

CANADA / JUDGMENT

R. v. Moazami

2025 BCCA 189

COURT

British Columbia Court of Appeal

DECIDED

19 June 2025

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2025 BCCA 189 R. v. Moazami

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Moazami,

2025 BCCA 189

Date: 20250619

Dockets: CA43308

Between:

Rex

Respondent

And

Reza Moazami

Appellant

File Sealed in Part

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Before:

The Honourable Madam Justice Bennett

The Honourable Justice Winteringham

The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated November 10, 2015 (sentence) (R. v. Moazami, 2015 BCSC 2055, Vancouver Docket 26108).

The Appellant, appearing in person (via videoconference):

R. Moazami

Counsel for the Respondent:

M.G. Scott

Place and Date of Hearing:

Vancouver, British Columbia

April 3, 2025

Place and Date of Judgment:

Vancouver, British Columbia

June 19, 2025

Written Reasons by:

The Honourable Justice Winteringham

Concurred in by:

The Honourable Madam Justice Bennett

The Honourable Justice Riley

Summary:

The appellant was convicted of 30 counts of prostitution-related, sexual, and human trafficking offences against 11 complainants between the ages of 14 and 19. The sentencing judge imposed a global sentence of 23 years, less five years and 26 days credit for time served. The appellant seeks leave to appeal his sentence on several bases, including that the sentencing judge failed to consider the appellant's rehabilitation potential, exceeded the Crown's proposed range of sentence without providing notice to the appellant, and improperly considered the appellant's exercise of his right to trial and the conduct of his defence as an aggravating factor. The appellant also seeks to admit fresh evidence on appeal, relating to alleged misconduct. Held: Leave to appeal is granted and the sentence appeal is allowed. The judge erred in principle when she considered the appellant's exercise of his right to a trial and his conduct during the trial to justify the imposition of a 23-year sentence. The total sentence is reduced from 23 years to 20 years and eight months and the appellant is credited an additional 50 days for pre-sentence custody. The

application to admit fresh evidence is dismissed. The appellant failed to establish the fresh evidence bears upon a decisive issue or could reasonably be expected to have affected the resulting sentence.

Reasons for Judgment of the Honourable Justice Winteringham:

Overview

- [1] Reza Moazami seeks leave to appeal a global sentence of 23 years, less time credited as five years and 26 days, imposed on November 10, 2015: *R. v. Moazami*, 2015 BCSC 2055. The sentence was imposed following a 61-day trial of 30 sexual and prostitution-related offences against 11 complainants ranging in age from 14 to 19 years over a period of two and a half years, from February 2009 to October 2011: *R. v. Moazami*, 2014 BCSC 1727 (collectively, the "Avails Offences"). Sentence was imposed on 26 counts after four counts of sexual assault were stayed pursuant to *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14.
- [2] After the trial for the Avails Offences, the appellant was convicted of attempting to obstruct justice and breaching a no-contact order for attempting to persuade one of the complainants not to testify against him: *R. v. Moazami*, 2016 BCSC 99 (the "Obstruction Offence"). For the obstruction of justice and breach conviction, the appellant was sentenced to three years imprisonment, to be served consecutively to the sentence for the Avails Offences: *R. v. Moazami*, 2016 BCSC 2137.
- [3] The appellant appealed the convictions for the Avails Offences and the Obstruction Offence. For both conviction appeals, the appellant focused on: (1) allegations of ineffective assistance of counsel; and (2) the conduct of an officer with the Vancouver Police Department ("VPD"), James Fisher. Mr. Fisher was the primary investigator for the Avails Offences and the Obstruction Offence. He was later convicted of sexual exploitation and breach of trust regarding a complainant in the appellant's proceedings and a second complainant in an unrelated matter. Mr. Fisher received an aggregate sentence of 20 months imprisonment plus two years probation: *R. v. Fisher*, 2018 BCPC 210, *aff'd* 2019 BCCA 33. The conviction appeals were delayed to allow time for the Crown to provide disclosure to the appellant about the investigation into the criminal conduct of Mr. Fisher.
- [4] On September 8, 2021, this Court dismissed the appellant's appeal of his conviction on the Avails Offences: *R. v. Moazami*, 2021 BCCA 328 (the "Avails Appeal"). As a part of the appeal, the appellant sought to introduce fresh evidence relating to Mr. Fisher's criminal conduct. The Court dismissed the application to admit fresh evidence. As a part of the sentence appeal now before this Court, the appellant seeks to admit fresh evidence, much of which is duplicated from his fresh evidence application in the Avails Appeal.

- [5] The sentence appeal was held in abeyance as the appellant challenged the underlying convictions in the Supreme Court of Canada. The Supreme Court dismissed the appellant's application for leave to appeal the underlying convictions on June 30, 2022. The appellant disputed this decision. While that dispute was outstanding, on June 27, 2024, pursuant to a case management order, Justice Fitch directed that the sentence appeal could proceed.
- [6] Counsel was appointed to represent the appellant on the sentence appeal but was discharged shortly before the appellant's written statement on the appeal was due to be filed. The appellant stated he wished to represent himself. He sought and was granted an extension of the filing deadline and filed a statement of argument on January 15, 2025. The appellant raised a number of grounds in the notices of appeal filed in 2016 and 2020, in case management conferences, and in his written statement of argument.
- [7] Essentially, the appellant contends the sentencing judge committed errors by: (1) failing to consider the principle of rehabilitation; (2) exceeding the Crown's proposed range of sentence without providing notice to the appellant that she intended to do so; (3) treating the appellant's exercise of his right to trial and the conduct of his defence as an aggravating factor; (4) improperly assessing the role of mandatory minimum sentences; (5) wrongly applying the totality principle; and (6) imposing a sentence that was demonstrably unfit.
- [8] In addition, the appellant contends he is eligible for a sentencing remedy based on Mr. Fisher's misconduct and other state misconduct. He also raises miscellaneous issues.
- [9] At this sentence appeal, the appellant again focuses his attention on Mr. Fisher's misconduct and seeks to introduce substantial material he characterizes as "fresh evidence". The material presented consists of: (1) disclosure from the Crown, including the post-conviction disclosure of the Fisher investigations; (2) documents said to relate to the effectiveness of his trial counsel; and (3) documents said to undermine the soundness of the convictions upheld by this Court.
- [10] For the reasons set out below, I would grant leave to appeal the sentence, dismiss the application to introduce fresh evidence, and allow the sentence appeal.
- [11] First, with respect to pre-trial custody credit, the Crown concedes the appellant is entitled to the benefit of increased pre-trial custody credit in accordance with this Court's determination--made subsequent to the sentencing decision on appeal--that the legislative provision that limited credit for those detained because of a bail breach was unconstitutional: *R. v. Romanchych*, 2018 BCCA 26. The Crown concedes, and I agree, that the appellant is entitled to 50 days further credit for pre-sentence custody time.
- [12] Second, the judge exceeded the Crown's sentencing position by almost three years without providing notice to the appellant of her intention to do so. This case predates *R. v. Nahanee*, 2022 SCC 37, and the judge, in the circumstances of this case, cannot be criticized for failing to give notice to the appellant and inviting further submissions pursuant to the principles set out in *Nahanee*. However, the judge revealed an error in principle in her explanation for

exceeding the Crown's position on sentence. In this case, the appellant's primary position at the sentencing hearing was that the Crown's position (20 years and 8 months) greatly exceeded any case seen in this country and therefore, a much lower sentence (10-12 years) was fit. The judge went above the Crown's position by almost three years and imposed a 23-year jail sentence.

- [13] The judge justified this position, in part, because the appellant "subjected these young, marginalized young women to the fear, stress, and aggravation of a long trial; he re-victimized the complainants and he lied to the Court under oath": at para. 144. While a guilty plea may be a mitigating factor on sentencing, neither a decision to plead not guilty nor the manner in which an accused person presents their defence is to be treated as an aggravating factor. In my respectful view, when the judge explained the higher sentence, she linked it, in error, to the appellant's decision to proceed with a trial, and in some respects, to the manner in which the trial was conducted. I have concluded the error directly impacted the sentence.
- [14] In my view, none of the other grounds of appeal have merit. The judge's analysis about the principles of sentencing and her application of those principles was otherwise without error. Deference has only been displaced with respect to the one error identified. For the reasons set out below, the error impacted the sentence imposed. I would reduce the sentence to twenty years and eight months--the Crown's original position on sentence.

