

CITATION: R. v. D.S., 2021 ONSC 3972
COURT FILE NO.: CR-19-00001540-0000
DATE: 2021 06 04

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

HER MAJESTY THE QUEEN

- and -

D.S.

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) C. Agatiello, for the Crown
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) L. Sandhu, for the Defence
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) **HEARD:** April 1 and 7, 2021

REASONS FOR SENTENCE

PUBLICATION RESTRICTION NOTICE

By court order made under subsection 486.4(1) of the *Criminal Code*, information that may identify the person described in this judgment as the complainant may not be published, broadcasted or transmitted in any manner. This judgment complies with this restriction so that it can be published.

FRAGOMENI J.

[1] D.S. was charged with one count of sexual assault. The formal Indictment reads as follows:

That he between the 1st day of August 2000 and the 31st day of October 2003, at the City of Brampton, in the Central West Region, did commit a sexual assault on K.L., contrary to section 271 of the *Criminal Code of Canada*.

[2] A trial was held before a jury and the jury convicted D.S. of sexual assault. The trial took place over 5 days and the jury returned the verdict on March 3, 2020.

[3] The complainant in this matter, K.L., testified at trial and testified that D.S. sexually assaulted her on numerous occasions.

[4] The particulars of the sexual assaults described by her consisted of the following:

- While driving her to the gym he touched her inappropriately in the following way:
 - At first, he tried to touch her hands, breasts, legs, and was kissing her;
 - At the gym he would look at her;

- On the drive home from the gym, he showed her how she needed to get a better bra and he would lift the bra straps and show her that they needed to be tighter.
- The inappropriate touching in the car going to they gym happened four or five times.
- She stopped going to the gym.
- The last incident occurred the day after she stopped going to the gym and she descried this incident as follows:
 - She was in the basement folding laundry. Her mother and brother were not home.
 - D.S. came downstairs and was standing by the door.
 - She was shocked to see him there.
 - K.L. had on track pants or pyjamas.
 - D.S. was standing in front of her.
 - He lifted her bra straps and pushed up her breast and said she needed a better bra – he'd get her a sports bra.

- He kissed her lips, but she did not kiss him back – she was really scared.
- He made her sit on the edge of the bed.
- He said it's okay, there is a first time for everything.
- She felt disgusted.
- He pushed her on the bed.
- He pulled her pants down but not all the way.
- He was able to put a portion of his penis into her vagina and it lasted one minute as his wife called him from the top of the stairs.
- K.L. told him she was scared and did not want to do it. He told her to keep it a secret.
- K.L. told her long-time friend G.S. what happened and that she told G.S. everything that happened.

[5] D.S. testified at trial and denied all allegations.

Legal Framework

[6] In order to sentence D.S., it is necessary for me to determine the facts of the offence.

[7] Section 724(2)(a) and (b) of the *Criminal Code of Canada* (“*Criminal Code*”) states:

Jury

(2) Where the court is composed of a judge and jury, the court

(a) shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty; and

(b) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[8] In *R. v. Ferguson*, [2008] 1 S.C.R. 96, 2008 SCC 6, the Supreme Court of Canada set out the following at paragraphs 17, 18, 21 and 22:

[17] Two principles govern the sentencing judge in this endeavour. First, the sentencing judge “is bound by the express and implied factual implications of the jury’s verdict”: *R. v. Brown*, 1991 CanLII 73 (SCC), [1991] 2 S.C.R. 518, p. 523. The sentencing judge “shall accept as proven all facts, express or implied, that are essential to the jury’s verdict of guilty” (*Criminal Code*, s. 724(2)(a)), and must not accept as fact any evidence consistent only with a verdict rejected by the jury: *Brown*; *R. v. Braun* (1995), 1995 CanLII 16075 (MB CA), 95 C.C.C. (3d) 443 (Man. C.A.).

