COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Kazenelson, 2018 ONCA 77
DATE: 20180130
DOCKET: C61543

Simmons, Lauwers and Pardu JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Vadim Kazenelson

Appellant

Brian H. Greenspan and Louis P. Strezos, for the appellant

Deborah Krick, for the respondent

Heard: December 13, 2017

On appeal from the conviction entered on June 26, 2015, with reasons reported at 2015 ONSC 3639, 122 W.C.B. (2d) 341, and the sentence imposed on January 11, 2016, with reasons reported at 2016 ONSC 25, 128 W.C.B. (2d) 76, by Justice Ian A. MacDonnell of the Superior Court of Justice, sitting without a jury.

Lauwers J.A.:

A. OVERVIEW

[1] Following a judge alone trial, the appellant was convicted of four counts of criminal negligence causing death and one count of criminal negligence causing

bodily harm. The charges arose from an incident in which five workers employed by Metron Construction Incorporated ("Metron") fell more than 100 feet to the ground when the swing stage[1] on which they were working suddenly collapsed. None of these workers was attached to a lifeline as required by both provincial law and industry practice. Tragically, four of these workers, including the site foreman, died; the fifth worker suffered serious permanent injuries. A sixth worker, Shoruh Tojiddinov, had tied himself off to one of two lifelines available on the swing stage and, as a result, did not fall when the swing stage collapsed.

[2] The appellant was Metron's project manager. The trial judge found that he was with the workers on the swing stage when it collapsed, but was holding onto one of the lifelines, and he managed to grab an adjacent balcony and pull himself to safety.

[3] The trial judge also made the following critical findings concerning the appellant:

- he had the authority to direct the workers who were on the swing stage (a fact conceded by the appellant both at trial and on appeal);

[1] A swing stage is a platform used to ascend and descend the exterior of a building. In this instance, the swing stage was a modular model made up of four ten-foot platforms bracketed together and was operated by motors on each end of the platform.

- he became aware, well in advance of the swing stage collapse, that there were only two lifelines available on the swing stage for the six workers working their way down the building from the top floor;
- knowing that fall protection was available for a maximum of two persons, he not only did nothing to rectify that situation, he permitted all six workers to board the swing stage with their tools in circumstances where he had no information concerning the weight capacity of the swing stage.

[4] Under s. 219 of the *Criminal Code*, “everyone is criminally negligent who … in omitting to do anything that it is his duty to do, shows wanton or reckless disregard for the lives or safety of other persons.

[5] Section 217.1 of the *Criminal Code* imposes a duty upon “everyone who has the authority to direct how another person does work or performs a task” “to take reasonable steps to prevent bodily harm to that person or any other person arising from that work or task”.

[6] The trial judge concluded that the appellant’s failure to take any steps to prevent the workers from boarding the swing stage in the above-noted circumstances constituted a breach of his duty under s. 217.1 and showed a wanton and reckless disregard for their lives and safety, thus amounting to criminal negligence. In addition, he concluded that the appellant’s failure to ensure that each worker had a lifeline “was a significant contributing cause of the

harm that resulted." He therefore convicted the appellant of four counts of criminal negligence causing death and one count of criminal negligence causing bodily harm.

[7] The trial judge imposed a sentence of three and a half years on each count to be served concurrently. Mr. Kazenelson appeals both conviction and sentence.

[8] I would dismiss the appeal. The trial judge's reasons for conviction and sentence are clear and the chain of reasoning is rooted firmly in his findings of fact. He made no legal or other errors. The appellant largely repeated arguments considered and dismissed by the trial judge.

B. THE CONVICTION APPEAL

[9] The trial judge's consideration of the applicable law relating to criminal negligence starts at para. 108 and extends over many paragraphs. The appellant did not take issue with the trial judge's self-instruction. The trial judge summarized the *actus reus* at para. 111, noting that the Crown must prove that: Mr. Kazenelson had the authority to direct how the workers employed by Metron did work or performed a task; he failed to take reasonable steps to prevent bodily harm to those workers; and in failing to do so he showed wanton or reckless disregard for their lives or safety. Counsel focused on the last element, and drew

the court's attention to the decision of Hill J. in *R. v. Menezes* (2002), 50 C.R. (5th) 343, [2002] O.J. No. 551 (Ont. Sup. Ct.), at para. 72:

> Criminal negligence amounts to a wanton and reckless disregard for the lives and safety of others. This is a higher degree of moral blameworthiness than dangerous driving. This is a marked and substantial departure in all of the circumstances from the standard of care of a reasonable person. The term wanton means "heedlessly" or "ungoverned" and "undisciplined" or an "unrestrained disregard for consequences". The word "reckless" means "heedless of consequences, headlong, irresponsible". [Citations omitted.]