Circumstances of the Offences

- [15] Between February 2009 and October 2011, the appellant operated a "lucrative" prostitution business involving teenage girls between the ages of 14 and 19. Many of the complainants came from disadvantaged backgrounds and the appellant exploited their vulnerabilities by promising them food, shelter, and a glamorous lifestyle. In some cases, the appellant introduced the complainants to illicit drugs, starting them on their road to addiction. This resulted in some of the complainants becoming highly dependent upon the appellant and continuing to work for him to support their addictions. The appellant abused many of the complainants sexually, physically, and psychologically, and he exerted a high degree of control over their movements and behaviour.
- [16] The investigation into the appellant's prostitution-related activities began on March 17, 2011, after the VPD responded to a domestic call involving the appellant. In the fall of 2011, the appellant was charged with the first subset of prostitution-related charges (living on the avails of prostitution and procuring alleged to have occurred from October 7, 2011 to December 22, 2011). Regarding the first subset of charges, the appellant was released on a recognizance with a \$100,000 surety (his mother). His bail continued after an 18-count information was sworn.

- [17] On August 12, 2012, a 36-count direct indictment was preferred and the appellant was to turn himself in on August 13, 2012. However, on August 9, 2012, the appellant was arrested for breaching the terms of his bail by contacting one of the complainants over the Internet. The direct indictment charged the appellant with 36 counts of living on the avails of prostitution, sexual exploitation and sexual assault against 11 complainants between the ages of 14 and 19, with nine complainants being under the age of 18.
- [18] At trial, the central issue was the appellant's exploitative behaviour towards the complainants and his knowledge or steps taken by him to determine the ages of the complainants. The appellant denied the elements of the offences and argued that he was providing protection to the complainants; he asserted the complainants had consented to sexual activity with him and that he reasonably thought the underage complainants were not underage. The judge determined the appellant was not credible and the other witnesses were, in general, credible. Further, she found that the appellant's actions towards some of the complainants were violent, intimidating, and coercive.
- [19] On September 15, 2014, following a 61-day trial, the appellant was convicted of 30 prostitution-related, sexual, and human trafficking offences. The 30 offences included: 13 offences involving some form of living on the avails of prostitution, four counts of procuring a person to work in the sex trade, one count of human trafficking, three counts of sexual interference of a person under the age of 16 years, four counts of sexual exploitation of a young person, and five counts of sexual assault, some of which included the use of the drug gamma hydroxybutyrate ("GHB") to render the complainant unconscious.
- [20] In the reasons for judgment in the Avails Appeal, this Court said the following about the offences:
- [19] In comprehensive reasons for judgment, the judge found, and it is not disputed, that Mr. Moazami: took provocative pictures of complainants and posted them on web-based advertising sites; supplied some of the complainants with unlawful drugs, usually without charge; travelled with certain complainants outside of British Columbia to hotels for the purpose of their prostitution; obtained locations, including apartments, where prostitution of the complainants took place; fixed rates of the complainants for sexual services; and retained some or all of the income earned in these transactions, he said for providing food, lodging, and clothing. The judge found [the appellant's] actions to some of the complainants were cruel and coercive, and met the predatory standards demanded by the offences on which she convicted, as we have earlier described.

The Fisher Offences

- [21] As stated, the appellant renews his fresh evidence application targeting Mr. Fisher's conduct. It is thus necessary to say something more about the appellant's allegations against Mr. Fisher (and others).

- [22] In March 2016, following the appellant's trials, the VPD started an investigation into the conduct of Mr. Fisher, relating to his exploitation of one of the complainants in the appellant's case and a complainant in another investigation involving a different accused. Mr. Fisher pleaded guilty to two counts of breach of trust and one count of sexual exploitation relating to a complainant in the appellant's proceedings and the complainant in the unrelated matter (the "Fisher Offences").
- [23] The Fisher Offences have featured heavily in the appellant's various applications and appeals. In the appellant's 2021 Avails Appeal, this Court considered the impact of Mr. Fisher's misconduct on the appellant's fair trial rights. The Court held that while Mr. Fisher's conduct was "appalling", it did not constitute an abuse of process that warranted granting the appellant a new trial, which would require the complainants to testify again: Avails Appeal at para. 190.

Circumstances of the Offender

- [24] The appellant was born in Iran in 1984 and moved to Canada with his family in 1996. When he committed the Avails Offences, the appellant was between the ages of 25 and 27. At the time of sentencing, he was 30 years old.
- [25] The appellant struggled in school as a result of his lack of English language skills. He suffered significant corporal punishment while attending elementary school; he reported being frequently struck with a ruler and being struck in the face by a teacher in sixth grade. At home, the appellant experienced a loving relationship with his mother and sister, but suffered regular physical abuse from his father who could not find work as a civil engineer after the family's move to Canada. The appellant's parents separated in 2000, and in 2002, his father returned to Iran. Around this time, the appellant suffered a brain injury as a result of a serious motor vehicle accident. He fully recovered from his injuries after a year-long period of rehabilitation but failed to graduate from high school due to his long absence. After leaving high school, the appellant worked at a variety of unskilled jobs. In 2009, he started his own personal training business. With respect to the appellant's circumstances, there is no independent verification of the appellant's background as he refused to participate in the preparation of a pre-sentence report.
- [26] During his incarceration leading up to the trial, the appellant had tried to better himself by taking all possible courses offered by the pretrial centre and he completed a 300-hour business course, obtaining a business diploma with the highest honours.
- [27] At the time of sentencing for the Avails Offences, the appellant's criminal record consisted of two convictions for obstructing a police officer in June and August of 2007, two convictions for failing to appear from March 2009 and March 2010, and one conviction for assault with a weapon from August 2010 (relating to S.W., a complainant and Crown witness in the trial for the Avails Offences whom the appellant contacted from jail, in contravention of a no-contact order, to bribe her not to testify against him, resulting in the Obstruction Offence).

Reasons for Sentence - Avails Convictions

- [28] The appellant was sentenced to 23 years imprisonment for the Avails Offences, with five years and 26 days deducted for time served.
- [29] In her reasons for sentence, the judge summarized the general principles of sentencing set out in s. 718 of the Criminal Code, R.S.C. 1985, c. C-46. She noted that because eight of the 11 complainants were under the age of 18 at the time of the offences, s. 718.01 required that she give primary consideration to the objectives of denunciation and deterrence: at para. 6. She also highlighted that s. 718.2 requires a sentencing judge to consider the relevant mitigating and aggravating circumstances and she found three aggravating factors of particular significance: 1) the appellant abused his common-law spouse in committing the offences; 2) the appellant abused a person under the age of 18 in committing the offences; and 3) the offences had a significant impact on the victims considering their young ages and personal circumstances: at para. 7.
- [30] The judge summarized the legal principles with respect to consecutive and concurrent sentences, the totality principle, and the impact of minimum sentences. She noted the Court must examine the circumstances of each offence to determine if the sentence imposed should be served concurrently or consecutively, and that s. 718.3(7)--enacted after the offences were committed--did not dictate that sexual offences against children automatically attracted consecutive sentences: at para. 13. With respect to the totality principle, she observed that this Court has instructed a combined sentence that exceeds the normal range of sentence for the most serious offence is not necessarily unduly harsh or long; rather, "[i]t is only when the aggregate sentence exceeds the overall culpability of the offender that the totality principle is violated": at para. 15, citing *R. v. Abrosimo*, 2007 BCCA 406 at para. 31. Lastly, because offences against children carry minimum sentences, the judge referred to this Court's instruction in *R. v. B.C.M.*, 2008 BCCA 365 regarding the interaction between statutory minimums and the general principles of sentencing and concluded that "a longer sentence due to a statutory minimum sentence may not necessarily signal a violation of the totality principle where consecutive sentences are imposed": at para. 18.
- [31] Next, the judge summarized the parties' positions on sentence. The Crown argued the sentence imposed for the sexual offences should be served consecutively to the sentence imposed for the prostitution-related offences and the sentences imposed for the offences against each complainant should be served consecutively, for a total sentence of 50 to 59 years: at para. 19. The Crown submitted that the total should be reduced to 17 years, based on the totality principle and after deducting three years and eight months for time served. The defence did not dispute the Crown's position on the overall length of sentence but argued the totality principle called for a far shorter sentence than submitted by the Crown. The defence took the position that the Crown's proposed sentence was "unduly harsh and crushing compared to [the appellant's] overall moral culpability" and referred to several manslaughter cases--which involved far more serious circumstances--where the sentence imposed was in the ten-year range: at para. 20.

