

CANADA / JUDGMENT

R. v. P.R.J

2023 BCCA 169

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 169 R. v. P.R.J.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. P.R.J.,

2023 BCCA 169

Date: 20230411

Docket: CA48021

Between:

Rex

Appellant

And

P.R.J.

Respondent

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Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated December 13, 2021 (sentence) (R. v. P.R.J., 2021 BCSC 2537, Kelowna Docket 91385-2).

Oral Reasons for Judgment

Counsel for the Appellant:

C.E. Tomusiak

Counsel for the Respondent:

E. Purtzki

Place and Date of Hearing:

Vancouver, British Columbia

March 31, 2023

Place and Date of Judgment:

Vancouver, British Columbia

April 11, 2023

Summary:

This is a Crown appeal from sentence for sexual interference against a child. The respondent parent was sentenced to a 23-month conditional sentence, followed by two years' probation. On appeal, the Crown sought a sentence of four years' imprisonment. Held: Leave to appeal is granted and the appeal from sentence is allowed. The sentence is varied to three years' imprisonment. The sentencing judge erred in principle and imposed a sentence that failed to give adequate effect to the gravity of the offence and the appellant's high moral blameworthiness.

- [1] DEWITT-VAN OOSTEN J.A.: This is a Crown appeal from sentence for sexual interference with a child.
- [2] Following a trial in the British Columbia Supreme Court, PRJ was found guilty of three offences against her then seven or eight-year old daughter: (1) sexual interference; (2) invitation to sexual touching; and (3) sexual assault.
- [3] Applying the rule against multiple convictions affirmed in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729 (S.C.C.), 1974 CanLII 14 [Kienapple], the judge conditionally stayed the sexual assault and entered convictions for the remaining two offences.
- [4] PRJ appealed the conviction for invitation to sexual touching. The appeal was allowed to the extent of entering a conditional stay on that count.

- [5] This left PRJ with one conviction for sexual interference contrary to s. 151(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code].
- [6] Since 2015, this offence has carried a maximum sentence of 14 years' imprisonment when prosecuted by indictment: Tougher Penalties for Child Predators Act, S.C. 2015, c. 23. PRJ committed her offence in July 2018.
- [7] Section 718.01 of the Criminal Code mandates that when sentencing for a child sexual offence, a court must give "primary consideration to the objectives of denunciation and deterrence". Under ss. 718.2(a)(ii), (ii.1) and (iii), abusing a child and doing so while in a position of trust are aggravating factors. It is also an aggravating factor for an offender's conduct to have a "significant impact on the victim, considering their age and other personal circumstances": s. 718.2(a)(iii.1).
- [8] PRJ received a 23-month conditional sentence for sexual interference, followed by two years' probation. The judge also imposed a DNA order; an order requiring that PRJ report for 20 years under the Sex Offender Information Registration Act, S.C. 2004, c. 10; and a firearms prohibition. The judge declined a prohibition order under s. 161(1) of the Criminal Code.
- [9] The reasons for sentence are indexed as 2021 BCSC 2537. The Crown says the sentence reflects errors in principle and is demonstrably unfit. It asks that we vary the sentence to four years' imprisonment.

Background

- [10] PRJ was her daughter's sole guardian.
- [11] The circumstances of the offence were summarized in the appeal from conviction (2023 BCCA 13 at paras. 7-10):

In November of 2018, P.R.J. entered into a rehabilitation program to address a longstanding substance abuse issue. At that time, P., who was then eight years old, was placed in the care of P.R.J.'s sister, M.F.

In December of 2018, P. told M.F. that P.R.J. had sexually touched her. As a result of that disclosure, in mid-January of 2019, P. was interviewed twice by a member of the Royal Canadian Mounted Police Child Exploitation Unit with specialized training and expertise in interviewing children. Those interviews were video and audio recorded.

The initial interview lasted approximately two-and one-half hours. During that interview, P. told the officer that one night when she was seven or eight years old, she crawled into P.R.J.'s bed; both were naked. P. said that P.R.J., who had been drinking, digitally penetrated P.'s vagina.