Counsel agreed that for the purpose of a prosecution under s. 217.1 of the *Code*, the "reasonable person" should be taken to be the "reasonable supervisor".

[10] The appellant made two arguments that the verdict was unreasonable. The context for the appellant's first argument is that this was the first conviction of an individual supervisor under s. 217.1 of the *Code*. He argued that "the approach of the trial judge stretches penal negligence too far" and that his conduct "simply did not rise to the high level of criminal negligence." He added that, even assuming a breach of s. 217.1, his acts or omissions did not show "a wanton and reckless disregard for the workers." This rendered the verdict unreasonable:

> [T]he trial judge failed to consider the acts of the workers in not securing more life lines and the fact that a life line was available when the stage was boarded, but not utilized, *establishing that neither the Appellant nor the workers adverted to the objective foreseeability of the risk of collapse*. In this context, it cannot be said the acts or omissions

> of the Appellant constituted a wanton or reckless disregard for their safety. [Emphasis in original.]

[11] More particularly, the appellant argued that the trial judge "did not consider the other circumstances that were objective and contextual markers of the high fault required for criminal negligence", which the appellant identified as the following:

> - The workers had worked on drop 5/6 [a descending row of balconies on the building face] for the entire day, apparently not adverting to the risk of mechanical failure of the swing stage;
> - The absence of foreseeability that the swing stage was so deficiently manufactured to the extent that it would have collapsed under its own weight;
> - When the workers boarded the stage, none of them, other than Tojiddinov, saw any need to utilize the available life line; and
> - Mr. Kazenelson himself boarded the stage (on the trial judge's findings) without either a fall arrest system and, like the other workers, without even attempting to secure himself to the available life line.

[12] I would not give effect to this argument. As the appellant acknowledged, the question for the trial judge was whether the appellant's conduct constituted a marked and substantial departure from what *a reasonable supervisor* would have done in the circumstances. The trial judge identified the circumstances relevant to this question at para. 127 of his reasons:

> The fundamental rule requiring fall arrest protection for each worker on a swing stage is a reflection of the simple fact that suspended access equipment can fail. The risk of such a failure is brought home to everyone who undergoes the suspended access training provided by the CSAO. Mr. Kazenelson had not only taken that training, he had followed it up with a course equipping him with the ability to train others. I am satisfied that he knew that swing stages are not fail safe. When he returned to the job site in the afternoon of December 24th, he became aware that six of his workers were more than 100 feet above the ground using a swing stage with only two lifelines. Not only did he fail to do anything to rectify this fundamental breach of the *Construction Regulation*, the standards of the Construction Safety Association, and industry practice, he permitted the workers, at the end of the day, to board the swing stage with all of their tools. The recklessness of his conduct was exacerbated by the fact that he had no information with respect to the capacity of the stage and thus no way of knowing whether it was capable of carrying the weight of all seven persons who boarded it. His conduct can only be characterized as a wanton and reckless disregard for the lives and safety of the workers and as a marked and substantial departure from what a reasonable supervisor would have done in the circumstances.

[13] In any event, the trial judge addressed these “contextual markers” relied on by the appellant a number of times in various sections of his analysis, including at paras. 18, 114, 129-130, and 142-143.

[14] As to the unexpected failure of the swing stage, the trial judge found, at para. 146, in the section of his analysis addressing causation:

> The relevant question, therefore, is whether a reasonable project manager would have contemplated the risk of equipment failure "as part of the general risk

> involved" in failing to provide lifelines for workers on a swing stage suspended 100 feet or more above the ground. In my opinion, the only possible answer to that question is yes. The risk of equipment failure was not only an objectively foreseeable risk, it was virtually the entire reason why the provision of a fall arrest system was regarded as the fundamental rule of swing stage work. The failure of the swing stage, even if unexpected, was not an event that was outside the ambit of the general risk animating the requirement for a fall arrest system. It is not necessary that the precise cause of the failure have been foreseen. [Footnote omitted.]