- [32] After reviewing the parties' positions, the judge noted neither party had been able to locate a single authority involving an offender convicted of similar offences in similar circumstances. She observed there were "a multitude of factors that render this case extraordinary and unique", including the large number of complainants; the young ages of the complainants and their vulnerable circumstances; the appellant's failure to take responsibility for his actions (after conviction) and his lack of remorse; the appellant's young age at the time of the offence; and the appellant's lack of a related criminal record: at para. 21.
- [33] The judge found the most appropriate way to determine a fit sentence in such a difficult case would be to address the mitigating and aggravating circumstances applicable to each complainant separately, in respect of the appellant's circumstances: at para. 42. She noted, while many of the factors applied to all or most of the complainants, there were "significant differences in terms of the nature of the offences, the vulnerability and ages of the victims, the duration of the offences, and the moral culpability of [the appellant]": at para. 42. Although none of the complainants filed victim impact statements, the judge highlighted that she had heard each complainant during the trial and appreciated the harm caused by the appellant. The mothers of two complainants had filed victim impact statements.
- [34] The judge then moved through an assessment of a fit sentence for each of the complainants at para. 135 as follows:
- 1) M.N.: 3 years for living on the avails of prostitution of a person under the age of 18 years; 2 years for sexual interference; 3 years for sexual exploitation. The sentences imposed for sexual interference and sexual exploitation were to be served concurrently and the sentence for living on the avails was to be served consecutively to the sexual interference and exploitation offences.
 - 2) E.B.: 6 years for living on the avails of prostitution of a person under the age of 18 with coercion; 2 years for sexual interference; 3 years for sexual exploitation. The sentence imposed for sexual interference and exploitation was to be served concurrently and the sentence for living on the avails (with coercion) was to be served consecutively to the sexual interference and exploitation offences.
 - 3) S.W.: 7 years for living on the avails of prostitution of a person under the age of 18 with coercion; 3 years for sexual exploitation. The sentence imposed for sexual exploitation was to be served consecutively to the living on the avails (with coercion) offence.
 - 4) S.H.: 45 days for living on the avails of prostitution; 2 years for living on the avails of prostitution of a person under the age of 18 years. The sentences were to be served concurrently.
 - 5) C.B.: 1 year for procuring a person to become a prostitute and 90 days for living on the avails of prostitution, to be served concurrently.

- 6) I.T.: 1 year for procuring a person to become a prostitute and 90 days for living on the avails of prostitution, to be served concurrently.
 - 7) J.C.: 1 year for procuring a person to become a prostitute; 6 months for living on the avails; 2 years for sexual assault; 2 years for human trafficking. The sentences for procuring, living on the avails, and human trafficking were to be served concurrently. The sentence imposed for sexual assault was to be served consecutively.
 - 8) H.W.: 3 years for living on the avails; 2 years for sexual exploitation, to be served consecutively to the sentence for living on the avails.
 - 9) T.H.: 6 months for procuring; 2 years for living on the avails; 45 days for living on the avails, all to be served concurrently.
 - 10) S.K.: 2 years for living on the avails.
 - 11) J.C.H.: 5 years for living on the avails, to be served consecutively to 18 months for sexual interference.
- [35] The judge then considered the mitigating and aggravating circumstances relevant to each of the 11 complainants and determined the entire length of sentence for all complainants to be 48 years and six months imprisonment before applying the totality principle. She concluded that the total sentence should not be calculated concurrently; to do so, she stated, "would be the equivalent of giving [the appellant] a reduced sentence because he inflicted harm on many young girls rather than only one or two": at para. 137. She noted that this Court has held that "crime should not be 'cheaper by the dozen'" but that the totality principle demands some reduction to avoid imposing a harsh and oppressive jail term that was "not befitting [the appellant's] past criminal record, and would crush his prospects for any rehabilitation": at para. 137.
- [36] Next, the judge addressed the statutory minimum sentences for each of the offences, which amounted to 25 years plus 315 days in total if the sentences were served consecutively. This total amount, the judge stated, "informs the Court with regard to the length of sentence necessary to adequately reflect the serious nature of the offences, the multiple complainants, the many aggravating factors, and [the appellant's] moral blameworthiness in light of the few mitigating circumstances": at para. 140. She then considered whether this length of sentence properly balances the objectives of deterrence and denunciation with the appellant's moral blameworthiness. Having determined that the appellant's moral blameworthiness fell "within the upper range of gravity and seriousness," the judge found the range of sentence did not exceed his overall culpability: at para. 141.
- [37] Returning to the total potential sentence of 48 years, the judge observed that this length of sentence was far greater than the sentences imposed in the cases provided by both parties. She noted that none of the authorities she reviewed were comparable to the appellant's circumstances; she repeated that, in this case, there were many aggravating factors, very few mitigating factors, and many of the offences had minimum sentences of five and two

years: at para. 142. For that reason, the judge found that a sentence in the range argued by the Crown was not unduly long or harsh.

- [38] After using the statutory minimum and maximum sentences as a benchmark and applying the factors relevant to the totality principles, the judge found a sentence of 23 years incarceration was "the minimum necessary to achieve the fundamental objectives of sentencing on the facts of this case": at para. 143. She then made the following comment about the appellant's potential for rehabilitation as it related to the objectives of sentencing:
- [143] Denunciation and deterrence are the most important principles of sentencing in light of the nature of the offences against children. While it is also important to consider [the appellant's] potential for rehabilitation, the serious nature of his offences and the harm he has caused to these young complainants requires this sentencing objective to be accorded a secondary role in crafting the appropriate sentence. Moreover, as described earlier, there has been no formal assessment of [the appellant's] potential for rehabilitation and risk for re-offending, and the value of the evidence of rehabilitation he has produced is lessened substantially by the known facts proven at the trial.
- [39] After determining the length of sentence to be imposed, the judge observed that it exceeded the length proposed by the Crown, but found that a reduction of the total sentence to 23 years "properly reflect[ed] [the appellant's] overall blameworthiness for his egregious misconduct and the serious harm caused to the complainants": at para. 144. The judge then made the following comments about the appellant's choice to proceed with a trial and the conduct of his defence:
- [144] In addition to [the appellant's] misconduct during the periods of the offences charged, as outlined in this judgment and in the reasons for conviction, he subjected these young, marginalized young women to the fear, stress, and aggravation of a long trial; he re-victimized the complainants and he lied to the Court under oath. He exhibited no remorse and failed to take even the slightest amount of responsibility for his misconduct. He has no insight into the harm caused to his victims.
- [40] The judge concluded by applying the totality principle to find a global sentence of 23 years imprisonment to be appropriate in the circumstances, and determined that the sentences imposed with respect to the offences against three of the complainants would be served consecutively: at para. 146.
- [41] Next, the judge considered the time served to be credited to the appellant. She observed that s. 719(3.1)--which provides that the Court may give credit for time served at 1.5 days for each day in pre-trial custody--applied to the appellant's pre-trial custody because the charges were first laid after the relevant sections of the Criminal Code were enacted in February 2010 and the triggering date is when the charges are brought: at para. 149, citing *R. v. Clarke*, 2014 SCC 28 at paras. 17-18. The judge summarized the appellant's various times spent in custody and calculated his total time served credit to be 1851 days, or five years and 26 days. After deducting the time served from the 23-year sentence, she determined the remaining

sentence to be served was 17 years and 339 days: at para. 156.

