
CANADA / JUDGMENT

R. v. Florence

2010 BCSC 1010

COURT

Supreme Court of British Columbia

DECIDED

11 March 2010

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2010 BCSC 1010 R. v. Florence

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Florence,

2010 BCSC 1010

Date: 20100311

Docket: 56534-2

Registry: Chilliwack

Regina

v.

BAN ON PUBLICATION

pursuant to s. 486.4

Criminal Code of Canada

Matthew Edwin Florence

Before: The Honourable Madam Justice E. J. Adair

Oral Reasons for Sentence

March 11, 2010

Counsel for the Crown:

A.L. Ormiston

Counsel for the Accused:

S. Paterson

Place of Trial:

Chilliwack, B.C.

[1] THE COURT: These are my reasons.

1. Overview

[2] There is a publication restriction pursuant to s. 486.4 of the Criminal Code that prohibits the disclosure of any information that could identify the complainant or certain witnesses. I will be using initials for names.

[3] On December 4, 2009, I found that on or about June 5, 2009, Matthew Edwin Florence sexually assaulted M, contrary to s. 271 of the Criminal Code, and that on or about June 5, 2009, Mr. Florence, for a sexual purpose, touched directly or indirectly with a part of his body, the body of M, a person under the age of 16 years, contrary to s. 151 of the Criminal Code.

[4] On March 4, 2010, after hearing submissions concerning whether one of the charges should be stayed based on the principle in *R. v. Kienapple*, [1975] 1 S.C.R. 729, I ordered that count 1 of the Indictment, the charge under s. 271, be stayed and that a conviction be entered on count 2 of the Indictment, the charge under s. 151. This is in accordance with the approach taken by Mr. Justice Barrow in *R. v. Lonegren*, 2008 BCSC 1817, and is appropriate in the circumstances here.

[5] I turn then to sentencing.

[6] A pre-sentence report was prepared by Dennis Cox of the Chilliwack Probation Office, and a psychological report was prepared by Dr. Ronald LaTorre, a clinical and forensic psychologist. Both were filed. Victim impact statements from M and her mother, NV, were also filed. In addition, I heard evidence from Dr. LaTorre, Mr. Gary Florence (Mr. Florence's father) and Mr. Florence himself.

2. The Facts

[7] I will divide this discussion into three categories: (a) the circumstances of the offence; (b) the circumstances of the offender, Mr. Florence; and (c) the impact on the victim.

(a) Circumstances of the Offence

[8] I will summarize these from my reasons for judgment pronounced December 4, 2009.

[9] After school on the afternoon of June 4, 2009, M and P (a girlfriend) met up with a group of friends, who were teenage boys, at Central Elementary School. The boys were T, J, W and N. The boys in the group ranged in age from about 12 or 13 to 15 or 16. M was then 14 years old. Her 15th birthday was on June 12, 2009. Mr. Florence turned 24 years old in April 2009.

- [10] Mr. Florence, who was there with J, also became one of the group. J introduced him to the others as "Matt" or "Matthew." The teenaged members of the group described spending their time mostly hanging out and talking. Mr. Florence hung out with them.
- [11] Mr. Florence had brought a backpack with him. At some point during the afternoon, he pulled out a couple of bottles of "Rockaberry," an alcoholic cooler-type drink. It comes in two-litre plastic bottles, like soda pop, and tastes like blackberries.
- [12] Mr. Florence asked members of the group if they wanted a drink. M and P said no. However, some of the boys accepted the offer. Mr. Florence was also drinking.
- [13] Later in the afternoon, Mr. Florence left the group. He told them he was going to the liquor store, and when he came back, he had another couple of bottles of Rockaberry and another alcoholic drink, "Old English."
- [14] Around the time Mr. Florence came back from the liquor store, P left to go to her brother's birthday dinner. M's afternoon at the park at Central was unremarkable - just hanging out and talking with friends - until about the time P left, which was sometime between 5:00 and 5:30 p.m. At one point during the afternoon, Mr. Florence and M were talking. Mr. Florence told M that he was 19 (which was false) and asked M how old she was. She told him that she was 15, which she was going to be in a week's time.
- [15] There is no doubt M was consuming alcoholic drinks later in the afternoon on June 4, 2009, after P left, and into the early evening. Mr. Florence provided all of the alcohol: Rockaberry, Old English, and later vodka. People were drinking straight out of the bottles, which were being passed around. T thought that, while he was there, M consumed a little less than half a bottle of Rockaberry - this would be a little less than a litre - and a bottle of Old English. T observed that, while he was with the group, M was staggering a little, holding herself up by trees and that her speech was a little slurred. T left the group about 6:30 p.m. or so. Just before he left, the group moved from Central down to the water park, what some witnesses called "Happy Park." M confirmed that she was also drinking some of the vodka Mr. Florence had purchased, although she was unable to say how much she drank. While at Happy Park, she, Mr. Florence, and another girl started drinking more Rockaberry, again passing the bottle around the three of them.
- [16] When they were walking back to Happy Park, M and Mr. Florence kissed, with their tongues touching. While at Happy Park, M and Mr. Florence kissed more than once, although M was unable to say how many times. She also described them hugging one another. At Happy Park, M recalled feeling a little dizzy from the alcohol and a little drunk. Her brother, W, recalled that M was acting oddly, violent, falling over him and his friend, yelling at them and hitting them. He said that M was talking gibberish, and he could not understand what she was saying, and that she was drunk. W recalled that Mr. Florence was following M around, saying "you can trust me, it's going to be okay." While still at the park, M looked down and found Mr. Florence fidgeting with the front of her pants. I found that although he knew she was much younger and had been told that she was 15, Mr. Florence was physically attracted

to M and acted on his attraction by touching and kissing M.

