

WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of the *Criminal Code* provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences;

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22,48; 2015, c. 13, s. 18..

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could

identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. B.J.T., 2019 ONCA 694

DATE: 20190906

DOCKET: C62821 & C62978

Feldman, Paciocco and Zarnett JJ.A.

DOCKET: C62821

BETWEEN

Her Majesty the Queen

Respondent

and

B.J.T.

Appellant

DOCKET: C26978

AND BETWEEN

Her Majesty the Queen

Appellant

and

B.J.T.

Respondent

Janani Shanmuganathan and Geocelyne Meyers, for B.J.T.

Craig Harper, for the Crown

Heard: February 14, 2019

On appeal by B.J.T. from the convictions for sexual interference and sexual assault entered by Justice John A. Desotti of the Superior Court of Justice, sitting without a jury, dated December 16, 2015, with reasons reported at 2015 ONSC 7293, and the sentence imposed on October 28, 2016, with reasons reported at 2016 ONSC 6616.

On appeal by the Crown from the sentence imposed on October 28, 2016, with reasons reported at 2016 ONSC 6616.

Feldman J.A.:

Introduction

[1] B.J.T., the father of the complainant, was convicted of two counts of sexual interference contrary to s. 151(a) of the *Criminal Code*, R.S.C. 1985, c. C-46, (touching a person under age 16 for a sexual purpose) and two counts of sexual assault contrary to s. 271 of the *Criminal Code*. He was convicted of one count of sexual assault and one count of sexual interference for shaving his daughter's pubic hair at her request in 2011 when she was 13, and was convicted on both counts again for shaving his daughter's pubic hair at her request a second time in 2013 when she was 15. The sexual assault convictions were stayed based on the principle from *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[2] After striking down the mandatory minimum sentence for the offence of sexual interference (45 days at the time of the first offence, amended by the time of the second offence to 1 year), as cruel and unusual punishment contrary to s. 12 of the *Canadian Charter of Rights and Freedoms* and not saved by s. 1, the trial

judge imposed a sentence of one day for the first offence concurrent to nine months for the second offence.

[3] B.J.T. appeals all of the convictions, and in the alternative seeks leave to appeal the nine-month sentence. The Crown seeks leave to appeal both sentences, asks this court to set aside the finding that the mandatory minimum sentences are unconstitutional, and to increase the sentence on the first count to six months, and the sentence on the second count to one year.

[4] For the reasons that follow, I would dismiss the appeals on both 2013 convictions and on the 2011 sexual assault conviction, I would set aside the 2011 sexual interference conviction and order a new trial, and I would dismiss all sentence appeals.

The facts found by the trial judge

[5] Both incidents arose out of the complainant, D.T.'s significant hygiene problem and odour originating from her pubic hair. She was teased about it at school and both her parents were aware of it. B.J.T. believed that as a result, his daughter had low self-esteem. B.J.T. also had low self-esteem when he was in school. As an obese child, he was bullied and had few friends. He had been a special education student. The trial judge observed him to be "a simple man" and concluded that "his depth of reasoning...is limited."

(1) The 2011 incident

[6] One day in 2011, when D.T. was 13 years old, she wanted to attend a dance, and told her parents that she would like her mother to shave her pubic hair. Her mother refused, saying she was too young, but suggested she speak with her two aunts, her mother's sisters. Later, when her mother was absent, D.T. asked her father, B.J.T. to shave her pubic hair and he agreed.

[7] The mother, J.T., was not home at the time. D.T. laid down on B.J.T.'s bed and B.J.T. used a razor and shaving cream to remove D.T.'s pubic hair.

[8] During her police interview, D.T. was asked where B.J.T. had shaved her. She replied: "[e]verywhere?" The interviewing officer sought clarification: "[l]ike, your pubic region?" She answered: "[y]es ... I don't know what it's called".

[9] The interviewing officer also asked whether B.J.T. said anything to D.T. while he was shaving her. She answered: "he just said it was really knotted, but, you know, you really don't do anything with yourself". These excerpts from D.T.'s police interview were not findings of fact by the trial judge. However, D.T. affirmed at trial that her statements in this interview were true, and these statements were not disputed.

[10] B.J.T. acknowledged that once the shaving was complete, he told D.T. not to tell her mother. But when J.T. got home that night, B.J.T. was crying, and he admitted to his wife that he had shaved their daughter at her request. In response,

she threatened to beat B.J.T. with a baseball bat if he ever shaved J.T. again. The complainant, however, expressed gratitude to her father for helping her out.

(2) The 2013 incident

[11] In 2013, when D.T. was 15 years old, she texted her father at work saying she had a request. He responded that she should ask him at home. When he arrived home, she asked him to shave her pubic hair again.

[12] When he shaved her pubic hair the second time, B.J.T. inserted his finger inside her vagina, he said, to remove a pubic hair. She said that she experienced significant discomfort and told him she could have removed the hair herself. D.T. also said that B.J.T. commented on the large size of her “clit”. He denied that he said that, saying that he was only commenting on a large skin tag he observed. The trial judge accepted D.T.’s evidence on this point.

