RANGEFINDR

# *R v SS* and the weirdness of judgments

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Running a sentencing database like rangefindr.ca seems like it should be easy. You take a sentencing judgment, formalize the data it contains into something searchable, and let the users search!

In reality you don't get very far into this process before you realize something: judgments are weird. Despite notionally adhering to a basic structure (facts + law = result) and some general assumptions (must be in English or French, must identify the parties, etc.), the corpus of Canadian caselaw is lousy with judgments that resist efforts to extract and structure their data.

One example is *R v SS*, 2007 ONCJ 390. The accused in *SS* was being sentenced for a sexual assault committed against a female friend who was too intoxicated to resist. The defence sought a 12-month conditional sentence while the Crown pitched 18 months custody. The accused was a first offender but showed no remorse. The court in its reasons emphasized denunciation and the protection of the public, but also rehabilitation.

Simple enough, right? Facts + law should = result.

Here is the result:

> Now, balancing the appropriate punitive and rehabilitative objectives and at the risk of taking some liberties with the traditional sentencing principles and procedures, I am prepared to offer Mr. [SS] a choice of sentences.
>
> [. . .]
>
> Now, I want to give counsel some time to digest that and have a discussion with Mr. [SS] as to which option he would favour. I'm prepared to go over it one more time if it's not clear. And it's simply two choices: ten months straight time, followed by probation for a year; the second option: a period of 12 months probation, during which time a intermittent sentence is served on weekends, 90 days, and the first six months of the probation, Mr. [SS] is confined to his home, and during the second six months of probation, he is effectively on an early curfew that is a curtailment of his liberty and for the purposes of approximating the sentence of imprisonment that is the first option. [emphasis added]

The court gives the defence some time to discuss and decide — but the reported judgment doesn't tell us which option the offender chose! We had no way to enter this case into rangefindr.ca unless we knew what the sentence was. So we ordered the information from the Ontario Court of Justice and it turns out the defence chose

Option 2: 90 days intermittent + one year probation.

You might reasonably wonder what possible precedential value *R v SS* could have. The sentence isn't apparent from the text of the judgment, and allowing the accused to pick his own sentence is almost certainly an error of law. But this didn't stop the Supreme Court of British Columbia from citing *R v SS* in *R v BSB*, 2008 BCSC 1526, aff'd 2010 BCCA 40, a sentencing judgment that went on to be cited by 29 further judgments (18 cite the lower court sentencing judgment and 11 cite the BC Court of Appeal). *R v SS*, odd as it was, became part of the sentencing range for sexual assault, especially in BC, and we had to include it.

I plan to write a lot more about the weirdness of judgments and the challenges of turning that weirdness into something useful. For now, let *R v SS* serve as a teaser: it's nowhere near unique.