

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

486.4 Order restricting publication — sexual offences. — (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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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

(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) **MANDATORY ORDER ON APPLICATION** — 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 complainant of the right to make an application for the order; and

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

. . .

486.6 OFFENCE — (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.

ONTARIO COURT OF JUSTICE

CITATION: *R. v. Rusk*, 2021 ONCJ 343

DATE: 2021 05 28

COURT FILE No.: Dufferin 18-982

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Brandon Charles RUSK

Before Justice D.A. Harris
Heard on November 6, 2020
Reasons for Sentence released on May 28, 2021

Robert Levancounsel for the Crown
The accused Brandon Charles Rusk..... on his own behalf

D. A. HARRIS J.:

INTRODUCTION

[1] Following trial, I found Mr. Rusk guilty of three counts of sexually assaulting SD when she was under the age of 16 (counts 1, 8 and 10), one count of exposing his genitals for a sexual purpose to SD when she was under the age of 16 (count 4), one count of sexual interference with SD when she was under the age of 14 (count 7), and two counts of inviting SD to sexual touching when she was under the age of 16 (counts 6 and 11). All of these offences occurred in Orangeville on August 19, 2018.¹

[2] I subsequently stayed count 1 based on the principles set out in *R. v. Kienapple*.²

[3] Crown counsel had elected to proceed by indictment on all charges.

[4] Mr. Rusk is before me today to be sentenced.

¹ *R. v. Rusk*, 2020 ONCJ 520, [2020] O.J. No. 4911 (Ont. C.J.)

² *R. v. Kienapple*, [1975] 1 S.C.R. 729.

NOTE: This judgment is under a publication ban described in the WARNING page(s) at the start of this document. If the WARNING page(s) is (are) missing, please contact the court office.

[5] Crown counsel suggested that I should impose a sentence of imprisonment for 12 to 15 months, followed by probation for three years.

[6] He also asked for the following ancillary orders:

(1) a DNA order;

(2) an order compelling Mr. Rusk to comply with the *Sex Offender Information Registration Act* for life;

(3) an order pursuant to section 161 of the *Criminal Code* for five years

(4) a weapons prohibition; and

(5) an order pursuant to section 743.21 of the *Criminal Code*.

[7] Mr. Rusk suggested that I impose a conditional sentence of imprisonment or sentence him to imprisonment on an intermittent basis.

[8] I find that imprisonment for one year followed by probation for three years is the appropriate sentence.

[9] My reasons for this are set out under the following headings:

- (1) The Law regarding conditional sentences of imprisonment,
- (2) The fundamental purpose and principles of sentencing,
- (3) The constitutionality of mandatory minimum sentences in this case,
- (4) The facts underlying the offences,
- (5) The impact on the victim,
- (6) The background of Mr. Rusk, and
- (7) Analysis.

CONDITIONAL SENTENCE OF IMPRISONMENT

[10] The conditional sentence came into being when section 742.1 of the *Criminal Code* was proclaimed in 1996.

[11] The Supreme Court of Canada subsequently stated in *R. v. Proulx* that "Parliament clearly mandated that certain offenders who used to go to prison should now serve their sentence in the community."³

[12] The Supreme Court of Canada stated further that an offender who meets the criteria of section 742.1 will serve a sentence under strict surveillance in the community

³ *R. v. Proulx*, [2000] S.C.J. No. 6 (S.C.C.) at para. 12.

instead of going to prison. His liberty will be constrained by conditions to be attached to the sentence. In case of breach of conditions, the offender will be brought back before a judge who may order him to serve the remainder of the sentence in jail, as it was intended by Parliament that there be a real threat of incarceration to increase compliance with the conditions of the sentence.⁴

[13] Section 742.1 lists five criteria that a court must consider before deciding to impose a conditional sentence. These are:

1. the offender must be convicted of an offence that is not specifically excluded by the legislation;
2. the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;
3. the court must impose a term of imprisonment of less than two years;
4. the safety of the community must not be endangered by the offender serving the sentence in the community; and
5. a conditional sentence must be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

[14] The first four criteria are prerequisites to any conditional sentence. These prerequisites answer the question of whether or not a conditional sentence is possible in the circumstances. Once they are met, the next question is whether a conditional sentence is appropriate. That decision turns upon a consideration of the fundamental purpose and principles of sentencing set out in sections 718 to 718.2.

[15] In Mr. Rusk's case, I am satisfied that almost none of the first four prerequisite criteria have been met.

[16] Sexual assault is an excluded offence pursuant to section 742.1 when the Crown proceeds by indictment.

[17] At least one offence (exposing his genitals) is still punishable by a minimum term of imprisonment. Sexual assault of a person under 16 and invitation to sexual touching may be too. I will say more about this later in these Reasons.

