

CANADA / JUDGMENT

R. v. Fisher

2019 BCCA 33

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 33 R. v. Fisher

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Fisher,

2019 BCCA 33

Date: 20190130

Docket: CA45590

Between:

Regina

Respondent

And

James Albert Stanley Fisher

Appellant

Restriction on publication: An order has been made under ss. 486.4(1) and 486.4(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of any information that could identify the complainants, including their initials. An order has been made under s. 486.4(1) on the publication of any information that would identify the author of the letter at tab 11 of Exhibit 8 of the sentencing exhibits. Pursuant to s. 16(4) of the Sex Offender Information and Registration Act, no person shall disclose any information that is collected pursuant to an order under SOIRA or

the fact that information relating to a person is collected under SOIRA.

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Garson

The Honourable Mr. Justice Willcock

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

August 21, 2018 (R. v. Fisher, 2018 BCPC 210, Surrey Provincial Court

Docket 219368-3C).

Counsel for the Appellant:

W.B. Smart, Q.C.

N. Gilewicz

Counsel for the Respondent:

M. Mereigh

Place and Date of Hearing:

Vancouver, British Columbia

January 9, 2019

Place and Date of Judgment:

Vancouver, British Columbia

January 30, 2019

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Willcock

Summary:

The appellant, a former police officer, appeals the sentence imposed following his plea of guilty to two counts of breach of trust and one count of sexual exploitation in relation to the kissing of two complainants in police investigations. On appeal, he says that the judge erred in placing undue weight on the victim impact statement of one victim and that the eight-month consecutive sentence on one count of breach of trust was demonstrably unfit. Held: appeal dismissed. The

judge did not err in principle by admitting and relying on B's victim impact statement. The sentence imposed was not demonstrably unfit when the kiss was considered in the context of the victim's history of abuse and her trusting relationship with the appellant.

Reasons for Judgment of the Honourable Madam Justice Garson:

- [1] James Fisher, a former police officer, appeals the sentence imposed following his plea of guilty to one count of sexual exploitation and two counts of breach of trust. The charges and his plea arose from circumstances surrounding his relationship with two complainants, referred to as A and B, involved in police investigations of two prostitution rings. In the course of the investigations, the appellant befriended and worked closely with A and B. The appellant kissed B once. He kissed A on three occasions.
- [2] The appellant was sentenced to 90 days in prison for the sexual exploitation of A (the mandatory minimum sentence) and 12 months in prison for the breach of trust of A. These two sentences were to be served concurrently. He was sentenced to eight months in prison for the breach of trust of B, to be served consecutively. Therefore he received a global 20-month sentence to be followed by two years of probation. The Reasons for Sentence are indexed as 2018 BCPC 210.
- [3] The appellant does not take issue with the sentence imposed for the offences related to A. He focuses his appeal on the eight-month consecutive sentence he received for the breach of trust of B. He says that a concurrent sentence ought to have been imposed, but if the sentence is to be consecutive, a sentence of one to two months would be fit.
- [4] For the reasons that follow I would grant leave to appeal but dismiss the appeal.

Background

- [5] At the sentencing proceedings, the facts which form the background to the charges and plea were set out in a detailed agreed statement of facts and a supplementary statement of facts. There is no dispute about any of the facts, though there is some dispute about the reliability of B's victim impact statement. I shall return to this point of controversy below.
- [6] The appellant is a 61-year-old former police officer. Until these charges were laid, he had a highly successful career and a stable family life. He has been married for about 32 years and has two adult children.
- [7] Before becoming a police officer, the appellant worked as a hockey referee at a high level. His goal was to work in the NHL. He did not succeed in that goal, but he did referee in the Western Hockey League and the 1990 national junior hockey championship. Between 2001 and 2011, he volunteered in coaching and organizing women's hockey.
- [8] The appellant joined the Vancouver Police Department ("VPD") in 1988 and became a highly decorated and accomplished investigator. For all but 17 months of his police career, he worked in specialty investigative units such as the Gang Task Force and the Coordinated Law

Enforcement Unit. He also worked for Criminal Intelligence Service Canada in Ottawa as a National Coordinator for Asian Organized Crime. He created a working group to formalize the sharing of information on Asian organized crime between federal and municipal investigators in British Columbia and Alberta. He worked with the New York Police Department on human smuggling, attended an Interpol conference in France to provide a briefing on human smuggling, briefed the Solicitor General on organized crime, and testified before a Parliamentary Justice Committee in Ottawa. These are just a few of his professional achievements. He received many awards and commendations.

- [9] The appellant has no criminal record.
- [10] The appellant was arrested on December 28, 2016, and immediately suspended from his duties as a police officer. He retired from the VPD in January 2017. He entered guilty pleas on March 28, 2018, and was sentenced on August 21, 2018.
- [11] I now turn to the background underlying this sentence appeal.
- [12] On January 2, 2011, the appellant was transferred into the Special Investigation Section-Counter Exploitation Unit of the VPD ("CEU") where he was positioned when the offences occurred. The CEU is a specialized unit whose purpose is to investigate prostitution-related offences, internet child luring, and internet child pornography. The CEU also assists sex trade workers in leaving the sex trade. The CEU directs its officers not to meet alone with female victims and witnesses.

