

CANADA / JUDGMENT

R. v. C.T.P.

2023 BCSC 416

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 416 R. v. C.T.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. C.T.P.,

2023 BCSC 416

Date: 20230320

Docket: 184845

Registry: Victoria

Rex

Respondent

v.

C.T.P.

Appellant

Restriction on publication: Pursuant to s.486.4(1) of the Criminal Code, there is a ban on publication, broadcasting, or transmission of any information that could identify the complainant

Before: The Honourable Justice A. Saunders

On appeal from: An order of the Provincial Court of British Columbia, dated September 14, 2022 (R. v. C.T.P., 2022 BCPC 185, File No. 21991-3-C, Western Communities).

Oral Reasons for Judgment

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L. A. Vizsolyi (March 20, 2023 only)

Place and Date of Hearing:

Victoria, B.C.

March 8-9, 2023

Place and Date of Judgment:

Victoria, B.C.

March 20, 2023

- [1] The appellant appeals a prison sentence of five and a half years, imposed for sex-related offences.

The Offences

- [2] The appellant had been charged with two counts of sexual assault, contrary to s. 271 of the Criminal Code; two counts of sexual touching, contrary to s. 151; one count of transmitting sexually explicit material, contrary to s. 171.1(1)(b); and three counts of luring a child through telecommunication, under s. 172.1(1)(b). Her victim was a 15 year-old boy. She was age 25.
- [3] The circumstances of the offences are summarized in the sentencing reasons, indexed at 2022 BCPC 185, at para. 2:
- a) One evening in April 2020, Ms. P. and a female friend encountered a group of boys who lived in the same neighbourhood as Ms. P. and her friend. The boys offered to trade marijuana, which they had, for alcohol. The women agreed to the exchange and went to purchase the alcohol. When they returned to Ms. P.'s home, the boys joined them there for a party, during which alcohol and marihuana were consumed. During the evening, Ms. P. had vaginal sex in her bedroom with one of the boys, C.M.
 - b) A few days later, Ms. P. sent a text message to C.M. inviting him to her house for a "hot make-out sesh". C.M. accepted the invitation and went to Ms. P.'s house, where they engaged in vaginal sex.

- [4] The defence of consent was not available to the appellant. The appellant did however rely on the defence of honest but mistaken belief as to the age of her victim. There was conflicting testimony at trial as to what the boys had said about their ages. The appellant testified that she had asked her victim three times whether he was 18, and each time he affirmed that he was. In cross-examination, she acknowledged having been "a little skeptical" about his assertion that he was 18. The trial judge found that she had been conscious of the risk that he might be under age 16; that it was this awareness on her part that had led her to ask him three times to state his age; and that her proceeding to have intercourse with him despite her skepticism was reckless, depriving her of the right to rely on the defence of mistake of age. Alternatively, the trial judge found that in the circumstances she did not take all reasonable steps to ascertain her victim's age.
- [5] The appellant was therefore convicted of two counts of sexual assault. The trial judge directed an acquittal on the sexual touching counts, under *R. v. Kienapple*, [1975] 1 S.C.R. 729. Her text messages were found to be communication for the purpose of a sexual assault, clearly within s. 172.1(1)(b); the three text messages were however in sequence, and the trial judge found they could only support conviction on one count under that section. The s. 171.1(1)(b) count was dismissed.

The Sentencing Decision at Trial

- [6] The Crown had proceeded summarily, and the sentencing ranges under the Code for each of the sexual assault and luring convictions were a minimum of six months to a maximum of two years less a day. On the sentencing hearing, the Crown sought a global sentence of four years and nine months' imprisonment (two years on each of the sexual assaults, and nine months on the luring). The appellant sought to challenge the mandatory minimum sentences on each count, and asked for the imposition of conditional sentences.
- [7] The trial judge sentenced the appellant to the maximum of two years on each of the sexual assault counts, and a further 18 months on the luring count, all to be served consecutively, for a total of five and a half years.
- [8] The trial judge's reasoning in sentencing was, quite properly, heavily influenced by the Supreme Court of Canada's restatement, in *R. v. Friesen*, 2020 SCC 9, of the law governing sentencing in cases of sexual assault upon a child, and the sentencing reasons quote extensively from *Friesen*. To put the sentencing decision in context, I summarize the salient aspects of *Friesen* as follows. The Supreme Court began its lengthy discussion by setting out three overarching points addressed in its reasons. The third of these points was:
- [5] Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives

and society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

- [9] The Supreme Court made note of Parliament's intent that increased maximum sentences, and the prioritization of the sentencing objectives of denunciation and deterrence, be seen to reflect the profound harm caused by sexual offences against children (Friesen, para. 95). To assist courts in arriving at sentences for sexual offences against children that correspond to these legislative changes and to current understanding of the profound harm caused, Friesen, beginning at para. 107, provides extensive guidance on three specific points:
- (1) Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;
 - (2) Sexual offences against children should generally be punished more severely than sexual offences against adults; and
 - (3) Sexual interference with a child should not be treated as less serious than sexual assault of a child.
- [10] In reviewing the significant factors that courts will often have to account for in determining a fit sentence, and in identifying common errors in categorizing sexual offences and measuring an offender's moral culpability, the Supreme Court made the following points that are of particular relevance to the present case:
- (a) That "consequential harm is a key determinant of the gravity of the offence", and that the best evidence of the harm will often come through victim impact statements (para. 85);
 - (b) That violence is inherent in sexual offences against children "since [they] involve[e] an adult's serious violation of a child's sexual integrity, human dignity and privacy even in cases of ostensible consent", and that therefore a victim's willing participation in sexual conduct does not mitigate the resulting harm (para. 152, quoting from *R. v. Hajar*, 2016 ABCA 222) [emphasis in original];
 - (c) That while sexual violence has a disproportionate impact on girls and young women, this should not detract from the particular challenges that boys and young men who are the victims of sexual violence face. Victimization can be particularly shameful for boys because of social expectations that males are supposed to appear tough (para. 69);
 - (d) That while the moral blameworthiness of an offender is enhanced when a victim is particularly young, courts "must also be particularly careful to impose proportionate sentences in cases where the victim is an adolescent" (para. 136).

- [11] In commenting specifically on the need to exercise caution in looking to prior precedents in sentencing ranges for guidance, the Supreme Court emphasized at para. 114 that the imposition of proportionate sentences will frequently require sentences of substantial length:

It is not the role of this Court to establish a range or to outline in which circumstances such substantial sentences should be imposed. Nor would it be appropriate for any court to set out binding or inflexible quantitative guidance. Nonetheless, it is incumbent on us to provide an overall message that is clear. That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed when there was only a single instance of sexual violence and/or a single victim. In addition maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances". Instead, a maximum sentence should be imposed whenever the circumstances warrant it.

[Citations omitted].

- [12] As I have noted, in the present case the sentencing reasons quote extensively from Friesen, including the latter passage from para. 114. Following that quotation, the trial judge wrote:

While it is the proper function of the Supreme Court to deliver messages to trial judges, they rarely do so in such blunt and forceful terms. I take note accordingly.

- [13] The trial judge proceeded to review the circumstances of the appellant and her victim. He recognized that the appellant had received treatment for anxiety and depression since age 14. She had a six-year-old son. She had no criminal history. Her risk of re-offending (assessed in a psychiatric pre-sentence report) had been assessed as low. The trial judge quoted a report from the appellant's family doctor, who advised that she was attending counselling for alcohol abuse and had a good prognosis for recovery. The doctor expressed concern that incarceration would result in a severe decline in her mental health and that the positive steps to address her alcohol abuse could be lost. The trial judge, from his reading of the pre-sentence report and a letter of reference from her employer, expressed his own concern that the appellant did not appear to understand that she as the adult had been the one responsible for preventing sexual activity.
- [14] As regards the victim, the trial judge had the benefit of a victim impact statement both from the victim, which was read on his behalf by his brother, and one from his mother, who delivered her statement in person. The trial judge described the victim's statement as "a powerful articulation of the effects of sexual abuse on children". Elsewhere in his reasons he described the impact on the victim as "very grave" and "very severe".
- [15] The trial judge expressed his conclusion as to the fit sentences for each of the counts as follows:

- [23] A fit sentence for each of the two sexual assaults of which Ms. P was convicted would be a "mid-single digit penitentiary sentence": Friesen at paragraph 114. In this case, if the Crown had proceeded by indictment, I would have imposed a sentence of the order of 3 to 5 years' imprisonment on each count. Because the Crown proceeded summarily, the maximum sentence which I can impose is 2 years less a day on each count. Applying the principles stated in Butler and Solowan, I should not reduce the sentence below 2 years less a day simply because the Crown elected to proceed summarily.
- [24] I think that a fit sentence for the count of internet luring would be 18 months' imprisonment.
- [25] Applying the principles stated in Rayo [R. c. Rayo, 2018 QCCA 824], the sentences should be consecutive, not concurrent.
- [16] As the fit sentence for each offence was not less than the mandatory minimum sentences of six months, the trial judge found no need to adjudicate the constitutional issues.

Grounds of Appeal

- [17] On this appeal, the appellant asks this Court to make its own determination of a fit sentence, on the basis that the trial judge both made several material errors in principle, and pronounced a total sentence that is demonstrably unfit.
- [18] The purported errors in principle cited by the appellant are as follows:
1. The misapplication of Friesen through applying the sentencing objectives of denunciation and deterrence to the exclusion of other relevant sentencing principles;
 2. The failure to give mitigating effect to the appellant's personal circumstances;
 3. The failure to consider the absence of aggravating factors; and
 4. The failure to consider and apply the sentencing range applicable to summary offences.
- [19] The appellant submits that on a proper application of all the relevant principles of sentencing, the five and a half-year term imposed should be reduced to a sentence of two years less one day. Further, the appellant submits that even with regard to the primary objectives of denunciation and deterrence, the principles and purposes of sentencing can be fulfilled through the imposition of a conditional sentence order ("CSO"). As a CSO may not be imposed when an offence is punishable by a minimum term of imprisonment, pursuant to s. 742.1(b) of the Criminal Code, the appellant challenges the constitutionality of the six-month minimum sentences that apply, where the Crown has proceeded summarily, under ss. 271(b) and 172.1(2)(b).

Discussion

Application of Friesen

- [20] The appellant submits that while the trial judge properly accounted for the need for the sentences to meet the objectives of denunciation and deterrence, he erred in failing to balance those objectives against the sentencing principles of parity (s. 718.2(b)) and restraint (ss. 718.2(d) and (e)) and the fundamental principle of proportionality (s. 718.1). The trial judge, it is submitted, elevated the need to achieve denunciation and deterrence, to the exclusion of other vital principles. Further, it is submitted that though the evidence was that the risk of recidivism was low, the trial judge erred in failing to give effect to "the principle of rehabilitation".
- [21] I do not find that the sentences imposed for each of the charged offences resulted from the trial judge misapprehending Friesen. The Supreme Court's decision is a very strong message that proportionality requires trial judges to properly account for the grave moral culpability inherent in any crime perpetrated by an adult against a child and for the harm done by sexual violence against children, and that sentences for sexual offences against children must increase. The trial judge found that the harm done to the appellant's victim was very severe.
- [22] The Supreme Court in Friesen made note of the British Columbia Court of Appeal having established a sentencing range of two to six years for "sexual assault involving intercourse", in *R. v. G.M.*, 2015 BCCA 165. While Friesen directs appellate courts to "revise and rationalize sentencing ranges and starting points" to provide for more severe sanctions in cases involving children (para. 117), and cautions against defining ranges based on penetration or other specific sexual activity (paras. 140, 146), the Supreme Court also recognized that the degree of physical interference is an aggravating factor (para. 138). The message is clear: sexual offences that harm a child can result in significant prison sentences, even after properly applying the full range of sentencing principles the Criminal Code prescribes.
- [23] In rejecting the defence submission that the sentences ought to be reduced by reason of the impact of a jail sentence on the appellant's young son, the trial judge said at para. 21 of his sentencing reasons that doing so "would dilute the deterrent effect of the sentence and fail to give effect to the expressed intention of Parliament and the Supreme Court". The appellant cites this passage as an example of the trial judge emphasizing deterrence and denunciation to the exclusion of other relevant factors. I do not read this passage to imply that. I interpret this as the trial judge saying that the need for deterrence in the case before him outweighed any mitigating effect that might arise out of the appellant's role as a mother. There was no error of principle demonstrated.
- [24] The appellant submits that the trial judge failed to give effect to the "principle of rehabilitation". Although rehabilitation is sometimes referred to as a principle, the Criminal Code describes it, rather, under s. 718, as one of several objectives that may be embodied in a just sentence in order to achieve the fundamental purposes of protecting society, and contributing to respect for the law and the maintenance of a just, peaceful and safe society.

