

CANADA / JUDGMENT

R. v. D.O.

2023 BCCA 260

COURT

British Columbia Court of Appeal

DECIDED

23 June 2023

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2023 BCCA 260 R. v. D.O.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. D.O.,

2023 BCCA 260

Date: 20230623

Docket: CA47617

Between:

Rex

Respondent

And

D.J.O.

Appellant

Restriction on publication: A publication ban has been mandatorily imposed under ss. 486.4(1) and (3) of the Criminal Code restricting the publication, broadcasting, or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials S.B., O.Z., G.B., K.M., I.F., D.P., D.G., S.B.2, and M.F. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated

June 18, 2021 (sentence) (R. v. D.O., 2021 BCPC 171,

Port Coquitlam Docket 101642-4-C).

Counsel for the Appellant:

T.M. Arbogast, K.C.

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Counsel for the Respondent

(via videoconference):

M.T. Ainslie, K.C.

L.A. Drake

Place and Date of Hearing:

Vancouver, British Columbia

May 24, 2023

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2023

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Grauer

Summary:

The appellant pled guilty to 11 counts of sexual offences against young children, many of whom were in his care as foster children. He was sentenced to 16 years and six months (with each count receiving a sentence of three years, reduced to 18 months to account for the principle of totality). The Crown had proposed a range of 7 to 11 years and the sentencing judge did not give the appellant notice that she intended to exceed the range. The appellant argues that the judge erred in failing to individualize each sentence and instead imposed the same sentence on each count,

in failing to notify counsel that she intended to impose a sentence beyond the range sought by Crown counsel, in considering the appellant's lack of remorse as an aggravating factor, and in imposing a sentence that was unfit and disproportionate.

Held: Leave to appeal granted but appeal dismissed. The judge considered each count and imposed a sentence that was within the range suggested to her for each individual count. The appellant has not shown what information he would have or could have provided to the judge had she given notice that she intended to exceed the sentencing range proposed by the Crown. The judge did not err in considering the appellant's lack of remorse as an aggravating factor. Finally, the judge did not impose a sentence that is demonstrably unfit.

Reasons for Judgment of the Honourable Madam Justice Bennett:

- [1] The appellant, D.O., was charged with 15 sexual offences against children. On the second day of his trial, he pleaded guilty to 11 offences, including two counts relating to child pornography. On the first day of the trial, the Crown tendered, and the judge watched, many of the videos seized from D.O.'s home, including videos of him sexually abusing several foster children in his care. He appeals the sentence of 16 years and six months' imprisonment imposed by the trial judge. The judge's comprehensive reasons for judgment are indexed at 2021 BCPC 171 ("Reasons").
- [2] I would grant leave to appeal but would dismiss the appeal.

Background

- [3] D.O. worked in a school as a Child and Youth Worker. D.O. had been married for 18 years and had three children. He and his wife began fostering children in 1995. After separating from his wife, D.O. continued to foster children beginning in 2008, up until the time of his arrest in 2019. He specifically requested younger boys as foster children. He adopted two of the boys whom he had fostered as a single parent.
- [4] D.O. came to the attention of the police in January 2019 when two of his adult children attended the police station to report discovering videos depicting sexual acts between their father and two young boys who were in his foster care.
- [5] A search of D.O.'s home resulted in the seizure of multiple digital devices. These devices revealed extensive video files and images of child pornography, some from the Internet and some "homemade". D.O. was charged with 15 counts, pleading guilty to 11 counts, described below:
 - (a) Count 1: the making of child pornography that occurred from January 16, 2008 to January 11, 2019 (Criminal Code, R.S.C. 1985, c. C-46, s. 163.1(2)) ["Code"];
 - (b) Count 2: the possession of child pornography (Code, s. 163.1(4));

- (c) Count 5: the sexual assault of D.P., a foster child of D.O that occurred between June 30, 2011 and July 31, 2015 (Code, s. 271) (reduced from sexual assault with a weapon);
- (d) Count 9: the sexual assault of D.G., a foster child of D.O., which occurred between August 11, 2017 and August 17, 2018 (Code, s. 271) (reduced from sexual assault with a weapon).
- [6] In addition, seven counts of sexual touching of a person under the age of 16 years (Code, s. 151) were particularized by the judge as follows:

[15]