[18] Second, when the factual implications of the jury’s verdict are ambiguous, the sentencing judge should not attempt to follow the logical process of the jury, but should come to his or her own independent determination of the relevant facts: *Brown*; *R. v. Fiqia* (1994), 1994 ABCA 402 (CanLII), 162 A.R. 117 (C.A.). In so doing, the sentencing judge “may find any other relevant fact that was disclosed by evidence at the trial to be proven” (s. 724(2)(b)). To rely upon an aggravating fact or previous conviction, the sentencing judge must be convinced of the existence of that fact or conviction beyond a reasonable doubt; to rely upon any other relevant fact, the sentencing judge must be persuaded on a balance of probabilities: ss. 724(3)(d) and 724(3)(e); see also *R. v. Gardiner*, 1982 CanLII 30 (SCC), [1982] 2 S.C.R. 368; *R. v.*

Lawrence (1987), 58 C.R. (3d) 71 (Ont. H.C.). It follows from the purpose of the exercise that the sentencing judge should find only those facts necessary to permit the proper sentence to be imposed in the case at hand. The judge should first ask what the issues on sentencing are, and then find such facts as are necessary to deal with those issues.

...

[21] However, the trial judge did not stop with these conclusions. He went on to make detailed findings of fact on Constable Ferguson's conduct. It was open to him under s. 724(2)(b) of the *Criminal Code* to supplement the jury's findings insofar as this was necessary for sentencing purposes. However, it was not open to him to go beyond what was required to deal with the sentencing issues before him, or to attempt to reconstruct the logical process of the jury: *Brown; Fiqia*. Nor was it open to him to find facts inconsistent with the jury's verdict or the evidence; a trial judge must never do this. The trial judge in the case at bar committed both these errors.

[22] First, the trial judge erred in attempting to reconstruct the logical reasoning of the jury. The law holds that the trial judge must not do this, and for good reason. Jurors may arrive at a unanimous verdict for different reasons and on different theories of the case: *R. v. Thatcher*, 1987 CanLII 53 (SCC), [1987] 1 S.C.R. 652. It is speculative and artificial to attribute a single set of factual findings to the jury, unless it is clear that the jury must unanimously have found those facts. Where any ambiguity on this exists, the trial judge should consider the evidence and make his or her own findings of fact consistent with the evidence and the jury's findings.

[9] The Defence submits that a less aggravated route to a conviction for sexual assault is appropriate in this case, and that the Crown has not proven beyond a reasonable doubt that the aggravated incident of sexual intercourse took place.

[10] The Defence submits that according to the testimony of K.L., she disclosed everything to G.S. in detail. However, G.S.'s testimony is inconsistent with that of K.L.. G.S. testified to the following:

- That the Defendant was touching K.L. in inappropriate ways that were uncomfortable to her.

- K.L. expressed her pain and frustration.
- The disclosure took place over the phone and during the calls K.L. was crying uncontrollably and scarred.
- K.L. did not know what to do – she didn't want to tell her mom in fear she wouldn't believe her.
- The disclosure was made to G.S. the same day it happened or the next day.
- K.L. told G.S. about one incident that happened in the car when she and D.S. were travelling to the gym together. K.L. told G.S. that the Defendant touched her inappropriately in the chest area and private area. K.L. asked him to stop. The Defendant said it was okay and not to worry and not to tell her mom.
- K.L. also told her about an incident when she was home alone, and the Defendant was fondling her. G.S. is not sure if K.L. said it went further or not. It was the same inappropriate touching that happened in the car.

[11] The defence points out that G.S. testified that she is pretty sure that if it went further K.L. would have told her.

[12] The defence submits that the sexual intercourse has not been proven beyond a reasonable doubt. G.S. was called by the Crown to rebut the allegation of recent fabrication. K.L. testified that she told G.S. all the details but G.S. testified that K.L. only told her about one incident in the car and one incident in the basement, with the incident in the basement being the same inappropriate touching as in the car.