On Appeal

[42] The appellant identified a number of grounds to support his submission that the judge erred in imposing a 23-year jail sentence and that the sentence was unfit. The appellant filed a notice of appeal and an amended notice of appeal, stating the grounds for his sentence appeal. During case management conferences and in his statement of argument, the appellant identified further grounds in support of his sentence appeal. In its responding statement of argument, the Crown listed and responded to each of the grounds raised.

[43] I have summarized the grounds raised by the appellant as follows:

- 1) The judge erred by failing to consider rehabilitation potential or the appellant's personal circumstances.
- 2) The judge erred by exceeding the Crown's proposed range of sentence and failed to provide notice to the appellant that she intended to exceed the sentence proposed by the Crown.
- 3) The judge erred by improperly considering the appellant's exercise of his right to trial and/or the conduct of his defence as an aggravating factor.
- 4) The judge erred by improperly assessing the applicable mandatory minimum sentences in place at the time of the sentencing hearing.
- 5) The judge erred in her application of the totality principle.
- 6) The judge imposed a sentence that was demonstrably unfit.

[44] In addition, the appellant raises several miscellaneous issues. In particular, he contends he is eligible for a sentencing remedy based on the misconduct of Mr. Fisher and alleged state misconduct.

Standard of Review

[45] The standard of review applicable to sentencing decisions is not controversial. It is highly deferential. Sentencing is a decidedly individualised process. An appellate court may intervene to vary a sentence only if the sentencing judge made an error in principle that had an impact on the sentence or if the sentence is demonstrably unfit: *R. v. Friesen*, 2020 SCC 9 at para. 26.

[46] In *R. v. Milne*, 2021 BCCA 166, Justice Dickson made clear that "[a]n error in principle may include an error in law, a failure to consider a relevant factor or the overemphasis of a relevant factor": at para. 44. A sentence is demonstrably unfit where it is clearly or manifestly excessive or inadequate or represents an unreasonable or marked departure from the principle of proportionality: *R. v. Lacasse*, 2015 SCC 64 at paras. 52-53.

- [47] The same standard of review applies to the sentencing judge's application of the totality principle (R. v. Joseph, 2010 BCCA 525 at para. 12) and the judge's determination as to whether sentences are served consecutively or concurrently (R. v. Maliki, 2005 BCCA 495 at para. 19).
- [48] Finally, if an error is found that has impacted the sentence, this Court may sentence afresh. Justice Fisher in R. v. Nystrom, 2023 BCCA 232 stated:
- [16] Where an error in principle has impacted the sentence, or where the sentence is demonstrably unfit, this Court may inquire into the fitness of the sentence and replace it with the sentence we consider appropriate, giving less deference to the sentencing judge. In doing so, we are to defer to the judge's findings of fact and identification of aggravating and mitigating factors, except to the extent they are affected by an error in principle: Lacasse at paras. 43-44; Friesen at paras. 27-29; Agin at paras. 48, 52; R. v. Parranto, 2021 SCC 46 at para. 122.

Discussion

First ground: Did the judge err by failing to consider rehabilitation or the appellant's personal circumstances?

- [49] The appellant asserts that the judge erred because she did not adequately consider the sentencing principle of rehabilitation and his personal circumstances.
- [50] It is clear that the judge considered rehabilitation and she explicitly addressed this sentencing principle at various points in her reasons: at paras. 40, 41, 137, and 143. The judge discussed the appellant's personal circumstances and recognized there was "some potential for rehabilitation": at paras. 32-39. The judge deemed it "important to consider [the appellant's] potential for rehabilitation" and considered the principle of rehabilitation as it related to the totality principle: at paras. 137, 143. The judge noted the appellant demonstrated an ability to better himself by taking business courses while in pre-trial custody but she weighed this against the appellant's choice to pursue crime instead of an available legitimate career option. The judge also raised a concern about the lack of a pre-sentence or psychological report. She made the following comments about the lack of any formal assessment of the appellant's rehabilitative potential:
- [143] While it is also important to consider [the appellant's] potential for rehabilitation, the serious nature of his offences and the harm he has caused to these young complainants requires this sentencing objective to be accorded a secondary role in crafting the appropriate sentence. Moreover, as described earlier, there has been no formal assessment of [the appellant's] potential for rehabilitation and risk for re-offending, and the value of the evidence of rehabilitation he has produced is lessened substantially by the known facts proven at the trial.

[51] Essentially, the judge considered rehabilitation to be an objective of secondary importance, giving primary consideration to denunciation and deterrence, as mandated by s. 718.01 of the Criminal Code. The judge acknowledged that the appellant did not have a related record and noted "his relatively young age at the time of the offences": at para. 51. As I read her reasons as a whole, it is clear that the judge considered the appellant's personal circumstances and the submissions made on his behalf. The appellant did not submit to a psychological assessment or permit himself to be interviewed for the purpose of a pre-sentence report. As such, the judge considered the available information when determining that rehabilitation, in the circumstances of this offender and these offences, was a secondary sentencing objective. I can see no error here and I would not interfere with the judge's assessment of rehabilitation. I would not accede to this ground of appeal.

Second ground: Did the judge err by exceeding the Crown's sentencing range without providing notice to the parties?

[52] The Crown sought a global sentence of 20 years and 8 months less credit for pre-trial custody. The appellant sought a global sentence of 10-12 years. The transcript of the proceedings reveal that the appellant focused his submissions on the "crushing" sentence sought by the Crown. The following submission by counsel reflects this focus:

Now, in this case, the Crown is looking for a sentence of some 20 years and seven months before application of enhanced credit for time already served and, in my submission -- and that's after the totality principle is brought into play. In my submission, that is unduly harsh, it's excessive, it's crushing, and in my respectful submission, it's not in keeping with the authorities.

And later, after considerable exchanges with the Court about the Crown's position, defence counsel submitted:

And I'm grounding the defence argument on this basis, that it's excessive, it's harsh, it's crushing and it goes over and above the moral culpability of [the appellant]. That is what the Crown is looking for, the global 20 years, seven months. And something less is called for, something substantial, but something less. I use a range of 10 to 12, and this is a difficult situation to come up with an appropriate sentence because we're into, basically, new territory on this case, but the defence sticks with that recommendation and those submissions, and I say the Crown is wrong in asking for the type of sentence that they are asking for. They're right in asking for it but it should not be imposed.

[53] The appellant rejected the notion that the Crown's position was fit. He stated as much during the sentencing hearing and in response to the Court's inquiries. At no point did the judge reveal she was considering a sentence exceeding the Crown's position. The appellant was not given an opportunity to respond or make further submissions. Before us, the appellant submitted that had he known the judge would impose a greater sentence than that sought by the Crown, he would have participated in the preparation of a pre-sentence report and/or psychological assessment. I note, however, that he did not include, as a part of his fresh evidence application, materials akin to a pre-sentence report or psychological assessment.

