was the most reliable source of assessment of the appellant's background out of all three of the reports. At sentencing, however, the appellant's counsel did not dispute the conclusions of Dr. Hashman and Dr. Davis concerning the appellant's mental state. Counsel's submissions there were to the effect that the appellant made significant progress (despite an alcohol abuse problem since age 11) while the proceedings were pending. Before this Court, the appellant's counsel also did not dispute the diagnostic conclusions of Dr. Hashman and Dr. Davis.

9 We agree with the appellant that it was an error on the part of the sentencing judge to rely on Dr. Hashman's report as the basis for his description of the animal cruelty and assault counts. The degree of error concerning the assault count is more pronounced than it is for the animal cruelty count but both are significant. A correct assessment of the gravity of the offence and the degree of responsibility of the offender under s 718.1 of the *Criminal Code* for both the animal cruelty and assault offences was therefore undermined. As regards the third count, however, it cannot be said that Dr. Hashman's report taints the sentence imposed for the breach of recognizance given the nature of the report's contents.

10 As noted below, the Crown argues that the errors were harmless. As to the assault count, the Crown says the sentence accorded with assault *simpliciter* as an offence and was markedly below the bottom of the range which would have been applicable if the facts alleged in Dr. Hashman's report on that count governed. As to the animal cruelty count, the Crown says

the variances were matters of degree and that, again, the ultimate sentence fit the agreed facts and thus was not clearly unfit by being based on a distorted understanding of the facts.

11 The error was serious in relation to both counts. There was a major amplification in character and in particulars of those offences on the *actus reus* side and there was concomitant increase in the moral culpability on the *mens rea* side relating to them. In our view it is not safe to assume that the major differences did not influence both the sentencing judge and the experts. We are therefore required to consider entirely afresh what would be fit sentences for the appellant for the offences to which he entered guilty pleas.

12 For present purposes, therefore, we use the agreed facts set out above.

13 The matter of sentencing was put over to obtain a pre-sentence report and a forensic assessment report. There were a number of adjournments for the preparation of reports and, in the meantime, the appellant had committed the offence on the count of breach of recognizance on March 25, 2014. Following a further series of adjournments the fact of his breach of recognizance was revealed and the guilty plea was taken on the following agreed facts:

> CROWN COUNSEL: Thank you.
>
> With respect to the matter where the plea was just entered the facts are as follows. The accused was on release on March 25th of 2014 for the other matters that are before the Court today with one of the conditions that he carry his release documents and produce them on demand to a peace officer or surveillance officer. On that date he was found at a C - train station and he was checked for proof of fare. He wasn't able to produce that and at that time it was found that he was on this release. He was asked for his release documents, could not produce them. He did not have them on — in his possession. Those are the circumstances the Crown is alleging.
>
> DEFENCE COUNSEL: That's admitted, Sir, he did not." [AB 33/16-17]

III Circumstances of the Appellant

14 The sentencing judge found that the appellant's moral blameworthiness respecting the animal cruelty offence was "at the extreme high end". While that characterization must now give way since it was applied on an inaccurate fact platform, we are forced to say that, even on the agreed version, there was a very troubling element of planning and a startling level of indifference to a sentient animal all contained within a deviant context. The cat was acquired a few days before the offence. There was a tarp laid down. The cat was strung up, and then cut and allowed to bleed to death while the appellant and his female partner were having sexual intercourse underneath. The appellant admitted to Dr. Hashman that he found the suffering and death of the cat to be sexually arousing. (Appellant's Factum, p 12, para 43.)

15 There is no dispute regarding the content of statements made by the appellant to the experts. Nor is there a dispute as to the combination of mental disorders diagnosed from the interview with the appellant and from testing procedures applied to him. We are satisfied, therefore, that what is extricable from the reports can be properly included as part of relevant circumstances of the appellant as an offender before the Court. The appellant's counsel concedes that the medical opinion findings included; (1) sexual sadism; (2) paraphilic disorder (not otherwise specified), (3) antisocial personality traits, and (4) alcohol abuse and poly-substance abuse. (Appellant's Extracts (AE) - Dr. Hashman, A18/ Report, p 13; see also appellant's Factum, p 12, para 42.)