- [17] M remembered leaving the park with two friends and Mr. Florence. Mr. Florence went into another liquor store, while M stayed outside talking to her friends. She felt sick and threw up on the street. I concluded that, by this time, M was indeed quite drunk and suffering from the effects of alcohol. When Mr. Florence came out of the liquor store, the two friends disappeared, leaving M alone with Mr. Florence.
- [18] M told Mr. Florence that she needed to go back to Central to meet up with W, but she said that Mr. Florence told her that he had talked to W and that W was meeting them at Mr. Florence's house. This was false. M and Mr. Florence started walking to Mr. Florence's house. M said that they were holding hands during the walk. She was still feeling sick. She remembers sitting down during the walk, feeling like she was going to pass out. M had another sip of Rockaberry. She recalls Mr. Florence saying that they had to keep going, and helping her up.
- [19] There is no doubt that M was in fact in Mr. Florence's apartment on June 4, 2009. M and Mr. Florence ended up in Mr. Florence's bedroom. M recalled being directed there by Mr. Florence, who told her there was an air conditioner in that room. M remembered lying down on her stomach on the bed, and waking up to find Mr. Florence was rolling her over on her back. Mr. Florence pulled down her pants and underwear, and pushed up her shirt and bra up around her neck. M said that, at that point, everything went black and started spinning. Every time M tried to move, everything would go black and fuzzy and start spinning. M's blackouts were most probably the effects of the alcohol she had consumed. M remembered Mr. Florence kissing her and being on top of her. He was rubbing her lower body, her inner thighs and vagina area with his hand. Everything again went black, and M next recalled seeing Mr. Florence come back into the room. Mr. Florence got on top of M, who was on her back, and she recalled that the lower part of Mr. Florence's body felt cold and wet. She recalled him trying to penetrate and have intercourse with her. M was pushing his hip with her left knee, trying to push him away, shaking her head and saying no. Mr. Florence did not stop. M said that everything went black again, and when she woke up, Mr. Florence was sitting next to her, rubbing her stomach and saying that everything would be okay.
- [20] M thought that she then fell asleep. She remembers waking up and putting on her clothes. She looked for her gray sweater and chequered belt, but could not find them. She threw up again by the side of Mr. Florence's bed. There was an alarm clock by the bed, and M remembered it was about Midnight. At first, when she got out of the house where Mr. Florence's apartment was, M did not know where she was. She walked up the street until she was able to get her bearings. She kept walking until she encountered Mr. Matthew Orwin.
- [21] Mr. Orwin was standing on the street outside the Empress Show Lounge around Midnight on June 4, 2009. He described the evening as very warm, and he had taken his dog for a walk. He testified he saw a young girl staggering down the street. She appeared to be in rough

shape and distraught: it was M. Mr. Orwin described her as looking like a wreck. Her hair was a mess, her face seemed red, and Mr. Orwin described her as appearing to be in shock, crying and very upset. Mr. Orwin walked M down to the courthouse, and she told him what had happened at Mr. Florence's apartment. Mr. Orwin called 911. He waited with M until the police and ambulance arrived.

- [22] In his July 8, 2009 statement to the police, Mr. Florence identified items belonging to M that would be found in his apartment. During the search of Mr. Florence's apartment on July 8, 2009, the gray sweater and chequered belt M was wearing on June 4, 2009 were in fact located in a closet in Mr. Florence's apartment. Mr. Florence's July 8 statement also corroborated M's evidence concerning what took place in Mr. Florence's apartment. Although Mr. Florence did not provide details in his statement, he admitted the fact of his sexual assault of M at his apartment, knowing she was underage.
- [23] During his evidence at the sentencing hearing, Mr. Florence confirmed what had happened at his apartment. He remembered, once he and M were at his apartment, taking off M's shirt and pants and trying to put his penis in her vagina. Mr. Florence confirmed that he knew it was wrong to have sex with a 15-year-old who was drunk, and he agreed that he forced M to have sex with him.

(b) Circumstances of the Offender

- [24] Mr. Gary Florence's evidence was particularly helpful in filling in details of Mr. Florence's background and family life, and describing resources that would be available to Mr. Florence in the native community.
- [25] Mr. Florence was born on April 21, 1985 in Chilliwack, B.C. He is one of three children born to Shirley Bolen and Gary Florence. Ms. Bolen is from the Squamish Band, and Gary Florence is from the Boston Bar First Nation Band. Through his mother, Mr. Florence is a registered member of the Squamish Band and has status as a First Nations individual. He grew up off reserve and had no connection with the First Nations culture during his early childhood while he lived with his biological parents, which he did until age 7. His parents abused alcohol on a regular basis, often leaving Mr. Florence to care for his younger siblings. Mr. Florence reported that his father was often physically abusive towards him when consuming alcohol. Mr. Gary Florence confirmed these facts. When he was 7, Mr. Florence contacted the police as a result of the neglect and physical abuse, after which he and his siblings were placed in foster care. Although he was physically abused, Mr. Florence reported no incidents where he was sexually abused when growing up.

