

Her Majesty the Queen v. Downes

[Indexed as: R. v. Downes]

79 O.R. (3d) 321
[2006] O.J. No. 555
Docket: C43604

Court of Appeal for Ontario,
Rosenberg, Feldman and Juriansz JJ.A.
February 14, 2006

Criminal law -- Sentencing -- Mitigating factors -- Strict pre-trial bail conditions -- Trial judge failing to consider whether to reduce sentence in light of lengthy period (18 months) under stringent bail terms (especially house arrest) -- No general guideline regarding appropriate amount of credit to be given -- In some circumstances little or no credit may be given but strict pre-trial bail must be considered -- Sentencing judge must explain why declining to give credit for house arrest before trial -- In circumstances appropriate to give little weight given seriousness of offences committed over time, relatively lenient sentence imposed and very limited evidence regarding impact of bail terms upon accused -- Given error in principle by failing to consider pre-trial house arrest, sentence appeal allowed and sentence reduced from 21 to 16 months' imprisonment.

The accused was convicted of three counts of forcible confinement, two counts of assault, one count of criminal harassment and one count of uttering a death threat. All of the charges involved a former girlfriend of the accused. The trial judge sentenced the accused to a total of 21 months' imprisonment and two years' probation. The accused appealed, arguing that the trial judge erred in not giving him credit for the 18 months that he spent subject to stringent bail

conditions, including a requirement that he observe a curfew and remain in his surety's house at all times except in the company of his surety, a condition amounting to house arrest.

Held, the appeal should be allowed.

Time spent under stringent bail conditions, especially under house arrest, must be taken into account as a relevant mitigating circumstance. However, like any potential mitigating circumstance, there will be variations in its potential impact on the sentence, and the circumstances may dictate that little or no credit should be given for pre-trial house arrest. It is incumbent on the sentencing judge to explain why he or she has decided not to take pre-trial house arrest into account. Failure to do so will constitute an error in principle. It is inappropriate to adopt a rigid formula for calculating the amount of credit to be given because there can be such a wide variation in bail conditions, and even house arrest conditions. The amount of credit will depend upon a number of factors, including the length of time spent on bail under house arrest; the stringency of the conditions; the impact on the offender's liberty; and the ability of the offender to carry on normal relationships, employment and activity. In the end, the amount of credit and the manner in which it is taken into account as a mitigating factor is a matter for the trial judge. Where the offender asks the trial judge to take pre-trial bail conditions into account, the offender should supply the judge with information as to the impact of the conditions. If there is a dispute as to the impact of the conditions, the onus is on the offender to establish those facts on a balance of probabilities.

In this case, the trial judge did not take into account the impact of the house arrest bail conditions. The lengthy period the accused spent under pre-trial house arrest was a relevant mitigating factor and should have been given some weight in his sentence. However, it was entitled to relatively little weight. While [page322] the conditions of the accused's house arrest were stringent, there was little evidence about the actual effect of the conditions on the accused. Given the accused's record and the seriousness of the offences committed over a

substantial period of time, the sentence imposed by the trial judge was already a relatively lenient one. In all the circumstances, an appropriate credit for the 18 months spent on bail under house arrest conditions was five months. The sentence was reduced to 16 months' imprisonment and two years' probation.

R. v. Bates, [2000] O.J. No. 2558, 134 O.A.C. 156, 146 C.C.C. (3d) 321, 35 C.R. (5th) 327, 47 W.C.B. (2d) 20 (C.A.), consd

