

CANADA / JUDGMENT

R. v. G.J.M.

2024 BCCA 82

COURT

British Columbia Court of Appeal

DECIDED

7 March 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCCA 82 R. v. G.J.M.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. G.J.M.,

2024 BCCA 82

Date: 20240307

Docket: CA49310

Between:

Rex

Appellant

And

G.J.M.

Respondent

Corrected Judgment: The text of the judgment was corrected
in the summary on March 15, 2024.

Restriction on publication: A publication ban has been mandatorily imposed under
s. 486.4 of the Criminal Code restricting the publication, broadcasting, or
transmission in any way of evidence that could identify a complainant or witness,
referred to in this judgment by the initials D.T.

This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Justice MacKenzie

The Honourable Justice Dickson

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Provincial Court of British Columbia, dated
July 27, 2023 (R. v. G.J.M., Port Coquitlam File 104813).

Counsel for the Appellant:

S. Elliott

Counsel for the Respondent:

M.W. James

Place and Date of Hearing:

Vancouver, British Columbia

November 28, 2023

Further Submissions Filed:

December 15, 2023 and

January 3, 2024

Place and Date of Judgment:

Vancouver, British Columbia

March 7, 2024

Written Reasons by:

The Honourable Justice Dickson

Concurred in by:

The Honourable Justice MacKenzie

The Honourable Mr. Justice Abrioux

Summary:

The Crown appeals a total sentence of two-years-less-a-day of imprisonment plus three years of probation for the respondent's repeated and prolonged sexual offending against his much younger half-sister, and possession of child pornography. According to the Crown, the judge made numerous errors in principle and imposed a sentence that is demonstrably unfit.

HELD: Leave to appeal is granted; the appeal is allowed; and the sentence is increased to four-and-one-half-years' imprisonment on the sexual interference counts and six months' imprisonment consecutive on the possession of child pornography count. The judge erroneously found the respondent's moral blameworthiness was diminished by his depression, placed him towards the lower end of the trust spectrum, and treated the disruption of his family unit as a mitigating collateral consequence. As a result, she skewed the balance of aggravating and mitigating factors unduly in his favour and failed to give proper effect to his high moral blameworthiness and the harmfulness of his offences. She also failed to impose a sentence that reflected the harm caused by the child pornography offence and misapprehended the evidence on how that offence came to light. In overall consequence, she imposed a sentence that is demonstrably unfit.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

- [1] In *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada established an analytical approach to sentencing for sexual violence against children that gives effect to its "profound wrongfulness and harmfulness": at para. 1. The Court sent a clear message: sentencing judges must do more than simply state that sexual offences against children are serious; they must impose sentences that are commensurate with their gravity: *Friesen* at para. 76. This approach responds to society's deepened understanding of the far-reaching damage caused by sexual violence to children, and places them, and the harm that they suffer, at the centre of the discussion. Its application mandates increased sentences that reflect this modern understanding and Parliament's choice to increase the sentences imposed for such crimes: *R. v. Bertrand Marchand*, 2023 SCC 26 at paras. 31-32.
- [2] The Crown seeks leave to appeal a sentence of two-years-less-a-day of imprisonment plus three years of probation imposed on the respondent for repeatedly sexually offending against his much younger half-sister over the course of a six-and-one-half-year period. According to the Crown, although the sentencing judge stated the *Friesen* principles, she failed to apply them and crafted a sentence that is demonstrably unfit. Based on the judge's findings that are untainted by error, it asks us to impose a sentence in the order of five years' imprisonment for the sexual interference counts, together with a sentence of six-months' imprisonment consecutive for the possession of child pornography count.
- [3] I agree with the Crown that the judge committed errors in principle and imposed a demonstrably unfit sentence. For the reasons that follow, I would grant the Crown leave to appeal the sentence, allow the appeal, and impose a term of four-and-one-half-years' imprisonment on the sexual interference counts and six months' imprisonment consecutive for possession of child pornography.

Circumstances of the Offences

- [4] The respondent is 11 years older than his half-sister, D.T. He began sexually abusing her when he was approximately 18 years old and she was approximately seven years old. The abuse continued until D.T. was approximately 13. Although she could not say how often the respondent sexually abused her, D.T. estimated it initially occurred at least twice a month and decreased in frequency as she got older. The abuse happened in the family home and the home of an aunt.
- [5] The sexual abuse included the respondent undressing D.T. and touching her vagina, forcing her to masturbate him and watch him masturbate, and forcing her to fellate him until he ejaculated in her mouth. D.T. told the respondent that she did not want him to ejaculate, but he continued despite her objections and tried to normalize the abuse by telling her that he was doing the same thing with another family member. At one point, D.T. saw the respondent recording her on his phone as she performed oral sex on him.
- [6] When D.T. was approximately 13, she began to recognize the wrongfulness of the respondent's behaviour through her interactions with peers and social media. She confronted the respondent and disclosed the abuse to their family. In 2020, at the behest of family members, the respondent turned himself in to police and provided a statement in which he admitted the sexual abuse, although he minimized its degree and duration. D.T. also provided a statement to police describing the respondent's crimes.

Circumstances of the Offender

- [7] The respondent's mother immigrated to Canada when he was eight years old, leaving him behind in the Philippines with extended family. Her goal was to sponsor him and his younger brother to join her once she was settled, which is what happened when the respondent was 13. He is currently a permanent resident of Canada, but not a Canadian citizen.
- [8] The respondent reported that his childhood in the Philippines was very difficult. He does not know the identity of his father, and says he was bullied and sexually assaulted by an older cousin who groped him on a few occasions during "tickle fights". He describes sharing a close bond with his grandmother, but not with other members of his family, and generally feeling worthless, unwanted, and unloved.
- [9] After arriving in Canada, the respondent moved between the homes of his mother and his aunt, attending school, making friends, and graduating from Grade 12 without difficulty. Thereafter, he maintained somewhat steady employment and normal sexual relationships until D.T. confronted him about the sexual abuse. His long-term girlfriend ended their relationship when she learned of his crimes.