[13] The following exchange is relevant and probative on this point:

Q. What you can remember?

A. ... so I believe there was one incident where I believe [D.S.] was going to the gym and she was probably accompanying him along because her mom worked late hours and I guess, like I said, we didn't drive. So I don't know who offer – I don't know if [D.S.] offered or if it was her mom that made the arrangement for her to go with [D.S.] to the gym, but I do remember her saying that they were sitting in the car and [D.S.] began to touch her inappropriately, whether it was fondling her chest or in her private area and I believe she's mentioned that she has asked him to stop and as – that she was uncomfortable and [D.S.] said something to the sorts – to the lines of it's okay, don't worry about it. It – don't tell your mom or something of that sort. So she called me when she got home and she was, again as, as I said, she would – was crying uncontrollably. A second situation I remember is when she mentioned that she was home alone in the basement and I believe [D.S.] made his way downstairs and he began the same, I guess fondling. I don't know if it went any further, but I do know he did the same sorts of acts that he was doing in the car as that – the previous incident.

Q. Okay. So when you're saying you don't know if it went any further, is that because [K.L.] didn't ...

THE COURT: Right. Just hold on, Madam Crown.

INTERPRETER: The interpreter's switching, Your Honour.

THE COURT: They're just going to do a switch.

MS. AGATIELLO: Okay.

INTERPRETER: Thank you, Your Honour.

MS. AGATIELLO: Q. When, when you – in the basement – the incident in the basement, you don't know if it went any further. Is that because [K.L.] didn't tell you about it or because you don't remember or...

A. It's possible that I don't remember.

Q. Okay.

A. I'm pretty sure if she told me all of that, she would've told me if it went any further, but I, I can't – from my memory, I cannot say that, that anything further happened.

Analysis

[14] The critical issue to be determined by me is whether the Crown has established that the aggravating feature of the sexual intercourse in the basement took place.

[15] The onus is on the Crown to establish aggravating factors in the sentencing process beyond a reasonable doubt. See *R. v. Gardiner*, [1982] 2 S.C.R. 368.

[16] I cannot find and conclude beyond a reasonable doubt that the aggravating feature of sexual intercourse has been proven beyond a reasonable doubt. I have come to this conclusion based on the inconsistencies between the testimony of K.L. and G.S.

[17] K.L. testified she told G.S. everything in detail. G.S. testified that K.L. told her about one incident in the car not four or five. G.S. also testified that the incident in the basement was the same inappropriate touching that took place in

the car. G.S. stated “I do know he did the same sort of acts that he was doing in the car”. That did not encompass sexual intercourse. G.S. goes on to say that she is “pretty sure “that K.L. would have told her if it had gone further.

[18] In all of these circumstances, I am left in a state of reasonable doubt about the aggravating feature of sexual intercourse.

[19] In *R. v. Khan*, 2017 ONCA 114, the Court stated that where a prior consistent statement is admitted to rebut an allegation of recent fabrication, it is admitted solely to provide a direct response to the suggestion that the witness concocted allegations after a triggering event. The statement is not admitted for the truth of its contents but only to show that the details were not added after the point in time suggested by opposing counsel. See para. 28 of *Khan*.

[20] In the case at bar, the defence argues that the details relating to the sexual intercourse were added after the events and were therefore a recent fabrication. I agree and the testimony of G.S. points in that direction.

[21] I cannot be sure beyond a reasonable doubt that the sexual intercourse took place. In this case the prior inconsistent statement made to G.S. is probative in assessing the credibility and reliability of K.L.

[22] Sentencing will, therefore, be based on the one incident of touching in the car and the one incident of touching in the basement.

Sentencing Considerations

Fundamental Purposes and Objectives

[23] Section 718 of the *Criminal Code* sets out the following,

Purpose

718 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.

[24] Section 718.01 of the *Criminal Code* states,

Objectives — offences against children

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

Victim Impact Statement

[25] There is no doubt that K.L. has suffered and continues to suffer psychological and emotional trauma and symptoms as a result of D.S' conduct. All aspects of her life have been affected. Her Victim Impact Statement is a powerful statement detailing how these events have played such a role in the struggles she has had and continues to have.

