

CANADA / JUDGMENT

R. v. Dias

2024 BCSC 431

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Supreme Court of British Columbia

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2024 BCSC 431 R. v. Dias

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dias,

2024 BCSC 431

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v.

Garcia Ribeiro Dias

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Before: The Honourable Justice MacNaughton

Oral Reasons for Sentencing

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Place and Date of Trial/Hearing:

Vancouver, B.C.

November 27, 2023

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Vancouver, B.C.

March 11, 2024

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Introduction

- [1] In reasons indexed at R. v. Dias, 2023 BCSC 1373, I convicted Garcia Ribeiro Dias on one count of sexual interference, contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. I found him not guilty on a second count of sexual interference and of one count of sexual assault. These are my sentencing reasons.

Overview of the Offence

- [2] Mr. Dias' conviction was with respect to sexual touching of I.L. on a number of occasions between December 18, 2018 and January 6, 2019, while he was alone with her during a vacation in Peru. Mr. Dias travelled to Peru with I.L. and Y.L., I.L.'s grandmother and guardian.
- [3] On the whole of the evidence, including I.L.'s hearsay statement, as corroborated, and Mr. Dias' recorded conversation with Y.L., I found that the Crown had proven the essential elements of the offence of sexual interference. In particular, I found that Mr. Dias touched I.L., moving his hands up her legs, to between her legs, and up to her chest. I found that the touching was subjectively for a sexual purpose and that Mr. Dias had violated I.L.'s sexual integrity.

Background and Current Circumstances of the Offender

- [4] As was his right, Mr. Dias did not testify at trial. He did not address the Court on sentencing except through his counsel.
- [5] Although, through his counsel, Mr. Dias waived the right to a Portuguese interpreter during the trial, an interpreter was provided to him for during the sentencing hearing and for the delivery of these reasons at counsel's request.
- [6] In the sentencing submissions, I heard that Mr. Dias is currently 83 years old. He was 78 at the time of the offence. He came to Canada from Portugal. Since his arrival in Canada, he has been active in the Vancouver Portuguese community.

- [7] Mr. Dias is a widower and has no children. His late wife was one of Y.L.'s closest friends. According to Y.L.'s evidence at trial, after her friend's death, Y.L. invited Mr. Dias into her and her grandchildren's lives. She testified that Mr. Dias was like a grandfather to them and this was consistent with I.L.'s videotaped statement to Det. Rotherham in which she referred to Mr. Dias as her grandfather and then corrected herself.
- [8] Mr. Dias lives in a Lutheran Church-based housing complex near Vancouver City Hall. As I discuss later in these reasons, his friend, Alberto Batista, lives with him while Mr. Batista is in Canada.
- [9] At sentencing, his counsel filed a letter from Victor Mansinho, the president of the Portuguese Club of Vancouver who wrote that Mr. Dias had been a member and customer of the club for almost 20 years. He described him as polite, caring, and respectful to the members of the club. That Mr. Dias is caring was confirmed to some extent by Y.L. during her evidence when she testified that Mr. Dias provided her with money to fight a custody/parenting battle with respect to her grandson.
- [10] I do not have the benefit of a pre-sentence report or psychological assessment with respect to Mr. Dias. However, in his submissions, defence counsel filed an October 6, 2023 letter from Dr. Michael Polay. With the exception of about May 2022 to March 2023, Dr. Polay has been Mr. Dias' primary care physician.
- [11] As it relates to this sentencing, Dr. Polay indicates that Mr. Dias suffers from a number of physical conditions including asthma and high blood pressure, which Dr. Polay said had increased "likely due to the stress surrounding his legal circumstances".
- [12] Dr. Polay said that, as a result of severe hip osteoarthritis, Mr. Dias had his left hip replaced in 2015 and his right hip in 2016. As a result, he has limited mobility, less stability, and an increased risk of falling. Mr. Dias is expected to have knee replacement surgery in the next two to five years. In April 2023, Mr. Dias fell and fractured his right wrist, requiring a cast. The break healed.
- [13] On Mr. Dias' last visit to see Dr. Polay, Dr. Polay described him as "somewhat despondent, complaining of low mood, disturbed sleep, poor appetite, difficulty with concentration". He cried easily. Dr. Polay said that, since his April 2023 fall, Mr. Dias presented as "not as cognitively sharp with mild confusion at times". In May 2023, Dr. Polay ordered blood work to rule out underlying conditions that might be affecting his cognition. There were none. He wrote that given Mr. Dias' age and legal circumstances, it was difficult to determine if his mental symptoms stemmed from a depressive episode or a cognitive decline, possibly emerging dementia, or both.