- (a) Count 3, in respect of Jane Doe, is an offence which occurred between April 30, 2008 and January 11, 2019. D.O. is spanking a young girl, who was not a child in his foster. According to the Crown, it was likely a child for whom D.O. was giving respite care.
- (b) Count 4, in respect of John Doe, are offences which occurred between April 30, 2008 and January 11, 2019; evidence found on the numerous devices seized from the residence of D.O. of repeated sexual acts on a young boy or boys. The Crown was not able to identify the child or children.
- (c) Count 7, in respect of S.B., is in relation to offences which occurred between June 27, 2012 to September 27, 2012, captured on video of D.O. engaged in sexual touching and sexually interacting with S.B., who was a foster child of D.O.
- (d) Count 8, in respect of O.Z., is in relation to offences which occurred between July 21, 2015 and January 11, 2019, captured on video of D.O. engaged in sexual touching and sexual interacting with O.Z., who was a foster child of D.O.
- (e) Count 13, in respect of G.B., is in relation to offences which occurred between October 2, 2015 and December 21, 2015, captured on video of D.O. bathing G.B as he stands naked and D.O. is spanking his bare buttocks. G.B. was a foster child of D.O.
- (f) Count 14, in respect of K.M., is in relation to offences which occurred between September 1, 2017 and November 30, 2018 that occurred at the school where D.O. worked. The photographs show D.O. spanking K.M. on a couch and in an office at the school. K.M. was not a child in D.O.'s foster care.
- (g) Count 15, in respect of I.F., is in relation to offences that occurred between June 25, 2018 and January 11, 2019, captured on video and in photographs of D.O. sexually touching and sexually interacting with I.F., who was a foster child of D.O.
- [7] In the videos discovered by police, there were several male child victims who could not be identified. Count 4, in respect of John Doe, appears to cover those allegations.

- [8] The judge described the files found on D.O.'s digital devices at paras. 10-14, noting that numerous videos and photographs were found, including "category 1" child pornography, which the parties acknowledged is considered the most graphic and egregious. The files were described as depicting sexually explicit videos or photos of young boys. Of the videos found, at least 15 were believed to be homemade child pornography. The judge noted:
- [10] Exhibit 5 is the Observation Report #1 in relation to the grey HP laptop. Constable Gafka found it contained 41 category 1 child pornography videos and 5 category 1 child pornography images.
- [11] As well, there were another 22 video files found on the grey HP Laptop, seven of which contained file naming consistent with child offences involving child pornography. The seven videos, ranged from .48 seconds to 6:46 minutes in length, with some containing more than one incident. The videos were of various sexual encounters between an adult male and young boys. The five photos showed sexually explicit images of young boys alone, or in the presence of or interacting with an adult male.
- [12] Thumbnail searches of the grey HP laptop found 3,093 files, and 41 were believed to be category 1 child pornography. Six samples in Exhibit 5 depict various sexual encounters between young boys and an adult male.
- [13] There were another 10,801 files located, of which 10,328 were graphics, and 473 were videos located on the grey HP laptop. Of the 10,328 graphics, nine photos were believed to be category 1 child pornography, and seven category 2 child pornography images. Among the 10 category 1 child pornography photos were five depicting a child under the age of 10 performing fellatio on a male. Five other photos are believed to be homemade category 1 child pornography.
- [14] Of the 473 videos located in the grey HP Laptop, 41 of them were believed to be category 1 child pornography. Among those 41 videos, 15 were believed to be homemade child pornography.
- [9] The judge further described the contents of the videos:
- [18] Constable Gafka gave evidence about the contents of the videos. In one, D.O. is manipulating a young boys' sleeping hand to masturbate him until he ejaculates. Another video is of a young boy sleeping, and his pants are pulled down exposing his buttocks and scrotum. D.O.'s hand comes into the frame, and D.O. has what appears to be ejaculate on his fingers. D.O. then rubs it on the child's anus. Another video shows a motionless child under the age of six, upon whom D.O. performs oral sex.
- [19] Other videos depict D.O. exposing the buttocks of a young boy, and spanking them until they are visibly red. Another shows D.O. rubbing the buttocks of a young boy and saying to the child "almost done." Another video shows a young boy bent over with his buttocks exposed, and he is trying to cover up, and D.O. says, "one more but on the bare bum, just one." The child is clearly resisting. In another video, a young boy is crying, saying he doesn't like it.

Many of the videos of spanking show the children pleading for D.O. to stop, and they attempt to stop him from hitting them.

