

CANADA / JUDGMENT

R. v. Harry

2023 BCSC 1026

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1026 R. v. Harry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Harry,

2023 BCSC 1026

Date: 20230511

Docket: 16876-3

Registry: Powell River

Rex

v.

Lance Jordon Harry, also known as Lance Jordan Harry

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Before: The Honourable Madam Justice Wilkinson

Oral Reasons for Sentence

Counsel for the Crown:

O.S. Kuzma, K.C.

Counsel for the Accused:

N. Acker

Place and Date of Hearing:

Powell River, B.C.

May 11, 2023

Place and Date of Judgment:

Powell River, B.C.

May 11, 2023

- [1] THE COURT: These are my reasons for sentence. As these reasons are being delivered orally, I may make minor corrections when a transcript is ordered, and expand on the citations for authorities referred to, without changing the outcome, of course. I may also revise them to ensure the anonymity of the complainant.
- [2] On August 2, 2022, I convicted Mr. Harry of sexual interference, contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]; invitation to sexual touching, contrary to s. 152 of the Code; dangerous operation of a conveyance, contrary to s. 320.13(1) of the Code; and flight from a peace officer, contrary to s. 320.17 of the Code.
- [3] At the time of these incidents on June 4, 2020, Mr. Harry was 36 years old and the complainant was 13 years old. Both the offender and the complainant had consumed large quantities of alcohol during the day.
- [4] That evening, Mr. Harry drove the complainant to a remote area by a lake, accessible by a logging road, near Powell River, British Columbia. Mr. Harry placed his hand on the complainant's inner thigh and her crotch and she kissed his neck. Either before or after this activity, the complainant performed oral sex on Mr. Harry. Mr. Harry then vaginally penetrated the complainant while in the front seat of his car.
- [5] Afterwards, as Mr. Harry drove away from the lake, he was met by a police vehicle which had responded to a complaint of dangerous driving in the vicinity. He ignored a command to stop and drove his vehicle, with the complainant in the passenger seat, into a tree, smashing his rear window, in an attempt to flee from the police. He later collided with a second police vehicle and was apprehended.

Position of the Crown

- [6] The Crown submits that Mr. Harry should be sentenced to a total of five to seven years in custody for the offences of sexual interference and sexual touching; an additional one month in custody for the offences of dangerous operation of a conveyance and flight from a peace officer, consecutive to the sentences for the sex offences but concurrent to each other; together with concurrent driving prohibitions of two years, plus the entire period to which the offender is sentenced to imprisonment.

- [7] The Crown further submits that ancillary orders are required in this case. In addition to mandatory orders, the Crown seeks discretionary orders for non-communication with the complainant during the custodial period; a 10-year prohibition from being within two kilometres of any dwelling house where the complainant ordinarily resides; prohibition from seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming a volunteer in any capacity that involves being in a position of trust or authority towards persons under the age of 16 years; and prohibiting him from having any contact, including communicating by any means, with a person who is under the age of 16 years, unless he does so under the supervision of a person whom the court considers appropriate.

Position of the Offender

- [8] Mr. Harry submits an appropriate sentence on the sexual offences is a conditional sentence order ("CSO") with restrictive and rehabilitative conditions. In the alternative, if the court declines to impose a CSO, the defence submits that an appropriate sentence would be a period of incarceration for 12 to 24 months. Three years for probation with strong emphasis on rehabilitative conditions would be appropriate, they say, for either proposed sentence. Mr. Harry additionally submits that a one-year driving prohibition would be appropriate on Counts 4 and 5.

Mr. Harry's Background

- [9] Mr. Harry is 37 years old and was born and raised in Powell River. His father was a Scottish logger. At this point he does not live near Powell River; he has moved to Vancouver Island. His mother was a member of the Tla'amin First Nation and a survivor of the residential school system. She was never employed. She sold illegal drugs in the community, along with his father. She passed away in 2015. Mr. Harry is the youngest of four siblings. He has a 46-year-old half-brother, a 45-year-old sister, and a 41-year-old brother.
- [10] Mr. Harry reports he was raised in a home where his parents had "big parties". He noted growing up on the "reserve" in Powell River until he was approximately 11 years old, when the family was "kicked out" of the reserve. He believed the move was precipitated by his mother pouring a beer on the landlord's head. The accused noted his father was away in camp for work for three weeks at a time, during which his mother would heavily drink every day.
- [11] Family friends would apparently come over and get into both verbal and physical arguments in front of the children. Mr. Harry recalls his mother throwing full beer bottles or cans at his father, and his father in turn would push his mother and verbally abuse her. Mr. Harry reports his parents would also physically abuse his siblings. He apparently escaped the abuse.