The Criminal Code does not oblige sentencing judges to apply each one of the objectives set out in s. 718, in the same manner as they must apply the principles of parity, restraint, proportionality, and totality. Where the objectives of denunciation and deterrence are paramount, "it is not an error in principle to give them primacy over other sentencing principles such as rehabilitation": G.M. at para. 17, citing *R. v. Wells*, 2000 SCC 10; *R. v. B.S.B.*, 2010 BCCA 40; and *R. v. Thuraiajah*, 2008 ONCA 91.

Application of Mitigating Factors

- [25] The appellant submits that the trial judge failed to give mitigating effect to the appellant's personal circumstances, including her age, her role as primary caregiver to her young son, her low risk of re-offending, and the lack of a criminal record. The appellant acknowledges these factors were expressly noted in the sentencing reasons, but says that the trial judge failed to relate each of these factors to the relevant sentencing principles, including in particular the assessment of her moral blameworthiness.
- [26] On this point, the recent decision of Chief Justice Bauman on the sufficiency of reasons, *R. v. R.O.*, 2023 BCCA 65, is apposite:
- [56] *R.O.* says the judge did not review the aggravating and mitigating circumstances specific to his case, nor did the judge give a specific analysis of the arguments made by counsel for a custodial sentence, providing no basis for the sentence imposed.
- [57] By way of reference to case law on sufficiency of reasons, including *R. v. R.E.M.*, 2008 SCC 51, *R.O.* suggests that the "why" of the sentence is not discernable.
- [59] In light of the functional and contextual approach to reasons set out by the Court in *R. v. Sheppard*, 2002 SCC 26 and *R.E.M.*, I find the judge's reasons as a whole provide an intelligible basis for review and demonstrate a logical connection between the sentence imposed and the basis for the sentence. In short, I cannot accede to *R.O.*'s argument that the "why" of the sentence is not discernable.
- [60] Although the judge did not articulate his analysis as to precisely how the aggravating and mitigating factors had shaped his sentence, he clearly considered the relevant factors, including Gladue factors, describing them at length and summarizing them immediately before giving the sentence.
- [27] It is clear that the trial judge understood the appellant's personal circumstances and considered them insufficient to outweigh the gravity of the offences and her high degree of moral culpability. There was no error in principle in this respect.

Absence of Aggravating Factors

- [28] It is submitted that the trial judge failed to consider the absence of two aggravating factors considered by the Supreme Court in *Friesen* to be significant determinants of a fit sentence: the abuse of a position of trust; and, the fact that each assault count related to only a single incident of sexual activity.
- [29] While the absence of aggravating factors may be a basis for distinguishing one case from another, and thus relevant to the parity principle under s. 718.2(b), "the absence of an aggravating factor is not a mitigating factor": *Friesen*, para. 150. There is no error of principle in this regard.

