

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
HER MAJESTY THE QUEEN	)	
	)	Kelly Eberhard, for the Crown
– and –	)	
	)	
K.K.	)	
	)	
Defendant	)	Krystal Manitus, for the Defendant
	)	
	)	
	)	HEARD: February 11-13, September 30 and
	)	October 20, 2020

PUBLICATION RESTRICTION NOTICE

Pursuant to subsection 486.4 of the *Criminal Code*, there is a ban on disclosing the name of any person involved in the proceedings as a party or a witness or any information likely to identify any such person. This Judgment complies with this restriction so that it can be published.

REASONS FOR SENTENCE

DE SA J.:

Background

- [1] Mr. K.K. has been convicted of sexual interference and invitation to sexual touching.
- [2] Mr. K.K. started sexually touching the complainant when she was between the ages of 10 and 12 sometime between 2013 and 2014.
- [3] The complainant testified that Mr. K.K. would come up from behind her and grope both of her breasts with both of his hands. He would do it for about 30 seconds. This type of

touching occurred numerous times over the course of 2 years when she would visit his house to see his family.

- [4] On one occasion, Mr. K.K. thrust his pelvis onto the complainant's body for approximately 1 minute while she was in bed. She believes she was in grade 7 or 8 at the time.
- [5] Mr. K.K. also once put the complainant's hand on his penis for about 15 seconds over his clothes.
- [6] The Crown submits that a sentence of 18-23 months in custody is appropriate. The Crown argues that the offender was in a position of trust when he perpetrated the assaults. The complainant was young, innocent and vulnerable, and the abuse has had a significant impact on her life. The Crown submits that a custodial sentence is necessary.
- [7] The defence takes the position that a conditional sentence should be imposed. Given Mr. K.K.'s age (60), his health, and the current concerns related to custody in the face of the ongoing pandemic, Mr. K.K. should serve his sentence in the community.

Analysis

General Principles

- [8] Pursuant to s. 718 of the *Criminal Code*, the “fundamental purpose” of sentencing is to contribute 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: (1) to denounce unlawful conduct; (2) to deter the offender and others from committing offences; (3) to separate offenders from society where necessary; (4) to assist in rehabilitating offenders; (5) to provide reparations for harm done to victims or the community; and (6) to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims and the community.
- [9] In the case of adult predators, absent exceptional circumstances, the objectives of denunciation and general and specific deterrence must take precedence over the other recognized objectives of sentencing.
- [10] In *R. v. D. (D.)*, 2002 CanLII 44915 (ON CA), Moldaver J.A. (as he then was) explained at paras. 34 and 35:

The overall message however, is meant to be clear. Adult sexual predators who would put the lives of innocent children at risk to satisfy their deviant sexual needs must know that they will pay a heavy price. In cases such as this, absent exceptional circumstances, the objectives of sentencing proclaimed by Parliament in s. 718(a), (b) and (c) of the *Criminal Code*, commonly referred to as denunciation, general and specific deterrence, and the need to separate offenders from society, must take precedence over the other recognized objectives of sentencing.

We as a society owe it to our children to protect them from the harm caused by offenders like the appellant. Our children are at once our most valued and our most vulnerable assets. Throughout their formative years, they are manifestly incapable of defending themselves against predators like the appellant and, as such, they make easy prey. People like the appellant know this only too well and they exploit it to achieve their selfish ends, heedless of the dire consequences that can and often do follow.

- [11] More recently, the Supreme Court in *R v. Friesen*, 2020 SCC 8, emphasised that sentences for these offences must reflect the contemporary understanding of sexual violence against children. When determining the gravity of the offence, it is not sufficient to simply state that sexual offences against children are serious. Courts must impose sentences that recognize and give effect to (1) the inherent wrongfulness of these offences, (2) the actual harm that children suffer, and (3) the potential harm to children that flows from these offences. As the Court explained at para. 5:

[S]exual 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.

COVID-19 as a Relevant Consideration

- [12] The courts have recognized that there will be situations that call for a sentence outside the normal sentencing range because of the specific circumstances of a particular case. *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089.
- [13] The risk posed by the COVID-19 pandemic to those who are incarcerated is one of those circumstances that can be taken into account when deciding whether a sentence below what would otherwise be imposed is nonetheless just and appropriate. *R. v. J.S.*, 2020 ONSC 1710, at para. 19; *R. v. Rajan*, 2020 ONSC 2118, at paras. 55 and 56; *R. v. T.L.*, 2020 ONSC 1885, at para. 36; *R. v. Kandhai*, 2020 ONSC 1611, at para. 7; *R. v. Kazman*, 2020 ONCA 251, at paras. 17 and 18.
- [14] While individual or collateral consequences can reduce a sentence within the range, however, such considerations should not reduce a sentence to the point that it becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender. *R. v. Studd*, [2020] O.J. No. 2035, at para. 42.

