

CANADA / JUDGMENT

R. v. Knight

2024 BCCA 394

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 394 R. v. Knight

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Knight,

2024 BCCA 394

Date: 20241115

Docket: CA49563

Between:

Rex

Respondent

And

Kyle Michael William Knight

Appellant

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Before:

The Honourable Madam Justice DeWitt-Van Oosten

The Honourable Justice Iyer

The Honourable Justice Edelmann

On appeal from: An order of the Supreme Court of British Columbia, dated August 8, 2023 (sentence) (R. v. Knight, 2023 BCSC 1748, Victoria Docket 179326-2).

Oral Reasons for Judgment

Counsel for the Appellant:

B. Movassaghi

Counsel for the Respondent:

C.E. Tomusiak

Place and Date of Hearing:

Vancouver, British Columbia

November 13, 2024

Place and Date of Judgment:

Vancouver, British Columbia

November 15, 2024

Summary:

The appellant was sentenced to three years' imprisonment for sexual interference. He appeals the sentence on four bases. He says: (1) the judge gave insufficient mitigating weight to the appellant's youthfulness and the fact that he experienced sexual abuse as a child; (2) she erred in her application of the sentencing principle of parity; (3) she erred in her application of the sentencing principle of proportionality; and (4) three years' imprisonment is a demonstrably unfit sentence. HELD: Extension of time to appeal is granted; application for leave to appeal is granted; however, the appeal from sentence is dismissed. The appellant has not established material errors in principle or that the sentence is demonstrably unfit.

[1] DEWITT-VAN OOSTEN J.A.: In August 2023, the appellant, Kyle Michael William Knight, was sentenced to three years' imprisonment for sexual interference contrary to s. 151(1)(a) of the Criminal Code, R.S.C. 1985, c. C-46. He received 275 days' credit for pre-sentence custody, leaving approximately 820 days left to serve (just over two years). The judge also made various ancillary orders, none of which are at issue here.

- [2] The appellant appeals from sentence. He says the sentence reflects material errors in principle, namely: (1) the judge gave insufficient mitigating weight to the appellant's youthfulness and the fact that he experienced sexual abuse as a child; (2) she erred in her application of the sentencing principle of parity; and (3) she erred in her application of the principle of proportionality. The appellant also says three years' imprisonment is a demonstrably unfit sentence.
- [3] He asks that the sentence be reduced to two years' imprisonment, less credit for time spent in pre-sentence custody.

Background

- [4] The judge's reasons for sentence are indexed at 2023 BCSC 1748 and summarize the factual circumstances surrounding the offence:
- [6] Late on the evening of October 19, 2019, Mr. Knight met E.M. for the first time on a city bus. Mr. Knight was 22 years old at the time. Both Mr. Knight and E.M. had been drinking earlier that evening.
- [7] At some point during the bus ride, E.M. and two of her friends decided to go to Mr. Knight's apartment with Mr. Knight and his friends to continue drinking.
- [8] After the bus ride, at least 10 people congregated in Mr. Knight's one-bedroom apartment. Mr. Knight sat next to E.M. on the couch until she spilled beer on his pants. When Mr. Knight went to change his pants, E.M. followed him into his bedroom. They kissed just inside the bedroom door. Mr. Knight lowered his pants, and E.M. performed oral sex on him.
- [9] Mr. Knight stood behind E.M. and helped her pull her pants down. His penis touched her vagina. At that moment, someone opened the bedroom door on their way to the bathroom. This was the fourth such intrusion while Mr. Knight and E.M. were in his bedroom. Mr. Knight pulled up his pants and left the bedroom. E.M. exited the bedroom a few minutes later with help from her friend.
- [10] The entire encounter between E.M. and Mr. Knight in the bedroom lasted three to five minutes.
- [11] At the time of these events, E.M. was approximately 15 years, 11 months old. Mr. Knight did not ask E.M. her age at any point before the sexual activity occurred.
- [5] The appellant was found guilty after a trial. The victim did not testify. Instead, the Crown led evidence of the sexual activity from a friend of the victim who witnessed the incident and assisted the victim in leaving the bedroom. The appellant testified and acknowledged sexual activity. However, he said he believed the victim was older than 16.