- [54] At the time, the judge was not required to give notice to the parties that she was considering imposing a sentence exceeding the upper end of the range proposed by the Crown. Following Nahanee (for cases involving guilty pleas and contested sentencing hearings), failing to provide notice and an opportunity for further submissions is understood to be an error in principle which, if it had an impact on the sentence, satisfies the standard for appellate intervention: Nahanee at paras. 52, 59. Nahanee was a case involving a guilty plea and contested sentencing hearing. We did not receive detailed submissions about the application of Nahanee to the case at bar where the judge had presided over a lengthy trial. In this province, at the time of the appellant's sentencing hearing, failure to notify the parties and invite further submissions, did not amount to reversible error: *R. v. R.R.B.*, 2013 BCCA 224.
- [55] That said, the Nahanee framework helps to assess the appellant's complaint about the judge exceeding the Crown's position. Nahanee makes clear that a sentencing judge's failure to provide notice and the opportunity for further submissions is an error in principle that will only justify appellate intervention where: (1) the court was deprived of information material to the sentence; (2) the judge failed to provide reasons, or provided unclear or insufficient reasons, for imposing the harsher sentence; and (3) the judge relied on flawed or unsupportable reasoning for imposing the harsher sentence, such as the erroneous consideration of an aggravating factor or misapprehension of relevant authorities.
- [56] The Crown submits there is nothing before this Court that would allow us to conclude that the judge was deprived of information material to the assessment of a fit sentence. That is, the appellant has not shown that the judge was deprived of information that would have impacted the sentence. The appellant contends that he would have participated in the preparation of a pre-sentence report and assessments had he known the judge would go higher than the "crushing" sentence sought by the Crown. Yet the appellant did not say what the new information would reveal about his circumstances and/or rehabilitation potential and how that new information would have impacted the sentence imposed. I acknowledge that the appellant need only inform the Court of the information he was unable to bring to the attention of the sentencing judge; if the information is material, such that it appears to the appellate court that it would have impacted the sentence, the court can sentence afresh: Nahanee at para. 57. In my view, information about agreeing to participate in a pre-sentence report does not constitute "material" information. It is the information contained in the pre-sentence report that would be relevant to this part of the analysis. The appellant did not say anything about what would have been included in a pre-sentence report that would have impacted the sentence.
- [57] Turning to the second branch of Nahanee, the judge delivered detailed and comprehensive reasons setting out her application of the principles of sentencing, the circumstances of the offence and of the appellant, and the case authorities relevant to her assessment. In my view, her reasons explaining the length of sentence were sufficient for appellate review.

[58] However, on the third branch of Nahanee, I am of the respectful view that the judge's reasoning for exceeding the Crown's sentencing position was based on an erroneous consideration; the appellant's decision to pursue a trial. I would characterize this as an error in principle and will address this submission under the next heading.

Third ground: Did the judge improperly consider the appellant's exercise of his right to trial or the conduct of his defence as an aggravating factor?

[59] The judge explained the basis for imposing a total sentence higher than the one sought by the Crown. The judge outlined the factors relevant to her decision that 23 years was fit and was the "minimum necessary to achieve the fundamental objectives of sentencing on the facts of this case," notwithstanding the Crown's shorter proposal: at para. 143.

[60] In my view, there is an aspect of the judge's reasoning on this point that is problematic. The judge links the appellant's exercise of his right to a trial and the conduct of his defence to the longer sentence imposed. I recite the paragraph here:

[144] Although the Crown has proposed a somewhat shorter total sentence, I find that a reduction of the total sentence to 23 years properly reflects [the appellant's] overall blameworthiness for his egregious misconduct and the serious harm caused to the complainants. In addition to Mr. Moazami's misconduct during the periods of the offences charged, as outlined in this judgment and in the reasons for conviction, he subjected these young, marginalized young women to the fear, stress, and aggravation of a long trial; he re-victimized the complainants and he lied to the Court under oath. He exhibited no remorse and failed to take even the slightest amount of responsibility for his misconduct. He has no insight into the harm caused to his victims.

[Emphasis added.]

[61] The Crown (very fairly) carefully set out the potential frailties of the judge's reasoning on this point. The Crown submits that even if the Court finds error here, it is one without an impact on the sentence because the findings were otherwise amply justified on the record.

[62] Respectfully, I disagree. The law is clear that a guilty plea may be a mitigating factor on sentencing. However, neither a decision to plead not guilty nor the manner in which an accused person presents their defence is to be treated as an aggravating factor on sentence. In *R. v. Kozy* (1990), 74 O.R. (2d) 545, 1990 CanLII 2625 (C.A.), the Court of Appeal for Ontario stated it this way, at page 506:

Just as an accused should never apprehend that a penalty will flow from a plea of not guilty, there should also be no perceived impingement upon the manner of presenting the defence. This is so whether it be counsel's viciousness in attacking a complainant or lies told by the accused. The latter may lead to its own penalty on a trial and conviction for perjury, but within the trial for the offence of sexual assault both rank as tactics of the defence, however ill-conceived, and they are embraced within the right to full answer and defence afforded by s. 802(1) and s. 650(3) of the Criminal Code

Imposing a higher sentence because an accused testified and lied would be contrary to his right not to be punished for a crime--in this case, perjury--of which he has not been convicted.

[63] Here, the Crown submits that read in isolation, the judge's comments at para. 144 might suggest error. However, the Crown contends that reading the reasons as a whole and in the context of the rest of the record, and in light of the presumption that the judge knew and applied the law, the judge was only observing that the appellant did not have the benefit of a guilty plea. A guilty plea could have been taken as indicating some remorse and insight into the harm caused by his action and would have spared the victims the need to relive their traumatic experiences at a trial. The Crown submits that the judge was simply responding to the appellant's submission that he had "taken a turn in his life" and "transformed" into a "man who is aware of and is responsible for his actions and their consequences". Ultimately, the Crown submits that the judge was entitled, as in *R. v. Vickers* (1998), 105 B.C.A.C. 42, 1998 CanLII 14982, to measure those assertions against a record that belied them.

[64] In *Vickers*, Justice Esson wrote:

[17] To determine whether the trial judge in this case improperly gave consideration to the accused's conduct at trial, it is necessary to have regard to the factual basis which led the trial judge to consider that matter. At one point in his reasons he said "that is an extremely aggravating set of circumstances in this particular matter". Standing alone, that language would indicate error. An aggravating circumstance is one which calls for a higher sentence than would otherwise be fit. To impose a higher sentence because of the perjury would be to commit the same error which led the Ontario Court of Appeal to reduce the sentence in *Kozy*. However, when regard is had to the whole of the proceedings on sentence and the whole of the judge's reasons, it becomes clear that the trial judge was directing himself to the question whether, in view of the misconduct at trial, he should give effect to the principal grounds for mitigation relied on by defence counsel.

In other words, in *Vickers* the trial judge's reasons read as a whole indicated that the comment about the offender's dishonesty at trial was made in response to and in rejection of a defence plea for mitigation. There was no error, because the judge did not rely on the accused's conduct at trial as an aggravating feature but rather as a basis for rejecting a plea for mitigation.

[65] Returning to the case before us, there are two aspects of the judge's reasoning on this point that distinguish this case from *Vickers*.

[66] First, in my view, the judge did more than simply comment that the appellant did not have the benefit of a mitigating guilty plea. The judge placed her comments about the appellant's choice to proceed to a trial in a paragraph where she explained her reasons for exceeding the Crown's proposed sentence. The judge stated that the 23-year sentence properly reflected the appellant's overall blameworthiness for his "egregious" conduct during the offending period, and "[i]n addition to [his] misconduct he subjected these young, marginalized young women to the fear, stress, and aggravation of a long trial; he re-victimized the complainants and he lied to the Court under oath": at para. 144. The judge

explicitly relied on the appellant's exercise of his right to a trial and the conduct of his defence to justify a 23-year sentence, one higher than sought by the Crown.

- [67] Second, the judge's statement that the appellant lied under oath cannot be easily explained. It raises the exact problem identified in *Kozy*. That is, the judge found that the appellant had lied but he was not convicted of perjury. In my view, reading the reasons as a whole and in light of the context of the record, the judge's treatment of his false testimony was used as an aggravating factor at sentencing. She stated as much when, in the sentence immediately preceding this comment, she indicated she was going higher than the Crown's proposed sentence.
- [68] In sum, it is my view that the judge erred when she considered the appellant's exercise of his right to a trial and his conduct during the trial as justification for imposing the 23-year sentence. Later in these reasons, I will address whether the error impacted the sentence imposed.

Fourth ground: Did the judge err in the assessment of pre-totality sentences independent of applicable mandatory minimums?