Availability of Conditional Sentence

- [15] Recent authority has made a conditional sentence available. The Ontario Court of Appeal in *R. v. Sharma*, 2020 ONCA 478 (CanLII) struck down the restriction on the availability of a conditional sentence for offences involving a maximum sentence of 14 years.¹ In *R. v. B.J.T.*, 2019 ONCA 694, the court also struck down the mandatory minimum sentence for s. 151. In 2017, an Ontario Superior Court in the case of *R v. Hussein*, 2017 ONSC 4202, struck down all three one-year mandatory minimum sentences for ss. 271, 151 and 153.
- [16] Under s. 742.1 of the *Criminal Code* the court may order a conditional sentence when:
1. The offence does not call for a minimum term of imprisonment;
 2. The court imposes a sentence of imprisonment of less than two years; and,
 3. The court is satisfied that “serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 and 718.2.
- [17] The courts have imposed conditional sentences for similar types of offences in the past.
- [18] In *R. v. L.F.W.*, [2000] 1 S.C.R. 132, a conditional sentence of 21 months was imposed where the accused was found guilty of 10 to 12 sexual assaults that involved forced masturbation and fellatio with the child who was between 6 and 12 years old. Most of the assaults took place in a locked shed. The offender told the victim that he had a gun, leading her to believe that her family would be endangered if she told anyone about the events.
- [19] The Supreme Court, relying on its judgment in *R. v. Proulx*, [2000] 1 S.C.R. 61, held that the sentence fell within the acceptable range even though the accused had “committed terrible offences and did not express any remorse...” and “a conditional sentence can provide significant denunciation and deterrence, particularly when onerous conditions are imposed”.
- [20] In *R. v. B.S.*, [2004] O.J. No. 1170, the accused, who was like an uncle to the complainant, age 13, touched her inappropriately on multiple occasions over a 13 month period. He would attempt to touch her on her breasts, offered to show her his penis, kiss her on the mouth and put his tongue in her mouth, had her sit on his lap clothed when he had an erection and put his hand down her bathing suit and touched her buttocks. The

¹ In *Sharma*, the Ontario Court of Appeal struck down ss. 742.1(c) and 742.1(e)(ii) of the *Criminal Code*.

Court of Appeal considered the sentence of 12 months imprisonment to be excessive in the circumstances, stating:

We are nevertheless of the view that the sentence of 12 months imprisonment for this first offender was manifestly excessive. As serious as the conduct was, exacerbated by the trust relationship 12 months imprisonment was outside the appropriate range for this kind of conduct for this type of offender.

...

We have given anxious consideration to an appropriate sentence in this case. We cannot disagree with the principle that some brief period of incarceration would have been appropriate bearing in mind the need for denunciation and general deterrence. Thus, the trial judge might have imposed a short jail sentence on the charge of sexual assault and a consecutive conditional sentence on the charge of invitation to sexual touching.

- [21] The sentence of 12 months was altered to a conditional sentence to be served in the community.

See also *R. v. Colacho-Romero*, [2020] O.J. No. 3333; *R. v. D.D.*, [2020] O.J. No. 1880; *R. v. Parsons*, [2020] O.J. No. 3864; *R. v. Lim*, [2020] O.J. No. 161.

Application to the Facts of the Case

- [22] In this case, the moral culpability of the offender is high. The offender is approximately 45 years older than the victim. He is the grandfather of the victim's friend.
- [23] The complainant was clearly very young and vulnerable. The touching began when the complainant was in grade 6 and only finished in grade 9 when the charges were laid.
- [24] The victim impact statement described a number of different ways that Mr. K.K.'s actions negatively affected the complainant including a decline in her mental health, a loss of ties within the Cambodian community, the negative impact on her relationship with her parents, paranoia of going out in public where she might see Mr. K.K. or his family and finally, her grades suffered as a result of Mr. K.K.'s criminal acts.
- [25] There are various mitigating circumstances to be considered in this case.
- [26] Mr K.K. is 60 years old and does not have a criminal record. His pre-sentence report identifies pro-social activities and work throughout his life in Canada. The letters received from his family, his employers, and friends demonstrate the offender is capable of doing good things and being a contributing member to society.