(3) Disclosure to the police

[13] The police became involved in this case in 2014, when D.T.’s maternal aunt, L.M., found out from D.T.’s boyfriend, A.K., that B.J.T. had shaved D.T. The information was then revealed to D.T.’s other maternal aunt, A.M., her mother, and eventually to the police.

Decisions below

(1) Reasons for conviction

[14] The trial judge first found the facts regarding both incidents. When he turned to the analysis, he dealt with the second incident (October 2013) first, observing that the only material difference in the accounts by the father and the daughter was with respect to the comments made during that second incident as well as the discomfort that the complainant felt when B.J.T. put his finger in her vagina to remove one pubic hair and the fact that she told him she could have done that herself. While he did not believe that a great deal turned on the difference between the two accounts, the trial judge accepted the testimony of the complainant regarding what occurred during the second shaving incident including what was said, and rejected the “skin tag” explanation by B.J.T. He found B.J.T.’s explanation for putting his finger into the complainant’s vagina “absurdly inappropriate”.

[15] The trial judge commented that he did not believe that a great deal turned on the difference for the purpose of assessing the “sexual connotation” of B.J.T.’s actions. It is unclear whether he was purporting to address the sexual interference count in this section of the reasons. He recited the Crown’s position that the words used by B.J.T. and the fact that he put his finger in his daughter’s vagina made the second incident “a clear and obvious sexual assault with an overt sexual connotation”. He appeared to accept the Crown’s position, finding that B.J.T.’s

rationale and explanation for putting his finger in his daughter's vagina was "at its highest...absurdly inappropriate".

[16] He then posed the question whether without those two added features of the evidence, did the shaving of the complainant's pubic area by B.J.T. by itself constitute a sexual assault, and concluded that it did.

[17] He referred to the argument that the consensual shaving at the daughter's request was not a sexual assault, and noted that argument could not realistically be made for the second incident. He reasoned that the entire context had changed after two years had passed, because: a) the complainant was now two years older and normally could make her own inquiries from professionals, from friends, her aunts, or on the internet or elsewhere to get the assistance she needed; and b) his wife's anger following the first incident, his own remorse, and the obvious ability of his daughter or him to make other inquiries for help including products, an aesthetician, or self-taught personal care. Based on those reasons the trial judge found that the second incident was "entirely and thoroughly inappropriate and constitutes by any objective standard a sexual assault".

[18] He concluded his analysis of the October 2013 incident by making the finding of guilt on both sexual interference and sexual assault.

[19] The trial judge next turned in the reasons to consider the first shaving incident, which occurred in 2011. He quoted from the Supreme Court of Canada's

decision in *R. v. Chase*, [1987] 2 S.C.R. 293, as the basis for determining the issue.

In *Chase*, the Supreme Court says at p. 302:

Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (*Taylor, supra, per Laycraft C.J.A.*, at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

[20] The trial judge then briefly again reviewed the circumstances in which the shaving occurred, including that: the complainant had the hygiene problem; she was being teased at school; she wanted her mother to shave her pubic area but her mother refused and told her to ask her aunts; and instead she asked her father when her mother was not at home.

[21] He then listed eight facts that were not in issue from the testimony of B.J.T., the mother, or the complainant:

- 1) The accused, using a shaving brush and shaving cream, shaved the pubic area of his daughter D.T. in the accused's bedroom.
- 2) J.T., D.T.'s mother, was not at home but given her response when she discovered that her husband had shaved her daughter, the inference is that she would have forbid this pubic hair shaving action and without any doubt she would have prevented her husband from performing this action had she been home.
- 3) The daughter desired this conduct from her father and expressed gratitude when it was over.
- 4) Although she was told not to tell anyone by her father, B.J.T. was clearly in some distress (crying in the living room) and told his wife what had occurred when she returned home.
- 5) J.T. indicated to her husband in response to her discovery of what he had done in shaving the pubic hair of their daughter that she would beat him with a baseball bat should he ever perform this act again.
- 6) No sexual statements, words, or expressions were used by the accused, B.J.T.
- 7) No sexual gratification was ever observed by D.T. or J.T. as a result of the actions of the accused, B.J.T. in shaving his daughter's pubic area on this first occasion.
- 8) The accused, B.J.T. would have had to touch his daughter's vagina in order to perform this shaving activity.

[22] The trial judge observed that doctors, nurses and other health care personnel could touch a child's or teenager's vagina without it being a sexual assault, as could parents changing diapers on a baby or applying cream to a young

girl's vagina. However, where a pre-teen or teenaged girl is involved, he stated that in no event would it be appropriate for a father to apply cream to his daughter's vagina when it could be done appropriately in another way.

[23] B.J.T.'s trial counsel argued that in this case, the shaving was done out of love and affection as a caring act, not a sexual assault, by an unsophisticated, simple man.

[24] The trial judge observed that the fact that B.J.T. is a simple man made the determination of guilt or innocence "all the more difficult". However, he was satisfied beyond a reasonable doubt that:

[B]y any objective standard, this accused, this father, should not have shaved his daughter's pubic area even if he believed subjectively that he was providing and administering a necessary hygienic act for his daughter to alleviate some obvious anxiety experienced by this same daughter with respect to her pubic hair.

