

CANADA / JUDGMENT

R. v. J.N.P.

2020 BCSC 570

COURT

Supreme Court of British Columbia

DECIDED

9 April 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

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2020 BCSC 570

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v.

J.N.P.

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Before: The Honourable Madam Justice Iyer

Oral Reasons for Sentence

Counsel for Crown:

T. Mitchell-Banks

Counsel for Accused:

E.K. Jones

Place and Date of Hearing:

Prince George, B.C.

April 6, 2020

Place and Date of Judgment:

Prince George, B.C.

April 9, 2020

INTRODUCTION

- [1] As there is an order in this case prohibiting publication of any information tending to identify the victim, I do not refer to anyone by name in these reasons.
- [2] On October 24, 2019, I convicted J.N.P. of sexual assault contrary to s. 271 of the Criminal Code, R.S.C., 1985, c. C-46 sexual interference with a person under the age of 16 years contrary to s. 151 of the Code, and invitation to sexual touching of a person under the age of 16 years contrary to s. 152 of the Code. The charges stem from an incident that occurred on April 21, 2017.
- [3] Sentencing was adjourned to allow time for preparation of pre-sentencing and psychiatric reports. Due to COVID-19 restrictions, the sentencing hearing proceeded by videoconference.
- [4] At the outset of the hearing, the Crown applied to register J.N.P.'s conviction on the s.151 offence and to enter conditional stays on the other two offences. This is appropriate because of the criminal law rule that prohibits multiple convictions being entered where a single event gives rise to multiple offences with substantially the same elements. Usually the conviction is for the most serious offence, and that is the case here.

CIRCUMSTANCES OF THE OFFENCES

- [5] The victim was 15 years old at the time of the offence. She is J.N.P.'s niece and is best friends with his eldest daughter, whom she has known her whole life. She spent a great deal of time in the J.N.P.'s home, at times living there and helping to take care of the younger children. J.N.P.'s partner was one of her mothers.
- [6] On the evening of April 21, 2017, J.N.P.'s partner was away and the other children were in bed. The victim and J.N.P. were in the living room. J.N.P. took her to a basement room containing old mattresses, clothes and an exercise machine. The victim sat on the mattresses. J.N.P. pulled off her shorts and underwear. She crossed her legs, but he pulled them apart and performed oral sex on her. He then pulled down his jeans, put her hand on his erect penis and then put it in her mouth. J.N.P. ejaculated in her mouth, then left and went upstairs.

- [7] The victim said she was frightened but did not physically resist because she had heard that, "if you fight, you get hurt." She disclosed the incident to a teacher a couple of weeks later.

JNP'S CIRCUMSTANCES

- [8] J.N.P. is 46 years old. He has eight children, now aged 5-18, with his long-time partner. He is currently living with an uncle, as the Ministry of Children and Family Development will not permit him to live at home because of this case. He is allowed to have supervised visits with his children. At the time of trial, J.N.P. had not seen his partner or their children for close to two years. I do not know whether he has seen his partner or children more recently.
- [9] The author of the pre-sentencing report spoke to each of J.N.P. and his partner. Each said that the separation has been hard, but that they are committed to each other and want to be reunited as a family.
- [10] J.N.P. is a member of one of six bands that make up the Tsilhqot'in National Government. When he was a young child, his mother was killed in a motor vehicle accident, and he was raised by his aunts and uncles. Either one aunt or an aunt and an uncle attended residential school. One of J.N.P.'s uncles is a band chief. J.N.P. had a good childhood. He has close ties to his family, culture and community. He speaks the Tsilhqot'in language, hunts and fishes. J.N.P.'s partner is a member of another First Nation.
- [11] J.N.P. did not graduate high school initially, but obtained a high school equivalency diploma in 2010. He is presently enrolled in a two-year Forestry Technician program and is hoping to continue into a four-year program. He has worked since high school in forestry-related occupations, including forest firefighting, falling and silvaculture. Finances are tight: J.N.P. receives a \$1,000 monthly stipend from his band while he is in school, and his partner helps out with expenses.
- [12] While J.N.P. had problems with alcohol and drugs previously, he has been abstinent for the past ten years. His prior criminal record consists of charges related to a bar fight in 1994, and driving with a blood alcohol level of over 80 in 1999 and 2006. I consider his dated criminal record irrelevant.
- [13] The forensic psychiatrist was unable to give an opinion on J.N.P.'s risk of re-offending because of the lack of collateral information and what she described as J.N.P.'s "extreme denial" that the offence occurred. She recommended ongoing supervision and reassessment for risk of future sexual violence, and that he attend sex offender programs. She also recommended counselling on better self-awareness, respectful relationship skills and anger management. In her view, supervised visits between J.N.P. and his children should continue.