- [26] Mr. Florence lived in foster care, off reserve, until about age 12, and apparently had a good relationship with his foster parents. Around the time Mr. Florence turned 12, he was charged with arson and then spent 3 years in custody at Burnaby Youth Custody Centre. Following his time in custody, Mr. Florence returned to live with his biological parents, who had relocated to the Boston Bar First Nation Reserve after having addressed their alcohol abuse.
- [27] Mr. Gary Florence, who was born in 1958, testified that, generally, there was a great deal of alcohol abuse in his background (including his own mother and father). He said further that many native people lose their way because of alcohol. He described his family's participation (which included Mr. Florence) in a healing program in Williams Lake in about 1997 or 1998, when Mr. Gary Florence would have been in his late 30s. He testified that he found participation in the healing program to be a very powerful experience. Mr. Gary Florence explained that he and his wife were strongly motivated at that time to address their serious alcohol abuse because they wished to have their children returned to them. Mr. Gary Florence and his wife have abstained from consuming alcohol for the past 13 years, and do not allow any alcohol in their home. Mr. Gary Florence explained that this has been very difficult at times, and has meant turning away friends and family. In his experience, living in a more urban area, like Chilliwack, creates additional pressures on individuals to relapse. With the assistance of the healing programs, Mr. Gary Florence and his wife have demonstrated the strength of their convictions and of their determination to exclude alcohol from their lives, and have done so for 13 years. They have done this with the knowledge, based on their own experience, of the great harm alcohol abuse can cause, particularly in the native community.
- [28] Once Mr. Florence's parents stopped consuming alcohol, they became involved in cultural activities. This influenced Mr. Florence to do the same, and when younger, he engaged in a variety of activities. However, Mr. Florence's involvement in these activities ceased when he relocated to Chilliwack for employment about four years ago.
- [29] According to the pre-sentence report, Mr. Florence has a good relationship with his parents, and had regular contact with them prior to the offence. Mr. Florence's parents are supportive of him and they are willing to have Mr. Florence live with them on Mr. Florence's eventual release from custody. As I noted above, alcohol is not permitted at Mr. Florence's parents' residence, and his parents would encourage Mr. Florence's involvement in cultural activities.
- [30] Mr. Florence completed his GED at the District Alternative Secondary Program in Boston Bar. Following his GED, Mr. Florence completed a flagging course, which eventually led to employment. Prior to the offence, Mr. Florence worked at A&D Flagging for four years. His employer, Andre Mongeon is aware of the charges and that Mr. Florence is in custody. Mr. Mongeon reported that Mr. Florence was a good employee with a good work history, and Mr. Mongeon would be willing to consider hiring Mr. Florence back in the future.

- [31] Mr. Florence is reportedly engaged to Amanda Goldsworthy, the mother of Mr. Florence's daughter, who has just turned one. They began living together in about March 2008. Ms. Goldsworthy is a member of the Chehalis Band, as is the couple's daughter. Prior to the offence, Mr. Florence and Ms. Goldsworthy had separated because of Mr. Florence's abuse of alcohol and infidelity. Ms. Goldsworthy reported to Mr. Cox that Mr. Florence would misuse alcohol every other day and damage property in their home. His aggression escalated to the point of shoving and pushing Ms. Goldsworthy while she was pregnant which, resulted in Ms. Goldsworthy contacting the police.
- [32] Mr. Florence believed that living at Ms. Goldsworthy's residence might be an option if released. When contacted concerning the viability of this plan, Ms. Goldsworthy reported that she is not prepared to have Mr. Florence live at her home.
- [33] Mr. Florence reported that individuals with whom he associated regularly misuse alcohol and engage in criminal behaviour. Although he reported to Mr. Cox that he would only consume small amounts of alcohol and that he does not use alcohol in the same way as his friends, other information indicated that Mr. Florence and his associates spend their free time in a local park in Chilliwack consuming alcohol to the point of intoxication. Mr. Florence confirmed this during his evidence at the sentencing hearing, and he admitted what he had told Mr. Cox - where he minimized his alcohol consumption - was not true.
- [34] According to the pre-sentence report, Mr. Florence appears to have some insight into how his choices and actions have affected him, but does little act on this insight. Although aware of the effect that negative associations have, Mr. Florence continued to spend time with a negative peer crowd. Mr. Florence denies engaging in the same criminal behaviours and the misuse of alcohol as his peer group, however, collateral information reported that Mr. Florence consumed alcohol every second day to the point of intoxication and had become physically abusive towards Ms. Goldsworthy. Mr. Florence denies abusing alcohol, describing his consumption as being on a social level. However, Ms. Goldsworthy reported that, during her relationship with Mr. Florence, Mr. Florence's alcohol consumption increased from every weekend to every other day, and that Mr. Florence would take the family money and spend it on alcohol. Again, in his testimony in court, Mr. Florence admitted that he was not truthful about the extent of his drinking when interviewed by Mr. Cox.
- [35] In the interview with Mr. Cox, Mr. Florence reported that his first sexual encounter was at approximately age 14 with his girlfriend, and that they engaged in sexual intercourse after a relationship of one year. He did not report any other sexual partners between this encounter and Ms. Goldsworthy. He indicated to Mr. Cox that his sexual interests are in female partners of the same or similar age as himself. Mr. Florence reported a casual interest in pornography, with a described interest in "barely legal" age material. During his testimony at the sentencing, Mr. Florence said that he had had about six sexual partners.