- [12] From birth, Mr. Harry's family had periods of transience, mainly residing on reserve in Powell River, but also moving for brief periods to other parts of Powell River, including Paradise Valley and Cranberry.
- [13] As a child, Mr. Harry formed impressions about Indigenous peoples based on what he saw around him and his own experiences. That was, he saw people in crisis and coping with trauma through the use of alcohol.
- [14] Mr. Harry reports that his first sexual experience growing up was at the age of 12, when he was at a house party hosted by his brother. One of his brother's friends at the party, a girl four years older than him, forced herself on him and they had intercourse. Thereafter, he thought it was "cool" to have sex with older girls.
- [15] Mr. Harry has three children with three different partners. He met his first partner when she was 18 and he was 21. Together they had a child, who is now 16. He recalled breaking up with that partner when their child was six months old. Mr. Harry says he threw a cigarette roller at his partner's head and, after that, she left the home with their child. He states that at the time he was "just being an asshole".
- [16] Mr. Harry was 24 when he met his second partner, aged 19, and they were together for two years. They have a child who is now 14 years old. Mr. Harry reports she ended the relationship when she found him having sexual relations with a neighbour.
- [17] At the age of 30, Mr. Harry entered into a relationship with his third partner, who was 17. He recalled her parents calling the police due to the age difference in the relationship. He stated the relationship was largely based on using and selling drugs. He reported that he pulled his partner out of a residence by her hair and "rag dolled her", and he says, "I broke my foot kicking her", when he thought she was having sexual relations with another man.
- [18] Mr. Harry has now been with his fourth partner for the past couple of years and they have a son, born during Mr. Harry's trial in June 2022. They live in a trailer on a property owned by his partner's father on the Island.
- [19] Mr. Harry graduated a Grade 12 alternate program in Powell River. He believed his teachers were completing his work for him to get him moving on from the school system. He has obtained various workplace tickets, such as First Aid and a power saw course. He reports working for a restoration company doing demolition work since the offence.
- [20] Mr. Harry believes he may be living with fetal alcohol spectrum disorder, as his mother was a chronic consumer of alcohol. Mr. Harry stated that he was raised in an environment where drinking was normalized and he was first introduced to alcohol by his older friends when he was 12 years old.

- [21] In 2013, Mr. Harry's mother was admitted into hospital as a result of the deterioration of her liver. The doctor apparently told her she needed to stop drinking, as it was the main cause of her liver disease, and she encouraged Mr. Harry to get sober and supported him in getting connected to a range of programs that were offered and paid for through the Tla'amin Nation. He attended a number of construction courses at the time and enjoyed them immensely.
- [22] In 2015, his mother passed away, unfortunately, due to complications from liver transplant surgery. This impacted Mr. Harry significantly. Mr. Harry reports his substance use increased heavily after his mother's death and that he was trying to cure himself of the pain. The death of his mother meant his connection to his wider family was lost.
- [23] Mr. Harry reports he has no hostility towards women. However, he spoke about feelings of loneliness, especially when fighting with his current partner. Typically, the arguments centre around his alleged engaging in sexual behaviour with other women.
- [24] Mr. Harry has a history of relationships with younger females. Mr. Harry stated he does not have a preference for younger females, but instead he goes for "the easiest ones", referring to those he sees with most potential for engaging in sex.
- [25] Mr. Harry believes his earliest exposure to alcohol was as a 13-year-old, drinking leftover beer behind the couch during one of his parents' parties. This differs slightly from the 12-year-old story before, but it is certainly contemporaneous.
- [26] He reported starting to use drugs at the age of 18. He would steal drugs from his family. Mr. Harry reports his mother indeed served an 18-month jail sentence in relation to selling drugs.
- [27] At the age of 19, Mr. Harry began to smoke crack cocaine. At 23, he would snort cocaine and smoke crack cocaine regularly and would typically consume 15 beers a day or a couple of two-litre cider beverages.
- [28] He attended the Salvation Army Harbour Light addiction treatment centre, but left after meeting a "crystal meth addict", and the two stayed in a hotel for "days", using drugs and having sex.
- [29] When Mr. Harry relocated to Vancouver Island in July 2021, he noted being unable to find crack cocaine. He and his current partner turned to crystal meth instead. Not liking the physical effect it had on him, he reports quitting his crystal meth use in November 2021.

Principles of Sentencing

- [30] The fundamental principles and purposes to be considered by courts in sentencing are set out in ss. 718 and 718.2 of the Criminal Code.