[15] Similarly, in addressing whether the actions of the workers broke the chain of causation through their failure to use the one available lifeline, and in failing to insist that sufficient lifelines for all of them be provided as the law requires, the trial judge found, at para. 148:

> The premise underlying the defence submission is that the workers were solely responsible for their safety. That premise runs head-on into s. 217.1 of the *Criminal Code* and ss. 27(1)(a) and [2](c) of *OHSA*. The former provision puts a duty on persons like Mr. Kazenelson to take reasonable steps to prevent bodily harm to workers. The latter provisions require such persons "to take every precaution reasonable in the circumstances" for the safety of workers and, more specifically, to ensure that a worker "works in the manner and with the protective devices, measures and procedures required by [the] Act and the regulations".

[16] There is no legal error in the trial judge’s expression, understanding, or application of the legal test for criminal negligence. I would agree with his assessment, which was amply supported by the facts.

[17] The appellant's second argument that the verdict was unreasonable was that the trial judge misapprehended the evidence. In particular:

> The trial judge failed to address the evidence of the Crown's main witness, Mr. Tojiddinov that when the stage collapsed he and the other workers were working on the 12th floor, and then engaged in impermissible speculation that was not supported by the evidence that the workers and Mr. Kazenelson had begun to descend from the 13th floor and this engaged in speculative and illogical reasoning that was essential to his path of conviction.

[18] The appellant submitted that the trial judge made the error identified by the Supreme Court in *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, which establishes that a verdict is unreasonable if an inference or finding of fact essential to the verdict is shown to be incompatible with evidence that was not otherwise contradicted or rejected. The appellant takes particular aim at what he describes as the trial judge's "central finding" that the appellant was on the 13th floor with the workers before the swing stage collapsed, which meant he must have boarded the swing stage with the workers – and is in contrast to the appellant's position that he was on the 12th floor at the time of the collapse and that he never boarded the swing stage. The trial judge stated, at para. 21 of the conviction reasons:

> However, I am satisfied beyond a reasonable doubt that upon his return in the afternoon Mr. Kazenelson became aware, well in advance of the collapse of the stage, that that there were only two lifelines available for

> the six workers who were working their way down from the top of the building. Mr. Kazenelson was aware of that because when he returned he joined the workers as they continued to pour concrete, and when he joined them they were either on or above the 13th floor. He could only have joined them at that level by taking the swing stage from the ground or from the 12th floor, and in either case it would have been obvious to him when he boarded the stage that there were only two lifelines. Indeed, the defence urged me to accept the evidence that when Mr. Kazenelson joined the workers he asked [the site foreman] Mr. Fazilov *why* there were only two lifelines. [Emphasis in original.]

[19] The appellant submits that the trial judge "ignored important aspects" of the evidence of the witness, Mr. Tojiddinov, who was the one worker wearing a lifeline and whom the appellant pulled to safety onto the 12th floor balcony after the swing stage collapsed. The appellant pointed to three aspects in his factum: first, Mr. Tojiddinov's evidence that "he was pulled back onto the same balcony that he fell from"; second, Mr. Tojiddinov's rope grab was on the 12th floor; and third, Mr. Tojiddinov's evidence as to the duration of the collapse was either that it took 15-20 seconds or that it happened instantaneously.

[20] Counsel sharpened the points in oral argument. First, he pointed out that the trial judge's conclusion in para. 21 assumed the appellant had sufficient time to remedy the absence of lifelines when he noticed it. But the appellant argues that the collapse, as admitted by Mr. Tojiddinov in cross-examination, was virtually immediate after the site foreman's, Mr. Fazilov's, response to the appellant's question, asking why there were only two lifelines.

[21] Even more significant is the second and related point. The appellant disputes the trial judge's finding, at para. 101, that the appellant was hanging onto the 12th floor balcony. He also disputes the trial judge's finding as to how the appellant got back onto the balcony from the collapsing swing stage. He argues that the finding is implausible, because it would have required superhuman gymnastics skills on the appellant's part, especially in view of the expert evidence that the stage collapsed outwards from the building. He asserted: "That's a feat that is superhuman."

[22] Counsel argues that the evidence instead supports a finding that the appellant was never on the swing stage. If that is true, then the window of his opportunity to notice the missing lifelines would narrow to the few moments he was on the balcony when he put the question about the missing lifelines to Mr. Fazilov, just before the swing stage collapsed.

