

CANADA / JUDGMENT

R. v. Ali

2025 BCSC 909

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Supreme Court of British Columbia

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2025 BCSC 909 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2025 BCSC 909

Date: 20250410

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Registry: New Westminster

Rex

v.

Azarik Aamir Ali

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Before: The Honourable Justice Matthews

Oral Reasons for Sentence

Counsel for the Crown:

T.J. Dotten

The Accused, appearing on her own behalf:

A. Ali

Counsel appearing as Amicus Curiae:

B.R. Anderson

Place and Date of Sentencing Hearing:

New Westminster, B.C.

February 28, 2025

Place and Date of Judgment:

New Westminster, B.C.

April 10, 2025

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- [1] I delivered these reasons for sentence orally. I have edited the transcript without changing the substance.
- [2] On September 27, 2024, I convicted Azarik Aamir Ali of one count of invitation to sexual touching, contrary to s. 152(a) of the Criminal Code. That conviction was on Count 5 of a five-count indictment pertaining to sexual offences against the same young complainant to whom I will refer by his initials as F.F. He was 13 years old at the time of the offending. He was the younger brother of Ms. Ali's former fiancé. I acquitted Ms. Ali on the other four counts on the indictment, which included allegations of sexual assault, invitation to sexual touching, sexual interference, and exposure. My verdict reasons have been transcribed and are indexed at 2024 BCSC 2160.
- [3] Ms. Ali brings a constitutional challenge to the mandatory minimum sentence in s. 152(a) of the Criminal Code.
- [4] The Crown does not oppose that challenge and has indeed submitted that the mandatory minimum sentence is not compliant with s. 12 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11.
- [5] The Crown seeks a sentence of one year, followed by three years on probation. The Crown is of the view that the circumstances are such that the court must consider a conditional sentence order.
- [6] Ms. Ali has not made submissions that question the fitness of a one-year sentence or a three-year probation term. The gist of her submissions, and she is a self-represented person, support the view that a conditional sentence is appropriate. Amicus curiae has assisted the court in a review of case law in that regard. Ms. Ali also asserts that some of the Crown's proposed probation terms are unduly onerous and restricted. I will come to those.

Constitutional Challenge to Mandatory Minimum Sentence

- [7] Amicus curiae assisted Ms. Ali to file a Constitutional Question Act application and notice seeking a finding that the one-year mandatory minimum sentence for invitation to sexual touching in s. 152(a) of the Criminal Code constitutes cruel and unusual punishment, contrary to s. 12 of the Charter.
- [8] In *R. v. Scofield*, 2019 BCCA 3, the one-year mandatory sentence for the offence of sexual interference, which is found in s. 151(a) of the Criminal Code, was found to infringe s. 12 of the Charter. The Crown concedes that sexual interference and invitation to sexual touching are not offences that are distinct enough to alter the constitutional analysis, and so the one-year mandatory minimum sentence under s. 152(a) cannot be constitutionally defended.

- [9] The Crown urges me to undertake the constitutional analysis and make a ruling so that this issue has been addressed squarely by a judge of this Court, even if I find that a fit sentence is not less than the mandatory minimum sentence of one year. Indeed, the Crown asserts that a one-year sentence is a fit sentence. The real question is whether the Court will structure the sentence to be served as a conditional sentence in the community or as a sentence of incarceration.
- [10] Part of the reason for urging me to proceed with a constitutional analysis is that indictable charges under s. 152(a) can proceed in either Provincial Court or Supreme Court, but a Provincial Court judge does not have the jurisdiction to declare the law to be of no force or effect: *R. v. Lloyd*, 2016 SCC 13 at para. 19. As a result, if a Provincial Court judge concludes that the one-year mandatory minimum sentence violates s. 12 of the Charter, the judge must decline to apply it and impose the fit sentence. However, the mandatory minimum sentence remains and another Provincial Court judge would have to follow the same procedure in another case involving the same mandatory minimum sentence. This leads to uncertainty and the inefficient use of judicial resources. The rule of law is offended when unconstitutional laws remain in force indefinitely: *R. v. E.O.*, 2019 YKCA 9 at paras. 37-38; see also *R. v. Hamlin*, 2019 BCSC 2266 at paras. 26-30.
- [11] A s. 12 challenge to a mandatory minimum sentence involves a two-part inquiry which engages a contextual and comparative analysis that requires the sentencing judge to:
- 1) determine what constitutes a proportionate sentence in the absence of the impugned provision, having regard to the objectives and principles of sentencing in the Criminal Code; and
 - 2) decide whether applying the mandatory minimum sentence would result in a grossly disproportionate sentence when compared to the fit and proportionate sentence identified.
- [12] In doing so, the court assesses:
- a) the scope and reach of the offence;
 - b) the effect of the penalty on the offender; and
 - c) the penalty, including the balance struck by its objectives.
- [13] If the mandatory minimum sentence does not pass this two-part inquiry, then it is open to the Crown to justify it under s. 1 of the Charter. The Crown does not seek to do so in this case.
- [14] In *Scofield*, the Court of Appeal held that the one-year mandatory minimum sentence in s. 151(a), when the Crown proceeds by indictment, infringed s. 12 of the Charter. The Court declared the one-year mandatory sentence in s. 151(a) to be of no force or effect.

- [15] Both s. 151 and s. 152 require specific intent and involve sexually interfering with a child. The constituent elements of the offences are not distinguishable. The difference is that s. 151 involves actual touching, while s. 152 involves an invitation to touch. It cannot be said that the invitation to sexual touching is a more serious offence than sexual interference.
- [16] This approach of comparing the constituent elements of the s. 152 offence to the s. 151 offence has been employed by courts of other provinces, where courts have held that the one-year mandatory minimum sentence in s. 152(a) is unconstitutional: *R. v. Fluet*, 2023 ONSC 3858 at paras. 33-34; and *R. v. Reeves*, 2020 ABQB 78 at paras. 11-15. The conclusion reached in those cases is that because the one-year mandatory minimum sentence in s. 151(a) is unconstitutional, the one-year mandatory minimum sentence in s. 152(a) is also unconstitutional.
- [17] The one-year mandatory minimum sentence in s. 151 has been declared constitutional twice in B.C.: *R. v. E.M.Q.*, 2015 BCSC 201; and *R. v. M.S.H.*, 2017 BCSC 35 (unreported). These decisions were considered by the Court of Appeal in *Scofield*, and their reasoning not applied to s. 151(a). Because of what I have already said about the indistinguishability between s. 151(a) and s. 152(a), I consider the analysis in *Scofield* to be persuasive and to be so indistinguishable as to be binding.
- [18] The two-part inquiry may proceed on the basis of either (a) the individual offender before the court, or (b) where a sentence is not grossly disproportionate for the individual offender, another offender in a reasonably foreseeable case or hypothetical scenario, often referred to as the reasonable hypothetical or generalized inquiry: *Scofield* at paras. 40-42, 108-109, 122, 124.
- [19] On the first stage of the inquiry, as I will explain further, I am of the view that a fit sentence is one year followed by three years of probation. Accordingly, on the second stage, the constitutionality review must proceed on the basis of the reasonable hypothetical scenario.
- [20] On the second stage of the inquiry in *Scofield*, the Court of Appeal held that s. 151(a) could potentially capture a wide scope of conduct, and that the mandatory minimum sentence of one year was grossly disproportionate when analyzed against both the particular offender and a reasonable hypothetical: paras. 73-74 and 75-88.
- [21] In *Scofield*, the Court of Appeal considered the reasonable hypothetical approach using this hypothetical scenario:
- [82] . . . Consider a case in which two young people meet at a party attended by other young people. One is almost 16 years old. The other turned 21 years old a few months earlier. The close-in-age exception is inapplicable by a few months and certainly less than one year. The two people drink alcohol and smoke marihuana. They are not drunk but their inhibitions are reduced. Finding that they are attracted to each other, they find a private bedroom. They engage in some kissing and brief sexual touching over their clothing, but they do not undress or have intercourse. After approximately ten minutes, they return to the party.