16 In Dr. Hashman's report there are a number of quotations from the appellant, including his assertion that he had "exaggerated" his situation in order to gain access to hospital. Dr. Hashman did not detect remorse. Rather he noted some anger towards the female for calling the police and making false allegations. The appellant's counsel at the hearing before this Court explained that the appellant's attitude had been initially grounded in his perception of her as a party to the animal cruelty offence, and that he later accepted his own culpability, demonstrating that fact by entering his guilty pleas.

17 Dr. Hashman also noted that the appellant's "thought content revealed multiple paraphilic fantasies including sexual sadism, necrophilia and torturing animals" as well as alcohol related blackouts. The appellant is reported to have said that he was having

"bizarre sexual fantasies and sadistic thoughts that 'are causing problems as he is starting to act on them more'." Nonetheless, the appellant did not manifest any "acute disturbance of mood, anxiety or psychosis (impaired contact with reality)." (AE - A8 / Report p 3, para 4).

18 Dr. Hashman referred to a psychological assessment performed by Dr. Nancy Remington. Dr. Hashman described the appellant's "sexual preferences, fantasies and behaviours in a matter of fact manner, similar to that observed during the video recorded police interview" (AE - A8 / Report, p 3, para 6). Dr. Hashman also described other aspects of the "very forthcoming" remarks of the appellant to him (AE — A9 / Report p 4, para 6).

19 Dr. Hashman also summarized the results of various tests including; (a) Wide Range Academic Test IV (WRAT-IV); (b) Test of Memory Malingering (TOMM); (c) Minnesota Multiphasic Personality Inventory (MMPI-II-RF); (d) Personality Assessment Inventory (PAI); (e) Millon Clinical Multiaxial Inventory-III (MCMI-III) and (f) Multiphasic Sex Inventory (MSI-II). He referred to elements of the appellant's history and things the appellant had said to others. Dr. Hashman noted that the appellant had awareness but based on his statements there were "escalating sexually deviant behaviours combined with a lack of empathy and remorse for his actions and the disinhibiting effects of alcohol" (AE — A19, Report, p 14).

20 We hasten to add that there is a large body of unadmitted material in Dr. Hashman's report which is not given any weight here. We emphasize that we only have regard to the diagnostic conclusions noted above.

21 Nineteen months later the report of Dr. Davis was provided. Properly, that report also identifies its sources. A large number of those sources must be discounted because they emanate from police officers and police reports, and from the report of Dr. Hashman. The testing by Dr. Remington and a psychosocial assessment by Daphne Buffet, plus records from Alberta Health Services are also mentioned. This Court has not received this material and thus cannot evaluate it, although the appellant did not challenge those materials.

22 For her assessment, Dr. Davis did not have some of the testing repeated, although she did have a PAI done again. She also arranged for testing, that being related to spousal violence and testing for future sexual violence. Dr. Davis personally interviewed the appellant on three occasions — February 18, 2014, March 10, 2014 and April 7, 2014. Her diagnostic impressions also were for: (1) sexual sadism; (2) paraphilic disorder (several types); (3) alcohol use disorder (in sustained remission); (4) cocaine use disorder (in sustained remission) and (5) antisocial personality disorder. She opined that the appellant's risk of recidivism was escalated if his substance abuse reached problematic levels again. She had other treatment recommendations.

23 The pre-sentence report provides a substantial body of self-reported information about the appellant's background and his most recent intimate relationship. The appellant's counsel did not stress individual aspects of the report, but contended that the overall effect humanized the appellant and to some extent explained how he got to where he was. In submissions to the sentencing judge, counsel emphasized one aspect of the pre-sentence report referring to the "subject's counselor Greg Ballendine" having advised Ms. Khan as follows:

> .....The subject has made significant progress while in treatment. He indicated the subject attended weekly treatment sessions for the first few months and then was reduced to biweekly sessions, and most recently to monthly ones. Greg noted the subject worked on learning life skills, appreciating consequences to his actions, taking responsibility, anger managements, and issues surrounding sexual normalcy. Greg believes the subject would benefit from ongoing treatment at this time.