[26] In *R. v. D.R.*, 2003 CanLII 9127 (ON CA), the accused pleaded guilty to one count of sexual assault and one count of sexual exploitation. The Court concluded that the conditional sentence imposed at trial was demonstrably unfit. At para. 2, the Court set out the particulars of the offences as follows:

[2] The offences here involved the prolonged sexual abuse by the respondent of his 15 year-old daughter in their home, while she was asleep in bed at night. They involved the fondling of the victim's breasts, buttocks and thighs underneath her clothes 3 to 4 times per month over a period of approximately 14 months. On one occasion, the victim awoke in her bed to find the respondent with his head between her legs near her crotch area. She believed that the respondent had been performing oral sex on her. Although the respondent denied the performance of oral sex, he admitted that he did place his head between the victim's legs. On another occasion, when the victim again awoke in her bed, she discovered the respondent lying behind her. From his sounds and movements, she believed that he was masturbating. The respondent denied that he did so. On yet another occasion, the respondent told the victim that he would allow her to go out with her friends on condition that she let him rub his penis on her body. She refused.

[27] The Court set out the guiding legal principles at para. 8:

[8] While sentences imposed by sentencing judges attract considerable deference from this court, on the facts of this case, we conclude that the governing principles of denunciation and deterrence, both specific and general, cannot be satisfied by a conditional sentence. This court has repeatedly indicated that a conditional sentence should rarely be imposed in cases involving the sexual touching of children by adults, particularly where, as here, the sexual violation is of a vulnerable victim by a person in a position of trust. In addition, circumstances that involve multiple sexual acts over an extended period of time and escalating in intrusiveness generally warrant a

severe sentence. See *R. v. Cromien* (2002), 2002 CanLII 4807 (ON CA), 155 O.A.C. 128 (C.A.); *R. v. Bedard* (2001), 2001 CanLII 8536 (ON CA), 158 C.C.C. (3d) 216 (Ont. C.A.); *R. v. Stuckless* (1998), 1998 CanLII 7143 (ON CA), 127 C.C.C. (3d) 225 (Ont. C.A.); and *R. v. G.O.* (1997), 1997 CanLII 14501 (ON CA), 99 O.A.C. 234 (C.A.). See also *R. v. L.F.W.*, 2000 SCC 6 (CanLII), [2000] 1 S.C.R. 132. The trial judge, with respect, failed in this case to give adequate or any consideration to those controlling principles. Moreover, the trial judge's error in imposing a conditional sentence was exacerbated by his further error of failing to impose a house arrest term as part of that conditional sentence. In all of those circumstances, the sentence imposed is manifestly inadequate.

[28] The Court imposed a sentence of two years less a day less credit of 6 months for that portion of the conditional sentence already served.

[29] In *R. v. Friesen*, 2020 SCC 9, the Court set out the following at paragraphs 1, 5, 37, and 51 as it relates to sexual offences against children:

[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. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.

...

[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.

...

[37] This Court has repeatedly held that sentencing ranges and starting points are guidelines, not hard and fast rules (*R. v. McDonnell*, 1997 CanLII 389 (SCC), [1997] 1 S.C.R. 948, at para. 33; *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207, at para. 45; *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, at para. 44; *Lacasse*, at para. 60). Appellate courts cannot treat the departure from or failure to refer to a range of sentence

or starting point as an error in principle. Nor can they intervene simply because the sentence is different from the sentence that would have been reached had the range of sentence or starting point been applied (*McDonnell*, at para. 42). Ranges of sentence and starting points cannot be binding in either theory or practice, and appellate courts cannot interpret or apply the standard of review to enforce them, contrary to *R. v. Arcand*, 2010 ABCA 363, 40 Alta. L.R. (5th) 199, at paras. 116-18 and 273. As this Court held in *Lacasse*, to do so would be to usurp the role of Parliament in creating categories of offences (paras. 60-61; see also *McDonnell*, at paras. 33-34).

...

[51] The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. This Court recognized the importance of these interests in *Sharpe* in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime (para. 92, per McLachlin C.J., and para. 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.). Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity (see *Sharpe*, at paras. 172, 174 and 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.).

Aggravating Factors

[30] I am satisfied that the following factors are aggravating:

- The complainant was under the age of 18 – K.L. was only 13 years old
- The accused was a close friend of the family. K.L. referred to D.S. as uncle during the time that they lived in his basement.
- The incidents of sexual touching took place in his car and in the basement, where she was living.

- The incidents were planned and deliberated, and K.L. was told not to tell anyone.