- [10] When he spoke to the police, the respondent described what he did to D.T. as "uncalled for" and stated that he wanted to stop himself, but could not. He also admitted to video-recording D.T. performing oral sex on him, but said that he had deleted the video. When the police asked the respondent why he committed the crimes, he said it was because he was lonely and had watched too many inappropriate movies.
- [11] As noted, the respondent initially minimized his crimes when he made his police statement. However, he later acknowledged to a psychologist, Duncan Greig, that everything D.T. stated had happened, and estimated she performed oral sex on him approximately two or three times per month. He also offered an unusual explanation that Mr. Greig characterized as straining credulity, namely, that he did not know sexual contact between family members was inappropriate until he was 20 years old and had already sexually offended against D.T. As Mr. Greig observed in an assessment report filed at the sentence hearing, this explanation was inconsistent with the respondent's statement to police that he had tried to stop, but could not.
- [12] After his crimes came to light, the respondent reported feeling guilty, depressed, and shunned by his family. He was told to leave the family home, his relationship with his mother deteriorated and his relationship with his aunt became strained. His relationship with his siblings, cousins, and step-father came to an end. In 2022, he made a serious suicide attempt, which he stated was the third time in his life that he had tried to kill himself. He was diagnosed by a psychiatrist with a major depressive disorder with possible traits of antisocial, borderline, histrionic and/or narcissistic personality disorder, and hospitalized for approximately one month.
- [13] The respondent has no criminal record. At the time of sentencing, he was 29 years old, living alone, and unemployed. His mother supported him financially. Following his hospitalization for the suicide attempt, he described pervasive feelings of emptiness, anxiety and suicidal ideation to his then-treating psychiatrist. However, when Mr. Greig interviewed him shortly before the sentencing hearing, the respondent reported that he was no longer taking psychiatric medication or receiving psychiatric care.

Sentencing Hearing

- [14] The respondent pleaded guilty to three counts of sexual interference and one count of possession of child pornography. Together, the charges spanned a six-and-one-half-year period from July 2011 to December 2017. The sentencing hearing was held in June 2023. The Crown sought a global sentence of eight years' imprisonment. The defence sought a two-year-less-a-day conditional sentence order.

- [15] D.T. did not provide a victim impact statement for the sentencing hearing. Crown counsel described her as an extremely shy individual who found the idea of making a statement intimidating, and stated that D.T. wanted to keep her feelings to herself. However, she noted, in her police statement D.T. said that the sexual abuse did "a big number on my life", and expressed anger at the respondent for attempting to minimize the duration of the abuse.
- [16] The respondent's mental health was a significant focus at the sentencing hearing. In his initial assessment report, Mr. Greig opined that the respondent's offences against D.T. "were primarily motivated by desire for sexual arousal and gratification". He noted that the respondent regularly cared for D.T. in their shared family home, and stated that spending time alone with her likely provided him with "some of the attention/affection that he had long been craving" and he might have seen their interactions "as first opportunities to explore/experience sexual play with another person". He also stated that cognitive distortions such as "I never forced her or anything" and "I always asked" likely helped the respondent to rationalize his behaviour, and that he posed "a low risk to sexually re-offend over the next 6 to 12 months". As to the respondent's understanding of the impact of his offences on D.T., Mr. Greig noted that he acknowledged his actions had "left a scar that will never go away" and said he wished he could apologize to D.T., but it was "too hard".
- [17] Mr. Greig went on to say that it was apparent "[the respondent] knows that what he did was wrong, and he is extremely remorseful." In his opinion, "experiencing the stress and humiliation of being arrested, charged, convicted, and (most of all) confronted and shunned by his family will sufficiently deter [the respondent] from re-offending". Based on his risk assessment, and regardless of whether the respondent was sentenced to incarceration or community supervision, Mr. Greig did not consider any special intervention or supervisions strategies necessary to mitigate his risk of future sexual violence. Nevertheless, he observed, "the Court may wish to have [the respondent] participate in sex offender treatment", and stated that "[i]f this is the case" important topics to address would include "developing [the respondent's] insight into the cognitive distortions that facilitated his commission of the offences, as well as coping with his shame".
- [18] In his initial assessment report, Mr. Greig also observed there was "clear evidence of past and recent major mental illness as well as suicidal (but not violent) ideation". In response to that observation, the defence requested and the judge commissioned a second report for the purpose of assessing whether there was any connection between the respondent's mental health and his offending, and, if so, the nature of the connection.
- [19] In his second report, Mr. Greig summarized the respondent's self-reports of life-long depression, loneliness, and self-hatred, and noted they were inconsistent with his long-time friend's statements that he presented in high school "as an outgoing, friendly, likeable person who was 'always happy' a well-liked member of a large group of friends". In addition, Mr. Greig reviewed the diagnoses of the psychiatrist who treated the respondent following his 2022 suicide attempt, and commented that he appeared "somewhat immature and naïve for his age".

