

CANADA / JUDGMENT

R. v. G.T.A.

2021 BCCA 425

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 425 R. v. G.T.A.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. G.T.A.,

2021 BCCA 425

Date: 20211112

Docket: CA47376

Between:

Regina

Respondent

And

G.T.A.

Appellant

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. This publication ban applies indefinitely unless otherwise ordered.

Corrected Judgment: The text of the judgment was corrected at paragraph 31 on November 16, 2021.

Before:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Voith

The Honourable Mr. Justice Marchand

On appeal from: An order of the Provincial Court of British Columbia, dated March 12, 2021 (R. v. G.T.A., 2021 BCPC 51, Victoria Dockets 175913-3-A and 175913-5-C).

Counsel for the Appellant:

J.W.D. Mills

Counsel for the Respondent:

J.A.M. Dickie

Place and Date of Hearing:

Victoria, British Columbia

October 5, 2021

Place and Date of Judgment:

Vancouver, British Columbia

November 12, 2021

Written Reasons by:

The Honourable Mr. Justice Marchand

Concurred in by:

The Honourable Madam Justice MacKenzie

The Honourable Mr. Justice Voith

Summary:

The Appellant received consecutive three-year, six-month and one-month jail sentences following his guilty pleas to one count each of sexual interference, uttering threats and breach of undertaking. The sentencing judge applied the totality principle to reduce the sentences for sexual interference and uttering threats by six and four months respectively, leaving a total custodial sentence of 33 months. The one-month sentence for breach of undertaking was vacated after the Crown directed a stay of proceedings on that count. The appellant seeks leave to appeal the sentence imposed in relation to his sexual interference offence. He submits the sentencing judge erred by imposing a sentence "far beyond the range" submitted by counsel without providing counsel an opportunity to make further submissions; finding facts that were not in evidence, placing undue weight on aggravating factors, and minimizing or overlooking some mitigating factors; declining to follow a sentencing decision of the same court; and imposing a demonstrably unfit sentence.

Held: Leave is granted but appeal is dismissed. It would have been preferable for the sentencing judge to alert the parties to his concerns about the proposed range of sentence, but he made no error in principle in not doing so. The judge made one finding of fact that was not supported by the evidence and misunderstood the appellant's performance on bail, but neither of these issues was material to the sentence imposed. The judge's overall view of the circumstances was supported by the record. The sentence he imposed was not demonstrably unfit.

Reasons for Judgment of the Honourable Mr. Justice Marchand:

Introduction

- [1] On March 12, 2021, G.T.A. was sentenced to consecutive three-year, six-month and one-month jail sentences following his guilty pleas to one count each of sexual interference, uttering threats and breach of undertaking. The sentencing judge then applied the totality principle to reduce the sentences imposed for sexual interference and uttering threats by six and four months respectively, leaving a total custodial sentence of 33 months. At the conclusion of the judge's delivery of sentence, the Crown directed a stay of proceedings on the breach of undertaking count. By way of corrigendum, the judge vacated the one-month sentence for that count.
- [2] Mr. A. seeks leave to appeal the sentence imposed for his sexual interference offence. He submits the sentencing judge erred by:
- imposing a sentence "far beyond the range" submitted by counsel without warning and without providing counsel an opportunity to make further submissions;
 - finding facts that were not in evidence, placing undue weight on aggravating factors, and minimizing or overlooking some mitigating factors;
 - declining to follow a well-reasoned sentencing decision of the same court that had not been overturned and that did not fail to apply any binding authority or statute; and
 - imposing a demonstrably unfit sentence that was disproportionate to the gravity of the offence and his degree of responsibility.
- [3] The Crown does not oppose the Court granting Mr. A. leave to appeal his sentence. On the merits, the Crown submits Mr. A. has failed to establish any reversible error. In particular, the Crown submits:
- There was no joint submission on sentence, Mr. A. has not demonstrated any prejudice, and a failure to warn counsel of an intention to sentence outside the range recommended by counsel is not an error of law or principle;
 - The sentencing judge may have made one minor error on a particular fact, but it was not material;

- The concept of judicial comity (following the decision of another judge of the same court) applies only to questions of law, not to sentencing decisions grounded in their own unique facts; and
- The sentence was not demonstrably unfit.