- [14] Dr. Polay noted that, after a July 22, 2022 motor vehicle accident, a CT scan showed vascular changes and that Mr. Dias had previously suffered a small stroke due to high blood pressure. He said that high blood pressure can lead to progressive cognitive changes, known as vascular dementia. Dr. Polay recommended that Mr. Dias go to the Access and Assessment Clinic at Vancouver General Hospital for a psychiatric assessment and for a further CT scan.
- [15] On October 20, 2023, Mr. Dias was assessed at the Elder Care Clinic at St. Paul's Hospital (the "ECC") by Dr. A. Sethi, a resident, under the supervision of Dr. K. Smith. Mr. Batista accompanied Mr. Dias and provided interpretation when necessary.
- [16] According to the information Mr. Dias provided to the ECC in his intake interview, he has an elementary school education and worked as a janitor in the oil sands in Alberta until he retired.
- [17] The ECC conducted a mini mental exam that indicated that Mr. Dias' cognition was mildly impaired. He was diagnosed with major neurocognitive disorder - Alzheimer's disease and cerebrovascular disease. In addition, he was diagnosed with depressed mood. The report said:

Based on our assessment today, [Mr. Dias] has demonstrated impaired function across a number of cognitive domains. This was most notable in his memory, executive function, and language. There is some evidence of decline of perceptual-motor control as well. His social cognition and attention appear to be preserved. His Mini Mental Status Exam also suggests cognitive impairment. We do feel that his degree of impairment is mild, and likely secondary to Alzheimer's disease and vascular events.

With respect to his mood, we feel that his diagnosis is most in keeping with an adjustment disorder with depressed mood. He does not meet criteria for major depression at this time, and his symptoms have temporally been closely related to his legal troubles.

We do not think that medical therapy with psychotherapeutics is indicated at this time, but [vascular] risk factor management with aspirin and lipid lowering agents (if no contra indication and tolerates) and exercise may be beneficial.

- [18] Mr. Dias' counsel relied heavily on the ECC report in his sentencing submissions.
- [19] I also heard evidence from Mr. Batista. He was one of the sureties put in place pursuant to my judicial interim release order, indexed at R. v. Dias, 2023 BCSC 1407. Mr. Batista lives in Mr. Dias' apartment and assists him with ensuring his compliance with the terms of his interim release, driving him to appointments and other activities, cleaning, and ensuring that Mr. Dias takes his medication.

- [20] Mr. Batista started living with Mr. Dias in about 2022. He returns to see his family in Europe for five or six month stretches at a time. Mr. Batista described Mr. Dias' memory problems. He said he was unsure whether Mr. Dias was confused or forgetful. He described how Mr. Dias had difficulty working his cell phone. Mr. Batista said that, in his view, Mr. Dias is getting worse. He also described that Mr. Dias has occasional urinary incontinence.
- [21] I accept on the evidence that Mr. Dias has a number of health difficulties, both physical and cognitive. I also accept, on the evidence, that Mr. Dias has positive traits and support in his community.
- [22] With respect to Mr. Dias' attitude towards the offence, as I will discuss in more detail later in these reasons, Mr. Dias does not appear to meaningfully accept that he has done something wrong, nor does he acknowledge how he has abused his position of trust.

Impact on the Victim and Her Family

- [23] I.L. did not file a victim impact statement ("VIS"); instead, the Crown filed a three-page VIS written by Y.L.
- [24] Mr. Dias objected to its content. After discussion, the parties were able to agree to remove some of the more egregious parts of Y.L.'s VIS. Notwithstanding the redactions, Mr. Dias continued to object to it being received into evidence.
- [25] I have concluded that Y.L.'s VIS should not be considered.
- [26] The mandatory requirements of s. 722(4) of the Code, require a VIS to be in Form 34.2. The Form provides guidance to a person providing a VIS as to its content. In this case, Y.L.'s VIS did not follow the Form.
- [27] In *R. v. Bremner*, 2000 BCCA 345 at para. 26, the Court adopted Justice Hill's comments in *R. v. Gabriel* (1999), 137 C.C.C. (3d) 1, 1999 CanLII 15050 (Ont. S.C.J.) at para. 22:

Without, in any fashion, diminishing the significant contribution of victim impact statements to providing victims a voice in the criminal process, it must be remembered that a criminal trial, including the sentencing phase, is not a tripartite proceeding. A convicted offender has committed a crime - an act against society as a whole. It is the public interest, not a private interest, which is to be served in sentencing.

- [28] At para. 27 of *Bremner*, the Court reproduced, and described as "extremely useful", Justice Hill's summary (*Gabriel* at paras. 29-33) of what should and should not be presented to the court when a VIS statement is submitted by the Crown. In brief, and as the summary applies to his case, Justice Hill said that a VIS:

- should describe the harm done or loss suffered by a victim;
- should not criticize the offender;
- should not make assertions as to the facts of the offence or recommendations as to punishment;

- should not contain additional disclosure or new facts related to the offence; and
- should not be vengeful.

[29] In this case, Y.L.'s VIS violates many of these rules. It is vengeful in its tone and very critical of Mr. Dias. As I said in my reasons for conviction, Y.L. clearly felt betrayed by a man she trusted, brought into her home, and allowed to have access to I.L. Because of my concerns about its content, I have disregarded the VIS. Nonetheless, I accept that both I.L.'s and Y.L.'s lives have been affected by Mr. Dias' offending conduct.