- [69] At the time of sentencing, there were several mandatory minimum sentences applicable to the appellant's offences against the eight complainants he knew to be under 18 years. Some of these mandatory minimum sentences were since found to be unconstitutional, summarized by the Crown as follows:
- 1) The offence of living on the avails of prostitution of a person under 18, contrary to what was then s. 212(2) of the Criminal Code, had a minimum sentence of two years imprisonment. This was held to be unconstitutional in *R. v. Badali*, 2016 ONSC 788.
 - 2) The offence of living on the avails of prostitution of a person under 18, with aggravating elements including coercion, contrary to what was then s. 212(2.1) of the Criminal Code, had a minimum sentence of five years. This was later held to be unconstitutional in *R. v. Albashir*, 2018 BCSC 2469.
 - 3) The offences of sexual interference and sexual exploitation contrary to ss. 151(a) and 153(1) (a) of the Criminal Code carried minimum jail sentences of 45 days. Subsequently increased mandatory minimum sentences were found to be unconstitutional: *R. v. Scofield*, 2019 BCCA 3; *R. v. E.O.*, 2019 YKCA 9.
- [70] The issue here is whether the judge committed a reviewable error by relying on unconstitutional mandatory minimum sentences that were in place at the time of the sentencing but are not in place now. In *R. v. Oud*, 2016 BCCA 332, Justice Saunders recognized "[t]he effect of the principles of proportionality and treating like offenders and like offences alike will sometimes mean that a mandatory minimum sentence may have a proportionate upward effect on sentences imposed". However, Justice Saunders went on to note, "this effect is not invariable, and will depend upon the degree to which the minimum penalty exceeds what might be the low end of an appropriate range, absent the minimum

provision": at para. 60.

- [71] Relevant to this ground of appeal is the judge's recognition that sentences imposed for sexual offences (against children especially but also adults) have increased in response to society's deepened and modernized appreciation of the wrongfulness and harmfulness of these types of offences: Friesen at paras. 44, 110. Although Friesen and some of the legislative developments post-date the appellant's offences, the criminal justice system's evolving approach to offences against children was reflected in the judge's reasons. For example, she referred to *R. v. Worthington*, 2012 BCCA 454, where Justice Saunders described s. 718.01 (and the other augmented provisions for offences concerning abuse of children) as "an attempt by Parliament to re-set the approach of the criminal justice system to offences against children": *Worthington* at para. 32. Justice Saunders also noted that the "range of sentences drawn from a former era may not reflect the appropriate balance of principles now required by the Criminal Code": *Worthington* at para. 34. On this point, the judge also cited paras. 33 and 34 of *R. v. K.R.J.*, 2014 BCCA 382 as supporting more severe sentences due to society's awareness of the impact of sexual abuse on children: at para. 6.
- [72] Here, the judge determined that the circumstances of the appellant's offences called for sentences that exceeded the mandatory minimums for almost all counts; she determined that the minimum sentence was the fit sentence on four counts. The judge imposed the longest sentence, seven years, for living on the avails of prostitution of a person under 18 years (S.W.), with coercion, contrary to s. 212(2.1). At the time, this offence carried a mandatory minimum sentence of five years. However, the judge detailed the basis for exceeding the minimum, stating the offences were "egregious", the appellant's coercion "endured for a lengthy period", the appellant's "moral culpability for this offence is extremely high", and the "minimum sentence does not sufficiently denounce his misconduct or act as a deterrent to him and others": at para. 71. The judge found the appellant regularly used verbal abuse as a means of intimidating S.W. and highlighted that he assaulted her on several occasions to secure her compliance. He "plied her with drugs and alcohol", "deprived [her] of the monies [she] earned", "used her for his own selfish motives of financial gain", and verbally and physically abused her to intimidate and control her: at para. 70.
- [73] In these circumstances, the judge concluded that a seven-year sentence was fit. The appellant was convicted of the same offence with respect to J.C.H. Here, the judge determined a sentence of five years was fit. Although the circumstances of the offence against J.C.H. were similarly "egregious" and she was "very young and vulnerable," the offence period was much shorter than for S.W., just under one month: at paras. 130-132.
- [74] In *Albashir*, the sentencing judge found sentences of four and five years were fit even absent the mandatory minimum. The judge had before her authorities supporting the range of sentence she ultimately imposed: at paras. 30-31, citing *R. v. Tang*, 1997 ABCA 174; *R. v. S.M.*, [2006] O.J. No. 1347, 2006 CarswellOnt 1947 (S.C.); *R. v. Almond and Pandher*, 2006 BCSC 1706; *R. c. Tynes*, 2010 QCCQ 11298, *aff'd* 2013 QCCA 1703.

[75] This discussion demonstrates that the living on the avails of prostitution of a person under 18 years--even without the additional elements under s. 212(2.1)--can attract significant sentences. In my view, the pre-totality sentences were amply justified by the circumstances of the offence and the appellant, as found by the judge. The judge properly assessed the pre-totality sentences independent of applicable mandatory minimum sentences. I would not accede to this ground of appeal.

Fifth ground: Did the judge err in her application of the totality principle?

[76] I should preface my discussion of this issue by noting that it may not be necessary to resolve it in view of the conclusion that I have reached with regard to the third ground (the sentencing judge's error in treating the appellant's not guilty plea and conduct at trial as an aggravating feature), the impact of that error on the resulting sentence, and this Court's determination of a fit sentence as a result. Having determined below that a fit overall sentence is 20 years, 8 months (as recommended by the Crown), less additional credit for time spent in custody, it may seem somewhat artificial to then examine whether the judge erred in finding that a 23-year sentence did not offend the totality principle. However, because the appellant raises the question of totality as an independent ground of appeal, I intend to address it.

[77] Pursuant to s. 718.2(c) of the Criminal Code, which provides "where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh", sentencing courts must ensure that the total sentence is "just and appropriate": *R. v. Bertrand Marchand*, 2023 SCC 26 at para. 99; *Friesen* at para. 157. Proportionality is the cardinal principle of sentencing: *Lacasse* at para. 12. Where consecutive sentences are imposed, the judge must ensure that the cumulative sentence does not exceed the overall culpability of the offender: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 1996 CanLII 230 at paras. 42, 80.

[78] In *Bertrand Marchand*, the Court instructed that "[d]etermining whether sentences should be consecutive or concurrent is a fact-specific inquiry to be undertaken in the context of each case": at para. 95. The Court stated that "[g]enerally speaking, 'offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences'": at para. 95, citing *Friesen* at para. 155.

[79] Deference is owed to a judge's decision on whether to impose a consecutive or concurrent sentence: *R. v. McDonnell*, [1997] 1 S.C.R. 948, 1997 CanLII 389 at para. 46.

[80] I agree with the Crown's submission regarding the judge's application of the totality principle. The judge determined the appellant's overall sentence by first determining fit sentences for each offence. Here, she assessed the counts pertaining to each of the 11 complainants, describing the aggravating and mitigating factors and the sentencing principles applicable for each. For almost every complainant, the judge repeated her acknowledgement of the appellant's age and lack of related criminal record. This was a factor relevant to her assessment and repeated throughout the reasons. The judge next

considered which sentences should be served consecutively and which concurrently. Only then did she turn to totality. As reflected in the transcript of the sentencing proceedings, this was a highly contentious issue at the hearing. In my view, the judge followed the approach subsequently endorsed by the Supreme Court in *Bertrand Marchand* at paras. 91-93, an approach which is entirely consistent with this Court's prior jurisprudence on this topic, as exemplified by *R. v. Li*, 2009 BCCA 85 at para. 28.

- [81] The judge determined that the sentences for the sexual offences against individual complainants should be served concurrently. The sentences for the prostitution offences, the judge concluded, should be served consecutively to the sexual offences. These offences, the judge found, were "qualitatively different" and were "not interrelated to a high degree"; as such, concurrent sentences would "effectively mean there would be no sentence imposed for serious sexual misconduct in very aggravating circumstances": at para. 53. In addition, the judge found that the sentences imposed for offences against different complainants should be served consecutively, to avoid giving the appellant a reduced sentence because he harmed many young girls rather than "only one or two": at paras. 11-13, 53, 137. Adhering to this framework, the judge concluded that the individually fit sentences totalled 48 and a half years: at para. 136.
- [82] Applying the totality principle was a difficult task. The judge acknowledged the challenge at the outset of her reasons, highlighting the unique factors of this case:
- [21] Neither the Crown nor the defence have been able to locate a single authority in which the offender has been convicted of similar offences in similar circumstances to [the appellant]. There are a multitude of factors that render this case extraordinary and unique. These include: (1) the large number of complainants; (2) the lengthy offence period; (3) the range of prostitution-related offences that run the full gamut prohibited by the Code; (4) the large number of times that [the appellant] committed sexual offences against the complainants over the offence period; (5) the young age of the victims and their vulnerable circumstances; (6) the existence of multiple minimum sentences for the offences committed and maximum sentences that range from 10 to 14 years jail; (7) the failure of [the appellant] to take responsibility for his actions after conviction and his lack of remorse; (8) his relatively young age at the time of the offence; and (9) his lack of a related criminal record.
- [83] In my view, the judge carefully tried to avoid imposing a sentence that failed to account for the sheer number of complainants and offences in order to avoid rendering the crimes "cheaper by the dozen": at para. 137. Although the parties presented many sentencing authorities, both parties agreed that none fully reflected the appellant or the circumstances of the many offences. At the same time, the judge recognized that the totality principle demanded some reduction of the entire sentence because otherwise it would amount to a harsh and oppressive jail sentence "not befitting [the appellant's] past criminal record, [which] would crush his prospects for any rehabilitation": at para. 137.