[20] Mr. Greig described formulating opinions about the connection between the respondent's mental health functioning at the time of the offences and the offences themselves as "challenging" due to the lack of information upon which to base such opinions and the respondent's claims that he did not know having sexual contact with a seven-year-old half-sibling was wrong. He opined that if the respondent knew his actions were wrong, then his mental health functioning could have been an important contributing factor. For example, he stated:

it should be noted that experiencing child sexual abuse has long been shown to be associated with future sexual offending. However [the respondent] has repeatedly asserted that he did not consider his cousin's behaviour (when [the respondent] was between 5 and 9 years old) to have been distressing or sexually motivated, let alone abusive, until he was approximately 20 years old. This was after he began sexually abusing D.T. I see little reason for him to be untruthful about this. It is possible that his sexual abuse experiences did impact him in some way prior to age 20 but he did not recognize this (e.g., by normalizing close body contact, groping, "grinding" between a child and an adult family member), but this cannot be known. I will note that research indicates that victims of child sexual abuse may be at higher risk of future sexual offending because their experiences may cause them to develop distorted attitudes and beliefs and sex and power, and they normalize sexual contact between adults and children. Child sexual abuse victims also may develop emotional regulation difficulties and difficulties forming healthy relationships, which, too, can lead to increased risk of sexual offending. However, again, [the respondent's] account would suggest his abuse did not affect him until age 20.

[21] Mr. Greig also opined that "[a]s a result of his early childhood experiences, [the respondent] may have developed intimacy deficits, depressive symptoms, insecurity, and low self-esteem". In addition, he stated, "it is reasonable to infer that these problems impacted his decision-making", and "[i]n a depressed state, he may have been motivated to seek distraction and relief by engaging in sexual behaviour". Further, he stated, "[t]here is also a possibility that because of his intimacy deficits, he was motivated to seek intimacy and psychological and/or physical/sexual affection from a familiar and non-threatening other", his "depressive symptoms may also have disrupted/destabilized his decision-making by impairing his ability to make reasoned judgments", and "[h]e may have made decisions more impulsively and with less consideration for the potential harms or consequences".

[22] At the end of the section of his report headed "Opinions Regarding Connection Between Mental Health & Offences", Mr. Greig emphasized his uncertainty as to the accuracy of the opinions expressed:

It is important to note that I do not know the accuracy of the formulation provided just above. The factors and mechanisms proposed above are hypotheses that only [the respondent] (and perhaps only through treatment) can confirm or disconfirm. There are other possible explanations for his behaviour. However, with the information that is available to me, the above represents a reasonable conceptualization of how his mental health might have contributed to his offences. Ultimately, based on the information that I have, the best opinion that I can offer is

that [the respondent's] depressive symptoms quite possibly influenced his decisions to offend against D.T.

[Underlined emphasis added; italicized emphasis in original.]

- [23] As to the respondent's current mental health functioning, Mr. Greig noted that his depressive symptoms and suicidal ideation had returned, and stated he needed psychiatric treatment to address those issues.
- [24] Crown counsel focused on the principles articulated in Friesen in her sentencing submissions. Relying primarily on R. v. Badhesa, 2019 BCCA 70 and R. v. Hagen, 2021 BCCA 208, defence counsel focused on the respondent's mental health challenges, contending that they caused or contributed to the commission of the offences and thus attenuated his moral blameworthiness. He also emphasized the respondent's youth, lack of a criminal record, and exposure to immigration and collateral consequences.

Reasons for Sentence

- [25] The judge began her reasons by reviewing the circumstances of the offences and the manner in which they came to police attention. She stated that it was difficult to know the long-term impacts of the abuse on D.T., but recognized even a single act of sexual violence can adversely impact the course of a child's life, citing Friesen. She also noted that D.T.'s mother was unable to describe the impact of the respondent's crimes on D.T., and felt stuck in the middle between her two children.
- [26] After outlining the principles of sentencing, including the principles articulated in Friesen, the judge summarized the submissions of the parties and the cases upon which they relied. Then she reviewed the personal circumstances of the respondent, including his statements to Mr. Greig regarding his life experiences and mental health.
- [27] Under the heading "Mental Health Considerations and Risk Assessment", the judge observed that those who commit sexual crimes against children are likely to be found to have a high degree of moral blameworthiness. However, she stated, citing Friesen, an offender's personal circumstances may impact their offending behaviour so as to reduce their overall culpability:
- [114] Two such circumstances were discussed by the Court in Friesen. First, at para. 91, the Court noted that offenders who suffer from mental disability and cognitive impairments "will likely have reduced moral culpability" for their sexual offending. Second, the Court further noted, at para. 92, that "systemic and background factors" may also have a "mitigating effect" in reducing an Indigenous offender's overall culpability even in cases involving sexual crimes against children.
- [28] The judge also cited this Court's decisions in Badhesa and Hagen, which identify the need for "detailed and specific" evidence to assist a sentencing judge in understanding the impact of mental health issues on an offender's moral culpability. Then she discussed Mr. Greig's

findings, and observed that his opinions were qualified in light of the limitations associated with the respondent's self-reporting. However, she stated, "[d]espite these limitations, Mr. Grieg provides several comments in his second report dated June 2, 2023 (Report #2) that provide the linkage between [the respondent's] longstanding mental health struggles and his sexual offending" [Emphasis added].

[29] The judge reviewed Mr. Greig's reports in detail. Based on that review, she found that the respondent's moral culpability was "reduced somewhat" by his childhood experiences and mental health:

[126] Mr. Grieg opines that [the respondent's] depressive symptoms may also have "disrupted/destabilized his decision-making, by impairing his ability to make reasoned judgments," or caused him to make decisions more impulsively. This opinion lends support the defence submission that [the respondent's] depression and childhood experiences of neglect and sexual abuse influenced his offending behaviours towards the victim.

[127] In sum, Mr. Grieg opined:

Ultimately, based on the information that I have, the best opinion I can offer is that [the respondent's] depressive symptoms quite possibly influenced his decision to offend against D.T. [original emphasis]

[128] Although Mr. Grieg's opinions were qualified due to the limitations of the information he had upon which to formulate his opinions, I am satisfied that [the respondent's] moral culpability for his sexual offending is reduced somewhat by his own childhood experiences with sexual abuse and neglect and by his longstanding and untreated depression. This is a factor that I will consider in determining a fit sentence on these charges.

[Emphasis added.]