[31] In *Friesen*, the Court stated the following at paragraphs 140, 141, 142, 144, and 145:

[140] We would not go so far in this case as to hold that defining a range or starting point according to the type of physical acts that it captures necessarily amounts to an error of law. However, we would strongly caution provincial appellate courts about the dangers of defining a sentencing range based on penetration or the specific type of sexual activity at issue. In particular, courts must be careful to avoid the following four errors.

[141] First, defining a sentencing range based on a specific type of sexual activity risks resurrecting at sentencing a distinction that Parliament has abolished in substantive criminal law. Specifically, attributing intrinsic significance to the occurrence or non-occurrence of penetrative or other sexual acts based on traditional notions of sexual propriety is inconsistent with Parliament's emphasis on sexual integrity in the reform of the sexual offences scheme. As we have explained, Parliament abolished the distinctions the *Criminal Code* formerly drew between offences based on whether penile penetration was involved. For sexual assault and sexual interference, the same maximum sentence thus applies regardless of whether penetration was involved. Making the presence or absence of penetration the cornerstone of a sentencing range would thus bring the old substantive law back indirectly by recreating at the sentencing stage the propriety-based distinctions that Parliament abolished in the substantive law (Boyle, at p. 177; see also Nadin-Davis, at p. 46).

[142] Second, courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. In assessing the significance of the degree of physical interference as a factor, as Christine Boyle writes, "judges should think in terms of what is most threatening and damaging to victims" (p. 180). Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However, as McLachlin J. explained in *McDonnell*, an excessive focus on the physical act can lead courts to underemphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause (paras. 111-15). Sexual violence that does not involve penetration is still "extremely serious" and can have a devastating effect on the victim (*Stuckless* (1998), at p. 117). This Court has recognized that "any sexual offence is serious" (*McDonnell*, at para. 29), and has held that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant" (*R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440, at para. 63, per McLachlin C.J., and para. 121, per Fish J.). The modern understanding of sexual offences requires greater emphasis on these forms of

psychological and emotional harm, rather than only on bodily integrity (*R. v. Jarvis*, 2019 SCC 10, [2019] 1 S.C.R. 488, at para. 127, per Rowe J.).

...

[144] Specifically, we would strongly caution courts against downgrading the wrongfulness of the offence or the harm to the victim where the sexually violent conduct does not involve penetration, fellatio, or cunnilingus, but instead touching or masturbation. There is no basis to assume, as some courts appear to have done, that sexual touching without penetration can be [translation] “relatively benign” (see *R. v. Caron Barrette*, 2018 QCCA 516, 46 C.R. (7th) 400, at paras. 93-94). Some decisions also appear to justify a lower sentence by labeling the conduct as merely sexual touching without any analysis of the harm to the victim (see *Caron Barrette*, at paras. 93-94; *Hood*, at para. 150; *R. v. Iron*, 2005 SKCA 84, 269 Sask.R. 51, at para. 12). Implicit in these decisions is the belief that conduct that is unfortunately referred to as “fondling” or [translation] “caressing” is inherently less harmful than other forms of sexual violence (see *Hood*, at para. 150; *Caron Barrette*, at para. 93). This is a myth that must be rejected (Benedet, at pp. 299 and 314; Wright, at p. 57). Simply stating that the offence involved sexual touching rather than penetration does not provide any meaningful insight into the harm that the child suffered from the sexual violence.

[145] Third, we would emphasize that courts must recognize the wrongfulness of sexual violence even in cases where the degree of physical interference is less pronounced. Of course, increases in the degree of physical interference increase the wrongfulness of the sexual violence. However, sexual violence against children remains inherently wrongful regardless of the degree of physical interference. Specifically, courts must recognize the violence and exploitation in any physical interference of a sexual nature with a child, regardless of whether penetration was involved (see Wright, at p. 150).

[32] In *Friesen*, the Court noted the following in the context of sexual offences against children at paragraphs 101, 103, 104, and 122:

[101] Parliament's decision to prioritize denunciation and deterrence for offences that involve the abuse of children by enacting s. 718.01 of the *Criminal Code* confirms the need for courts to impose more severe sanctions for sexual offences against children. In 2005, Parliament added s. 718.01 to the *Criminal Code* by enacting Bill C-2. In cases that involve the abuse of a person under the age of 18, s. 718.01 requires the court to give “primary consideration to the objectives of denunciation and deterrence of such conduct” when imposing sentence.

