

CANADA / JUDGMENT

R. v. R.A.T.

2025 BCSC 1736

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2025 BCSC 1736 R. v. R.A.T.

IN THE SUPREME COURT OF BRITISH COLUMBIA

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v.

R.A.T.

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Before: The Honourable Justice E. McDonald

On appeal from: An order of the Provincial Court of British Columbia, dated November 21, 2024 (R. v. R.A.T., 2024 BCPC 229).

Oral Reasons for Judgment on Summary Conviction Appeal

Counsel for the Appellant:

M.E. Bloom

Counsel for the Respondent:

A.T. Vandersluys

Place and Date of Hearing:

Penticton, B.C.

August 6, 2025

Place and Date of Judgment:

Penticton, B.C.

September 4, 2025

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[1] These reasons for judgment were delivered orally. They have since been edited for distribution and publication.

Overview

- [2] This is an appeal by R.A.T. of a sentence pronounced by a Provincial Court judge after a guilty plea on a charge of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. The appellant sexually assaulted his step-granddaughter, S., when she was ten years old.
- [3] In the summer of 2023, S. stayed overnight at her grandmother and the appellant's home. After going home, S. disclosed to her mother that while she was sitting on the appellant's lap playing on the computer, the appellant reached his hand inside of her underwear and shirt to touch her bum and breasts. The appellant told S. not to say anything about the touching, and he apologized to S. for the touching.
- [4] At an early stage, the appellant pled guilty. However, there was no joint submission on sentencing.

- [5] At the sentencing hearing, the Crown recommended a sentence of six months jail followed by two years probation, a DNA order and a weapons prohibition for five years. The defence sought a 12-month conditional sentence followed by two years probation and there was no opposition to the ancillary orders that were recommended by the Crown.
- [6] The sentencing judge ultimately imposed a sentence of 12 months jail, followed by 18 months' probation. The length of the jail sentence is at the core of this summary conviction appeal. None of the probation or the ancillary orders made by the sentencing judge are under appeal.
- [7] The appellant appeals from the sentence, alleging that the judge imposed a harsher sentence, which was double the length of the sentence recommended by the Crown, without providing an opportunity for counsel to make submissions on the sentence. The appellant submits that had counsel been given the opportunity to do so, counsel for the defence would have made submissions and provided factual information that would have impacted the sentence in a material way.
- [8] The appellant appeals from the sentence of 12 months incarceration on the grounds that the judge committed an error in principle and he failed to consider a relevant fact, or erroneously considered an aggravating or mitigating factor that had an impact on the sentence.
- [9] The respondent opposes the relief sought by the appellant and submits that the judge committed no error in imposing a harsher sentence on the appellant.

Issues

- [10] The main issues raised on this appeal are as follows:
- a) Did the sentencing judge err by imposing a harsher sentence without adequately notifying the parties and providing a meaningful opportunity to provide facts and submissions?
 - b) Did the sentencing judge err respecting the maximum sentence for sexual assault and by failing to adequately weigh factors having an impact on sentence?

Legal Principles

- [11] There is no disagreement respecting the applicable legal principles.
- [12] The appellant's counsel referred me to authorities setting out the standard of review applicable to a sentence appeal: *R. v. Agin*, 2018 BCCA 133 at para. 5 [Agin], *R. v. Lacasse*, 2015 SCC 64 at paras. 11, 43 [Lacasse] and *R. v. Friesen*, 2020 SCC 9 at para. 26 [Friesen].
- [13] In *Lacasse*, the Supreme Court of Canada reiterates, at paras. 44 and 51, that appellate intervention is justified in one of three circumstances:
- i. where the sentencing judge has committed an error in principle;

- ii. where the sentencing judge failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor that has an impact on sentence; or,
- iii. the sentence is demonstrably unfit.