- [36] Mr. Cox reports that Mr. Florence appears to have little or no insight concerning the impact of the offence on M. Mr. Florence blamed the entire event on the consumption of alcohol. However, Mr. Florence denied abusing alcohol, believing that he only consumes alcohol socially. He claimed that the events that followed the consumption of the alcohol were also mutual. Mr. Florence was not able to attribute his behaviour to any other underlying factors. He assigned half the blame to M.
- [37] In his report, Dr. LaTorre concluded that there was no evidence that Mr. Florence suffered from a personality disorder, and there was also no evidence that Mr. Florence could be diagnosed with any form of paraphilia including paedophilia. Dr. LaTorre concluded that Mr. Florence abused alcohol but this is a treatable condition. Dr. LaTorre commented that (and I am reading from p. 5 of his report):
- Mr. Florence appears somewhat ambivalent about his guilt and his version of the offence is that he attempted but failed coitus and that he used no force to either make the victim consume alcohol or to have sex with him. There therefore appears to be denial and minimization. There is no evidence of shame or remorse.
- [38] Mr. Florence's evidence at the sentencing also demonstrated both his ambivalence about whether he had done anything wrong and his lack of empathy for M. He also had difficulty acknowledging the extent of his alcohol abuse, although he was prepared to blame alcohol for what took place on June 4, 2009, and he appeared ambivalent concerning whether he has a problem with alcohol, saying at one point that he "probably" still has a problem. He admits he was not telling Mr. Cox the truth when he said that he just drank socially and did not think he had a problem. However, he said that he was about "90 percent" serious about getting treatment. When asked on cross-examination why it was only 90 percent, his testimony was to the effect that this was the first time he had ever been in this kind of trouble.
- [39] Mr. Florence continues to blame M for the events on June 4, although he qualifies this by saying he blames her "a little bit." He acknowledged that was the reason why in the note he wrote at the end of his interview by Corporal MacIntosh he crossed out "I" and wrote "we had too much to drink." On cross-examination, Mr. Florence admitted that he knew M was drunk and that she was 15, and that he knew it was wrong to have sex with a 15-year-old who was drunk.
- [40] Dr. LaTorre also carried out a risk assessment with the object of assessing the risk that Mr. Florence will sexually re-offend in the future. Dr. LaTorre used two methods. The first method is the "Static 99" and the revised version "Static 99R." Dr. LaTorre described the Static method as a blunt instrument. The risk is assessed by calculating how an individual scores with respect to ten specific risk factors, including: age less than 25, having never lived with a lover over two continuous years, having a history of non-sexual violence (which would include Mr. Florence's abuse in childhood), having unrelated victims, prior convictions and prior sex offences. For example, in the age category, a person under age 25 receives a higher

score (indicating higher risk) than someone older. On the Static 99R, Mr. Florence scored in the low-moderate risk category, where the predicted recidivism rate over a five year period is 6.6 percent. However, that was based on Mr. Florence receiving a positive score of zero on the basis that he had lived with Ms. Goldsworthy for two years. In fact, he had not, and he should therefore have received a score of one in that category. His total score would then place him in the moderate-high risk category on the Static 99R, with a predicted recidivism rate of 8.7 percent over a five-year period.

- [41] In addition to assessing risk using the Static method, Dr. LaTorre also considered characteristics that have been shown in the relevant literature to be related to sexual offence recidivism, and that assist a clinician such as Dr. LaTorre to arrive at a structured clinical judgment. In his report, Dr. LaTorre listed eight higher-risk characteristics that Mr. Florence appeared to have. These characteristics included problems resulting from child abuse (something that clearly applies to Mr. Florence), problems with substance abuse (Mr. Florence's abuse of alcohol) and problems with non-intimate relationships (Mr. Florence's poor choice of friends and leisure companions). However, during cross-examination, Dr. LaTorre agreed that some other items in this list (e.g., physical coercion in sexual violence) were based on what he had read in the police report, as compared with the findings at Mr. Florence's trial.
- [42] Dr. LaTorre's opinion is that, in the absence of treatment or other interventions to address Mr. Florence's higher risk indicators, Mr. Florence is at a relatively moderate risk over the short term, and more elevated risk over the longer term, relative to other sexual offenders, of future sexual or other violent offending. In cross-examination, Dr. LaTorre affirmed that the potential risk that Mr. Florence may re-offend can be reduced if Mr. Florence engages in treatment, and that his alcohol abuse is a serious problem.
- [43] In Dr. LaTorre's opinion, there are both more and a greater variety of services available to Mr. Florence in the federal correctional system, both to address his treatment needs and to accommodate his aboriginal background, than in the provincial system. The federal system also offers different levels of treatment programs, whereas the provincial system is more a "one-size fits all." In Dr. LaTorre's view, if the alternatives were a sentence of 2 years and a sentence of 2 years less a day, the preferable alternative would be 2 years because of the better treatment resources available to someone such as Mr. Florence in the federal system. Dr. LaTorre also expressed the opinion that it would be preferable to provide a sentence of 2 years with 3 years' probation, than to provide a sentence slightly longer than 2 years, because a sentence of 2 years plus 3 years' probation would allow Mr. Florence a longer period of access to services in the community (Dr. LaTorre provides some examples of the services in his report), and it also allows a longer period of supervision and monitoring, which Dr. LaTorre considered would be beneficial to Mr. Florence and which would further reduce the risk of re-offending. In Dr. LaTorre's experience, a period of supervision after release provides additional support for rehabilitation and for an offender to solidify positive behaviours, while providing no supervision can simply set up the offender for failure on

release.