- [20] In some of the videos, the identity of the male could not be confirmed, but D.O. was the suspected offender. In one video, two young boys estimated to be about four to six years old are sleeping in a bed. The man masturbates himself to full erection and then puts his erect penis in the mouth of one of the children and ejaculates into it.
- [21] Many of these videos were shown at trial.
- [22] Exhibit 6 is Observation Report #2, which indicates 26 files were located in the black HP laptop of which three were believed to be category 1 child pornography. Of the 2,095 videos located, five were believed to be category 1 child pornography.
- [23] Exhibit 7 is Observation Report #3 in relation to the grey and black Mac computer. In the computer, 120 files containing words and naming associated with child pornography were located. 104 of the 120 files were consistent with names and words found in child pornography. Among the five examples given in court of that content involved full penetration by a father on his daughter, and other deeply disturbing sexual material involving children.
- [24] Observation Report #3 indicates 75 video files were located in D.O.'s home folder, all of which were believed to be category 1 child pornography. Five samples of the material were set out in the report. Depictions involve adults explicitly offending against very young children. Also found were 83 video files depicting sexually explicit imagery of children with children, and children with adult males. One video involves a girl under the age of two years old. One video is 30 minutes in length, with graphic and deeply disturbing imagery.
- [25] The third witness for the Crown was Constable B. George, who examined some of the devices seized from the residence of D.O. On those devices, she located over 64 text document files or narratives, which were accounts of adults in varying sexual interactions with children.
- [26] The narratives in File 1 depict child on child sexual interactions, adults with children, and young teen sexual interactions. Some of the narratives included titles such as, "Incest", "Anal", "Extreme Pedo", "Male Raping Children", "Grandchildren", and "Sex with a Three Month old Twice a Week".
- [27] The narratives in File 2 included titles, "Adult Male Watch Adult Male Brother Molesting a 13 Month old Baby's Face", and "Five Males Sexually Assaulting 1 Child over a Weekend".
- [28] In File 3, narrative titles included, "Church run by Nuns", which detailed a sixty-year-old nun having sex with a three-year-old child. In another, the nun urinates in the mouth of a seven-year-old child until the child chokes.

- [29] These narratives read into the court record by Constable George were so deeply graphic that she broke down in the witness box while giving that evidence.
- [10] The sentencing judge thoroughly reviewed D.O.'s background and summarized the filed pre-sentence report and psychological report at paragraphs 31-78. I summarize her findings below.
- [11] D.O. was 54 years old at the time of sentencing. His family upbringing was unremarkable. His siblings are supportive, and he lived with a family member in north central B.C. He studied Child and Youth Care Counselling in college, and was employed by a Lower Mainland school board as a Child and Youth worker. He remained there for twenty years, until charges were brought. As noted, one of the victims appears to be a student at the school.
- [12] He admitted to the psychologist who conducted the assessment for the sentencing proceedings that he had a "spanking fetish" that was part of the arousal process he engaged in with female sexual partners and the child victims.
- [13] He admitted that he was sexually aroused by children between the ages of 7 and 12 years. He primarily offended against boys under the age of 10, but was also sexually aroused by girls under the age of 12 years. D.O. advised that he was never disturbed by the thoughts of having sex with children and did not seek counselling.
- [14] D.O. acknowledged looking at adult pornography including "spanking" videos, but claimed to move to viewing child pornography about ten years ago, despite the fact the police recovered material from as early as 2005. Although D.O. said the recordings he made of sexually abusing the children were not shared, he admitted that he filmed the offences so he had something he could go back to look at.
- [15] The probation officer indicated that D.O. "does not appear to grasp the gravity of his offending behaviour beyond what the experience currently cost him personally and what it will cost him in the future. He acknowledged he did something wrong, but he was unable to express what that was, and at no time did he take responsibility for what he had done". He did not express regret or show insight into his offending. He appeared to blame others for the position he is in, including his victims.
- [16] He was upset to learn that his children had reported him and was disappointed in them for not talking to him about it rather than reporting it to the police. Not once did D.O. express empathy or concern for the children or how his conduct affected them. He had no comprehension of the impact of his offending on them, their families or the community at large.
- [17] In her reasons, the judge said the following:
- [48] When asked how he thought the victims were impacted by his offending, he replied:

It's a difficult question because of how the offences happened. On one occasion, if the child was never told, they would never have known and so the trauma was brought on by them being told. They have all been told how terrible the trauma was. At the time it was more playful and was not a horrible thing but over time and later in life it could have an impact, I guess. I have never had intercourse with a child. To me having intercourse with a child would be more traumatizing than the molestation.

- [49] The pre-sentence report writer said the responses of D.O. suggests externalization of the blame, deflection of responsibility, and minimization of some offences as less harmful than others.
- [50] The psychological assessment similarly finds that D.O. failed to take responsibility, denied and substantially minimized the extent of the harm that was caused by his actions for the same reasons he gave in the pre-sentence report.
- [18] D.O. minimized the harm done because he had offered the victims "a good, stable and loving home that they would not otherwise have had". The children came from damaging circumstances before they came to him for foster care.
- [19] When a child came into his home, he assessed whether they would report him before he offended against them. For example, if the child had regular contact with family members, he would not "touch them".
- [20] He believes that his offending was "opportunistic" and therefore, he is a low risk to re-offend.
- [21] The judge quoted from a statement given to the probation officer by DO:
- [58] According to the pre-sentence report writer, perhaps the most revealing subjective view D.O. has of himself in relation to these most serious charges was his response when he was asked at the end of the interview what he would like the judge to know about him prior to sentencing. His statement was:

I feel I am a genuinely good person. I know I have done something wrong. But I am a nurturing person and I do have compassion for children because I care for them. I am not an evil stalker out to lure or go to parks to seek out children and I am not a predator. I like to think that I am a nurturing human being who cares about people very much. In a sense my charges back up what I am saying. I have never kidnapped or lured, never coerced.