- [14] The appellant relies on the first two grounds for justifying appellate intervention.
- [15] Sections 718, 718.1 and 718.2 of the Code set out the principles that apply to the sentencing of an offender. The principles in these sections include denunciation, deterrence, separating offenders from society where necessary, assisting in rehabilitating offenders, providing reparations, and promoting a sense of responsibility in offenders. Section 718.1 provides that a sentence must be proportionate to the gravity of the offence and s. 718.2 provides a list of factors or principles that a sentencing judge should consider.
- [16] In *Lacasse*, at paras. 48-49, the court also reiterates the need to show deference to a sentencing judge's exercise of discretion and that an appellate court may not intervene simply because it would have weighed the relevant factors differently.
- [17] In *R. v. Nahanee*, 2022 SCC 37 [*Nahanee*], the Supreme Court of Canada addressed the appropriate approach when a sentencing court is considering exceeding the positions put forward by the Crown and defence on sentencing. The Court held that if a judge does so without providing opportunity for the Crown and defence to make further submissions, and those further submissions would impact the sentence, an error in principle will have occurred which justifies intervention by a reviewing court.
- [18] In *Nahanee*, the majority makes clear that the error in principle model set out in *Lacasse* remains the applicable route of appeal:
- [52] ... Procedural fairness is not the applicable route of appeal. Rather, the applicable route of appeal is the error in principle model, as outlined in *R. v. Lacasse*, 2015 SCC 64 [2015] 3 S.C.R. 1089. The judge's failure to provide notice and the opportunity for further submissions is an error in principle that will only justify appellate intervention "where it appears from the trial judge's decision that such an error had an impact on the sentence" (*Lacasse*, at para. 44; see also *R. v. Friesen*, 2020 SCC 9, at para. 26). In short, this failure is always an error, though not necessarily one warranting appellate intervention. Where the appellant can establish impact, the judge will have been deprived of an important piece of information relevant to determining a fit sentence. I see no reason to diverge from this established approach to sentence appeals.
- [19] At para. 59 of *Nahanee*, Justice Moldaver, writing for the majority, describes that where the sentencing judge fails to provide notice and/or an opportunity to make further submissions, three types of errors in principle will warrant appellate intervention:
- 1) if the failure to provide notice and/or further submissions impacts the sentence;

- 2) if the sentencing judge failed to provide reasons, or provided unclear or insufficient reasons, for imposing the harsher sentence; and
- 3) if the sentencing judge provided erroneous reasons for imposing the harsher sentence.

[20] Of these three types of errors in principle, the appellant relies on the first, namely, that the sentencing judge's failure to provide notice as soon as possible of his intention to impose a harsher sentence than was recommended by the Crown, and to provide counsel with an opportunity to make further submissions that would have materially impacted the sentence. The appellant is also specifically concerned that the sentencing judge relied on authorities that he did not bring to the attention of counsel.

ISSUE 1: Did the sentencing judge appropriately notify the parties and provide an opportunity to make submissions?

- [21] In *Nahanee* at para. 44, the Supreme Court of Canada instructed sentencing judges to let the parties know as soon as possible "if they are concerned that the Crown's proposed sentence is, or may be, too lenient and they are contemplating exceeding it".
- [22] There is no particular form to the sentencing judge's notice, and it does not require exacting detail about what is troublesome in the Crown's proposed sentence. The purpose is to put the parties "on notice that the judge is considering exceeding the Crown's proposed sentence". The notice must consist of more than "simply asking questions or expressing vague concerns about the parties' sentencing proposals": *Nahanee*, para. 45.
- [23] At para. 46 of *Nahanee*, Justice Moldaver writing for the majority, states as follows respecting the notice requirement:
- [46] There may be cases where the judge has no thought of imposing a harsher sentence than the Crown has proposed until the sentencing hearing is over and the judge has reserved their decision. When that occurs, the judge should notify the parties as soon as possible and invite further submissions, either orally or in writing. At this juncture, the judge may be able to provide greater detail as to the reasons for their concern.
- [24] The opportunity to make further submissions is not "a chance to pull a rabbit out of a hat". Rather, at a contested sentencing hearing, the parties are expected to initially provide as much relevant information as possible in support of their respective positions, including information about facts of the plea negotiation that are highly relevant to support the reasonableness of the Crown's proposed sentence: *Nahanee* at paras. 48 and 49.
- [25] At para. 48, Moldaver J. provided guidance on the focus and content of the additional submissions:

Additional submission should respond to the concerns raised, including matters the parties considered irrelevant or simply overlooked in their initial submissions. For example, this will be the case where the parties propose differing non-custodial options and the judge signals that they are considering a period of incarceration. Further argument and pertinent authorities will likely be necessary.