(c) Impact on the Victim

- [44] In addition to the victim impact statements from both M and her mother, NV was interviewed in connection with the preparation of the pre-sentence report. The effect on M and her family of the events on June 4, 2009 have been very significant indeed.
- [45] In her statement, M reports that she does not go to school parks and does not hang out with any friends. Once out of school, she only talks to one friend and reports she has no trust in men or in some women. She is failing in school this year. She is sad and depressed. She is seeing two counsellors: one every two weeks, and one every week. She has been seeing doctors and getting blood tests done, which will continue for a year or more. M reports having female problems physically (something that her mother confirmed). M has become isolated from friends and classmates, and has grown apart from other members of the family.
- [46] In her statement, NV reports that, since June 4, 2009, she has not been able to stop thinking about what happened, and that it plays on her every day. She was involved in looking for the man who assaulted her daughter, and worked with the police to catch him. NV says that she now has the whole family in counselling because what happened to M is affecting everyone. She personally has lost weight and has not been able to work. She is currently taking medication to try and help her cope. NV reports that her son, W, is very upset, has just started counselling and is falling back in school. She says that she cannot let M go out to a park in case something happens, and that she now drives M to and from school and to M's best friend's house to make sure that M is never left alone. She also drives M to Abbotsford every week so that both she and M can get counselling. NV ends by saying that what happened to M has deeply affected her whole family in so many ways. The family is also out-of-pocket more than \$600.00.
- [47] When interviewed for the pre-sentence report, NV reported that prior to the offence M had not had sexual intercourse, and that since the offence M has suffered significant physical ailments with her reproductive system. NV confirmed that M's school work has suffered, and she is missing classes to attend medical appointments and counselling. NV reported that M. had been threatened at school, and that a teacher confronted M in front of her classmates and said that M cannot use the sexual assault as an excuse for poor grades. M's grades have been affected to the point where her school has requested that she attend an alternate school in the district. Prior to the offence, M was interested in attending college and looking towards the future. Now, NV reported that M is no longer interested and displays an attitude of no longer caring. NV expressed frustration and disappointment with the system that is in place to help victims.

[48] In summary, M has suffered serious emotional trauma for which she continues to attend counselling. She suffered humiliation and degradation, and has been publicly humiliated at her school. She has suffered physical trauma, which she continues to address. She has lost her sense of trust and safety in the community. She is failing in school and no longer interested in the future. Her mother and younger brother are also suffering, and all the members of the family are in counselling.

3. Legal Parameters

[49] A charge under s. 151 carries a maximum sentence of imprisonment for ten years and minimum punishment of imprisonment for a term of 45 days.

4. The Position of the Crown and of the Defence

[50] The Crown seeks a custodial sentence of 3 years plus 4 months, or 40 months. Giving Mr. Florence credit for the time he has spent in custody, the actual custodial sentence would be 2 years. The Crown also seeks 3 years' probation, essentially on the terms recommended in the pre-sentence report with a modification to condition 9. The Crown submits that, based on the evidence, the applicable authorities, and the mitigating and aggravating factors in this case, an actual custodial sentence of 2 years plus 3 years' probation is appropriate here.

[51] The defence says that a fit sentence would be a custodial sentence of 2 years and 10 months, or 34 months. Giving Mr. Florence credit for the time he has spent in custody, the actual custodial sentence would be 18 months. The defence does not object to a period of probation, but does object to some of the terms recommended in the pre-sentence report, particularly conditions 9 and 10.

5. The Principles of Sentencing

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

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

- [53] When a court imposes a sentence for an offence that involved the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
- [54] The sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [55] The Criminal Code also mandates that a court that imposes a sentence shall also take into consideration the principle that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender. Evidence that the offender, in committing the offence, abused a person under the age of 18 years is deemed to be an aggravating circumstance.
- [56] Further, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. Finally, the court is required to take into account the principle that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.
- [57] The court should also consider whether the goals of sentencing in the circumstances of a particular case will be met by a conditional sentence rather than a custodial jail sentence. However, because there is a mandatory minimum sentence for the offence described in s. 151, a conditional sentence is not available. This reflects the seriousness which our society views this crime.

6. Mitigating and Aggravating Factors

- [58] I turn next to the mitigating and aggravating factors. As I have stated, the Court is required by law to take into account any relevant mitigating or aggravating circumstances which might go to increasing or reducing the sentence.
- [59] First, mitigating factors. Mr. Florence had a very difficult childhood, during which he appears to have taken responsibility for the welfare of his younger siblings by contacting police when he and they were being neglected and abused by their parents. There is a family history of alcohol abuse. Mr. Florence has no criminal record. He completed his GED and became certified as a flagger. Mr. Florence's former employer speaks well of him and would be willing to hire Mr. Florence back in the future. He has the current support of his parents, a very important factor, particularly since they are most serious about abstaining from alcohol and do not allow it in their home. He has indicated that he would be willing to attend any treatment or education program related to sexual offending and alcohol abuse or any other treatment programs that may be deemed necessary.

