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R. v. Kell, 2026 ONSC 2946

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CITATION: R. v. Kell, 2026 ONSC 2946
LINDSAY COURT FILE NO.: CV-21-31200119-00AP
DATE: 20260520

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
HIS MAJESTY THE KING	)	G. Jarrar, for the Crown/Respondent
– and –	)	
MICHAEL KELL	)	
Appellant	)	N. Xynnis, for the Appellant
	)	**HEARD:** February 13, 2026

REASONS FOR DECISION

DE SA J.:

Overview

[1] The Appellant was charged with Assault, Assault with a Weapon and Assault Causing Bodily Harm, contrary to the *Criminal Code of Canada*.

[2] After trial, the Appellant was found guilty of all three charges and was sentenced to one year in jail followed by three years of probation.

[3] The Appellant now appeals against his convictions and sentence.

[4] The Appellant submits that the trial judge's reasons were deficient, and the limited reasons suggest he took an uneven approach to the defence evidence. More particularly, the Appellant submits that:

1) The trial judge failed to adequately explain how he came to his conclusions regarding credibility and/or reliability or why he accepted the evidence of the complainant or rejected the evidence of the Appellant;

2) The trial judge accepted the evidence given by the complainant, while almost uniformly rejecting the evidence of the Appellant and his wife solely on the basis of the contradictory video evidence, which the Appellant submits was not reasonable.

2026 ONSC 2946 (CanLII)

[5] With respect to sentence, the Appellant takes the position that: 1) the trial judge committed an error in principle by not giving due weight to the positive circumstances of the Appellant, the principle of restraint, or "properly applying" the conditional sentence provisions in the *Code*; and 2) the trial judge imposed a sentence (12-months jail) that was "harsh and excessive" and contrary to established precedent.

[6] Having reviewed the record here, I see no merit to the conviction appeal. The appeal against conviction is dismissed.

[7] Leave to appeal sentence is granted and a conditional sentence of 2 years less a day is substituted, followed by a period of probation.

[8] The reasons for my decision are outlined below.

Evidence at Trial

The Case for the Prosecution

[9] The complainant, Pavel Gmuzdek, was employed as the operations manager for Haliburton Forest. The Appellant and his wife, Yvonne, worked as independent logging contractors at the Haliburton Forest operation. Mr. Gmuzdek was responsible for inputting data regarding production and expenses in relation to the individual contractors.

[10] There had been ongoing disagreements between Michael Kell and management regarding deductions from their compensation. On November 19, 2021, Michael and Yvonne Kell picked up their pay at the Haliburton Forest office and were concerned about deductions that had been made.

[11] They drove to Mr. Gmuzdek's residence to speak with him. He was not present and they spoke with his neighbour.

[12] Mr. Gmuzdek testified that he was on the road near Minden when he received a text message from his neighbour reporting an unsettling visit from Mr. Kell. Mr. Gmuzdek then spoke with Yvonne and advised her that he would return to the office and print off the relevant paperwork relating to their pay which he would leave for her in the mailbox.

[13] Mr. Gmuzdek testified that while printing the relevant paperwork, Michael Kell violently entered the building and swore at him. Mr. Kell was carrying some kind of tool with a wooden handle that Mr. Gmuzdek believed to be a Peavey. As Mr. Gmuzdek rose from his chair, Mr. Kell aggressively swung at him with the tool. Mr. Gmuzdek turned to move away and was struck on the right side of his body. Mr. Kell swung the tool at him again. Mr. Gmuzdek blocked it with his forearm. Mr. Kell dropped the tool and the two men grabbed at one another. Mr. Kell tried to punch Mr. Gmuzdek and put both hands on his neck. At some point Mr. Kell's eyeglasses fell to the floor and were broken.

2026 ONSC 2946 (CanLII)

[14] Mr. Gmuzdek was able to de-escalate the situation. The two men sat down, and Mr. Kell aired a variety of grievances ranging from price fixing to the vandalism of his equipment. Mr. Kell eventually apologized and the two left the building together.

[15] Later that evening Mr. Gmuzdek attended Haliburton Hospital for treatment. Photographs taken several days after the altercation and tendered at trial showed significant bruising to Mr. Gmuzdek's abdomen and forearm. Mr. Gmuzdek testified that he spoke with his manager over the weekend who called police.