- [26] The format for the additional submissions, rests with the sentencing judge in consultation with the parties and the parties must be allowed adequate time to prepare additional submissions, if needed: Nahanee at para. 50.
- [27] The Crown and the defence do not agree on whether the judge gave the parties notice that he was contemplating a longer sentence or whether the parties had an opportunity to provide information and make legal submissions on the intended sentence.
- [28] Upon my review of the transcript of proceedings, which I will summarize shortly, I find that the record confirms that the sentencing judge gave the parties adequate notice that he was considering exceeding the sentencing recommendation made by the Crown and he provided the parties with an opportunity to make further submissions.
- [29] On November 4, 2024, the proceedings began before the sentencing judge with the counsel confirming that, by consent, the Crown was proceeding summarily and the appellant seeking to enter a guilty plea to the offence of sexual assault. The sentencing judge undertook a formal inquiry including by asking if the appellant understood that the sentencing judge would "give very careful consideration to what both counsel have to say with respect to an appropriate sentence but ultimately the sentence that is imposed is a sentence that I determine is appropriate and fit in the circumstances". The appellant confirmed that he understood, and the guilty plea was entered.
- [30] The Crown indicated that there was one victim impact statement to be entered that was redacted with the agreement of the defence. The Crown then proceeded with its submissions on sentence.
- [31] At the end of the Crown's submissions, the sentencing judge asked the Crown if he had any case law to support a six-month sentence. The Crown responded to the sentencing judge, stating he had no specific authority that fit the facts of this case.
- [32] At that point in the proceedings, the sentencing judge had the following exchange with Crown regarding the basis for the Crown's sentencing position:

THE COURT: Is there - well, maybe I'll hear from your friend but is there a reason the Crown is taking position of six months jail?

CROWN COUNSEL: I - perhaps, Your Honour, you can - what I'm - I'm saying because the principles of denunciation -

THE COURT: I know, but where's that six months being pulled from? Because Friesen says sentences have to go up. And is six months from the Crown's position, us, the courts, escalating sentences? Like, where - where is six months coming from?

It can't be - we can't pull numbers out of thin air on this and - and six months for touching a child underneath the clothing?

CROWN COUNSEL: Perhaps if it was -

THE COURT: I'll hear from defence on this, but I guess I'd like to know why the Crown takes that -

CROWN COUNSEL: Well, I can tell you -

THE COURT: -- position. Is there - were there some frailties in the Crown's case or -

CROWN COUNSEL: What can I tell you, your Honour, And so, I don't have a specific case for you today and I can't - I can't point to any frailties that I'm aware of. Perhaps if it was -

THE COURT: I just can't imagine that we're at that stage where we're proceeding on sexual offence cases without any supporting precedents. It doesn't sound right to be that we're just being asked to pull a number out of -

CROWN COUNSEL: I understand, Your Honour.

THE COURT: And there's got to be cases that demonstrate for this range - this type of conduct attracts this particular range. You can move in and out of that range, depending on aggravating and mitigating circumstances but --

CROWN COUNSEL: Yes, Your Honour, and I did -

THE COURT: But to say that we're not paying attention to cases anymore - I expect your friend is going to be filing cases that demonstrate that a conditional sentence is appropriate in these circumstances.