...

[103] Section 718.01 should not be interpreted as limiting sentencing objectives, notably separation from society, which reinforce deterrence or denunciation. The objective of separation from society is closely related to deterrence

and denunciation for sexual offences against children (*Woodward*, at para. 76). When appropriate, as discussed below, separation from society can be the means to reinforce and give practical effect to deterrence and denunciation.

[104] Section 718.01 thus qualifies this Court's previous direction that it is for the sentencing judge to determine which sentencing objective or objectives are to be prioritized. Where Parliament has indicated which sentencing objectives are to receive priority in certain cases, the sentencing judge's discretion is thereby limited, such that it is no longer open to the judge to elevate other sentencing objectives to an equal or higher priority (*Rayo*, at paras. 103 and 107-8). However, while s. 718.01 requires that deterrence and denunciation have priority, nonetheless, the sentencing judge retains discretion to accord significant weight to other factors (including rehabilitation and *Gladue* factors) in exercising discretion in arriving at a fit sentence, in accordance with the overall principle of proportionality (see *R. v. Bergeron*, 2013 QCCA 7, at para. 37 (CanLII)).

...

[122] Parliament has provided in s. 718 of the *Criminal Code* that "[t]he fundamental purpose of sentencing is to protect society". As this Court held in *K.R.J.*, the wording of s. 718 demonstrates that "public protection is part of the very essence" of sentencing (para. 33). This purpose takes on particular significance when criminal offences are enacted to protect vulnerable groups such as children from harm (see *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 76 and 131-32).

[33] In *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 SCR 206, The Court set out the following as it relates to proportionality at para. 42,

[42] For one, it requires that a sentence not exceed what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence. In this sense, the principle serves a limiting or restraining function. However, the rights-based, protective angle of proportionality is counter-balanced by its alignment with the "just deserts" philosophy of sentencing, which seeks to ensure that offenders are held responsible for their actions and that the sentence properly reflects and condemns their role in the offence and the harm they caused (*R. v. M. (C.A.)*, 1996 CanLII 230 (SCC), [1996] 1 S.C.R. 500, at para. 81; *Re B.C. Motor Vehicle Act*, 1985 CanLII 81 (SCC), [1985] 2 S.C.R. 486, at pp. 533-34, *per* Wilson J., concurring). Understood in this latter sense, sentencing is a form of judicial and social censure (J. V. Roberts and D. P. Cole, "Introduction to Sentencing and Parole", in Roberts and Cole, eds., *Making Sense of Sentencing* (1999), 3, at p. 10). Whatever the rationale for proportionality, however, the degree of censure required to express society's condemnation of the offence is always limited by the principle that an offender's sentence must be equivalent to his or her moral culpability, and not greater than it. The two perspectives on proportionality thus

converge in a sentence that both speaks out against the offence and punishes the offender no more than is necessary.

[34] Section 718.2(a) of the *Criminal Code* sets out the following aggravating factors, in part:

- The offender, in committing the offence, abused a person under the age of eighteen years,
- The offender abused a position of trust or authority in relation to the victim
- The offence had a significant impact on the victim considering their age, and other personal circumstances including their health and financial situation

Mitigating Factors and Personal Circumstances of the Defender

[35] D.S. has no criminal record.

[36] D.S. is employed. He has a commercial trucking business that employs 20 people.

[37] He is married with two adult children.

[38] He has medical issues; high blood pressure and he is a diabetic.

[39] He was on very strict bail conditions without any breaches noted.

[40] He has contributed to numerous charities over the past 15 years.

[41] The defence submits that a conditional sentence of 90 days is appropriate considering that he is being sentenced on sexual touching and not the more egregious act of sexual intercourse.