IMPACT ON THE VICTIM

[14] The assault has caused the victim great emotional harm. That harm includes the violation of her integrity, the betrayal of trust by her uncle, J.N.P., and the destruction of fundamental relationships with her best friend and one of her moms. She was not able to speak with the author of the pre-sentence report. Nearly three years after the offence, her father reports that she continues to have severe anxiety/panic attacks. She attends counselling and is trying to go through a healing process. I have no information about how or whether she will be able to move forward.

PARTIES' POSITIONS ON SENTENCING

[15] The Crown's initial position was that J.N.P. should be sentenced to a term of three years' imprisonment. However, a few days prior to the hearing, the Supreme Court of Canada issued an important decision providing guidance on sentencing principles that apply to sexual offences against children: *R. v. Friesen*, 2020 SCC 9 [Friesen]. As neither counsel was aware of the decision, I gave them time to read it. When the hearing resumed, Crown counsel took the position that Friesen has fundamentally changed the sentencing principles governing child sexual offences such that three years is not a fit sentence. The Crown submitted a sentence of six to seven years is necessary.

[16] Defence counsel said that, as Friesen did not set a national benchmark for sentencing, the law is unchanged. He submitted that a sentence of two years less a day and three years' probation with counselling conditions is appropriate.

[17] There was no disagreement about the appropriateness of ancillary orders.

SENTENCING PRINCIPLES

Statutory Provisions

[18] I must apply the statutory provisions that were in force at the time of the offence. Sections 718 to 718.2 of the Criminal Code set out the purposes and principles governing sentencing. Section 718 states that the purpose is to impose a sentence that is proportionate to the offence in light of six objectives:

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

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;

- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[19] Section 718.01 says that where, as in this case, the offence involves abuse of a person under the age of 18, the primary sentencing objectives are deterrence and denunciation. Sections 718.1 and 718.2 are also important. They state:

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[20] Many cases have interpreted and applied these principles in the context of sexual offences against children. However, the Supreme Court of Canada's comprehensive review and discussion of how trial courts should approach sentencing for these offences in *Friesen* provides a new starting point applying the statutory principles and earlier cases should be read in light of it.

R v Friesen

- [21] Briefly, *Friesen* says that sentences for sexual offences should increase. This is because Parliament has changed the Criminal Code to increase the maximum sentences for these offences and to emphasize the importance of deterrence and denunciation in these cases. Sentences must also reflect current understandings of the wrongfulness and harmfulness of sexual violence against children, which extends beyond individual victims to their families, communities and society at large.
- [22] The Court emphasized that the "wrong" underlying the sexual offence prohibitions is not only the impropriety of engaging children in sexual activity, it is broader and deeper than that. The focus is on emotional and psychological harms, as well as physical harm. These harms include damage to the victim's personal autonomy, bodily and sexual integrity,

dignity and equality, to their relationships with their families and communities, and harms to the families, communities and society. Sentences must also reflect the wrongfulness of exploiting children's weaker position in society, the disproportionate impact on girls, which is linked to systemic problem of violence against women, and the disproportionate impact on indigenous people and other vulnerable groups.