- [33] At that point, the Crown indicated that he would gather the case authorities for the sentencing judge that the Crown had submitted electronically for the hearing. Indeed, after the defence concluded its submissions, the Crown reviewed those cases with the judge.
- [34] During the defence counsel's sentencing submissions, the sentencing judge also asked about Friesen. The sentencing judge expressed a concern that neither counsel had adequately considered the facts and sentence reached by the Supreme Court of Canada in such an important case.
- [35] At the conclusion of the proceedings on November 4, 2024, the sentencing judge informed counsel that he was reserving on the sentencing decision. The sentencing judge directed the parties to consult the judicial case manager on a date for the decision and defence counsel advised that he would make himself available as soon as possible.

[36] On November 21, 2024, when the proceedings resumed, the sentencing judge indicated that he had some questions. The first question posed by the sentencing judge concerned whether the appellant had provided a statement and admitted his guilt to the police. The defence counsel confirmed there was no custodial statement made by the appellant, but the appellant had cooperated with the police.

[37] The sentencing judge then posed a question respecting going above the sentence recommended by the Crown, and the following exchange occurred:

THE COURT: Great. And the second question is, I guess for both counsel, is there a reason why - I'm contemplating going above what the Crown is asking for in this case. And I'd like to know, is there a justifiable reason why I should not go above what the Crown is asking for?

Because I do have to give the Crown that opportunity.

And I guess I will ask counsel this question. If it were a stranger that had done this, and the harm inflicted wasn't as extreme as it was, what would the Crown's position on sentence be? Would the Crown be seeking something less than six months if it was a stranger?

CROWN COUNSEL: I can't say that that would be the case, Your Honour. And in terms of the range of sentence, of course you have the authority to go above what the Crown asks. This is not a joint submission. You're not in any way -

THE COURT: Right. But I'm duty bound to ask the Crown and counsel whether - as a courtesy whether there's any reason I should not.

CROWN COUNSEL: I don't have any specific submissions with respect to that, Your Honour.

THE COURT: Okay.

DEFENCE COUNSEL: Um, yes, Your Honour. My friend is correct, this is not a joint submission so - it is contested. Your Honour has the ability to do that.

I would highly encourage your Honour not to do that. Again, we've come here. This - this matter has always been set for resolution and we had to get things in order.

So again - again I don't intend to try to reargue everything, but on the spectrum of the - of these types of - I respectfully say it's at the very lowest end of it. I know Your Honour has talked about this reason, factor and a position of trust and I actually took some time to think about this. That it was exactly what Your Honour was asked, would this be worse if this was a stranger. Typically with children it's always going to be a position of trust in some form or effect and again, of course, that's just the nature of it. If it isn't, then who's watching the child, right? Unless it's -

But my submission is that a CSO is available now. We've come a long way, it's been a long time where [R.A.T.] has shown all of the, um, let's call it - done everything he can to show that this was an out of character moment.

And in my respectful submission, a CSO is a jail sentence. And so he is, if Your Honour agrees to go, that is a jail sentence. It's 12 months. It's longer than what the Crown's asking for.

It's my submission that, given the whole circumstances of this offence and the plea and everything, that a CSO is a fit sentence and essentially sends a message that, "This happens, you're going to jail," but in this case, with the way that R.A.T. dealt with the file, saved everybody the time - not even for a second did they have to think that they would testify. And therefore, it's on that basis that I say Your Honour should not jump to the Crown's position and rather should accede to the defence submission and impose a CSO.

[Emphasis added.]