Sentencing Parameters for the Offence

[30] The maximum penalty for the offence of sexual interference is 14 years in jail. The minimum sentence of one year in jail has been declared unconstitutional in *R. v. Scofield*, 2019 BCCA 3. Section 742.1(c) of the Code, as it is currently written, does not preclude a conditional sentence order ("CSO") for the offence of sexual interference.

Position of the Parties

[31] The Crown and defence do not agree on whether a jail sentence is required in this case, or, if it is, its duration.

Crown's Position

[32] The Crown submits that in the circumstances of this case, a custodial sentence of three years is appropriate.

[33] In addition, the Crown seeks ancillary orders including:

- 1) that Mr. Dias provide a sample of his DNA as is mandatory under s. 487.051 of the Code;
- 2) that Mr. Dias comply with the obligations of the Sex Offender Information Registration Act, S.C. 2004, c. 10, as amended;
- 3) an order under s. 743.21(1) of the Code prohibiting Mr. Dias from communicating directly or indirectly, with I.L., Y.L. or P.L. during the custodial period of his sentence;
- 4) a lifetime protective order under s. 161 of the Code restricting Mr. Dias from:
 - a) having any contact or communication directly with I.L., Y.L. and P.L.;
 - b) being within 200 meters of any residence, school, or workplace of I.L., Y.L. and P.L.; and
 - c) having any contact or communication directly or indirectly with, or be in the presence of, any person under the age of 16 years of age, except for incidental communication, contact, or presence in a public place where other adults are present.

- 5) a mandatory order pursuant to s. 109 of the Code prohibiting Mr. Dias from possessing any firearm, cross-bow, prohibited weapons, restricted weapon, prohibited device, ammunition, prohibited ammunitions and explosive substance for a period of 10 years after he is released from prison; and
- 6) a victim surcharge of \$200.

Defence's Position

- [34] Mr. Dias submits that an eight-month conditional sentence is appropriate given Mr. Dias' age and health concerns. Because of s. 742.1(a) of the Code, a CSO may only be made if the court orders a sentence of less than two years, and a CSO would be consistent with the purpose and principles of sentencing.

Legal Principles

- [35] In addressing the sentence in this case, the most important authority is the Supreme Court of Canada's decision in *R. v. Friesen*, 2020 SCC 9. There, the Court was dealing with offences of sexual violence against children. It involved a conviction of one count of sexual interference, albeit in circumstances much more egregious than those in this case.
- [36] The Court took the opportunity in *Friesen* to make clear to sentencing judges that sentences for crimes of sexual violence against children must increase. There were several considerations that led the Court to this conclusion:
- a) an emerging, deeper understanding of the vulnerability of child victims, and the profound harm that such criminal conduct causes to victims, families, and communities; and
 - b) over many years, Parliament has mandated, through Code amendments, that sentences for sexual offences against children must increase.
- [37] The Court offered specific guidance on sentence increases for sexual offences against children, stating that "mid-single digit penitentiary terms for sexual offences against children are normal and that upper single-digit and double-digit sentences should be neither unusual nor reserved for rare or exceptional circumstances": *Friesen* at para. 114. Despite being reluctant to specify any kind of binding starting point or range for sexual offences against children, except indicating that such sentences should increase from the then ranges, the Court listed a number of factors to consider in determining a fit and appropriate sentence.
- [38] As a result, cases decided pre-*Friesen*, or that do not consider it, may not reflect current understanding of the objective gravity and moral blameworthiness of offences involving sexual violence against children. The Court cautioned against reliance on "dated" precedents: *Friesen* at para. 110.

[39] The following guidance from Friesen informs my assessment of the just and appropriate sentence in this case:

- a) It is essential for sentencing judges to properly understand the wrongfulness of sexual offences against children and the harm that such offences causes to victims: at para. 50.
- b) The interests that the law is designed to protect include personal autonomy, bodily integrity, sexual integrity, dignity, and equality. In this regard, sentencing courts need to be aware of not only the physical harm that sexual offences cause to the victim, but also the emotional and psychological harm. The likely effects of sexual offences include "shame, embarrassment, unresolved anger, reduced ability to trust others", and fearfulness: at paras. 55---57.
- c) These forms of harm are particularly pronounced in children. Even a single instance of sexual violence can profoundly alter a child's life: at para. 58.
- d) Sexual violence against children also causes harm in the form of damaged relationships with families and caregivers. Sexual violence can tear families apart and render them dysfunctional. Parents or siblings may have a misguided sense of blame toward the child victim. And child victims may lose confidence in the ability of family members to protect them: at para. 60.
- e) Sexual violence against children can have ripple effects on other relationships. Among other things, child victims of sexual violence may experience a loss of trust amongst people they know or the community at large: at para. 61.
- f) The protection of children from harm is one of our society's most fundamental values. Sexual violence against children is wrong and especially morally blameworthy because it can turn this societal value on its head: at para. 65.
- g) Perpetrators of sexual violence against children commit their offences in secrecy, often using coercion to discourage child victims from reporting. Offenders also rely on society's naïve reluctance to recognize or acknowledge that such crimes are committed in their communities by individuals they know: at para. 67.
- h) It is not enough for courts to simply acknowledge the seriousness of sexual offences against children. The sentences imposed must actually reflect the gravity of the crime and the harm to the victims: at para. 76.
- i) Physical contact of a sexual nature with a child always constitutes a wrongful act with both physical and psychological components, even when the conduct is not accompanied by additional physical violence and does not result in physical or psychological injury: at para. 77.