Consideration of Summary Offence Sentences

- [30] The appellant submits that where the Crown has proceeded summarily, it is an error in principle for a trial judge to fail to consider sentences imposed in summary convictions for the same or similar offences. The appellant cites the decision of this Court in *R. v. Lequiere*, 2006 BCSC 668, where it was said:
- [61] Based upon the foregoing review, the decision to proceed summarily is a significant one and is a relevant factor for the sentencing judge to consider when determining the appropriate range of sentence for the purpose of minimizing disparity in accordance with section 718.2(b) of the Criminal Code. Consideration of this factor requires the sentencing judge to consider sentences that have been given to other offenders in similar circumstances for the same offence that has proceeded summarily. A failure to consider other summary conviction cases, being a relevant factor, is a reviewable error.
- [62] In this case, the sentencing judge erred by not considering other similar summary conviction cases. Although cases that have proceeded by indictment may be relevant, consideration of only those cases in the case at bar resulted in overemphasis on a relevant factor, namely the range of appropriate sentence in indictable cases. The overemphasis of a relevant factor is also a reviewable error.
- [31] This approach to sentencing has however been implicitly overruled by the Supreme Court of Canada's decision in *R. v. Solowan*, 2008 SCC 62, where Mr. Justice Fish wrote:
- [15] A fit sentence for a hybrid offence is neither a function nor a fraction of the sentence that might have been imposed had the Crown elected to proceed otherwise than it did. More particularly, the sentence for a hybrid offence prosecuted summarily should not be "scaled down" from the maximum on summary conviction simply because the defendant would likely have received less than the maximum had he or she been prosecuted by indictment. Likewise, upon indictment, the sentence should not be "scaled up" from the sentence that the accused might well have received if prosecuted by summary conviction.

[Emphasis added.]

- [32] Under s. 718.1 of the Criminal Code, a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. Maximum sentences are no longer reserved for the "worst offender" or the "worst offence", and whether the Crown has proceeded summarily or by way of indictment is not a "circumstance" relevant to parity. There is no requirement that a sentence for a hybrid offence prosecuted summarily that is within the summary range be adjusted to account for the more limited range of sentences available. Or, to put it another way, a comparator sentence imposed in a case involving a similar offender, for similar offences, committed in similar circumstances (the parity factors set out in s.718.2(b)), but where the Crown had proceeded by way of indictment, is not to be re-apportioned - "scaled down" - when applied to a summary conviction sentencing. The Crown's decision on the mode of prosecution has no bearing on sentencing, other than setting the permissible range. It can no longer be considered an error in principle for a sentencing judge to consider only sentences imposed in indictment cases.
- [33] In any event, although Friesen was the only sentencing case specifically referenced in the trial judge's decision, counsel provided the trial judge with written submissions that extensively canvassed sentencing in both summary conviction and indictment cases. And Friesen's cautions as to reliance on past precedents, and as to the need for sentences for sexual offences against children to increase, mean that previous decisions, whether in summary conviction or indictment cases, may have limited utility. Absent an error in principle, a sentencing judge's failure to make explicit mention of summary conviction sentencing cases in sentencing for hybrid offences is not grounds for varying a sentence on appeal.

The Totality Principle

- [34] I do however find that the trial judge erred in failing to properly apply the totality principle expressed in s. 718.2: that "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh".
- [35] The trial judge set out the totality principle in his sentencing reasons, quoting from *R. v. M. (C.A.)*, [1996] 1 SCR 500. He then moved to applying the sentencing principles to the facts, and pronounced the fit sentences for each count at paras. 23-25, quoted above. He then applied the totality principle as follows:
- [26] The total sentence which I impose will be for a term of 5.5 years' imprisonment. That is roughly equivalent to that which was held in Friesen to be appropriate for either of the sexual assaults, standing alone. For that reason, the "totality principle" is not offended by a sentence of 5 to 6 years imprisonment.
- [36] In *R. v. Punko*, 2010 BCCA 365, the B.C. Court of Appeal adopted the description of the totality principle from the decision of the Manitoba Court of Appeal in *R. v. Grant*, 2009 MBCA 9, wherein Mr. Justice Chartier stated at para. 98:

- 1) First, the judge needs to determine the appropriate sentence for each offence in accordance with the appropriate sentencing principles and those governing consecutive sentences. It is trite to say that offences which are separate and distinct should generally attract consecutive sentences, while offences that are sufficiently interrelated and occur during the same general incident should normally receive concurrent sentences
- 2) Second, if some or all of the offences are to be served consecutively, they should be totalled up and then the judge should take one last look to see whether the total sentence exceeds the overall culpability of the offender as per s. 718.2(c) of the Code (the totality principle). If none of the sentences imposed are to be served consecutively, then there are no totality principle considerations.
- 3) The last look is a more focussed application of the general principle of proportionality. It does not require a reconsideration of the sentencing principles applied in 1) above. Rather, it requires an examination of the gravity of the offences, the offender's degree of guilt or moral blameworthiness with respect to the crimes committed and the harm done to the victims. If the total sentence exceeds the overall culpability of the offender, it must be adjusted.

[Emphasis added; citations omitted]

- [37] In the present case, the requirement to take a "last look" was not satisfied by simply referring to the sentence that had been imposed in Friesen and finding "rough equivalence". I say this for two reasons.
- [38] First, the circumstances of Friesen were vastly different. The accused in that case had inflicted sexual violence on a four-year-old child, with the child's mother participating. His likelihood of reoffending was judged to be high. Although it was recognized that the offender had not stood in a position of trust, the Supreme Court found it highly aggravating that he had exploited the mother's relationship in order to assault the child. Further, the Court noted that even if the mother had not stood in a position of trust, the co-ordination of the violence by multiple offenders was also an important aggravating factor (paras. 171-173). It also bears mention that the Supreme Court further made note of three aggravating factors that it did not rely on in deciding to restore the trial judge's sentence, but that could be relevant to future cases: the offender's extortion of the mother; the commission of the offences in the home of the child's mother; and, evidence of the offender's misogyny (para. 176). Friesen is in no way an appropriate comparator.
- [39] Second, comparison of sentences in other cases is properly part of the parity analysis. It may have some utility in deciding whether the totality principle applies. But at this stage of sentencing the focus is on whether the aggregate sentence exceeds what is appropriate given the offender's own moral culpability.

- [40] Here, a proper application of the totality principle ought to have accounted for the links between each of the two assaults and the luring. It is the case that the assaults were distinct offences, separate in time from each other. They were not part of the same endeavour. The gap in time between the two assaults had afforded the appellant an opportunity to consider afresh - while not under the influence of intoxicants - whether her initial skepticism as to the victim's age had been well-founded. The luring, while factually part of the same endeavour as the second assault, was an offence against a law designed to protect a different societal interest, as the trial judge recognized (see Rayo at paras. 136-141). For these reasons, the decision to make the sentences consecutive rather than concurrent was logical and principled.
- [41] But that is not the end of the inquiry. A full accounting of the appellant's moral culpability also ought to have recognized that though the offences were separate, they were all rooted in the appellant's initial reckless failure to ascertain her victim's true age. Further, consideration of her moral culpability on the luring charge ought to have recognized that though a telecommunications device had been used to intrude on the victim's sphere of privacy, exposing him to sexual exploitation, this was not a case of electronic media being used to "groom" a potential victim, and the degree of intrusion through text messaging was on the low end of the scale. These considerations militated against the total sentence simply being the sum of separate consecutive sentences.
- [42] For these reasons, I find that the sentence imposed arose out of a material error in principle. I am therefore required to perform a fresh sentencing analysis, although with certain limitations. The Supreme Court described the appellate court's role in these circumstances, in Friesen:
- [27] If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence . It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.
- [28] However, in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position .

[Citations omitted.]