- [38] When the defence counsel completed his submissions and confirmed there were no further questions, the sentencing judge pronounced his reasons for sentence.
- [39] The appellant submits that the alleged error in principle involves the failure to notify the parties of authorities that the sentencing judge intended to rely on, and to seek further submissions on those authorities. The authorities specifically at issue are as follows: *R. v. T.J.*, 2021 ONCA 392, *R. v. C.K.*, 2023 BCCA 468, *R. v. Maslehati*, 2024 BCCA 207 [Maslehati] and *R. v. Pike*, 2024 ONCA 608. None of these additional authorities were referred to by counsel, nor were they cited in any of the authorities that counsel referred to in their respective sentencing submissions.
- [40] In these additional authorities, each of which involved sexual offences against children, including child pornography, the appellate courts intervened to increase the sentences imposed.
- [41] The defence points out that in each of these additional authorities, the Crown proceeded by indictment. Had the sentencing judge made these cases known to counsel, defence counsel submits that he could have pointed out that proceeding by indictment opened a different picture on the range of the sentence that is distinguishable from the present case where the Crown proceeded summarily.
- [42] The defence also submits that had counsel had been provided with an opportunity to address the additional authorities, they could have been distinguished on factual grounds.
- [43] It is important to consider that none of the four authorities referred to by the sentencing judge set out new legal principles or changes to the law. Rather, these authorities all consider the sentencing principles established by the Supreme Court of Canada in *Friesen* when dealing with sexual offences against children. The additional cases the sentencing judge referred to were simply illustrations of the application of those principles.
- [44] In the present case, the sentencing judge acknowledged that the appellant is a good candidate for a conditional sentence. He also acknowledged that there are cases supporting a conditional sentence for sexually abusing a child.

- [45] However, at para. 79 of the sentencing reasons, the sentencing judge noted that most of the cases concluding that a conditional sentence was appropriate, were distinguishable and involved situations where the offender's moral culpability was significantly diminished. In each of the four additional authorities referred to by the sentencing judge, the courts concluded that a conditional sentence for a sexual offence against a child failed to meet the objectives and principles of sentencing.
- [46] For example, in *Maslehati*, at para. 67, Justice DeWitt-Van Oosten stated:
- [67] Friesen sent a strong message to judges tasked with sentencing for child sexual assault: mid-single digit penitentiary terms should be considered normal and upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances: at para. 114. Appellate decisions released post-Friesen show that substantial penitentiary terms are no longer unusual for child sexual assault, even for first-time offenders: *R. v. C.K.*, 2023 BCCA 468 at para. 112; *R. v. G.J.M.*, 2024 BCCA 82 at para. 71 [G.J.M.].
- [47] I find that referring to these four authorities does not give rise to a situation where - after the submissions have completed - the issuance of an appellate decision significantly changes the law. In such circumstances, a judge might find it appropriate to seek further submissions to address the potential impact of the new authority. However, with respect, the four authorities at issue in the present circumstances, they merely provide illustrations of the application of the principles set out in Friesen.
- [48] As well, the four authorities were referred to where the record of proceedings indicates that on two separate occasions, the sentencing judge raised with counsel the lack of case authority to support their positions. Despite the sentencing judge providing the parties an opportunity to address his concern, the additional submissions that the parties provided, failed to address his concern. It was apparent the sentencing judge was aware of the guidance from the Supreme Court of Canada in Friesen and he was concerned that the parties had not adequately considered the implications of Friesen in determining their positions.
- [49] For the reasons explained, I do not find the sentencing judge committed an error in principle by failing to provide notice of his concern about the parties' sentencing positions, including his intention to refer to four additional authorities to support his sentencing decision, or by failing to provide the parties with an opportunity to address his concern. I also do not find that the appellant has shown that he could have provided facts and submissions that would have materially affected the sentence. Indeed, it is evident from the excerpt above, both parties made further submissions after the sentencing judge indicated he was concerned about their sentencing positions and contemplating a sentence beyond the Crown's proposed sentence.

ISSUE 2: Did the sentencing judge err by misidentifying the maximum sentence or by failing to appropriately weigh relevant factors?