- [31] Section 718 of the Code provides that the fundamental purpose of sentencing is "to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions", with reference to six objectives. These objectives are: denunciation of unlawful conduct; deterring the offender and other persons from committing offences; separating offenders from society, where necessary; assisting in rehabilitating offenders; providing reparations for harm done to victims and the community; and promoting a sense of responsibility in offenders, acknowledging the harm done to victims or to the community.
- [32] Sentencing is an exercise in balancing. No single objective trumps the others, subject to statutory provisions. A sentencing judge's role is to determine which objectives meet the greatest weight, given the circumstances of the offence and the offender: see *R. v. Nasogaluak*, 2010 SCC 6 at para. 43. Ultimately, "the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a 'just and appropriate' sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender": see *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500.
- [33] As the offences at issue in this case involve an underage person, s. 718.01 of the Code provides that I must give primary consideration to the objectives of denunciation and deterrence in sentencing the offender. The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: see s. 718.1.
- [34] Section 718.2 of the Code describes a number of specific principles to be considered in sentencing, including that the sentence should account for any relevant aggravating or mitigating circumstances. Because the complainant was a 13-year-old at the time of the offence, this constitutes an aggravating factor: s. 718.2(a)(ii.1).
- [35] Mr. Harry is Indigenous. Section 718.2(e) of the Code requires consideration of the role of unique systemic and background factors, which we commonly refer to as the Gladue principles, pursuant to *R. v. Gladue*, [1999] 1 S.C.R. 688, in sentencing Indigenous persons in appropriate types of sentencing procedures and sanctions based on an offender's Indigenous heritage or connection. For serious offences, the length of the term of imprisonment must be considered in light of an Indigenous offender's unique circumstances. Alternatives to incarceration must be explored even if the absence of community support and systemic and background factors may bear upon an Indigenous person's moral culpability and may impact the sentencing principles of deterrence and denunciation.
- [36] The principles discussed in *Gladue* were reaffirmed by the Supreme Court of Canada subsequently in *R. v. Ipeelee*, 2012 SCC 13. Mr. Justice LeBel summarized *Gladue* as follows:
- [59] The Court held, therefore, that s. 718.2(e) of the Code is a remedial provision designed to ameliorate the serious problem of overrepresentation of Aboriginal people in Canadian prisons, and to encourage sentencing judges to have recourse to a restorative approach to

sentencing (Gladue, at para. 93). It does more than affirm existing principles of sentencing; it calls upon judges to use a different method of analysis in determining a fit sentence for Aboriginal offenders. Section 718.2(e) directs sentencing judges to pay particular attention to the circumstances of Aboriginal offenders because those circumstances are unique and different from those of non-Aboriginal offenders (Gladue, at para. 37). When sentencing an Aboriginal offender, a judge must consider: (a) the unique systemic or background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (b) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection (Gladue, at para. 66). Judges may take judicial notice of the broad systemic and background factors affecting Aboriginal people generally, but additional case-specific information will have to come from counsel and from the pre-sentence report (Gladue, at paras. 83-84).

- [37] In Ipeelee at paras. 71-75, Justice LeBel addressed the criticism that the application of the Gladue principles will have the practical effect of requiring shorter jail sentences for Indigenous offenders. He rejected the criticism, stating that the statutory provision in the Code, 718.2(e), "does not create a race-based discount on sentencing". Rather, he stated, "sentencing judges are required to pay particular attention to the circumstances of Aboriginal offenders in order to endeavour to achieve a truly fit and proper sentence in any particular case": Ipeelee at para. 75.
- [38] Nevertheless, even in cases where a restorative justice plan is proposed to address the systemic and background factors affecting the offender and the offender has community support, it may be appropriate to sentence an offender to a lengthier prison sentence to address not only the sentencing principles of denunciation and deterrence but to aid the offender in the offender's own rehabilitation: see *R. v. Pouce Coupe*, 2014 BCCA 255 at paras. 25-29.
- [39] The Supreme Court of Canada, in *R. v. Friesen*, 2020 SCC 9 at para. 5, provided clear instructions for sentencing in cases involving sexual offences against children:
- [5] . . . we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