[23] I would not give effect to the argument that the trial judge misapprehended the evidence. He stated the central issues in similar terms to the argument before us at paras. 67-69.

[24] The trial judge's key findings were set out at paras. 101-103:

> According to Mr. Tojiddinov, however, Mr. Kazenelson explained that "...he was holding on to the balcony, holding on to the lifeline, and he had just enough time to climb over." There is nothing implausible about that explanation. It would have been sensible for Mr. Kazenelson to be holding onto Tojiddinov's lifeline if

> he was not attached to one himself, and sensible to maintain manual contact with the balcony as the stage began to descend. As I said earlier, Mr. Tojiddinov's evidence as to what Mr. Kazenelson told him finds support in the statement that Mr. Kazenelson made to Marissa Ortiz - that he had been 'hanging' on or from the balcony after the collapse.
>
> Once it is accepted that Kazenelson was on the 13th floor balcony prior to the workers boarding the stage, then completely apart from Mr. Tojiddinov's testimony the only reasonable inference is that Mr. Kazenelson used the swing stage to get there (either by having it sent down to ground level or by having it collect him on the 12th floor) and that he was on the swing stage when it collapsed. However, and in any event, the circumstantial evidence provides compelling confirmation for Tojiddinov's account.
>
> I am satisfied beyond a reasonable doubt that Kazenelson was on the stage at the time of the collapse.

[25] This set of findings follows a long development in the reasons starting at para. 65. Counsel for the appellant agreed that it was appropriate for the trial judge to treat Mr. Tojiddinov essentially as a *Vetrovec* witness in considering whether his evidence could support a conviction.

[26] The trial judge noted that Mr. Tojiddinov's trial evidence, which placed the appellant on the swing stage, was inconsistent with evidence he had given to the police and to Ministry of Labour investigators. On this basis, he noted, at para. 70, that: "There are many reasons to be concerned about the credibility and reliability of Mr. Tojiddinov's account of the material events." At para. 77, the trial

judge found that reliance on his evidence would be “dangerous”. Accordingly, he noted: “Before acting on his testimony, I agree, I should be satisfied that there is confirmation for it.” He then added: “I am satisfied, however, that there is substantial confirmation for the material portions of his account.”

[27] The trial judge pointed to a number of items of the evidence to substantiate this observation, which he listed in para. 79 of the reasons, and also in his review of the evidence of Marissa Ortiz and Mykhaylo Chernikov. There is no point in excerpting the lengthy text of the discussion. The conclusion the trial judge reached, at para. 96, is amply substantiated:

> On the totality of the evidence - the circumstantial evidence, the evidence of Chernikov, the evidence of Ortiz, and the evidence of Tojiddinov - I am satisfied beyond a reasonable doubt that Mr. Kazenelson was on the 13th floor balconies with the workers.

[28] While counsel challenged many of the factual findings and the trial judge’s use of the circumstantial evidence and the evidence of Ms. Ortiz and Mr. Chernikov, he did so from the perspective of his central argument that Mr. Kazenelson’s escape from the falling swing stage was a superhuman feat. But the finding that it was plausible was open to the trial judge on the evidence, which he analyzed at great length. We find no palpable and overriding error in his analysis of the circumstantial evidence or the evidence of Ms. Ortiz and Mr. Chernikov.

[29] The trial judge then evaluated the evidence as to whether the appellant was on the swing stage at the time of its collapse. To repeat, he stated, at para. 102, that "the circumstantial evidence provides compelling confirmation for Tojiddinov's account", which placed the appellant on the stage. He concluded at para. 103: "I am satisfied beyond a reasonable doubt that Kazenelson was on the stage at the time of the collapse."

[30] In his summary of the factual findings, the trial judge set out the narrative he found at para. 107(ix):

> After pouring concrete on the 13th floor, the workers loaded their tools onto the swing stage in preparation for the trip to ground level. Mr. Kazenelson assisted them in that regard. Then, Mr. Fazilov, the five other workers and Mr. Kazenelson all boarded the stage. The only person who tied off to a lifeline was Mr. Tojiddinov. Mr. Kazenelson was the last person to board. I am satisfied that the motors were engaged, that the stage began to descend and that it descended several feet before the two centre modules of the stage separated, the stage collapsed, and Fayzullo Fazilov, Aleksey Blumberg, Vladimir Korostin, Aleksandrs Bondarevs and Dilshod Marupov fell 100 feet or so to the ground. Mr. Tojiddinov, the only person who was tied off to a lifeline, was left dangling in mid-air. Mr. Kazenelson, who had been holding on to Tojiddinov's lifeline, managed to scramble onto the balcony of apartment 1205.

