

CANADA / JUDGMENT

R. v. M.T.

2026 ONCA 346

COURT

Court of Appeal for Ontario

DECIDED

15 May 2026

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Collection

Decisions of the Court of Appeal

Date

2026-05-15

Neutral citation

2026 ONCA 346

Docket numbers

COA-25-CR-1336

Judges

Zarnett, Benjamin; Copeland, Jill M.; Dawe, Jonathan

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. M.T., 2026 ONCA 346[1]

DATE: 20260515

DOCKET: COA-25-CR-1336

Zarnett, Copeland and Dawe JJ.A.

BETWEEN

His Majesty the King

Respondent

and

M.T.

Appellant

M.T., acting in person

Ian Kasper, appearing as duty counsel

Avene Derwa, for the respondent

Heard: May 5, 2026

On appeal from the sentence imposed by Justice Robert J. Nightingale of the Superior Court of Justice, on August 14, 2025.

REASONS FOR DECISION

[1] The appellant was convicted at trial of sexual interference and sentenced to 17 months' imprisonment and two years' probation. The sentencing judge also made various ancillary orders, including an order under s. 161(1) of the Criminal Code, R.S.C. 1985, c. C-34.

[2] The appellant is appealing both his conviction and his sentence, but his appeals have been bifurcated and we heard only his sentence appeal. His conviction appeal has not yet been scheduled.

A. The length of the custodial sentence [3] The appellant was convicted of touching his niece's vaginal area under her clothing on a single occasion while he was babysitting her and her younger brother. She was 10 or 11 years old at the time, and the appellant was 21 or 22 years old. The complainant reported the incident some years later, and when the appellant was sentenced, he was 30 years old.

[4] The Crown's position was that the appellant should receive a reformatory sentence in the 18-to-24-month range, while the defence requested a conditional sentence or, in the alternative, a custodial sentence of up to 12 months. The sentencing judge imposed a custodial term of 17 months and declined to permit the appellant to serve this sentence in the community.

[5] The appellant, who was ably assisted on his sentence appeal by duty counsel, Mr. Kasper, has now served nearly nine months of this sentence. He no longer seeks a conditional sentence, but asks to have the length of his custodial sentence reduced.

- [6] Mr. Kasper submits that the sentencing judge made two errors in principle that warrant appellant intervention. He seeks to have us reduce the appellant's custodial sentence to a length that would make the appellant eligible for immediate release based on his earned remission credits: see *R. v. Summers*, 2014 SCC 26, [2014] 1 S.C.R. 575, at para. 24.
- [7] First, Mr. Kasper argues that the sentencing judge failed to give proper effect to the principle of restraint, which applies with special force when sentencing youthful first offenders: see e.g., *R. v. Bertrand Marchand*, 2023 SCC 26, 487 D.L.R. (4th) 201, at para. 132; *R. v. Habib*, 2024 ONCA 830, 99 C.R. (7th) 110, at para. 31.
- [8] We are not persuaded that the sentencing judge made this error. The principle of restraint requires courts “to avoid imprisoning young adults when possible”: *Habib*, at para. 31. However, it does not preclude sentences of imprisonment from ever being imposed on youthful first offenders. Rather, “[w]hen imprisonment is necessary” for a youthful first offender, courts must “make the sentence as short as possible to achieve the principles and objectives of sentencing”: *Habib*, at para. 31.
- [9] In this case, the sentencing judge correctly identified the primary sentencing objectives as denunciation and deterrence: *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, at para. 101; Criminal Code, s. 718.01. He specifically noted that the appellant's status as a youthful first offender was a mitigating factor, as was the fact that he “has otherwise led a prosocial life”. The sentencing judge had to weigh the mitigating factors with the aggravating factors he identified, which included the complainant's young age and the appellant's breach of trust. He concluded that a fit sentence for the appellant was an upper reformatory sentence slightly below the range proposed by the Crown. This was a discretionary decision that is entitled to appellate deference.
- [10] Mr. Kasper's second argument is that the sentencing judge failed to give proper weight to the Gladue factors: *R. v. Gladue*, [1999] 1 S.C.R. 688. Specifically, he maintains that the sentencing judge erred by “functionally” requiring the appellant to establish a causal link between his Indigeneity and the commission of his offence: see *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, at para. 82, citing *R. v. Collins*, 2011 ONCA 182, 277 O.A.C. 88, at paras. 32-33; *R. v. F.H.L.*, 2018 ONCA 83, 360 C.C.C. (3d) 189, at para. 32.
- [11] The sentencing judge did not ignore the appellant's Indigeneity. He quoted at length from the appellant's Gladue report and noted, among other things: (i) that the appellant's paternal grandfather and great-grandparents were residential school survivors; (ii) that the appellant's life had been “marred by poverty”; and (iii) that the appellant had found it difficult when his family moved to the Six Nations reserve for several years when he was a young child, because “he did not grow up in the community” and “did not know his culture”.
- [12] We agree that the sentencing judge's statements, citing *R. v. J.N.*, 2013 ONCA 251, 305 O.A.C. 175, and *R. v. Bourdon*, 2024 ONCA 8, 95 C.R. (7th) 219, that the appellant needed to do more than “make a bare assertion of Indigenous status”, and that these “systemic and background factors” did not “shed light on [his] level of moral blameworthiness”, are, on their own,