Following this interview, while M.F. and P. were having lunch, P. told M.F. she had forgotten to tell the officer something important, namely that P.R.J. had kissed her vagina. This resulted in P. being interviewed again that afternoon for approximately 20 minutes. P. told the officer about the kissing incident.

[12] In addition to the acts described here, PRJ was found to have directed her daughter to touch PRJ's vagina. This finding was upheld on appeal. Per Justice Frankel, writing for the Court (at para. 32):

P's evidence was that P.R.J. had "made" / "wanted" her to touch P.R.J.'s vagina in the same way P.R.J. had touched P's vagina, i.e., by digital penetration. Given P's age and the fact that she had not been a willing participant in what occurred on the night in question, it was open to the judge to infer P.R.J. had drawn P's hand to her vagina to make that penetration happen

[Internal references omitted.]

[13] P's trial evidence was that she tried to physically protect herself from the sexual touching as it unfolded. However, PRJ did not stop.

[14] In her testimony, PRJ admitted to a night when P came into her bed, PRJ rolled into her daughter, or over her, and P complained about being hurt. PRJ said her daughter was "whining", telling her mother that she hurt her--"just a lot of negative talk about [her]". P was "kind of crying". PRJ denied any sexual touching. The judge found this was the incident described by P in her evidence: 2021 BCSC 2420 at paras. 124-127.

[15] The conviction for sexual interference was entered on August 31, 2021. Sentence was imposed on December 13, 2021.

[16] A pre-sentence report was prepared for sentencing. The judge ordered a psychological or psychiatric assessment as part of the report. However, for reasons that are unclear, the assessment was not done. The judge was prepared to complete the sentencing process without it. Counsel did not object.

[17] The pre-sentence report stated that since being removed from PRJ's care, P has shown herself to be "resilient" and has made "incredible progress". However, she initially presented as a "scared lost puppy that was unsure". She was "often found hiding in a closet crying". She had suffered an "emotional toll". She now lives with PRJ's sister. Arrangements were made for therapeutic intervention. It took "time for her to settle and feel secure", but she "eventually became comfortable". The last therapist involved with her said she "presented as happy and [was] doing very well". Should P require supportive intervention in the future, it will be made available to her, recognizing that "in her teen or adult years, she will encounter events, relationships, or circumstances that trigger her".

[18] PRJ was 44 years old when sentenced. The pre-sentence report described her as isolated, struggling with depression and/or anxiety, and not being connected to any services. A court liaison worker confirmed that between the trial and sentencing, PRJ had various

interactions with police. Most of them related to her mental health. The Court has no information about the nature of those incidents, PRJ's current mental health status, or the extent of any assessment or programming that has occurred since the imposition of sentence. At trial, PRJ testified that she was receiving disability benefits "related to her mental health". However, she did not provide greater detail.

- [19] PRJ's appeal from conviction and the Crown's appeal from sentence were initially scheduled to be heard together before the end of September 2022. However, they were later bifurcated. The appeal from conviction was resolved in January 2023. The appeal from sentence came on for hearing on March 31, 2023.
- [20] I understand that as at March 31, 2023, PRJ had served 341 days of her conditional sentence. The Court has been told that PRJ is currently in custody. Among other things, she is alleged to have breached the terms of her conditional sentence.

Reasons for Sentence

- [21] The judge began his reasons for sentence by noting that sentences for child sexual offending must recognize and give meaningful effect to the fact that "any and all such offending violates the integrity of children, both sexually and physically": 2021 BCSC 2537 at para. 4, citing *R. v. Friesen*, 2020 SCC 9 [Friesen]. He instructed himself that the "primary purposes and objectives" of sentencing are denunciation and deterrence: at para. 5.
- [22] The judge noted that PRJ was in a position of trust when she committed the offence and that the offence occurred in P's home: at paras. 5, 22. He accepted these factors as aggravating: at paras. 5, 22. The judge recognized that although P was said to be doing well at the time of sentencing, it is unknown whether the sexual offence may have long-term, adverse effects on her well-being: at paras. 7-10. The judge acknowledged that it is because of the harms arising from child sexual offences that these offences must be treated as very serious (at para. 11):

judges must approach sentencing in cases of sexual offending against children as very serious cases by considering not only the inherent wrongfulness of such offences but also by considering and assessing the harm that is done not only to a particular child victim but also the harm done to communities and society as a whole when children are violated especially by those relied upon to protect them from harm.