Other cases referred to

R. v. F. (G.C.) (2004), 71 O.R. (3d) 771, [2004] O.J. No. 3177, 188 C.C.C. (3d) 68 (C.A.); R. v. Gregory, [1995] P.E.I.J. No. 102, 132 Nfld. & P.E.I.R. 169, 410 A.P.R. 169 (C.A.); R. v. Hanna, [2000] O.J. No. 3498, [2000] O.T.C. 676, 47 W.C.B. (2d) 414 (S.C.J.); R. v. Hilderman, [2005] A.J. No. 977, 2005 ABCA 249, 371 A.R. 4, 199 C.C.C. (3d) 561 (C.A.), affg [2004] A.J. No. 1375, 2004 ABQB 864, 369 A.R. 28 (Q.B.); R. v. J.S.G., [2003] Y.J. No. 42, 2003 YKTC 38, 40 M.V.R. (4th) 204 (Terr. Ct.); R. v. Lapierre, [1998] A.Q. No. 91, [1998] R.J.Q. 677, J.E. 98-527, 123 C.C.C. (3d) 332, 15 C.R. (5th) 283 (C.A.); R. v. Lau, [2004] A.J. No. 1348, 357 A.R. 312, 334 W.A.C. 312, 193 C.C.C. (3d) 51, 2004 ABCA 408, 36 Alta. L.R. (4th) 228 (C.A.); R. v. Lepore, [2001] O.J. No. 2396, [2001] O.T.C. 479, 50 W.C.B. (2d) 270 (S.C.J.); R. v. McDonald (1998), 40 O.R. (3d) 641, [1998] O.J. No. 2990, 54 C.R.R. (2d) 189, 127 C.C.C. (3d) 57, 17 C.R. (5th) 1 (C.A.); R. v. Mills, [1999] B.C.J. No. 566, 133 C.C.C. (3d) 451, 23 C.R. (5th) 384 (C.A.); R. v. Millward, [2000] A.J. No. 1371, 2000 ABCA 308, 89 Alta. L.R. (3d) 20, 271 A.R. 372, 48 W.C.B. (2d) 260 (C.A.); R. v. Pangman, [2001] M.J. No. 217, 2001 MBCA 64, [2001] 8 W.W.R. 10, 156 Man. R. (2d) 120, 154 C.C.C. (3d) 193 (C.A.); R. v. Perreault, [2005] B.C.J. No. 894, 197 C.C.C. (3d) 183, 2005 BCCA 226 (C.A.); R. v. Porter, [2001] B.C.J. No. 1826, 2001 BCPC 191 (Prov. Ct.); R. v. Proulx, [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 142 Man. R. (2d) 161, 182 D.L.R. (4th) 1, 249 N.R. 201, 212 W.A.C. 161, [2000] 4 W.W.R. 21, 140 C.C.C. (3d) 449, 49 M.V.R. (3d) 163, 30 C.R. (5th) 1 (sub nom. R. v. P. (J.K.D.)); R. v. Rezaie (1996), 31 O.R. (3d) 713, [1996] O.J. No. 4468,

112 C.C.C. (3d) 97, 3 C.R. (5th) 175 (C.A.); R. v. Spencer (2004), 72 O.R. (3d) 47, [2004] O.J. No. 3262, 188 O.A.C. 363, 241 D.L.R. (4th) 542, 186 C.C.C. (3d) 181, 22 C.R. (6th) 63 (C.A.); R. v. Tallman, [1989] A.J. No. 119, 65 Alta. L.R. (2d) 75, 48 C.C.C. (3d) 81, 68 C.R. (3d) 367 (C.A.); R. v. Wust, [2000] 1 S.C.R. 455, [2000] S.C.J. No. 19, 2000 SCC 18, 184 D.L.R. (4th) 385, 252 N.R. 332, 143 C.C.C. (3d) 129, 32 C.R. (5th) 58 (sub nom. R. v. W. (L.W.))

Statutes referred to

Criminal Code, R.S.C. 1985, c. C-46, ss. 719 [as am.], 742.1 [as am.]

APPEAL by the accused from a sentence imposed by Minden J. of the Superior Court of Justice, dated May 2, 2005.

Colin Downes, in person.

Delmar Doucette, Duty Counsel.

Susan Chapman and Leslie Paine, for respondent. [page323]

The judgment of the court was delivered by

[1] ROSENBERG J.A.:-- The principal issue in this sentence appeal concerns the impact of stringent pre-trial bail conditions; specifically, the lengthy period of time spent under house arrest. On May 2, 2005, Minden J. sentenced the appellant to a total of 21 months' imprisonment and two years' probation following his conviction for a number of serious offences. The appellant has now appealed that sentence.