Background

- [4] On October 18, 2019, Mr. A. was scheduled for preliminary inquiry, but counsel informed the presiding judge they had "reached a resolution." There was no suggestion the resolution involved a joint submission on sentence. Mr. A. then pleaded guilty to one count each of sexual interference, uttering threats and breach of undertaking. The presiding judge confirmed that counsel had reviewed the requirements of s. 606 of the Criminal Code [Code] with Mr. A. One of those requirements is to ensure an accused understands the court is not bound by any agreement made between the accused and the Crown regarding sentence. At Mr. A.'s request, the presiding judge ordered pre-sentence and psychiatric assessment reports.
- [5] The sentencing hearing was held on February 12, 2021. The parties filed an agreed statement of facts, pre-sentence report ("PSR"), forensic psychological assessment and the complainant's victim impact statements as exhibits.
- [6] The circumstances, in brief, are that Mr. A. and the complainant worked together at a fast food restaurant in Victoria. Over several months, they developed a friendship that evolved into a sexual relationship. Starting in November 2017, the sexual relationship lasted approximately ten months. There were numerous sexual encounters including sexual intercourse. At the time, Mr. A. was 23 and 24. He knew the complainant was 15.
- [7] On June 2, 2018, Mr. A. sent text messages to the complainant in which he told her, among other things, to kill herself and asked "Can I kill you." Later that day, Mr. A. met the complainant and made further statements to her to the effect that he intended to hurt and/or kill her and others.
- [8] The same day, the complainant provided the police with copies of the text messages. She did not inform them of her sexual relationship with Mr. A. A police officer subsequently spoke with Mr. A. about the text messages and informed him that the complainant "was not legally able to give consent in any sexual relationship." The sexual relationship continued for almost three more months, ending in late August 2018.
- [9] On October 6, 2018, the complainant provided a statement to the police describing her sexual relationship with Mr. A. Mr. A. was arrested later that day. He gave a statement to the police in which he admitted having had a sexual relationship with the complainant from November 2017 to late August 2018. Mr. A. was released on an undertaking with conditions, including a condition that he not communicate with the complainant.

- [10] During the sentencing hearing, the Crown referenced information from the PSR and psychological assessment indicating that Mr. A. had accepted responsibility and shown remorse, suffered from anxiety and depression, was no longer using cannabis, and presented a low to moderate risk to reoffend.
- [11] The Crown identified a number of aggravating factors, including the duration and nature of Mr. A.'s offending behaviour, the age difference between Mr. A. and the complainant, Mr. A.'s actual knowledge that what he was doing was not lawful, and the lasting impact of Mr. A.'s offences on the complainant and her family. The Crown noted Mr. A.'s threats were not made in the context of coercing the complainant into sexual activity.
- [12] The Crown also acknowledged a number of mitigating factors, including Mr. A.'s guilty plea, remorse, mental health issues, immaturity, family support, employment and prospects for rehabilitation.
- [13] The Crown noted that s. 718.01 of the Code requires that denunciation and deterrence be the paramount sentencing principles in cases involving the abuse of a person under 18 years of age.
- [14] The Crown highlighted that, in *R. v. Friesen*, 2020 SCC 9, the Supreme Court of Canada emphasized the need for sentences to fully reflect the impact and profound wrongfulness of sexual offences against children. After noting that *Friesen* requires an upward departure from prior sentencing ranges, the Crown submitted that the range for sexual interference must be higher than the one- to three-year range previously established in British Columbia.
- [15] Ultimately, the Crown submitted that Mr. A. should receive a jail sentence in the high provincial range of 18 months or more for sexual interference and three months for uttering threats, to be served concurrently. The Crown acknowledged the totality principle might justify some reduction in the sentences imposed. The Crown also sought probation and mandatory ancillary orders. The Crown indicated its intention to enter a stay of proceedings in relation to the breach of the non-communication bail condition as the result of new and binding case law regarding the mens rea of such offences. The stay was not recorded on the record of proceedings.
- [16] In response, Mr. A. acknowledged there is no such thing as "de facto consent" but submitted the development of Mr. A.'s sexual relationship with the complainant was not predatory or exploitative but rather arose out of "genuine affection."
- [17] Mr. A. emphasized that he was a youthful, first-time offender who had fully cooperated with the police, accepted responsibility, was remorseful and pled guilty. Mr. A. submitted he was extremely shy and socially delayed.

- [18] He noted that he fell into serious anxiety and depression following a friend's 2014 overdose, which led to Mr. A. attempting suicide. Mr. A. highlighted he had been diagnosed with depression, anxiety and social phobia. He told the forensic psychologist that, at the time of his sexual offending, he was on an anti-depressant, was smoking a lot of weed, did not care what happened to him, and did not care if he went to jail. He did not want to live in society.
- [19] Mr. A. also highlighted the progress he had made by taking anti-depressant medication, discontinuing his misuse of cannabis, receiving trades training and obtaining good employment.
- [20] Finally, Mr. A. noted he had been on bail for two years without incident.
- [21] Mr. A. cited *R. v. C.J.J.*, 2020 BCPC 201, and *R. v. Voong*, 2015 BCCA 285, for the proposition that, in the exceptional circumstances of his case, a sentence outside the usual range would be proportionate and fit. Specifically, Mr. A. submitted an appropriate sentence would be 90 days for sexual interference and 30 days for uttering threats. Mr. A. submitted the sentences ought to be concurrent because they both arose out of the relationship between Mr. A. and the complainant. Absent that relationship, Mr. A. submitted he would likely receive a discharge for his threats.
- [22] In reply, the Crown submitted the suspended sentence with probation imposed in *C.J.J.* could not be reconciled with *Friesen* and turned on its unique facts, including the offender's remote location and the impossibility of the offender serving an intermittent sentence due to COVID-19 protocols in place at the time.
- [23] The sentencing judge reserved judgment.