[31] The trial judge related the law to the facts at paras. 108-130, and, as noted above, stated, at para. 127:

> When [the appellant] returned to the job site in the afternoon of December 24th, he became aware that six

> of his workers were more than 100 feet above the ground using a swing stage with only two lifelines. Not only did he fail to do anything to rectify this fundamental breach of the *Construction Regulation*, the standards of the Construction Safety Association, and industry practice, he permitted the workers, at the end of the day, to board the swing stage with all of their tools. The recklessness of his conduct was exacerbated by the fact that he had no information with respect to the capacity of the stage and thus no way of knowing whether it was capable of carrying the weight of all seven persons who boarded it. His conduct can only be characterized as a wanton and reckless disregard for the lives and safety of the workers and as a marked and substantial departure from what a reasonable supervisor would have done in the circumstances.

[32] As to the issue of timing raised by the appellant, the trial judge rejected the argument that the appellant had no opportunity to address the safety infractions once he knew of them because the swing stage collapsed immediately. This is especially clear in para. 44 of his sentencing reasons:

> While the evidence was in conflict with respect to how long he was with the workers prior to the collapse, it was at least half an hour and it may have been up to two hours. From the moment he joined them, he was aware that they were working 100 feet or more above the ground without lifelines. His duty to take steps to rectify this dangerous situation was fully engaged, and it remained engaged for some time. He not only did nothing, he permitted all six workers to board the stage together with their tools, and he did so in circumstances where he had no information with respect to the capacity of the stage to safely bear the weight to which it was being subjected. [Footnote omitted.]

[33] In my view, the trial judge fully and adequately addressed the factual issues in the case and the conclusion to which their resolution led him. I can discern no palpable and overriding errors, no errors in principle in his approach to the facts, and no errors in his approach to the applicable law or his application of it. I do not agree that upon a full consideration of the record the factual conclusions reached by the trial judge are implausible.

[34] I would dismiss the conviction appeal.

C. THE SENTENCE APPEAL

[35] This court should approach a sentence appeal "mindful of the highly deferential standard of review applicable in sentencing cases", as this court observed in *R. v. Orwin*, 2017 ONCA 841, 142 W.C.B. (2d) 319, at para. 51. The court noted: "Except where the sentencing judge has made an error of law or of principle that has an impact on the sentence imposed, we may not vary the sentence unless it is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 11."

[36] As noted, the trial judge imposed a sentence of three and a half years on each count to be served concurrently. He stated, at para. 23 of his sentencing reasons:

> [I]t is common ground that a term of imprisonment is necessary to adequately denounce Mr. Kazenelson's conduct and to deter other persons with authority over workers in potentially

> dangerous workplaces from breaching the legal duty set forth in s. 217.1 of the *Code* to take reasonable steps to prevent bodily harm from befalling those workers.

[37] The appellant submitted that the trial judge erred in law and in principle, and imposed a sentence that is unfit. A fit sentence, according to the appellant's factum, would have been 12-18 months, but in oral argument counsel for the appellant said a threshold penitentiary sentence of two years would have been fit. Such a sentence would have met the sentencing objectives of denunciation and general deterrence.

[38] The appellant argues that the trial judge made three specific errors in the way he approached sentencing. First, the trial judge "failed to properly consider the conduct of the workers in considering a fit sentence". Specifically, he erred in holding, at para. 27 of his sentencing reasons, that their conduct could be "more accurately described as an absence of an aggravating feature rather than as the presence of a mitigating one." The appellant submits that the workers were contributorily negligent, and that their contributory negligence should have served to decrease the appellant's moral blameworthiness. The trial judge considered and rejected this argument, concluding at para. 28 of his sentencing reasons:

> However, to mitigate the breach on the basis of the victims' awareness of the danger or the absence of overt coercion would ignore the reality that a worker's acceptance of dangerous working conditions is not always a truly voluntary choice. It would also tend to undermine the purpose of the

> duty imposed by s. 217.1 of the *Criminal Code*, which is to impose a legal obligation in relation to workplace safety *on management*. [Emphasis in original.]