- [40] Established sentencing ranges for sexual violence against children must increase relevant to the ranges established for sexual violence against adults: Friesen at paras. 114-118. There, the court states that:
- [114] mid-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.
- [41] In *R. v. Williams*, 2020 BCCA 286 at paras. 11-21, the Court of Appeal for British Columbia describes the principles set out in Friesen and their impact on, for example, sentencing ranges previously established in British Columbia. However, the Court declined to set the appropriate range of sentencing for British Columbia and instead emphasized that a new analytical framework is to be applied to the sentencing of sexual offences against children: Williams at paras. 50-51.
- [42] The Ontario Court of Appeal discussed the primary consideration provision in s. 718.01 of the Code in *R. v. Lis*, 2020 ONCA 551:
- [47] By enacting s. 718.01, Parliament prioritized denunciation and deterrence for offences that involve abuse of children. The words "primary consideration" prescribe a relative ordering of sentencing objectives, a feature that does not appear in their listing in s. 718. This ordering reflects Parliament's intention that sentences "better reflect the seriousness of the offence": Friesen, at paras. 101-102.
- [48] The enactment of s. 718.01 also qualifies the previous direction of the Supreme Court that it falls to the sentencing judge to determine which sentencing objectives are to be prioritized. Section 718.01 confines the sentencing judge's discretion from elevating other sentencing objectives to an equal or higher priority. However, the sentencing judge retains the discretion to assign significant weight to other factors, such as rehabilitation, in giving effect to the fundamental principle of proportionality: Friesen, at para. 104; *R. c. Rayo*, 2018 QCCA 824, at paras. 103, 107 and 108.
- [43] The Crown refers me to two decisions pre-dating Friesen for consideration of sentences previously considered appropriate.
- [44] In *Pouce Coupe*, the offender was convicted of sexual assault involving one incident of unprotected intercourse. He was 19 years old and resided with his grandparents on the Blueberry First Nations reserve. He had no prior criminal record and had the support of family and his community. The pre-sentence report indicated he denied the offence and the trial judge rejected the defence submission that he had demonstrated genuine and sincere remorse. The complainant was 15 years old. In her victim impact statement, she stated the incident made her depressed and continued to cause her to have nightmares. The Gladue report set out systemic and background factors affecting the appellant as an Indigenous offender and proposed a restorative justice plan for the offender. The trial judge imposed a three-year custodial sentence, finding that it was more likely to aid the offender in his

rehabilitation than a shorter sentence coupled with a proposed restorative justice plan. However, in that case, the Indigenous offender's family and community continued to believe him to be innocent and a restorative justice plan would have had minimal rehabilitative effect: *Pouce Coupe* at para. 28.

- [45] In *R. v. Jaden*, 2018 BCSC 1685, the offender pled guilty to sexual assault involving one incident of unprotected intercourse. He was 51 years old and had no prior record. He was employed; married with four children; and had family and community support. He was remorseful. The complainant was 15 years old. The offender was a supportive friend to the complainant's mother and he provided groceries and money to the complainant's mother. The offender was sentenced to a three-year custodial sentence.
- [46] As the Crown points out, the Supreme Court of Canada in *Friesen* provides lengthy and detailed guidance on sentencing in cases of child sexual assault cases. In addition to the principle concerning the imposition of a sentence featuring an upward departure from prior precedents, the Court made it clear that offences against children should be punished more severely than sexual offences against adults and that sexual interference with a child should not be treated less seriously than sexual assault of a child.
- [47] Of particular relevance is the court's analysis of the need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle: see *Friesen* at para. 75-92. In discussing the gravity of sexual offences against children, the Court states:
- [76] We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.
- [84] When they analyze the gravity of the offence, sentencing judges thus must always take into account forms of potential harm that have yet to materialize at the time of sentencing but that are a reasonably foreseeable consequence of the offence and may in fact materialize later in childhood or in adulthood. To do otherwise would falsely imply that a child simply outgrows the harm of sexual violence (see *Wright*, at p. 88).
- [85] When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence. This consequential harm is a key determinant of the gravity of the offence (see *M. (C.A.)*, at para. 80)
- [48] In addition, the Court provides additional guidance in cases of adolescent girls:

- [136] At the same time, courts must also be particularly careful to impose proportionate sentences in cases where the victim is an adolescent. Historically, disproportionately low sentences have been imposed in these cases, particularly in cases involving adolescent girls, even though adolescents may be an age group that is disproportionately victimized by sexual violence (Benedet, at pp. 302, 304 and 314; L. (D.O.), at pp. 464-65, per L'Heureux-Dubé J.). In particular, sexual violence by adult men against adolescent girls is associated with higher rates of physical injury, suicide, substance abuse, and unwanted pregnancy (I. Grant and J. Benedet, "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019), 97 Can. Bar Rev. 1, at p. 5; "The 'Statutory Rape' Myth", at p. 269; R. v. Hess, 1990 CanLII 89 (SCC), [1990] 2 S.C.R. 906, at pp. 948-49, per McLachlin J.).
- [49] In support of a custodial sentence of five to seven years on the sexual offences, the Crown refers me to the decision in R. v. Griffin, 2021 ONSC 2618, which post-dates Friesen.
- [50] The offender was convicted of sexual assault involving one incident of unprotected intercourse and of uttering a threat arising from the same incident. He was 34 years old and the complainant was 16 years old. The offender was an intimate partner of the complainant's mother and lived with the family during the time the complainant was 10 to 14 years old. He was the father of the complainant's younger brother and she regarded him as a father figure. For some time prior to the offence the complainant lived primarily on the street, deeply enmeshed in street and drug culture. She reached out to the offender and they communicated via text and phone calls. The offender offered to help her navigate away from some of her problems and lifestyle. He invited her to his family cottage on an island, accessible only by boat. On the first night at the cottage, he had unprotected sex with the complainant after a night of consuming cocaine. He then threatened to harm her if she disclosed the sexual activity. At the time of the offence, the offender was on probation, following a conviction of assault on the complainant's mother. The offender was gainfully employed, grew up in a stable home, had no history of mental health or addiction issues, and had the support of family and friends. In her victim impact statement, the complainant described serious emotional concerns and a recognition that the consequences of her exploitation will endure for some time. The offender was sentenced to a six-year custodial term.
- [51] Mr. Harry refers me to the decisions in R. v. J.N.P., 2020 BCSC 570 and R. v. Vaux, 2021 BCSC 1773.
- [52] In J.N.P., the offender committed sexual interference against his 15-year-old niece on one occasion. He was in a position of trust. He performed oral sex, placed the victim's hand on his erect penis, and put his penis in her mouth. J.N.P.'s dated criminal record was considered "irrelevant". He had previously engaged in substance abuse, but was abstinent for 10 years prior to sentencing. The offence caused the victim "great emotional harm". J.N.P. was Indigenous, with close ties to his community. The Court imposed a sentence of three years' imprisonment.

[53] In Vaux, Mr. Vaux pled guilty to two counts of sexual interference. He was a 23-year-old Indigenous male. His expression of remorse was accepted and he apologized to one of his complainants. He was a first-time offender with no criminal record. His moral culpability was significantly reduced as a result of his cognitive deficits. Mr. Vaux had penetrative sexual intercourse with two victims, aged 14 and 15. He was sentenced to a CSO totalling 23 months.

Reports Received for Assistance on Sentencing

[54] I received three reports prepared to assist the Court in determining a fit and proper sentence.

[55] A Gladue report for Mr. Harry, filed November 17, 2022.

[56] A Pre-Sentence Report (the "PSR"), filed on November 28, 2022.

[57] A report authored by forensic psychiatrist Dr. Rakesh Lamba, which was prepared February 10, 2023. Dr. Lamba opines as follows:

- a) Mr. Harry meets the criteria for alcohol and poly-substance use disorders, particularly stimulant use and opiate use disorder;
- b) He meets the criteria for anti-social personality disorder. He has a history of failing to meet social norms with respect to lawful behaviours, reckless disregard for safety of self or others, irresponsibility, and impulsivity.
- c) The dynamics of Mr. Harry's sexual offences are rooted in poor control of his sexual impulses and inability or unwillingness to control his sexual impulses.
- d) Mr. Harry does not appear to have a strong circle of positive social supports. However, I do note that the writer of the report did not have access to the information that I have access to. Such a strong circle of support could be protective.
- e) Even though Mr. Harry is currently in an intimate relationship, which commenced approximately two years ago, and has a child with his partner, Dr. Lamba notes there are indications of instability in that relationship when he relapses into alcohol and drug use.
- f) As well, the report writer, or Dr. Lamba, notes Mr. Harry's social contacts are limited and are focused around alcohol and drug use, so far as Dr. Lamba knew.

[58] There is conflicting and/or erroneous information in or between the reports which are founded on Mr. Harry's own reporting:

- a) concerning his desire to gain a connection with his culture;
- b) his statement to Dr. Lamba that he pled guilty, when this is clearly not the case;

- c) his reporting to Dr. Lamba of not using any crack cocaine and only two slips into drinking alcohol and snorting cocaine in May and June 2022, while at the same time providing information for the PSR that, after relocating to Vancouver Island in July 2021 and being unable to find crack cocaine, he and his partner turned to crystal meth, which he then quit in November 2021;
- d) his trial testimony that after he, Sarah, and the complainant's mother shared two lines each of crack cocaine in the morning of June 4, 2020 no further drugs were consumed, while otherwise reporting to Dr. Lamba that the complainant was doing lines of cocaine provided by her mother on that day;
- e) his trial testimony that he and the complainant left his house for another ride at the request of the complainant, while reporting to Dr. Lamba that at some point he wanted to leave the house and get a flap of cocaine and the complainant wanted to come with him, saying they should go to the lake and do a line.