[Emphasis added.]

- [23] The judge recognized that sentencing is an individualized process and the personal circumstances of the offender will inform the search for a just sanction. He was satisfied it was not necessary to sentence PRJ to a penitentiary term or a lesser term of conventional imprisonment. From his perspective, a conditional sentence would best serve to promote PRJ's rehabilitation by allowing her to address her substance use and "psychiatric issues" in the community: at para. 23.

- [24] In reaching this conclusion, the judge noted that: (1) PRJ has no criminal record; (2) the sexual offending occurred once; (3) PRJ was "extremely intoxicated" at the time of the offence and "likely further uninhibited" by the "misuse of prescription medication"; (4) her conduct was "an aberration in the relationship between mother and daughter"; and (5) she was experiencing anxiety and depression at the material time: at paras. 14-18.
- [25] The judge also noted that PRJ and her daughter lived together for at least five months after the offence and there was no suggestion of similar behaviour; PRJ performed well on bail for three years prior to sentencing; there is no evidence she "poses a risk to the community" if not incarcerated; and, because of the offence, PRJ has experienced the loss of her child, who has been removed from her care: at para. 23.

Issues on Appeal

- [26] The Crown says the judge erred in principle by: (1) incorrectly holding that penitentiary sentences for child sexual offending are reserved for serial or repeat offenders; and (2) inadequately considering and giving effect to the harms associated with PRJ's conduct.
- [27] The Crown also says a 23-month conditional sentence and two years' probation is demonstrably unfit and fails to give adequate effect to the sentencing objectives of denunciation and deterrence.

Discussion

Standard of Review

- [28] A highly deferential standard of review applies to appeals from sentence. Appellate courts may only interfere if an appellant establishes an error in principle that materially affected the sentence, or the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11 [Lacasse].
- [29] Errors in principle include an error of law, failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. An error in principle entitles the appeal court to perform its own sentencing analysis, although the court must defer to any factual findings that are untainted by the error: *Lacasse* at paras. 41-44; *Friesen* at paras. 25-29.

Did the Judge Misdirect Himself on the Availability of a Penitentiary Term?

- [30] Prior to the sentencing hearing, the judge asked counsel for their positions on whether one or more of PRJ's convictions carried a mandatory minimum term of imprisonment.
- [31] At the time of sentencing, the mandatory minimum penalty for sexual interference (by indictment) had been declared unconstitutional in *R. v. Scofield*, 2019 BCCA 3. The offence of invitation to sexual touching did have a mandatory minimum penalty and would have precluded a conditional sentence. However, the Crown (erroneously) told the judge that the mandatory minimum was of no force and effect. (The conditional stay of this conviction has rendered that error of no impact.) Although both offences carry maximum penalties of 14

years' imprisonment, the Crown also accepted that s. 742.1(c) of the Criminal Code, as it then stood, did not preclude a conditional sentence in light of the constitutional ruling in *R. v. Chen*, 2021 BCSC 882. (Section 742.1(c) has since been amended and would no longer preclude a conditional sentence for PRJ's offence: An Act to amend the Criminal Code and the Controlled Drugs and Substances Act, S.C. 2022, c. 15, s. 14.)

- [32] After Crown counsel stated their position and before they addressed quantum, the judge advised the parties of his preliminary view that a custodial sentence would not be appropriate in this case. He did not think "incarceration would serve the principles of sentencing", even though the "circumstances [were] egregious".
- [33] Crown counsel proceeded to make their submissions, emphasizing the Supreme Court of Canada's comments in *Friesen* about the gravity of sexual offending against children. The Crown referred the judge to passages in *Friesen* that highlight the harms associated with these offences, the critical importance of denunciation and general deterrence, and the call for increased sentences. In *Friesen*, the Supreme Court of Canada referred to Parliament's choice in 2015 to increase the maximum sentences for sexual offending against children and said this legislative change:
- [109] should shift the range of proportionate sentences as a response to the recognition of the gravity of these offences. Sentences should increase as a result of this legislative initiative. In certain cases, a sentencing judge [translation] "must feel free to impose sentences above" a past threshold ... courts must give "the legislative intent its full effect" and should not feel bound to adhere to a range that no longer reflects Parliament's view of the gravity of the offence. Such a range may in fact be "obsolete and must be revised upwards"

[Internal references omitted; emphasis added.]