- [50] The appellant alleges the sentencing judge made an error in principle by misidentifying the maximum sentence for sexual assault.
- [51] There is no dispute the sentencing judge incorrectly stated the maximum sentence in circumstances where the Crown proceeds summarily. The error consisted of stating that the maximum sentence was two years in jail, when in fact, it was two years, less a day.
- [52] The appellant submits that the sentencing judge's error is compounded by his stating that the Crown's decision to proceed summarily is irrelevant to determining a fit sentence, except for establishing the maximum sentence. The appellant referred me to an authority recognizing the maximum sentence as a measure of the offence's seriousness: *R. v. Sharma*, 2022 SCC 39 at para. 106. Therefore, the appellant submits that the sentencing judge erred by characterizing this as irrelevant.
- [53] The respondent points out that sexual assault is a hybrid offence. The respondent also submits that the Crown's decision to proceed summarily does not take away from the seriousness of the offence; it merely establishes a ceiling of two years less a day for the sentence.
- [54] I find that the misstatement of the maximum sentence is minor and without meaningful impact on the sentencing judge's decision. When I read the reasons for sentence in their entirety, I find the sentencing judge engaged in a thorough and appropriate analysis of the gravity of the offence, including the mitigating and aggravating factors, as guided by the principles in *Friesen*.
- [55] The appellant's additional ground of appeal relates to alleged errors regarding factors having an impact on sentence. More specifically, the appellant submits that the sentencing judge placed too much weight on the victim impact statement and inadequate weight on mitigating factors such as the guilty plea, the appellant's expression of remorse and his rehabilitation efforts.
- [56] As a general principle, the court may not allow an appeal merely because it might have weighed the factors differently than the sentencing judge and it must be recognized that the "balancing of relevant factors must be assessed against the reasonableness standard of review": *Lacasse* at para. 49.
- [57] Respecting the victim impact statement, the appellant points out that the statement was not prepared in Form 34.2 of the Code and it was unsworn and redacted. Despite this, the Crown and the appellant's counsel agreed to redact portions of the statement and to tender the redacted statement as an exhibit during the sentencing proceeding. Had the appellant wished to provide additional submissions about the requirements of the statement, those submissions could have been, but were not, provided during the sentencing proceedings.

- [58] I am not persuaded that the sentencing judge engaged in speculative reasoning as the appellant suggests with respect to certain comments he made regarding the impact of this offence on the complainant and her family. In Friesen at para. 63, the Court specifically instructs sentencing judges to be careful not to lose sight of the harms engendered by sexual violence against children, including to family members:
- [63] The ripple effects of sexual violence against children can make the child's parents, caregivers, and family members secondary victims who also suffer profound harm as a result of the offence. Sexual violence can destroy parents and caregivers' trust in friends, family, and social institutions and leave them feeling powerless and guilty (R. v. C. (S.), 2019 ONCA 199, 145 O.R. (3d) 711, at para. 6; Rayo, at para. 39; D. (D.), at para. 13). The harm to parents' relationship with their children can also be profound. For instance, children can react to the sexual violence by shutting their parents out of their lives (Rafiq, at para. 40). Parents and caregivers may also bear the financial, personal, and emotional costs of helping their children recover and cope with emotional and behavioural challenges (see D. (D.), at paras. 11-13).
- [59] Further, Friesen notes, at para. 86, that "direct evidence from children or their caregivers is not required for the court to find that children have suffered actual harm as a result of sexual violence".
- [60] I do not agree with the appellant that the sentencing judge failed to give sufficient weight to the various mitigating factors. The reasons for sentence are a thorough and comprehensive consideration of the circumstances of the offence, the offender and the application of the relevant principles of sentencing.
- [61] Sentences imposed must be commensurate with the gravity of sexual offences against children and reflect the contemporary understanding of sexual violence against children: Friesen, para. 76. As noted in Friesen, at para. 50, "getting the wrongfulness and harmfulness right is important."
- [62] I find that when read in their entirety, the reasons demonstrate a balanced examination of all relevant factors as guided by Friesen, including mitigating factors. There is no basis to find that the sentencing judge exercised his discretion unreasonably and when I apply the reasoning in Nahanee, I do not find a justification for appellate intervention.
- [63] When I consider the authorities and the case as a whole, I am unable to conclude that the sentence under appeal is demonstrably unfit because it falls so far outside of the acceptable sentencing range or for any other grounds raised by the appellant.

Disposition

- [64] For the reasons explained, the appeal is dismissed. I leave it to the correctional authorities to calculate the jail time remaining to be served.

"E. McDonald J."

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