Reasons for Sentence

- [24] The sentencing judge gave considered reasons for judgment that are now reported at *R. v. G.T.A.*, 2021 BCPC 51.
- [25] After detailing the circumstances of Mr. A.'s offences, the judge reviewed his personal circumstances, including his remorse, empathy, lack of criminal history, struggles with mental health and cannabis misuse. With respect to his employment, the sentencing judge stated:

Since these offences, the accused has taken up studying for a trade, motivated primarily by a desire to appear favourable to the court but also motivated by a desire to obtain a trade.

- [26] Based on the psychological assessment, the judge noted Mr. A. represents a low to moderate risk to reoffend, with the risk elevated if Mr. A. is under the influence of substances. The judge highlighted the psychological assessor's opinion that Mr. A. lacked insight into his need for treatment. The judge expressed he was unsure "what level of risk to reoffend sexually the accused represents."

[27] The judge next reviewed the complainant's circumstances and "extensive victim impact statement." At para. 16 of his reasons, he highlighted her description of the impact of Mr. A.'s offending behaviour two and a half years after his offences:

I still struggle with my mental health and PTSD on a daily basis. I'm still required to take antidepressants and sleep medications daily to function. My panic attacks, anxiety, chronic fatigue, and nightmares have continued with little relief. I struggle with finding the motivation for physical activity or anything that takes me out of the house. I frequently miss work due to my depression and anxiety. I'm continuing to see my counsellor regularly which my parents pay for out-of-pocket but I have a long way to go in my journey of healing. When I see a car that looks like what the accused owned, I am still overcome with panic and anxiety because I worry it is him and he is close to me. Although I now feel some relief because I work and go to school in new locations, part of me always worries he will somehow know where I am. I realize now that I will be left with lifelong scars because of the actions of [Mr. A.].

[28] The judge also noted the emotional and financial toll Mr. A.'s offending behaviour has had on the complainant's family.

[29] The judge began his analysis by stating "[t]he crafting of a fit and proper sentence is a profoundly individualized exercise." He set out the purpose and principles of sentencing articulated in ss. 718, 718.01, 718.1 and 718.2 of the Code. He emphasized the principles of proportionality and restraint while noting:

[20] Parliament dictates the need for the Courts to give primary consideration to the principles of denunciation and deterrence when it comes to sentencing those who offend against persons under the age of 18:

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

[30] The judge cited extensively from Friesen and R. v. Williams, 2020 BCCA 286. The sentencing judge noted the Supreme Court of Canada and this Court have directed sentencing courts to increase sentences for those who sexually offend against children and outlined various factors to take into account in doing so.

[31] The judge then undertook "the difficult question" of determining the appropriate range of sentence after Friesen. The judge cited R. v. Angel, 2018 BCSC 1751, and R. v. Scofield, 2019 BCCA 3, for the proposition that the pre-Friesen range for sexual offences against children was one to three years' imprisonment.

- [32] The judge next reviewed a number of post-Friesen sentencing decisions. Specifically, he reviewed C.J.J., R. v. K.A.N., 2020 BCPC 41; R. v. R.O., 2021 BCPC 29; R. v. L.S.N., 2020 BCCA 109; R. v. Nahanee, 2021 BCCA 13; and R. v. Scribner, 2020 BCSC 1685. After doing so, he was unable to reconcile the principles articulated in Friesen with the sentence imposed in C.J.J. and declined to follow that case. He ultimately concluded the appropriate range of sentence for a sexual assault on a child by a youthful first offender is two to five years' imprisonment.
- [33] The judge set out the aggravating and mitigating circumstances identified by the parties during submissions. Of note, he characterized Mr. A. as having "some limited mental health struggles."
- [34] The essence of the judge's decision on sentence appears in paras. 56-61 of his reasons for judgment where he held:
- [56] In this case the accused represents a low to moderate risk to reoffend while at the same time expressing little insight as to his need to seek and obtain treatment for the sexual offending. Given the recommendations in the psychological assessment, and the author of that report[s] very guarded prognosis with respect to the likelihood of success given the accused[s] lack of insight, the Court must be particularly mindful of the need to separate this offender from society. [Citations omitted.]
- [57] I am not persuaded that the accused's relative immaturity and mild mental health struggles represent a particularly powerful mitigating circumstance. In my view, his mental health prognosis provides at best an explanation rather than an excuse for his offending behaviour.
- [58] The accused has had the benefit of a loving and supportive upbringing and continues to enjoy the benefit of a supportive family. There are certainly no factors such as those found in cases in which Gladue principles are at play which in any way minimize his moral blameworthiness. The accused commenced a friendship with the child, and, knowing it to be entirely illegal, converted that friendship into a sexual relationship knowing throughout that it was illegal. In my view his moral blameworthiness is high. It seems to me that the conversion of his friendship into a sexual relationship must represent either an abuse of the trust that friends place in each other or, alternately, and perhaps more reasonably, represents behaviour tantamount to grooming. It is no answer to these charges that the accused allowed his friendship to morph into a sexual relationship that somehow that process in any way reduces his moral blameworthiness. In my view these facts [are] virtually indistinguishable from the facts in Scribner.
- [59] The sexual offending occurred regularly over a period of ten months and involved sexual intercourse regularly. The accused was aware throughout that the behaviour was illegal and was indifferent to that fact. This significantly aggravates the moral blameworthiness of the accused.