- [6] To obtain a conviction for sexual interference (a specific intent offence), the Crown must prove that the accused intentionally used their body or an object to touch the complainant's body for a sexual purpose and that the complainant was under 16 years: *R. v. G.B.*, 2009 BCCA 88 at paras. 24-25; *R. v. P.R.J.*, 2023 BCCA 13 at paras. 43-47, 53. Consent is not a defence. Nor is it a defence that the accused believed the complainant was 16 or older when the offence occurred unless the accused took all reasonable steps to ascertain the complainant's age: Criminal Code, ss. 150.1(1), (4).
- [7] At trial, the appellant advanced the defence of honest but mistaken belief in age. The Crown failed to prove that he did not honestly believe the victim was 16 or older: 2023 BCSC 624 at para. 39. However, the judge found that the appellant did not take all reasonable steps to ascertain the victim's age. As such, he was found guilty of sexual interference on the basis that he was "reckless" about the victim's age: 2023 BCSC 1748 at para. 12. The finding of recklessness is explained this way in the reasons for conviction:
- [43] In this case, Mr. Knight failed to make any inquiries to determine E.M.'s age. Mr. Knight argues, in essence, that no further steps were necessary because E.M. looked old enough to consent. In my view, it was not objectively reasonable in the circumstances not to make active inquiries to ascertain E.M.'s age.
- [44] Mr. Knight had no actual knowledge of E.M.'s age and no factual information from which to infer her age. Mr. Knight met E.M. for the first time on October 19, 2019. He did not ask E.M. her name or how old she was. Mr. Knight did not ask E.M. what school she attended or what she was studying. Before that night, he had not met her friends who were with her. He did not ask any of her friends how old they were. It would have been objectively reasonable in the circumstances to ask for at least some of this information in order to ascertain E.M.'s age before engaging in sexual contact with her. Mr. Knight failed to take these reasonable steps.
- [45] The youthful appearance of V.P., one of E.M.'s friends, ought to have been a red flag that prompted Mr. Knight to take active steps to find out E.M.'s age. I find that Mr. Knight recognized that V.P. looked young, but failed to make active inquiries despite this red flag. When he gave a statement to police, Mr. Knight said that V.P. looked like he was 12 years old "or something"
- [2023 BCSC 624, emphasis added.]
- [8] At sentencing, the judge was told that both the victim and her family have been significantly impacted by the offence:
- [14] According to the presentence report, E.M. experienced multiple long-term impacts as a result of the offence, including flashbacks and nightmares that she fears will never go away. In the aftermath of the offence, E.M. began abusing drugs and alcohol to manage her feelings and emotions. Although she now has control of her use of the substances, the events sent her into "an alcoholic spiral" for several months.

- [15] In her written victim impact statement, E.M. says that her outlook on life was completely changed by the offence. She is quite uncomfortable around men she does not know. She fears that something similar is going to happen again. She fears that something similar may happen to her own daughter. E.M.'s sexual experiences subsequent to the offence are not enjoyable.
- [16] E.M.'s mother confirms that the offence affected E.M. and her whole family. E.M.'s family constantly worries about what could happen to her when she goes out with her friends. E.M.'s mother reports that E.M. had a long period of depression and was in an almost constant anxious state after the offence occurred. She stopped going to school and could not get out of bed. Her anxiety limited her activities.
- [17] E.M. has pursued therapy and takes medication to manage the psychological effects of the offence. She anticipates she may need therapy for the rest of her life.

See also para. 48 of the reasons for sentence.

Judge's Sentencing Analysis

- [9] The Crown sought a sentence of three to four years' imprisonment. The defence acknowledged that a custodial sentence was required, but submitted that a prison term of two years less one day would suffice.
- [10] The judge began her analysis of the case by canvassing the appellant's personal circumstances. By the time of sentencing, he was 26 years old. He had been diagnosed with attention deficit hyperactivity disorder and anxiety as a child, and he struggled during his teenage years with intermittent employment and periods of homelessness. Prior to sentencing, the appellant disclosed multiple instances of sexual abuse as a child. He has a lengthy history of substance abuse, starting in his early teens. He also has a relatively lengthy criminal record.
- [11] The judge next turned to the purpose, objectives, and principles of sentencing as codified in ss. 718-718.2 of the Criminal Code.
- [12] She recognized that every sentence must be proportionate to the gravity of the offence and the offender's degree of personal responsibility: at paras. 31, 48, 55. She understood that in cases involving sexual interference, denunciation and deterrence require "primary consideration". She identified the existence of deemed aggravating features, namely, a victim under the age of 18 and significant impact from the offence: at paras. 30-33.
- [13] The judge instructed herself that any sentence she imposed must respect the principle of parity: at para. 34. Citing *R. v. Angel*, 2018 BCSC 1751 at para. 70, she accepted the proposition that an offender who is found guilty of sexual interference because they failed to take all reasonable steps to ascertain the complainant's age may have a lower level of moral culpability for the offence than someone who lacks an honest belief that the victim was of the age of consent: at para. 40. At the same time, the judge appreciated that her

sentencing analysis must account for the Supreme Court of Canada's decision in *R. v. Friesen*, 2020 SCC 9, a case involving child sexual abuse that emphasizes the harmfulness and wrongfulness of this conduct. In *Friesen*, the Supreme Court placed "children, and the harm they suffer, at the centre of the [sentencing] discussion": *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 32, emphasis added.