The Breach of Trust and Sexual Exploitation of A

- [13] In 2014, the CEU began an investigation into an individual named Michael Bannon. The appellant was the lead investigator. Mr. Bannon was arrested in July 2015 and charged with procuring A and eight other complainants to work in the sex trade. A was 17 at the time. She estimated that Mr. Bannon arranged about 200 sexual encounters between her and individuals who paid money for sex with her. On January 30, 2018, Mr. Bannon pleaded guilty to 22 of the counts he was facing. He was sentenced to fourteen years in jail.
- [14] In the course of the investigation, the appellant and A were in frequent contact. The appellant knew that A was in the care of the Ministry, had virtually no parental relationship or support, had mental health issues including self-harm, had attempted suicide, and was addicted to drugs. He became involved in her life, regularly communicating with her, her step-father, her social worker, and her youth worker. The sentencing judge noted that A was 17 at all relevant times and the appellant was aware of her age: para. 59.
- [15] The first incident that formed the basis of these charges occurred between August 22 and 30, 2015. The appellant met A alone, having told her he had two tickets to the PNE. They spoke in his car and he agreed to drop her off at a restaurant. Before she got out of the car, they hugged and kissed, including French kissing. They kissed for 30 seconds to a minute.

- [16] The second incident occurred on November 21, 2015. The appellant wanted to give A a book on drug addiction and rehabilitation. He met with her alone and off duty at around midnight. They talked in his car for about 30 minutes and then kissed for about 10 minutes. About a week earlier, A had been hospitalized for cutting herself, was arrested, and had to change residences. The appellant was aware of these difficulties. At the time of the incident, she had not slept for a number of days and had consumed a large quantity of drugs and alcohol. She had also begun to experience psychotic episodes.
- [17] The third incident occurred on December 7, 2015. A had confided to the appellant that she was having psychotic episodes. The appellant made her a series of appointments with a psychiatrist. On December 7, he drove her to her appointment with the psychiatrist as her social worker was unavailable. After the appointment, he took A back to his office. He asked her to identify the naked persons in a photograph relevant to the Bannon investigation. They then went into an adjacent office, where he kissed her. She was not feeling well and told him she did not want to kiss him. He asked her for one more kiss and she acquiesced. The kissing lasted about five minutes and included French kissing.
- [18] In March 2016, A disclosed these incidents to her youth worker. Around the same time, she disclosed the incidents to another police officer.
- [19] A lengthy investigation into A's allegations ensued. A became a paid police agent and her communications with the appellant were intercepted by the police.
- [20] After A agreed to become a police agent, the appellant and some of his colleagues became aware of a false rumour circulating among sex trade workers that he had slept with A. The appellant spoke with A about the rumour and the resulting investigation. These conversations were intercepted by the police. The sentencing judge stated that the intercepted conversations revealed that the appellant was helping, preparing, and arguably coaching A as to what to say to the investigators: para. 67. However, the judge concluded that "there is nothing that amounts to the appellant asking A to lie to the police, or to deceive the police, or do anything to obstruct the police in either investigation": para. 71. He further noted that there was absolutely no evidence before him that the appellant had had sexual intercourse with A.

The Breach of Trust of B

- [21] B met the appellant in 2011, when she was 16, in the course of the CEU's investigation of an individual named Reza Moazami. Mr. Moazami was charged with numerous prostitution-related offences involving 11 complainants, including B. He was convicted of 30 counts of prostitution-related offences on September 15, 2014 and sentenced to 23 years in jail. The trial judge described Mr. Moazami's treatment of B as "abusive, callous, and border[ing] on psychopathic."

- [22] The appellant worked with B for five years in the course of the Moazami investigation. He played a significant role in the investigation and had frequent contact by text, telephone, and in person with her.
- [23] On December 3, 2015, B texted the appellant and they agreed to meet. They talked for approximately 15 minutes in his car in a parking lot. As they were saying goodbye, he hugged her. He asked her for a goodnight kiss and then kissed her on the lips. She left the car.
- [24] B disclosed the details of the incident to the manager of a program that assists sex trade workers. That individual reported the incident to the police on May 27, 2016, and the police began an investigation. B became a paid police agent. Her communications with the appellant were intercepted and used in the investigation of the kissing incident. The intercepted communications were also relevant to an investigation of whether the appellant had covered up B's role in a stabbing.
- [25] B told the police that she was upset by the kiss and did not return to work that night as she had planned. She also told the police that following this incident she began to drink every day.