- [60] Then, aggravating factors. In this case, an aggravating factor is that Mr. Florence, in committing the offence, abused a person under 18 years of age. The Criminal Code directs that in such circumstances, the court shall give primary consideration to the objectives of denunciation and deterrence of such conduct.
- [61] Mr. Florence denies and minimizes his problems with alcohol. Unless these are addressed appropriately, he has at least a moderate risk of re-offending, based on Dr. LaTorre's opinion. Although he did not force M to drink, Mr. Florence provided all the alcohol, knowing she was underage. He continued to provide her with alcohol even after it was apparent that she was quite drunk. This included giving her more Rockaberry as they were on their way to his apartment.
- [62] As a result of both her age and the large amount of alcohol she had consumed, M was highly vulnerable. Mr. Florence exploited that vulnerability. When M wanted to go back to the school to meet her brother, Mr. Florence lied to her about W being at his apartment. Because of what he said, M went with him. I do not think there can be any other conclusion but that Mr. Florence deliberately took steps to get M back to his apartment, knowing she was 15 and very drunk, so that he could have sex with her.
- [63] Moreover, because of M's age, any sexual touching was prohibited, and she could not consent to it. However, Mr. Florence's sexual touching of M was persistent and prolonged. Once Mr. Florence got M into his apartment and into his bedroom, it culminated in Mr. Florence undressing M, touching and attempting intercourse with her. Mr. Florence resists accepting full responsibility for what he did: alcohol is to blame, and M is to blame, at least a little bit. Although he has sincere regrets over how his relationship with Ms. Goldsworthy and their daughter has been affected by his actions, Mr. Florence appears to have little appreciation of how his acts affected M and her family.

7. Case Law

- [64] In support of the Crown's position, Ms. Ormiston cited: R. v. R.R.M., 2009 BCCA 578; R. v. Goodliffe, 2003 BCSC 2025, aff'd 2005 BCCA 426; R. v. Van de Wiele, [1997], 3 W.W.R. 477 (Sask. C.A.); R. v. Churchill, [1997] O.J. No. 5529 (Gen. Div.); R. v. Hughes, [1999] B.C.J. No. 32 (S.C.); R. v. Law, 2007 ABCA 203; and R. v. J.S.S., 2001 MBCA 144. Ms. Paterson for Mr. Florence did not cite any additional authority.
- [65] I will review briefly two of these cases: R.R.M., supra, and Goodliffe, supra.
- [66] In R.R.M., the offender had pleaded guilty to sexual assault of his 14-year-old stepdaughter, and was sentenced to 2 years' imprisonment and 3 years' probation. The offender was a 37-year-old aboriginal who had grown up in a First Nations community where sexual and substance abuse problems were rampant. He had a prior criminal record, dating back to 1997, when he was convicted for impaired driving and assault. A term of the probation order for the assault offence was that he undergo alcohol and drug treatment, which he did successfully. The victim had been left with significant emotional problems, while the

offender seemed to fail to appreciate the impact of his offence. He had been banished from two First Nations communities.

- [67] The main question on the appeal was whether the sentencing judge's refusal to consider the offender's banishment as a mitigating factor rendered the sentence unfit. The Court of Appeal concluded it did not. Madam Justice Smith said beginning at para. 19:
- [19] The seriousness with which society views the sexual assault of a child is reflected in the federal sentences that are generally imposed for similar offences in similar circumstances. The sentencing judge relied upon *R. v. B.S.B.*, 2008 BCSC 1526 as authority for the proposition that the range of sentence for a sexual assault involving sexual intercourse is between two and six years.

...

- [21] In *R. v. Herman*, [1994] B.C.J. No. 2770 (C.A.), this Court reduced a six-year sentence to four years, in circumstances where the 36-year-old offender had engaged in sexual intercourse with a 14-year-old victim who was four months pregnant at the time of the offence. The offender was not in a position of trust to the victim and the pre-sentence report was "very favourable". At para. 8, the Court referred to *R. v. Gracie* (1994), 31 B.C.A.C. 40, 50 W.A.C. 40 and *R. v. Prasad*, [1994] B.C.J. No. 1602, where sentences of three-and-one-half and three years, respectively, were upheld in similar but less egregious circumstances.

Madam Justice Smith continues at para. 24:

- [24] The sentencing of Aboriginal offenders for serious sexual assaults, where there is evidence that they have suffered from historical and systemic abuses, is not an easy task. This Court has observed that in sentencing Aboriginal offenders, while judges must be "sensitive to the conditions, needs and understandings of Aboriginal offenders and communities, this does not mean that sentences for such offenders will necessarily focus solely on restorative objectives or give less weight to conventional sentencing objectives such as deterrence and denunciation." See *R. v. Morris*, 2004 BCCA 305 at para. 55, 186 C.C.C. (3d) 549. Chief Justice Finch further noted at para. 53 that Gladue made clear that it was not the principles of sentence that varied in sentencing Aboriginal offenders but the application of those principles to a particular case. In *Gladue* (at para. 80), the Court further stated that:

As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or case-by-case) basis: for this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code?