- [22] D.O.'s offending escalated from watching child pornography, to sexualized touching of children while bathing them, to spanking and masturbatory acts and insertion of his penis into a sleeping child's mouth. He was diagnosed with Pedophilic Disorder. D.O., in the opinion of the psychologist, presents a high risk for future sexual violence, including a high risk towards children regardless if they are in his care.

- [23] Victim impact statements were received from or on behalf of some of the victims. The judge reviewed the statements at length from paras. 79-95. She described the profound ways in which D.O.'s abuse has impacted not only the children but their families. The issues that the children now suffer include, but are not limited to: addiction, homelessness, mental health concerns including suicidal ideation, memory loss, and behavioural and relationship challenges. Victim impact statements from family members described feelings of guilt, pain, and fear.
- [24] The statements, some made personally, some by social workers or family members, all demonstrate the significant negative impact that has been felt by the victims and their family members.
- [25] Statements in relation to the victims depicted in the child pornography in D.O.'s possession were not tendered, as they sometimes are, from the Canadian Centre for Child Protection: see, for example, *R. v. McCrimmon*, 2022 YKCA 1 at paras. 12-15. It is trite to observe that each time child pornography (or child abuse material) is downloaded and watched, the child victims are revictimized. See also *R. v. Friesen*, 2020 SCC 9 at para. 48.
- [26] The sentencing judge did not comment on the victimization of the children who were the subject of the images that were downloaded, but that does not weigh in favour of D.O.
- [27] The judge identified the foster children as Black, Indigenous, and white. All were from situations that resulted in them being placed in foster homes, thereby increasing their vulnerability.
- [28] At the sentencing hearing, Crown counsel submitted that each offence could draw an individual sentence of two to five years and should be served consecutively, amounting to a total sentence in excess of 20 years, and upwards to 30 years. However, Crown counsel noted that the principle of totality was engaged and submitted that one year on each count to be served consecutively, totalling 11 years, would be appropriate, but that the range of sentence was 7 to 11 years.
- [29] Defence counsel ultimately submitted that a sentence of 7 years, which was at the lower end of the Crown's submission, was a fit sentence.
- [30] The sentencing judge set out, at paras. 97-128, the principles of sentencing, discussed the totality principle at length, considered the principles and factors when sentencing a person convicted of sexual offences against children, and discussed in particular, the Supreme Court of Canada's decision in *Friesen*. She discussed the cases cited to her by counsel and the applicable principles in order to determine an appropriate range of sentence for the circumstances before her. She noted that in 2015, Parliament increased the maximum sentences for the offences she was addressing. She concluded at para. 171 that the pre-2015 cases relied on by the defence were less helpful and she therefore did not rely on them.

[31] She considered s. 718.3(7) of the Code, which mandates consecutive sentences for multiple sexual offences against children:

718.3 (7) When a court sentences an accused at the same time for more than one sexual offence committed against a child, the court shall direct

- (a) that a sentence of imprisonment it imposes for an offence under section 163.1 be served consecutively to a sentence of imprisonment it imposes for a sexual offence under another section of this Act committed against a child; and
- (b) that a sentence of imprisonment it imposes for a sexual offence committed against a child, other than an offence under section 163.1, be served consecutively to a sentence of imprisonment it imposes for a sexual offence committed against another child other than an offence under section 163.1.

[32] The judge then set out a lengthy list of aggravating factors:

[181]

- (a) the sheer number of child victims of D.O., some identified, some not identified;
- (b) D.O.'s abuse of the position of trust and authority he had over his victims;
- (c) when determining which foster children he would offend against, he chose those less connected to their families because they were less likely to disclose the abuse;
- (d) he knew the victims came from "damaged" homes, and even with his offending, his view is he offered them a loving and nurturing home;
- (e) his sexual conduct exacerbated already emotional and cognitive fragilities of his victims, notwithstanding his training in the field of child and youth care;
- (f) his "grooming" of his victims;
- (g) the prolonged over ten-year period in which the offending occurred;
- (h) his use of a weapon, a belt;
- (i) sexually abusing his victims while they were sleeping;
- (j) his brazen offending of sleeping children with other children nearby;
- (k) his blame on others for being caught, including his own children;
- (l) his denials, almost complete lack of insight, no expression of regret or acceptance of responsibility;
- (m) the lack of empathy or compassion for his victims, their families or the community at large;
- (n) the harm caused to his victims, those known by their victim impact statements, and those unknown;

- (o) the age differential between him and his victims;
- (p) the escalation of his offending;
- (q) his denial of coercion of or predation on his victims;
- (r) the lack of foreseeable harm his offending will cause his victims in the future;
- (s) videotaping and photographing his sexual offending, which also escalated over time;
- (t) storing and keeping homemade child pornography and using it for later arousal;
- (u) his deflection of responsibility in the making of child pornography;
- (v) his vast collection of non-homemade child pornography videos, images and narratives;
- (w) his subjective view that he is "extremely low risk" to re-offend;
- (x) the psychologist's opinion that he is a high risk for re-offending;
- (y) his diagnosis of pedophilic disorder; and
- (z) his stated desire to work in the same professional field again in future.