[30] Next, the judge discussed the issue of collateral consequences. She noted that collateral consequences may be accounted for as a personal circumstance of the offender, that they are neither aggravating nor mitigating factors, and that they must not be allowed to dominate or skew the sentencing process, citing *R. v. Pham*, 2013 SCC 15. She found that the respondent was at high risk of deportation to the Philippines, which she described as a collateral consequence that will have a profound and negative impact on his future.

[31] Turning to aggravating and mitigating factors, the judge noted that the respondent's family relationship with D.T. was an aggravating factor. The same was true of his abuse of a position of trust, the significant impact of his offences on D.T., and the duration, frequency and location of the offences, which he committed in her family home.

[32] As to mitigating factors, the judge said this:

[137] Both Crown and defence agree there are significant mitigating factors in this case. At the time the offending began, [the respondent] was a youthful first time offender.

- [138] [The respondent] turned himself in to police, cooperated with the police in giving a statement, and pleaded guilty. Without his cooperation, the full extent of [the respondent's] offending (including the circumstances in relation to the possession of child pornography charge) would not have come to light given the very young age of the victim.
- [139] He has complied with all court conditions of his bail. There has been no further offending since 2017.
- [140] He entered a guilty plea at an early stage in the proceedings and spared the victim from having to testify at trial. In the circumstances of this case, this is a significant mitigating factor.
- [141] Remorse is a relevant mitigating factor in sentencing
- [142] [The respondent] has shown his remorse through his guilty plea and his acceptance of full responsibility for his actions. In his PSR interview, he has shown insight into his offending by acknowledging that his behaviour "will leave scars" on D.T. for the "rest of [her] life". Unfortunately, [the respondent's] remorse and self-loathing led to an almost fatal attempt at suicide.
- [143] [The respondent] read out in court a written letter of apology he prepared for the victim, his family, and the Court. The letter was sincere, heartfelt, and acknowledged the harm he caused to the victim and his family.
- [144] In terms of collateral consequences of his offending, [the respondent] has lost many important relationships because of his offending, including relationships with his immediate and extended family, and a long term girlfriend with whom he cared about a great deal, and he is likely to be deported to the Philippines.
- [Emphasis added.]
- [33] The next section of the reasons is headed "Application of the Analytical Framework in Friesen in this Case". Under this heading, the judge noted Mr. Greig's opinion that the respondent had a low risk of sexually re-offending for the next 6-12 months and would benefit from psychiatric treatment. She also noted that the respondent was "a trusted adult as a much older adult brother to D.T.", which elevated his degree of moral blameworthiness, but stated that, unlike a parent or grandparent, he fell "towards the lower end of the 'spectrum' of trust relationships". As to the duration and frequency of the offending, she stated:
- [155] At paras. 131-133, the Court in Friesen notes that the frequency and duration of sexual violence against a child can significantly increase the harm to the victim and directs that higher sentences should be imposed where the abuse is committed on multiple occasions and for longer period of time (at para. 133).

[156] In this case, [the respondent] minimized the duration of his sexual offending in his first assessment interview with Mr. Grieg. At p. 12 of Report #1, [the respondent] reports that his offending did not persist for longer than a year, yet also stated to Mr. Grieg that, "everything D.T. said happened" (p. 12). In any event, [the respondent] has acknowledged responsibility for his sexual offending and pled guilty to three counts of sexual interference that occurred multiple times over a six year period.

[157] There is no question D.T. has endured significant harm as a result of this abuse. Indeed, D.T. has stated that [the respondent's] sexual offending did "a number on my life".

[Emphasis added.]

[34] After noting the age of the victim, the degree of physical interference, and the absence of consent, the judge completed her analysis under the heading "Sentence". She discussed the general rule regarding concurrent and consecutive sentences and the respondent's moral blameworthiness, which she characterized as "partly diminished" by his difficult childhood and depression.

[162] I find that [the respondent's] moral blameworthiness for his sexual offending is partly diminished as a result of his difficult childhood in the Philippines, including his own disturbing experiences as a victim of childhood sexual trauma, and by his longstanding and persistent struggles with depression. This finding by no means lessens the gravity of the offences, nor the harm caused to D.T.

[Emphasis added.]

[35] The judge went on to address the parties' competing positions, both of which she rejected. In rejecting the Crown's recommendation of an eight-year custodial sentence, she characterized its position as "unduly harsh" and repeated her view that the respondent's moral culpability was reduced. In rejecting the defence recommendation of a conditional sentence order, she stated that such a sentence would not be fit and proportionate in the circumstances. She also stated that sex offender programming, psychiatric treatment, and counselling would be "integral to [the respondent's] reintegration into the community", and found his willingness to participate weighed in favour of a reduced term of imprisonment:

[163] The Crown's sentencing recommendation for an aggregate eight year custodial sentence in this case is unduly harsh and overlooks the unique circumstances of this offender, including his reduced moral culpability, and the mitigating factors and collateral consequences present in this case.

[164] Notwithstanding [the respondent's] unique circumstances, I have also concluded that a 24 month conditional sentence followed by a three year term of probation as proposed by the defence would not satisfy the primacy of the sentencing objectives of deterrence and denunciation given the gravity of the offences, the frequency and duration in which the sexual offending occurred, and in considering the profound impact these offences have on a very young and vulnerable victim. In my opinion, a conditional sentence would not be a

fit and proportionate sentence in the circumstances of this case and that a custodial sentence is required.

[165] [The respondent] is willing to participate in sex offender programming, psychiatric treatment, and counselling. In my view, such programming will be integral to [the respondent's] reintegration into the community. Friesen recognizes that an offender's willingness to participate in treatment can weigh in favour of a reduced term of imprisonment and that a community environment is likely more favourable to facilitate treatment for [the respondent]. This is one such case where a reduced custodial sentence is appropriate given the current state of [the respondent's] mental health, ongoing suicidal ideation, and need for treatment.