[39] I would agree.

[40] The second sentencing error, the appellant submits, is that the trial judge placed too much emphasis on general deterrence than was appropriate for a first-time offender. The appellant had a momentary lapse in judgment, contrasted with his history of safety compliance, so that his "moral blameworthiness did not require the sentence imposed." The appellant argues that the trial judge's emphasis should have been on the fact of imprisonment, not its length. General deterrence has been accomplished; the construction industry is well aware of this case, which has also led to regulatory changes. The elements of denunciation and deterrence were further served by the length of the trial.

[41] I would not give effect to this argument. The trial judge bore these factors in mind. He recognized, at para. 41, that: "Apart from his breach of duty in this case, Mr. Kazenelson is unquestionably a person of good character." He considered, at para. 42, that: "The search for the appropriate sentence in this case must be guided by the fundamental principle that the penalty be proportionate to the gravity of the offences and the degree of responsibility of the offender." In his view, expressed at para. 43, the "seriousness of the offences committed by Mr. Kazenelson and their consequences cannot be doubted: four

men lost their lives and a fifth suffered devastating and life-altering injuries." While acknowledging that the appellant's breach of duty was not part of an on-going pattern of conduct, the trial judge observed, at para. 44, that his "breach of duty was more than a momentary lapse."

[42] The trial judge reached the conclusion, at para. 45, that:

> [A] significant term of imprisonment is necessary to reflect the terrible consequences of the offences and to make it unequivocally clear that persons in positions of authority in potentially dangerous workplaces have a serious obligation to take all reasonable steps to ensure that those who arrive for work in the morning will make it safely back to their homes and families at the end of the day.

[43] This led the trial judge to reject the sentence proposed by the defence.

[44] The third sentencing error made by the trial judge, according to the appellant, is related to the second. He found that "a seriously aggravating circumstance", which he developed in paras. 31-32, and then summed up in para. 44 of the sentencing reasons:

> [T]his is not a case where the finding of criminal negligence rests on a failure to advert to a risk to the lives and safety of the workers - Mr. Kazenelson adverted to the risk, weighed it against Metron's interest in keeping the work going, and decided to take a chance. That is a seriously aggravating circumstance in relation to the moral blameworthiness of his conduct.

[45] The trial judge was clearly troubled by a patent incongruity. On the one hand, as he noted at para. 10, the rule that each worker had a lifeline was

scrupulously enforced until the day of the tragedy, to the point that, as one worker testified, if “Mr. Kazenelson had caught him working on a swing stage without being tied off to a lifeline he would have been fired.” On the other hand, only one out of six workers using the swing stage on December 24 was tied off, to the appellant’s knowledge and in his presence. The trial judge drew the inference, at para. 32, that the delay in dropping more lifelines would have pushed the deadline out of reach, so the appellant abandoned his duty.

[46] I agree with the appellant that this inference is not entirely consistent with the trial judge’s earlier findings that the appellant first noticed the safety breaches at the end of the work day. He noted in para. 107(ix) of the conviction reasons: “After pouring concrete on the 13th floor, the workers loaded their tools onto the swing stage in preparation for the trip to ground level.” He repeated this at para. 127: “[the appellant] permitted the workers, at the end of the day, to board the swing stage with all of their tools.”

[47] That said, it was not unreasonable for the trial judge to draw the inference, on the totality of the facts, that the desire to complete the work that day led the appellant to compromise his duties. At para. 21 of his reasons, the trial judge found that the appellant “became aware, well in advance of the collapse of the stage, that there were only two lifelines available for the six workers who were working their way down from the top of the building.” Moreover, I am not

persuaded that the sentence would be unfit, even in the absence of this aggravating factor.

[48] Taken together, the trial judge wrestled anxiously and carefully with the issue of the appellant's moral blameworthiness and its effect on the sentence. I see no error in principle and no merit in the argument that the sentence is unfit. I would dismiss the sentence appeal.

D. DISPOSITION

[49] I would dismiss the appeal.

Released:

"JS"
"JAN 30 2018"

"P. Lauwers J.A."
"I agree Janet Simmons J.A."
"I agree G. Pardu J.A."