During their time together, they act willingly, knowing each other's ages. Neither person has a criminal record. This is the only occasion where either one engages in this kind of conduct with each other.

- [83] In my opinion, imposing a one-year mandatory minimum sentence in those circumstances is grossly disproportionate, would shock the conscience of Canadians, and would be cruel and unusual punishment. A proportionate sentence would not attract imprisonment or even . . . a CSO. The result does not turn on the gender of the participants or any other details about the personal circumstances of the older person. Other reasonably relevant factors about the offender that heighten the disproportionate character of the sentence can be added to the hypothetical. As in this case, the offender might have disabilities that reduce moral culpability. Alternatively, the judge might be obliged to consider significant Gladue factors in sentencing.
- [22] For s. 152(a), the same hypothetical could be employed, except that instead of "finding a private bedroom where they engaged in some kissing and brief sexual touching over their clothing", the 21-year-old suggests they find somewhere private so they can fool around. Regardless of what the 16-year-old does or says, the offence would be made out. The same analysis as in *Scofield* would apply.
- [23] I declare s. 152(a) to be grossly disproportionate when analyzed against a reasonable hypothetical, and I declare it to violate s. 12 of the Charter and to be of no force and effect.

Positions of the Parties

- [24] The Crown seeks a sentence of one year followed by three years of probation. The Crown asserts that it would be reasonable for the court to conclude that the prerequisites for a conditional sentence as provided for in s. 742.1 of the Criminal Code are met. The Crown seeks several conditions if a conditional sentence is imposed, including a curfew from 6:00 a.m. to 6:00 p.m., no-contact and no-go orders pertaining to F.F. and Z.K., another youth who was a witness to the offence, and not being in the presence of any person under the age of 16, and counselling as directed. The same terms are sought for the probation order, except for the curfew.
- [25] The Crown seeks the following ancillary orders:
- a) Mandatory DNA order.
 - b) SOIRA order.
 - c) The victim fine surcharge unless it is appropriate to exempt Ms. Ali.
- [26] Ms. Ali has not specifically made a submission on the length of sentence, but her submissions align with the imposition of a conditional sentence order. She seeks that the terms of the curfew be different from what the Crown has imposed on a conditional sentence order.

Sentencing Principles

General

- [27] Section 718 of the Criminal Code provides that the fundamental purpose of sentencing is to protect society and to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. Sections (a) through (f) of s. 718 set out objectives to achieve the fundamental purpose, namely: denouncing unlawful conduct and its resultant harms; deterrence both general and specific; separating offenders from society where necessary to protect the public; assisting in rehabilitation; providing for reparation for harms done; and promoting responsibility in offenders and acknowledging the impact of their conduct. As explained in *R. v. Nasogaluak*, 2010 SCC 6 at para. 43, none of these factors are inherently more important than the other. Rather, the sentencing judge must determine which are important and persuasive, given the circumstances of the case.
- [28] Sections 718.1 and 718.2 of the Criminal Code provide a non-exhaustive list of sentencing principles. Section 718.1 mandates that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. Section 718.2 provides for the consideration of aggravating and mitigating circumstances, the principles of parity and totality, and the instruction to consider all available sanctions other than imprisonment that are reasonable in the circumstances. The most fundamental of these principles is proportionality: *R. v. Ipeelee*, 2012 SCC 13 at para. 37.
- [29] Parity, by providing that similar offenders who commit similar offences should receive similar sentences, gives meaning to proportionality: *R. v. Friesen*, 2020 SCC 9 at paras. 30-33. Sentencing ranges are a tool to determine a fit sentence and are to assist the court to do so in accordance with the parity principle. However, they are guidelines, not hard and fast rules. They must not overtake the unique circumstances of the offence, the offender, and the community in which the offence occurred or the principle of proportionality: *Nasogaluak* at para. 44; and *R. v. Smith*, 2017 BCCA 112 at para. 35.

Rehabilitation

- [30] The Court of Appeal for British Columbia has provided guidance on how to take into account rehabilitation. In general, where there is evidence of a reasonable chance of rehabilitation, the principle of deterrence should yield to that prospect, especially in cases where incarceration will detract from the prospects of rehabilitation such that public safety is better served by rehabilitation.

Sexual Offences Against Children

- [31] Section 718.01 of the Criminal Code promotes the prioritization of denunciation and deterrence in sentencing for sexual offences. In *Friesen* at paras. 43, 44, 50, and 75-92 the Supreme Court of Canada explained that in sentencing for sexual offences against children,

the legislative objective of protecting children from wrongful exploitation and harm must be reflected in the sentence. The proportionality principle is served by a sentence that reflects that sexual offences against children are inherently wrongful, i.e., have high intrinsic moral blameworthiness, and the potential and actual harm of these offences, i.e., the gravity, is extremely high.

- [32] The Court also reminded sentencing judges that not all offenders are the same in terms of moral blameworthiness. The Court suggested that persons who suffer from mental disabilities and Indigenous persons who themselves have been the victims of the legacy of residential schools may have relatively reduced moral blameworthiness that should be taken into account: Friesen at paras. 92-93.
- [33] A sentencing judge must focus on the potential and actual emotional and psychological harm, as well as the physical harm of the offence, in both the short and long term.
- [34] In Friesen at para. 107, the Court provided guidance on sentencing sexual offenders involving child victims as follows:
- a) upward departure from previous sentencing ranges may be required to impose a proportionate sentence;
 - b) sexual offences against children should generally be punished more severely than sexual offences against adults; and
 - c) sexual interference with a child should not be treated as less serious than sexual assault of a child.
- [35] A non-exhaustive list of relevant factors is set out at para. 121 of Friesen, the likelihood to reoffend; abuse of position of trust or authority; duration and frequency of sexual violence; the age of the victim; the degree of physical intervention; and any participation of the victim.
- [36] A fit sentence for a sexual offence against a child will often be mid single-digit penitentiary terms. Upper single-digit and double-digit penitentiary terms should not be unusual or reserved for the most severe cases: Friesen at paras. 108-120. In Friesen, the offence at issue was a single sexual assault of a four-year-old. The Court upheld the sentencing judge's sentence of a six-year sentence.