- j) The harms caused by sexual violence against children include harm that manifests itself during childhood, and long-term harm that only becomes evident during adulthood: at para. 80.
 - k) Courts must reject the belief that there is no serious harm to children in the absence of additional physical violence: at para. 82.
 - l) Applying force of a sexual nature to children is always morally blameworthy. Such blameworthiness includes harm that was actually intended, and harm to which the offender is reckless or wilfully blind: at para. 88.
 - m) The moral blameworthiness of sexual violence also includes the recognition of the offender's wrongful sexual exploitation and objectification of the victim. The degree of blameworthiness is higher when the victim is a child, because children are so vulnerable: at paras. 89-90.
 - n) Despite all of this, the sentencing court should not overlook factors that, where present, tend to diminish the offender's blameworthiness: at para. 91.
- [40] The Court discussed a number of factors to be considered in determining a fit sentence for child-related sexual offences, including (a) the likelihood of reoffending, (b) the abuse of a position of trust or authority, (c) the duration and frequency of the offending conduct, (d) the victim's age, and (e) the degree of physical interference.

[41] I will go on to consider each of these factors in the context of this case.

Application of the Legal Principles

Likelihood of Reoffending

- [42] The Supreme Court of Canada explained that this factor is relevant to protecting society and also to the sentencing objective of rehabilitation. On the likelihood to reoffend, the Court stated, "Where the sentencing judge finds that the offender presents an increased likelihood of reoffending, the imperative of preventing further harm to children calls for emphasis on the sentencing objective of separating the offender from society": Friesen at para. 123.
- [43] On the other hand, courts should encourage efforts toward rehabilitation, which may weigh in favour of a reduced term of incarceration followed by probation, since a community environment is often more favourable to rehabilitation, but only where the need to provide immediate and short-term protection to children is not compromised: Friesen at para. 124.
- [44] I do not have the benefit of a risk assessment of whether Mr. Dias is likely to engage in sexual conduct with minors. However, at his age, I suspect that it is unlikely that he will have an opportunity to reoffend in what remains of his lifetime, after his sentence is complete. At such an age, his means and opportunity are significantly diminished. It is unlikely that he will again be in a position of such trust with a child. The risk of him reoffending is quite low.

- [45] I conclude that the protection of children from Mr. Dias in the future is not a primary consideration in determining the appropriate sentence in this case.

Abuse of Position of Trust or Authority

- [46] Whether an offender is in a position of trust or authority falls along a spectrum. Any abuse of trust is likely to increase the harm to the victim and, thus, the gravity of the offence. Abuse of trust is an aggravating factor because it increases the offender's degree of responsibility and inhibits reporting of abuse. All other things being equal, an offender who abuses a position of trust in committing a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child: Friesen at paras. 125-126, 129-130.
- [47] Abuse of a position of trust or authority is a statutory aggravating factor. Before its inclusion in s. 718.2(1)(iii) of the Code, it was recognized in the case law as an aggravating factor: R. v. S.B.T., 2010 BCCA 145 at para. 16.
- [48] Although Mr. Dias was not in a formal position of trust or authority with respect to I.L., like a teacher, doctor, or counsellor might have been, he was a trusted friend of the family, and Y.L. put her trust in him to care for I.L. when she was unavailable to do so. I.L. saw Mr. Dias as a grandfather figure. Y.L.'s testimony that she would never forgive herself for trusting Mr. Dias was compelling.
- [49] Mr. Dias committed his crime in private when Y.L. was away from the residence they all stayed at in Peru or while Y.L. was sleeping. During those times, I.L. was entrusted to his sole care. The secrecy of his behaviour indicates that he was aware that he was a trusted person in I.L. and Y.L.'s lives. He acknowledged that he knew what he was doing was wrong in his recorded conversation with Y.L.
- [50] Abuse of a position of trust is a significant aggravating factor in this case; it adds to Mr. Dias' moral culpability.