[16] Security video from the Haliburton Forest yard shows Mr. Gmuzdek arriving at the yard and entering the building at 5:37 p.m. At 6:03 p.m. a figure appears behind Mr. Gmuzdek's truck, moving toward the building. Around 6:35 p.m. two figures leave the building. Mr. Gmuzdek identified himself as the person who enters his truck. Video from a different camera shows Mr. Gmuzdek driving from the yard and passing a pedestrian on the road who is carrying a bat-like object at his side. Mr. Gmuzdek identified this person in the video as Mr. Kell.

Defence Evidence

[17] The Appellant testified in his defence. He denied assaulting Mr. Gmuzdek. He acknowledged attending with his wife to pick up their pay and then driving to Mr. Gmuzdek's residence to voice his concerns about the deductions. After that, the Appellant testified that he returned home. His wife went back to the yard later in the evening to speak with Mr. Gmuzdek but the Appellant did not.

[18] On November 21, 2021, his wife told him that she had been assaulted by Mr. Gmuzdek. The Appellant and his wife chose not to report the alleged assault because they did not trust the police and were concerned about their employment with Haliburton Forest.

[19] The Appellant's wife, Yvonne Kell, also testified. Ms. Kell testified that she drove to the yard and parked near the building. She met with Mr. Gmuzdek to discuss her complaints about deductions. According to Ms. Kell, she told Mr. Gmuzdek that his supervisor would be charged with fraud. Mr. Gmuzdek responded by striking her in the face with the back of his hand, knocking her glasses to the floor and breaking them. Ms. Kell then drove home.

[20] When asked why she did not report the alleged assault to the police even after the Appellant and his wife lost their jobs, Ms. Kell said it looked a "little silly" in her mind to report the incident to the police after they had charged her husband. She also testified that she parked her black F-150 truck in the main parking lot on November 19, 2021, before 6:00 p.m. When confronted with the surveillance video that did not show the F-150 in the parking lot at that time, Ms. Kell implied that someone may have tampered with the video.

Reasons for Judgment

[21] In his Reasons for Judgement, the trial judge accepted the evidence of Mr. Gmuzdek and rejected the defence evidence outright. In convicting the Appellant, the trial judge stated, in part:

2026 ONSC 2946 (CanLII)

> I do not accept the evidence of Mr. Kell or his wife Yvonne, nor does it raise a doubt in my mind. Among other issues, the defence evidence is inconsistent with the security video from the lumber yard. Contrary to her evidence, the security video demonstrates that Yvonne Kell did not attend the lumber yard on the evening of November 19th. Her testimony on this point is refuted by the video. That evidence, the security video, confirms the presence of a second individual, likely a male, who entered the building and left with Mr. Gmuzdek some 30 minutes later. I accept Mr. Gmuzdek's evidence as credible and reliable. His evidence is firmly supported by the security video, the photographs of his injuries and the hospital records. In addition, it is apparent that Michael Kell was upset on November 19th and was looking for Mr. Gmuzdek. In short, he had a motive to commit the offenses before the court. Any inconsistency regarding Mr. Gmuzdek's description of the lumber tool or the absence of evidence of broken glasses or injury to Mr. Kell does not undermine Mr. Gmuzdek's evidence. Considering the evidence as a whole, I am satisfied beyond a reasonable doubt that Mr. Kell assaulted Mr. Gmuzdek with a lumber tool causing the bodily harm revealed in the photographs. In the result, findings of guilt should be entered with respect to all three counts.

2026 ONSC 2946 (CanLII)

Sentencing Hearing

[22] At the sentencing hearing, the Crown initially proposed a 90-day imprisonment sentence. In response, the trial judge expressed "real difficulty" with the proposed sentence and suggested that the appropriate sentence to be in the upper reformatory range. The trial judge referred the parties to Justice Code's decision in *R. v. Seerattan*, 2019 ONSC 4340, and gave the parties the opportunity to make further submissions.

[23] After reviewing the caselaw, the Crown revised its position to 6-months of imprisonment. Throughout the proceedings, defence submitted that the appropriate sentence was a conditional sentence order.