24 The appellant has been in custody since sentencing. No more recent information was provided.

25 Distilling all of this material to the agreed essentials, it is evident that the appellant suffers from disorders which influence his conduct, and which manifested themselves in his offences. The appellant appears to be reasonably intelligent and to be able to co-operate with expert interventions. He has shown a willingness to provide information even though to his knowledge it cast him in a negative light. He also appears to be quite able to control his behaviour, such as to have numerous interpersonal relationships and to accommodate himself to strictures imposed on him. He appears to have been compliant, even constructive,

in the engagements while the case was pending before the Court. His efforts to regulate his substance abuse issues speak in his favour. In addition, the appellant did not have a criminal record prior to these convictions.

IV Discussion

26 As noted above, the first ground of appeal is that the sentencing judge effectively sentenced the appellant for worse crimes than he admitted. This ground has substance even though the Crown would submit otherwise. Unfortunately, it would appear that due to the significant gaps in time between appearances on this matter, the sentencing judge turned for assistance as to what the facts of the offences were to the summaries of those offences as contained in the expert reports that he had been provided with by consent of counsel.

27 We reject the Crown submission that the fact that the provision of the reports to the sentencing judge was unopposed by counsel for the appellant effectively amounts to either; (a) an admission of all their content or; (b) a waiver of any objection to their content. Numerous examples in various corners of the law can be cited for the principle that consensual admissions of expert opinion records can often be considered conditional, even if the conditions are unspoken. A gate-keeping function still rests with the trial judge. Such conditional admissions do not automatically constitute a blanket waiver or admission, nor do they enjoin the ability of a party to challenge the opinion thus offered (even if belatedly): see generally *R. v. Sekhon*, 2014 SCC 15 (S.C.C.) at paras 43 to 48, [2014] 1 S.C.R. 272 (S.C.C.); *R. v. Jacobs*, 2014 ABCA 172 (Alta. C.A.) at paras 54 to 68, (2014), 577 A.R. 3 (Alta. C.A.); *Blake v. Dominion of Canada General Insurance Co.*, 2015 ONCA 165 (Ont. C.A.) at paras 53 to 62, [2015] O.J. No. 1218 (Ont. C.A.); see also, generally, *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 (S.C.C.) at paras 103 to 111, [2015] S.C.J. No. 16 (S.C.C.). This is not to say that real consent by all parties might not be express or inferred to the content, scope or flavour or opinion evidence reports in different circumstances. But that is not this case.

28 The error by the sentencing judge is easily explained on this record. This Court has previously commented on the undesirability of criminal proceedings being segmented and churning over extended periods, having regard in particular to risks of distortion of the fact-finding process: see eg *R. v. Kristensen*, 2010 ABCA 37 (Alta. C.A.) at para 21, (2010), 251 C.C.C. (3d) 372 (Alta. C.A.). The case at bar was not a situation where by operation of the *Criminal Code* a form of 'supervision over time' was authorized where a series of reports are created and received by consent: compare *R. v. McDonald*, 2015 ABCA 108 (Alta. C.A.) at paras 30 to 33, [2015] A.J. No. 303 (Alta. C.A.). We are satisfied that the sentencing judge was labouring under a misapprehension caused by the passage of time.