[33] With respect to mitigating factors, she placed little weight on D.O.'s guilty plea that was entered on the second day of the trial for the following reasons:

[182] (i) he did not do so out of a sense of responsibility or remorse; (ii) the case against him was overwhelming; (iii) it was not an early plea, coming on day two of the trial, after much prosecutorial resources had been expended; and (v) his victims had been prepared to testify by the Crown.

[34] She also placed little weight on his otherwise apparent good character when she weighed it against the gravity of the offences he committed.

[35] The judge determined each sentence individually before applying the totality principle, consistent with the approach endorsed by this Court in *R. v. G.F.*, 2018 BCCA 339 at para. 37. The judge agreed with the Crown's initial range of two to five years per count and imposed three years on each count, to be served consecutively, for a total of 33 years. She did not, however, agree with the Crown's proposed application of the totality principle and disagreed that a total sentence of 11 years was fit. Rather, she concluded that the appropriate disposition was to impose a sentence of 18 months on each count, to be served consecutively, for a total sentence of imprisonment of 16 years and six months. She did not provide notice to defence counsel that she would be exceeding the range of sentence submitted by the Crown. Finally, she imposed ancillary orders that are not the subject of this appeal.

Issues on appeal

[36] D.O. submits that the sentencing judge committed four errors:

- (i) She failed to individualize each sentence, and instead imposed the same sentence on each count regardless of the gravity of the offence;
 - (ii) She failed to notify counsel that she was intending to impose a sentence beyond the range sought by Crown counsel, in accordance with *R. v. Nahanee*, 2022 SCC 37;
 - (iii) She considered D.O.'s lack of remorse as an aggravating factor; and
 - (iv) The sentence was unfit and disproportionate as a result of the sentencing judge's misapplication of the decision in *Friesen*.
- [37] On appeal, D.O. seeks a sentence of 11 years, in accordance with Crown counsel's submission at the sentencing hearing. The Crown on appeal submits that the sentence is fit, and no error occurred that impacted the sentence.

Standard of Review

- [38] A sentence imposed by a trial judge is entitled to considerable deference. In *R. v. M.* (C.A.), [1996] 1 S.C.R. 500, 1996 CanLII 230 at para. 90, (and recently confirmed in *R. v. Lacasse*, 2015 SCC 64 at para. 41), the Court said:
- [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit. Parliament explicitly vested sentencing judges with a discretion to determine the appropriate degree and kind of punishment under the Criminal Code.
- [Emphasis in original.]
- [39] The Court refined the standard of review in *Lacasse*. Justice Wagner (as he then was), speaking for the majority, concluded:
- [44] In my view, an error in principle, the failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor will justify appellate intervention only where it appears from the trial judge's decision that such an error had an impact on the sentence.
- [40] Thus, if an error impacts the sentence, then and only then, may an appellate court set aside deference and consider whether the sentence was a fit sentence. It may affirm the sentence or impose a sentence it considers fit.
- [41] Even without error, a sentence may be "demonstrably unfit". This is a high threshold to meet, and the analysis must be focussed on the principle of proportionality as outlined in s. 718.1 of the Code: *Lacasse* at paras. 52-54.
- [42] A sentence that is outside the usual range of sentences is not necessarily a demonstrably unfit sentence. As explained by Justice LeBel in *R. v. Nasogaluak*, 2010 SCC 6 at para. 44:

[44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances of the offence and the offender, and to the needs of the community in which the offence occurred.

Legal framework

[43] Each of the offences carries a mandatory minimum sentence of one year, however, some of the minimum sentences have been struck down as unconstitutional. No issue was raised with respect to the minimum sentences, and there is no need to consider them.

[44] The maximum sentence for offences are:

- (a) sexual interference of a person under the age of 16 years (s. 151): 14 years' imprisonment;
- (b) making child pornography (s. 163.1(2)): 14 years' imprisonment;
- (c) possessing child pornography (s. 163.1(4)): 10 years' imprisonment; and
- (d) sexual assault of a person under the age of 16 years (s. 271): 14 years' imprisonment.

[45] The principles of sentencing are codified, and the relevant sections are:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
 - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,
 - (iii.2) evidence that the offence was committed against a person who, in the performance of their duties and functions, was providing health services, including personal care services,shall be deemed to be aggravating circumstances;
 - (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
 - (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
 - (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
 - (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [46] The judge carefully reviewed the decision in Friesen, which represents a pivotal change in the way judges are to approach sentencing those convicted of sexual offences against children, including child pornography offences.