Conditional Sentences

- [37] Section 742.1 of the Criminal Code provides for conditional sentences when four criteria are met:
- 1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
 - 2) the court must impose a term of imprisonment of less than two years;

- 3) the safety of the community would not be engaged by the offender serving the sentence in the community; and
 - 4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the Criminal Code.
- [38] The principle of restraint in sentencing codified in s. 718.2(d) and (e) of the Criminal Code, requires a court to consider a conditional sentence where these requirements are met: *R. v. Proulx*, 2000 SCC 5 at para. 90.
- [39] A conditional sentence order will contain denunciatory features, especially when it contains house arrest terms, and is longer than a jail sentence by inclusion of probation with terms that restrain liberty: *Proulx* at paras. 102, 107; and *R. v. J.F.D.V.*, 2025 BCCA 4 at para. 67. Nevertheless, where denunciation and deterrence are especially pressing, incarceration may be the preferable sanction: *Proulx* at para. 114.
- [40] Section 742.1 of the Criminal Code lists specific circumstances that preclude a conditional sentence. Taking those into account, there are no cases that are inherently unsuitable for conditional sentences, including cases of sexual offences involving children: *Proulx* at paras. 79, 82; and *J.F.D.V.* at para. 8.
- [41] Nevertheless, the fundamental principle of proportionality requires identification of the harm caused by an offender and the wrongfulness, also referred to as the moral blameworthiness, of the conduct: *Friesen* at paras. 75-76. Because sexual offences against children usually combine a high level of harm with a high level of moral blameworthiness, and are inherently violent, even if not physically violent, *Friesen* at para. 77, it is rare that a case involving sexual offending against a child will be appropriate for a conditional sentence order: *J.F.D.V.* at paras. 40, 71-74. Those that are appropriate are cases where there are significant mitigating factors such as Gladue factors, a joint submission after a guilty plea, elderly offenders, and/or offenders with serious medical issues: *J.F.D.V.* at paras. 75-77; *R. v. C.K.*, 2023 BCCA 468 at paras. 108-110; and *R. v. Faroughi*, 2024 ONCA 178 at paras. 99, 104. In *J.F.D.V.*, the Court did not rule out that other situations might warrant a conditional sentence order: para. 78.
- [42] In *Proulx*, the Supreme Court of Canada addressed the appropriate approach to conditional sentences under what was then relatively new amendments to the Criminal Code. At paras. 58-60, Chief Justice Lamer explained that the requirement that the judge impose a sentence of imprisonment of less than two years does not require the judge to first impose a sentence of imprisonment of a fixed duration before considering whether that sentence can be served in the community. In particular, the sentencing judge is not required to consider the principles of sentencing twice, once in deciding whether the sentence will be less than two years of imprisonment, and again in determining whether a conditional sentence is appropriate. Rather, the sentencing court shall make a preliminary determination about whether the appropriate range of sentence is a term of imprisonment of less than two years and, if it is, then determine whether it is appropriate for the offender to serve his or her

sentence in the community, taking into account the principles of sentencing.

Circumstances of the offence

- [43] The events alleged to give rise to the first four counts on the indictment took place between March 2019 and September 2019 in the home that Ms. Ali shared with F.F.'s oldest brother. I acquitted Ms. Ali on those counts because I concluded the Crown had not proved each element of the offences alleged beyond a reasonable doubt.
- [44] The count on which I convicted Ms. Ali took place in November 2019 at the home of F.F.'s cousin Z.K. and Z.K.'s father. Z.K.'s father was related to and was friends with both Ms. Ali and F.F.'s family. F.F., F.F.'s oldest brother, Ms. Ali, Z.K., Z.K.'s father, Z.K.'s grandmother, and perhaps Z.K.'s sister were at the home of Z.K.'s father at the time of the November 2019 incident.
- [45] A few days prior to the November 2019 incident, Ms. Ali texted Z.K. and communicated with him and F.F., including communicating sexual content that I, in my verdict reasons, found demonstrated sexual interest in F.F. on the part of Ms. Ali.
- [46] By the time of the November 2019 incident, F.F.'s oldest brother and Ms. Ali had broken up. The adults present at that time, except Z.K.'s grandmother, were in the dining room or on the deck socializing. F.F. and Z.K. were playing videogames in a bedroom. Ms. Ali came into the room and whispered to F.F. about going to another room to engage in sexual acts. I found that she asked him to have oral sex and anal sex with her.
- [47] Ms. Ali said this to F.F. while Z.K. appeared to be engaged in a videogame and was wearing headphones. Z.K. testified that, despite the headphones, he could hear some of what Ms. Ali was saying and it was apparent to him that F.F. was uncomfortable. Z.K. had received the text messages from Ms. Ali a few days earlier and in those she asserted that she had engaged in oral sex with F.F. During the November 2019 incident, Z.K. asked F.F. if he wanted to go get some water in order to get him away from Ms. Ali.
- [48] In my verdict reasons, when finding facts about this incident, I considered F.F.'s evidence that during the November 2019 incident, he considered what Ms. Ali was saying to him based on previous occasions when she had talked about sexual activity with him. Although I had determined that the Crown had not proven beyond a reasonable doubt the allegations of invitation to sexual touching it had alleged occurred during times previous to the November 2019 incident, I found that there had been prior sexual conversations between Ms. Ali and F.F. I said as follows at para. 229 of my verdict reasons:

F.F. testified that Ms. Ali was looking at him the way she had on previous occasions when asking him to engage in sexual acts. While I have not found that the Crown has proved other invitation to sexual touching incidents beyond a reasonable doubt, on the whole of the evidence I am satisfied that there had been sexual discussions between Ms. Ali and F.F. and that his experience with that informed his view of what Ms. Ali was communicating to him during the November 2019 incident.

[49] At para. 231, I said this about Ms. Ali's evidence and made a finding about her demonstrated sexual interest in F.F.:

Ms. Ali testified that she did not speak to F.F. at all that night and specifically did not whisper to him or ask him to go upstairs with her. I do not believe Ms. Ali's evidence in this regard because she denies she spoke to F.F. at all, and Z.K. gives independent evidence that she did. I also conclude, based on the November 13, 2019, text messages, that Ms. Ali was interested in F.F. sexually. I conclude that is why she was asking Z.K. about sexual interactions with F.F. in those text messages.

Circumstances of the Offender

[50] Ms. Ali was interviewed by a probation officer, Poonam Dhaliwal, for the purpose of a pre-sentence report, and by a psychologist with Forensic Psychiatric Services Commission, Dr. Greig, for a pre-sentence psychological assessment.

[51] Ms. Ali was born and raised in Surrey, the child of immigrants from Fiji. She has one younger sister, Zahara Ali. Ms. Ali told Ms. Dhaliwal that her parents and sister are supportive of her, but they did not have complete knowledge of this matter. Ms. Ali, her parents, her sister, and her sister's five-year-old son live together in Ms. Ali's parents' home. Ms. Ali told Dr. Greig that her parents have never been comfortable with her sexual preferences or gender transition. She told Dr. Greig that she had told her parents and her sister that she had been acquitted on four counts of the charges on the indictment, but not that she had been convicted on one.

[52] Ms. Ali told Ms. Dhaliwal and Dr. Greig that she was sexually assaulted by a cousin at age seven, and after that experienced ongoing sexual abuse by her cousins. She reported to Ms. Dhaliwal that at age 16, two older male relatives sexually abused her. She told Ms. Dhaliwal that the abuse made her feel like a freak show and a toy for someone else's use.

[53] Ms. Ali told Ms. Dhaliwal that she experienced bullying in high school but nothing significant. She told Dr. Greig that the bullying did not really affect her because she had "inner battles". In the text that Ms. Ali sent to Z.K. shortly before the 2019 incident, she stated that she had been bullied and would never wish that on anyone else.