Duration and Frequency of Offending Conduct

- [51] Sexual interference that occurs with frequency and over an extended period will significantly increase the harm to the victim, especially the long-term emotional and psychological harm. It also increases the offender's moral blameworthiness.
- [52] The court should not discount a sentence simply because numerous incidents of sexual violence are covered by a single charge: Friesen at paras. 132-133. At para. 133 of Friesen, the Court provided the following guidance on how to account for the duration and frequency of the offending conduct in sentencing:

- [133] Sexual violence against children that is committed on multiple occasions and for longer periods of time should attract significantly higher sentences that reflect the full cumulative gravity of the crime. Each further instance of sexual violence traumatizes the child victim anew and increases the likelihood of long-term harm.
- [53] I.L. said in her statement to Det. Rotherham that Mr. Dias touched her on about 10 occasions while they were in Peru. In the recorded conversation with Y.L., Mr. Dias said that he touched I.L. every time Y.L. was away.
- [54] Mr. Dias took advantage of the opportunity that was given to him every time Y.L. was away from the residence or sleeping. The abuse ended only when I.L. reported it to her grandmother, and her grandmother arranged for I.L. to stay with friends until they returned to Vancouver.
- [55] It is not possible to determine the exact number of times on which Mr. Dias sexually interfered with I.L., but I accept that it was more than once and perhaps as many as 10 times over a period of about three weeks. The number of incidents adds to Mr. Dias' moral culpability.

I.L.'s Age

- [56] A victim's young age is an aggravating factor because the power imbalance between children and adults is more pronounced for young children: Friesen at paras. 134-136.
- [57] I.L. was eight years old when the abuse occurred. In the video of her recorded statement to Det. Rotherham on January 19, 2019, she presented as a young girl forced to describe adult things. Although she appeared bright and poised, she was not particularly mature for her age.
- [58] Further, the age difference between I.L. and Mr. Dias is striking; he was certainly old enough to be her grandfather.

Degree of Physical Interference

- [59] The degree of physical interference with the victim's bodily integrity is an aggravating factor. However, the Court discouraged sentencing judges from downgrading the seriousness of an offence based principally on the notion that the particular acts involved may not have been physically intrusive. The Court in Friesen "strongly" cautioned sentencing courts not to fixate on a sentencing range based on whether penetration occurred or based on the specific sexual activity in issue. The Court said that there is no hierarchy of physical acts for the purposes of determining the degree of physical interference: Friesen at paras. 140-147.

- [60] The Court also discouraged sentencing judges from focusing on the presence or extent of physical injury, warning that doing so could detract from a proper consideration of the psychological and emotional impacts of the crime on the child-victim: Friesen at paras. 56, 77, 144.
- [61] I found that all the sexual touching took place over I.L.'s clothes. I found that Mr. Dias touched I.L., moving his hands up her legs, to between her legs, and up to her chest. In her statement, I.L. recounted one occasion on which Mr. Dias hurt her vaginal area and that she put wet tissue on it to ease the pain which she said continued for about two days. She described Mr. Dias as pressing down really hard and, in the diagram, she drew the pressure as a series of dark lines on her vaginal area. As I said in my reasons for conviction of Mr. Dias, her evidence about the use of wet tissues was corroborated to some extent by Y.L.'s evidence.
- [62] While the degree of physical interference in this case does not fall on the most extreme end of the spectrum of conduct covered by the offence of sexual interference, the Court said all forms of sexual touching are inherently violent as they involve non-consensual interference with the physical and sexual integrity of the victim: Friesen at para. 82.

Mitigating Factors

- [63] I have discussed the aggravating factors above, including that I.L. was eight-years-old at the time of the offence and that Mr. Dias took advantage of his position of trust to repeatedly use I.L. for his own sexual gratification.
- [64] I will now turn to the mitigating factors in this case.
- [65] In this case, the most significant mitigating factor is Mr. Dias' advanced age and health challenges. Although this does not mitigate his culpability or moral blameworthiness, it is a factor I must carefully consider when establishing the duration of the sentence and the circumstances in which it should be served. The sentence should not be any longer than necessary to meet the goals of denunciation and deterrence, keeping in mind its effect on a person who is 83 years old and faces health challenges.
- [66] As the Court of Appeal said in *R. v. Swope*, 2015 BCCA 167, while age and health circumstances may mitigate a sentence in appropriate cases, they are not controlling factors and, in some cases, will not affect the sentence at all: at paras. 21, 32-36. Mr. Swope was 78 years old when he was sentenced to 39 months for six counts of indecent assault that occurred 30 years prior. He suffered from coronary artery disease, type 2 diabetes, congestive heart failure, renal and neurological complications, significant mobility problems, degenerative disc disease, and hearing impairment.