- [47] The Court in Friesen made it clear that sentences in relation to crimes against children must increase from those previously imposed in order to "reflect proportional harm" (para. 5). In 2015, Parliament increased the maximum sentences available for a number of offences against children and a judge's duty is "to give Parliament's sentencing initiatives their full effect" (para. 45). As such, judges must be cautious about using pre-2015 precedents (para. 110).
- [48] This Court has often said that children are "priceless assets" and in need of protection: see, e.g., *R. v. D.G.*, 2014 BCCA 84 at para. 37; *R. v. S.B.T.*, 2010 BCCA 145 at para. 21. In Friesen, the Court stated that "protection of children is one of the most fundamental values of Canadian society" (para. 65), noting that children in government care are particularly vulnerable to victimization (para. 71).
- [49] Therefore, the sentence must reflect the high moral blameworthiness of the offender, recognizing the harm to the child, which often continues into adulthood, the harm to their families, and the harm to the community (paras. 60, 62, 80, 87, 90).

Totality principle

- [50] When consecutive sentences are imposed, the judge is required to consider whether the cumulative sentence is proportional. The sentence should not exceed the overall culpability of the offender: Friesen para. 157. In *M. (C.A.)*, the Court, at para. 42, described the application of the principle as follows:
- [42] In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing*, [4th ed. 1994] at pp. 44-45:

The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

I. Individualized sentences

- [51] D.O. submits that the judge erred in imposing identical sentences for all offences, both initially (three years each) and ultimately (18 months each). He submits that had the judge crafted an individual sentence for each offence, it would have affected the application of the totality principle because the initial sentence might have been less.
- [52] D.O. submits that, for example, what he referred to as the "spanking offences" although serious, were less serious than the sexual assaults. I note, parenthetically, that the so-called "spanking offences" were sexual assaults as well. These were not offences in relation to the infliction of punishment, but rather they were offences of a sexual nature, given D.O.'s admitted sexual fetish in relation to spanking, and in particular, spanking naked young boys.
- [53] The judge considered each count, and imposed a sentence that was within the range suggested to her. She did not weigh the relative seriousness of each offence, and instead looked to the ultimate fit sentence, such as what occurred in *R. v. Caissie*, [1993] B.C.J. No. 703, 24 B.C.A.C. 57 (C.A.), where this Court varied the individual sentences that had been imposed by the sentencing judge in order to reflect the seriousness of each count. The Court did not, however, interfere with the total sentence imposed by the judge.
- [54] In my view, in light of *Lacasse*, the question is: if there was an error, did it impact the sentence? In my view, as explained below, if this was an error on the part of the judge, it did not impact the sentence. This Court has the ability to "rearrange" the sentences imposed, and while some sentences may have called for a lesser sentence than others, some may well have called for a higher sentence. At the end of the day, the sentences imposed were within the range of sentences for each offence and in my view, a consideration of the relative seriousness of each count would not have impacted the application of the totality principle or the sentence.
- [55] I would not accede to this ground of appeal.

II. Nahanee issue of failure to provide notice

- [56] When the judge imposed the sentence, the Supreme Court of Canada's decision in *Nahanee* had not been decided. In *Nahanee*, the majority concluded that despite there being no joint submission with respect to the sentence, if a judge plans to impose a harsher sentence than that proposed by the Crown, the judge must notify the parties and allow them to make further submissions. Justice Moldaver said:
- [4] In my opinion, the public interest test adopted by this Court in [*R. v. Anthony-Cook*, 2016 SCC 43] does not, and should not, apply to contested sentencing hearings following a guilty plea, regardless of the amount of prior negotiation between the parties culminating in the plea. In such cases, however, if the sentencing judge is of a mind to impose a harsher sentence, in any respect, than what the Crown has proposed, they should notify the parties and give them an opportunity to make further submissions -- failing which, they run the risk

of having the harsher sentence overturned on appeal for any one of the following three errors in principle:

- (i) the appellant establishes that there was information they or the Crown could have provided to the sentencing judge that would have impacted the sentence;
- (ii) the sentencing judge failed to provide adequate reasons for imposing the harsher sentence, thereby foreclosing meaningful appellate review; or
- (iii) the sentencing judge provided erroneous or flawed reasons for imposing the harsher sentence.

[57] In conclusion, however, the majority found that Mr. Nahanee had not shown that any further information he would or could have provided, had he been given notice, would have impacted the sentence.