- [14] Applying *Friesen*, the judge found as a fact that the offence caused the victim "significant psychological harm": 2023 BCSC 1748 at para. 48. She rejected a submission by the defence that the gravity of the appellant's conduct was lessened by virtue of the fact that it involved an "isolated encounter that lasted only a few minutes": at para. 50. The sexual activity involved a high degree of physical interference and caused significant harm: at para. 51. The victim was intoxicated at the time of the offence, vulnerable, and the appellant supplied her with alcohol: at para. 56.
- [15] The judge also rejected a defence submission that the offence was less grave because the victim was only a few weeks away from turning 16 when it occurred. From her perspective, this fact did not "diminish [the victim's] entitlement to protection under the law as an underage person": at paras. 52-53, citing *R. v. Brozer*, 2023 BCSC 134 at para. 72.
- [16] The judge took note of the fact that there was no "supplementary violence" (harmful physical conduct that extended beyond the violence inherent to the offence). Nor was there evidence of "advance planning": at para. 54. She found that the appellant's "relative youth" at the time of the offence was a mitigating factor. Furthermore, because his conviction arose from a failure to take all reasonable steps to determine the victim's age, the judge was prepared to treat his moral culpability as "lower": at paras. 58-59.
- [17] However, there was nothing in the record to indicate that the appellant's history of substance abuse rendered him unable to appreciate the wrongfulness of his conduct and the harm caused by it: at para. 60. Nor was there evidence from which to conclude that psychological challenges contributed to the offence: at para. 61. The judge acknowledged that the appellant has expressed a willingness to participate in substance abuse or other counselling, including treatment for sexual offenders: at para. 62.
- [18] In determining a fit sentence, the judge considered various authorities provided by the Crown and defence and found *Brozer* to be instructive. In that case, the offender was sentenced to three years' imprisonment for one count of sexual interference involving a 15-year-old co-worker. He was 23 at the time of the offence and had unprotected vaginal intercourse with the victim. The accused knew the victim was 15. During the encounter, the victim told Mr. Brozer her age and said that as a result, they could not do anything sexual: *Brozer* at para. 6. He nonetheless carried on. At the time of sentencing, Mr. Brozer was 27. He had no criminal record, no substance abuse issues, or any mental health challenges. He had a "relatively happy and stable" childhood environment and a "supportive social network to assist him during and after his sentence": at paras. 24, 65. The judge who sentenced Mr. Brozer accepted that the likelihood of him committing future acts of sexual violence was

low: at para. 42. She imposed a prison term of three years.

Standard of Review

- [19] To obtain a reduction in sentence, the appellant must establish an error in principle that materially affected the sentence or that the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *Friesen* at para. 26. A demonstrably unfit sentence is one that unreasonably departs from the principle of proportionality: *Lacasse* at para. 53.
- [20] If the threshold for appellate interference has been met, the Court may sentence afresh: *Friesen* at para. 27. In those circumstances, deference is owed to the judge's findings of fact and to their identification of aggravating and mitigating factors, except to the extent that those findings are affected by an error in principle: *R. v. Nystrom*, 2023 BCCA 232 at para. 16.