- [67] On a sentence appeal, the Court of Appeal acknowledged that life expectancy and the subjective experience of imprisonment may be appropriate to consider in sentencing. Despite finding that that the time Mr. Swope would spend in prison was likely to be a significant portion of his remaining life, the Court did not find that the sentence was overly long or oppressive: at paras. 32-37.
- [68] Other mitigating factors in this case are that Mr. Dias does not have a prior criminal record and that he has some community support. Usually, the absence of a criminal history tends to show that an offender's behaviour is an isolated incident in the life of an otherwise pro-social individual. It suggests a potential for rehabilitation and that a sentence will provide specific deterrence from reoffending.
- [69] However, in this case, Mr. Dias has a history of breaching court orders setting out the conditions of his interim release pending trial. His disregard for court orders tends to lower the mitigating impact of his lack of a criminal record.
- [70] Mr. Dias' counsel submitted that Mr. Dias' acknowledgement to Y.L. that he knew what he did was wrong, and counsel's invitation for me to convict, was tantamount to a guilty plea. I do not agree. A guilty plea is an opportunity for an accused to save the time, expense and emotional cost of a trial to a victim of an offence or to the witnesses affected. In this case, no such savings were achieved and Mr. Dias did not express remorse to the Court.
- [71] Mr. Dias does not appear to accept the gravity of his actions. Although he did not testify at trial, at the hearing into the breach of his bail conditions, he said that Y.L. had put I.L. up to reporting sexual abuse because Y.L. owed him money. He said this, despite the fact that he can be heard in his recorded conversation with Y.L. acknowledging that he knew what he had done to I.L. was wrong. He can also be heard to say that he touched I.L. because he thought she liked it and it gave her pleasure. He does not acknowledge the profound breach of trust involved in his actions.
- [72] Mr. Dias' refusal to accept responsibility for the offence for which he has been convicted is not an aggravating factor on sentencing. It simply reflects an absence of remorse; the absence of what would otherwise be a mitigating factor.

Principles and Objectives of Sentencing

- [73] The overarching goal of sentencing is for the court to impose a sanction that is proportionate to the gravity of the offence and the degree of moral blameworthiness of the offender. This principle is codified in s. 718.1 of the Code, but has "long been central to Canadian sentencing": Friesen at para. 30.
- [74] The most relevant of the other sentencing objectives set out in the Code with respect to the offence of sexual interference are denunciation and general deterrence.

Denunciation

- [75] Denunciation involves the concept that a sentencing judge should impose a sentence that reflects society's condemnation of the offence: Friesen at para. 105; R. v. M. (C.A.), 1996 SCC 230 at para. 81. In all but rare cases, sexual offences involving young victims and an abuse of a position of trust, involve conduct warranting severe rebuke in the form of a substantial jail sentence.

Deterrence

- [76] General deterrence involves the concept that a sentencing judge should impose a sanction that will serve to discourage other like-minded individuals in our society from committing similar offences: R. v. B.W.P., 2006 SCC 27 at para. 2.
- [77] It is the unfortunate fact that child-victim sexual offences are more prevalent than we, as a society, would hope and those are only the reported offences. As Friesen made clear, sentencing decisions for these types of offences must send a clear, consistent message that crimes of sexual violence against children will result in significant penalties.
- [78] In this case, specific deterrence is also an objective. Mr. Dias must receive a sentence that brings home to him the unacceptable nature of his conduct. As I have said, that does not appear to have sunk in. Although I have found that the risk of reoffending in Mr. Dias' case is low, even in his recorded conversation with Y.L. in which he admitted to the conduct, he never apologised or called I.L. by her name; he referred only to her as "the girl", suggesting that he depersonalized his conduct.

Rehabilitation

- [79] The sentencing objective of rehabilitation is of lesser importance in this case. Statutorily, s. 718.01 of the Code provides that in sentencing for offences involving abuse of a person under 18 years of age, the court must give "primary consideration" to the sentencing objectives of denunciation and deterrence. This is particularly the case where the offender was in a position of trust. Rehabilitation is a much less important objective in such cases: see, for example, R. v. D.G., 2014 BCCA 84 at para. 16-17; S.B.T. at para. 16; and R. v. A.E.S., 2018 BCCA 478 at para. 54.
- [80] In this case, Mr. Dias' repeated and flagrant breaches of his bail conditions also reduces the weight to be given to rehabilitation.

Parity

- [81] The sentencing objective or principle of parity involves the concept that similar offences committed by offenders in similar circumstances should receive comparable sentences. This principle has now been codified in s. 718.2(b) of the Code.

- [82] Parity introduces a level of objectivity and rationality to sentencing. However, it is often difficult to achieve in practice, because sentencing is an individualized process and no two cases are exactly alike, and every offender is an individual with a unique background and personal circumstances.
- [83] In *R. v. Parranto*, 2021 SCC 46 at paras. 11-12, Justices Brown and Martin acknowledged the inherent tension between the principle of parity and individualized sentencing, but explained that both are accounted for within the overarching principle of proportionality: See also Friesen at para. 32.
- [84] Counsel for the Crown and for the defence relied on a number of cases in support of their respective sentencing positions. The cases involved a wide range of conduct, offender, and victims. Some cases involved more aggravating circumstances, others less. Those cases involving less vulnerable victims or discrete one-time events are less helpful.