[58] Mere failure to notify the parties of the intention to impose a higher sentence is not, in and of itself, an error that would warrant appellate intervention. The failure must result in an error in principle that would have impacted the sentence (Nahanee at paras. 4, 57-58). Justice Moldaver set out in detail the three types of errors in principle that would warrant intervention by an appellate court at para. 59:

[59] In my view, where the sentencing judge fails to provide notice and/or an opportunity for further submissions, there are three types of errors in principle that would warrant intervention by the appellate court:

- i. If the failure to provide notice and/or further submissions impacts the sentence. The appellant must demonstrate that there was information that they could have provided, if given the opportunity to do so, and it appears to the appellate court that this information would have impacted the sentence. If the appellate court is of the view that there is missing information that would realistically have impacted the sentence, the court can consider the sentence afresh. In assessing impact, the focus should be on whether the missing information is material to the sentence at issue. For example, where both parties propose non-custodial sentences and the judge imposes a period of incarceration without notice, the appellant can establish impact by pointing to something material that they would have presented had they been given notice and the opportunity for further submissions, such as a pertinent authority or important mitigating fact. The Crown should assist the appellate court wherever possible by providing or confirming the information that the sentencing judge did not have.
- ii. If the sentencing judge failed to provide reasons, or provided unclear or insufficient reasons, for imposing the harsher sentence. Failure to provide sufficient reasons is an error of law, which is a type of error in principle (Friesen, at para. 26; R. v. Sheppard, 2002 SCC 26, [2002] 1 S.C.R. 869, at para. 28). The appellate court may only intervene if the insufficiency of reasons foreclosed meaningful appellate review. While it is preferable for sentencing judges to explicitly say why they exceeded the Crown range, it will not necessarily foreclose meaningful appellate review if

this is not done. The court may look to the record, as a whole, to determine whether sufficient reasons have been given for exceeding the Crown range. Courts are to take a functional approach to sufficiency of reasons (Sheppard, at para. 50).

iii. If the sentencing judge provided erroneous reasons for imposing the harsher sentence. The appellate court may intervene if the sentencing judge relied on flawed or unsupportable reasoning for imposing the harsher sentence, such as the erroneous consideration of an aggravating factor or misapprehension of relevant authorities. Standing alone, however, flawed reasoning will not be enough; the appellant must also satisfy the court that this reasoning impacted the sentence (Lacasse, at paras. 43-44).

[Emphasis in original.]

[59] D.O. submits that all three types of errors noted above occurred here.

[60] D.O. submits that if he had been provided notice by the judge of her intention to impose a harsher sentence than that sought by the Crown, he "would have provided further information that would have affected the sentencing analysis". He submits that defence counsel at sentencing (who is not counsel on the appeal) made brief submissions, highlighting certain case law and the guilty plea by D.O.

[61] D.O. submits that he would have made more comprehensive submissions on sentencing and pointed out errors in relation to the judge's assessment of aggravating and mitigating factors. He submits that if the judge had given notice, counsel could have tried to discover what the judge's concerns were and addressed them.

[62] D.O. points to the list of aggravating factors noted in the Reasons at para. 181 and noted above. He submits that the judge's reasoning with respect to those factors is "flawed and erroneous" because of the lack of notice and opportunity to make further submissions. He submits that there were numerous factors that he "could have provided additional information about that would have impacted the sentence, and there are other factors that the sentencing judge erred in considering aggravating". The difficulty with this argument is that despite advising this Court that there is additional information that could or would impact the sentence, none was provided in either written or oral submissions.

[63] In addition, D.O. submits that he could have made additional submissions on the issue of lack of remorse not being an aggravating factor, in relation to the third Nahanee error noted above. I will address this ground as a separate ground of appeal, noting only that this issue was front and centre during submissions.

[64] In Nahanee, the Court specifically noted that there must be information identified that would or could impact the sentence. In that case, as in this case, none was presented: see also, R. v. Sellars, 2023 BCCA 132 at para. 12. I would not accede to this ground of appeal.

III. Lack of remorse as an aggravating factor

[65] D.O. submits that the judge used several of the factors listed at para. 181 of her Reasons as "aggravating factors" in error. He points in particular to the following factors:

- (l) his denials, almost complete lack of insight, no expression of regret or acceptance of responsibility;
- (m) the lack of empathy or compassion for his victims, their families or the community at large;
- (u) his deflection of responsibility in the making of child pornography;
- (w) his subjective view that he is "extremely low risk" to re-offend; and
- (y) his diagnosis of pedophilic disorder.

[66] The Crown submits that the judge was simply outlining the relevant factors, as opposed to "aggravating factors", that she was applying. While that may have been a preferable manner to characterize such factors in reasons for judgment, that is not what the judge said here, and I do not see a basis to go behind her reasons as stated.

[67] It is an error to consider lack of remorse as an aggravating factor in sentencing. That principle is well-established: see, e.g., *R. v. Muhammad*, 2004 BCCA 396:

[9] I had occasion, recently in a case, to refer to [*R. v. Zeek*, 2004 BCCA 42] and other cases that dealt with this difficult question of how remorse is to be treated in questions of sentence. The principle that I gleaned from the cases is that lack of remorse is not an aggravating factor, but if an accused displays remorse that is something that can work in favour of an accused person. The way I would put it is that lack of remorse is a somewhat neutral factor in sentencing, but if an accused demonstrates remorse, it may lead the court to conclude that the accused has begun on the road to rehabilitation by recognizing that the conduct he or she engaged in was unacceptable. To that extent remorse can be treated as a positive circumstance that might reduce what would be an otherwise fit sentence for a particular offence.