- [54] Ms. Ali has worked in delivery services and in office administration for courier companies. She was unemployed for a period during the time the charges were outstanding on this matter due to mental health issues and stress because of the charges against her. At the time of the pre-sentence report, she was working for a union local doing administrative work.
- [55] Ms. Ali was 24 years old at the time of the offending. She is currently 30 years old.
- [56] At the beginning of the trial, Ms. Ali advised the Court that she prefers female pronouns. Based on the evidence, I conclude that at the time of the November 2019 incident on which she was convicted, people around her regarded her as male and referred to her using male pronouns. In Ms. Ali's evidence, she referred to her transness and testified it was an issue in her relationship with F.F.'s oldest brother. She told Dr. Greig that she came to terms with her transgender status at around age 22, which would have been while she was in a relationship with F.F.'s oldest brother and before the offence.
- [57] To Ms. Dhaliwal, she reported that finances were the major issue in her relationship with F.F.'s oldest brother. She told Ms. Dhaliwal and Dr. Greig that F.F.'s oldest brother sexually assaulted her by penetrating her anus or putting his penis in her mouth when she was sleeping. She told Dr. Greig that F.F.'s oldest brother slapped her, threw things at her, and locked her out of the house naked.
- [58] Ms. Ali told Ms. Dhaliwal that she is attracted to age-appropriate males. Ms. Ali told Dr. Greig that she did not know how to answer the question of whether she was exclusively attracted to males.
- [59] Ms. Ali told Ms. Dhaliwal and Dr. Greig that she has suffered from depression and anxiety since the age of six. She has had suicidal ideations, which she described as ongoing at the time of the interviews. Ms. Ali discussed with Dr. Greig that she has heard voices talking to her in the past, and was prescribed medication which she took and then stopped taking because she did not think it was working anymore.
- [60] Dr. Greig noted several inconsistencies between what Ms. Ali told her and what other medical records noted. There is no explanation for the differences. I note that medical records are not always accurate. Ms. Ali told Dr. Greig about various medications she has been prescribed and stopped taking because she felt they were not working. She told Dr. Greig that after a hospitalization when she was having an emotional breakdown, a panic attack, and suicidal ideation, she was referred for counselling which she attended for several sessions, but then stopped because she felt that she and the counsellor were not connecting.
- [61] At a March 2023 hospitalization as a result of overwhelming suicidal ideation, a psychiatrist questioned whether Ms. Ali is bipolar, and also referred to the possibility of borderline personality traits or disorder and auditory hallucinations.

- [62] Dr. Greig assessed Ms. Ali for borderline personality disorder and concluded that there was insufficient information to make such a diagnosis or a diagnosis of bipolar disorder.
- [63] Ms. Ali told both report writers that the November 2019 incident did not happen. She told Ms. Dhaliwal that the November 2019 incident was made up because Z.K.'s mother believes that Ms. Ali turned F.F.'s oldest brother gay. She told Dr. Greig that maybe F.F.'s oldest brother made it up because she broke up with him.
- [64] Ms. Ali told Dr. Greig that she does not need any treatment to prevent her from offending again. I understand that Ms. Ali's position at this hearing is that she does not believe she needs sexual offence counselling because she maintains her innocence, but she is not opposed to participating in it. Ms. Ali told Dr. Greig she would like some treatment for her depression. She said she would like cognitive behavioural therapy and would not participate in group therapy.
- [65] Dr. Greig expressed difficulty assessing whether Ms. Ali's mental health issues are related to her offending because she denies the offending. He referred to research showing that past sexual abuse is associated with future sexual offending, explaining that victims of sexual abuse sometimes normalize sexual relations between adults and children. Dr. Greig could not say whether any of the dynamics he described, including normalization, play a role with Ms. Ali. Similarly, he stated that major depressive disorder may cause persons to seek distraction through sexual behaviour, but he could not say whether that was the case with Ms. Ali.
- [66] Expressing significant caveats on the risk assessment due to lack of information pertaining to what drove Ms. Ali to commit the November 2019 offence, Dr. Greig opined that Ms. Ali has a low to moderate risk to reoffend, and the risk is with a male child or adolescent to whom she is related or with whom she is friends. Dr. Greig referred to the fact that Ms. Ali lives in the same house with her sister's five-year-old son, in terms that I consider to be concerning.
- [67] In making my own determination in this regard, I have had regard to my findings that, prior to November 2019, Ms. Ali had sexual conversations with F.F. and a few days prior to November 2019, she sent Z.K. text messages in which she expressed sexual interest in F.F. I find that the sexual conversations to a limited extent and the text messages to a great extent demonstrate a boldness on the part of Ms. Ali around the topic of sexual relations between adults and children. It demonstrates that she has, to a certain extent, normalized sexual conversations and interactions between adults and children. Together with Dr. Greig's opinion, I conclude that there is a material risk of her reoffending.
- [68] Ms. Dhaliwal stated that placement of transgendered inmates is based on consultations with a multidisciplinary team and input from the inmate. Male persons convicted of sexual offences in British Columbia and sentenced to less than two years in custody may serve their sentence at Ford Mountain Correctional Facility and will be referred to a forensic sexual offence program if the offence is one that meets the requirements for such programming. A

period of incarceration of 12 to 18 months is required to provide enough time to complete the program.

- [69] If Ms. Ali is placed at Alouette Correctional Centre for Women, there is no programming specific to sexually-motivated offences.
- [70] The Forensic Sexual Offence Program is available to persons who are serving their sentence in the community.
- [71] Dr. Greig recommended that Ms. Ali undertake the Forensic Sexual Offence Program or one-on-one sex-focused treatment with a psychologist.
- [72] After completion of such treatment and specifically after completion of the Forensic Sexual Offence Program, a person is required to participate in a Maintenance After Treatment Program. If the person is under community supervision, that treatment continues until the community order expires.
- [73] Ms. Ali has no criminal record.
- [74] During the sentencing hearing, the Court was advised that Ms. Ali lives with her parents, her sister, and her sister's five-year-old son. That does not square well with the terms of Ms. Ali's current release order, which includes that she not be in the presence of a person under the age of 16, except for family gatherings, and then only in the presence of Ms. Ali's parents the entire time, and in no circumstances is she to engage in conversation with a person under the age of 16. I was told by Crown counsel that Ms. Ali's bail supervisor is aware of her living situation and has not reported a breach of her bail conditions.
- [75] Because of current concerns the Court voiced about a conditional sentence order with Ms. Ali living in a home with a young child, Ms. Ali arranged for her sister, the child's mother, to address the Court during the sentencing hearing.
- [76] Ms. Ali's sister advised the Court that she works as a paramedic. Her son, who is five years old and I understand will turn six in May 2025, lives with her. His father is not part of his life. The young boy's maternal grandparents, that is Ms. Ali's parents, provide care for their grandson when Ms. Ali's sister is at work, including before-school and after-school care. Ms. Ali's sister said she has never asked Ms. Ali to babysit her son, but Ms. Ali and her son do spend time together. She said her son likes to be around Ms. Ali. Ms. Ali's sister advised that her son's bedroom and Ms. Ali's bedroom are next to each other on the second floor of the house. Ms. Ali's sister said she had no concerns about her son being around Ms. Ali. Ms. Ali's sister advised the Court that she has known of Ms. Ali's acquittal on most of the counts since that happened. She became aware of Ms. Ali's conviction the day prior to the sentencing hearing. She has not read the reasons for verdict.

- [77] I perceived that Ms. Ali's sister's views are that Ms. Ali has been unfairly persecuted by F.F.'s family and that she does not accept that Ms. Ali committed a sexual offence. She confirmed that she is not concerned about Ms. Ali being around her son because she does not believe that Ms. Ali committed the crime that she has been convicted of.
- [78] Ms. Ali's sister advised the Court that their parents do not, to her knowledge, know of the conviction.