- [60] The accused caused the child to suffer significant harm. Indeed the very sort of harm which [Friesen] so eloquently articulates It has caused harm to her family . Indeed, the harms caused parallel almost perfectly that which the Supreme Court advised was the inevitable consequence of this horrific behaviour. There is no doubt that the psychological consequences to the child are aggravated by the threatening behaviour as well as that accused's breach of his Release Order.
- [61] In my view, the facts of this case suggest a sentence for the sexual offending [at] the lower end of the range but certainly not at the bottom of that range. Having reviewed the authorities provided, I also agree with Crown counsel that a sentence of six months for the offence of uttering a threat is appropriate and well within the range of sentences for offenders in the accused[']s circumstance.
- [35] The judge recognized he would be imposing sentences in excess of those proposed by both the Crown and Mr. A. After citing *R. v. R.R.B.*, 2013 BCCA 224; *R. v. Anthony-Cook*, 2016 SCC 43; and *Nahanee*, he determined there would be "no utility in inviting further submissions" and he did not do so.
- [36] The judge imposed sentences of 36 months for sexual interference, six months consecutive for uttering threats and one month consecutive for breach of undertaking. Considering the totality principle, he reduced the sentences for sexual interference and uttering threats by six and four months respectively. The total sentence was, therefore, 33 months. The Crown subsequently reminded the judge of the Crown's intention to stay the breach of undertaking count. The Crown then directed the stay. By way of corrigendum, the judge vacated the one-month sentence imposed on that count.

Standard of Review

- [37] Sentencing is a highly individualized process. Sentencing judges have "front-line" experience, see and hear all the evidence and submissions in person, and are generally familiar with the circumstances and needs of the local community. As a result, sentencing judges have broad discretion to impose a fit sentence. Sentencing decisions are entitled to considerable deference and will only be overturned for good reason: *Friesen* at para. 25; *R. v. Sellars*, 2018 BCCA 195 at para. 22.
- [38] When weighing competing sentencing objectives, it falls to the sentencing judge to determine which deserve the greatest weight: *Voong* at para. 12, citing *R. v. Nasogaluak*, 2010 SCC 6 at para. 43. An appeal court may not vary a sentence simply because it would have imposed a different one: *Voong* at para. 11, citing *R. v. L.M.*, 2008 SCC 31 at para. 14.
- [39] An appeal court can intervene to vary a sentence only if the sentence is demonstrably unfit or if the sentencing judge made an error in principle that had an impact on the sentence: *Friesen* at para. 26; *Sellars* at para 22; *R. v. Lacasse*, 2015 SCC 64 at para. 41.

Analysis

Did the sentencing judge err in principle by imposing a sentence "far beyond the range" submitted by counsel without providing counsel an opportunity to make further submissions?