- [23] With respect to the gravity of the offence, sentences must reflect the fact that these offences are inherently violent, whether or not there is physical injury, and that the harm they cause can have life-long impacts on victims and their families. The Court stated three guiding principles (at para. 107), two of which are applicable here. First, "upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence. Second, "sexual offences against children should generally be punished more severely than sexual offences against adults".
- [24] The Court expressed concern about sentencing the ranges endorsed by appellate courts, and said they must increase (at 114):

mid-single digit penitentiary terms for sexual offences against children are normal and that 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).

- [25] Finally, the court listed significant factors in determining a fit sentence as including, but not limited to: likelihood to reoffend; abuse of a position of trust, bearing in mind the full spectrum of trust relationships; the duration and frequency of the sexual violence; age of the victim, bearing in mind the disproportionate victimization of adolescent girls; and the degree of physical interference, without establishing a hierarchy of physical acts or treating penetration as the most egregious conduct. Victim participation is not a relevant factor.
- [26] The Court applied these principles to restore the trial judge's sentence of six years for sexual violence including oral sex and attempted penetration of a four-year-old girl.

Consideration of Indigenous Status

- [27] Friesen affirms that sentencing an indigenous person for any sexual offences against children requires consideration of the systemic and background factors outlined in cases like *R. v Gladue* [1999] 1 SCR 688 and *R. v Ipeelee*, 2012 SCC 13 [Ipeelee], which may have a mitigating effect, and lead the court to take a more rehabilitative and restorative approach to sentencing (at para. 92). At the same time, it stated that when a child victim is indigenous, the court may consider the heightened risk of sexual victimization faced by these children because of their indigeneity (at para. 70).

DETERMINING A FIT SENTENCE IN THIS CASE

[28] I start by considering the aggravating and mitigating factors in this case. The aggravating factors are:

- The victim is a person under the age of 18 (Code s. 7118.2(a)(ii.1)).
- J.N.P. abused a position of trust (Code s. 7118.2(a)(iii)). J.N.P. is the victim's uncle; his eldest daughter and the victim were best friends, and the victim spent a great deal of time in his house and helped care for the younger children. She was like one of his children and this makes his conduct especially morally blameworthy: Friesen, para. 129
- The offence has had a severe impact on the victim: (Code s. 7118.2(a)(iv)). As I have said, the offence has caused the victim lasting psychological and emotional harms, including the violation of her integrity, autonomy and dignity, and destruction of some of her most important relationships. It has also deeply divided other family members. It is reasonably foreseeable that these harms will continue long into the future and may never be overcome.
- The degree of physical interference was significant. Without suggesting that there is a hierarchy of physical acts, in the circumstances of this case, I consider that the coerced oral sex and ejaculating into the victim's mouth to be profoundly demeaning conduct: Friesen paras. 137-154.

[29] Before turning to the mitigating factors, I want to be clear that J.N.P.'s consistent denial that he engaged in the conduct for which he has been convicted and therefore has not expressed remorse is not an aggravating factor. Similarly, the facts that J.N.P.'s likelihood to reoffend cannot be assessed and his failure to engage in rehabilitative steps flow from his denial and are also neutral factors in this case. Finally, as the conduct consists of a single incident, duration and frequency are not aggravating factors here.

[30] The most significant mitigating factor in this case is J.N.P.'s status as an Indigenous person. While the pre-sentence and psychiatric reports do not contain much specific information about J.N.P. for purposes of a Gladue analysis, I can take judicial notice of the history of colonialism, displacement and residential schools that translates into the current reality of comparatively low educational attainment, lower incomes and greater unemployment, as well as higher rates of substance abuse, suicide and incarceration: Ipeelee at para 60.

[31] J.N.P. referred to "the cycle of violence" in his interviews with the authors of the pre-sentencing and psychiatric reports. He also made a statement to me at the end of the hearing in which he referred to intergenerational trauma. He said that he "didn't escape any of that" but he strongly felt the need to stop that cycle by raising his children with strong values and close supervision. He said that he has seen other people pass their trauma on.