Victim Impact

- [79] The evidence at trial was that in 2019, F.F. was spending a lot of time at the home of his oldest brother and Ms. Ali, because he was having problems at the home of his parents and was very close to his oldest brother. F.F. spent the 2019 spring break there, was there after school some days, and spent much of the summer there. F.F. referred to other things he had going on in his life, including problems with his friend group and problems at home. I conclude that at that time, F.F. was going through challenging times for a 12- to 13-year-old. He turned 13 in May 2019. F.F. was seeking time with his oldest brother and therefore was spending time with Ms. Ali as a result. From the evidence at trial, I conclude that Ms. Ali knew that F.F. was going through a challenging time.
- [80] The evidence at trial was that after the November 2019 incident, F.F. told his oldest brother what had happened on that date, but asked him not to tell anyone else. F.F. also testified that he called help lines because of how he was feeling, including about the other things going on in his life that were upsetting him. He told the police that he was cutting himself, but by the time he talked to the police in March 2020, he was no longer cutting himself.
- [81] F.F. wrote a victim impact statement which Crown counsel read into the record at F.F.'s request. I understand the victim impact statement relates to all of the incidents that F.F. complained about, which included events that took place at the home that F.F.'s oldest brother and Ms. Ali shared. F.F. complained about other occasions where Ms. Ali asked him to engage in masturbation with her, asked him to jack off, exposed her penis to him, and groped him. As I have related, I held that the Crown had not proved the counts that related to those incidents beyond a reasonable doubt. F.F. understandably speaks about his experience in the terms of the entirety of what he says happened. As I have said, although I acquitted on the other counts, I found that there had been sexual conversations between Ms. Ali and F.F. prior to the November 2019 incident, and I found that Ms. Ali demonstrated sexual interest in F.F. in the text messages that she sent to Z.K. I have considered F.F.'s victim impact statement to consider the impact of the November 2019 incident on him, taking into account my findings that it occurred in the context of Ms. Ali having had sexual conversations with F.F. prior to that incident and having expressed sexual interest in him in the text messages she sent to Z.K.

- [82] In his victim impact statement, F.F. describes that when "everything started happening", all of the happiness and innocence he knew disappeared and his childhood was taken from him. He stated that Ms. Ali was someone he trusted. He stated that he had difficulty trusting people in his life. He stated that he suffered in silence. He stated that he did not want to talk about it because he thought that avoiding it was the best option he had. He stated that going through the court proceedings was the hardest thing he has done and it felt like he was reliving what had happened. He described going to the washroom to cry and console himself during the court proceedings. He stated that he anticipates spending the rest of his life learning to live with the pain that Ms. Ali caused to him and his family. He expressed that he is going to try to do what he can to reclaim his life and that determination is something that Ms. Ali cannot take away from him.
- [83] Z.K. was drawn into the November 2019 incident by Ms. Ali through the text messages and because he was present at the time the invitation to sexual touching occurred. Z.K. had the context through the text messages and because he could see that F.F. was uncomfortable to understand that something sexually inappropriate was going on.
- [84] Z.K. testified that after the incident, he felt down about it, because he was close to F.F. Z.K., I understand, was also 13 years old at the time. Z.K.'s mother, who is F.F.'s maternal aunt, testified that she noticed that Z.K. and F.F. were behaving strangely, including being quiet, not joining in with other family members, and whispering to each other. Eventually Z.K. told her what had happened and showed her the text messages that Ms. Ali had sent to him a few days before the November 2019 incident.
- [85] F.F.'s oldest brother and Z.K.'s mother discussed the matter with Z.K.'s father, with F.F.'s parents and with F.F. and Z.K. Z.K.'s mother and F.F.'s oldest brother decided to go to the police to report what the boys said had happened during the November 2019 incident.

Analysis of a Fit Sentence

Preliminary Determination of Custodial Sentence

Proportionality, Harm Done, and Moral Blameworthiness

- [86] Harm done, also referred to as the gravity of the offence, is focused on the wrongfulness of the conduct and the harm posed or caused by the conduct: Friesen at paras. 75-76. Its focus is on what the offender did, not the circumstances of the offender.
- [87] Keeping in perspective that F.F.'s impact statement is based on many incidents of sexually inappropriate discussions, invitations, exposure, and groping, it is nevertheless apparent that the impact on F.F. of any one of these interactions was severe. He stated that he lost the innocence and joy of his childhood on the first occasion. I infer that whether that was when he was 12 or 13, and whether the incident I convicted on was that first incident or one of many, his perspective is that Ms. Ali stole his childhood from him. He considers himself scarred. Several years later, he is struggling to retain the ability to trust and to, in his words,

reclaim his life.

- [88] The harm done was wider than to F.F. alone. It included another young person, Z.K., and several members of F.F.'s family and Z.K.'s family.
- [89] The offence, therefore, was very grave.
- [90] Moral blameworthiness does take Ms. Ali's circumstances into account: Friesen at paras. 92-93. However, it is not permissible to only take Ms. Ali's circumstances into account because to do so undermines the necessary recognition of the harm done by sexual offending against children, which harm is reasonably foreseeable by an offender and therefore informs moral blameworthiness: R. v. P.R.J., 2023 BCCA 169 at paras. 55-56, citing Friesen at paras. 88-90.
- [91] Although Ms. Ali does not have a mental disability that suggests she would not understand the nature of her offending and is not an Indigenous person whose family background might reduce moral culpability, I consider her moral responsibility to be ameliorated to a limited extent by the sexual abuse she suffered herself as a child when older, but still young relatives sexually abused her. As Dr. Greig pointed out, such abuse at a young age can normalize sexual interaction between adults and children in the abused person.
- [92] On the other hand, Ms. Ali is taken to be able to reasonably foresee that her conduct toward F.F. would harm him gravely. In addition, she knew he was vulnerable young teenager going through a challenging period in his childhood.
- [93] Taking all of this into account, Ms. Ali has high moral blameworthiness.

Friesen Factors

- [94] With regard to the degree of physical intervention in the offence, F.F. testified that Ms. Ali put her arm around his shoulder when whispering to him to go upstairs with her. The words she spoke described significant physical intervention and harm, including oral sex and anal sex. Keeping in mind that sexual offences that involve any form of physical conduct are inherently violent, the degree of actual physical intervention on the November 2019 incident is at the low end of the spectrum.
- [95] The incident was a single event, albeit in the context of a relationship that I have concluded had involved prior sexual conversations and prior sexual interests of Ms. Ali toward F.F.
- [96] Ms. Ali had been in a relationship with F.F.'s oldest brother. By the time of the November 2019 offence, that had ended a few months earlier. At the time of the November 2019 offence, F.F. and Ms. Ali were both guests of F.F.'s uncle. F.F. and Z.K. were the kids. The others, including Ms. Ali, who was a cousin of F.F.'s uncle, were the adults. I conclude that his presence in that home and in that role put him in a limited position of trust, although not as profound as when he was in a relationship with F.F.'s oldest brother.

[97] F.F. was 13 years old and, as I have stated, going through a challenging time. I find he was vulnerable and his vulnerability was known to Ms. Ali.

Mitigating Factors

[98] Ms. Ali is a first-time offender.

[99] At the time of the offending, Ms. Ali was 24 years old. She was young, but she was more than 10 years older than F.F.

[100] Ms. Ali's background includes sexual abuse as a child. That is relevant to her moral blameworthiness, as I have already stated. Ms. Ali does not accept that her victimization of sexual abuse has caused her to normalize sexual relations between adults and children. She stated, in her evidence at trial and to Dr. Greig, that she would never have sexual interactions or inappropriate sexual conversations with a child. Nevertheless, I consider this to be a mitigating factor.

[101] Ms. Ali also alleges that she was sexually abused by F.F.'s oldest brother during their relationship. There is no evidence that assists with the connection between these allegations and the offence for which she has been convicted. I do not consider this factor to be mitigating.

[102] Ms. Ali has not expressed remorse, because she maintains her innocence. She has stated that she empathizes with what F.F. has expressed. I consider this to be neutral.