[166] After considering [the respondent's] unique circumstances, and his prospects for rehabilitation, I have concluded that he will require ongoing community supervision after completion of his custodial sentence. I agree that a three year term of probation is appropriate in this case.

[Emphasis added.]

[36] The judge found that a fit and appropriate sentence on the sexual interference counts was 24 months-less-a-day of imprisonment, to be served concurrently, followed by a three-year term of probation. In addition, she found, a six-month jail sentence, to be served consecutively, was fit. However, taking into account the totality principle, she concluded that a term of imprisonment of 24 months-less-a-day on all counts, followed by a three-year term of probation, was a fit and proportionate aggregate sentence.

On Appeal

Position of the Crown

[37] Crown counsel submits the judge erred in principle by improperly discounting aggravating factors and unreasonably crediting the respondent with mitigating circumstances. For example, she says, the judge erroneously: found the respondent's moral culpability was mitigated because it was "quite possible" his depression influenced his actions; placed him towards the lower end of the trust spectrum; and treated the disruption of his family unit as a mitigating collateral consequence. In addition, she says, the judge focussed on the respondent's guilty plea as an acknowledgement of responsibility rather than giving effect to his greater culpability for multiple sexual offences. Moreover, she purported to acknowledge the unique harms caused by child pornography by imposing a consecutive sentence, then erased it by misapplying the totality principle, and misapprehended the evidence in finding that offence would not have come to light without the respondent's cooperation with the police.

- [38] According to the Crown, in cumulative effect, these errors led the judge to place undue emphasis on the respondent's personal circumstances and craft a sentence that was not equal to the gravity of his crimes or consistent with the harm-based approach mandated by Friesen. In other words, Crown counsel argues, although the judge stated the offences were serious, the sentence that she imposed did not reflect the normative character of the respondent's actions and their consequential harms. On the contrary, the sentence was demonstrably unfit.
- [39] In Crown counsel's submission, a substantial penitentiary sentence was plainly required to reflect and give effect to the profound wrongfulness and harmfulness of the respondent's crimes against his vulnerable, much younger sister. She says that a sentence of two-years-less-a-day for the serious sexual abuse of a young child over a six-and-one-half-year period during her formative years undermines the credibility of the criminal justice system. This is particularly so, she says, bearing in mind the Supreme Court of Canada's guidance in Friesen, and the sentences imposed for comparable crimes since Friesen was released.

Position of the Defence

- [40] Defence counsel responds that the judge considered and balanced the mitigating and aggravating factors, and ultimately arrived at a fit sentence. In his submission, to the extent that she may have erred, it did not have an impact on the sentence, and hence the appeal should be dismissed.
- [41] In support of his submission, defence counsel emphasizes the judge found the respondent fell towards the lower end of the trust spectrum, not at the lower end, and made that finding in direct comparison to a parent or grandparent. She also recognized that many very harmful offences occurred over a prolonged period, although their exact frequency was unknown. He says that, on a fair reading, the judge's comments at para. 156 on the respondent's guilty plea to offending over a six-year period were intended simply to confirm the prolonged duration of the offences. Moreover, he says, the judge correctly noted that collateral consequences are neither aggravating or mitigating factors under the heading "Collateral Consequences". Although she also commented on collateral consequences under the heading "Aggravating and Mitigating Factors", in his submission this was not a material error that impacted the sentence.
- [42] Defence counsel goes on to submit that Mr. Greig's reports provided a sufficient evidentiary basis for the judge's conclusion that the respondent's mental health impacted his offending on a balance of probabilities. For example, he says the respondent was sexually abused as a youth, struggled with past and recent major mental illness, and experienced symptoms and deficits that may have motivated him to seek intimacy with a non-threatening other and disrupted his decision-making when he offended against D.T. Importantly, defence counsel says, the judge was aware of the limitations in Mr. Greig's opinions when she found the respondent's moral culpability was reduced somewhat by his childhood experiences and longstanding depression, and that he presented a low risk of re-offending. In his

submission, she made no palpable and overriding errors in her findings, and they are entitled to appellate deference.

- [43] Furthermore, defence counsel says, the judge was entitled to reduce the total sentence of 30 months' imprisonment to two-years-less-a-day on a totality analysis. In his submission, a twenty percent reduction to address the totality principle does not fall outside the norm. According to the defence, to the extent the judge erred in finding the possession of child pornography offence would not have come to light but for the respondent's cooperation, that error did not have a material impact on her totality analysis.
- [44] Ultimately, defence counsel submits, the judge crafted and imposed a sentence that was not demonstrably unfit in all of the circumstances. As the Court held in *Friesen*, he says, there is no set sentencing range for sexual interference, and the case law since *Friesen* has continued to include sentences of two-years-less-a-day for such offences. For example, defence counsel notes: in *R. v. Alfred*, 2021 BCCA 71, the Indigenous offender was sentenced to nine months' imprisonment for sexual interference, including sexual intercourse and a few instances of sexual touching; in *R. v. L.S.N.*, 2020 BCCA 109, on appeal an Indigenous offender was sentenced to two-years-less-a-day for sexually offending against his 11-year-old stepdaughter; and, in *R. v. T.J.H.*, 2023 YKCA 2, an Indigenous offender pleaded guilty to two counts of sexual interference against two complainants and a Crown appeal of a conditional sentence order was dismissed.
- [45] In sum, defence counsel emphasizes that sentencing is a highly individualized process and every case is different. He concedes the sentence imposed in this case can fairly be characterized as low, but argues that does not make it demonstrably unfit. In his submission, Parliament has provided front-line judges with considerable discretion to determine the degree and type of punishment required in cases involving sexual interference, the standard of review is highly deferential, and conditional sentence orders and provincial jail time have been imposed since *Friesen* was decided. All things considered, he contends that, although we might have imposed a different sentence, the judge was entitled to sentence the respondent as she did, and the appeal should be dismissed.