[68] In terms of the list above, the only factor I consider as arguable as an error is (l) where the judge stated D.O. had no "expression of regret". The rest, in my opinion, are clearly relevant in that they pertain to the future risk of offending posed by D.O. Those factors relate to the concern that D.O. has little or no insight into the seriousness of his offending, which properly relates to the risk he poses in the future.

[69] In this case, given that D.O.'s lack of remorse is intrinsically tied to his lack of insight, when the reasons are considered as a whole, in my view, the judge did not commit an error in principle. The comment with respect to lack of an expression of regret, in the context of the rest of the sentence, clearly refers to his lack of insight into his offending: see *R. v. Alderman*, 2017 BCCA 26. Similar to *Alderman*, I interpret the judge's consideration of the lack of remorse as going to the assessment of the degree to which D.O. poses a continuing

risk to the public, which she was entitled to do. Indeed, even if the judge misused D.O.'s lack of remorse, it is not an error that would have impacted the sentence for the reasons outlined below. The offences were horrendous and the moral blameworthiness of D.O. is high, as outlined by the 25 other factors properly noted by the judge.

[70] I would not accede to this ground of appeal.

IV. Fitness of sentence

[71] An appellate court will interfere with a sentence if it is demonstrably unfit.

[72] D.O. submits that the judge imposed an unfit sentence. He submits that she failed to give him any credit for the guilty plea or for his crime-free life previous to these incidents, save for an unrelated conviction many years ago. He submits that the judge, by refusing to consider pre-2015 precedents, mistakenly concluded that the range of sentence was higher than it is. He submits that the Crown position of 11 years reflects the upward trend of sentencing in child sexual offences, as previous high sentences had been in the 8-year range.

[73] The judge addressed the submission that D.O. expressed remorse by way of his guilty plea. She gave it little weight. It is trite law that a guilty plea in the face of overwhelming evidence is given less weight (Friesen at para. 164). Many of the offences in this case were video recorded and the judge viewed them on the first day of trial. There is the advantage of not requiring the victims to testify, although all had been prepared by the Crown to do so, as the plea was not timely. The judge carefully set out her reasons for not giving the guilty plea much weight, noted above.

[74] In my view, the judge did not err in her consideration of the guilty plea or the so-called good character of D.O. The offences in the indictment commenced in 2008 and continued for over ten years until his adult children reported him to the police. Contrary to the submission by D.O., his conduct here was so horrendous that it does "completely outweigh" any previous good character.

[75] I agree that pre-2015 cases may have some relevance; as noted in Friesen, however, such cases need be considered cautiously, keeping in mind that Parliament has increased the maximum sentences available for these offences. One only needs to look at the 25-year sentence imposed in M. (C.A.) to see that significant sentences have been imposed pre-2015.

[76] Unlike many of the precedents presented to the judge, this case involved many extremely vulnerable victims, with offences occurring over a decade. Not only were the children's personal autonomy and dignity violated, some were abused while sleeping and many of the violations were recorded for future use by D.O. In addition, D.O. possessed large quantities of child sexual abuse material (pornography) that depicted terrible abuse of children, as outlined in the reports filed at the sentencing hearing and noted above.

- [77] He posed a high risk to reoffend, in part because he had no insight into the wrongness of his conduct.
- [78] The Crown has pointed to cases involving similar offences that justify the final sentence imposed by the judge: see *R. v. MacKay*, 2022 BCCA 374 and *R. v. Stuckless*, 2019 ONCA 504.
- [79] As the Court said in *Friesen* at para. 114:
- [114] [*R. v. D. (D.)* (2002), 58 O.R. (3d) 788, 2002 CanLII 44915 (C.A.)], [*R. v. Woodward*, 2011 ONCA 610], [*R. v. S. (J.)*, 2018 ONCA 675], and this Court's own decisions in *M. (C.A.)* and [*R. v. L.M.*, 2008 SCC 31] make clear that imposing proportionate sentences that respond to the gravity of sexual offences against children and the degree of responsibility of offenders will frequently require substantial sentences. Parliament's statutory amendments have strengthened that message. 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 -- as *Moldaver J.A.* wrote in *D. (D.)*, "judges must retain the flexibility needed to do justice in individual cases" and to individualize the sentence to the offender who is before them (at para. 33). Nonetheless, it is incumbent on us to provide an overall message that is clear (*D. (D.)*, at paras. 34 and 45). 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 where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward*, and *L.M.* In addition, as this Court recognized in *L.M.*, maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).
- [80] There is no question that this is a significant sentence, however, it is fully justified considering the law, all of the circumstances of the offences, the offender and, in particular, his high degree of moral blameworthiness.

Conclusion

- [81] Having found no error that impacted the sentence, and concluding that the sentence is not demonstrably unfit, I would grant leave to appeal but dismiss the appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Mr. Justice Grauer"

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