[2] This appeal began as an inmate appeal and the appellant was assisted by duty counsel, Mr. Doucette. Ms. Chapman appeared on behalf of the respondent, the Crown, at the oral hearing. In his own submissions, the appellant sought a reduction in his sentence for several reasons and, in

particular, because his 18 months of pre-sentence house arrest were not taken into account. Mr. Doucette expanded on the latter submission. It became apparent during oral argument that it would be helpful to have further submissions from the parties as well as further material, including a transcript of the original bail hearing. We have now received that material as well as written submissions from Mr. Doucette, on behalf of the appellant, and Ms. Paine, on behalf of the Crown.

[3] For the following reasons, I would grant leave to appeal sentence, allow the appeal and reduce the sentence to 16 months' imprisonment.

The Facts

(a) The facts of the offences

[4] Following a four-day trial, the trial judge found the appellant guilty of three counts of forcible confinement, two counts of assault, one count of criminal harassment and one count of uttering a death threat. The charges arise out of a series of events between March and October 2003 and all involve T.F., a former girlfriend of the appellant.

[5] The appellant began a romantic relationship with T.F. in June 2002. The relationship was uneventful until the evening of March 18, 2003. On that evening, the appellant assaulted the complainant as she returned home from a night out. He accused her of cheating on him and struck her violently with closed fists in the back and chest. When she tried to enter her apartment building, the appellant grabbed her and forced her into his car. She eventually convinced the appellant to let her go to her apartment but he stayed with her. In the elevator, the complainant began to scream. The appellant covered her mouth and forced her against the elevator [page324] wall. He threatened to kill her if she did not talk to him. Eventually, the elevator reached the complainant's floor and she managed to get out. The appellant picked her up and carried her toward the stairwell. He then dropped her and walked away. The complainant told the appellant that he would be going to jail. The appellant looked surprised and said that he loved her.

These events founded convictions for unlawful confinement, assault and uttering a death threat.

[6] The complainant did not contact the authorities and in mid-April she reconciled with the appellant after he apologized. The complainant decided the evening of March 18 was an isolated incident and began to date the appellant again. However, within months the appellant was again showing signs of jealousy. In late June, the complainant told the appellant that she wanted the relationship to end. The appellant refused to accept this and he frequently appeared at her home and employment. Sometimes she would talk to the appellant and other times he would force her into his car so he could talk to her. The appellant would sometimes appear possessive, angry and violent. The complainant became afraid to leave her apartment and felt helpless. This conduct, which continued until October 2003, led to the conviction for criminal harassment.

[7] On the evening of September 29, 2003, the complainant entered the appellant's car because he had her birth certificate. Once she was in the car, he drove away. He began yelling at her and moving his head near her. When she tried to push him away, the appellant bit her hand. They drove around for hours. The appellant was almost incoherent and said he would take her to a place where she would never be found. Eventually, he drove her to his parents' home. This incident led to convictions for assault and unlawful confinement.

[8] The final incident occurred on October 12, 2003. The complainant again entered the appellant's car, this time because he had her cellular telephone. Again he began to drive off. The appellant demanded to know the nature of the complainant's relationship with a man, whose number he had found in the telephone's memory. When the complainant tried to get out, the appellant grabbed her by the hair and pulled her back in. The complainant finally told the appellant the man's address. He drove there and when he stopped the complainant left the car and ran to her apartment building. The appellant threw the telephone and the complainant retrieved it and said she was calling the police. A few days later she did call the police. This last incident led to a third conviction for

unlawful confinement.

(b) The bail hearing and the bail conditions

[9] The bail hearing was held on October 21, 2003. Crown counsel sought a detention order. The appellant called a friend and [page325] sometime employer as a witness at the bail hearing. She was prepared to be a surety for the appellant and to have him live with her family provided that he was subject to a curfew, or as she put it, "he won't be allowed out basically". At first she testified that she would allow him out to work only if he was working for her, although she also said she would be willing to have the appellant go back to his other job. The justice of the peace held that the appellant could be released on stringent terms. Among the conditions imposed as part of the release order, the appellant was required to adhere to the following:

- reside with his surety;
- abstain from communicating with the complainant and the Crown witnesses;
- not be within 500 metres of the complainant's home or residence;
- observe a curfew and remain at the house at all times except in the company of his surety.

[10] This last condition amounted to house arrest but unlike most house arrest conditions, contained no exemption for medical necessities, employment and attendance for religious worship. Therefore, the appellant was entirely dependent upon his surety if he wished to go out of the house.