- [27] Mr. K.K. has been on bail for over 3 years without incident. He has been required to live away from his own house given its proximity to the complainant's address which I expect has been onerous.
- [28] Mr. K.K. suffers from diabetes mellitus, which has been poorly controlled due to his failing to comply with his medications and his diet. He suffers from chronic renal disease associated with his diabetes and chronic vascular disease. He also suffers weakness in his legs causing him to fall down. This is believed to be associated with neurological problems.
- [29] As a child, Mr. K.K. was himself the victim of a brutal regime in Cambodia and was taken from his home, having to escape years later to Thailand as a refugee.
- [30] I recognize the comments of the Supreme Court in *R. v. Friesen*, supra, that courts must impose sentences that recognize and give effect to (1) the inherent wrongfulness of these offences, (2) the actual harm that children suffer, and (3) the potential harm to children that flows from these offences.
- [31] I agree that a conditional sentence, in normal circumstances, would not sufficiently address the need for general deterrence and denunciation when dealing with offences of this sort. The need for deterrence and denunciation almost always mandates that a jail sentence be imposed. This is evident from the recent jurisprudence and Parliament's approach to offences involving the sexual exploitation of children. *R. v. B.S.*, [2004] O.J. No. 1170. However, these are exceptional times. With the ongoing pandemic, I do have some concerns with incarcerating Mr. K.K. given his age and his underlying health conditions.
- [32] In *R. v. Hearn*, 2020 ONSC 2365, Pomerance J., albeit in the context of pre-sentence custody, explained at paras. 10 and 11:

In normal circumstances, the period of pre-sentence custody, while significant, might be seen by some to fall short of reflecting the seriousness of the offence and moral blameworthiness of the offender. However, we are not presently in normal circumstances. At the time of this hearing, the COVID-19 pandemic is sweeping the globe. This was a factor leading to the joint position taken by counsel.

The risk of infection is, by necessity, higher in custodial institutions, where conditions – cramped quarters, shared sleeping and dining facilities, lack of hygiene products – make it difficult, if not impossible, to implement social distancing and other protective measures. This is not to say that the virus is rampant in jails, or that government officials are not trying to protect inmates. It is only to say that, as a matter of logic and common sense, the risk of contracting the virus is higher in an environment where people are forced to habitually congregate with one another.

- [33] In my view, given all the circumstances, the goals of deterrence and denunciation can be adequately addressed by imposing a period of incarceration of 2 years less one day to be served in the community.
- [34] To further recognize the severity of the offences, I will require that Mr. K.K. be subject to a house arrest condition for the entire duration of the sentence.
- [35] I will also impose a period of probation of 2 years in addition to the other ancillary orders outlined below.

Disposition

- [36] The offender is sentenced as follows:
- [37] For the offence of sexual interference, Mr. K.K. is sentenced to a conditional sentence of 2 years less one day. He will be required to remain on house arrest for the duration of the sentence. He will have the standard exceptions for groceries once a week and for medical appointments and religious observance. I will also consider any additional terms put forward by the parties.
- [38] In addition, I will impose 2 years of probation on terms including to keep the peace and be of good behaviour, to reside where approved by his probation officer and to notify his probation officer in advance of any change of address and change of employment, not to be in contact with any person under the age of 16 except while in the presence of a person approved of by his probation officer, not to be in contact with the victim and not to be within 100 metres of her residence, expected place of work, or school, and to attend and actively participate in all assessment, and counselling programs as directed by the probation officer.
- [39] On the offence of invitation to sexual touching, I will sentence Mr. K.K. to a 12-month conditional sentence to be served concurrently with the same terms.
- [40] The offender shall provide a DNA sample.
- [41] The offender shall be registered under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for life.
- [42] The offender is prohibited from communicating with the victim during the custodial period of sentence. Section 743.21 of the Criminal Code.
- [43] The offender shall also be subject to a weapons prohibition (s. 109) for a period of 10 years.
- [44] The offender will be subject to a s. 161 Order for 10 years restricting the offender from:

(a) attending a public park or public swimming area where persons under the age of 16 years are present or can be reasonably be expected to be present, or a daycare centre, school ground, playground or community centre;

(a.1) being within 100 meters of the complainant's school, residence, employment or any place she is known to be;

(b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity that involves a position of trust or authority towards persons under the age of 16 years; and

(c) having any contact – including communicating by any means – with a person who is under the age of 16 years, unless the offender does so under the direct supervision of the person's parent or guardian.

Justice C.F. de Sa

Released: November 26, 2020

CITATION: R. v. K.K., 2020 ONSC 7198

ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

– and –

K.K.

Defendant

REASONS FOR SENTENCE

Justice C.F. de Sa

Released: November 26, 2020