

CANADA / JUDGMENT

R. v. Tyabji-Sandana

2024 BCSC 1325

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1325 R. v. Tyabji-Sandana

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tyabji-Sandana,

2024 BCSC 1325

Date: 20240604

Docket: 16792-2

Registry: Powell River

Rex

v.

Kasimir Tyabji-Sandana

Restriction on Publication: Pursuant to 486.4(1) C.C.C.

Before: The Honourable Justice Edelmann

Oral Reasons for Sentence

Counsel for the Crown:

J.C. Young

Counsel for the Accused:

D.C. Tarnow

Place and Date of Hearing:

Powell River, B.C.

June 3 & 4, 2024

Place and Date of Judgment:

Powell River, B.C.

June 4, 2024

- [1] THE COURT: Mr. Tyabji was found guilty by a jury of sexual interference. He is now before me for sentencing.
- [2] Prior to the sentencing hearing, I made findings of fact with respect to the offence at the request of the parties. I do not propose to review all of those findings today, but I will go over them, at least in part, for the benefit of the members of the community present today.
- [3] Mr. Tyabji and K.C. met around January 2016 when K.C. and her friend volunteered on a sheep farm owned by Mr. Tyabji's mother and Mr. Wilson. They were accumulating volunteer credits required for graduation from high school. K.C.'s friend was 17 years old and in Grade 12. K.C. was 14 years old and in Grade 9, turning 15 in April 2016.
- [4] Judy Tyabji and Gordon Wilson testified about their understanding about how old K.C. was when she volunteered at the farm. According to them, K.C. appeared to be older than 14 or 15, which was consistent with the testimony from K.C. herself, who said that from the age of 15, many people thought she was older and mistook her for someone who was 18 to 20.
- [5] Mr. Wilson described his experience with adolescents and young adults, and he said both he and Ms. Tyabji understood K.C. to be a high school senior, and that they would not have had her work on the farm if she was under 16.
- [6] Mr. Tyabji says the only discussion he remembers about what K.C. was doing in school or her age at the time was Ms. Russ saying that she was in Grade 12 and that K.C. was a year younger. K.C. stopped working on the farm sometime around the time of her 15th birthday in April.
- [7] Starting on May 13, 2016, Mr. Tyabji and K.C. began to communicate by email. Mr. Tyabji and K.C. next met in person on Canada Day and in the subsequent weeks were in regular contact. They did a number of activities together, including walks, hiking, and swimming.
- [8] In late July or early August, Mr. Tyabji invited K.C. to his home to look at some photo books. He kissed her for the first time on that occasion.
- [9] On August 22, Mr. Tyabji sent an email entitled, "I think this is good news?" which included information about the age of consent being 16. Mr. Tyabji said that after kissing K.C., it seemed that they were "taking it to another level". He thought the age of consent was 18 and therefore he says he decided to look it up. He thought it was good news because he thought K.C. was 16.

- [10] In the last week of August or early September, Mr. Tyabji and K.C. went hiking together. Mr. Tyabji had brought a blanket, and while the two of them were on the blanket, he kissed K.C. and touched her breast. Mr. Tyabji testified this would have happened after August 22.
- [11] Sometime in September, Mr. Tyabji and K.C. had sexual intercourse. They had sexual intercourse on more than one occasion and the last time was likely sometime in November. They stopped seeing each other in early December 2016.
- [12] In considering the totality of the evidence, I found that Mr. Tyabji had an honest but mistaken belief that K.C. was 16 years old throughout the relevant time. The circumstances in which K.C. met Mr. Tyabji on the farm provided a number of indicia that she was more than 14 years old at the time. She was there to earn graduation credits with her friend and not only Mr. Tyabji, but others who interacted with K.C. at the time, thought she was older.
- [13] I was also not satisfied that Mr. Tyabji was wilfully blind to K.C.'s age. I found no indication that he deliberately chose not to inquire further into her age because he did not want to know. I found in particular that the email of August 22 not to be consistent with wilful blindness. A person who is deliberately seeking to avoid inquiry into age would not have invited a discussion on precisely that topic.
- [14] Crown and defence agree that an offender who knowingly engages in sexual conduct with a child has a higher degree of moral culpability than one who has failed to take reasonable steps, as set out by Justice Marchand (as he then was) in *R. v. Angel*, 2018 BCSC 794:

In passing sentence on Mr. Angel, I must take into account that he has committed a grave crime. On the other hand, as recognized by Madam Justice Fisher in similar circumstances . . . an offender like Mr. Angel who failed to take all reasonable steps to determine the complainant's age has a lower level of moral culpability than an offender who lacks an honest belief that the complainant was the age of consent.

- [15] That being said, Mr. Tyabji was 28 years old when he was having sexual contact with someone who, even on his own stated belief, had only recently turned 16. Given the age difference between them, it was incumbent on him to ensure he did not have sexual contact with someone under the age of consent.
- [16] Ultimately Parliament has placed the responsibility on adults to ensure they do not engage in sexual activity with minors below the age of consent. A reasonable person in Mr. Tyabji's circumstances would have turned their mind to the reasons for their belief in K.C.'s age and recognize that further inquiry was warranted.

Victim Impact

- [17] The impact on K.C. has been significant. Throughout her testimony and in her victim impact statement, it was clear that her interactions with Mr. Tyabji have had a lasting effect in her life which will continue for the foreseeable future. She describes that instead of being able to navigate through her life as a typical teenager, she sat with the shame, embarrassment,

and trauma from the time she spent with Mr. Tyabji. The court process itself has been long, stressful, and retraumatizing. She only shared what happened with her mother shortly before trial and she could not bring herself to tell her father.

Background

- [18] Mr. Tyabji was born and primarily raised in Kelowna. He was 28 years old at the time of the offence and is now 35. During his early childhood, his mother was married to a man Mr. Tyabji would come to learn was his stepfather. They separated when Mr. Tyabji was five and he lived primarily with his stepfather and two half-sisters. His mother, Judy Tyabji, is a prominent former politician in British Columbia and later married Gordon Wilson, another prominent politician at the time. Their relationship was the subject of substantial media coverage at the time, and there continues to be media scrutiny of the family, and in particular Mr. Tyabji's case.
- [19] Mr. Tyabji tried to run away from his stepfather's home multiple times in an attempt to live with his mother and Mr. Wilson on the Sunshine Coast. At age 14, he was successful in requesting the parenting arrangement be changed to allow him to move.
- [20] After high school, Mr. Tyabji attended acting school, worked in call centres, and on oil rigs in Northern Alberta. More recently, Mr. Tyabji enrolled at Vancouver Island University and began pursuing a law degree. He later transferred to the University of British Columbia and I understand he has completed the course work for his law degree. He is currently working as a consultant for his mother's company and is responsible for marketing, inventory management, sales, distribution, and consumer analytics.
- [21] Although he aspires to practise law, his criminal convictions will likely present a challenge for the foreseeable future. In addition to the matter before me, Mr. Tyabji has one past criminal conviction for possession of a controlled substance in 2018.
- [22] Mr. Tyabji has struggled with alcohol misuse for most of his life. He indicates that it worsened after his arrest in 2015 on the drug matter and during the COVID-19 pandemic. He has been meeting with a counsellor and working with an addictions doctor at the Raven Song Community Health Clinic. He attended the Together We Can residential recovery facility for 45 days in 2021. He has had incidents of suicidal ideation and on at least one occasion he attempted to take his own life by overdosing.
- [23] A presentence report and two Gladue reports were prepared for the sentencing in this matter. Mr. Tyabji's biological father was not willing to participate in the preparation of the Gladue report or otherwise be involved. One of the Gladue report writers was, however, able to contact Mr. Tyabji's paternal uncle who is a registered citizen with the Métis Nation of British Columbia. He was able to provide a number of details about the family history.