- [40] In *Anthony-Cook*, the Supreme Court of Canada recognized the critical role joint submissions on sentence play in the proper functioning of the criminal justice system. The Court held that sentencing judges should generally defer to joint submissions and should not depart from them unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest: *Anthony-Cook* at para. 32.
- [41] The Court also established the procedure to be followed where a sentencing judge is concerned about a joint submission and is considering departing from it. Of relevance to this case, in all cases, counsel are expected to justify the joint sentence. If the judge is not satisfied with the jointly proposed sentence, "fundamental fairness" dictates that the judge should notify counsel of their concerns, and invite further submissions to address those concerns: *Anthony-Cook* at paras. 49-60.
- [42] While the parties did not advance a joint submission on sentence, Mr. A. submits the sentencing judge erred by not providing counsel an opportunity to address his concerns. In support of his submission, Mr. A. relies on *R. v. Baptiste*, 2021 QCCA 1064, and *R. v. Kriqaliluk*, 2021 NUCA 4.
- [43] In *Baptiste*, the Court of Appeal of Quebec held that the trial judge erred in principle when he imposed a sentence in excess of a jointly proposed sentence following a guilty verdict (rather than a guilty plea) without giving counsel an opportunity to address his concerns. In *Kriqaliluk*, the Nunavut Court of Appeal held the sentencing judge erred in principle by not providing notice that he intended to depart from a jointly recommended range of sentence (rather than a specific jointly proposed sentence).
- [44] While *Baptiste* and *Kriqaliluk* are helpful and persuasive authorities, the current approach in this jurisdiction to a case where a guilty plea is not conditional on a joint submission is clear. In *Nahanee*, a division of three justices of this Court rejected the very arguments advanced by Mr. A. Bound by the Court's earlier decision in *R. v. R.R.B.*, at para. 46 the division held that "[t]he rule is, while it is preferable to advise counsel of the intention to impose a sentence outside the range suggested by either counsel, it is not an error of law or principle to fail to do so."
- [45] The Court in *Nahanee* noted the same rule appears to have been adopted in Alberta and Quebec. At para. 47, the Court then cited the following passage from *R. v. Keough*, 2012 ABCA 14:
- [20] The case law recognizes the importance of a trial judge giving fair warning to counsel when he or she proposes to sentence outside the recommended range: *R. v. Hood*, 2011 ABCA 169 at para. 15; *R. v. Abel*, 2011 NWTCA 4 at para. 23; *R. v. Beal*, 2011 ABCA 35 at paras. 15, 18, 502

AR 177, 44 Alta LR (5th) 306. This is a component of a wider principle that the parties are entitled to reasonable notice if the judge proposes to decide the case in a way not advocated by either party [Citations omitted.] . Nevertheless, the sentencing judge has an obligation to impose a fit sentence, and neither exceeding the recommended range, nor failing to give counsel notice of intention to exceed the range, is, without more, reviewable error. If the sentence imposed is not demonstrably unfit having regard to the principles of sentencing in the Criminal Code, appellate interference is not warranted. Failing to seek the input of counsel may, however, make it more likely that the trial judge may overlook or overemphasize the relevant factors, rely on an irrelevant factor, impose a sentence based on an error in principle, or commit some other reviewable error.

[Underline emphasis added; italic emphasis added in Nahanee.]

[46] Mr. A. seizes on this passage from Keough in support of his submission that there is more in this case.

[47] As I understand the passage from Keough, "without more" means an appeal court will interfere when a sentencing judge exceeds a recommended range of sentence without notifying the parties only when the judge imposes a demonstrably unfit sentence or commits a material error in principle.

[48] In this case, Mr. A. advances two bases for intervention. Specifically, Mr. A. submits that if the sentencing judge had alerted the parties to his concerns, they would have had an opportunity to (1) inform him of the negotiations that led to Mr. A.'s guilty pleas and (2) address misunderstandings that are apparent in the judge's reasons for sentence.

[49] On the first of these bases, there is no application to adduce fresh evidence regarding the negotiations that led to Mr. A.'s guilty plea. As a result, there is no evidentiary basis to meaningfully consider Mr. A.'s submission. On the second, I will address any alleged "misunderstandings" in the balance of my reasons for judgment.

Did the sentencing judge err in principle by finding facts not in evidence, placing undue weight on aggravating factors and minimizing mitigating factors?

[50] Mr. A. submits the sentencing judge erred in principle by finding facts not in evidence, placing undue weight on aggravating factors and minimizing mitigating factors. Specifically, he submits the judge misapprehended the evidence on material points by:

- Finding Mr. A. suffered "limited mental health struggles" despite evidence describing what Mr. A. characterizes as "severe anxiety and depression to the point of suicidal ideation";
- Finding Mr. A. had a "loving and supportive upbringing" despite evidence of his mother's "departure";
- Finding Mr. A.'s "primary motivation" to obtain a trade was his "desire to appear favourable to the court" in the absence of evidence that was the case;

- Considering Mr. A.'s breach charge to be an aggravating factor when the Crown had indicated the charge would be stayed;
- Making inconsistent findings regarding the risk posed by Mr. A.; and
- Attributing inadequate weight to mitigating factors, including Mr. A.'s guilty plea, demonstrated remorse, acknowledgement of responsibility and good performance on bail for a considerable period of time.