The Burnaby Stabbing Incident

- [26] On June 8, 2015, a male was stabbed in Burnaby in the course of a drug deal with B and her boyfriend. His injuries were not life-threatening. On June 9, 2015, B met with the appellant and they discussed the incident. At some point, she confessed to him that she was the stabber. On June 10, 2015, the appellant advised the Burnaby RCMP that he had spoken to a female who witnessed the stabbing, and provided B's name, date of birth, and phone number. He then texted B and encouraged her to contact the RCMP first. B changed her phone number a few days later and the RCMP were unable to reach her. The appellant had her new phone number, but did not provide it to the RCMP. B never spoke with the Burnaby RCMP regarding the stabbing and the appellant never told the investigators that B had confessed to him that she was the stabber.
- [27] In a statement to the police given on September 16, 2016, B said that she stabbed the victim to protect her boyfriend, since she believed the victim was going to kill him. On September 30, 2016, B was granted immunity in connection with the stabbing.
- [28] The sentencing judge noted that the appellant was not being sentenced for any crime related to obstructing justice: para. 86. However, he remarked that, as an officer of the law, the appellant had an obligation to do more with B's admission than bury it: para. 86.

Counts

- [29] The appellant pleaded guilty to three counts.
- [30] By information, he was charged with one count relating to A:

Count 1

James Albert Stanley FISHER, between the 22nd day of August, 2015 and the 7th day of December, 2015, inclusive, at or near Vancouver and Surrey, in the Province of British Columbia, being a person in a position of trust or authority towards a young person, [A], did kiss [A] for a sexual purpose, contrary to Section 153 of the Criminal Code.

[31] By indictment he was charged with two further counts:

Count 1

James Albert Stanley FISHER, between the 22nd day of August, 2015 and the 7th day of December, 2015, inclusive, at or near Vancouver and Surrey, in the Province of British Columbia, being an official, did, in connection with the duties of his office, commit a breach of trust by kissing [A] for a sexual purpose, [A] being a witness in a criminal prosecution, contrary to Section 122 of the Criminal Code.

Count 2

James Albert Stanley FISHER, between the 3rd day of December, 2015 and the 6th day of December, 2015, inclusive, at or near Burnaby, in the Province of British Columbia, being an official, did, in connection with the duties of his office, commit a breach of trust by kissing [B], [B] being a witness in a prior criminal prosecution, contrary to Section 122 of the Criminal Code.

[32] As originally framed, Count 2 included the language that he did "commit a breach of trust by kissing [B] for a sexual purpose." At the outset of the sentencing proceedings, the Crown withdrew the words "for a sexual purpose" from the indictment. However, the judge found that the kiss was a sexual activity: para. 30.

[33] The maximum sentence in respect to Count 2 is five years. There is no prescribed minimum sentence.

Reasons for Judgment on Sentencing

[34] The Crown sought a global sentence for all three counts of 18 to 20 months' imprisonment plus two to three years' probation, noting the mandatory minimum of 90 days for the sexual exploitation charge.

[35] The defence asked that the mandatory minimum of 90 days' imprisonment be served intermittently on weekends. For the two counts of breach of trust, the defence sought a lengthy Conditional Sentence Order ("CSO").

[36] The Crown opposed the CSO but acknowledged that it was available.

- [37] The sentencing judge noted that in breach of trust and sexual exploitation cases, the paramount sentencing principles were denunciation and general deterrence: para. 92. He noted that "the sentence imposed should send a very clear message of society's absolute and unequivocal condemnation of the offender's conduct and represent a symbolic collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values" [citation omitted]: para. 92.
- [38] The sentencing judge reviewed the appellant's personal background and character references. He noted that the reference letters spoke highly of the appellant. However, the sentencing judge said that there was a hidden side to the appellant. He noted that the offences he committed, as well as his conduct with respect to the Burnaby stabbing incident, appeared irreconcilable with the appellant's professional and personal accomplishments.
- [39] The sentencing judge noted that the offences had already had catastrophic consequences for the appellant's career, reputation, marriage, and post-retirement career prospects. He said he would take into account the price the appellant had already paid for his crimes, but that he ought to have known he would pay that price when he committed the offences: para. 112.
- [40] The judge then turned to the mitigating and aggravating factors. He noted that there were a number of mitigating factors: the appellant's guilty plea, the personal and professional consequences he had already suffered, the impact on his family, his lack of a criminal record, and his remorse and full acceptance of responsibility for his crimes.
- [41] The judge then noted the aggravating factors.
- [42] First, the appellant had breached both the public trust and the victims' personal trust.
- [43] Second, the victims were extremely vulnerable and viewed the appellant as their saviour and as a father figure. A was especially vulnerable. The appellant knew of her fragile psychological state and that she could not legally consent.
- [44] Third, the crimes were not isolated incidents, but the appellant's behaviour was escalating over a three- or four-month period. The incidents took place in late August 2015 (A), November 21, 2015 (A), December 3, 2015 (B), and December 7, 2015 (A). However, the judge noted that there was no evidence of further incidents after December 7, 2015.
- [45] Fourth, the judge considered the impact on the victims to be a significant aggravating factor: para. 123. A and B both filed victim impact statements. In B's victim impact statement, she stated that after the kiss with Mr. Fisher, she relapsed into substance abuse after five years of being clean and attempted suicide twice. The appellant urged the judge to take a critical view of her statement. He emphasized that the judge who heard Mr. Moazami's trial, in which B was a witness, made serious adverse findings regarding her credibility and declared her a hostile witness. The judge stated:

- [24] I do not quarrel with Justice Bruce's findings about B., but what I do not accept is that those findings are in any way transportable into this proceeding. B., in giving her victim impact statement, was not likely in survival mode. She had nothing to gain, or no consequence to avoid, by telling lies and making up the impact Mr. Fisher's crime has had on her life. Could she have exaggerated that impact on her life? Absolutely. But as trial judges we see on a daily basis victims telling us how a crime has impacted their life. Some exaggerate, some minimize, but in very few cases can we accept, as objectively established, the impact the victim tells us the crime has had on their life. Perception is their reality and we factor their nuanced statements into our sentencing decisions without a critical analysis of how reliable or accurate their feelings are.
- [25] So, while at the time of the Moazami trial B. was found to be an unreliable witness, I do not factor those findings into my determination of the impact that Mr. Fisher's crime has had on B. as told to me by B.
- [123] Mr. Fisher has urged me to be cautious taking at face value what B. says in her Victim Impact Statement, given the adverse credibility findings of Justice Bruce in the Moazami trial. I have already commented on this issue earlier in these reasons and I will not repeat what I have already said. But clearly, B. was a victim at the hands of other people from the time she was a child. Mr. Fisher came to rescue her from a psychopathic pimp and developed a father-figure relationship with her. I have no difficulty concluding that Mr. Fisher's crime against B. had a devastating impact on her.
- [46] A said in her statement that she had been extremely vulnerable at the time of the incidents. She said that the incidents took her back to her experiences in the sex trade, where she learned that if someone did something for her, she would be expected to reciprocate with sex. The judge accepted that she felt that kissing the appellant was the price she had to pay for the help he gave her in the Bannon investigation.
- [47] Fifth, the sentencing judge noted that the crimes may have tarnished the reputation of the VPD, although he did not consider this to be a significant aggravating factor.
- [48] The sentencing judge then reviewed all the authorities provided to him by counsel. He commented first on the Crown authorities:
- In *R. v. Greenhalgh*, 2011 BCSC 511, aff'd 2012 BCCA 236, a Border Services Officer employed by Canada Border Services Agency was sentenced for three counts of sexual assault and one count of breach of trust. He conducted illegal, feigned strip searches of four women who were crossing the border and sexually touched three of them. He was sentenced to two years' imprisonment less a day followed by three years of probation.
 - In *R. v. Cook*, 2010 ONSC 5016, a police officer was sentenced for five offences, including two counts of breach of trust and three counts related to drug offences, for stealing packages of what he believed to be cocaine from a crime scene. The sentencing judge in that case observed that an individual accused of breach of trust will inevitably be able to produce

good character references because it is that character profile that allows the individual to attain the position of trust: para. 36. Mr. Cook was sentenced to five years and eight months' imprisonment.

- In *R. v. Sandhu*, [2013] O.J. No. 6325 (C.J.), aff'd 2015 ONSC 1679, a police officer attending a massage parlour to perform a license inspection demanded that a masseuse perform oral sex on him. He was convicted of sexual assault and sentenced to 15 months' imprisonment, followed by two months of probation.
 - In *R. v. Von Seefried*, [2017] O.J. No. 1094 (C.J.), a police officer was sentenced for sexually assaulting a female passenger of a vehicle he pulled over for a traffic stop. He was sentenced to 16 months' imprisonment.
 - In *R. v. Bracken*, 2005 SKPC 64, a police officer who was the lead investigator in a sexual assault investigation involving a 17-year-old complainant sexually assaulted her in his police cruiser by squeezing her breast. He had been initiating sexual conversations with her for several months before this incident. The sentencing judge, Judge Mary Ellen Turpel-Lafond, noted that the complainant was a vulnerable teenage sexual assault victim and that the offender knew from his professional experience that she was scarred by that abuse and was susceptible to influence: paras. 22-23. Although there was only one incident of sexual touching, Judge Turpel-Lafond found the sexual assault could not be described as being at the low end of the spectrum of harm, given the context: para. 51. The offender was sentenced to nine months' imprisonment. The sentencing judge noted that the facts in *Bracken* were strikingly similar to those in this case and that many of Judge Turpel-Lafond's comments were equally applicable to the appellant: paras. 165, 176.
- [49] The defence referred to a number of authorities in which a CSO or intermittent jail sentence had been imposed:
- In *R. v. F.O.R.*, 2016 BCPC 223, the offender was sentenced for carrying on a sexual relationship with the teenage daughter of his former partner. The relationship began just prior to her 18th birthday. He pleaded guilty to touching a young person while being in a position of trust and breaching a term of his release. He was sentenced to 90 days' imprisonment to be served intermittently followed by two years' probation.
 - In *R. v. Chen*, 2017 BCSC 1689, aff'd 2017 BCCA 426, a piano teacher was sentenced for sexually touching and kissing five students, including French kissing, over a period of 17 years. The victims were from 11 to 19 years old. He was 69. He was sentenced to 75 days' imprisonment followed by 21 months to be served in the community by way of a CSO and one year of probation. In reviewing this decision, the sentencing judge noted that the sentencing judge in *Chen* must have been of the view that exceptional circumstances existed such that a conditional sentence was appropriate.