[24] The trial judge noted that the attack was an unprovoked, planned and deliberate attack on an unarmed man. The trial judge imposed a sentence of 12 months of imprisonment for the assault causing bodily harm charge. He stayed the assault *simpliciter* and assault with a weapon charges pursuant to the rule in *R. v. Kienapple.* In sentencing the Appellant, the trial judge explained:

> Mr. Kell is a mature first offender. There is no evidence of remorse. Remarkably. Kell denigrated Mr. Gmuzdek when interviewed by the probation officer tasked with the preparation of the pre-sentence report that had been requested by the defence.
>
> As mentioned, in *R. v. Seerattan*, Code, J. identified a sentencing range for serious assaults. To my mind the present case falls within the mid-range identified by Code, J. warranting an upper-range reformatory sentence.

> Given Mr. Kell's relatively advanced age, when considered in the context of the inmate population, the absence of a prior record and the difficult circumstances of under-staffing and over-crowding in the Central East Correctional Centre, I conclude that 12-months imprisonment is sufficient to meet the objective of proportionality.
>
> While statutorily available, I am satisfied given the gravity of the assault and Mr. Kell's level of moral responsibility that a conditional sentence of imprisonment is incapable of meeting the demands of denunciation in the present case. See *R. v. V (C.D.)*, [2024] ONCA 226 at paragraph 7.

Analysis

Were the trial judge's reasons sufficient and did the trial judge err in his assessment of credibility?

Sufficiency of Reasons

[25] An appeal based on insufficient reasons "will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review": *R. v. Dinardo*, 2008 SCC 24 (CanLII), [2008] 1 S.C.R. 788, at para. 25; *R. v. R.E.M.*, 2008 SCC 51 (CanLII), [2008] 3 SCR 3, at para. 16; *R. v. Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 S.C.R. 869, at para. 55.

[26] Reasons for judgment must be examined in the context of the entire proceeding, especially the nature of the evidence heard and the arguments advanced*: R. v. J.J.R.D.*, 2006 CanLII 40088 (ON CA), at para. 32; *R. v. Vuradin*, [2013] 2 SCR 639, 2013 SCC 38 (CanLII); *R.E.M.*, at para 17.

[27] Rarely will the deficiencies in the trial judge's credibility analysis, as expressed in the reasons for judgment, merit intervention on appeal: *Dinardo,* at para. 26. The Supreme Court explained in *R.E.M.*, *supra*, at para. 49:

> While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize.
>
> Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

2026 ONSC 2946 (CanLII)

[28] In this case, the reasons are more than adequate to understand the path taken by the trial judge. The trial judge accepted the evidence of the complainant regarding the events. He based his decision on the credibility of the complainant which was firmly supported by the security video, the photographs of his injuries and the hospital records.

[29] Indeed, a considered and reasoned acceptance of the truth of conflicting credible evidence will often be more than adequate as an explanation for rejecting the accused's evidence: *R. v. J.J.R.D., supra,* at para. 53.

[30] The Appellant also maintains that the trial judge placed excessive reliance on the security video and subjected the defence evidence to a higher level of scrutiny.

[31] I see no basis for the Appellant's assertions in this regard. The trial judge was entitled to give the weight he did to the security video which corroborated the complainant's evidence and contradicted the evidence of Ms. Kell. The alleged uneven scrutiny is nothing more than the findings of the trial judge as to the credibility and reliability of the evidence. As the jurisprudence makes clear, these findings are entitled to deference: *R. v. G.F.*, 2021 SCC 20, 163 O.R. (3d) 480, at para. 99; *R. v. Howe* (2005), 192 C.C.C. (3d) 480, at para. 59 (Ont. C.A.).

[32] The conviction appeal is dismissed.

Sentence Appeal

Standard of Review

[33] It is trite that a sentence imposed by a trial judge is entitled to deference on appeal. A sentence appeal must not become a second sentencing hearing at which an appellate court substitutes its view of an appropriate sentence. Indeed, the fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention.; *R. v. Lacasse*, 2015 SCC 64, at para. 11.

[34] There are two circumstances where deference is displaced. The first is when the trial judge makes an error in principle that had an impact on the sentence. In such cases, the appellate court can "inquire into the fitness of the sentence and replace it with the sentence it considers appropriate.": *R. v. Lacasse*, 2015 SCC 64, at paras. 41-47.

[35] As Laskin J.A. explained in *R. v. McKnight* (1999), 1999 CanLII 3717 (ON CA), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, however, this does not mean that appellate courts can interfere with a sentence simply because they would have weighed the relevant factors differently:

> To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about. To maintain deference to the trial

2026 ONSC 2946 (CanLII)

> judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. *Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably should an appellate court interfere with the sentence on the ground the trial judge erred in principle.* [Emphasis added.]