Support for Mr. Harry

- [59] Mr. Harry provided letters of support from a variety of people in his life. His partner, a cousin, his partner's father, his daughter, a niece, a friend, and a co-worker all provided letters of support. Staff at his First Nation's men's support group and staff with the Family Pathways Program confirmed Mr. Harry's access to their services. Some of the letters pre-date the trial. The focus in the letters in support is on Mr. Harry's steps toward dealing with his substance abuse and how he is thriving as a new father with his partner. His employer confirmed his dedication and professionalism.
- [60] Mr. Harry himself wrote two letters to the court, one pre-dating the trial, which speaks to his addiction issues; and one more recent letter, which, in addition to addressing his addictions and the steps he has taken to overcome them, he expresses remorse. His expression of remorse is in general terms as remorse for the situation. He does not mention the victim or the sexual offences. He does refer to the driving and evading offences. He expresses great fear of going to jail. He places his priority on his children and to continue working in order to provide for them.

Victim Impact Statement

- [61] The complainant prepared a victim impact statement on September 29, 2022, which she presented at the sentencing hearing.
- [62] The complainant's grandmother prepared a victim impact statement on September 29 as well, and she also presented her statement.

Aggravating Factors

- [63] As to aggravating factors that are to be considered, I note the following:

- [64] Mr. Harry subjected the complainant to an extremely invasive form of sexual violence, penile-vaginal penetration, in addition to other sexual activity, including having the complainant engage him in oral sex. He did not wear a condom during the offence.
- [65] The examination of the complainant by a forensic nurse examiner disclosed numerous abrasions and contusions on her legs, inner thighs, below her breasts, right arm, and right buttock.
- [66] The sexual offences have had a profound negative effect on the complainant psychologically, emotionally, and to her life and relationships, and have negatively impacted her family. She has tried to take her life twice. Her trauma is ongoing, is already of a longstanding duration, and may well be permanent. The complainant and her grandmother's victim impact statements are a vivid example of the harms that are referred to extensively in Friesen. They are haunted by Mr. Harry's actions.
- [67] Mr. Harry, who had been travelling in his vehicle with others during the day, had the complainant alone in his vehicle, in a remote location, increasing her vulnerability. This was also at night.
- [68] Mr. Harry knew that the complainant had consumed a large amount of alcohol and claimed she had ingested cocaine, factors which additionally increased her vulnerability.
- [69] Mr. Harry, in his testimony at trial and afterwards, has shown no remorse for his actions or empathy towards the victim but for his letter presented to court today. He has little to no insight into the sexual offences for which he has been convicted. Furthermore, he blames both the victim and her mother.
- [70] The offender has a criminal record, dated March 16, 2021, for an assault which arose in an intimate partner relationship. He received a suspended sentence and probation for one year. He also has a prior conviction for fleeing while under pursuit. For that he received a \$1,000 fine and a driving prohibition for one year.
- [71] Dr. Lamba opines that the offender's risk for re-offending sexually is "average to above average compared to a group of sexually motivated offenders", and that Mr. Harry "is in need of significant treatment in the areas of substance abuse and sex offending".

Mitigating Factors

- [72] Mr. Harry has been gainfully employed since November 2021, apart from two short periods of layoffs which are not of his doing.
- [73] He has completed the Respectful Relationships program in December 2021 and approximately six counselling sessions with the Tla'amin Nation men's support group in June 2021. He also attended, but did not complete, the Harbour Light residential treatment program, about which he testified at trial; and he has expressed a willingness to address alcohol, substance use, and trauma through Indigenous healing methods, as well as any program directed by the court, although he provided different information to the writer of

the PSR.