- In *R. v. Nicholson*, 2018 BCSC 515, a police officer was sentenced for one count involving three incidents of breach of trust which included encouraging a police informant to provide false information in a drug investigation, giving false information to a fellow officer, and counselling an accused while transporting him to the police detachment about how important it was that he not be found with drugs and offering him an opportunity to make a phone call. The sentencing judge adopted a joint submission of 17 months to be served by way of a CSO.
- [50] The sentencing judge determined that a CSO would not adequately serve the applicable sentencing principles in this case. He emphasized the appellant's senior position in the CEU and his role in the Bannon and Moazami investigations. He noted that the appellant was not guilty of a momentary lapse in judgment, but that his offences continued over a period of months. He emphasized the fact that his first offence against A occurred the first time he met alone with her in contravention of the CEU's policy. He concluded that there were no exceptional circumstances justifying a CSO, as in *Chen*. The gravity of the offences and the degree of the appellant's moral culpability required his incarceration.
- [51] The sentencing judge then considered the appropriate range of sentence. He noted that in *Bracken*, the range of sentence was determined to be nine to fifteen months. That case involved one incident and one victim. The conduct was "similarly seriously intrusive" given the victim's vulnerability and their trusting relationship. However, he noted that the relationship had already been overtly sexualized and the offender took immediate responsibility for his actions. He noted that in this case, the appellant's offences occurred over a period of months and he did not immediately accept responsibility: para. 211.
- [52] The judge also referred to *Von Seefried*. That case also involved one incident, one victim, and "seriously intrusive" sexual behaviour. However, the offender had no relationship with the victim and used his authority as a police officer to coerce her. The judge observed that in the case at bar, the appellant "did not use his authority as a police officer to enable his offences against A and B, rather he used his well-developed relationship with these women to facilitate his offences against them": para. 212.
- [53] After considering these authorities, the sentencing judge determined that a jail sentence of between nine and fifteen months for the crimes against each of A and B would be a fit sentence. He determined that the sentences should be consecutive because the crimes occurred at separate times against separate victims.
- [54] He then sentenced the appellant to the mandatory minimum sentence of ninety days for the sexual exploitation of A, not to be served intermittently; twelve months for the breach of trust of A; and eight months for the breach of trust of B, to be served consecutively. The global sentence was therefore 20 months' imprisonment. He further sentenced the appellant to two years of probation.

Issues

- [55] The appellant asserts that the sentencing judge erred in two ways. First, he says that the judge erred in accepting the victim impact statement of B without properly scrutinizing it, despite another judge having found B to be a completely unreliable witness. Second, he says that the sentence imposed with respect to Count 2, the breach of trust of B, was disproportionate considering the gravity of the offence and his degree of responsibility. He says that the sentence on Count 2 was unduly harsh. This is his main ground of appeal.
- [56] The appellant does not appeal from his sentence on the other two counts. In oral submissions, he withdrew an argument based on the judge's finding that the kiss with B was sexual activity.

Discussion

Standard of Review

- [57] The standard of review is that set out in *R. v. Lacasse*, 2015 SCC 64. Appellate intervention is justified only where the sentencing judge made an error in principle that had an impact on the sentence or the sentence is demonstrably unfit: paras. 43-44; 51-53. As stated by Stromberg-Stein and Fitch J.J.A. for the majority in *R. v. Agin*, 2018 BCCA 133:
- [56] Appellate intervention is justified when an appellate court identifies a material error that has impacted the sentence, in that the sentence would have been different absent the error. The court will then assess the fitness of the sentence by conducting its own sentencing analysis. If the sentence is unfit, the court may vary the sentence and impose a fit sentence.
- [57] Where there is no error, or the error had no impact on the sentence, appellate intervention can still be justified if the sentence is demonstrably unfit.
- [58] Justice Wagner, speaking for the majority in *Lacasse*, emphasized that "wide latitude" must be given to sentencing judges: para. 11. Describing the deferential nature of appellate review of sentencing judgments, he said:
- [40] In this regard, Iacobucci J. explained in [*R. v. Shropshire*, [1995] 4 S.C.R. 227] that consideration of the fitness of a sentence does not justify an appellate court taking an interventionist approach on appeal:

An appellate court should not be given free rein to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable. [para. 46]

[41] In [R. v. Proulx, 2000 SCC 5], this Court, per Lamer C.J., discussed these same principles, which continue to be relevant:

In recent years, this Court has repeatedly stated that the sentence imposed by a trial court is entitled to considerable deference from appellate courts: see *Shropshire*, *supra*, at paras. 46-50; [R. v. M. (C.A.), [1996] 1 S.C.R. 500], at paras. 89-94; [R. v. McDonnell, [1997] 1 S.C.R. 948], at paras. 15-17 (majority); R. v. W. (G.), [1999] 3 S.C.R. 597, at paras. 18-19. In M. (C.A.), at para. 90, I wrote:

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. [First emphasis added; second emphasis in original.]