- [25] This review of some of the sentencing decisions involving similar circumstances, while not determinative of the length of a custodial sentence, provides some guidance on the range of sentence from which a court may then assess any aggravating and mitigating factors. As this Court stated in *R. v. Bernier*, 2003 BCCA 134, 177 C.C.C. (3d) 137, a range of sentence is not conclusive in determining the appropriateness of a sentence. It is the individual circumstances of a particular offence and offender, and the application of the relevant

principles of sentence to those circumstances, that informs the appropriateness of the sentence.

[68] In concurring reasons dismissing the appeal, Chief Justice Finch said beginning at para. 40:

[40] Having said that, it is clear on the authorities that a custodial sentence of two years is at the low end of the range for a serious sexual assault of this nature. In *R. v. Morris*, 2004 BCCA 305, this Court said that:

[56] The fundamental principle of sentencing requires for aboriginals and all others alike, that the sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1.

[41] It appears to me, with respect, that the learned sentencing judge settled on an appropriate sentence in this case, despite the error of principle in excluding banishment from consideration.

[69] In *R. v. Goodliffe*, the Court of Appeal dismissed the offender's appeal from a sentence of 27 months, following his conviction for sexual assault. Both the victim and Mr. Goodliffe had consumed the drug GHB, but the trial judge found the Crown had failed to prove that Mr. Goodliffe gave the drug to the victim. The Court of Appeal noted that the trial judge had taken into account that, at the time of sentencing, the offender had changed his lifestyle by stopping the use of drugs and leaving the party scene. However, in weighing the factors relevant to sentencing, the trial judge considered that the gravity of the offence and the offender's denial of responsibility made the principles of denunciation and deterrence paramount over rehabilitation. The Court of Appeal noted (at para. 11) that the offender's good behaviour for the two years he had been on bail might reduce the concern over public safety and specific deterrence, but he continued to deny full responsibility for this serious offence.

[70] Mr. Florence, do you have anything to say before I pronounce sentence?

[71] THE ACCUSED: No, I don't.

[72] THE COURT: All right. You may be seated.

8. Reasons

[73] In my opinion, the circumstances of this case are such that the punitive objectives of denunciation and deterrence are very important. A significant period of incarceration is necessary.

- [74] Mr. Florence knew that M was not more than 15. He had specifically asked how old she was. He lied about his own age. He provided alcohol to her until she was drunk to the point of vomiting and passing out. He lied to her to convince her to come with him to his apartment. Knowing that she was young and also very drunk, indeed passed out on his bed and therefore very vulnerable, Mr. Florence proceeded to undress her, touch her sexually and attempt to have intercourse with her.
- [75] Mr. Florence continues to show ambivalence about his responsibility for what took place, and ambivalence concerning whether he has a substance abuse problem. Although there were and are resources available to him in the Native community to address substance abuse, Mr. Florence never used them. Despite having his parents as models of both the great harm abuse of alcohol can bring, and of individuals who have been successful in addressing this problem, Mr. Florence chose to abuse alcohol and he engages in denial of his own problem. Mr. Florence demonstrates little appreciation for the effect his actions have had on M and her family.
- [76] Based on the evidence from Dr. LaTorre, Mr. Florence is at a relatively moderate risk over the short term, and more elevated risk over the longer term, relative to other sexual offenders, of future sexual or other violent offending.
- [77] I conclude that a fit sentence in this case for this offence committed by this offender harming this victim in this community is a custodial sentence of 3 years and 4 months.
- [78] Mr. Florence has been in custody since July 9, 2009, a period of 8 months to March 9, 2010. While s. 719(3) of the Criminal Code gives the sentencing judge discretion in deciding how to treat that time, the general practice is to give credit of 2 months for each month served, since pre-sentence custody is often served in more onerous conditions and is not subject to the legislative provisions regarding parole eligibility and statutory release: see *R. v. Orr*, 2008 BCCA 76. This practice of giving credit of 2 months for each month served was recently reaffirmed by the Court of Appeal in *R. v. Aubin*, 2009 BCCA 418 and *R. v. Rufus*, 2009 BCCA 419. (I note that the Truth in Sentencing Act, which limits the amount of credit that a sentencing judge can give an offender for pre-sentencing time in custody, does not apply because Mr. Florence was charged before the amendments came into force.)
- [79] In accordance with the applicable authorities, Mr. Florence is therefore entitled to credit of 16 months and this is to be deducted from the sentence of 3 years and 4 months, with the result that his actual sentence is 2 years.
- [80] In my view, Mr. Florence's sentence must also include a period of probation, to protect the community and reintegrate Mr. Florence, and I include as part of Mr. Florence's sentence probation for 3 years. There are treatment options available to Mr. Florence in the community. By imposing the maximum probation available, Mr. Florence will be able to take advantage of these programs and hopefully address the underlying causes of his conduct and those factors that Dr. LaTorre identified as creating a moderate risk of recidivism, and be rehabilitated. He will also be able to participate in healing programs

described by Mr. Gary Florence, and which Mr. Gary Florence and his wife found very powerful and of great assistance in addressing their own alcohol abuse.

[81] Mr. Florence, if you would stand, please. I am going to read the sentence.