- [34] Crown counsel identified various aggravating factors in the case and sought a sentence of four years' imprisonment. In the event the judge decided that a non-penitentiary sentence was appropriate, the Crown opposed a conditional sentence, submitting that the "extremely aggravating" circumstances rendered a conditional sentence inconsistent with the fundamental purpose and principles of sentencing: Criminal Code, s. 742.1(a).
- [35] After Crown counsel said they were seeking a four-year prison term, the judge responded with these comments: "Four years is way out of line, counsel. Way out of line. And all the authorities you've given me, it's just not in the cards".
- [36] Crown counsel conceded that historically, a four-year sentence may have fallen outside the generally accepted range of sentences for a first-time conviction involving one incident of sexual interference. However, the Crown submitted that post-*Friesen*, a penitentiary term cannot be assumed unfit for a child sexual offence by a first-time offender, even if it involved only one incident of touching. The judge responded by saying:

THE COURT: Single event. Single event. Single event, and yes, breach of trust, serious breach of trust conditions. A single event. Not a four year sentence. Four year sentences are for serial offenders, repeat offenders, repeating offenders against children.

[Emphasis added.]

[37] This distinction between a "single event" and serial or repeat offending made its way into the reasons for sentence:

[14] as egregious as her sexual offending was, it occurred on one occasion only. In that regard PRJ is not like many offenders who sexually abuse children either a serial offender against many children or an offender who has repeatedly abused a child over a protracted period of time.

[Emphasis added.]

[38] On appeal, the Crown says the judge's comments and reasons reveal a clear error in principle. He was of the erroneous understanding that four years' imprisonment is not available for cases that do not involve serial or repeat sexual offending.

[39] The Crown points out that the offender in Friesen pleaded guilty to one count of sexual interference with a four-year old child; the offence occurred one time; and it did not involve multiple physical acts: Friesen at paras. 167-168. The offender was 29 years old, had no prior criminal record and had "experienced a traumatic and painful childhood involving physical, emotional and sexual abuse": at para. 174. Mr. Friesen was not in a position of trust. Nonetheless, he received six years' imprisonment for sexual interference (as well as a six-year concurrent sentence for extorting the child's mother). His sentence was reduced on appeal to 4.5 years; however, it was restored by the Supreme Court of Canada. Even then, the Court described the six-year sentence as "lenient": Friesen at para. 169.

[40] In response to this ground of appeal, PRJ says the judge did not make the error alleged. Nowhere in his reasons did he suggest that a four-year sentence is only available at law for serial or repeat offenders. Instead, PRJ says the judge found that a four-year sentence would be unfit in the circumstances of this case, and, in arriving at that conclusion, he properly took account of the fact that the sexual contact with P occurred on only one occasion.

[41] PRJ accepts that Friesen directs the courts to increase sentences for sexual offending against children. However, at the same time, the Court did not oust the individualized approach to sentencing or, importantly, the principle of proportionality. Indeed, para. 30 of Friesen affirms that "[all] sentencing starts with the [now codified] principle that sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender". This principle "has long been central to Canadian sentencing": Friesen at para. 30, citing *R. v. Wilmott*, [1966] 2 O.R. 654 (C.A.), 1966 CanLII 222. See also s. 718.1 of the Criminal Code.