...

Although an appellate court might entertain a different opinion as to what objectives should be pursued and the best way to do so, that difference will generally not constitute an error of law justifying interference. Further, minor errors in the sequence of application of s. 742.1 may not warrant intervention by appellate courts. Again, I stress that appellate courts should not second-guess sentencing judges unless the sentence imposed is demonstrably unfit. [paras. 123 and 125]

[Citations added; emphasis in original.]

Applicable Principles of Sentencing

[59] As noted above, the sentencing judge identified denunciation and general deterrence as the paramount sentencing principles in this case.

[60] The sentencing judge found the appellant to be deeply remorseful and apologetic. Thus specific deterrence, rehabilitation, and the protection of society were lesser factors in his sentence.

[61] I agree with the sentencing judge that denunciation and general deterrence were the primary applicable principles in sentencing the appellant.

[62] I now turn to the errors alleged by the appellant.

Victim Impact Statement of B

[63] This appeal raises the question of the weight that may be placed upon a victim impact statement where the offender disputes the truth or reliability of the statement, but does not seek to cross-examine the victim.

- [64] In her victim impact statement, B said that after the offence "her life went downhill fast" and she relapsed after five years of being clean. She said that she lost the ability to trust anyone and became "depressed, negative, hopeless, [and] homeless". She ascribes this downward spiral to the appellant's conduct.
- [65] The appellant takes no issue with the admissibility of B's statement, but says the judge erred in not approaching it with a critical view given the adverse findings made about her credibility in the Moazami trial. He also suggests that B had a financial motive to exaggerate the impact of the offence. He points to the fact that at the time she made the statement, B indicated that she was considering pursuing a claim for restitution; that she told investigators she was considering suing the police department and the City of Vancouver; and that she had been paid more than \$40,000 for her role as a police agent. Given this context, the appellant says the judge erred in placing undue weight on her statement.
- [66] The Crown contends that the appellant chose not to challenge the admissibility of B's statement, did not seek to cross-examine B on it, and pointed to no disputed facts warranting a Gardiner hearing (in accordance with *R. v. Gardiner*, [1982] 2 S.C.R. 368). Crown counsel notes that the sentencing judge was well aware of the appellant's position on B's credibility, including the factual basis for the argument that she had a financial motive to exaggerate. The sentencing judge nonetheless rejected the appellant's submission and accepted B's statement. The Crown points out that pursuant to s. 718.2(a)(iii.1) of the Criminal Code, R.S.C.1985, c. C-46, the sentencing judge was required to consider the sentencing principle that a sentence should be increased to account for evidence that the offence had a significant impact on the victim.
- [67] Section 722 of the Criminal Code provides for the use of victim impact statements on sentencing. The pertinent portion of the section for this appeal is s. 722(1):
722. (1) When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.
- [68] Section 4 of the Victims of Crime Act, R.S.B.C. 1996, c. 478, provides:
4. Crown counsel must ensure that a victim is given a reasonable opportunity to have admissible evidence concerning the impact of the offence, as perceived by the victim, presented to the court before sentence is imposed for the offence.
- [Emphasis added.]
- [69] In *R. v. Berner*, 2013 BCCA 188, this Court discussed the purpose of victim impact statements. The Court stated:

- [12] Victim impact statements play an important role in the sentencing process. They were formally introduced into sentencing proceedings by legislation in 1988. While there was some inconsistency among the courts as to the admissibility of such evidence prior to codification, the general trend was toward acceptance. The issue was resolved in *R. v. Swietlinski*, [1994] 3 S.C.R. 481 at 503, where Chief Justice Lamer observed: "It is well known that the victim's testimony is admissible at a hearing on sentencing". The current statutory scheme, enacted in 1995, is set out in s. 722 of the Criminal Code.
- [70] The Court emphasized that the sentencing judge is required to consider a victim impact statement for the purpose of sentencing. The Court also noted that the statement is intended to bring home to the offender in a palpable way the consequences of his or her conduct. It is a means to inform the court of the damage done by that conduct to the victim and, indirectly, to the community. In this way the victim impact statement achieves the objective of sentencing set out in s. 718(f) of the Criminal Code, which provides:
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:
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.
- [71] On sentencing, the Crown must prove beyond a reasonable doubt the existence of any aggravating fact disputed by the offender: *R. v. Gardiner*, supra; s. 724(3)(e) of the Criminal Code. Where the Crown calls a witness to prove a disputed fact, the offender may cross-examine that witness pursuant to s. 724(3)(c).
- [72] The appellant faced a dilemma at his sentencing. The judge considered his guilty plea to be a mitigating factor in part because it meant neither victim had to testify. The mitigating effect of the plea might have been diminished if he had put B through the potentially re-victimizing experience of being cross-examined on her statement: *R. v. V.W.*, 2008 ONCA 55 at para. 28. In choosing not to cross-examine her, he took the risk that the judge would place significant weight on the statement, as in fact he did.
- [73] In my view, the judge cannot be said to have erred in accepting and placing weight upon B's statement in the absence of any cross-examination or contradictory evidence. If the appellant wished to preclude the judge from considering the statement as required by s. 722(1), he could have challenged its admissibility or cross-examined B on it at the sentencing hearing. He chose for strategic reasons not to do so. It was then incumbent upon the judge to consider the statement in determining an appropriate sentence.
- [74] Even if the judge had erred in placing undue weight on the victim impact statement, such an error would have had no material impact on the sentence. The appellant appears to take issue primarily with the part of the statement that describes B's relapse into substance abuse