(c) The appellant's personal circumstances

[11] The appellant is 27 years of age. He has a learning disability but obtained a Grade 11 education. He has a five-year-old daughter from a previous relationship. The appellant has maintained minimal contact with his daughter's

mother. His parents have custody of the child and state that the appellant has a good relationship with his daughter. The appellant's employment history is uneven. According to his father, the appellant has a poor work ethic. This is confirmed by one of the appellant's employers. While the appellant is a licensed gas fitter, he has not been able to work in that field because his criminal record prevents him from being bonded. More recently, the appellant has attempted to qualify as an electrician.

[12] In March 2005, during an adjournment of the trial, the appellant was admitted to a psychiatric facility because of suicidal thoughts. The treating psychiatrist did not conduct a full assessment but believed that the appellant showed signs of borderline personality disorder. The probation officer who prepared [page326] the pre-sentence report described the appellant as not being remorseful. The appellant's comments to the probation officer and his testimony at trial indicate that he has little insight into the harm he caused the complainant, whom he blames for disrupting his relationship with his daughter.

[13] The appellant has a prior criminal record for offences in 2001 and 2002 of break and enter, assault, assault with a weapon, and failing to comply with a recognizance. He was also convicted in 2004 of uttering a threat against a friend of the complainant. His longest previous sentence was three months' imprisonment.

(d) The sentence

[14] The trial judge imposed the following sentences:

March 18, 2003 events: ten months' imprisonment on each count concurrent

Criminal harassment: eight months' imprisonment consecutive

September 29, 2003 events: three months' imprisonment consecutive for assault; three months' concurrent for unlawful confinement

October 12, 2003 events: three months' concurrent

Total sentence: 21 months' imprisonment

[15] The trial judge also imposed two years probation. Finally, the 21 months' imprisonment was made consecutive to a sentence of 20 days' imprisonment that the appellant was then serving for two counts of breach of recognizance. That sentence was imposed by a judge of the Ontario Court of Justice on the same day that the appellant appeared before Minden J. These breaches of recognizance occurred in the following circumstances. Both occurred during an adjournment of the trial. On the first occasion, the appellant went out without his surety, in violation of his bail. The surety called the police and the appellant was arrested. The second incident occurred when the surety had the appellant admitted to the psychiatric facility and left him there. By being in the facility without his surety present, the appellant was in breach of the house arrest condition and was charged again.

Sentence Submissions and Reasons for Sentence

[16] At trial, defence counsel (not Mr. Doucette) sought a sentence of 12 to 18 months' imprisonment. He made no specific [page327] mention of the bail conditions, except in the context of explaining the two breach of recognizance charges. It was apparent that the trial judge was aware of the bail conditions since he had released the appellant on the same bail after he was arrested during the adjournment of the trial. Crown counsel made extensive reference to this court's decision in *R. v. Bates*, [2000] O.J. No. 2558, 146 C.C.C. (3d) 321 (C.A.) and sought a penitentiary sentence of two to three years' imprisonment.

[17] The trial judge gave careful and comprehensive reasons. He noted, in particular, his concern with the appellant's mental health status. The trial judge took into account that the offences involved a pattern of abuse and the need for denunciation and deterrence in cases such as this. The trial judge referred to the appellant's lack of remorse. He also

referred to the convictions for the breach of recognizance but noted that those convictions did not relate to any attempt to contact the complainant.

[18] The trial judge concluded that it was not necessary to impose a penitentiary sentence. He gave the following reasons:

This conclusion is premised on various factors including the absence of certain aggravating features which I have already referred, the fact that the offender's longest previous term of incarceration was three months in jail and the fact that the pre-sentence report, while generally unimpressive, does appear to suggest that there may be some prospects of rehabilitation.

On the other hand I agree that the aggravating features both of the offender and the offences are such that a significant period of incarceration is required to give effect to the purposes and principles of sentencing of primary concern in this case.

Issues on Appeal

[19] Through duty counsel, the appellant asked the court to reduce his sentence. In addition to the fact that he was not given credit for the time he spent on bail under house arrest conditions, the appellant stated that through his incarceration, he had learned his lesson and was anxious to be reunited with his daughter. He has job prospects and has successfully completed Anger Management and Substance Abuse courses. His attitude has changed and he said he was "truly sorry for the trouble I have caused for the court, my family and everyone involved".