Discussion

- [21] The appellant says the three-year sentence reflects material errors in principle. He says the judge: (1) gave insufficient mitigating weight to the appellant's youthfulness and the fact that he experienced sexual abuse as a child; (2) she erred in her application of the sentencing principle of parity; and (3) she erred in her application of the principle of proportionality. The appellant also says three years' imprisonment is a demonstrably unfit sentence.
- [22] In my view, the judge did not make the errors alleged.
- [23] First, the appellant says the judge accepted the appellant's youthfulness as a mitigating factor (at para. 58), but erroneously held that it did not lessen the gravity of the offence: at para. 52. The judge was correct to take this approach. As this Court noted in *R. v. Ellis*, 2022 BCCA 278 at paras. 130-131 and *R. v. Maslehati*, 2024 BCCA 207 at para. 76, the personal circumstances of the offender do not affect the gravity of the offence. "Personal circumstances that diminish an offender's moral blameworthiness or attract mitigating weight do not make the offence less grave": *Maslehati* at para. 76.
- [24] On the issue of childhood sexual victimization, the judge was alive to this aspect of the appellant's background. See paras. 19-24 of her reasons for sentence. She understood that his personal circumstances were relevant to her proportionality analysis: at para. 55. It is well-established that for purposes of appellate review, reasons for judgment are read as a whole and in the context of the record. In my view, there is no principled basis on which to find that the judge did not take the appellant's childhood struggles into account in determining a fit sentence.
- [25] Moreover, as the Crown correctly noted in its material, there was no evidence of a contributory link between the appellant's childhood sexual victimization and his offending, such that this aspect of the case could properly attenuate his moral culpability or otherwise attract significant weight in the proportionality analysis. For example, there was no evidence that childhood trauma had normalized sexual abuse for the appellant in a manner that

affected his ability to appreciate the harm he could cause through sexual interaction with someone under the age of 16: R. v. C.K., 2023 BCCA 468 at paras. 86-88; R. v. Hurley, 2024 BCCA 259 at paras. 26-29.

- [26] In the absence of a demonstrated contributory link, the judge was not bound to approach or assess this factor in a particular way. The appellant says that in light of the recognized long-term harms of child sexual abuse detailed in Friesen, a sentencing judge should assume a nexus between an offender's childhood victimization and their offending. However, this position fails to account for the analytical approach to the issue that is set out in Hurley and other cases and is binding upon us. Nor does it recognize that in Friesen, the Supreme Court noted that children who experience sexual violence " may be more prone to engage in sexual violence against children themselves when they reach adulthood ": at para. 81, emphasis added, internal reference omitted. Thus, an individualized assessment is required, based on the evidentiary foundation available at sentencing.
- [27] I note that at his sentencing hearing, the appellant did not submit that his childhood experiences reduced his culpability for the offence or justified a lower sentence. Instead, it was referred to in support of a broad-scoped counselling provision in the event counselling formed part of the sentence:

And also, as my friend pointed out, the [pre-sentence] report also indicates that there are a number of instances of unreported sexual abuse that Mr. Knight has suffered. I point that out only to say this, Justice, it's clear that he has the insight now to know that he needs some help with substance misuse, and it would appear, with this additional background information, potentially counselling of a more general nature would be able to assist Mr. Knight

[Emphasis added.]

- [28] The second and third alleged errors focus principally on the judge's use of Brozer as a comparative case for sentencing. The appellant says the sentence imposed in Brozer significantly impacted the judge's application of the principles of parity and proportionality. From his perspective, this is problematic because Brozer is a fundamentally different case. He also impliedly suggests that sentences of three years' imprisonment are more appropriately imposed in cases involving more than one incident of sexual abuse or a significant breach of trust. In support of the latter point, he cites R. v. P.R.J., 2023 BCCA 169 [P.R.J.].
- [29] I would not accede to the parity argument.
- [30] The judge understood there are distinguishing features between Brozer and this case, including the fact that the sexual activity was more invasive in Brozer, and importantly, that Mr. Brozer knew the victim was 15 when he committed the offence. From the judge's perspective, Mr. Brozer was an offender of greater moral culpability: at paras. 59, 70.