Conclusion and Disposition

[42] I am satisfied that considering the legal principles set out in the legislation and jurisprudence that a period of incarceration of 15 months is an appropriate response by the Court in this matter. The Defence argues that sentences for sexual offences against children have increased since the time this offence was committed. As such he has the benefit of a more lenient sentence. The Defence submits that a 90-day Conditional Sentence is therefore appropriate. I do not accept that position. In accordance with the legal principles set out in *D.R.* and in light of the sentencing framework mandated by the Court in *Friesen*, the governing principles of denunciation and deterrence cannot be satisfied by a Conditional Sentence. Further, *Friesen* stated the following at paragraphs 109 and 110:

[109] This guidance from *Lacasse* applies to sexual offences against children. As noted previously, Parliament's decision in 2015 to increase maximum sentences for sexual offences against children should shift the range of proportionate sentences as a response to the recognition of the gravity of these offences. Sentences should increase as a result of this legislative initiative (*Rayo*, at para. 175). In certain cases, a sentencing judge [translation] "must feel free to impose sentences above" a past threshold (*R. v. Régnier*, 2018 QCCA 306, at para. 78 (CanLII)). As the Quebec Court of Appeal has reasoned, courts must give "the legislative intent its full effect" and should not feel bound to adhere to a range that no longer reflects Parliament's view of the gravity of the offence (para. 40). Such a range may in fact be "obsolete and must be revised upwards" (para. 30).

[110] A second reason why upward departure from precedents may be required is that courts' understanding of the gravity and harmfulness of sexual offences against children has deepened, as we have sought to explain above. As Pepall J.A. observed in *Stuckless* (2019), there has been a considerable evolution in Canadian society's understanding of the gravity and harmfulness of these offences (para. 90). Sentences should thus increase "as courts more fully appreciate the damage that sexual exploitation by adults causes to vulnerable, young victims" (*Scofield*, at para. 62). Courts should accordingly be cautious about relying on precedents that may be "dated" and fail to reflect "society's current awareness of the impact of sexual abuse on children" (*R. v. Vautour*, 2016 BCCA 497, at para. 52 (CanLII)). Even more recent precedents may be treated with caution if they simply follow more dated precedents that inadequately recognize the gravity of sexual violence against children (*L.V.*, at paras. 100-102). Courts are thus justified in departing from precedents in imposing a fit sentence; such precedents should not be seen as imposing a cap on sentences (see *Stuckless* (2019), at paras. 61-62, per Huscroft J.A.).

[43] As set out in *Friesen* a clear and strong message must be sent by the Court that sexual offences against children cannot and will not be tolerated in the community.

[44] In this case K.L. was only 13 years old, she referred to D.S. as her uncle. The wrongfulness and harmfulness of sexual violence against children as set in *Friesen* is far reaching and causes ongoing harm to children, families, and society at large.

[45] D.S.' conduct violated K.L.'s personal autonomy, bodily integrity, sexual integrity, and her dignity.

[46] I want to conclude my reasons by setting out how serious the consequences have been for K.L. as a result of this violation on her by D.S. as articulated in her Victim Impact Statement:

- The offence took place over a decade ago, and I still feel like it happened yesterday
- I am not the same person anymore.
- D.S. has ruined my life, my relationships, and my reason to live.
- this incident turned me into an addict, taking pain meds and smoking pot to heal my pain physically and emotionally.

[47] As *Friesen* so aptly points out, children deserve to enjoy a childhood free of sexual violence, and sentences for sexual offences against children must fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.

Sentence

1. D.S. is incarcerated for a period of 15 months.

2. A DNA Order shall issue in accordance with s. 487.051 of the *Criminal Code*.
3. A SOIRA Order shall issue pursuant to s. 490.013(2)(b) of the *Criminal Code* for a period of 20 years.
4. A Weapons Prohibition Order shall issue for 10 years pursuant to s. 109(2)(a)(ii) of the *Criminal Code*.
5. A Non -Communication Order with respect to the complainant shall issue pursuant to s. 743.21(1) of the *Criminal Code*.

Fragomeni J.

Released: June 04, 2021

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COURT FILE NO.: CR-19-00001540-0000
DATE: 2021 06 04

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

D.S.

Defendant

REASONS FOR SENTENCE

Fragomeni J.

Released: June 04, 2021