[20] On behalf of the appellant, Mr. Doucette submits that the trial judge erred in principle in failing to give the appellant any credit for the time spent on bail under house arrest. He agrees that a mathematical formula, such as 1:1, is not appropriate but argues that the judge must give some credit for time spent under stringent bail conditions. He suggests that the sentence be reduced to between nine and 12 months, in

effect, giving credit of [page328] between 12 and nine months for the 18 months spent under house arrest.

[21] Ms. Paine, writing on behalf of the Crown, asks that the appeal be dismissed. She concedes that time spent on bail under house arrest conditions should be taken into account as a mitigating factor. She submits that a judge is not obliged to give credit for house arrest pending trial provided there are good reasons for not doing so. She agrees with Mr. Doucette that there should be no rigid formula. She points out that very little is known about the impact of the house arrest in this case on the appellant. Further, Ms. Paine submits that in this case the trial judge adverted to the appellant's house arrest in the following statement:

Indeed to the offender's credit, throughout the period he was on release pending trial, the offender apparently complied with his recognizance, which included a house arrest provision, as well as a strict no contact clause.

[22] According to Ms. Paine, this statement is an indication that the trial judge must have taken the appellant's bail conditions into account as a mitigating factor. Even having regard to the period of house arrest, she submits that the sentence of 21 months is entirely fit, if not lenient, given the seriousness of the offences.

Analysis

- (a) The relevance of bail conditions in determining sentence

[23] It is now well established that an offender should be given credit for pre-sentence custody. The rationale for doing so comes from the provisions of the Criminal Code, R.S.C. 1985, c. C-46 and judicial recognition of the conditions under which pre-sentence custody is served. Section 719(3) of the Criminal Code expressly provides that the sentencing court may take pre-trial custody into account. As Arbour J. said in *R. v. Wust*, [2000] 1 S.C.R. 455, [2000] S.C.J. No. 19, 143 C.C.C. (3d) 129, at para. 41, "while pre-trial detention is not intended as

punishment when it is imposed, it is, in effect, deemed part of the punishment following the offender's conviction, by the operation of s. 719(3)".

[24] While appellate courts do not lay down any fixed formula, it is generally agreed that a sentencing court should give more than 1:1 credit for pre-sentence custody in recognition of the circumstances that attend pre-sentence custody in most cases. See *R. v. Tallman*, [1989] A.J. No. 119, 48 C.C.C. (3d) 81 (C.A.), at para. 95; *R. v. Pangman*, [2001] M.J. No. 217, 154 C.C.C. (3d) 193 (C.A.), at p. 195 C.C.C.; *R. v. Mills*, [1999] B.C.J. No. 566, 133 C.C.C. (3d) 451 (C.A.), at paras. 42 and 44; [page329] *R. v. McDonald* (1998), 40 O.R. (3d) 641, [1998] O.J. No. 2990, 127 C.C.C. (3d) 57 (C.A.), at para. 31; and *R. v. Lapierre*, [1998] A.Q. No. 91, 123 C.C.C. (3d) 332 (C.A.), at p. 345 C.C.C. As Laskin J.A. explained in *R. v. Rezaie* (1996), 31 O.R. (3d) 713, [1996] O.J. No. 4468, 112 C.C.C. (3d) 97 (C.A.), at p. 721 O.R., p. 104 C.C.C., in many respects pre-trial custody is even more onerous than post-sentencing custody:

First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody waiting trial.

[25] Thus, as a rule, trial courts will give 2:1 credit for pre-sentence custody and occasionally enhanced credit where the circumstances under which the offender has spent his time in jail have been particularly onerous. And in some cases, trial courts will give less than 2:1 credit because of the circumstances of the custody or the reasons for the detention. See *Pangman*, *supra*, at para. 66; *R. v. Millward*, [2000] A.J. No. 1371, 89 Alta. L.R. (3d) 20 (C.A.), at paras. 2 and 4; and *R. v. Gregory*, [1995] P.E.I.J. No. 102, 132 Nfld. & P.E.I.R. 169 (C.A.), at para. 21.