Crown Cases

- [85] Counsel for the Crown relies on three cases to justify its submission that in the circumstances of this case, a custodial sentence of three years is appropriate, in addition to the imposition of a number of ancillary orders.
- [86] In the first, *R. v. Gerrard*, 2021 BCSC 1219, the offender was convicted of one count of sexual interference stemming from an incident that occurred between 1995 and 1997 when the victim was 11 or 12 years old. In that case, the offender received a two-year custodial sentence followed by two years' probation and ancillary orders, including a 10-year order under s. 161 of the Code.
- [87] In the second, *R. v. P.R.J.*, 2023 BCCA 169, the Court of Appeal overturned a 23-month CSO and imposed a three-year jail term: at para. 80.
- [88] In the third, *R. v. C.R.J.*, 2023 BCSC 1151, the court imposed a four-and-a-half-year sentence and a five-year order under s. 161 of the Code.
- [89] The Crown submits that the three cases it relies on are similar to Mr. Dias' circumstances as they all involve sentences for sexual interference against victims who were about the same age as I.L. at the time of Mr. Dias' offence, the sentences were imposed after a trial, and the offenders had no prior criminal record.

Defence Cases

- [90] The defence provided a number of cases to support its position that an eight-month CSO is appropriate given Mr. Dias' age and health concerns.
- [91] The defence submits that none of the cases relied on by the Crown are applicable to Mr. Dias' circumstances. The defence submits that the Crown's cases do not consider Mr. Dias' health condition and how it compromises his future.

- [92] The first case the defence relies on is *R. v. Asowi*, 2020 ABPC 48, in which the court imposed a suspended sentence of three years' probation, a firearm and weapon prohibition, a DNA order, and a 20-year sex offender registration for sexual assault and sexual interference. The offender was elderly and suffered from dementia.
- [93] The second case, *R. v. Campbell*, 2021 BCSC 323, involved a 66-year-old offender, convicted of historical sexual assault of the complainant who was, at the time, between nine and 11 years old. He was acquitted of sexual interference. The assault involved an inappropriate massage. The offender was a close friend of the victim's family. He was sentenced to a 12-month conditional sentence and 18-months' probation.
- [94] The third case, *R. v. C.V.E.B.*, 2019 BCPC 118, involved a 79-year-old offender convicted of sexually assaulting a 10-year-old, who lived a few doors down from him. The offender suffered from dementia and other significant health problems. He was sentenced to an eight-month conditional sentence, followed by 18-months' probation.
- [95] The fourth case, *R. v. D.M.*, 2021 BCSC 379, involved sentencing for sexual exploitation under s. 153(1)(a) of the Code. The victim was his daughter who was between the ages of 16 and 18 when the four incidents of sexual touching occurred. The offender admitted to some of the impugned conduct and acknowledged the harm he had done, although he disputed that the touching was for his sexual gratification. He received a 90-day intermittent sentence to be served on weekends.
- [96] The defence also relied on a number of child pornography cases that I do not find helpful.

Determining a Fit Sentence for Mr. Dias

- [97] I considered all of the cases put before me by the parties. It is well-settled that sentencing is an individual exercise. My duty is to fashion a sentence that is fit and proper in the circumstances of this offence, this offender, and this victim.
- [98] Given the importance of deterrence and denunciation in this case, I am satisfied on the evidence before me that Mr. Dias should be given a custodial sentence. The offending behaviour in the cases relied on by Mr. Dias are not comparable to his offending behaviour.
- [99] In *Asowi*, the court found that the offender's responsibility was diminished by his dementia, which was found to have "eroded his judgment and his ability to control the antisocial impulses that he acted on": at paras. 37, 53. The offender was a stranger to the victims; he did not occupy a position of trust.
- [100] Similarly, in *C.V.E.B.*, which pre-dates *Friesen*, the court found the offender's offending behaviour was more likely than not linked to his major neurocognitive disorder (dementia), which reduced his moral culpability. Additionally, in imposing the CSO, the judge considered that the sexual assault involved an isolated incident that was relatively brief, that the offender had complied with his strict bail conditions since the offence, and that his significant health conditions would have made incarceration "extremely difficult" for him

and difficult for the correctional authorities: at para. 85.