[25] He concluded by finding B.J.T. guilty of both sexual interference and sexual assault for the 2011 incident as well. The trial judge stayed the two sexual assault convictions based on the principle in *Keinapple*.

[26] The matter was put over for sentencing and a pre-sentence report to September, 2016.

(2) Reasons for sentence

[27] In the first five paragraphs and in paragraphs 45 and 46 of his reasons for sentence, the trial judge further explained his reasons for finding B.J.T. guilty of two counts of sexual interference and two counts of sexual assault. It was only in the reasons for sentence that he stated the basis for finding that B.J.T. had a sexual purpose, the specific intent required for sexual interference.

[28] Dealing first with the sexual assault convictions, the trial judge explained that the defence of consent was not available because the complainant was under 16 years old, and the other components: an act of force and violation of the sexual integrity of the complainant were made out, regardless of the accused's or the complainant's reasons for doing the shaving.

[29] With respect to the convictions for sexual interference requiring a sexual purpose, for the 2013 event, the trial judge stated that the comment B.J.T. made about the size of the complainant's clitoris and his reaching inside the vagina to pluck a hair denoted "an additional sexual purpose and an aggravating circumstance."

[30] For the 2011 event, the trial judge stated that he concluded that there was a sexual purpose in the touching that occurred. He explained that B.J.T. should have looked to other means to help his daughter in order to avoid the inappropriate touching.

[31] At the sentencing hearing, B.J.T. moved to have the trial judge declare the mandatory minimum sentence for sexual interference to be cruel and unusual punishment contrary to s. 12 of the *Charter*. In 2011, the mandatory minimum prison sentence was 45 days, but it was increased in 2012 to 1 year.

[32] The trial judge set out the test and the two-step process for determining whether a mandatory minimum sentence is grossly disproportionate, provided by the Supreme Court in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773. He first determined the appropriate sentences for the two sexual interference offences as a suspended sentence and a period of probation for the 2011 incident (though he ultimately imposed a sentence of 1 day and 12 months of probation) and 9 months for the 2013 incident.

[33] He then considered the proposed hypothetical question of whether the sentence of one year would be grossly disproportionate for the offence on the facts that occurred in the first incident in 2011, and found that in the unique circumstances of that first shaving to help his daughter with her hygiene problem, B.J.T.'s low moral culpability made a one-year sentence grossly disproportionate and not justified under s. 1 of the *Charter*.

[34] He therefore found that the one-year mandatory minimum sentence violates s. 12 of the *Charter*. While the trial judge did not make the same specific finding with respect to the original 45-day mandatory minimum, he did so implicitly by

sentencing B.J.T. to only one day on the 2011 conviction concurrent to nine months for the 2013 conviction. There were also a number of ancillary orders.

Issues

[35] B.J.T. raises three issues, two relating to the convictions and one relating to sentence.

1. Did the trial judge err by finding that the shavings were done for a sexual purpose and therefore constituted sexual interference?
2. Did the trial judge err in finding that the shavings constituted sexual assault?
3. Did the trial judge err by imposing a sentence for the second incident that was harsh and excessive?

[36] The Crown raises three issues relating to the sentences imposed:

1. Did the trial judge err in holding that the mandatory minimum sentences for sexual interference are unconstitutional?
2. Did the trial judge err by striking down the mandatory minimums, and failing to read in the mandatory minimum sentences mandated for the offences on summary conviction?
3. Did the trial judge err by imposing sentences that were not reflective of the gravity of the offences?

Conviction appeal

(1) Sexual interference

[37] The offence of sexual interference under s. 151 of the *Criminal Code* is made out when the accused, for a sexual purpose, directly or indirectly touches the body of a person who is under 16 years old. It is a specific intent offence, meaning that the offender must specifically intend that the touching is for a sexual purpose. The offender may also have another purpose or reason for the touching, but if he or she also has a sexual purpose, the offence is made out.

[38] B.J.T. correctly submits that in his reasons for conviction, the trial judge never specifically addresses the requirement that the touching be for a sexual purpose. However, in the reasons for sentence, delivered several months later, he does address the issue specifically.

[39] B.J.T. submits that the reasons are insufficient for both incidents, but in addition, the finding of sexual purpose for the first incident constitutes an unreasonable verdict.

[40] I will deal with the two incidents in turn, beginning with the second incident.

(a) Sexual interference – the 2013 incident

[41] In his reasons for conviction, the trial judge appeared to accept the Crown's position that because B.J.T. inserted his finger into the complainant's vagina for a stated reason that was, at best, "absurdly inappropriate", and made the comment

that his daughter had a large “clit”, those two additional aspects of the second pubic shaving incident added a sexual connotation. The trial judge also relied on the fact that B.J.T. went ahead a second time to shave his daughter’s pubic area, knowing it would not be tolerated by his wife and how upset he was after the first time.

[42] In the reasons for sentence, after discussing why what occurred amounted to sexual assault, the trial judge explained that the basis for the conviction for sexual interference included B.J.T.’s comment about the size of his daughter’s clitoris and reaching in her vagina to pluck a pubic hair. The trial judge stated that these two factors “denote an additional sexual purpose...”