29 Counsel can be of great assistance to the sentencing judge to avoid this sort of problem. It should be no surprise that a sentencing judge might infer from receipt of a report presented by consent that factual assertions in it (even if otherwise subject to objection) are not in dispute: see eg *R. c. Lemonnier*, 2014 QCCA 1492, [2014] Q.J. No. 8206 (C.A. Que.), leave denied, (2015), [2014] S.C.C.A. No. 440 (S.C.C.). Indeed, a judge is expected to consider a pre-sentence report or similar material placed before the judge under s 726.1 of the *Code*: see eg *R. v. Virani*, 2012 ABCA 155 (Alta. C.A.) at paras 11 to 14, (2012), 524 A.R. 328 (Alta. C.A.). But reports may paint an inaccurate or confused picture: see eg *R. v. Gnam*, 2013 ABCA 254, 556 A.R. 12 (Alta. C.A.).

30 Accordingly, counsel must take responsibility for reports given to sentencing judges in difficult cases — for that matter, in all cases, particularly as to matters of moral culpability on the part of the offender. To be sure, sentencing judges are not bound to interpret or characterize the evidence provided to them, or its implications, in precisely the same way as counsel do, whether or not there is a joint submission by counsel on the topic: see eg *R. v. Johnson*, 2010 ABCA 392, 265 C.C.C. (3d) 443, 493 A.R. 74 (Alta. C.A.); *R. v. Gibson*, 2015 ABCA 41, 319 C.C.C. (3d) 115 (Alta. C.A.). This ability to adjudicate is, of course, not license to make unsupportable inferences: see eg *R. v. Cowan*, 2012 ABCA 199 (Alta. C.A.) at paras 18 to 26, (2012), 288 C.C.C. (3d) 367, 533 A.R. 157 (Alta. C.A.); *R. v. Moller*, 2012 ABCA 381 (Alta. C.A.) at para 10, (2012), 539 A.R. 300 (Alta. C.A.).

31 Where facts are agreed upon by counsel, counsel should reduce those facts to writing and ensure the agreed facts are filed with the Court so there will not be errors as occurred here: compare *R. v. Asp*, 2011 BCCA 433 (B.C. C.A.) at para 40, (2011), 278 C.C.C. (3d) 391 (B.C. C.A.) where counsel were encouraged to "condescend to particularity". Counsel should sort out inconsistencies, if possible.

32 Counsel cannot rely on the possibility that inadmissible material will be harmless: compare *R. v. Bell*, 2013 BCCA 463 (B.C. C.A.), at paras 34 to 38, (2013), 344 B.C.A.C. 237 (B.C. C.A.). Counsel should not assume that argument, and not evidence, can overcome evidential deficiencies: see eg *R. v. S. (H.)*, 2014 ONCA 323, 308 C.C.C. (3d) 27 (Ont. C.A.). Counsel should at the very least make their position on disputes clear so the sentencing judge knows what the ground rules are. Concern about reports in sentencing is not a new problem. There have been criticisms for decades about pre-sentence reports over-shooting agreed facts or annexing inappropriate material. The point of a report is not advocacy but information: see eg *R. v. Arcand*, 2010 ABCA 363 (Alta. C.A.) at para 287, (2010), 264 C.C.C. (3d) 134, 499 A.R. 1 (Alta. C.A.). An accused is entitled to a fair shake when it comes to the broad array of information a report might contain: see eg *R. c. Angelillo*, 2006 SCC 55 (S.C.C.) at paras 30 to 32, [2006] 2 S.C.R. 728 (S.C.C.).

33 The second ground of appeal in this case is linked to the first. The appellant contends that the sentencing judge used the appellant's mental disorders exclusively to his disadvantage and not as evidence of his capacity towards rehabilitation nor to the impulses which should be taken in mitigation of his degree of moral culpability. As pointed out in *Virani*:

> [16] As exemplified in *R v Resler*, 2011 ABCA 167, 505 AR 330, at para. 16, correct assessment of an offender's moral blameworthiness can be influenced by a proven relevant mental illness. See also *R v Tremblay*, 2006 ABCA 252, 401 AR 9 at para. 7, cited in *Resler*; *R v Belcourt*, 2010 ABCA 319, 490 AR 224; *R v Ayorech*, 2012 ABCA 82, at para. 10; see also *R v Peters* (2000) 194 Nfld & PEIR 184 (N.L.C.A.). This is not to say that evidence of mental illness or personality disorder will necessarily justify any particular disposition or lenience; it may indeed in some cases make protection of the public a priority objective. However, the evidence in this case as summarized above was relevant and was not really damaging to the defence position.