- [24] Mr. Tyabji's paternal grandfather was Métis Cree and his paternal grandmother Métis. She was taken to residential school for several years where she suffered physical and sexual abuse. Mr. Tyabji's uncle described the impact on the family in which alcoholism, violence, and poverty were endemic parts of their childhood. His mother was a severe alcoholic who drank throughout her pregnancies and throughout her life to cope with the trauma from her residential school experience.
- [25] Mr. Tyabji's biological father was not at all involved in his childhood. They have only met on a handful of occasions. He found out his biological father was Indigenous when he was 11. When he told his school, he was assaulted by his stepfather, who told the school to ignore the information. Mr. Tyabji's mother describes the environment in which he was raised with his stepfather. He was raised in an environment where he was ashamed of being Indigenous. His sisters were raised to believe he is not good enough or as good as them because he is Indigenous. They think he has a drinking problem because he is part Indigenous.
- [26] As a child, Mr. Tyabji reports being bullied at school, physically assaulted, and subject to racial epithets.
- [27] The supplemental Gladue report summarizes the adverse effects impacting Aboriginal people in general and that have affected Mr. Tyabji-Sandana:

[M]ultigenerational familial instability, violence, breakdown, and fragmentation. Mr. Tyabji consequently grew up having no awareness of or involvement with his biological father or Indigenous home community, while his formative environment in the care of his stepfather was marked by racial discrimination, intolerance, instability, and social alienation.

The unresolved trauma from these experiences manifested in a range of maladaptive issues, impacting Mr. Tyabji's sense of self worth, security, interpersonal relationships, and functional abilities.

As early as age 14, Mr. Tyabji began consuming alcohol as a means to self-medicate and numb the emotional manifestations of feelings of grief and loss and social alienation, and the intergenerational effects, including the absence of a biological father, loss of his cultural identity and connection to the larger Indigenous community which has resulted in a loss of language, culture, ancestral knowledge, and the traditional family and community support mechanisms which would have otherwise been available to Mr. Tyabji throughout his life.

Principles fo Sentencing

- [28] The principles of sentencing are set out at s. 718 of the Criminal Code:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[29] As set out in ss. 718.01 and 718.2(a) and discussed in some detail in the Supreme Court of Canada's decision in *R. v. Friesen*, 2020 SCC 9, the primary consideration in sentencing for sexual offences against children is denunciation and deterrence. The Court began its decision in *Friesen* with the following comments:

[1] Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against children deny thousands of Canadian children such a childhood every year. . . .

[5] Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

[30] The Court went on to discuss in some detail the harms caused by sexual offences against children:

[79] In addition to the inherent wrongfulness of physical interference and exploitation, courts have recognized that sexual violence against children inherently has the potential to cause several recognized forms of harm. The likelihood that these forms of potential harm will materialize of course varies depending on the circumstances of each case. . . .

[80] We wish to focus courts' attention on the following two categories of harm: harm that manifests itself during childhood, and long-term harm that only becomes evident during adulthood. During childhood, in addition to the inherent wrong of interference with their bodily integrity, children can experience physical and psychological harm that persists throughout their childhood . . . These forms of harm can be so profound that children are

"robbed of their youth and innocence" . . . The following list of recognized forms of harm that manifest themselves during childhood makes this clear:

These effects include overly compliant behaviour and an intense need to please; self-destructive behaviour, such as suicide, self-mutilation, chemical abuse, and prostitution; loss of patience and frequent temper tantrums; acting out aggressive behaviour and frustration; sexually aggressive behaviour; an inability to make friends and non-participation in school activities; guilty feelings and shame; a lack of trust, particularly with significant others; low self-esteem; an inability to concentrate in school and a sudden drop in school performance; an extraordinary fear of males; running away from home; sleep disturbances and nightmares; regressive behaviours, such as bedwetting, clinging behaviour, thumb sucking, and baby talk; anxiety and extreme levels of fear; and depression.