Discussion

Standard of Review

- [46] As defence counsel correctly observes, the standard of review on sentence appeals is highly deferential. This standard is intended to ensure that sentencing judges can individualize the method and outcome of the sentencing process. Given their direct exposure to the evidence and front-line experience, sentencing judges are best positioned to determine a just and appropriate sentence that is consistent with the objectives and principles of sentencing. Accordingly, an appellate court may only interfere with a sentence if the judge made an error in principle that materially affected the sentence, or the sentence is demonstrably

unfit: R. v. Lacasse, 2015 SCC 64 at para. 11; Friesen at paras. 25-26, 38.

- [47] There is a high threshold for appellate interference with a sentence based on demonstrable unfitness. In particular, a sentence is unfit if it is "clearly unreasonable", "clearly excessive or inadequate", or represents a "substantial and marked departure": Lacasse at para. 52.
- [48] An error in principle may include "an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor": Friesen at para. 26. However, an appellate court may not interfere with a sentence simply because it would have weighed the relevant factors differently. An error in principle in the weighing of relevant factors will only be established if the sentencing judge exercised their discretion unreasonably by not giving enough weight to one relevant factor or overemphasizing another relevant factor: Lacasse at para. 49; Friesen at para. 26.
- [49] Where a sentence is demonstrably unfit or the sentencing judge made a material error in principle, an appellate court must determine a fit sentence. In doing so, it must apply the principles of sentencing afresh, with due deference to the sentencing judge's findings of fact and identification of aggravating and mitigating factors to the extent that they are not tainted by error: Friesen at paras. 27-28.

Did the judge make a material error in principle or impose a demonstrably unfit sentence?

- [50] In my view, the judge made several errors in principle that materially affected the sentence. Specifically, and most significantly, she erred in finding the respondent's moral blameworthiness was diminished by his long-standing depression, and placing him towards the lower end of the trust spectrum. She also erred in treating the disruption of his family unit as a mitigating collateral consequence of his offending. As a result, the judge skewed the balance of aggravating and mitigating factors unduly in favour of the respondent, and failed to give proper effect to his high moral blameworthiness and the profound harmfulness of his offences. She erred further in failing to impose a sentence that reflected the unique harms caused by the child pornography offence, and misapprehended the evidence on how that offence came to light. In cumulative consequence, she imposed a sentence that is demonstrably unfit.
- [51] In R. v. C.K., 2023 BCCA 468 at para. 51, this Court affirmed the importance of prioritizing the sentencing objectives of denunciation and deterrence in cases involving child sexual offences. Quoting from R. v. Bissonnette, 2022 SCC 23, Justice DeWitt-Van Oosten explained that a sentence is the means by which society communicates its moral values, condemns the offence committed, and punishes the offender in a just manner in light of their moral blameworthiness and the gravity of the offence. She emphasized the need to impose sentences that account for the predictably far-reaching damage that sexual violence causes to children, their families, and their communities, thus impacting both the gravity of the offence and the degree of responsibility of the offender. She also noted that focussing excessively on an offender's personal circumstances may result in a skewed proportionality analysis, an underestimation of the wrongfulness and harmfulness of the offences, and a

failure to comport with the Friesen-mandated approach.

Moral Blameworthiness and Mental Health

- [52] The extreme wrongfulness and harmfulness of child sexual offences were clearly explained in Friesen. As the Court stated, such conduct "is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child" and offenders "usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child": at para. 88. Like all forms of sexual violence, child sexual offences "are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender -- the offender is treating the victim as an object and disregarding the victim's human dignity": at para. 89. Moreover:
- [90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable (R. v. Morrison, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 153). As L'Heureux-Dubé J. recognized in R. v. L.F.W., 2000 SCC 6, [2000] 1 S.C.R. 132, "[a]s to moral blameworthiness, the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions" (para. 31, quoting from R. v. L.F.W. (1977), 155 Nfld. & P.E.I.R. 115 (N.L.C.A.) at para. 117, per Cameron J.A. ("L.F.W. (C.A.)")). Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires (Woodward, at para. 72) ...
- [53] Nevertheless, relevant factors that may reduce an offender's moral culpability must be accounted for when crafting a sentence for child sexual violence. For example, as the Court observed in Friesen, citing R. v. Scofield, 2019 BCCA 3 and R. v. Hood, 2018 NSCA 18, "offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability": at para. 91. In Scofield, this Court increased a conditional sentence order from six months to one year in a case where a severely cognitively impaired 22-year-old offender pleaded guilty to having unprotected sexual intercourse with two 15-year-old girls, both of whom participated willingly after meeting him on the Internet. In Hood, the Court dismissed a Crown appeal from a 15-month conditional sentence order imposed in a case where a teacher in the throes of a severe manic episode associated with a then-undiagnosed bipolar disorder engaged in oral sex with a 15-year-old former student and sent sexual texts to another former student, then aged 17.
- [54] As I have explained, the judge referred to Friesen in her analysis of the respondent's moral blameworthiness. To repeat, at para. 114 of her reasons she stated "at para. 91 [of Friesen], the Court noted that offenders who suffer from mental disabilities and cognitive impairments 'will likely have reduced moral culpability' for their sexual offending". However, that is not what the Court said. Rather, the Court observed that an offender's moral culpability will likely be attenuated by mental disabilities that impose serious cognitive limitations, citing Scofield and Hood as examples. Those observations align with this Court's

guidance in *Badhesa* and *Hagen*. They do not suggest the mere presence of a mental disability or disorder will likely have that effect.