- [42] As such, PRJ submits that when sentencing for a sexual offence involving a child, a judge remains entitled after Friesen to consider the whole of the circumstances in achieving a proportionate sentence, including the nature of the sexual violation and the number of times it occurred, and the fact that the crime was aberrant for the offender. According to PRJ, this is all the judge did. He allowed the fact that the offence occurred only once to inform his proportionality analysis and there is nothing improper about that. Had there been more than one occasion of sexually violative conduct, it would have justifiably increased the gravity of the case and warranted a more severe sentence: Friesen at para. 131.
- [43] I agree with the Crown that the judge's comments are troublesome. Any suggestion that four-year sentences are reserved for "serial offenders, repeat offenders, repeating offenders against children", is clearly incorrect. There is nothing at law that precludes the imposition of a four-year sentence for a first-time offender who sexually interferes with a child on one occasion, and it would be an error in principle to hold otherwise.
- [44] In Friesen, the Supreme Court of Canada declined to establish a national sentencing range for child sexual offences. However, it sent a strong message that judges should consider mid-single digit penitentiary terms as "normal" for these offences: Friesen at para. 114. In other words, penitentiary sentences should not be seen as out of the ordinary, or only available in cases that involve highly aggravating factors, such as multiple victims or multiple acts of deviant behaviour. The fact that a case involves a single victim or a single instance of sexual violence does not preclude a penitentiary term. Per Friesen (at para. 114):

it is incumbent on us to provide an overall message that is clear That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim In addition maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" Instead, a maximum sentence should be imposed whenever the circumstances warrant it

[Internal references omitted; emphasis added.]

- [45] However, on a fair reading of the reasons in this case, considered as a whole and in context, I am satisfied the sentence imposed on PRJ did not result from a misapprehension of the law.
- [46] I agree with PRJ that the judge did not consider himself legally circumscribed from imposing a penitentiary sentence. In his reasons, he acknowledged that in "most circumstances", a sentence other than the one he imposed would be warranted: at para. 21. The 23-month conditional sentence was grounded in the judge's view of the case and his conclusion that four years' imprisonment was not necessary to achieve the objectives of sentencing specific to PRJ. (See paras. 13-19 and 22 of the judgment.) In reaching this

determination, the judge took account of the fact that the offence occurred on one occasion. He was entitled to do so. I accept that the reference to serial and repeat offending was the judge's way of distinguishing the case from factual scenarios involving more aggravated circumstances. Accordingly, I would not interfere with the sentence on the basis of the Crown's first alleged error in principle.

Did the Judge Fail to Adequately Consider the Harm?

- [47] The Crown also alleges that the judge erred in principle by failing to adequately consider and give meaningful effect to the harms arising from PRJ's offending--immediate and long-term.
- [48] PRJ says there is no substance to this ground of appeal. She submits the judge was alive to the harmfulness of the offending. He understood the highly violative nature of the sexual contact. He understood that PRJ breached her daughter's trust. He accounted for the impact of the offence on P, after it occurred and in the future. He may not have laid everything out in detail, but he heard the trial evidence and he was familiar with the whole of the case.
- [49] I accept that the judge recognized the aggravated nature of the sexual touching: at para. 4. He described the circumstances as "egregious": at para. 14. He appreciated that even though P was reported as "doing well" at the time of sentencing, she may experience future adversity because of her mother's offending: at paras. 7, 9. The judge was alive to the fact that sexual offending against children not only harms the child, but the community and society as a whole: at para. 11.
- [50] However, I agree with the Crown that the judge's consideration of harm failed to give adequate effect to this aspect of the case. The potential long-term effects on P were generally described as unknown. That characterization, combined with the lack of express consideration of the immediate harm to P; her obvious distress during the incident; the "emotional toll" she experienced in the months following; and the need for therapeutic intervention, implies that the harm to P might not be so serious. In fact, the likelihood of long-term adverse effects arising from child sexual offending is well-established.
- [51] There was also no consideration of the harms suffered by other family members as a result of PRJ's conduct. A victim impact statement was not filed because the criminal justice process had exhausted PRJ's sister as the new caregiver. The judge referred to PRJ as having suffered the "total removal of her only child from her life": at para. 23. No mention was made of the likely trauma suffered by P who, as a young child, was removed from her home and separated from the only parent involved in her life.
- [52] The Crown has persuaded me that the judge did not consider the harms associated with child sexual offending "in a manner that reflects society's deepening and evolving understanding of their severity": Friesen at para. 74, emphasis added. He did not give meaningful effect to those harms. Doing so was required to properly assess the gravity of PRJ's offending and her moral blameworthiness.