- [74] The Gladue report thoroughly canvasses the systemic and background factors of Mr. Harry which may bear upon his moral culpability, including the presence of alcohol, criminality, family violence, poverty, and possible fetal alcohol spectrum disorder during his childhood and adolescence.
- [75] Mr. Harry is a registered member of the Tla'amin Nation, but cannot speak his language, as it was lost during his mother's upbringing at residential school. This is one of the negative consequences of the residential school system and its colonial roots. He advised the Gladue report reporter, Claudia Hui, that he was not aware of his culture and language and hoped to regain this connection and knowledge in order to have a stronger sense of cultural identity. However, this assertion, as I noted above, is in direct conflict with his contemporaneous assertion to his probation officer that he "has no connection to his culture" and, more importantly, that he "does not care to engage". Consequently, it is difficult to assess Mr. Harry's commitment to pursuing his cultural identity. That does not negate the detrimental impact of colonialism on his life.
- [76] Tragically, Mr. Harry was born into the cycle of community trauma and intergenerational cultural violence that colonial policies have caused. Mr. Harry himself has witnessed and/or experienced violence, substance abuse, homelessness, criminality, sexual violence, domestic violence, struggles with mental health, lack of opportunities, poverty, loss of traditional language, disassociation from culture, and death in his family.
- [77] Mr. Harry does appear to have developed social supports recently. He is re-engaging with his older children since the offence. He has attended limited counselling. He has taken serious steps to address his substance abuse. However, he has relapsed at least twice since the offences.
- [78] Mr. Harry was under the influence of alcohol and drugs during the commission of these offences, and, similar to his testimony at trial, he reported to Dr. Lamba, "I was drunk and high for months on end at the time". At most, as Crown submits, and I agree, this is a minor mitigating factor and does little to reduce his moral blameworthiness. He acknowledged to the Gladue report writer that "when he has been under influences of substances or alcohol, he has made bad decisions in relation to his own relationships." Again, this is similar to his testimony at trial. He knew or ought to have known that being under the influence of alcohol or drugs increased his propensity to make bad decisions.

Conclusion

- [79] Mr. Harry's moral blameworthiness is not negated by his personal circumstances. The offences against the complainant were highly intrusive and impacted her physical, psychological, and sexual integrity. Mr. Harry's conduct has resulted in immediate harm to a 13-year-old and she continues to suffer significantly. The impact on the self-confidence and mental health of the complainant, her trust in others, and the challenges she will confront

in forming long-lasting and meaningful relationships and the impact on family relationships are eloquently described in the victim impact statements I heard today.

- [80] Mr. Harry's conduct on the sexual offence convictions must be denounced. Denunciation applies to the offence, not the offender. Denunciation and general deterrence weigh heavily in the proportionality analysis. Persons who may be like-minded need to understand that this form of criminality will attract significant punitive consequences.
- [81] Until very recently, Mr. Harry expressed an utter lack of remorse. His recent letter to the Court fails to refer to the sexual offences. He focuses on avoidance of a jail term and the needs of his children. He appears to have developed no insight into the nature of his crimes or the effect they have on the complainant and her family. I do not accept his recent expression of remorse as being genuine.
- [82] Mitigating against a long-term period of incarceration is the likely impact of Mr. Harry's experiences as an Indigenous person that has contributed to his lack of family, community, and, until recently, social supports, as well as his long history of substance abuse. He also does not have a previous criminal record of conviction for a sexual offence, but he does have a conviction for a related domestic assault.
- [83] He has been gainfully employed, for the most part, since the offences and appears to have had some success in addressing his substance abuse problem.
- [84] I also recognize the impact of incarceration on Mr. Harry's partner and young child. However, this is rarely a consideration serving to significantly reduce a sentence.
- [85] The sentence I impose must send a strong statement of denunciation and express the community's abhorrence when children are offended against. Thus, a sentence in cases like this must constitute a strong statement of deterrence, both specific and general, keeping in mind that this is Mr. Harry's only conviction for a sexual offence. A sentence of significant incarceration is required, however, to address those sentencing objectives.
- [86] I must not ignore restorative and rehabilitative objectives in determining a fit and proper sentence. In balancing these objectives with the primary objectives, I consider the mitigating factors that I have referred to earlier. Mr. Harry has made recent positive progress toward rehabilitation. However, it is limited.
- [87] However, as well, this is not a case of the safety of the community not being endangered by the offender serving his sentence in the community. *R. v. Kienapple*, [1975] 1 S.C.R. 729 does not apply to these ss. 151 and 152 convictions. I agree with the Crown that a CSO is not available with respect to a s. 152 conviction at this time. If it did apply, I would find that a CSO is not appropriate: see *R. v. Proulx*, 2000 SCC 5 at para. 127. Mr. Harry's history of domestic assault, average to above average risk of re-offending, his sexual relations history, and his need for significant treatment are reasons why the risk to the community is too great at this time.