[32] There is no evidence that J.N.P. suffered any childhood abuse. He did not complete high school, but he returned to get his equivalency diploma. He has worked hard and provided for his family over the years, and has returned to school to increase his employment prospects. He has also overcome alcohol and substance abuse problems and been clean for ten years. In these ways, J.N.P. has constructively and courageously addressed some of the systemic barriers associated with being an Indigenous person in this country.

[33] A fit sentence in this case must also reflect that the victim is an adolescent Indigenous person, and therefore belongs to a group that is vulnerable to increased risk of sexual violence. Recently, in *R v. West*, 2020 BCSC 352, in the course of sentencing an Indigenous person for child sexual offences against an Indigenous complainant, Justice Marchand described the current situation in this way (at para. 34-36)

[34] In its powerful final report, the National Inquiry into Missing and Murdered Indigenous Women and Girls documented a crisis of violence, including sexual violence, against Indigenous women, girls, and 2SLGBTQQIA people. The Inquiry identified four "pathways" that have resulted in disproportionate rates of oppression and violence towards Indigenous women, girls, and gender-diverse people. The four pathways identified by the Inquiry are:

- Historical multigenerational and intergenerational trauma;
- Social and economic marginalization;
- Maintaining the status quo and institutional lack of will; and
- Ignoring the agency and expertise of Indigenous women and girls and 2SLGBTQQIA people.

[35] The Inquiry concluded that:

the more these pathways intersect in an Indigenous person's life, the more likely they are to experience violence

[36] One of my takeaways from the Inquiry's work is that Canada's colonial history and destructive assimilationist policies, as well as racism and sexism, have embedded and normalized violence into the everyday lives of Indigenous women, girls, and gender-diverse people.

[34] In light of all of these considerations, I cannot accept either the Crown's position or that of the defence. In my view, a sentence of 6-7 years is clearly excessive. I note that in the face of the extremely egregious conduct in Friesen, the Supreme Court concluded that the six years of incarceration imposed by the trial judge was a fit sentence. The circumstances in this case are very different. However, bearing in mind the strong guidelines in Friesen about the need to denounce and deter sexual violence against children and to increase the length of sentences, a provincial sentence is also not appropriate. The conduct was serious and it was a complete betrayal of a close family relationship. A penitentiary sentence is necessary in this case.

- [35] Finally, I asked the Crown for information on the situation with respect to COVI-19 in correctional institutions. However, as this concern was not addressed in submissions, and the information provided suggests that correctional authorities have appropriate measures in place, I have not taken that into account.
- [36] Sir, would you please stand. I sentence you to a term of incarceration of three years for the offence of sexual interference with a person under the age of 16 years contrary to s. 151 of the Code. Please have a seat.
- [37] You will also be subject to the following four ancillary orders:
1. The count on the indictment is a primary designated offence under s. 487.04(a). Under s. 487.051(1) of the Code, I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Databank.
 2. Under s. 109(1) and (2) of the Code, you are prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance during the period that begins on the day on which this order is made, and ending not earlier than ten years after your release from imprisonment after conviction for this offence; you are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
 3. The offence of sexual interference under s. 151 is a designated offence under s. 490.011(a) of the Code. That means that, under s. 490.012(1) and 490.013(2)(b) of the Code, you are required to comply with the Sex Offender Information Registration Act for 20 years.
 4. Under s. 161 of the Code, you are prohibited for a period of 10 years from the date of this order from having any contact, including communication by any means, with the victim, unless under the supervision of a person whom the court considers appropriate.
- [38] The Crown also seeks an order under s. 743.2 of the Code. That section mandates that my reasons for sentence and any relevant reports that were submitted to the court and any other information relevant to administering the sentence be forwarded to the Correctional Service of Canada. I make that order with respect to my reasons for sentence, as well as the pre-sentence report and the psychiatric report. I decline to include my reasons for judgment in this order as the part of my judgement relevant to administration of the sentence is set out in my sentencing reasons.

"Iyer J."

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