unfortunate. J.N. and Bourdon were both cases in which there was only limited evidence that the offenders' Indigenous backgrounds had any direct impact on their childhoods and upbringings. In J.N. the offender had grown up in the United States and believed that some of his ancestors were Indigenous, while in Bourdon the offender had grown up unaware of his Indigenous heritage, which he only discovered in his mid-thirties. We agree that the appellant's circumstances, as the sentencing judge found them, were very different.

[13] However, we are not persuaded that this error affected the sentence he imposed. Appellate intervention will only be warranted where the error in question had an impact on the ultimate sentence: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 44. Here, the sentencing judge concluded:

Given the seriousness of these sexual offences committed by [the appellant] against the young complainant and his moral blameworthiness, his Indigenous heritage does not ultimately displace the main consideration of and principles of denunciation and deterrence both general and specific as the most significant factors in the sentencing process for this sexual interference offence.

[14] The sentencing judge's conclusion that the appellant's offence warranted an upper reformatory-length sentence, taking into account his breach of trust and the impact of the offence on the young complainant, remains entitled to appellate deference.

[15] We would accordingly not interfere with the length of the appellant's custodial sentence.

B. The section 161(1) order [16] Mr. Kasper also takes issue with the specific terms of the s. 161(1) order made by the sentencing judge. Ms. Derwa, for the Crown, fairly agrees that some of these terms need to be varied.

[17] The terms the sentencing judge imposed must be considered in light of his determination that certain other terms were not justified. Citing *R. v. K.R.J.*, 2016 SCC 31, [2016] 1 S.C.R. 906, the sentencing judge noted that s. 161(1) orders "should be carefully tailored as a reasonable attempt to minimize the risk" to young children in the community. He stated:

In this case, there is no evidentiary basis of [the appellant] being a predatory sexual offender but rather his offending behaviour was opportunistic and confined to a child left in his care.

[18] The sentencing judge found that this made it unnecessary to include a term under s. 161(1) (a) prohibiting the appellant from attending public parks, swimming areas, or other similar locations where children might reasonably be expected to be present. However, he made a s. 161(1) order of ten years' duration, with terms that prohibit the appellant:

(i) from having any contact with the complainant C.T., her mother A.T., or her brother I.T., except through legal counsel;

(ii) from being within 2 kilometres of the dwelling-houses where C.T., A.T. and I.T. reside, or any place where they are employed or known to be;

(iii) “from being alone or in the presence of any person he knows to be or reasonably appears to be under the age of 16 years, except his own children unless in the presence of his employer while he is working or otherwise someone over the age of 18 years who is aware of the existence of this order”.