- [88] Even if that risk could be addressed by way of severe and punitive restrictions in the community, in the circumstances of this case, "the need for denunciation or deterrence is so pressing that incarceration will be [in my opinion] the only suitable way in which to express society's condemnation of [Mr. Harry's] conduct or deter similar conduct in the future": Proulx at para. 127.
- [89] Given the gravity of the sexual offences, the age of the victim, and the preponderance of aggravating factors when measured against the mitigating factors, a global sentence of five years for the sexual interference and touching convictions would be an appropriate and fit sentence. This sentence gives primary consideration to the principles of deterrence and denunciation, whilst acknowledging the ability of the offender to access rehabilitation programs in a federal corrections facility.
- [90] On the convictions for dangerous operation of a vehicle and attempt to flee, given the circumstances of the pursuit in the bush, a fit and proper sentence of one month for each count, to be served concurrently to each other but consecutively to the sentence for sexual offences, is fit and proper. I will further order a driving prohibition, as submitted by the Crown, given Mr. Harry's driving conviction record and the circumstances of this case.
- [91] Taking into account Mr. Harry's Indigenous heritage and the painful effects of colonialism on his upbringing, particularly his mother's experience, which no doubt was a significant contributor to the substance abuse in which he engaged, and domestic abuse in which he grew up witnessing in his family environment and modelling at least once in his own relationship, I am prepared to reduce the global sentence to a period of four years in prison to address the reduction in blameworthiness attributable to Mr. Harry's status. This reduction would not be disproportionate to the otherwise appropriate global sentence of five years.
- [92] Furthermore, I will make ancillary orders required for the protection of the public.
- [93] Mr. Harry, would you please stand up.
- [94] On the count of sexual interference under s. 151 of the Criminal Code and invitation to sexual touching contrary to s. 152 of the Criminal Code, I sentence you to a global sentence of four years.
- [95] On the count of dangerous operation of a conveyance contrary to s. 320.13(1) of the Code and flight from a peace officer contrary to s. 320.17 of the Code, I sentence you to one month on each count, to be served concurrent to each other and consecutively to the sentence on the counts under ss. 151 and 152. I further order that you are prohibited from operating a vehicle for two years, plus the entire period to which you are sentenced to imprisonment, for a total of six years.
- [96] The total period of incarceration is, therefore, four years and one month.
- [97] I also impose the following ancillary orders, which I consider justified in the circumstances:

1. Pursuant to s. 109(2) of the Criminal Code, you are prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for 10 years after release from your term of imprisonment. Under the same section, you are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life, running from the date of this order.
 2. Sexual assault is a primary designated offence within the meaning of s. 487.04 of the Criminal Code. As such, pursuant to s. 487.05(1), I make an order authorizing the taking of a sample of bodily substance from you for the purpose of forensic DNA analysis and inclusion in the National DNA Databank.
 3. Under the authority of s. 743.21 of the Criminal Code, while serving your sentence, you are prohibited from communicating, directly or indirectly, with the complainant or any member of her immediate family.
 4. Pursuant to s. 161 of the Criminal Code, and for a period of 10 years, I order that you are prohibited from:
 - i. being within 500 metres of any dwelling house in which the complainant or any members of her immediate family is known by you to ordinarily reside;
 - ii. seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years; and
 - iii. having any contact, including communication by any means, with a person who is under the age of 16 years, unless the person is your child or you do so under the supervision of another adult;
 5. Under s. 490.012(1) of the Criminal Code, I hereby make an order in Form 52 requiring you to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10 for a period of 20 years.
 6. Finally, pursuant to s. 743.2 of the Criminal Code, I order that a copy of these reasons for sentence be forwarded to the Correctional Service of Canada, as well as a copy of the reports provided to me, that being the Gladue report, the PSR, and the forensic assessment.
- [98] I direct participation in sexual offender and substance abuse treatment and counselling while in prison, as well as psychiatric treatment as available, and, if at all possible, the authorities allow you to serve your sentence at an institution near your youngest child, who now resides with your partner near Duncan, British Columbia. I note that the Nanaimo Correctional Centre apparently contains the Guthrie House Therapeutic Service, which would be suitable for Mr. Harry's rehabilitation.
- [99] That is your sentence, Mr. Harry. You may sit back down.
- [100] All right, counsel, anything arising from that?

[101] CNSL O. KUZMA: Nothing, Justice. Thank you.

[102] CNSL N. ACKER: And nothing from my perspective, Justice.

[103] THE COURT: All right. I now wish to address the complainant.

[104] I wish to say to you that I realize how coming forward with your statement of what happened to you required courage on your part and a determination to do the right thing. I also wish to commend your mother, who ensured that you went to the hospital right away and were able to have the caring assistance of the dedicated and professional nurses there. We know many sexual offences involving young persons go unreported and the victims quietly live with their story for the rest of their lives, feeling alone, embarrassed, and afraid that they may not be believed. As painful as it must have been, only by your coming forward can justice be done. You are still young and have many opportunities and a life to look forward to, and I expect you will be a caring and positive member of your community. Thank you.

[105] Thank you, counsel.

[106] CNSL O. KUZMA: Thank you, Justice.

[107] CNSL N. ACKER: Thank you, Justice.

"Wilkinson J."

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