- [51] It is true Mr. A. attempted suicide and was taken to the hospital by his father following his friend's overdose death in 2014. It is also true Mr. A.'s father told the author of the PSR that Mr. A. had struggled with "severe anxiety" since his adolescence. Finally, it is true Mr. A. told the psychological assessor that he was depressed, smoking weed and generally struggling at the time of his offending.
- [52] On the other hand, according to records summarized in the psychological assessment, when Mr. A. was taken to the hospital in 2014, he was diagnosed as "a young man with no previous psychiatric history, experiencing a situational crisis and a complex grief reaction." He was prescribed anti-depressant medication and referred for follow-up. No records were produced to indicate he had in fact followed up. Further, no records were produced to objectively verify the depth of Mr. A.'s anxiety and depression in 2018 and 2019. Presumably he was no longer suffering from the situational crisis he experienced four or five years before. In addition, the psychological assessment indicates Mr. A. was on anti-depressant medication at the time of his offending and that anti-depressant medication generally helped him cope.
- [53] On the evidentiary record as a whole, it was open to the judge to characterize Mr. A.'s mental health struggles as "mild" at the time of his offending.
- [54] Turning to Mr. A.'s upbringing, the judge said the following:
- [9] [Mr. A.] had the advantage of an upbringing in a supportive family without any history of neglect or abuse. His parents separated prior to his birth and shared custody of the children. He enjoyed a good relationship with both of his parents though, ultimately, his mother and one of his siblings moved away, at which time he began to be closer to his father.
- [55] The PSR indicates Mr. A. had not had any contact with his mother and twin sister since approximately 2018 when "they both moved out of the country". In 2018, Mr. A. was 23 and 24 years old. His mother's "departure" at that time is not inconsistent with the judge's finding that Mr. A. had a positive upbringing.

- [56] The Crown concedes there was no evidence that Mr. A.'s "primary motivation" to obtain a trade was his "desire to appear favourable to the court". On the other hand, the PSR indicates he was "partially motivated" to enter his trades program for this reason, as well as by a desire to obtain a trade. On its own, the judge's modest mischaracterization of Mr. A.'s motivation for obtaining a trade is not the type of error that would justify intervention by this Court.
- [57] At para. 54, the judge identified the "significant negative consequences to the victim of the accused['s] sexual violence" as an aggravating factor. At para. 60, he added "[t]here is no doubt that the psychological consequences to the child are aggravated by the threatening behaviour as well as th[e] accused's breach of his Release Order."
- [58] Given the apparent confusion regarding the stay of proceedings on the breach count, it is not surprising the judge identified how Mr. A.'s post-charge attempts to communicate with the complainant aggravated her "significant negative consequences". These negative consequences were clearly relevant to the breach count that had yet to be formally stayed.
- [59] Once the breach count was formally stayed, there was an argument to be made that Mr. A.'s performance on bail could be considered mitigating rather than aggravating. However, while the Crown conceded it could not establish the necessary mens rea for the breach count, it did not concede Mr. A. had been a "model candidate on bail". Indeed, the complainant's victim impact statement makes clear that she suffered increased anxiety due to Mr. A.'s attempts to communicate with her after he was arrested and charged.
- [60] Further, "people who are on bail are expected to behave themselves": *R. v. R.M.D.*, 2014 BCCA 56 at para. 7. Compliance with bail conditions is typically neutral although, as a matter of discretion, in some cases compliance with strict bail conditions may be considered mitigating: *R. v. L.I.*, 2017 BCCA 444 at paras. 11-13. In this case, Mr. A.'s bail conditions were not particularly onerous and there was no evidence he suffered significant prejudice as a result of them. As a result, at best, Mr. A.'s post-charge attempts to communicate with the complainant were neutral.
- [61] The judge understandably found the negative consequences resulting from Mr. A.'s sexual offending to be "significant". In all of the circumstances, it is hard to imagine the weight the judge placed on those consequences would have been much different if he had ignored Mr. A.'s attempts to communicate with the complainant.
- [62] The judge made a number of statements regarding the risk posed by Mr. A.
- [63] The judge indicated Mr. A. posed a low to moderate risk to reoffend violently, with the risk elevated if he was under the influence of substances. He then stated it was unclear what risk Mr. A. posed to reoffend sexually: para. 12. The judge identified Mr. A.'s "excellent opportunity to fully rehabilitate" to be a mitigating factor: para. 53. The judge identified Mr. A.'s low to moderate risk to reoffend to be aggravating: para. 54. The judge expressed concern regarding Mr. A.'s lack of insight into his need for treatment for his sexual

offending. He also highlighted that the author of the psychological assessment reported a "very guarded prognosis" for Mr. A.: para. 56. The judge did not tie his views regarding the risk posed by Mr. A. to his misunderstanding that Mr. A. had breached his bail.