and her two suicide attempts. In my view, this part of the statement, while important, did not factor largely in the judge's reasoning as to the appropriate sentence. Rather, he emphasized B's history of victimization and the father-like relationship the appellant had with her. The appellant does not dispute B's history or her description of their relationship. These parts of the statement are corroborated by the intercepted conversations, in which she expressed feelings of betrayal and anger and said that she had viewed the appellant as a father figure. Ultimately, I am not convinced that the impugned portions of her statement had a material impact on the sentence.

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

Proportionality of the Eight-Month Sentence

[76] As I would find that the sentencing judge committed no error in principle, appellate intervention will only be justified if the sentence is demonstrably unfit.

[77] The appellant's main argument on appeal was that the sentence was unfit on the basis that it was not proportionate to the gravity of the offence. I repeat that this argument relates only to the eight-month sentence on Count 2, the breach of trust for kissing B. The appellant does not seek to minimize the seriousness of his conduct or his moral blameworthiness. He says simply that, although his behaviour was inappropriate, eight months' incarceration is a disproportionate sentence for one brief consensual kiss.

[78] The appellant also contends that the eight-month sentence was disproportionate to the 12-month sentence imposed for the breach of trust involving A. That breach of trust involved three incidents which were much more sexualized than the incident with B, and hence more serious.

[79] The appellant contends that the judge erred by conflating the offence against A with the offence against B. In the appellant's factum he says:

The judge did no individual analysis leading to the conclusion that the range of sentence was appropriate in both circumstances. Without the bolstering effect of joining the offences in the judge's analysis, the circumstances surrounding the incident with B are limited to a single, brief goodnight kiss on one occasion with a person of the age of consent after having asked permission.

[80] Therefore, he says the two offences were significantly different.

[81] The appellant also disputes the sentencing judge's decision to impose consecutive sentences. He says that this decision reflects an inconsistency in the judge's reasons. He treated the offences as a pattern of escalating conduct, implicitly treating all four offences as linked. However, in deciding to impose consecutive sentences, he described the offences as separate. The appellant also submits that the judge failed to consider the totality principle when imposing consecutive sentences.

- [82] Finally, the appellant submits that the judge did not take into account the difficult circumstances in prison for a police officer. The judge may not have adverted specifically to his status as a former police officer, but it was so obvious I do not think it can be said to be an error that he failed to expressly refer to it as a factor in his sentencing decision.
- [83] The Crown argues on the other hand that the appellant's argument on appeal focuses unduly on the actus reus of the offence, and ignores the context in which the offence occurred. The Crown notes that the sentencing judge found that, while the appellant did not use his authority as a police officer to coerce the victims, he used "his well-developed relationship with these women to facilitate his offences against them": para. 212. The Crown submits that the sentencing judge's decision to impose consecutive sentences was discretionary and is owed deference on appeal. The Crown also notes that the eight-month sentence was one month below the judge's stated sentencing range for the offence: para. 213.
- [84] I turn to the cases brought to our attention. Six of the eight cases involved sexual contact. Three of those, Greenhalgh, Sandhu, and Von Seefried, involved a police officer or, in Greenhalgh, a border guard who committed aggressive, coercive sexual assaults on strangers. Apart from the official status of the accused, those cases bear less similarity to the facts of the case under appeal.
- [85] The other three cases, Chen, F.O.R., and Bracken, are more analogous. They each involved an accused who knew his victim or victims and took advantage of their youth and vulnerabilities. As noted above, Chen involved a 69-year-old piano teacher who was sentenced to 75 days' imprisonment, 21 months' CSO, and one year of probation for sexually touching and kissing five students. That sentence was upheld by this Court. Mr. Chen was suffering from major depression, had been extensively shamed in local Asian newspapers, and had been shunned by his community. As the sentencing judge in this case observed, the judge who sentenced Mr. Chen must have viewed these as exceptional circumstances justifying a CSO.
- [86] F.O.R. was a Provincial Court decision in which the offender engaged in sexual activity with the daughter of his former partner on one occasion a few weeks before her eighteenth birthday, then carried on a brief consensual relationship with her after she turned eighteen. He was sentenced to 90 days' intermittent imprisonment and two years of probation.
- [87] Finally, Bracken was a Saskatchewan Provincial Court decision in which a police officer sexually touched the teenage complainant in a sexual assault investigation. He was sentenced to nine months' imprisonment.
- [88] On appeal, the Crown also referred to *R. v. Power*, 2009 BCSC 1514, aff'd 2010 BCCA 21. The accused in that case was a lawyer who invited his teenaged client to spend the night at his apartment, where he sexually touched him and performed oral sex on him. He was convicted of one count of sexual exploitation and sentenced to 18 months' imprisonment and two years' probation.