. . .

- [81] Sexual violence against children also causes several forms of long-term harm that manifest themselves during the victim's adult years. First, children who are victims of sexual violence may have difficulty forming a loving, caring relationship with another adult as a result of the sexual violence . . . children are more likely to struggle with substance abuse, mental illness, post-traumatic stress disorder, eating disorders, suicidal ideation, self-harming behaviour, anxiety, depression, sleep disturbances, anger, hostility, and poor self-esteem as adults . . .
- [31] It is clear from K.C.'s victim impact statement that many of these harms have manifested themselves as a result of Mr. Tyabji's conduct in the case before me.
- [32] The court in Friesen also explicitly addressed the application of the principles in Gladue in the context of sexual offences against children at paragraph 92:
- [92] . . . where the person before the court is Indigenous, courts must apply the principles from R. v. Gladue . . . and Ipeelee. The sentencing judge must apply these principles even in extremely grave cases of sexual violence against children . . . The systemic and background factors that have played a role in bringing the Indigenous person before the court may have a mitigating effect on moral blameworthiness . . . Similarly, a different or alternative sanction might be more effective in achieving sentencing objectives in a particular Indigenous community . . .
- [33] Both the Court in Gladue and the Criminal Code direct a sentencing court to consider sanctions other than imprisonment, as set out in s. 718.01(e) [sic - 718.2(e)]:
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.
- [34] The applicable methodology was discussed in R. v. Ipeelee, 2012 SCC 13 starting at paragraph 72:

- [72] . . . The methodology set out by this Court in Gladue is designed to focus on those unique circumstances of an Aboriginal offender which could reasonably and justifiably impact on the sentence imposed. Gladue directs sentencing judges to consider: (1) the unique systemic and background factors which may have played a part in bringing the particular Aboriginal offender before the courts; and (2) the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular Aboriginal heritage or connection. Both sets of circumstances bear on the ultimate question of what is a fit and proper sentence.
- [73] First, systemic and background factors may bear on the culpability of the offender, to the extent that they shed light on his or her level of moral blameworthiness. This is perhaps more evident in Wells where Iacobucci J. described these circumstances as "the unique systemic or background factors that are mitigating in nature in that they may have played a part in the aboriginal offender's conduct" (para. 38 (emphasis added)).
- [35] In Mr. Tyabji's case, it is clear that the legacy of colonialism, racism, and bias against Indigenous people in this country were relevant to the circumstance in which he found himself at the time of the offence. The legacy of Indian residential schools, intergenerational trauma, substance abuse, and the resulting loss of parenting skills and familial composition were all likely contributors to the fact that Mr. Tyabji's father was not in a position to be part of his childhood and remains estranged. As a result, Mr. Tyabji was raised not only without a strong positive Indigenous identity, but in an environment that was actively hostile to such an identity. His dysfunctional pursuit of an intimate relationship with someone little more than half his age led to devastating consequences for K.C..
- [36] However, Mr. Tyabji's dysfunction in relation to intimacy, as with his ongoing struggles with addiction, is not unrelated to the social context in which he spent his own childhood.
- [37] Mr. Tyabji expressed genuine remorse for the impact his conduct had on K.C.. I do not find his description of himself as a man-child at the time to have been an attempt to minimize his conduct, but rather a more mature reflection and condemnation of the decisions he made at the time. I have little concern that Mr. Tyabji would commit a similar offence in the future. Even in the course of the conduct before me, there were clear indications that he was concerned about the legality of his conduct. Unfortunately, he did not take the reasonable steps that would have been expected in the circumstances.
- [38] However, I find that his moral culpability is significantly lower than the offenders in the cases cited by the Crown in support of a lengthy penitentiary sentence. All of the cases except Knight involved offenders who subjectively knew they were engaged in sexual activity with a child, and Mr. Knight did not bother to turn his mind to the issue either way.
- [39] I am, therefore, satisfied that a penitentiary sentence in the circumstances is not required.