- [53] As explained in Friesen, the "wrongfulness and the harmfulness [of sexual offences against children] impact both the gravity of the offence and the degree of responsibility of the offender": at para. 75, emphasis added. These offences are treated as grave (or very serious) because of the harms. However, a judge's assessment of an offender's moral blameworthiness must also account for the harms arising from child sexual offending because they are reasonably foreseeable. The failure to do so can result in a skewed proportionality analysis that risks the offender's personal circumstances overwhelming the determination of a fit sentence.
- [54] Here, the judge considered PRJ's personal circumstances at the time of the offence, including that she was "extremely intoxicated" and "uninhibited" (at para. 16), and likely experiencing anxiety and depression: at para. 18. It is clear from the reasons that these factors impacted the sentence, both its length and its form: at para. 23. It is implicit that they were found to have attenuated PRJ's moral blameworthiness.
- [55] To properly assess PRJ's personal responsibility, the judge was obliged to consider her moral blameworthiness in the context of the harms flowing from her conduct. Or, as aptly articulated by the Crown in its factum, the judge had to assess PRJ's personal responsibility "through the lens of the harms" associated with child sexual offending.
- [56] As explained in Friesen:
- [88] Intentionally applying force of a sexual nature to a child is highly morally blameworthy because the offender is or ought to be aware that this action can profoundly harm the child. In assessing the degree of responsibility of the offender, courts must take into account the harm the offender intended or was reckless or wilfully blind to. For sexual offences against children, save for possibly certain rare cases, offenders will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child.
- [90] The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable. Offenders recognize children's particular vulnerability and intentionally exploit it to achieve their selfish desires.
- [Internal references omitted; emphasis added.]
- [57] Properly analyzed, factors specific to an offender's physical condition, mental or cognitive state at the time of an offence may attenuate the offender's personal responsibility. As I explained in *R. v. Hagen*, 2021 BCCA 208 (at para. 43):

[43] factors that attenuate moral culpability always require meaningful consideration at sentencing, even in the context of a grave offence. This will include, but is not limited to, cognitive impairment or mental health issues shown to affect an offender's capacity to control their impulses or appreciate the seriousness of their conduct or its risk; mental illness; addiction; traumatic personal events that may contribute to their offending behaviour; or Gladue factors.

See also *R. v. Badhesa*, 2019 BCCA 70 at paras. 39-40 [Badhesa]; *R. v. Williams*, 2020 BCCA 286 at para. 33, *R. v. L.S.N.*, 2020 BCCA 109 at para. 52 [L.S.N.].

[58] However, sexual interference is a specific intent offence (2023 BCCA 13 at para. 53). Whatever PRJ's level of intoxication may have been, it did not negate this intent. In other words, notwithstanding the intoxication and her possible misuse of prescription drugs, anxiety or depression, PRJ knowingly offended against her seven or eight-year old daughter for a sexual purpose. She intentionally applied force of a sexual nature to a young and dependent child in circumstances where she was, or ought to have been aware, that her actions could profoundly harm the child. There was no evidence that PRJ was unaware of the "profound physical, psychological, and emotional harm that [her] actions may [have caused]": Friesen at para. 88. To the contrary, there was evidence that during the sexual interference, P manifested visible signs of immediate harm, but they were ignored.

[59] In my view, the reasons for sentence reflect a finding of diminished moral blameworthiness based on mere assumptions about the contribution of PRJ's substance use and mental health to her sexual offending: *R. v. Milne*, 2021 BCCA 166 at paras. 46-48 [Milne]. Applying the harm-based analytical approach mandated by Friesen, PRJ's personal responsibility was properly at the high end.

[60] In *L.S.N.*, the Court set aside a suspended sentence for sexual interference by an Indigenous 37-year old offender with a "tragic upbringing" (at para. 55), on the basis that the judge's failure to properly assess the offender's personal responsibility for his behaviour fundamentally tainted the sentencing analysis and "led to the imposition of a sentence that fails to reflect either the gravity of the offence or the [offender's] moral culpability": at para. 57.

[61] I consider the same type of error to have occurred here and it provides a principled foundation for appellate interference.

What is A Fit Sentence?

[62] The error in principle displaces the deferential standard of review and entitles this Court to conduct its own sentencing analysis: Friesen at para. 27.