- [84] The judge focused throughout on the overarching principle of proportionality. She set out her conclusion as follows:
- [143] A sentence in the range argued by the Crown is not unduly long or harsh if it is commensurate to [the appellant's] moral blameworthiness and the harm inflicted on the complainants. In my view, using the applicable statutory minimum and maximum sentences as a benchmark, and applying the factors relevant to the application of the totality principle, I find that a sentence of 23 years incarceration is the minimum necessary to achieve the fundamental objectives of sentencing on the facts of this case. Denunciation and deterrence are the most important principles of sentencing in light of the nature of the offences against children. While it is also important to consider [the appellant's] potential for rehabilitation, the serious nature of his offences and the harm he has caused to these young complainants requires this sentencing objective to be accorded a secondary role in crafting the appropriate sentence. Moreover, as described earlier, there has been no formal assessment of [the appellant's] potential for rehabilitation and risk for re-offending, and the value of the evidence of rehabilitation he has produced is lessened substantially by the known facts proven at the trial.
- [85] I wish to address the fact the judge looked to the aggregate of the minimum sentences if served consecutively (almost 26 years) as a factor informing the Court's decision regarding the length of sentence. In my view, and in all of the circumstances, the judge's approach was not in error nor did it result in a disproportionately harsh sentence. I reach this conclusion for a number of reasons.
- [86] First, the minimum sentences were only one factor the judge considered. Her reasons make clear that she looked to the minimum sentences as relevant to a "benchmark" reflecting Parliament's view and the community's view of the seriousness of sexual offences involving children: at para. 143. In addition, she considered other factors identified in the authorities relevant to her application of the totality principle.
- [87] Second, the judge arrived at a range far greater than the authorities presented to her by the appellant and the Crown. She explained why that was so, noting that there were 11 complainants and the offences were committed over a lengthy period. Despite the appellant's earlier arrest by the police, "he went back to his illegal prostitution business". The judge stated, "there are serious, aggravating factors involved with most of the complainants, including lasting harm and the commission of acts of violence": at para. 142.
- [88] Third, the judge's approach was not inconsistent with the appellant's suggestion that, because this case was in "new territory", the judge should "look at the offences, what happened, keep in mind there's minimums and come up with an appropriate global sentence for this particular offender". In my view, this is the approach the judge undertook when determining a fit sentence.

[89] Fourth, in her consideration of the aggregate total of the mandatory minimums, the judge acknowledged she could impose a sentence less than the aggregate and in the end, that is what she did. In so doing, she recognized that although she was bound to apply the minimum sentences, she was not bound to order that they all be served consecutively. On this point, the judge evaluated the proportionality of a sentence in that particular range to the overall moral blameworthiness of the appellant. The judge was uniquely positioned to make the assessment that the total sentence "properly reflects [the appellant's] overall blameworthiness for his egregious misconduct and the serious harm caused to the complainants" and was the "minimum necessary to achieve the fundamental objectives of sentencing on the facts of this case": at paras. 143-144.

[90] In sum, in her application of the totality principle, the judge followed the approach now suggested in *Bertrand Marchand*. She identified the factors that she considered in determining 23 years was fit. I see no error in the judge's application of the totality principle. I would not accede to this ground of appeal.

Sixth ground: Is a sentencing remedy warranted based on Mr. Fisher's misconduct or other state misconduct?

[91] The appellant submits his fresh evidence application relates to whether he is entitled to a remedy as a result of the alleged state misconduct. The material presented is, for the most part, the same material provided in support of the appellant's *Avails Appeal*; on appeal, the application to adduce the fresh evidence was dismissed.

[92] The task before this Court is to assess the fitness of the appellant's sentence. I appreciate the sources and types of fresh evidence are more flexible in relation to sentence appeals than conviction appeals. However, the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8, still governs. The following criteria must be established:

- 1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases.
- 2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue relating to the sentence.
- 3) The evidence must be credible in the sense that it is reasonably capable of belief.
- 4) The evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[93] In its written submission, the Crown detailed the proposed fresh evidence which constitutes about 4,900 pages of documents in 13 separate PDF files. I summarize the proposed evidence and my conclusions on the evidence as follows:

- 1) Many of the documents are from the Stinchcombe disclosure package (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45), some of which are documents that are already part of the trial record; for those documents that did not form part of the trial record, none bears upon a decisive or potentially decisive issue relating to the sentence or could be expected to impact the sentence.
 - 2) The transcript of the appellant's police interview is part of the disclosure package; the Crown did not seek to introduce the appellant's statement, there was no voir dire about the admissibility of the statement, and it played no role at the trial. No Charter application was made at trial or in relation to sentencing.
 - 3) The 3,000 pages of post-conviction disclosure about Mr. Fisher was considered in relation to the Avails Appeal and this material is similarly irrelevant to the issues raised in the sentence appeal.
 - 4) Some of the documents relate to the appellant's other matters, now concluded, and not to the sentence appeal; none of these documents bear on the fitness of the sentence at issue.
 - 5) Another category of documents consists of various media articles, including articles relating to the appellant, Mr. Fisher, and a missing persons report about one of the complainants. This material is irrelevant to the issues raised in the sentence appeal.
 - 6) The documents that form a part of third-party records applications are not relevant, and in any event, already form part of the record.
 - 7) Some of the documents relate to the appellant's long-standing complaints about the alleged ineffectiveness of trial counsel. Trial counsel were not counsel at the appellant's sentencing hearing and these documents are not relevant to the issues raised here.
- [94] The Crown identified one document that this Court could admit as fresh evidence. That is a Parole Board of Canada decision dated January 7, 2025, denying the appellant unescorted temporary absences from the institution. The underlying material referenced in the decision was not included as part of the fresh evidence. In the appellant's case, the sentence was imposed almost ten years ago. As such, it may have been useful to consider the type of information referenced by the Parole Board in accordance with the principles discussed in cases such as *R. v. Sipos*, 2014 SCC 47.
- [95] Section 687(1) of the Criminal Code relates specifically to the power of an appeal court to admit fresh evidence on an appeal against sentence. In *Sipos*, Justice Cromwell held that "while the sources and types of new evidence are more flexible in relation to sentence appeals, the well-known 'Palmer' test governs admissibility of fresh evidence": at para. 29. Justice Cromwell noted that fresh evidence addressing events that have occurred between the time of sentencing and the time of the appeal may raise difficult issues which bring competing values into sharp relief, such as the value of finality versus the reality that things change over time: *Sipos* at paras. 30-31.