- [89] Of these sentencing decisions, all are distinguishable in one way or another and most are lower court decisions. I find most of them to be unhelpful with the exception of Bracken, whose facts are very similar to the facts of this case. In both cases, a senior police officer assisting a young, traumatized crime victim took advantage of his position to initiate sexual contact with her. I do not accept the appellant's argument that the facts in Bracken are significantly dissimilar.
- [90] In Bracken, Judge Turpel-Lafond discussed the importance of context in sentencing for sexual offences. At paras. 48, 49 and 51, Judge Turpel-Lafond said:
- [48] The characterization of the sexual assault before the Court as at the low end of the spectrum needs to be carefully considered. The case law does anticipate an analysis of the particular facts in each sexual assault but that analysis is not confined to an assessment of the physical acts. The evaluation of the sexual assault requires a consideration of the subjective impact of the assault on a victim, and the inference that a reasonable person would know the impact of their actions. Trial judges do not base their decision on the spectrum solely on the physical acts of sexual assault, placing touching at the low end and intercourse at the high end of a spectrum.
- [49] Sexual assault sentencing requires a broader contextual analysis. The leading case of *R. v. Sandercock* (1984), 48 C.R. (3d) 154 (Alberta Court of Appeal), as applied in Saskatchewan, requires the trial judge to evaluate the intensity of the behaviour of the offender and whether or not he knew the victim would suffer emotional or psychological injury, or physical injury. Where the touching might seem to be less aggressive or forceful, but there is a "contemptuous disregard" for the feelings and personal integrity of the victim, the assault must be classified as at the higher end of the spectrum. Context matters a great deal and hence the characterization of the facts before the Court as at the "low end" is difficult to accept.
- [51] Mr. Herman, on behalf of the Crown, argued that characterizing the sexual touching in this case at the low end of the spectrum is only possible if it is viewed in a vacuum. Mr. Herman's submission is correct. The impact of Sergeant Bracken's conduct on a sexual assault victim could not be assessed at the low end of a spectrum of harm given his position, his knowledge, and the fact that the victim was struggling with depression, anxiety and poor self-worth. He demonstrated a contemptuous disregard for her personal integrity.
- [91] I agree with this description of the importance of context. The comments made by Judge Turpel-Lafond are applicable to the appellant's offences. As the Crown says, the appellant's submissions ignore the broader context in which he committed the offences. That context is the appellant's role in the life of B.

- [92] The appellant could be described as B's saviour. He supported her in improving her life, moving away from sex work, and getting off drugs. She had been abused in one way or another by most of the men in her life. She trusted and relied on the appellant, and so his betrayal of that trust by sexualizing their relationship was far more significant than the physical act of one kiss.
- [93] B described her relationship with the appellant in portions of her victim impact statement that the appellant does not challenge. She met him when she was about 16. She was then an underage sex worker. Over the course of the investigation they became "very close". She said, "I had so much respect for him and looked up to him as a positive role model, a father figure . I often looked to him for advice and guidance. We used to joke about him walking me down the aisle one day . I will never understand why it happened." I reiterate that the offence with which he was charged with respect to B is a breach of trust.
- [94] This is a tragic case. It was tragic for the victims who had grown to trust and admire a senior police officer who did all that he could to help improve their lives and bring to justice those who abused them. He worked tirelessly to do so. To experience the appellant as just another man seeking sexual favours from them must have been a breach of trust of the highest order.
- [95] The many reference letters filed on behalf of the appellant are a testimony to the exceptional nature of his contribution to the police force, of which he was, until these events, a distinguished member. For the appellant, his seemingly inexplicable offending has had catastrophic effects on his life. But, in my view, this appeal seeks to minimize the breach of trust and separate it from the full context in which it occurred. His offence against B was not just a kiss. His offence must be examined in the broader context. The appellant must have known, considering his role in B's life, that even non-aggressive or non-forceful conduct would be a serious breach of her trust in him. As in Bracken, the kiss cannot be examined in a vacuum.
- [96] For the same reasons I do not accept that the judge erred in overstating the seriousness of the offence against B by conflating it with the offence against A. The offence against B was serious when viewed in the context of B's life and relationship with the appellant, regardless of whether one also considers the offences against A.
- [97] The judge's decision to impose a consecutive sentence is a discretionary one. The appellant does not suggest that these facts require a concurrent sentence; rather he says that the imposition of a consecutive sentence renders the total sentence disproportionate, or that in imposing a consecutive sentence the judge disregarded the totality of the sentence. I do not agree. In my view, when the sentence is examined in its context, it cannot be said that the judge failed to consider the totality of the sentence or imposed a sentence that was disproportionate to the gravity of the offence. I would not accede to the submission that the sentence is demonstrably unfit.

Disposition

[98] I would grant leave to appeal and dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Mr. Justice Willcock"

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