[43] While it is expected that a trial judge sitting alone will clearly include all of his or her findings in the reasons for conviction, because the judge is not *functus officio* until the sentence has been imposed, a court of appeal may look at the reasons for sentence as well as the reasons for conviction to understand the basis for conviction. See *R. v. Trobert*, 2000 SKCA 113, 119 Sask. R. 224 at para. 11. See for examples: *R. v. Stewart*, 2017 ONSC 4843 at paras. 27, 29, and 47; *R. v. Menkarios*, 2010 ONSC 5478 at para. 56.

[44] In his reasons for conviction, the trial judge addressed both offences for the second incident, sexual interference and sexual assault, and convicted on both, but without referring specifically to the subjective element of sexual purpose that

is required for the offence of sexual interference and without identifying what evidence satisfied that element. However, in the reasons for sentence, where the trial judge addressed the offences separately, with respect to the offence of sexual interference, he stated that it was the two additional factors that denoted an additional sexual purpose. This court is entitled to assess both the reasons for conviction and for sentence to understand the basis for the conviction. I would therefore dismiss the appeal on the second incident regarding the conviction for sexual interference.

(b) Sexual interference – the 2011 incident

[45] On the first incident, the trial judge addressed both the sexual interference charge and the sexual assault charge together on the basis that the Supreme Court of Canada decision in *Chase*, which deals with how to determine whether the impugned conduct in a sexual assault charge “has the requisite sexual nature”, provides the basis for determining the issue. In his reasons for conviction, he set out the list of eight factual findings, including that during the 2011 incident there were no sexual statements and no sexual gratification, although B.J.T. had to touch his daughter’s vagina to perform the requested pubic shaving.

[46] He then observed that parents changing diapers or putting cream on a young girl’s vagina would not be a sexual assault from an objective standard, but that in the case of a pre-teen or teenaged girl, there was no instance where a father

could apply cream to his daughter's vagina, stating: "Objectively, it would make no sense with a plethora of alternative solutions available to resolve this personal care need."

[47] Trial counsel for B.J.T. argued that the shaving was done out of love and affection, by an objective standard a caring act and not a sexual assault. Trial counsel for B.J.T. also submitted that B.J.T. was unsophisticated with a simple view of life and his family. The trial Crown's position was that other solutions should have been sought in order to address the hygiene problem in a more appropriate way.

[48] The concluding paragraph of the reasons for conviction shows a trial judge who clearly had concerns about B.J.T.'s *mens rea* for the offence of sexual interference. He stated:

Given that the accused, is a simple man, makes this determination of innocence or guilt all the more difficult. Nevertheless, on balance I am satisfied beyond a reasonable doubt that by any objective standard, this accused, this father, should not have shaved his daughter's pubic area even if he believed subjectively that he was providing and administering a necessary hygienic act for his daughter to alleviate some obvious anxiety experienced by this same daughter with respect to her pubic hair.

[49] In the reasons for sentence, in para. 5, the trial judge explained his finding on the sexual interference count as follows:

As indicated, I also concluded that there was a sexual purpose in the touching (shaving) that occurred with respect to Count # 1. My conclusion was that I agree and accept what the accused's wife indicated to the accused that she had two sisters and they could ask them about what they could do to assist their daughter. Moreover, B. T. could have or should have looked to any other means short of his own action in shaving his daughter's pubic hair, as a way of avoiding this inappropriate touching.

[50] B.J.T. submits that even reading both reasons as a whole, the finding that B.J.T. could have and should have sought other alternatives before shaving his daughter himself does not amount to a finding of sexual purpose. I agree. While it was possible for a trier of fact to infer that because there were other ways for the father to help his daughter out of the situation, the fact that he instead took the opportunity to shave her including touching her vagina, shows that he did it for a sexual purpose, the trial judge did not make that finding.

[51] Further, the trial judge repeatedly states that he is using an objective standard. That standard is applicable when deciding whether there was a sexual assault, but in the case of sexual interference, where the specific intent is that the accused touched the complainant for a sexual purpose, a finding of specific subjective intent must be made.

[52] Instead, the trial judge postulated that even if B.J.T.'s subjective intent was to give his daughter help that she needed, he would still be guilty of the offence. That is of course incorrect in law, unless he also intended to touch her for a sexual purpose, which again, the trial judge did not say.

[53] For these reasons, in the case of the 2011 incident, the sentencing reasons do not assist the court in understanding the trial judge's basis for conviction. I would therefore allow the appeal on that count and set aside the conviction. I do not accept the submission that there is no basis on this evidence to find sexual interference for the first incident. The problem here is that the reasons of the trial judge do not make the required finding of subjective intent to touch the complainant for a sexual purpose and identify and explain the basis for it. I would therefore order a new trial.

(2) Sexual assault

[54] As the complainant is under 16 years of age and none of the statutory exceptions apply (ss. 150.1(2), 150.1(2.2), 150.1(2.3) 150.1(3), 150.1(4) and 150.1(6) of the *Criminal Code*), lack of consent is not an element of the offence of sexual assault and consent is not a defence. As there was touching of the complainant's body, the only issue at trial was whether the touching was of a sexual nature that violated her sexual integrity.

