SUPREME COURT OF CANADA

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Case in Brief: *R. v. Nahanee*

Judgment of October 27, 2022 | On appeal from the Court of Appeal for British Columbia
Neutral citation: 2022 SCC 37

The Supreme Court upholds the eight-year prison sentence for a B.C. man who sexually assaulted two girls.

In 2019, Kerry Nahanee plead guilty to two counts of sexual assault against his nieces. Mr. Nahanee admitted to sexually assaulting one niece once and sexually assaulting the other niece many times. At the sentencing hearing, the Crown asked the judge to sentence Mr. Nahanee to between four to six years in prison. The lawyer for Mr. Nahanee asked the judge for a sentence of three to three-and-a-half years.

The judge sentenced Mr. Nahanee to five years for the assaults on the first niece and three years for the assault on the second niece for a combined total of eight years in prison. The judge considered various aggravating and mitigating factors in calculating Mr. Nahanee's sentence. Aggravating factors increase the severity of a sentence, while mitigating factors contribute to a more lenient sentence.

In the judge's view, the aggravating factors in this case included: abuse of a family member; abuse of a person under the age of 18; abuse of a position of trust; and that the offences significantly impacted the two victims. As for mitigating factors, Mr. Nahanee had plead guilty, he was relatively young, and he had no criminal record.

The judge also considered Mr. Nahanee's Indigenous background during sentencing. Section 718.2(e) of the *Criminal Code* directs courts to pay special attention to the circumstances of Indigenous offenders. As such, the judge reviewed the *Gladue* report, which is a pre-sentencing report done for Indigenous offenders.The *Gladue* report gets its name from the Supreme Court of Canada's 1999 ruling in *R. v. Gladue*, which established the factors that courts must take into account when sentencing Indigenous offenders.

Mr. Nahanee appealed his sentence to British Columbia's Court of Appeal. He argued that the "public interest test" established by the Supreme Court of Canada in its 2016 ruling in *R. v. Anthony-Cook* should apply to his case. That test guides judges when the Crown prosecutor and defence lawyer agree to a specific sentence in exchange for a guilty plea. According to the test, judges should impose the agreed-upon sentence unless it would bring the administration of justice into disrepute, which is never in the public interest. Mr. Nahanee also argued the sentencing judge should have advised the parties that she intended to impose a harsher sentence than the Crown was seeking. The Court of Appeal dismissed Mr. Nahanee's appeal. He then appealed to the Supreme Court of Canada.

The Supreme Court has dismissed Mr. Nahanee's appeal.

The *Anthony-Cook* case does not apply.

Writing for the majority, Justice Michael Moldaver said that the public interest test in the *Anthony-Cook* case, "does not, and should not, apply to contested sentencing hearings following a guilty plea". The *Anthony-Cook* case applies only when both parties propose a joint submission on sentencing, meaning they agree on the sentence. Mr. Nahanee's case involved a contested sentencing hearing because the Crown and defence lawyer had proposed different sentences.

The majority said judges must notify the parties if they intend to impose a harsher sentence than the one sought by the Crown. The judge must then give the parties the opportunity to make further submissions.

In this case, the judge did not notify the parties that she intended to impose a harsher sentence and did not provide them an opportunity to make further submissions. However, the majority said Mr. Nahanee did not show he had information to provide the judge that would have impacted his sentence. Also, the judge provided adequate reasons for why she exceeded the sentence the Crown was seeking and her reasons, when read as a whole, were not wrong. Finally, the eight-year sentence was not demonstrably unfit.

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Breakdown of the decision: ***Majority*****:** Justice Moldaver dismissed the appeal (Chief Justice Wagner and Justices Brown, Rowe, Martin, Kasirer and Jamal agreed) | ***Dissenting:*** Justice Karakatsanis would have allowed the appeal and referred the matter back to the Court of Appeal for it to determine a fit sentence (Justice Côté agreed)

More information (case #39599): Decision | Case information | Webcast of hearing

Lower court rulings: sentence (Provincial Court of British Columbia – unreported) | appeal (Court of Appeal for British Columbia)