[64] I do not consider the judge's findings regarding the risk posed by Mr. A. to be inconsistent. In fact, they are supported by the record. In particular, the psychological assessment contains the following information:

- Mr. A.'s level of risk for violent re-offence is estimated to be low to moderate;
- Mr. A.'s risk to reoffend is elevated if he is under the influence of substances or showing symptoms of depressed mood;
- Mr. A. requires long-term psychological treatment for his mood dysregulation, substance abuse and sexual behaviour; and
- Treatment may be challenging because it is unclear if Mr. A. has been able to maintain treatment connections in the past and lacks insight into his need for treatment.

[65] With a supportive family and available treatment, it was open to the judge to find that Mr. A. has an excellent opportunity to rehabilitate. At the same time, his history of mood dysregulation, substance abuse and sexual offending, and lack of insight into his need for treatment raise concerns. While the psychologist did not express an opinion that Mr. A.'s prognosis is "very guarded", it was open for the judge to conclude that was the case.

[66] Finally, it was entirely within the purview of the judge to assign weight to the fairly long list of mitigating circumstances he identified. I can discern no error in principle in how he undertook the task.

Did the sentencing judge err in principle by declining to follow C.J.J.?

[67] Mr. A. submits the sentencing judge was bound to follow the decision made by a judge of his own court in C.J.J. He cites *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590, 1954 CanLII 253 (B.C.S.C.), in support of his submission. In my view, his reliance on that case is misplaced.

[68] *Re Hansard Spruce Mills Ltd.* is typically cited for the proposition that judicial comity requires a trial judge to follow the judgment of another judge of the same court unless:

- Subsequent decisions have affected the validity of the judgment at issue;
- The judge did not consider a binding authority or relevant statute; or
- Exigencies required the judge to give an immediate decision without an opportunity to fully consult relevant authorities.

See *Re Hansard Spruce Mills Ltd.* at 592.

- [69] In this case, Mr. A. has not identified a principle of law established in C.J.J. that the judge was bound by comity to follow. Rather, Mr. A. submits the judge should have relied on C.J.J. to impose the sentence he was seeking. Respectfully, he was not bound to do so.
- [70] The overarching goal of sentencing is to impose a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender: Friesen at para. 30. As part of the exercise of determining a proportionate and fit sentence, sentencing judges must consider the parity principle expressed in s. 718.2(b) of the Code. That section provides that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances".
- [71] In Friesen, the Court explained the complementary relationship between parity and proportionality as follows:
- [32] Parity and proportionality do not exist in tension; rather, parity is an expression of proportionality. A consistent application of proportionality will lead to parity. Conversely, an approach that assigns the same sentence to unlike cases can achieve neither parity nor proportionality (R. v. L.M., 2008 SCC 31, [2008] 2 S.C.R. 163, at paras. 36-37; R. v. Ipeelee, 2012 SCC 13, [2012] 1 S.C.R. 433, at paras. 78-79).
- [33] In practice, parity gives meaning to proportionality. A proportionate sentence for a given offender and offence cannot be deduced from first principles; instead, judges calibrate the demands of proportionality by reference to the sentences imposed in other cases. Sentencing precedents reflect the range of factual situations in the world and the plurality of judicial perspectives. Precedents embody the collective experience and wisdom of the judiciary. They are the practical expression of both parity and proportionality.
- [72] Quoting from Lacasse at para. 57, the Court in Friesen affirmed that sentencing ranges established by appeal courts are "summaries of the minimum and maximum sentences imposed in the past, which serve in any given case as guides for the application of all the relevant principles and objectives": at para. 36. The Court then emphasized that sentencing ranges guide but do not bind sentencing judges: at para. 37.
- [73] In this case, the sentencing judge undertook a thorough analysis of a number of appropriate comparator decisions involving somewhat similar offenders, offences and circumstances, including C.J.J. While there are a number of factual similarities between C.J.J. and this case, C.J.J. also involved a number of unique and distinguishing characteristics. In addition to those highlighted by the Crown at the sentencing hearing, the judge in C.J.J. found the offender to represent no risk to reoffend: at para. 83.
- [74] The sentencing judge did not have to express an opinion on whether C.J.J. was consistent with Friesen. In the absence of a complete appeal record and argument from the involved parties, I decline to do so. All that needs to be said is it was open to the judge to find C.J.J. was distinguishable and to not follow it.

Did the sentencing judge impose a demonstrably unfit sentence?

[75] In his statement on sentence, Mr. A. submits:

The sentence of 3 years [for] a first-time offender who [pled] guilty, who suffered from significant mental health issues, who accepted responsibility for his offending by letter (and in court) and who kept his conditions for a significant period of time while on release prior to the sentencing is harsh, excessive and ultimately unfit. Further, the sentence is based on erroneous conclusions on the evidence and on errors in principle that result in a sentence that does not accurately reflect the gravity of the offence and the moral blameworthiness of the offender.