[26] These rationales do not readily apply to time spent on

bail, even under stringent conditions such as house arrest, for three reasons. First, there is no statutory provision that directly addresses the issue. Section 719(2) of the Criminal Code provides that, "Any time during which a convicted person is unlawfully at large or is lawfully at large on interim release granted pursuant to any provision of this Act does not count as part of any term of imprisonment imposed on the person" (emphasis added). However, there is no suggestion that this provision limits the right of a sentencing court to take into account, as a mitigating factor, time spent on pre-sentence bail. See *R. v. Hilderman*, [2005] A.J. No. 977, 371 A.R. 4 (C.A.), at paras. 10-11.

[27] Second, even the most stringent bail conditions, including house arrest, tend to allow the offender the opportunity to work, attend school, attend medical appointments, conduct religious worship and address personal needs. The rehabilitative and treatment options that are often denied an accused in pre-trial custody are usually available, even to an accused on house arrest.

[28] Third, unlike pre-trial custody, the impact of the bail conditions cannot be assumed. Trial judges do not need evidence or even submissions to understand the impact of ordinary pre-trial custody on an offender because they can take judicial notice that the ordinary consequences of pre-trial custody involve a severe loss of liberty. It is only in unusual circumstances, where the offender seeks enhanced credit, or the Crown seeks less than the [page330] usual 2:1 credit, that a trial judge will need to engage in a hearing to determine the effect of pre-trial custody.

[29] On the other hand, some of the same considerations that justify credit for pre-sentence custody apply to an offender who has spent a long time under house arrest. Stringent bail conditions, especially house arrest, represent an infringement on liberty and are, to that extent, inconsistent with the fundamental principle of the presumption of innocence. House arrest is a form of punishment, albeit of a different character than actual incarceration. Pre-sentence house arrest varies little in character from the house arrest that is often imposed

as a term of a conditional sentence under s. 742.1 of the Criminal Code. As Mr. Doucette points out, in *R. v. Proulx* [copyright] [2000] 1 S.C.R. 61, [2000] S.C.J. No. 6, 140 C.C.C. (3d) 449, at para. 103, Lamer C.J.C. identified house arrest as a form of punishment in the conditional sentence context:

First, the conditions should have a punitive aspect. Indeed, the need for punitive conditions is the reason why a probationary sentence was rejected and a sentence of imprisonment of less than two years imposed. As stated above, conditions such as house arrest should be the norm, not the exception. This means that the offender should be confined to his or her home except when working, attending school, or fulfilling other conditions of his or her sentence, e.g. community service, meeting with the supervisor, or participating in treatment programs. Of course, there will need to be exceptions for medical emergencies, religious observance, and the like.

(Emphasis added)

Despite its punitive aspects, the offender receives no credit towards parole eligibility for time spent on pre-sentence house arrest.

[30] Counsel have assembled a list of cases from trial courts in this and other provinces indicating a recognition that some credit should be given for pre-sentence bail conditions. Most courts reject the application of any kind of formula and rather consider the time spent under stringent bail conditions, especially house arrest, as a mitigating factor to be considered with other factors. See, for example, *R. v. Hanna*, [2000] O.J. No. 3498, [2000] O.T.C. 676 (S.C.J.), at para. 56; *R. v. Lepore*, [2001] O.J. No. 2396, [2001] O.T.C. 479 (S.C.J.), at para. 15; *R. v. J.S.G.*, [2003] Y.J. No. 42, 40 M.V.R. (4th) 204 (Terr. Ct.), at para. 23; *R. v. Porter*, [2001] B.C.J. No. 1826, 2001 BCPC 191 (Prov. Ct.), at para. 58; and *R. v. Hilderman*, [2004] A.J. No. 1375, 369 A.R. 28 (Q.B.), at para. 26, *aff'd* [2005] A.J. No. 977, 371 A.R. 4 (C.A.).