- [55] In *Badhesa*, the offender beat his mother to death and viciously assaulted his wife while experiencing an acute episode of psychotic depression and extreme intoxication. At the sentence hearing, a psychiatrist testified that his depression and alcohol consumption were "meshed" in a "chicken-and-egg" relationship. In that context, this Court explained that when imposing sentence in cases involving mental illness, a judge must determine whether it is more likely than not that the mental illness caused or contributed to the commission of the offence, including in relation to self-induced intoxication. Citing *R. v. Ayorech*, 2012 ABCA 82 and *R. v. Ramsay*, 2012 ABCA 257, we also explained that "[i]mpaired reasoning, delusional disorders and other compromised mental conditions distinguish those afflicted from ordinary, fully accountable offenders" and "a more lenient disposition than would otherwise be called for" may be appropriate for an offender "found to be criminally responsible, but suffering from a serious mental illness or disability": at para. 40.
- [56] Like the offender in *Badhesa*, the offenders in *Ayorech* and *Ramsay* suffered from severe mental illness or cognitive deficits that contributed materially to the commission of their offences, which diminished their moral blameworthiness. In *Ayorech*, the offender suffered from a developmental disorder and schizophrenia; in *Ramsay*, Fetal Alcohol Spectrum Disorder. These disorders manifestly interfered with the offenders' ability to reason and compromised their volitional and decision-making capacity. As this Court explained in *Hagen*, "cognitive impairment or mental health issues shown to affect an offender's capacity to control their impulses or appreciate the seriousness of their conduct or its risk" may attenuate their moral culpability: at para. 43.
- [57] The respondent's long-standing depression was of a distinctly different order of magnitude. Although undoubtedly challenging, it did not affect his capacity to finish high school or work regularly until after the offences came to light. Nor was there proof that because of his depression the respondent could not control himself sexually or appreciate the seriousness and harmfulness of failing to do so.
- [58] In *Badhesa*, we emphasized that "[g]eneralizations are insufficient" to establish a link between a mental illness or cognitive deficit and offending conduct that attenuates an offender's moral culpability: at para. 43. As repeated in *R. v. Nystrom*, 2023 BCCA 232, detailed and specific evidence is necessary:
- [22] Sentencing judges must consider evidence of the nature and magnitude of the disorder, determine its overall role in the offending conduct, and be satisfied on a balance of probabilities that the disorder caused or contributed to the commission of the offence. Detailed and specific medical evidence is necessary to properly understand the relationship between the disorder and the offending conduct; generalized evidence is not sufficient [citations omitted].

- [59] There was no such evidence in this case. In his first report, Mr. Greig opined that the respondent's offences were "primarily motivated by desire for sexual arousal and gratification", and he knew that what he did was wrong. When asked to opine on whether there was any connection between the respondent's mental health and his offending, Mr. Greig was admirably frank: the most he could say was that, if the respondent knew his actions were wrong, his mental health "might have contributed to his offences" and his depressive symptoms "quite possibly influenced his decision to offend". However, he acknowledged, he could not confirm the accuracy of his "conceptualization of how [the respondent's] mental health might have contributed to his offences".
- [60] The evidence of a material connection between the respondent's mental illness and his offending conduct was unlike that in cases such as Scofield, Hood, Badhesa, Ayorech and Ramsay. Contrary to the judge's conclusion, Mr. Greig's general observations and heavily qualified hypotheses did not provide an evidentiary basis upon which a material "linkage between [the respondent's] longstanding mental health struggles and his sexual offending" could reasonably be found on a balance of probabilities. It follows that the judge erred in concluding otherwise, and finding the respondent's long-standing depression diminished his moral blameworthiness.

Position of Trust

- [61] Pursuant to s. 718.2(a)(iii) of the Criminal Code, the abuse of a position of trust is an aggravating factor for purposes of determining a fit sentence. Breaches of trust are likely to increase the harm done to the victim, and thus the gravity of the offence and the degree of responsibility of the offender. However, as stated in Friesen, trust relationships arise in a wide range of circumstances, and are located along a so-called "trust spectrum". As also stated, "[a] child will likely suffer more harms from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender such as those [situations] involving family members, caregivers, teachers, and doctors, to mention a few": Friesen at paras. 125-126.
- [62] As defence counsel submits, the respondent did not occupy the same place on the spectrum as a parent or grandparent. However, in my view, the judge erred in finding that he fell "towards the lower end of the 'spectrum' of trust relationships" vis-à-vis D.T. I agree with the Crown that this finding was palpably wrong and unreasonable.
- [63] The respondent's role as D.T.'s much older adult brother and regular caregiver placed him a position of high trust, and D.T. in a position of profound vulnerability and dependence. Those respective positions enabled the respondent to exploit and victimize D.T. in her family home, where she should have been safest. I agree with the Crown that the respondent's multiple egregious breaches of the high trust position he occupied in relation to his much younger sister significantly increased the degree of his moral blameworthiness.

Other Material Errors

- [64] Under the heading "Duration and frequency of the offending", the judge noted that the respondent minimized the duration of his offending in his first interview with Mr. Greig, but also admitted that "everything D.T. said happened". She went on to say "[i]n any event, [the respondent] has acknowledged responsibility for his sexual offending and pled guilty to three counts of sexual interference that occurred multiple times over a six year period". I accept that these statements, read in context, simply reflect the judge's acknowledgement (in words) of the multiple nature and prolonged duration of the respondent's offences. However, the sentence that she imposed failed to reflect and give full effect to his increased culpability for sexually offending against D.T. many times for many years.
- [65] The judge also erred by treating the disruption of the respondent's family unit as a mitigating consequence of his offending. Like his depression, his social isolation was an unfortunate personal circumstance. However, the respondent's damaged family relationships were the entirely predictable result of his offences, which rendered his family members, particularly his mother, his secondary victims: Friesen at paras. 62-63. In my view, the corresponding negative effect of their victimization on the respondent was not a mitigating consequence of his crimes.
- [66] The judge erred further by misapprehending the evidence in finding that the possession of child pornography offence would not have come to light but for the respondent's cooperation with police. The evidence was clear: D.T. reported that offence herself when she made her police statement. Moreover, the judge purported to acknowledge the unique harm caused by the child pornography offence by imposing a consecutive sentence, then reduced an already low sentence based on the totality principle, thus failing to give effect to the separate harm caused by the child pornography offence and the respondent's overall moral blameworthiness: *R. v. Abrosimo*, 2007 BCCA 406 at para. 32; *R. v. Somers*, 2021 BCCA 205 at paras. 41-48.