[55] To determine whether what occurred amounted to a sexual assault, the issue for the court is to decide: "viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer?" The circumstances to be considered include "[t]he part of the body touched, the nature of the contact, the situation in which it occurred, [and] the words and gestures

accompanying the act...” See *Chase* at p. 302. For sexual assault, a sexual purpose or motive is not required, but its presence or absence can be a factor in considering whether the conduct was sexual: see also *R. v. Marshall*, 2017 ONCA 801, at para. 53.

(a) Sexual assault - the 2013 incident

[56] In addressing the sexual assault count for the second incident in his reasons for conviction, the trial judge removed from his consideration both B.J.T.’s comment about the size of his daughter’s clitoris and the fact that he put his finger into her vagina to pluck a pubic hair. It is unclear why the trial judge did this as those two factors form part of the circumstances. However, he framed the issue as follows: “The second issue that arises from this trial is whether a father’s shaving of his daughter’s pubic area constitutes a sexual assault absent any suggestive sexual words used in the course of the shaving or absent any unnecessary touching of the daughter’s vagina such as the insertion of a finger in the vagina to remove a pubic hair?”

[57] He rejected the submission that this was not a sexual assault but a consensual act at the request of the daughter. He found that this argument was not even possible for the second incident when two years had passed since the first one, where he had cried afterward, his wife had been very angry, and it was obvious that there were other ways for his daughter to deal with the problem. He

concluded that the second incident was “entirely and thoroughly inappropriate and constitutes by any objective standard a sexual assault.”

[58] In the reasons for sentence, he stated that: “the act of shaving of the pubic hair of the complainant, his daughter, was an act of force with the sexual integrity of the victim violated. Absent the issue of consent, I concluded that by all objective standards, this conduct would denote a sexual assault to any reasonable observer.” He added that the fact that the daughter asked her father to do it did not affect the criminality of the conduct, as neither consent nor motive would remove the violation of her sexual integrity.

[59] I see no basis to interfere with the trial judge’s finding of sexual assault. The *mens rea* for the offence is the general intent to touch the complainant. The test for determining whether the touching violated the complainant’s sexual integrity required the trial judge to consider all the circumstances and apply an objective standard. He considered the part of the body that was touched and the fact that B.J.T. knew the pubic shaving was inappropriate and that he should not do it. He made no error in his conclusion. I must also add that had the trial judge also considered as part of the circumstances the sexual actions by B.J.T. of putting his finger into the complainant’s vagina and commenting on the size of her clitoris, those two factors, which he referred to as “aggravating” in the reasons for sentence, would have been confirmatory of his conclusion.

(b) Sexual assault – the 2011 incident

[60] B.J.T. argues that the trial judge failed to refer to evidence that could have raised a reasonable doubt about the sexual nature of the first shaving incident, including the absence of any sexual utterance or gratification by him, as well as the fact that the complainant felt better about herself afterward, was grateful to her father, and had no emotional distress following the first incident.

[61] I would reject this argument as it is belied by the factual findings, which included the complainant's gratitude, and the lack of observed sexual gratification or utterances by B.J.T.

[62] B.J.T. submits that few if any of the eight factual findings, reproduced above, could logically support the conclusion that his conduct was of a sexual nature or violated D.T.'s sexual integrity. In my view, a number of them could: the fact that B.J.T. shaved his daughter's pubic area in his bedroom (#1); the fact he did so at a time when D.T.'s mother was not home (#2); the fact that B.J.T. told his daughter not to tell anyone (#4); and the fact that B.J.T. would have had to touch his daughter's vagina to shave it (#8).

[63] The trial judge referred to the leading case of *Chase*, and considered the circumstances surrounding what occurred. He appropriately applied an objective standard. His finding that shaving his 13 year-old daughter's pubic area and touching her vagina violated her sexual integrity was open to him on the evidence.

Sentence appeals

[64] The sexual assault charges were stayed and no sentence was imposed for them. As I would set aside the conviction on the first sexual interference charge and order a new trial, I will address only the sentence appeal relating to the second incident of sexual interference. B.J.T. seeks leave to appeal his sentence of nine months for the second sexual interference. The Crown appeals the finding that the mandatory minimum of one year contravenes s. 12 of the *Charter*, and seeks leave to appeal the sentence of nine months as inadequate to reflect the gravity of the offence.

[65] I will first address the constitutional issues and then the two sentence appeals.

(1) Did the trial judge err in holding that the mandatory minimum sentence for sexual interference is unconstitutional?

[66] The trial judge set out and applied the two-step process mandated by the Supreme Court in *Nur*, at para. 46, to determine whether the mandatory minimum sentence of one year is grossly disproportionate to the appropriate punishment having regard to the nature of the offence and the circumstances of the offender.