[36] The second circumstance displacing deference is when the sentence imposed is "demonstrably unfit." This is a high bar. Demonstrably unfit has been described as "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure.": *R. v. Lacasse*, 2015 SCC 64, at paras. 52-55.

Application to the Facts of this Case

[37] The range of sentences for assault causing bodily harm is very wide from an absolute discharge to significant penitentiary terms: *R. v. Singh*, 2023 ONSC 4949, at para. 60.

[38] While the learned sentencing judge here properly stressed the need for deterrence in cases involving violence, in my view, he failed to give adequate weight to the principle of restraint or the fact that the Appellant was a first offender. In so doing, in my view, he exercised his discretion unreasonably.

[39] Although a court can, in pursuit of the objective of general deterrence, impose a harsher sentence in order to send a message with a view to deterring others, the offender must still deserve that sentence: *R. v. Paré*, 2011 QCCA 2047; G. Renaud, *The Sentencing Code of Canada: Principles and Objectives* (2009), at para. 3.13. As the Supreme Court explained in *R. v. Lacasse, supra*, at para. 128:

> If a judge fails to individualize a sentence and to consider the relevant mitigating factors while placing undue emphasis on the circumstances of the offence and the objectives of denunciation and deterrence, all that is done is to punish the crime: *R. v. R. (M.)*, 2010 QCCA 16, 73 C.R. (6th) 136. Proportionality requires that a sentence not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. From this perspective, it serves as a limiting principle: *Nasogaluak*, at para. 42.

[40] The objectives of *individual deterrence and rehabilitation are paramount* when dealing with first offenders: See *R. v. Demeter* (1976), 1976 CanLII 1413 (ON CA), 32 C.C.C. (2d) 379, 3 C.R. (3d) S-55 (Ont. C.A.).

[41] Section 718.2 of the *Criminal Code* recognizes that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. All available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered.

2026 ONSC 2946 (CanLII)

[42] A first sentence of imprisonment should be as short as possible and tailored to the individual circumstances of the accused: *R. v. Priest*, 1996 CanLII 1381 (ON CA).

[43] Notably, in this case, the initial sentence proposed by the Crown was 90-days. While not binding on the sentencing judge as an upper limit, the range of sentence put forward by the parties should be given serious consideration in the assessment of an appropriate sentence.

[44] It should also be remembered that the objectives of denunciation and deterrence are not only met through the imposition of a term of incarceration: see *R. v. Proulx*, 2000 SCC 5 (CanLII), [2000] 1 S.C.R. 61, at paras. 20 and 22; *R. v. Wismayer* (1997), 1997 CanLII 3294 (ON CA), 33 O.R. (3d) 225 (C.A.), at pp. 241-245.

[45] The level of violence involved here does not automatically exclude an appropriately crafted conditional sentence. As Justice Zarnett explained in *R. v. Ali*, 2022 ONCA 736, at para. 27:

> The caselaw establishes that a conditional sentence can provide deterrence and denunciation and thus may be appropriate for a crime involving violence, such as aggravated assault, even when deterrence and denunciation are paramount considerations. Conditional sentences have been found appropriate in cases when similar, or more extreme, violence has been present compared to what occurred here.

[46] While the Appellant is not youthful, he is a first offender and one who should have been accorded more credit, for having lived a productive life without any interaction with the law until his early 60s. The offence here was clearly an aberration of the Appellant's character and due to an unusual set of circumstances that are unlikely to be repeated.

[47] In the circumstances here, I would grant leave to appeal the sentence and substitute a conditional sentence of 2 years less a day, followed by a period of probation for 2 years with the standard terms.

[48] The conditional sentence should include house arrest for the first year, and a curfew for the balance. It should also include the mandatory conditions set out in s. 742.3(1) of the *Criminal Code*, conditions requiring that the Appellant have no contact with the complainant, and that the accused not own, carry, or possess weapons.

[49] Counsel can confer and provide the court with an agreed form of order.

[50] The conditional sentence shall be followed by 2 years of probation with the same terms imposed by the trial judge.

[51] The ancillary orders of the trial judge shall also remain in effect.

Justice C.F. de Sa

Released: May 20, 2026

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SUPERIOR COURT OF JUSTICE

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– and –

MICHAEL KELL

Appellant

REASONS FOR DECISION

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