- [101] Mr. Dias' medical condition is not as advanced as that of the offender in either Asowi or C.V.E.B. Mr. Dias' degree of impairment was described as "mild" in both the ECC report and the letter from Dr. Polay. He was described as likely having pre-Alzheimer's disease, although no interventions were suggested at present. Unlike the reports in Asowi, neither report with respect to Mr. Dias described him as displaying disinhibition. There is nothing in this case that leads me to find that Mr. Dias' mild impairment diminishes the moral culpability of his actions.
- [102] Further, I note that the Crown forwarded medical information about Mr. Dias to the Correctional Service of Canada ("CSC") and inquired about their capacity to handle a prisoner with his medical complications. The CSC responded that his health conditions would be manageable in their Regional Treatment Centre which has a geriatric unit.
- [103] With respect to Campbell, the impugned conduct was an inappropriate massage of the victim beneath an oversized nightshirt. Justice Brundrett found that the offender's conduct was of a sexual nature from an objective point of view and convicted him of sexual assault. However, he had reasonable doubt as to whether the touching was done for a subjectively sexual purpose, though he called it "highly suspicious": at para. 9. He had reasonable doubt as to whether the touching occurred during a lapse of judgment in relation to the accused's very misguided massage technique, and he was acquitted of sexual interference: at para. 9. In this case, I found that Mr. Dias touched I.L. for his own sexual gratification.
- [104] In D.M., the offender read a statement to the court during the sentencing hearing. He apologised to his daughter and admitted that it was wrong to touch her breasts, he understood how doing so impacted her, and he agreed to attend counselling. The court found that his statement was sincere. Nonetheless, the court held that while there were mitigating circumstances, they did not justify a non-custodial sentence and that a period of incarceration was appropriate to reflect the moral culpability of the offender and the harm he caused to his daughter, his family, and the community: at para. 96.
- [105] In the recorded conversation, Mr. Dias acknowledged to Y.L. that he knew what he was doing to I.L. was wrong and that he should not have done it. However, he did not ask Y.L. to tell I.L. that he was sorry, he never apologized to I.L., and he never expressed remorse to the Court. He did not offer to attend counselling.
- [106] However, I accept that the circumstances of the offences in P.R.J. and in Friesen were more horrific than those in this case. The degree of Mr. Dias' physical interference with I.L.'s body was not as grave as occurred in either of those cases and, while he was in a position of trust, he was not a parent as in P.R.J. I also conclude that the degree of Mr. Dias' physical interference with I.L.'s body was less than that involved in C.R.J. Here, I found that the evidence supported that Mr. Dias had touched I.L. over her clothes.
- [107] Gerrard does not involve an offender of Mr. Dias' age or medical condition.

- [108] Sexual abuse of a child is highly morally blameworthy. Mr. Dias knew or ought to have known that he was profoundly harming I.L. when he treated her as an object for his sexual gratification. His suggestion that he did so for I.L.'s pleasure or because she liked it is offensive. She was a vulnerable eight-year-old child spending time on vacation with a trusted adult male she thought of as her grandfather. At her age, she did not understand what was going on. As she described to Det. Rotherham, it was "bothering" her. She did not tell her grandmother until she had been touched by Mr. Dias a number of times. Mr. Dias profoundly betrayed the position of trust Y.L. had put him in. He was welcomed into Y.L.'s family after his wife passed away. He babysat I.L. and her brother; he joined them for meals.
- [109] I have considered the mitigating factors and Mr. Dias' personal circumstances; however, in all of the circumstances, it is my view that a conditional sentence would not properly reflect the moral blameworthiness of Mr. Dias' conduct, nor society's "deepened understanding of the wrongfulness and harmfulness of sexual violence against children and the far reaching and ongoing harm that it causes to children, families, and society at large": Friesen at para. 5; see also R. v. C.K., 2023 BCCA 468 at para. 62. To order a conditional sentence would be to allow Mr. Dias' personal circumstances to overwhelm the determination of a fit sentence. Considering all the circumstances of this case, a sentence of two years in custody is proportionate in all of the circumstances.

Sentence

- [110] Accordingly, I sentence Mr. Dias to two years in custody. It is my recommendation that the CSC arrange for Mr. Dias to serve his sentence in the Regional Treatment Center geriatric unit.

Ancillary Orders

- [111] Mr. Dias, you have been convicted of a primary designated offence. As part of your sentence, you are to provide a DNA sample pursuant to s. 487.051 of the Code.
- [112] Pursuant to s. 743.21 of the Code, I order you to have no contact or communication, directly or indirectly, with I.L. for the duration of your custodial sentence.
- [113] For a period of five years from the end of your custodial sentence, you shall be prohibited from:
- being within two kilometers of any dwelling house where I.L. ordinarily resides, pursuant to s. 161(1)(a.1) of the Code;
 - seeking, obtaining or continuing any employment, whether or not that employment is remunerated, or becoming a volunteer, in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years, pursuant to s. 161(1)(b) of the Code; and

· having any contact, including communication by any means, with a person who is under the age of 16 years, unless you are in the immediate and continuous presence of someone over the age of 18 who is aware of the existence of this order, pursuant to s. 161(1)(c) of the Code.

[114] You are required to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10, for a period of 20 years: ss. 490.012(1) and 490.013(2)(b). Sexual interference is a primary designated offence under s. 490.011 of the Code, making such an order mandatory if the sentence is two years or more: s. 490.12(1).

[115] As is mandatory pursuant to s. 109 of the Code, I prohibit you from possessing any firearm, cross-bow, prohibited weapons, restricted weapon, prohibited device, ammunition, prohibited ammunition and explosive substances for a period of ten years after you are released from prison.

[116] You are to pay a victim surcharge of \$200.

[117] Pursuant to s. 743.2 of the Code, I order that a copy of these reasons, a copy of Dr. Michael Polay's letter dated October 6, 2023 (marked as Ex. 2 on this sentencing hearing), and the report from the St. Paul's Hospital's Elder Clinic dated October 20, 2023 (marked as Ex. 3 on this sentencing hearing) be provided to the CSC for the purpose of understanding and accommodating Mr. Dias' health challenges while in custody. I also order that Y.L.'s contact information be provided to the CSC.

"MacNaughton J."

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