[40] With respect to the question of whether the sentence should be served in the community, I will begin with respect to the comments of the Supreme Court of Canada in *R. v. Proulx*, 2000 SCC 5 with respect to the impact of a conditional sentence order and the role that a conditional sentence can play in sentencing. At para. 105, the Court said:

The stigma of a conditional sentence with house arrest should not be underestimated. Living in the community under strict conditions where fellow residents are well aware of the offender's criminal misconduct can provide ample denunciation in many cases. In certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison.

106 The amount of denunciation provided by a conditional sentence will be heavily dependent on the circumstances of the offender, the nature of the conditions imposed, and the community in which the sentence is to be served . . .

[41] The stigma of an investigation and prosecution for a sexual offence of this nature is also a factor to be considered, as discussed by the Court of Appeal in *R. v. D.E.S.M.*, 1992 CanLii 6009 (BC CA), [1993] B.C.J. No. 702, at para. 20:

There is no suggestion that the accused is a danger to anyone so he need not be isolated in order to protect the public. By convicting him, society has already stigmatized him as a person who has committed a serious offence, and has denounced his offence. Quite recently, the Supreme Court of Canada has expressed itself quite strongly on the importance of stigma as a consequence of criminal proceedings. The court has been saying what most lawyers and criminologists have known all along, that a public charge, trial and conviction for a serious offence brands a person for life, constitutes serious punishment, and is an important part of the way society brings offenders to account for their misconduct.

[42] The stigma and impact of the charges and conviction have been significant for Mr. Tyabji. He is a member of a prominent family and his case before the court has garnered significant attention in a small community to which he continues to be connected through his family. When the fact of the charges became known at the law school, he was ostracized. There is little question his conviction will present a significant impediment to any career he might wish to pursue.

[43] In my view, considering the overall circumstances, I find this is a case where the objectives of denunciation and deterrence can be met by the imposition of a lengthy and strict conditional sentence order.

[44] Mr. Tyabji, I am therefore going to sentence you to a term of imprisonment of two years less a day to be served in the community. I did not hear submissions from counsel with respect to the conditions so, Madam Clerk, I am going to read out the conditions. I will make any changes. I will hear from counsel with respect to their comments on the conditions.

[45] So the proposed conditions are the following:

- You must keep the peace and be of good behaviour.
- You must appear before the court when required to do so by the court.
- You must notify the court or your conditional sentence supervisor in advance of any change of name or address, and promptly notify the court or supervisor of any change in employment or occupation.
- You must remain in British Columbia, unless you have prior written permission from the court or your conditional sentence supervisor to leave the province.
- You must report in person to a conditional sentence supervisor [discussion with counsel] at 1855 Burrard Street, Suite 202, Vancouver, British Columbia, by 3:00 p.m. on June 5, 2024, and after that you must report as directed by your supervisor.
- You must have no contact or communication, directly or indirectly, with K.C.. You must not go to any place where K.C. lives, works, attends school, or worships, or happens to be. If you see her, you must leave her presence immediately without any words or gestures.
- When first reporting to your conditional supervisor, you must provide them with the address where you live and your phone number. You must not change your address or phone number without prior written permission from your supervisor.

[46] And do we have an address where Mr. Tyabji is going to be residing?

[47] CNSL D. TARNOW: Just thought it would be better than having you read it out.

[48] THE COURT: Yes. All right. You must obey house arrest by being inside your residence -- and the residence will be specified -- 24 hours a day, every day.

[49] You must present yourself immediately at the door of your residence or answer the phone when any peace officer or conditional sentence supervisor attends or calls to check on you during the house arrest. You may be away from your residence during the house arrest with the written permission of your conditional sentence supervisor. Such permission is to be given only for employment or other compelling reasons. You must carry the permission with you when you are outside your residence.