Demonstrably Unfit Sentence

- [67] The foregoing errors all tainted the judge's proportionality analysis. As a result, it was unduly skewed in favour of the respondent. Although the judge stated the Friesen principles, she failed to apply them, and focussed instead on the respondent's personal circumstances, which overwhelmed her analysis. However, an offender's personal circumstances necessarily play a reduced role in sentencing for child sexual violence due to the need to prioritize the principles of denunciation and deterrence: *Nystrom* at para. 50.
- [68] The judge did not prioritize the principles of denunciation and deterrence, as mandated by Friesen. Consequently, the sentence she crafted failed to give full effect to the respondent's moral blameworthiness and the profound harmfulness of his multiple egregious crimes.

- [69] In my view, a term of two-years-less-a-day of imprisonment plus three years of probation for repeated, invasive sexual offences committed over a prolonged period against the respondent's much younger sibling in her formative years was a demonstrably unfit sentence. It represented a substantial and marked departure from post-Friesen sentences imposed in similar circumstances, and was clearly inadequate.
- [70] In C.K., Justice DeWitt-Van Oosten conducted a thorough and helpful review of post-Friesen sentences imposed on offenders with no prior criminal record for sexual offending: at paras. 102-103. It is unnecessary for present purposes to repeat that review, upon which I rely. I would simply note that the circumstances here are similar in several respects to those in C.K., although they are more aggravated in some ways. There are also fewer mitigating factors present in this case.
- [71] The youthful first-time offender in C.K. sexually abused his younger step-sibling for several years, commencing when the victim was 11. Like the respondent in this case, he pleaded guilty, expressed remorse, and reported negative childhood experiences that he claimed attenuated his moral culpability. In overturning the conditional sentence order imposed below, Justice DeWitt-Van Oosten stated that a sentence of three-and-one-half-years' imprisonment fell at the "low end for child sexual offending of the nature and duration that occurred here". She also noted that "a substantial penitentiary term is no longer treated as unusual or reserved for rare or exceptional circumstances", and observed that, but for the presence of several mitigating factors, including substantial rehabilitative efforts, genuine remorse and insight, and a low risk to reoffend, "a sentence closer to five years' imprisonment would have been a fit sentence": at paras. 8, 112, 117.
- [72] In contrast, the cases cited by the respondent in support of the fitness of the sentence of two-years-less-a-day of imprisonment and three years of probation imposed by the judge are significantly distinguishable from this case. Most notably, in all three of the cases he cites, the sentences were informed by Gladue factors, which have no relevance here.
- [73] In sum, while the Court did not prohibit a sentence of under two years' imprisonment or establish a national sentencing range for serious child sexual offences in Friesen, its central message was clear and unequivocal. To be fit, a sentence imposed for child sexual violence must reflect and give full effect to the profound wrongfulness and harmfulness of the offence, in accordance with the modern understanding. In my view, the sentence imposed in this case failed to meet these criteria. Accordingly, it was demonstrably unfit.

What is a fit sentence?

- [74] As I have explained, where a sentence is demonstrably unfit or the sentencing judge made a material error in principle, this Court must determine a fit sentence, applying the principles of sentencing afresh with due deference to the judge's findings of fact and the aggravating and mitigating factors that are untainted by error: Friesen at paras. 27-28.
- [75] What, then, is a fit sentence in the circumstances of this case?

- [76] According to the Crown, given the presence of multiple aggravating factors and limited mitigating factors, a substantial penitentiary term in the order of five years would be a proportionate sentence on the sexual interference counts, followed by a consecutive sentence for possession of child pornography. According to defence counsel, if the sentence imposed in the court below is unfit, given the respondent's unique background, low risk of re-offending, and poor mental health, a total sentence of less than three-and-one-half-years' imprisonment should be imposed.
- [77] To repeat, the respondent sexually assaulted his much younger sister, D.T., repeatedly and intrusively, over the course of a six-and-one-half year period, during her formative years, in their shared family home. In committing these offences, the respondent breached his position of trust as D.T.'s caregiver, exploited her vulnerability and dependency, and, on one occasion, created a video recording of his crime. As a predictable result of these offences, D.T. has suffered serious and ongoing damage, and their family unit has been disrupted. To his credit, after D.T. disclosed the abuse to their family, the respondent turned himself in to police, pleaded guilty, and is genuinely remorseful, albeit not fully insightful. He currently presents a low risk of re-offending and is willing to engage in treatment, as required.
- [78] In my view, based on the aggravating and mitigating features of this case, the respondent's high moral blameworthiness, and the profound harmfulness of his offences, a term of four-and-one-half-years' imprisonment is a fit sentence on the sexual interference counts. In addition, given the unique harms associated with the child pornography offence and the requirements of s. 718.3(7)(a) of the Criminal Code, a term of six months' imprisonment consecutive on the possession of child pornography count is also fit.

Conclusion

- [79] For all of these reasons, I would grant leave to the Crown to appeal the sentence, allow the appeal, and impose a term of four-and-one-half-years' imprisonment on the sexual interference counts and six months' imprisonment consecutive for the possession of child pornography count.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Abrioux"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/24/00/2024BCCA0082cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-g-j-m-2024>

Prepared on 29 October 2026 · Esheria