Aggravating Factors

[103] As discussed already in conjunction with the Friesen factors, I consider Ms. Ali was in a limited position of trust and this is an aggravating factor. F.F.'s circumstances as a 13-year-old vulnerable youth, given what Ms. Ali knew of that vulnerability, is troubling. During the November 2019 incident, Ms. Ali did not desist asking F.F. for sexual interactions when he ignored her and when he shrugged her off. She persisted and eventually placed her arm around his shoulder to try to encourage F.F. to accompany her. I consider these circumstances and factors aggravating.

Collateral Factors

[104] Collateral consequences of a sentence are described as secondary consequences, that is secondary to the criminal process, including consequences arising from the commission of the offence, the sentence imposed, or the impact on the offender: *R. v. Suter*, 2018 SCC 34. Collateral consequences can be taken into account, but they are not aggravating or mitigating factors, because those factors relate only to the gravity of the offence: *R. v. Pham*, 2013 SCC 15 at para. 11. Collateral consequences may influence the consideration given to rehabilitation and assist in tailoring the sentence with regard to rehabilitation: *Pham* at para. 11. The weight to be given to them varies from case to case and the seriousness of the offence: *Pham* at para. 12.

- [105] Ms. Ali is a transgendered person. I have not heard evidence specific as to how incarceration interrelates to being transgendered, but it is not a great leap to conclude that the difficulties that transgendered persons face in society would be magnified in a penal institutional setting and that, all other things being equal, a transgendered person will have a more challenging experience being institutionalized than a person who is not transgendered.
- [106] The evidence demonstrates uncertainty about how Ms. Ali's transgendered status will be addressed if she is incarcerated. While I understand her wishes will be taken into account, they will not be determinative as to whether she is incarcerated in an institution for women or for men. If she is incarcerated in a women's institution, the sexual offender programming will not be available.
- [107] As I have stated, Ms. Ali is of the view that she does not need such programming, but she is willing to participate in it. It is not clear that a one-year period of incarceration would be enough to complete the first stage of the programming in any event. Accordingly, the availability of programming is not significantly determinative as to how to structure the sentence.
- [108] As I discuss below, a three-year probation is a more meaningful opportunity for sexual offender treatment and counselling, both in terms of duration and availability.
- [109] Ms. Ali has longstanding depression and anxiety, and perhaps other undiagnosed mental illnesses. She has suicidal ideation. These features of her health are collateral considerations.
- [110] There is some evidence, not from Ms. Ali, that her parents are financially dependent on her. This must be qualified by the evidence that she lives rent-free in their home, paying only for her own food. I conclude there is financial interdependence between her and her parents. I find this to be a collateral factor, but not one that I give significant weight to.

Cases to Consider on Parity

- [111] In J.F.D.V., the offender was convicted of sexual interference and sexual assault. The sentence pertained to sexual interference as the sexual assault charge was conditionally stayed through application of the Kienapple principle. There were four offences over a period of seven months when the complainant was 12 years old and the offender, her uncle, was 39. The trial judge found that the offender touched her breast under her clothes, pressed his penis against her, touched her vagina, and placed his hand on her vagina. The sentencing judge imposed a conditional sentence of two years less a day and a probation period of three years. For reasons I will address further, the Court of Appeal held that a conditional sentence was not appropriate and substituted a sentence of one year in custody and three years' probation. It is that sentence that I am focusing on in the parity analysis.

- [112] The Court of Appeal held that the sentencing judge did not give meaningful weight to wrongfulness and harmfulness. In that case, the factors going to harmfulness included that the complainant was Indigenous, had a disability, had experienced grave relational harm, and the complainant and accused were in a position of trust.
- [113] Of those, relational harm and the position of trust applies to the circumstances of F.F. His evidence demonstrates that he felt conflicted about telling his oldest brother, because the person who perpetrated the harm was, at the time of the November 2019 incident, his brother's former fiancé and the breakup had been hard on his brother. In his victim impact statement, he described how he suffered in silence until the adults in his life caused him to come forward. F.F. described harm to his whole family.
- [114] As I have described, I consider Ms. Ali to have been in a limited position of trust at the time of the 2019 incident.
- [115] In *Faroughi*, the Court of Appeal for Ontario considered a case of child luring by communicating with a person under the age of 16 for the purpose of facilitating the offence of invitation to sexual touching, and communicating for the purpose of obtaining sexual services with a person under the age of 18. The offender was 19 years old and responded to an ad made by an undercover police officer who posed as a 14-year-old. The sentencing judge imposed a sentence of seven months' imprisonment and did not consider a conditional sentence order because there was a mandatory minimum custodial sentence of six months in that provision of the Criminal Code. The Court of Appeal for Ontario struck the mandatory minimum sentence as unconstitutional and substituted a nine-month conditional sentence. The Court of Appeal for Ontario described the offending as grave, and despite that it was a sting operation, it was not a victimless offence, although the absence of a specific victim is relevant to gravity.
- [116] In this case, there is a victim to whom grievous harm has been done.
- [117] In *R. v. Singahti*, 2024 NUCA 10, Justice Slatter upheld the imposition of a conditional sentence in the case of conviction for invitation to sexual touching. The offender, who was 27 years old at the time of the offence, was socializing with friends, went into the bedroom of his friend's daughter, and asked the daughter and her friend to have sex with him in exchange for alcohol and cigarettes. When they refused, he offered them \$35 to remove their pants. They refused. The trial judge imposed a 120-day conditional sentence and 12 months' probation under house arrest, which would allow the offender to continue to work and support his family. In upholding the sentence, Slatter J.A. observed that invitation to sexual touching is serious, but the fact that there was no touching between the complainants and the respondent to be ameliorating.
- [118] In *R. v. C.D.S.*, 2024 SKPC 19, the accused was convicted of communicating for the purpose of obtaining sexual services for consideration with a person under the age of 18. The accused was 22 years old. At a Christmas dinner gathering, he asked his half-sister, 16 years old, to show him her pussy in exchange for \$20. The victim was upset and crying on the

occasion, but refused to provide a victim impact statement at the sentencing. The sentencing judge comprehensively reviewed the principles, including the Friesen considerations. He held that C.D.S. had lowered moral culpability because he had been physically abused as a child, leading to being placed in foster care where he was sexually assaulted. He held that a conditional sentence order was appropriate, given the offender and the circumstances. The sentence was a six-month conditional sentence and 18 months of probation.

- [119] In *R. v. Goolcharan*, 2015 ONSC 6094, the offender telephoned the 14-year-old daughter of his friend on several occasions and offered to pay for dirty panties or sexual acts from her and her 15-year-old friend. The Court described them as brief conversations over a few days. Aggravating factors included a previous conviction for sexual assault, albeit dated, and being in a position of trust to the victim. The Court found several mitigating factors, including child physical and sexual abuse, and that the offender had a severely disabled child for whom he cared. The sentence was one year of imprisonment.
- [120] Counsel have also referred me to cases of guilty pleas, but I do not consider those cases to be of assistance in determining a range for the purposes of guidance with parity.
- [121] I consider these cases as guides in keeping with the parity principle. When I consider parity and the facts of this case that are individual, including the very grave nature of the offence in terms of harm done, as I have described, and the high moral blameworthiness, slightly ameliorated because Ms. Ali was sexually abused as a child, and her lack of criminal record, I consider a one-year sentence followed by three years of probation to be appropriate.
- [122] I consider three years of probation to be appropriate because the reports demonstrate that Ms. Ali has not come to terms with her sexual offending. I am hopeful that she will come to terms with it and that she will engage in the sexual offending counselling or treatment in a meaningful way. There is significant doubt that it can be concluded during a one-year sentence, regardless of how it is served, and therefore three years of probation is appropriate to permit that to happen and for her to be supervised through the conditions of a probation order while she does. If she does not engage with rehabilitation regarding sexual offending, then it is even more appropriate to keep her separate from society, and in particular children, for three years through the conditions of a probation order.