- [19] The Crown acknowledges that the first of these terms is unlawful, since s. 161(1) does not authorize non-contact orders. This term must accordingly be struck out. This does not affect the similarly-worded term of the appellant’s probation order, which will remain in effect during the two years of his probation.
- [20] The sentencing judge did have authority under s. 161(1)(a.1) to impose geographical restrictions on the appellant’s movements. However, the breadth of the second term of his s. 161(1) order is problematic in two respects. First, s. 161(1)(a.1) is directed at keeping offenders away from places where “the victim identified in the order” is likely to be. It is not apparent that the complainant’s mother and brother can properly be considered “victims” of the appellant’s offence: *R. v. T.S.*, 2020 ONCA 594, at para. 3.
- [21] Ms. Derwa suggested that the sentencing judge may have included the mother and brother in this term because of the possibility of the complainant visiting their residences. However, it is not apparent why he also found it necessary to prohibit the appellant from being within 2 km of any place where the mother and brother work or are otherwise “known to be”.
- [22] The second concern is that the three persons named in this term apparently all live in the same medium-size community where the appellant’s family resides. At the time of trial the appellant no longer lived in this community, but was residing with his long-term roommate in a different community a considerable distance away. However, Mr. Kasper advised us that the appellant’s roommate has had to give up their apartment, and that it is not clear where the appellant will be able to live when he is released from custody in the next few months.
- [23] If the appellant is obliged by his personal circumstances to return to live in his original home community, the order that bars him from being within 2 km of anywhere that the three named persons reside, work, or are otherwise known to be, might prove to be unworkably restrictive.
- [24] In these circumstances, we will narrow the reach of the second term of the s. 161(1) order by (i) removing A.T. and I.T.’s names, and (ii) reducing the specified geographical radius to 500 metres.
- [25] The third term of the order is problematic for different reasons. The sentencing judge’s goal in imposing this term seems to have been to prevent the appellant from being with children under the age of 16 unless other adults are also present, consistent with his finding that the appellant was an opportunistic offender. However, this term as drafted both goes further than s. 161(1) permits, while also overshooting the sentencing judge’s apparent objective.

- [26] First, the grammatical structure of the first clause of this term, read literally, prohibits the appellant from merely being alone, which was plainly not what the sentencing judge intended. In his reasons the sentencing judge stated that he meant to include a term “prohibiting [the appellant] from being alone in the presence of” persons under 16, not “alone or in the presence of” persons under 16. The addition of the “or” appears to have been a drafting error.
- [27] Second, s. 161(1)(c) authorizes sentencing judges to bar offenders from “having any contact” with persons under the age of 16, without appropriate supervision. The term imposed by the sentencing judge goes further and prohibits the appellant from merely being in the presence of children, even if he makes no attempt to communicate with them.
- [28] Third, there are few public places the appellant can go where he will not run the risk of encountering persons under 16: see K.R.J., at para. 81. Even if there are also adults present, they are unlikely to be “aware of the existence of this order” unless they are the appellant’s close friends or family members. Accordingly, this term as drafted will make it extremely difficult, if not impossible, for the appellant to ever go out in public on his own for ten years. The necessity of such a term is difficult to reconcile with the sentencing judge’s finding that it was not necessary to make an order under s. 161(1)(a) prohibiting the appellant from attending public parks, swimming areas, etc.
- [29] Ms. Derwa fairly acknowledges that this term of the s. 161(1) order also needs to be varied. We will address the problems we have identified by amending it so that it will now read:

[M.T.] is not to have contact with any person he knows to be or reasonably appears to be under the age of 16, unless someone over the age of 18 is also present. This term does not apply to his own children.[2]

C. disposition [30] Leave to appeal sentence is granted and the appellant’s sentence appeal is allowed to the extent of varying the terms of the s. 161(1) order, as discussed above. In all other respects the sentence appeal is dismissed.

“B. Zarnett J.A.”

“J. Copeland J.A.”

“J. Dawe J.A.”

- [1] This appeal is subject to a publication ban pursuant to s. 486.4 of the Criminal Code, R.S.C. 1985, c. C-46.
- [2] The appellant does not currently have any children of his own, but the sentencing judge presumably included this exception in recognition of his having set the duration of the s. 161(1) order at ten years.

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Prepared on 29 October 2026 · Esheria