[50] You may also be away from your residence during the house arrest hours while at, going directly to, or returning directly from a healthcare facility because of a medical emergency. If asked, you must provide your conditional sentence supervisor with proof of your attendance at the facility.

[51] THE ACCUSED: Your Honour, I have a -- I have a dog.

[52] THE COURT: We will need -- I am going to read out the condition. I am going to hear from your counsel in a moment and perhaps you can have a discussion with your counsel and I will hear from him.

- [53] You must attend, participate in, and complete any intake, assessment, program, treatment, or a full-time live-in treatment program as directed by your conditional sentence supervisor. This may include programming or treatment for alcohol or drug addiction, psychiatric and psychological health, or sexual offending.
- [54] You must complete 100 hours of community work service under the direction of your conditional sentence supervisor. Your community work service must be completed by December 1, 2025.
- [55] You must not seek, obtain, or continue with any volunteer position or employment that involves being in a position of trust or authority towards a person under the age of 18 years, unless you have the advance written permission of your supervisor. If you are given permission, you must carry it with you in paper or electronic format at all times when you are engaged in the activity requiring permission. If a peace officer finds you engaged in the activity and requests to see the permission, you must show it to the officer.
- [56] Following your conditional sentence, you must comply with a probation order for a term of 36 months. The conditions are the following:
 - [57] You must keep the peace and be of good behaviour.
 - [58] You must appear before the court when required to do so by the court.
 - [59] You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or the officer of any change of employment or occupation.
 - [60] You must report in person to a probation officer within two business days of the completion of your conditional sentence, unless you have obtained, before the completion of your conditional sentence, written permission from the probation officer to report elsewhere or within a different timeframe. After that, you must report as directed by your officer.
 - [61] You must have no contact or communication, directly or indirectly, with K.C.
 - [62] You must not go to any place where K.C. lives, works, attends school, worships, or happens to be. If you see her, you must leave her presence immediately without any words or gestures.
 - [63] You must attend, participate in, and complete any intake, assessment, program, treatment, or full-time live-in treatment program as directed by your conditional sentence supervisor. This may include programming or treatment for alcohol or drug addiction, psychiatric and psychological health, sexual offending.

- [64] You must not seek, obtain, or continue with any volunteer position or employment that involves being in a position of trust or authority towards a person under the age of 18 years, unless you have the advance written permission of your probation officer. If you are given permission, you must carry it with you in paper or electronic format at all times when you are engaged in the activity requiring permission. If a peace officer finds you engaged in the activity and requests to see the permission, you must show it to the officer.
- [65] Perhaps before I turn to ancillary orders, I will hear from counsel with respect to any issues or concerns with respect to the conditions.
- [66] CNSL J. YOUNG: Not from the Crown, not that I am able to immediately identify, no.
- [67] THE COURT: All right.
- [68] CNSL D. TARNOW: I have never run into this before. The accused lives in an apartment building.
- [69] THE COURT: Yes.
- [70] CNSL D. TARNOW: He has a dog. He likes to walk the dog twice a day. It doesn't need far, it's a small dog, but I don't know how to deal with this. I know Your Honour's -- Justice, you are concerned about house arrest. I don't know how to deal with this.
- [71] THE COURT: Well, I mean, the reality is, is that if the sentence that was being requested by the Crown had been imposed, I hope Mr. Tyabji had made arrangements with respect to what was going to happen with the dog. I will hear from the Crown on that, but my concern is that a dog is not a situation where it is going out for half an hour at a specific time every day. It is that being responsible for a dog involves the potential for medical emergencies. It is not a straightforward issue like going out to get groceries or something like that. I was going to canvass whether or not there should be such an exception, especially with a lengthy conditional sentence order like this one. I understand Mr. Tyabji lives on his own, that there would be room for a couple of hours a week where he would go out to be able to get provisions and whatnot, although if he is out for employment purposes, obviously some of those things can be dealt with in that context. And I gather that a conditional sentence supervisor will generally be able to address those things in a more flexible manner. But in terms of the issue with the dog, it is that appears to be a reason to be out of the house at any time.
- [72] CNSL D. TARNOW: I think we'll leave it and -- yeah. Mr. Justice, I think we will leave it.
- [73] THE COURT: All right. So sexual interference is a primary designated offence, and so pursuant to s. 487.051(1) of the Criminal Code, I make an order in Form 5.03 authorizing the taking of samples of bodily substances for the purpose of registration in the DNA National Data Bank.