- [43] Given the deference that I am required to exercise - in particular, as to the trial judge's characterization of the harm to the complainant - and given that I have found no errors in his assessment of the principles of parity and proportionality, seen in the light of Friesen, then absent the totality principle I would reach the same conclusions as the trial judge respecting what the fit sentences on the individual counts would be, and respecting their being served consecutively. I find however that applying the totality principle requires adjusting those individual sentences and how they are to be served, in order to reduce the total term of imprisonment.
- [44] In addition to the cases cited by counsel, useful guidance as to the total fit sentence is provided by the recent decision of Mr. Justice Betton in *R. v. Aeichele*, 2023 BCSC 253. The offender in that case was a male in his mid-40's. His victim, an adolescent female, was known to him to be 15 years of age. They had intercourse on a number of occasions over the course of eight months. He was charged with one count of sexual interference under s. 151, and one count of luring under s. 172.1(1)(b). He was sentenced to 30 months - two and a half years - for the sexual interference count, and one year on the luring count, to be served concurrently. There were two significant mitigating factors that are not found in the present case: the fact that there was a guilty plea, and the offender's aboriginal heritage. Further, while the offences occurred over a more extended period of time, and while the harm done to the victim in that case was no doubt serious, the reasons do not indicate that the sentencing judge found the consequences to be as grave as did the trial judge in the present case.
- [45] I find that a fit global sentence is a term of three years. This is sufficient to recognize the gravity of the offences, the primacy of the objectives of denunciation and deterrence, and the appellant's moral culpability. This total sentence is to be achieved through sentencing the appellant to two years on the first count of sexual assault; one year on the second count of sexual assault, to be served consecutively; and one year on the luring count, to be served concurrently with the one year on the second sexual assault.

Constitutionality of the Mandatory Minimum Sentences

- [46] The appellant challenges the six-month mandatory minimum sentences on the sexual assault (s. 271(b)) and luring (s. 172.1(2)) counts. As the fit sentences in the present case exceed the mandatory minimums, my decision whether to consider the constitutionality of those sentencing provisions is discretionary: *R. v. Lloyd*, 2016 SCC 13 at para. 19.
- [47] The Crown concedes that the six-month mandatory minimum under s. 271(b) is no longer constitutionally defensible. In *R. v. C.B.A.*, 2021 BCSC 2107, Madam Justice Lyster found the 90-day mandatory minimum sentence for summary convictions on the offence of sexual interference, under s. 151(b), to be grossly disproportionate, thereby infringing 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 [Charter], when applied to two different reasonable hypothetical scenarios. Though ruling on the constitutional issue is not

necessary to the disposition of the present case, the Crown submits that given the ruling in C.B.A. it would be an appropriate use of judicial resources to undertake the s. 12 analysis, as such would provide jurisprudential certainty.

- [48] I agree. As the Crown acknowledges, the two hypothetical scenarios considered by Lyster J. could apply equally to a sentencing under s. 271(b), as the two hypothetical offenders under those scenarios could have simultaneously committed offences under both s. 151 and s. 271. Moreover, in Friesen the Supreme Court stated, at para. 120, that it is an error of law to treat sexual interference as less serious than sexual assault; as the hypotheticals considered in C.B.A. are equally applicable to the two offences, then if the 90-day minimum under s.150 is grossly disproportionate, it follows that the higher six-month minimum under s. 271(b) must necessarily be grossly disproportionate as well. Section 12 of the Charter is infringed. The Crown does not seek to justify the infringement under s. 1 of the Charter.
- [49] I therefore declare the mandatory minimum sentence under s. 271(b) to be invalid and of no force and effect.
- [50] However I choose not to exercise my discretion to undertake the constitutional analysis with respect to s. 172.1(2). The constitutionality of that six-month mandatory minimum sentence is currently under consideration by the Supreme Court of Canada, in Attorney General of Quebec et al v. H.V. (appeal from R. v. H.V., 2022 QCCA 16; leave to appeal to SCC granted, 40093 (18 August 2022)), heard February 16, 2023, and it may be expected that the Supreme Court's decision will conclusively determine the issue.

Conclusion

- [51] The appeal is allowed, and the sentence is varied to a term of three years: two years under Count 1 of the Indictment; one year under Count 2, to be served consecutively; and one year under Count 6, to be served concurrently with the sentence under Count 2.
- [52] The six-month mandatory minimum sentence under s. 271(b) of the Criminal Code is declared to be invalid and of no force and effect.

"A. Saunders J."

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