See also *R. v. Ramsay*, 2012 ABCA 257 (Alta. C.A.) at paras 21 to 25, (2012), 536 A.R. 174 (Alta. C.A.).

34 The appellant's counsel emphasizes what he points to as frankness of the appellant when speaking to the experts about his inclinations. In his submission, this demonstrates the appellant's acceptance of responsibility and acknowledgment of his impulses which he finds difficult to restrain. Counsel argues that he is seeking help to release the grip of these propensities. The appellant's counsel points to progress in controlling his substance abuse including alcohol abuse, and suggests his level of co-operation with the experts in conversation and testing augurs well on the other disorders identified. The appellant, it is said, started on a correct path since early after his arrest.

35 There is something to be said for this. But the evidence taken as a whole does not indicate that the appellant is or was unable to master his behaviour. Rather, the opposite is indicated. In that light, his "degree of responsibility" within the meaning of s 718.1 of the *Code* is not diminished by his disorders. We agree that the appellant should not be sentenced for his disorders. But we are not persuaded that this is a case where mental disorder is operative as a mitigating factor.

36 In light of the defects in the fact base under the opinions, we must decline to accept those opinions in *aggravation* of the offences as such, although they are not irrelevant. Absence of mitigation is not aggravation: see eg *Republic of Croatia v. Snedden*, [2010] H.C.A. 14 (Australia H.C.) It follows that although the sentencing judge was on the wrong foot due to the material he had, the effect of that is that the responsibility to assign proportional sentences individually and in total falls now to this Court. Deference presupposes that the reasons are free from an error of law or principle: *Arcand* at para 76; *R. v. Zentner*, 2012 ABCA 332 (Alta. C.A.) at para 68, (2012), 539 A.R. 1 (Alta. C.A.). Where such an error is shown, this Court must sentence afresh.

37 This brings us therefore to the third ground of appeal which impugns each sentence. The sentence for breach of recognizance draws the criticism that 30 days is too much because the appellant does not have a prior record for that sort of offence. The appellant calls the offence "trivial". We do not agree. The requirement to comply with a recognizance bears some relationship with the offence to which the recognizance relates. It is a form of community control which allows a person to be at large despite the strength of the case against that person: *R. v. St-Cloud*, 2015 SCC 27 (S.C.C.). We discern no error in

the 30 day sentence, particularly when coupled with the other offences. The sentencing judge's court is highly familiar with this type of count.

38 The sentence for assault was grounded in the relationship between the parties which brings into consideration Parliament's policy statement about domestic violence in s 718.2(a)(ii) of the *Code*. Moreover, it was agreed that the appellant grabbed the complainant by the hair and by the neck when she rebuffed him. The agreed facts accept this as being done with assaultive intent. The reports of Dr. Hashman and Dr. Davis concerning the appellant's disorders of thinking do not suggest this was a minor matter even if no consequential harm ensued. We do not find error in the three-month sentence imposed for this. We note as well that no consideration was given for a DNA order here.

39 The sentence for animal cruelty is substantial. It has a long period of probation associated with it. The strictures of the probation order are intrusive, but they are also subject to amendment upon motion to the Provincial Court: see s 732.2(3) and (4) of the *Criminal Code*. We are not persuaded that they should be adjusted here. To the extent that they may promote further treatment of the appellant they are in both his and society's best interests: *R. v. Maier*, 2015 ABCA 59 (Alta. C.A.); *R. c. Mathieu*, 2008 SCC 21 (S.C.C.) at para 20, [2008] 1 S.C.R. 723 (S.C.C.); *R. v. Knott*, 2012 SCC 42 (S.C.C.) at paras 41 to 44, [2012] 2 S.C.R. 470 (S.C.C.).