- [74] Pursuant to s. 109(2) of the Criminal Code, you are prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, and explosive substance for a period of 10 years, and any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
- [75] The Crown is seeking an order for compliance with the Sex Offender Information Registry and under the Criminal Code, as it currently reads I am to make an order that you comply, unless I am satisfied that you have established that there would be no connection between making the order and the purpose of helping police services prevent or investigate crimes of a sexual nature by requiring the registration of information relating to sex offenders under the Act, or the impact or the order on the person, including on their privacy or liberty would be grossly disproportionate to the public interest in protecting society through the effective prevention or investigation of crimes of a sexual nature to be achieved by the registration of information relating to sex offenders under that Act.
- [76] While I have found that Mr. Tyabji is at a low risk to reoffend, I do accept that in the circumstances of this case, as set out by the Crown, the information would have been of assistance in investigating the offence that is before me.
- [77] While 20 years is a long time, I do not find that compliance with the SOIRA would be grossly disproportionate in the circumstances. K.C. will undoubtedly continue to feel the impact of Mr. Tyabji's actions long after he has completed his sentence and likely after he is no longer subject to compliance, and I do not consider it grossly disproportionate in the circumstances to have him comply with registration. I therefore am going to make an order under the Sex Offender Information Registry Act. And I understand that it is mandatory for a period of 20 years. Is that your understanding as well, counsel?
- [78] CNSL J. YOUNG: That is -- that's my understanding, yes.
- [79] THE COURT: Yes, Mr. --
- [80] CNSL D. TARNOW: I think so, yeah.
- [81] THE COURT: All right. The Crown has also sought a rather broad order under s. 161 of the Criminal Code. I am not satisfied that such an order is warranted in the circumstances. Mr. Tyabji will be subject to strict reporting conditions, as well as a number of conditions for the next five years and I do not find that continuing conditions after that are required in the circumstances, and I therefore decline to make an order under s. 161.
- [82] Unless I hear otherwise from counsel, there will be a victim fine surcharge in the amount of \$200 to be paid within 60 days. And if you require further time to pay the surcharge, you must apply in writing to ask the court for an extension.

- [83] There was some suggestion of restitution and there was an offer from Mr. Tyabji to pay for counselling. I do not have any indication or I have not heard from counsel with respect to the appropriateness of making a prospective restitution order. Normally restitution is for costs that have been incurred, and so it is unclear to me as to whether or not that is an order that is open to me to be making.
- [84] CNSL J. YOUNG: I don't think so. My understanding is that it has to be quantifiable and proven. I guess it's something that I could inquire about, but at this point I don't -- there's been no request, so --
- [85] THE COURT: All right. I am going to leave it to counsel to perhaps have a discussion as to whether that is something that K.C. would want in the circumstances, and whether that is something that Mr. Tyabji is seeking to do. If that is something that ought to be done in the form of an order and counsel are in agreement about it, then perhaps that can be brought to my attention or that can just simply be done by way of desk order. It is not clear to me that a restitution order at this point is appropriate, unless counsel have another view of that. I am going to leave that question open at this point. Should counsel wish to revisit that issue, that can be brought back before me. It is something that I would consider in the circumstances, but it is unclear to me as to the mechanism by which I would do that.

"Edelmann J."

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