[67] That test was recently summarized by Steel J.A. in *R. v. JED*, 2018 MBCA 123, 368 C.C.C. (3d) 212, at para. 92 as follows:

Following *R. v. Nur*, 2015 SCC 15, there is a two-step analysis to determine whether the mandatory minimum sentence was grossly disproportionate (see para 46):

1.The court must determine what constitutes a proportionate sentence for the offence, having regard to the objectives and principles of sentencing in sections 718-718.2 the *Code*; and

2.The court must ask whether the [mandatory minimum sentence] requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the [mandatory minimum sentence] provision is inconsistent with section 12 and will fall unless justified under section 1 of the *Charter*. In the analysis under the second step, the court is to determine the effect of the [mandatory minimum sentence] on the offender in the present circumstances and on a hypothetical offender in reasonably foreseeable circumstances (see *R. v. EJB*, 2018 ABCA 239 at para 11; and *R. v. Morrison*, 2017 ONCA 582 at para 117).

[68] The trial judge first found that the appropriate sentence for the first incident of sexual interference was a suspended sentence with a period of probation, given there was no effect on the complainant, and without the second incident, the first would not have resulted in any charge. For the second incident however, the appropriate sentence was 9 months given that it was the second time, the complainant was 15 years old, and there were the added effects of the sexual comment and action that occurred during the second pubic shaving. As discussed in the final section of this decision, I would uphold this sentence.

[69] Presumably, as a nine-month sentence could not be said to be grossly disproportionate to a one-year sentence, the trial judge then went on to consider the proposed reasonable hypothetical, the circumstances of the first incident, had it occurred when the mandatory minimum was one year and not 45 days. He

concluded that the low moral culpability in the circumstances of that offence made a one-year sentence grossly disproportionate to an appropriate sentence for an offender in those circumstances, and therefore he found it to be in contravention of s. 12 of the *Charter*. On this appeal, the Crown did not argue that the mandatory minimum sentence could be saved by s. 1 of the *Charter*.

[70] Because I would set aside the conviction for sexual interference on the first incident and order a new trial, I do not view it to be appropriate for this court to speculate on the level of moral responsibility that may or may not be found at a new trial on the first incident. I would not, therefore, find it appropriate to use the first incident as a reasonable hypothetical for the purpose of this appeal analysis.

[71] However, the issue of the constitutionality of the mandatory minimum for sexual interference (s. 151(a) of the *Criminal Code*) has recently been considered by five other courts of appeal across the country:¹ the Quebec Court of Appeal in *Caron Barrette c. R.*, 2018 QCCA 516, 46 C.R. (7th) 400; the Nova Scotia Court of Appeal in *R. v. Hood*, 2018 NSCA 18, 409 C.R.R. (2d) 70; the Manitoba Court of Appeal in *R. v. JED*; the British Columbia Court of Appeal in *R. v. Scofield*, 2019 BCCA 3, 52 C.R. (7th) 379; and since the argument of this appeal, the Alberta

¹ The mandatory minimum for sexual interference (s. 151(a) of the *Criminal Code*) has also been held to be unconstitutional by the Ontario Superior Court of Justice in a number of cases, in addition to the case under appeal. Those include: *R. v. M.L.*, 2016 ONSC 7082, 367 C.R.R. (2d) 268; *R. v. S.*, 2017 ONSC 1869, 378 C.R.R. (2d) 282; *R. v. Hussein*, 2017 ONSC 4202; *R. v. Ali*, 2017 ONSC 4531, 387 C.R.R. (2d) 209; *R. v. M.*, 2018 ONSC 746; and *R. v. H.L.*, 2018 ONSC 1026.

Court of Appeal in *R. v. Ford*, 2019 ABCA 87, 371 C.C.C. (3d) 250. In all five cases, the courts found the mandatory minimum in s. 151 of the *Criminal Code* contravened s. 12 of the *Charter* and was not saved by s. 1.

[72] In those cases, the courts noted that the offence of sexual interference can be committed in a variety of ways, thereby increasing the potential for the mandatory minimum sentence to be found to be grossly disproportionate in some circumstances for some offenders. In four cases, hypothetical circumstances for conviction were posited and accepted as reasonably foreseeable, while in *JED*, the Manitoba Court of Appeal accepted the reasonable hypotheticals posited by the two other courts (Q.C.C.A. and N.S.C.A.) whose decisions pre-dated *JED*, as appropriate for the analysis. Steel J.A. noted that they were based on previous cases before the court. All five appeal courts found the mandatory minimum sentence to be grossly disproportionate to a range for an appropriate sentence for the reasonably foreseeable hypothetical offender in the posited circumstances.

[73] In *Scofield*, the B.C.C.A. postulated a hypothetical where two young people meet at a party; one is almost 16, while the other recently turned 21, making the close in age exception (s. 150.1(2.1) of the *Criminal Code*) inapplicable. The two people drink alcohol and smoke marijuana, reducing their inhibitions. They go to a private bedroom where they engage in some kissing and brief sexual touching over their clothing for ten minutes. They act willingly and know each other's ages. Neither has a criminal record. Harris J.A. concluded that a one-year sentence for

that conduct would be grossly disproportionate to a proportionate sentence which would not necessarily involve imprisonment or even a conditional sentence. He also added that if the 21 year-old had a disability that reduced his moral culpability or if *Gladue* factors applied, (*R. v. Gladue*, [1999] 1 S.C.R. 688,) those two characteristics of the offender could make the mandatory minimum sentence more disproportionate.