40 As for the twenty-month prison term for animal cruelty, the *Criminal Code* was amended on April 17, 2008 to reflect the recognition that the prior sentence range for such conduct was wholly inadequate. A collation of cases has been provided to us by counsel for the appellant and counsel for the Crown. Some of those refer to earlier cases which in turn were governed by the *Code* maximum prior to 2008. The Crown submits that sentences appear to be rising. We do not have enough information to say whether that is so.

41 That said, it is clear that the sentence imposed on the appellant is amongst the higher sentences imposed for animal cruelty offences in the group of cases given to us. That is not to say that the group therefore establishes a range, let alone a cap. The case law has not revealed an overall policy strategy for animal cruelty cases as yet. But it is pertinent to note what was said by Fraser CJA dissenting in *Reece v. Edmonton (City)*, 2011 ABCA 238, 335 D.L.R. (4th) 600, 513 A.R. 199 (Alta. C.A.) at para 162, leave denied (2012), [2011] S.C.C.A. No. 447 (S.C.C.): "a civilized society should show reasonable regard for vulnerable animals". Sentient animals are not objects.

42 The sentences that should be imposed upon the appellant for animal cruelty and assault are those that were imposed by the trial judge — specifically, 3 months' imprisonment for the assault, and 20 months' imprisonment, consecutive, for the animal cruelty charge. As to that latter charge, the appellant's motive of self-gratification, the sadism inherent in his methodology and the degree of pre-meditation and planning involved call for a denunciatory and deterrent sentence. This offence entailed much more than the destruction of property. By enacting s 445.1 of the *Criminal Code*, which allows the Crown to proceed by indictment and imposes a maximum sentence of 5 years' imprisonment, Parliament recognized, and intended that courts also recognize, that cruelty to animals is incompatible with civilized society: see, generally, Peter Sankoff, Vaughan Black & Katie Sykes eds, *Canadian Perspectives on Animals and the Animals and the Law* (Irwin Law, 2015).

43 In this respect, the appellant's counsel also submits that the objectives of denunciation and deterrence can be given reduced priority because this crime is so unusual as to be rare. We do not have enough information to assess rarity, although one would hope that it would be.

44 The appellant's submission that denunciation fades as an objective because this case is unusual also cannot be accepted. There is no logic to that. As for the objective of deterrence, it should be remembered that what the law seeks to deter is conduct which the offender chooses to do. The framework of the offence identifies the aspects of conduct which are done wilfully in the commission of the offence. For this offence, the wilful conduct is such that society would expect the courts to do what they can to discourage it within the boundary of proportionality. The objective of deterrence is not set aside merely because the court is unaware of the prevalence of the specific offence. Actions which are vicious, cruel or sexually motivated should be deterred whether or not animals are involved.

45 The error of the sentencing judge was a significant one. But fundamentally it is an error of a wrong reasoning trajectory. Interference with the sentence imposed here would be justified by unfitness and disproportionality under s 687 and s 718.1 of the *Criminal Code*, not by reasoning defect. Cure of reasoning deficiency is not itself an objective of sentencing. As pointed out in *R. v. Lemmon*, 2012 ABCA 103 (Alta. C.A.), at para 23, (2012), 524 A.R. 164 (Alta. C.A.): "We must remember that the ultimate objective is a sentence that reflects the gravity of the offence and the degree of responsibility of the offender, not a mindless application of sentencing principles."

46 In the end, we are not persuaded that the sentence imposed on the animal cruelty offence is excessive or unfit. Nor would the common law or statutory concepts of totality, the latter under s 718.2 of the *Code*, command a reduction of the total effective sentence: see discussion of totality in *R. v. Ranger*, 2014 ABCA 50 (Alta. C.A.) at paras 48 to 50, (2014), 569 A.R. 39 (Alta. C.A.).

V Conclusion

47 Leave to appeal sentence is granted. The appeal is dismissed.

Appeal dismissed.