[76] In oral submissions, Mr. A. repeated various submissions he made to the sentencing judge. In particular, he submitted that his sexual offending arose out of "genuine affection" rather than predatory conduct and that his circumstances were "exceptional".

[77] I am unable to agree with any of Mr. A.'s submissions.

[78] In *Friesen*, the Supreme Court of Canada made clear that the overarching objective of sentencing in relation to sexual offences against children is to protect children from exploitation and harm: at para. 42. Children are highly vulnerable and experience disproportionate rates of sexual violence: at para. 65. Sentences must reflect the inherent wrongfulness and harmfulness of sexual violence against children: at para. 76.

[79] The Court declined to establish a national range for sexual interference but held that an upward departure from prior sentencing precedents and ranges is required: at para. 107. Further, at paras. 115-117, the Court directed provincial appeal courts to revise sentencing ranges to ensure that sentencing ranges for sexual offences against children increase relative to sentencing ranges for similar sexual offences against adults. The Court held that stronger sanctions were necessary for sexual offences against children to "reflect Parliament's recognition of the inherent vulnerability of children and the wrongfulness of exploiting that vulnerability": at para. 116.

[80] Notably, at paras. 115 and 119 the Court singled out decisions of this Court that established a sentencing range for "sexual assault involving intercourse" of two to six years for both adult and child victims. At para. 118, the Court emphasized that the separation in sentencing ranges applicable to sexual offences against adults and children is to be achieved by increasing the range of sentences imposed where the victim is a child, not by decreasing the range of sentences imposed where the victim is an adult.

[81] The Court added:

[114] [M]id-single digit penitentiary terms for sexual offences against children are normal and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim, as in this case, *Woodward*, and *L.M.* In addition, as this Court recognized in *L.M.*,

maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" (para. 22). Instead, a maximum sentence should be imposed whenever the circumstances warrant it (para. 20).

- [82] At paras. 148-154, the Court addressed the topic of victim participation. The Court firmly rejected the notion of de facto consent as a mitigating factor. Because children are legally incapable of consenting, victim participation is irrelevant to the sentencing exercise. At most, victim participation "may coincide with the absence of certain aggravating factors": at para. 150.
- [83] Among the practical advice provided to assist sentencing judges, the Court noted that a victim's participation might be the result of grooming and that grooming is an aggravating factor. Further, the Court emphasized that a victim's participation should never distract the sentencing court from the fact that adults, not children, are responsible for preventing sexual activity between adults and children: at paras. 153-154.
- [84] In this case, by virtue of the agreed statement of facts, the judge was aware there had been some level of cooperation between the parties prior to the sentencing hearing. He understood Mr. A. was a youthful first-time offender with mental health problems who had taken responsibility for his actions. He was aware Mr. A. had made progress while on bail and had generally performed well. He gave credit to Mr. A. for saving the court time and the complainant anguish by pleading guilty. He accepted that Mr. A. was remorseful, had family support and had an "excellent opportunity to fully rehabilitate".
- [85] At the same time, the judge understood Mr. A. had a heightened level of moral blameworthiness. Mr. A. initiated and continued a sexual relationship with the complainant when he knew she was legally unable to consent. It was open to the judge to consider the evolution of the relationship from friendship to sexual as "tantamount to grooming." Having reached that conclusion, Scribner was a valid comparator. (In Scribner, the 28-year-old first-time offender conversed online with a vulnerable 14-year-old child in the hopes of fostering a sexual relationship with her. The offender attended, at the invitation of the child, her residence and had unprotected sexual intercourse with her. The offender was sentenced to four years imprisonment for sexual interference and 18 months consecutive for luring.)
- [86] The judge correctly considered the nature, duration and consequences of Mr. A.'s offending to be aggravating. It was also open to him to conclude Mr. A. presented a not insignificant risk to reoffend.
- [87] Friesen clearly leaves no room for Mr. A.'s submission regarding "genuine affection". Further, on the justifiable view the judge took of the circumstances, there was nothing "exceptional" about Mr. A.'s case to take it outside the usual sentencing range.

[88] The circumstances of this appeal do not call for the Court to identify a specific range of sentence for all cases of sexual interference. For the purposes of this appeal, all I need to say is that Mr. A. has failed to demonstrate the sentence imposed by the judge was demonstrably unfit.

Conclusion

[89] It would have been preferable for the sentencing judge to have alerted counsel to his concerns about the range of sentence proposed by them, but he made no error in principle in not doing so. Further, there is no reason to conclude it would have made a difference to the outcome if he had.

[90] The judge made one finding of fact that was not supported by the evidence and became somewhat confused about Mr. A.'s performance on bail, but neither of these issues was material to the sentence imposed. The judge's overall view of the circumstances was supported by the record. The sentence he imposed was not demonstrably unfit.

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

"The Honourable Mr. Justice Marchand"

I AGREE:

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Voith"

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