[74] In *Caron Barrette*, the facts were that the offender was 23 years old. He engaged in a romantic relationship with a 14 year-old girl with her parents' consent. Neither was aware that their conduct was illegal. The court found that a 90 day intermittent sentence was proportionate and that the one-year mandatory minimum was therefore grossly disproportionate. The court also confirmed that the three reasonable hypotheticals postulated by the trial judge were appropriate and supported the finding that the mandatory minimum of one year contravened s. 12 of the *Charter*. Those three were:

1. A romantic relationship similar to that which existed between the offender and the victim, but for a period of several days, which only involved kissing and touching;
2. An isolated caress, over the clothes, on the thigh or buttocks, not in the context of an abuse of authority, where the sexual touching is found to be without consequences for the victim; and
3. A romantic relationship in which the victim is 15 ½ years old and legally unable to consent at the beginning of the relationship, and the relationship continues after she reaches 16 years old.

[75] I agree that the hypotheticals postulated in these cases are reasonable and that the one-year mandatory minimum sentence would be grossly disproportionate to a proportionate sentence for the offender in those circumstances. As a result, the mandatory minimum sentence constitutes cruel and unusual punishment contrary to s. 12 of the *Charter*. The Crown does not submit that such a provision is saved by s. 1.

(2) What is the appropriate remedy?

[76] The Crown does submit, however, that if this court finds that the mandatory minimum for the indictable offence under s. 151(a) of the *Criminal Code* contravenes the *Charter*, the remedy is not to strike down the provision, but instead to read in the mandatory minimum sentences provided in s. 151(b) of the *Criminal Code* for when the Crown proceeds summarily. The Crown submits that so long as the mandatory minimum for the summary offence is not also grossly disproportionate, then reading in that minimum furthers the legislative intent of Parliament with a *Charter*-compliant minimum sentence for an inherently serious offence against a child. The Crown could offer no precedent where reading in the mandatory minimum for the same offence on summary conviction was the remedy after the mandatory minimum sentence for the indictable offence was struck down.

[77] I would not give effect to this submission for two reasons. The first is that contrary to the Crown's submission, to read in a different and lower mandatory

minimum would not be implementing the intent of Parliament, but rather would be usurping the role of Parliament to decide whether to consider a lower mandatory minimum or to trust judges to impose appropriate sentences for this offence, having regard to all the relevant circumstances of the offence and the offender. See *R. v. Ferguson*, 2008 SCC 6, 1 S.C.R. 96, at paras. 50-51.

[78] The second reason is that proceeding in that way would require a second *Nur* analysis and a finding regarding the constitutionality of the mandatory minimum sentence for the summary offence when that issue is not directly raised by this appeal. In that regard, in the recent Ontario Superior Court decision in *R. v. Drumonde*, 2019 ONSC 1005, Schreck J. struck down the mandatory minimum for the summary conviction offence in well-written reasons. That decision was not appealed by the Crown.

[79] In my view, the appropriate remedy is the one that has been imposed by the other courts that have found the mandatory minimum to be unconstitutional, which is to strike it down. I would uphold the decision of the trial judge on this issue.

(3) Did the trial judge err by imposing a sentence that is not reflective of the gravity of the offence?

[80] Both sides appeal the sentence. B.J.T. appeals the nine-month sentence imposed for the October 2013 conviction for sexual interference. He takes the position that the sentence is harsh and excessive in all the circumstances and that a non-custodial sentence should have been imposed. As part of its sentence

appeal, the Crown asks the court to increase the sentence imposed to one year to reflect the gravity of the offences and to deter and denounce sexual crimes against children.

[81] It is well-established that sentencing involves a highly individualized assessment by the trial judge to which significant deference is owed on appeal. An appellate court may only intervene in the sentence imposed at trial where there has been an error in principle, failure to consider a relevant factor or the erroneous consideration of an aggravating or mitigating factor that had an impact on the sentence, or where the sentence is demonstrably unfit. A sentence will be demonstrably unfit if it departs from the principle of proportionality: that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” See *R. v. Lacasse*, 2015 SCC 64, [2015] 2 S.C.R. 1089, at paras. 41, 44, and 53.

[82] The sentencing process in this case was particularly difficult where the trial judge first had to determine whether a 45-day sentence and a one-year sentence were grossly disproportionate to the offence and the offender. In that context, the gravity of the offence against a child may appear to be minimized. Furthermore, in this case, the child was a teenager who asked her father to shave her pubic area. Again, that fact was argued as one that mitigated the offence.

[83] However, sexual interference of a child is a very serious offence. The moral blameworthiness on the part of the adult is because it is the adult's role to protect the child, not acquiesce where the child may not appreciate the impropriety of the proposed action because of its sexual aspect. Nor should the effect of sexual interference on the child be minimized. In *R. v. A.B.*, 2015 ONCA 803, 333 C.C.C. (3d) 283, at para. 45, I stated:

[T]he protection for children is not simply from sexual exploitation but from any sexual contact or the invitation to sexual contact with adults. Parliament viewed the protection to be necessary because of the inherent power imbalance that undermines consent, and because of the physical and psychological consequences of a sexual encounter between a child and an adult stemming from that imbalance.