[63] The Crown says a four-year term of imprisonment is a fit sentence. If the Court concludes that a lesser sentence is appropriate, it is the Crown's position that allowing the sentence to be served conditionally in the community would be wholly inappropriate, given the gravity of the offence, the manner in which it was committed, PRJ's moral blameworthiness, and

the heightened importance of denunciation and deterrence in child sexual abuse cases. The Crown describes the sexual interference as "egregious" (which the judge accepted), and says the only mitigating factor in PRJ's favour was the absence of a prior criminal record (which the judge also accepted).

- [64] PRJ says a 23-month conditional sentence with two years' probation is a fit sentence and gives meaningful effect to the principles of denunciation and deterrence. Even if this sentence could be said to fall outside the generally applicable range for sexual interference post-Friesen, exceptional circumstances are not required to justify it (*R. v. Armstrong*, 2023 BCCA 50 at para. 31).
- [65] I consider a three-year prison term to be a fit sentence in this case. The conditional sentence imposed by the judge was demonstrably unfit, and, consistent with the Court's role to bring the law "into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders", appellate interference is warranted: Friesen at para. 35, citing *R. v. Stone*, [1999] 2 S.C.R. 290 (S.C.C.), 1999 CanLII 688 at para. 239.
- [66] In *R. v. T.J.*, 2021 ONCA 392, the Ontario Court of Appeal set aside a nine-month custodial sentence imposed for a first-time offender who, on one occasion, engaged in sexual touching of a six-year old child and demanded that she perform fellatio (which did not occur). The Court allowed a Crown appeal from sentence and substituted a two-year sentence. Like PRJ, the offender had a history of substance use and had been on bail for three years before sentencing, "without any concerns": at para. 7. Similar to what occurred in this case, the Ontario Court found that the nine-month sentence did not:
- 32 give the inherent wrongfulness of the conduct, its highly morally blameworthy nature, and the extent of harm caused to [the victim], the centrality that Friesen demands in sentencing.
- [Emphasis added.]
- [67] In substituting a two-year sentence, the Ontario Court described T.J.'s conduct as "highly morally blameworthy": at para. 32. It was "violent, exploitative, and harmful to [the victim] and her family": at para. 46. The same can be said here.
- [68] The conduct underlying T.J.'s offence was non-penetrative. Although in a position of trust, he was not a parent to the victim, which renders a child especially vulnerable. The offences occurred many years before sentence was imposed, and, in the interim, the offender appears to have taken some steps towards rehabilitation. Critically, at sentencing and on appeal, the Crown did not seek a sentence of more than two years' imprisonment. These features distinguish T.J. from the case before us and justify a higher sentence.
- [69] In *R. v. J.N.P.*, 2020 BCSC 570, the offender committed sexual interference against his 15-year old niece on one occasion. He was in a position of trust. He performed oral sex, placed the victim's hand on his erect penis, and put his penis in her mouth. The offender had a dated criminal record that was considered "irrelevant": at para. 12. He had previously engaged in substance abuse, but was abstinent for ten years prior to sentencing. The offence caused the

victim "great emotional harm": at para. 14. However, s. 718.2(e) of the Criminal Code was also engaged--this is a remedial provision specific to Indigenous offenders. The judge imposed a sentence of three years' imprisonment.