[31] Appellate authority also tends to support the principle of giving credit for stringent bail conditions. In *R. v. Lau*, [2004] A.J. No. 1348, 193 C.C.C. (3d) 51 (C.A.), at para. 15, Hunt J.A. held that "a trial judge may take account of very strict bail conditions and treat them as akin to custody in calculating a sentence". In [page331] *R. v. Spencer* (2004), 72 O.R. (3d) 47, [2004] O.J. No. 3262, 186 C.C.C. (3d) 181 (C.A.), at para. 43, Doherty J.A. recognized that stringent bail conditions may be taken into account as a mitigating factor:

In deciding whether any delay in the completion of the process should mitigate sentence, it is appropriate to consider an offender's bail terms. The more stringent those terms, the more likely it will be that any delay in completion of the process will have some mitigating effect on sentence. Indeed, even absent delay, particularly stringent bail conditions can have a mitigating effect on sentence.

(Emphasis added)

[32] *Lau* and *Spencer* were referred to with approval in *R. v. Perreault*, [2005] B.C.J. No. 894, 197 C.C.C. (3d) 183 (C.A.).

[33] Accordingly, I conclude that time spent under stringent bail conditions, especially under house arrest, must be taken into account as a relevant mitigating circumstance. However, like any potential mitigating circumstance, there will be variations in its potential impact on the sentence and the circumstances may dictate that little or no credit should be given for pre-sentence house arrest. I agree with Ms. Paine that it is incumbent on the sentencing judge to explain why he or she has decided not to take pre-sentence house arrest into account. The failure to do so will constitute an error in principle as explained by Laskin J.A. in *Rezaie*, supra, at p. 719 O.R., p. 103 C.C.C.:

[Error in principle] connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law.

[34] I also agree with Ms. Paine, and to a large extent with Mr. Doucette, that it is inappropriate to adopt a rigid formula because there can be such a wide variation in bail conditions and even house arrest conditions. In some cases, the terms of the house arrest may impinge very little on the offender's liberty. Some accused may be allowed to work as usual, take care of their family obligations as usual and in general, see little serious impact on their pre-bail way of life. For others, house arrest may be very difficult. The accused may find themselves essentially confined to a very small space, cut off from family and friends and unable to obtain employment [See Note 1 at the end of the document]. [page332]

[35] I generally agree with the comments of Conrad J.A. in Hilderman, *supra*, at para. 20:

Any rehabilitation during pre-trial house arrest is excellent for society and an objective in sentencing. That does not mean a sentencing judge cannot still impose the sentence he or she deems necessary to comply with all of the sentencing principles, including denunciation at the time of sentencing. The sentencing judge is not required to give a mathematical deduction. The court will merely have to consider what impact the pre-trial house arrest should have on the sentence he or she eventually imposes.

[36] Thus, a trial judge faced with an offender who has spent time on bail under house arrest should adopt a flexible approach. In the end, the amount of credit and the manner in which it is taken into account as a mitigating factor is a matter for the trial judge. That factor must be considered along with the myriad of other mitigating and aggravating circumstances that may impact on the sentence in a given case.

[37] In summary, credit for pre-trial bail conditions should be approached in the following manner:

- Time spent on stringent pre-sentence bail conditions, especially house arrest, is a relevant mitigating factor.

- As such, the trial judge must consider the time spent on bail under house arrest in determining the length of sentence.
- The failure of the trial judge to explain why time spent on bail under house arrest has not been taken into account is an error in principle.
- The amount of credit to be given for time spent on bail under house arrest is within the discretion of the trial judge and there is no formula that the judge is required to apply.
- The amount of credit will depend upon a number of factors including, the length of time spent on bail under house arrest; the stringency of the conditions; the impact on the offender's liberty; the ability of the offender to carry on normal relationships, employment and activity.
- Where the offender asks the trial judge to take pre-sentence bail conditions into account, the offender should supply the judge with information as to the impact of the conditions. If there is a dispute as to the impact of the conditions, the onus is on the offender to establish those facts on a balance of probabilities in accordance with s. 724(3) of the Criminal Code. [page333]

(b) The sentence in this case

[38] In *Bates*, supra, at paras. 35 and 36, Moldaver and Feldman JJ.A. explained the principles and objectives to be applied in imposing sentence in domestic violence and harassment cases:

Domestic violence and harassment cases most often involve conduct directed by a male spouse or partner against a woman. Yet offenders who feel empowered to harass a partner or former partner with impunity will not necessarily confine their behaviour to that person, but may also harass and terrorize her friends and family members. As this case illustrates, the respondent somehow perceived that his love

and need for the complainant allowed him to be an unwanted presence in her life and in the lives of her family and associates, and to threaten and terrorize them to achieve his ends. His irrational actions made him a menace to [the complainant] and to those close to her.