- [96] Without impugning the soundness of the Parole Board decision, I would not admit this document. The appellant did not make submissions about this document and it would be unfair to rely on it without giving the appellant an opportunity to address the Parole Board's conclusion regarding his high risk to re-offend.
- [97] The appellant has not established that any of the material bears upon a decisive or potentially decisive issue relating to the sentence imposed nor could it be said that any of this material could reasonably be expected to have affected the result of the sentencing hearing. For the reasons stated below, I would not admit any of the fresh evidence nor would I accede to any of the grounds characterized as misconduct.
- [98] First, regarding the submissions about Mr. Fisher, this Court acknowledged the seriousness of Mr. Fisher's misconduct and the potential impact on investigations in its reasons for judgment in the Avails Appeal. The Court commenced this part of its reasons by stating, "Disgraced Vancouver City Police Detective, James Fisher, is the centre of this ground of appeal. As noted, [the appellant] was convicted of multiple counts relating to prostitution and related sexual offences that had been investigated by Mr. Fisher": Avails Appeal at para. 30. At that time, the appellant sought to adduce fresh evidence to demonstrate the extent and impact of Mr. Fisher's conduct on his trial, arguing that Mr. Fisher's conduct resulted in a miscarriage of justice and an abuse of process vis-à-vis his trial rights, and generally as a result of impugning the integrity of the justice system.
- [99] The Court conducted a lengthy analysis of the proposed fresh evidence, much of which is duplicated in the appellant's fresh evidence application on this appeal. In the end, this Court has already determined that "based on the timing of his actions, it is clear [Mr. Fisher's] conduct did not in any way affect the fair trial rights of [the appellant]. There is no evidence that supports the argument that such rights were affected": Avails Appeal at para. 186.
- [100] The appellant seeks to re-argue this issue, which was fully dealt with in the Avails Appeal. In my view, no intervention of this Court is warranted. As found at the Avails Appeal, Mr. Fisher's misconduct did not impact the appellant and was unrelated to the circumstances of the appellant's offences, including with respect to the fitness of his sentence.
- [101] Second, the appellant seeks constitutional remedies due to "egregious misconduct by state agents" and takes issue with virtually every aspect of the investigation and judicial proceedings that led to his conviction, alleging unfairness, corruption, and misconduct.
- [102] For completeness, I identify each of the other allegations the appellant advances. In my view, these allegations can be disposed of in brief fashion:
- 1) The appellant submits the proceedings constituted a miscarriage of justice because of disclosure failures, problems with the admissions of fact, witness credibility and the adequacy of the interviews and the investigation, allegations of ineffective assistance of his trial counsel, and problems with trial rulings. It is my view that these submissions do not bear on the fitness of the sentence imposed or justify any remedy.

- 2) The appellant submits he should be granted a remedy based on the misconduct of the VPD, the Crown, or due to bias on the part of the judge. In my view, these submissions are unsupported by the record.
 - 3) The appellant submits he is entitled to some type of credit for time he spent on bail and then in custody. The appellant's lawyer advanced submissions about custodial conditions and the appellant's time in protective custody. The judge recognized the harshness of his pre-trial detention in her reasons: at para. 36.
 - 4) The appellant alleges Charter breaches relating to his arrest, detention, search, and interview. At trial, there was some evidence about the circumstances of the appellant's arrest. However, the appellant did not raise any alleged Charter breaches at the trial or in relation to sentencing. The appellant could have raised these issues at trial or to seek a sentencing remedy and did not. The record does not provide a proper basis for fully determining these issues. Having considered the state of the record, fairness to all parties, the importance of having the issue resolved by the Court, its suitability for decision and the broader interests of the administration of justice, it is not in the interests of justice for this Court to exercise its discretion to allow the appellant to advance the Charter claims at this proceeding: see *R. v. J.F.*, 2022 SCC 17 at para. 41.
 - 5) The appellant raises issues regarding language proficiency and mental health. In my view, neither has any bearing on the fitness of the sentence imposed. The appellant did not raise English proficiency during the trial or during the Avails Appeal. As for issues relating to mental health and medication, the judge responded to counsel's submission about the appellant's head injury in a car accident. She considered this and stated there was "no evidence that he suffered from a physical or mental disability that would have predisposed him to the offences for which he was found guilty": at paras. 33 and 49.
- [103] In my view, none of these submissions bear on the fitness of the sentence. I would not accede to any of the issues raised under the appellant's ground alleging misconduct.

Did the Error Impact the Fitness of the Sentence Imposed?

- [104] As set out above, I have concluded the judge erred when she justified the 23-year sentence based on the factors identified at para. 144 of her reasons; that is, that the appellant compelled the complainants to endure a trial, thus re-victimizing them; and lied in his testimony. These impugned factors were directly connected to the reason why the judge exceeded the Crown's sentencing position. In my view, this error impacted the length of the sentence ultimately imposed.

What is a Fit Sentence?

- [105] Where an error in principle has impacted the sentence, this Court may determine a fit sentence, applying the principles of sentencing afresh, with due deference to the judge's findings of fact and the aggravating and mitigating factors that are untainted by error: Friesen at paras. 27-28; R. v. G.J.M., 2024 BCCA 82 at para. 74.
- [106] I have concluded the judge treated the appellant's exercise of his right to a trial as an aggravating factor and used this factor to justify exceeding the Crown's sentencing position, a position characterized by the appellant as "crushing". Giving priority to the objectives of deterrence and denunciation and placing adequate weight on the harm inflicted on the complainants, and because the judge's reasons are otherwise untainted by error, I would reduce the total sentence to 20 years and 8 months, the position advanced by the Crown at the sentencing hearing. The judge's analysis of the applicable sentencing principles, including aggravating and mitigating factors, and the circumstances of the offence and the offender was otherwise flawless.
- [107] The parties presented numerous authorities, although both the Crown and the defence agreed that there were virtually no comparable sentencing authorities, particularly cases involving 11 complainants. That said, the cases before the judge all involved significant penitentiary sentences.
- [108] It is important to point out, and indeed to stress, that the appellant's criminal conduct was grave and morally reprehensible. He engaged in predatory and exploitative criminal behaviour toward a large number of vulnerable young victims. His conduct was punctuated by coercion and sexual violence toward a number of them. At the sentencing hearing, the parties were unable to find any other reported sentencing decisions dealing with avails and related sexual offences on this scale over a comparable duration of time involving so many victims. Every one of the appellant's victims was an individual who suffered indignity at the hands of the appellant. All were traumatized, some severely, to the point that they continued to struggle years afterward. The trial judge found a pressing need for denunciation and deterrence, a conclusion that has not been disturbed on appeal and is fully supported by the evidence at trial and sentencing. Clearly, the appellant's offending conduct called for a very lengthy penitentiary sentence.
- [109] However, in my view, the sentencing judge's error in principle impacted the sentence to the extent that it led to her to impose a penitentiary term exceeding the position advanced by the Crown. The Crown's position was formulated with a view to the gravity of the offences and the offender's moral blameworthiness and also took into account the principle of totality. I would thus reduce the total sentence to 20 years and 8 months. For calculation purposes, the sentence imposed for count 14 (2-year sentence for living on the avails of a person under the age of 18) will run concurrently (rather than consecutively) to all counts. The sentence for count 6 will be reduced from 6 years to 5 years and 8 months. The sentence for count 6 will continue to run consecutively to all counts.

Credit for Time Served

[110] At the time of the appellant's sentencing and pursuant to s. 719(3.1) of the Criminal Code, pre-trial credit was limited to credit of one-to-one for those detained based on a breach of bail, like the appellant. The appellant was therefore credited on a one-to-one basis for the 99 days the judge found he was detained because of the bail breach. For the balance of the appellant's pre-trial custody, the judge granted credit of 1.5:1. During the time the appellant's appeals have been outstanding, this aspect of the legislation was found to be unconstitutional: see *Romanchych*.

[111] The Crown, again fairly in my view, agrees that the appellant is entitled to additional credit for this 99-day period, or an additional 50 days of credit: see *R. v. Mavros*, 2018 BCCA 398.

[112] I would grant additional credit to the appellant for pre-trial custody in the amount of 50 days.

Disposition

[113] The application to adduce fresh evidence is dismissed.

[114] Leave to appeal sentence is granted. The sentence appeal is allowed and the sentence of 23 years is reduced to 20 years 8 months, calculated as follows:

- a) The sentence imposed for count 14 (2-year sentence for living on the avails of a person under the age of 18) will run concurrently (rather than consecutively) to all counts. The sentence for count 6 will be reduced from 6 years to 5 years and 8 months, consecutively.
- b) The appellant is credited an additional 50 days for pre-sentence custody and this credit is to be applied to count 6.

"The Honourable Justice Winteringham"

I AGREE:

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Justice Riley"

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