[84] In his reasons for sentence the trial judge was alive to these considerations and to the gravity of the offence. He referred to this court's decisions in *R. v. Woodward*, 2011 ONCA 610, 107 O.R. (3d) 81, and in *R. v. D.(D.)*, 163 C.C.C. (3d) 471 (Ont. C.A.), where the court focused on the physical and psychological violence involved in sexual abuse of children, and to the historical evolution of (increasing) sentences for sexual offences against children.

[85] At para. 26 of his reasons for sentence, the trial judge recognized the impact on the daughter in this case:

To put this psychological impact in some context, prior to these offences, the complainant, D. T., indicated, through her victim impact statement, that her father was the most important person in her life. She is now apprehensive

when it comes to physical contact with anyone and at the same time she is saddened by her father's absence in her life.

[86] The trial judge also took account of the circumstances of B.J.T. including the view of the probation service that he is not a high risk to reoffend, as well as the mitigating and aggravating factors. One of the mitigating factors is that B.J.T. is a simple man with limited intellectual abilities who appeared to be assisting his daughter.

[87] B.J.T. objects to the trial judge treating as an aggravating factor under s. 718.2(a)(iii) of the *Criminal Code* the fact that he was in a position of trust to his daughter. He argues that this was not an abuse of trust in the factual circumstances. I do not agree. The fact that a child consents or even initiates the activity does not remove the trust relationship or the obligation of the adult to decline the invitation. In *R. v. Audet*, [1996] 2 S.C.R. 171, at p. 188, in discussing the crime of sexual exploitation (s. 153 of the *Criminal Code*), the Supreme Court endorsed the following quotation from *R. v. Hann* (1990), 86 Nfld. & P.E.I.R. 33 (Nfld. S.C.): “The implication of the wording of s. 153 is that notwithstanding the consent, desire or wishes of the young person, it is the adult in the position of trust who has the responsibility to decline having any sexual contact whatsoever with that young person.” (Emphasis added by the S.C.C.)

[88] In arriving at the two sentences, the trial judge viewed the first incident as warranting a very minimal sentence because it did not appear to have had a

negative effect on the daughter and would have been “buried within the dynamics of this particular family” had the same thing not occurred a second time. When it did, B.J.T. certainly knew better, he had been warned and threatened by his wife, he knew his daughter could receive assistance in another way, and he took advantage of the situation by commenting on the size of his daughter’s clitoris and putting his finger in her vagina, indicating that he had a sexual purpose.

[89] The trial judge came to his conclusions in paragraphs 39 and 40 of his reasons for sentence:

Looking at the totality of the circumstances and in particular the genuine concern that was raised by the accused's daughter about her hygiene difficulties; the failure of the complainant's mother to suggest or engage in some alternative remedy when this subject first was broached; the remorse shown by the accused thereafter; the lack of negative feedback or emotional trauma displayed by the complainant, D. T. after the first incident; the personal circumstances of the accused, B. T. including his own background of being bullied and demeaned; the provisions of s. 718 and in particular those sections that reflect denunciation and deterrence when it involves children; the lack of perceived sexual gratification; and finally the absolute uniqueness occasioned in the sexual touching, leads me to conclude that a suspended sentence and a period of probation is the sentence that I should impose with respect to Count # 1.

With respect to Count # 3, given that the accused was aware that the shaving of his daughter's pubic hair was not appropriate conduct as reflected both by his wife's earlier reaction, and, I infer by any common sense understanding of the nature of this activity upon his now 15 year old daughter, and the reality that the accused

made both an inappropriate comment as well as digital penetration, I conclude that an appropriate period of incarceration would be 9 months.

[90] In my view neither side has pointed to an error that affected the sentence or made it demonstrably unfit. To the contrary, the sentence respects the principle of proportionality by reflecting the gravity the trial judge perceived in the incident, the need to protect the child and to take into account the circumstances of the offence and the offender. I would not interfere with the sentence imposed for the 2013 sexual interference charge.

[91] As I would set aside the conviction for sexual interference on the 2011 incident, I would lift the stay of the sexual assault conviction for that incident and transfer the sentence of one day concurrent to that conviction.² All other aspects of the sentence would remain in place.

Result

(1) Conviction appeal

[92] I would allow the appeal against the conviction for sexual interference for the 2011 incident, set aside the conviction and order a new trial. I would dismiss

² The mandatory minimum sentence for s. 271 of the *Criminal Code* when the complainant is under 16 years old was implemented in 2012. As there was no mandatory minimum in place at the time this offence was committed in 2011, that mandatory minimum does not apply and its constitutionality need not be addressed here.

the appeal against the other convictions. I would lift the stay of the conviction for sexual assault for the 2011 incident.

(2) Sentence appeals

[93] I would dismiss the appeals against sentence. I would impose the one day concurrent sentence for the conviction for sexual assault for the 2011 incident.

Released: "K.F." September 6, 2019

"K. Feldman J.A."

"I agree. David M. Paciocco J.A."

"I agree. B. Zarnett J.A."