Consequently, when an offender like the respondent comes before the court for sentencing, it is important for the court to denounce his conduct in the clearest terms by fashioning a heavy sentence.

[39] In *Bates*, the court was of the view that the appropriate sentence was 30 months' imprisonment. The conduct in *Bates* was similar to the conduct by the appellant in this case with two important differences: *Bates* terrorized his victim on one occasion with an imitation firearm and he repeatedly violated court orders requiring that he not contact the victim. In other respects, however, the cases are similar and involved threats, unwanted contact and unlawful confinement. The psychiatric record in the *Bates* case was much fuller and somewhat more optimistic than the record in this case. *Bates* also had a less serious criminal record.

[40] When compared to the sentence imposed in *Bates*, it is apparent that the sentence of 21 months imposed by the trial judge in this case was well within the appropriate range. Leaving aside the question of house arrest, it is, if anything, somewhat lenient.

(c) The issue of house arrest in this case

[41] A central dispute in this appeal is whether the trial judge took the time the appellant spent while on bail under house arrest into account in sentencing him. It seems to me that the trial judge did take the bail conditions into account to some extent. For example, he gave the appellant credit for not breaching the non-communication condition of his bail. However, I do not agree with Crown counsel that the trial judge otherwise took into account the impact of the house arrest bail conditions. In fairness to the trial judge, he was not asked to do so. As I have indicated, defence counsel at trial did not

make any submissions [page334] suggesting that the appellant should be given credit for the pre-sentence house arrest. Therefore, counsel did not provide the trial judge with the kind of information that would be helpful in weighing the importance of that factor.

[42] In my view, the lengthy period the appellant spent under pre-sentence house arrest in this case is a relevant mitigating factor and should have been given some weight in his sentence. It is therefore necessary to consider the impact of the house arrest on the appellant. For the following reasons, I would give it relatively little weight.

[43] On the one hand, the conditions under which this appellant spent his house arrest seem to have been in some respects at the more stringent end of the scale. It was not contested that the appellant's relationship with his daughter was disrupted. This was the most serious effect on the appellant's liberty interest about which we have information. But, as well he was allowed to leave the house only with his surety and even the normal exceptions that usually attend house arrest were missing. There was not even an exception for necessary medical care and as a result, the appellant was charged and convicted of breach of recognizance when he remained at the hospital without his surety.

[44] On the other hand, as I have said earlier, we actually know very little about how the appellant spent his time while on house arrest. It is unclear, for example, whether the condition that his surety always accompany the appellant, interfered with any realistic employment prospects. Both the appellant's father and his former employer expressed the opinion that the appellant had a weak work ethic. It is also unclear whether the house arrest severely constrained the appellant's ability to move around. As the Crown fairly points out, there were no limits on the appellant's ability to leave the house for any purpose, provided he was accompanied by his surety.

[45] Finally, given the appellant's record and the seriousness of the offences committed over a substantial period

of time, the sentence imposed by the trial judge was already a relatively lenient one.

[46] In my view, having regard to all the circumstances, an appropriate credit for the 18 months spent on bail under house arrest conditions in this case is five months.

Disposition

[47] Accordingly, I would grant leave to appeal, allow the appeal from sentence and reduce the sentence for criminal harassment from eight months' imprisonment to three months' imprisonment consecutive. In all other respects, I would dismiss [page335] the appeal from sentence. In the result, the appellant's total sentence is 16 months' imprisonment and two years' probation.

Appeal allowed.

Notes

Note 1: Also, see R. v. F.(G.C.) (2004), 71 O.R. (3d) 771, [2004] O.J. No. 3177, 188 C.C.C. (3d) 68 (C.A.) where this court was faced with determining the appropriate credit for time spent on a conditional sentence after a successful Crown appeal substituting a custodial term for the conditional sentence. In those circumstances, Borins J.A., writing for the court, rejected a rigid approach.