- [31] The judge also understood that notwithstanding the outcome in other cases, her task was to "craft an appropriate sentence" specific to the appellant in the particular context of this case: at para. 71. She appreciated that sentencing is an inherently individualized endeavour. The fact that she did not assign the amount of weight to the distinctions between Brozer and this case that the appellant says she should have, does not mean she erred in principle. That was a matter for her to determine in the exercise of her discretion. It is not the role of this Court on appeal to "reweigh the relevant factors in the sentencing analysis": *R. v. T.H.*, 2024 BCCA 123 at para. 45, citing *Lacasse* at para. 49.
- [32] The judge found that the appellant's moral blameworthiness for the offence was "lower" than Mr. Brozer's: at para. 59. However, she also found that, unlike Mr. Brozer, he is not a first-time offender, and this fact was logically relevant to the overall sentencing analysis. The judge made specific mention of this distinction between the two cases: at para. 70. The appellant does not have a prior conviction for sexual assault; however, he does have four convictions for offences of violence. Although not mentioned by the judge in her reasons, the appellant accepts there was material before her showing that he was likely on probation at the time of the offence.
- [33] There was no evidence specific to the issue of risk. However, the pre-sentence report indicated that the appellant's response to programming and assistance within the correctional system "has not been favorable". He has not followed through when referred to agencies for help with trauma or emotional issues. He successfully completed a treatment program for substance abuse, but relapsed and has not attended supportive programming since then. He has actively avoided supervision in the community and has "demonstrated impulsive violent behaviour" while under supervision, including damaging office property. At the time of sentencing, the appellant was a "regular user" of illicit substances. The judge was entitled to take the whole of this information into account in assessing a just sanction that would give meaningful effect to the purpose, objectives, and principles of sentencing, including the principle of specific deterrence.
- [34] Lastly, the appellant says a three-year term of imprisonment unreasonably departs from the principle of proportionality and is demonstrably unfit: *Lacasse* at para. 53. In support of this submission, he argues that the sentence does not give adequate effect to the appellant's lack of a prior conviction for a sexual offence or the absence of evidence that he poses a risk to re-offend sexually. He also argues the sentence is too high given the duration of the sexual activity, the fact that the victim was almost 16 at the time of the offence, and the absence of a breach of trust. The appellant points to cases such as *P.R.J.*, in which this Court sentenced a mother to three years' imprisonment for sexual interference with her daughter because, at least in part, there was a significant breach of trust: at para. 72. The appellant says that his circumstances are profoundly different.

- [35] The appellant's fitness argument fails to account for the fact that the appellant is not a first-time offender and has a history of prior violent encounters. As stated earlier, this formed part of the appellant's personal circumstances and the judge was entitled to treat the appellant's criminal history as an aggravating factor: at paras. 56, 70.
- [36] The appellant's fitness argument also fails to account for the Supreme Court's direction in *Friesen* that although the involvement of a young child increases the gravity of an offence and the offender's personal responsibility (at paras. 134-135), judges must be careful to ensure that sentences imposed for sexual violence against adolescents also give meaningful effect to the harmfulness and wrongfulness of the offence:
- [136] 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. In particular, sexual violence by adult men against adolescent girls is associated with higher rates of physical injury, suicide, substance abuse, and unwanted pregnancy

[Internal citations omitted, emphasis added.]

The judge made explicit note of the Supreme Court's comments in her reasons: at paras. 42-43. She was right to do so. See also *Nystrom* at para. 46.

- [37] At sentencing, the appellant emphasized the brief duration of the sexual activity with the victim and argued that this lessened the gravity of the offence. As I read her reasons, the judge did not reject the proposition that a single incident of sexual abuse may warrant a lesser penalty than multiple incidents. Rather, she found that in the context of this particular case, where a single incident gave rise to significant harm, the submission was unpersuasive: at para. 51. In my view, this conclusion was reasonably open to the judge on the record.
- [38] Finally, as this Court emphasized in *T.H.*:
- [31] Sentencing decisions are entitled to considerable deference and an appeal court should only substitute its own decision for a sentencing judge's for good reason (*Friesen*, at para. 25, citing *Lacasse*, at para. 48, *Shropshire*, at para. 46). 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.
- [Underlining in the original.]
- [39] The appellant has not persuaded me there is "good reason" to vary his sentence. In light of the individualized approach to sentencing, another judge may have imposed a lesser term of imprisonment. However, that does not make this sentence demonstrably unfit. Instead, a three-year sentence is consistent with *Friesen* and subsequent jurisprudence from this

Court. The appellant committed a grave offence involving sexual violence against an intoxicated 15-year-old who was a child within the meaning of the Criminal Code. He was young at the time (22 years old), but an adult who had the capacity to understand and reasonably foresee the immediate and long-term harms that flow from child sexual assault. Applying the highly deferential standard of review that accompanies an appeal from sentence, I would not interfere.

Disposition

[40] For the reasons provided, I would grant an extension of time to apply for leave to appeal from sentence to December 28, 2023. I would also grant leave to appeal.

[41] However, I would dismiss the appeal. The appellant has not established a material error in principle that affected the sentence or that the sentence is demonstrably unfit in the circumstances of this case and this offender.

[42] IYER J.A.: I agree.

[43] EDELMANN J.A.: I agree.

[44] DEWITT-VAN OOSTEN J.A.: The extension of time to apply for leave to appeal from sentence is extended to December 28, 2023. Leave to appeal is granted. The appeal itself is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

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