- [70] PRJ's offence involved only one occasion of sexual interference. However, she committed a highly invasive sexual offence which included digital penetration and an oral vaginal assault. The "degree of physical interference is a recognized aggravating factor": Friesen at para. 138.
- [71] P's age at the time of the offence was a "significant aggravating factor" because of the obvious power imbalance: Friesen at para. 134. The fact that P was only seven or eight years old is relevant to the gravity of PRJ's offending and her level of personal responsibility. "Sexual offences against children are wrongful precisely because the perpetrators recognize and exploit children's special vulnerability": Friesen at para. 135, internal references omitted.
- [72] PRJ was her daughter's sole guardian, the person P depended on, and the offence was committed in a place in which P reasonably expected to be kept safe. An offender who stands in trust "owes a duty to protect and care for the child that is not owed by a stranger" and breach of this duty "enhances moral blameworthiness": Friesen at para. 129. An abuse of trust "exploits children's particular vulnerability to trusted adults, which is especially morally blameworthy": Friesen at para. 129, internal references omitted.
- [73] The judge found that PRJ was intoxicated. However, there was no foundation from which to reasonably conclude that because of intoxication, PRJ was unable to appreciate the wrongfulness of her conduct or its consequential harms.
- [74] P suffered immediate harm from her mother's conduct, and, based on everything known about child sexual offending, there is a reasonable likelihood she will struggle with the adverse effects of that conduct in the future, in one form or another. In my view, PRJ's moral blameworthiness is not mitigated by intoxication or her use of prescription drugs. There was no evidence that at the time of the offence, PRJ's volition and decision-making capacity was significantly impaired by her intoxication, a mental illness or cognitive disability: Badhesa at para. 40. She is not the same type of offender for whom a conditional sentence was considered appropriate in *Scofield* and *R. v. Vaux*, 2021 BCSC 1773. In the latter cases, there was evidence of serious cognitive and social deficits that Friesen recognizes may result in reduced moral culpability: at para. 91.
- [75] Moreover, according to the pre-sentence report, substance abuse has long been an area of risk for PRJ. There was evidence that PRJ's family has attempted to "support and help [PRJ] in every possible way, but to no avail". There was also evidence that PRJ was aware of the risks associated with her substance use, but, before the offence, she did little to seek to sustainably reduce that risk. Instead, in July 2018, she allowed herself to be in a position that the judge found lowered her inhibitions. In this context, I do not consider PRJ's intoxication to have a mitigating effect: *R. v. Sesay*, 2020 BCCA 41 at para. 38; *Milne* at paras. 49-50.

- [76] The only mitigating factor realistically at play was the absence of a criminal record. PRJ has not identified any others.
- [77] Given the gravity of the offence, the high degree of moral blameworthiness, and the lack of mitigating factors, a three-year prison term is a fit sentence, even though PRJ is a first-time offender. In my view, a three-year term gives meaningful effect to the Supreme Court's direction in *Friesen* and ss. 718.01, 718.2(a)(ii), (ii.1) and 718.2(a)(iii) of the Criminal Code.
- [78] With this sentence, a conditional sentence order is not available.

Disposition

- [79] I would grant the Crown leave to appeal and allow the appeal from sentence.
- [80] I would set aside the 23-month conditional sentence order and replace it with a sentence of 36 months' imprisonment (or, 1,095 days).
- [81] The sentence would run from December 13, 2021. I would leave it up to the correctional authorities to calculate the amount of credit PRJ is statutorily entitled to for time already served on the conditional sentence. The intention is that for purposes of statutory release, PRJ be treated as an offender who received a three-year penitentiary term when sentence was first imposed.
- [82] I would leave the DNA order, the 20-year SOIRA order and the firearms prohibition intact.
- [83] In accordance with s. 743.21 of the Criminal Code, I would impose a non-communication order that PRJ have no contact, directly or indirectly, with: P, the appellant's sister, MF, or the appellant's mother, JJ.
- [84] Finally, the judge declined to impose a s. 161(1) prohibition. The Crown has not pressed this issue. A s. 161(1) prohibition is protective in nature and available when there is "an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the [court] is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk": *R. v. K.R.J.*, 2016 SCC 31 at para. 48.
- [85] Given the judge's factual finding that PRJ does not pose a risk to the community, which has not been challenged on appeal, I do not consider there to be a sufficient basis to impose a s. 161 prohibition.
- [86] WILLCOCK J.A.: I agree.
- [87] GRIFFIN J.A.: I agree.

[88] WILLCOCK J.A.: Leave is granted to appeal the sentence, the sentence appeal is allowed, the 23-month conditional sentence order is set aside and replaced with a sentence of 36 months' imprisonment, or 1,095 days, to run from December 13, 2021. A non-communication order that PRJ have no contact, directly or indirectly, with P, the appellant's sister, MF, or the appellant's mother, JJ, is made pursuant to s. 743.21 of the Criminal Code.

"The Honourable Madam Justice DeWitt-Van Oosten"

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