[82] I therefore impose the actual sentence of 2 years of imprisonment, followed by 3 years of probation.

[83] Mr. Florence, you may be seated while I read the terms of probation.

[84] In addition to the mandatory probation terms, the other terms of probation set out in the pre-sentence report are, with small modifications, reasonable and appropriate in my view. Therefore, the terms of Mr. Florence's probation will be as follows:

1. You are to report within 48 hours of your release to a probation officer at 45960 Wellington Avenue, Chilliwack, British Columbia, and thereafter as directed by your probation officer.
2. You are to reside at a residence approved of by your probation officer and not change that residence without prior approval from your probation officer.
3. You are to attend such counselling as directed by the probation officer, including sexual offender treatment and/or maintenance programs.
4. You are to participate in any psychological or psychiatric assessment as directed by your probation officer.
5. You are not to possess any weapon as that term is defined in s. 2 of the Criminal Code.
6. You shall not possess or consume any alcohol or non-prescription drugs.
7. You are to have no contact, directly or indirectly, with MV or any member of her immediate family or with PT.
8. You are not to attend at the residence, place of employment or school of MV or PT, should those become known to you.
9. You shall not be in the company of any person under the age of 16 years unless you are supervised by an adult who is previously approved in writing by your probation officer.
10. You are not to attend any public park, swimming area, school ground or playground where persons under the age of 16 years are present or can reasonably be expected to be present.
11. You are to participate in and successfully complete any substance abuse counselling or treatment program, and any other counselling or education program as may be directed by and to the satisfaction of your probation officer.

That ends the terms of the probation.

[85] I am now going to deal with the ancillary orders.

- [86] Other than certain terms of the order under s. 161 of the Criminal Code, the ancillary orders were not opposed.
- [87] Pursuant to s. 490.012(1) of the Criminal Code, where an offender has been convicted of an offence under s. 151, and on the application of the Crown, the court is mandated to make an order in Form 52 that the offender comply with the Sex Offender Information Registration Act for the period set out in s. 490.013.
- [88] I therefore order Mr. Florence to comply with the Sex Offender Information Registration Act for 20 years, pursuant to s. 490.013(2)(b) of the Criminal Code on the terms set out in Form 52 of the Criminal Code.
- [89] Having given Mr. Florence the opportunity of making submissions concerning the impact an order under the Sex Offender Information Registration Act would have upon him, I am satisfied that the impact of making the order is not grossly disproportionate to the public interest in protecting society.
- [90] I also make an order pursuant to s. 487.051(2) of the Criminal Code in Form 5.03 authorizing the taking from Mr. Florence of samples for the purpose of forensic DNA analysis by means of the investigative procedures set out in s. 487.056 of the Criminal Code.
- [91] In this case, Mr. Florence engaged in sexual acts with M without M's consent, and violated her personal and sexual integrity. An order under s. 109 of the Criminal Code is appropriate. I therefore order pursuant to s. 109 of the Criminal Code that Mr. Florence be prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for a period of 10 years after release, and from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
- [92] Under s. 161 of the Criminal Code, where an offender has been convicted of an offence under s. 151 in respect of a person who is under the age of 16 years, the court sentencing the offender shall consider making, and may make, subject to the conditions or exemptions that the court directs, an order prohibiting the offender from:
- (a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, schoolground, playground or community centre;
 - (b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; or
 - (c) using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.

- [93] The prohibition may be for life or for any shorter duration the court considers desirable and in the case of a prohibition that is not for life, the prohibition begins from the later of (a) the date on which the order is made; and (b) where the offender is sentenced to a term of imprisonment, the date on which the offender is released from imprisonment for the offence, including release on parole, mandatory supervision or statutory release. On the application of either the offender or the prosecutor, the court may vary the conditions prescribed in the order, if, in the opinion of the court, the variation is desirable because of changed circumstances after the conditions were prescribed.
- [94] In Mr. Florence's case, in the light of the pre-sentence report and Dr. LaTorre's report and evidence, the Crown seeks an order under s. 161 for a term of 5 years. The Crown submits that s. 161 is highly relevant in this case, where the events started out in a schoolyard and progressed to a park.
- [95] Ms. Paterson, on behalf of Mr. Florence, does not object to orders being made in respect of s. 161(1)(b) and (c), and does not object to a term of 5 years. However, because Mr. Florence has a young daughter, an order, without conditions, under s. 161(1)(a) could create problems and be a hardship for Mr. Florence in Ms. Paterson's submission.
- [96] In my opinion, given the circumstances in which the offence took place, an order is required under all of subsections (a), (b) and (c) of s. 161(1). I therefore order that for a period of 5 years Mr. Florence is:
- (a) prohibited from attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present or a school ground, playground or community centre, or, unless accompanied by either an adult member of his immediate family or his daughter's mother (Ms. Goldsworthy) or an adult member of Ms. Goldsworthy's immediate family, a daycare centre;
 - (b) prohibited from seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards a person under the age of 16 years; and
 - (c) prohibited from using a computer system within the meaning of subsection 342.1(2) for the purpose of communicating with a person under the age of 16 years.

Those prohibitions will be in effect for a period of five years.

[97] Those are my reasons.

"The Honourable Madam Justice E. J. Adair"

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Prepared on 29 October 2026 · Esheria