Whether a Conditional Sentence is Appropriate

- [123] I start with whether the s. 742.1 criteria are met. Since I have decided the mandatory minimum sentence has no force or effect and found that a one-year sentence followed by three years of probation is appropriate, the issues are whether the safety of the community will be endangered by Ms. Ali serving the sentence in the community, and whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 of the Criminal Code.

- [124] I pause to note that I initially understood the Crown to be taking the position that a conditional sentence order was appropriate. Because I had concerns about that at the sentencing hearing, I advised Crown, Ms. Ali, and amicus that I had concerns and would be considering not acceding to that position. My concerns centred on the safety of the community requirement, and in particular that Ms. Ali's intention, if given a conditional sentence order, is to continue to reside in the same house as her parents, her sister, and her sister's young child.
- [125] Crown counsel clarified that the Crown's position is that the circumstances are such that the Court is required to consider whether a non-custodial sentence would be appropriate. For that reason, Crown took the view that the court's concern does not engage the procedure when the court is considering a sentence that exceeds the Crown's recommendation.
- [126] In any event, Crown and Ms. Ali were made aware that I would be considering not imposing a conditional sentence but imposing a jail sentence, and had the opportunity to make submissions on that including, as I have already related, having Ms. Ali's sister attend at the sentencing hearing to address the matter of the circumstances of the living arrangements at the family home.
- [127] When considering the prerequisite that having the offender serve the sentence in the community will not endanger the safety of the community, the sentencing judge should consider the risk posed by the specific offender through considering two factors: (1) the risk of the offender reoffending; and (2) the gravity of the damage that could ensue in the event of a reoffence: Proulx at paras. 68-76.
- [128] A consideration of the risk posed by the offender should include the risk of any criminal activity and not be limited solely to the risk of physical or psychological harm to individuals.
- [129] I am of the view that the public safety requirement for a conditional sentence cannot be met. Ms. Ali does not acknowledge her sexual offending. While she is willing to engage in treatment, she does not think she needs it. She is entitled to maintain her innocence, and that is not an aggravating factor, but it does affect how the Court views her risk of reoffending.
- [130] Dr. Greig provided a caveat on his opinion on the risk of reoffending because of the circumstances as I have described them, including that Ms. Ali maintains her innocence and therefore did not address reasons for the offending I have found.
- [131] Nevertheless, Dr. Greig opined that the risk of reoffending was low to moderate. I have concluded that there is a material risk of reoffending for the reasons I have already set out.

- [132] If a conditional sentence order is made, Ms. Ali will be living in a residence with a five-year-old child, a matter about which Dr. Greig expressed some concern. Dr. Greig suggested monitoring if Ms. Ali serves her sentence in the community. The monitoring he suggests could not effectively prevent Ms. Ali from committing an offence with her nephew, but might detect it if it had occurred.
- [133] I acknowledge that the child's mother, Ms. Ali's sister, advised the Court that she is aware of Ms. Ali's conviction and has no concerns. However, as I have stated, while she was aware of the acquittals when they were made, she only became aware of the conviction the day before the sentencing hearing. Her parents, who are the other primary caregivers for the child, were still not aware at the time of the sentencing hearing. It appears that Ms. Ali has kept her problems with the criminal law from her family. I do not believe Ms. Ali's sister had sufficient time to absorb the fact that her sibling, who lives in the same house as her son, has been convicted of a very serious sexual offence regarding a 13-year-old boy with whom she used to live. I perceive that Ms. Ali's sister's views are that Ms. Ali has been unfairly persecuted by F.F.'s family and that she does not accept that Ms. Ali committed a sexual offence.
- [134] I am of the view that there is cause for concern and that, as I have said, I have found a material risk that Ms. Ali will reoffend. No amount of risk is acceptable because the harm that would be done to the child if Ms. Ali offends against him is grave, in the same way the harm done to F.F. was grave.
- [135] I am also of the view that a conditional sentence would not meet the Criminal Code's objectives of sentencing.
- [136] In J.F.D.V., the Court stressed that it is important to not allow the consideration of a conditional sentence to let the "Friesen message slip away" from the analysis of a fit sentence at para. 56. The Court must continue to grapple with the harm and moral blameworthiness aspects of the case when considering a conditional sentence. While a conditional sentence can provide denunciation and deterrence, especially where it contains house-arrest terms, it will not necessarily do so because conditional sentence orders may show "serious disregard for the need to give significant weight to denunciation and deterrence" in some cases: R. v. R.A.R., 2000 SCC 8 at para. 26, cited by the Court of Appeal in J.F.D.V. at para. 68. In R.A.R., the sentencing judge imposed a sentence of one year incarceration with three years of probation for sexual assault where the offender was an adult and the victim was an adult. The Court of Appeal substituted a conditional sentence order. The Supreme Court of Canada restored the original sentence.

- [137] The types of rare case exceptions where a conditional sentence order may be appropriate in cases involving sexual offences against children are canvassed in J.F.D.V. at paras. 71-83. In this case, like in J.F.D.V., there was no guilty plea, no Gladue factors, the offending conduct involved a limited breach of trust, and F.F. was young and vulnerable. Unlike in J.F.D.V., F.F., although vulnerable, is not disabled or Indigenous and so the aggravating circumstances in this case are not as pronounced as in J.F.D.V.
- [138] While this case has some similarities to Faroughi, such as Ms. Ali not having a criminal record and Ms. Ali having a prosocial lifestyle, there are also important differences. Ms. Ali's family support, particularly around living with her five-year-old nephew, is based on incomplete information to her parents, and her sister's view that Ms. Ali did not commit the crime of which she has been convicted. Ms. Ali has not proactively involved herself in sexual offence treatment, whereas the offender in Faroughi had.
- [139] In Faroughi, the offender had medical hardships which were taken into account. I consider this to be somewhat but not completely analogous to Ms. Ali's status as a transgendered person with longstanding depression, suicide idealization and anxiety. I accept that a prison sentence will likely be harder on her than if she was not transgendered.
- [140] Ms. Ali's circumstances do demonstrate some evidence of diminished moral culpability due to her history of being sexually abused as a child.
- [141] The most persuasive factor for a conditional sentence order is Ms. Ali's status as a transgendered person coupled with her serious mental health issues.
- [142] I note that the Crown does not propose a conditional sentence with house arrest, but one with a curfew. Ms. Ali submitted that the curfew is inappropriate because her religious practices would be interfered with and she uses the ability to go sit near the ocean to calm herself. I accept that these are important and beneficial things for her, but her submission demonstrates that her position is that she should have a sentence in which her liberty is not significantly impinged.
- [143] I am of the view that these circumstances do not outweigh gravity and moral blameworthiness of this offence so that the principles of denunciation and deterrence can be met by a conditional sentence of any type, let alone one with a curfew instead of house arrest or one with limited to no curfew.

Sentence

- [144] Ms. Ali, please stand.
- [145] I sentence you to one year in custody followed by three years of probation. Pursuant to s. 743.21 of the Criminal Code, while in custody you must have no contact with F.F. or Z.K.

[146] You must comply with a probation order for a term of 36 months. I will refer to the conditions together with their number on the probation picklist for the purposes of clarity. The conditions are:

- a) 5001: You must keep the peace and be of good behaviour. You must appear before the Court when required to do so by the Court. You must notify the Court or the probation officer in advance of any change of name or address, and promptly notify the Court or the officer of any change of employment or occupation.
- b) 5004: You must report in person to a probation officer at 80 Sixth Street, 105, New Westminster, within two business days after your release from custody, unless you have obtained, before your release from custody, written permission from the probation officer to report elsewhere or within a different timeframe. After that, you must report as directed by your probation officer.
- c) 5101: You must have no contact or communication, directly or indirectly, with F.F. or Z.K.
- d) 5105-1: You must not go to any place where F.F. or Z.K. live, work, attend school, worship, or happen to be. If you see either of them, you must leave their presence immediately without any words or gestures.
- e) 5302: You must live at an address approved in advance by your probation officer and provide them with your phone number. You must not change your address or phone number without prior written permission from your probation officer.
- f) 5502: You must not have any contact, communication, directly or indirectly, or be in the presence of any person under the age of 16. The exceptions are as follows:
 - i. with the prior written permission of your probation officer. Such permission is to be given only for compelling reasons. You must carry the permission, which can be in electronic format, with you at all times;
 - ii. in the immediate presence at all times of your parents or your sister and only after they have been told by your probation officer about this order, and your history as described in your criminal record, Pre-Sentence Report, and these Reasons for Judgment.
- g) In no circumstances may you reside in the same residence of any person under the age of 16.
- h) 5701: You must attend, participate in, and complete any intake, assessment, counselling, or education program as directed by your probation officer. This may include, but is not limited to, counselling or programming for:
 - i. mental health;
 - ii. sexual offence prevention.

[147] You may be seated.

Ancillary Orders

[148] Count 5 on the indictment on which I have convicted you is a primary designated offence. Pursuant to s. 487.051(1) of the Criminal Code, I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Data Bank.

[149] Pursuant to s. 490.011 of the Criminal Code, invitation to sexual touching is a primary offence and a designated offence. The custodial sentence is less than two years, which requires me to make an order that you be registered under the Sex Offender Information Registration Act, S.C. 2004, c. 10 unless you satisfy me, on the balance of probabilities on certain matters. Those matters are that there will be no connection between making the order and the purpose of helping the police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sexual offenders under the Act, or the impact of the order would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature to be achieved by the registration of information relating to sexual offenders under the Act.

[150] In considering whether one or both of these exceptions apply, the court should consider the following factors:

- a) the nature and seriousness of the designated offence;
- b) the victim's age and other personal characteristics;
- c) the nature and circumstances of the relationship between the person and the victim;
- d) the personal characteristics and circumstances of the person;
- e) the person's criminal history, including the age at which they previously committed any offence and the length of time for which they have been at liberty without committing an offence;
- f) the opinions of experts who have examined the person; and
- g) any other factors that the court considers relevant.

[151] I am going to return to referring to Ms. Ali in the third person instead of addressing her directly for the purpose of this analysis.

[152] Ms. Ali relies on the second exception. She submits that a SOIRA order would have significant impact on her mental health. She stated that the time since the charges were laid has been very hard on her mental health and she believes that if there was a SOIRA order, this would continue and worsen because she would feel like someone was always coming to check up on her.

- [153] I accept that a SOIRA order will be difficult for Ms. Ali, in particular with regard to her mental health. However, her mental health, including suicidal ideation, has been a longstanding problem, well before these charges were laid. It is not clear the degree to which a SOIRA order would affect her mental health. Ms. Ali is a sexual offender and I have concluded that there is a risk of her reoffending. Her argument on this point is made only with reference to the impact of the SOIRA order on her. She does not address the public interest in preventing and investigating sexual offences in her submissions. As I have said in other contexts in these reasons, I understand that is because she does not acknowledge that she is a sexual offender, and while that is not an aggravating circumstance, it is relevant to my assessment of this issue.
- [154] With regard to the four statutory factors to consider, the fact that Ms. Ali is a first-time offender who has mental health issues weighs in favour of her position that she be exempted. Some facts weigh heavily against exempting Ms. Ali from a SOIRA order. They are that F.F. was 13 years old, the seriousness of the offence, the limited position of trust I have found, their relationship arose out of a close group of related people and friends, Dr. Greig reached the opinion, on which he placed the caveat, that she has a low to moderate likelihood to reoffend and, if she were to, it would likely take place within a close familial relationship or close friend relationship of a young male child, and my conclusion that Ms. Ali does pose a risk to reoffend.
- [155] I conclude that Ms. Ali has not satisfied her burden to persuade me that the hardship to her should outweigh the public interest in the prevention and investigation of sexual offences.
- [156] With regard to a victim surcharge, there is evidence that Ms. Ali had significant debt due to the financial circumstances of her relationship with F.F.'s oldest brother, because she was unemployed for a period of time due to her depression and anxiety, and because of her legal bills pertaining to when she was represented in this matter. She is now going to be in custody for a year and will not be able to work during that time. Accordingly, pursuant to s. 737(2.1) of the Criminal Code, I am satisfied that the victim impact surcharge would cause undue hardship to Ms. Ali. I make an order that she is not required to pay the victim impact surcharge.
- [157] That is the conclusion of my reasons. Mr. Dotten?
- [158] CNSL T. DOTTEN: Two issues I just wanted to bring to the Court's attention. I think the Court may have misspoken when it stated the term of the probation order. On several occasions the Court said three years, but I think the word that came out was 26 months as opposed to 36 months when the sentence was actually pronounced.
- [159] THE COURT: Yes, that is 36 months.
- [160] CNSL T. DOTTEN: Okay. And the only other consideration with respect to the probation condition. I did not get the entirety of the wording for the contact or communication with those under 16.

[161] THE COURT: Yes.

[162] CNSL T. DOTTEN: I know that Crown had proposed one line-it comes from recent Court of Appeal jurisprudence where these orders have been amended in some circumstances, that allows for incidental contact or communication in a public place, so someone can go to McDonald's and order a hamburger, for instance. And there has been some concern over time that if that is not included, it can bring it back before the courts. I do not know if my friend the amicus has anything to say about that, or if the Court specifically turned its mind to that particular suggestion.

[163] CNSL B. ANDERSON: There is actually a case that my friend and I had carriage of at the trial level and the Court of Appeal, it was a case called Goddard in the Court of Appeal. So, I would agree with my friend, that it is an exception that should be present just to allow incidental in-public contact.

[164] THE COURT: All right. So, the terms of probation I listed under 5502 of the picklist, I listed two numbered exceptions. I will add a third exception which is incidental communications in a public place.

[165] All right, Registrar, you looked like you had a point of clarification.

[166] THE CLERK: How long is the SOIRA?

[167] THE COURT: Oh, thank you. Mr. Dotten, is it typically 10 years?

[168] CNSL T. DOTTEN: It says 20 years.

[169] THE COURT: 20 years.

[170] CNSL T. DOTTEN: 490.013(2)(b).

[171] THE COURT: All right, 20 years for the SOIRA order.

[172] THE CLERK: And is the signature of the accused waived on the documents or is it required?

[173] THE COURT: I think it should be required.

[174] CNSL T. DOTTEN: In any event, he will be signing those from an in-custody basis, so I do not think it is too much of a controversy, but I do not think there is any reason he would not consent.

[175] THE COURT: All right, they are required.

[176] All right. Ms. Ali, I know this has been very, very challenging for you and I expect the next four years will be very challenging for you. I have said that I think you still have some way to go to come to grips with what I have concluded in reaching a determination to convict you of invitation to sexual touching. I hope that over the next four years, you make strides in that regard and are able to live a life free of future offending. And I do hope for you that you are also able to address some of your mental health issues, aside from this offence. I

wish for you that you have some recovery from that significant health issue.

[177] All right. I thank counsel for your assistance through this matter, and again, Ms. Ali, I wish you the best of luck.

"Matthews J."

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