[18] Crown counsel agreed, as do I, that I should impose a sentence of imprisonment for much less than two years. That is the only prerequisite that has been met here.

[19] I am not satisfied that Mr. Rusk serving his sentence in the community, even subject to appropriate conditions, would not endanger the safety of the community. Alcohol was a significant factor in these offences. He has a problem with alcohol. His attitude regarding women consenting or not consenting to his sexual advances is severely wanting, even when he has not been drinking. I am not satisfied that he has fully committed to changing his ways. I am concerned there is a real danger that he

⁴ *Ibid*, at para. 21.

might repeat one or more of his offences following the imposition of a conditional sentence.

[20] In addition, I am not satisfied that a conditional sentence is appropriate in all of the circumstances of this case having regard to the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the *Criminal Code*.

FUNDAMENTAL PURPOSE AND PRINCIPLES OF SENTENCING

[21] The fundamental purpose of sentencing as expressed in section 718 of the *Criminal Code* is to contribute to respect for the law, the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the objectives of denunciation; deterring the offender and other persons from committing offences; separating offenders from society, where necessary; assisting in rehabilitating offenders; providing reparation for harm done to victims or to the community; and promoting a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[22] The relevance and relative importance of each of these objectives will vary according to the nature of the crime and the circumstances of the offender.⁵

[23] The fundamental principle of sentencing is that the punishment should be proportionate to the gravity of the offence and the degree of responsibility of the offender. The punishment should fit the crime. There is no single fit sentence for any particular offence.⁶

[24] Doherty J.A. of the Ontario Court of Appeal stated in *R. v. Hamilton* that:

The "gravity of the offence" refers to the seriousness of the offence in a generic sense as reflected by the potential penalty imposed by Parliament and any specific features of the commission of the crime which may tend to increase or decrease the harm or risk of harm to the community occasioned by the offence.⁷

[25] He went on to state that:

The "degree of responsibility of the offender" refers to the offender's culpability as reflected in the essential substantive elements of the offence - especially the fault component - and any specific aspects of the offender's conduct or background that tend to increase or decrease the offender's personal responsibility for the crime.⁸

[26] He then quoted Rosenberg J.A. who had previously described the proportionality requirement in *R. v. Priest*:

⁵ *R. v. Hamilton*, *supra* at para. 102; *R. v. Lyons*, [1987] 2 S.C.R. 309 (S.C.C.) at para. 26; *R. v. Morrissey*, [2000] S.C.J. No. 39 (S.C.C.) at para. 46.

⁶ *Criminal Code*, section 718.1

⁷ *R. v. Hamilton*, *supra*, at para. 90.

⁸ *Ibid*, at para. 91.

The principle of proportionality is rooted in notions of fairness and justice. For the sentencing court to do justice to the particular offender, the sentence imposed must reflect the seriousness of the offence, the degree of culpability of the offender, and the harm occasioned by the offence. The court must have regard to the aggravating and mitigating factors in the particular case. Careful adherence to the proportionality principle ensures that this offender is not unjustly dealt with for the sake of the common good.⁹

[27] Proportionality is the fundamental principle of sentencing, but it is not the only principle to be considered.

[28] Section 718.01 of the *Criminal Code* came into effect in 2005 and provides that "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".

[29] Section 718.2(a)(ii.1) provides that evidence that an offender, in committing an offence, abused a person under the age of 18 years, shall be deemed to be an aggravating circumstance and that the sentence should be increased to reflect that.

[30] Section 718.2(a)(iii.1) provides that it is an aggravating circumstance if the offence had a significant impact on the victim, considering her age and other personal circumstances, including her health and financial situation.

[31] Section 718.2(c) provides that where consecutive sentences are imposed the combined sentence should not be unduly long or harsh.

[32] The totality principle is a particular application of the general principle of proportionality.¹⁰

[33] It requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. The judge must review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.¹¹

[34] The sentencing provisions of the *Criminal Code* were amended following *R. v. M. (C.A.)*, *supra*. Proportionality was included as the fundamental principle of sentencing (section 718.1) and sentencing courts were instructed to take into consideration the totality principle when imposing consecutive sentences to ensure that the combined sentence is not unduly long or harsh (section 718.2(c)).¹²

⁹ *R. v. Priest*, [1996] O.J. No. 3369 (Ont. C.A.) at para. 26, quoted in *R. v. Hamilton*, *supra*, at para. 92.

¹⁰ *R. v. Ahmed*, 2017 ONCA 76, 136 O.R. (3d) 403 (Ont. C.A.) at para. 79.

¹¹ *R. v. C.A.M.*, [1996] S.C.J. No. 28 (S.C.C.) at para. 42; *R. v. Ahmed*, *supra* at para. 79.

¹² *R. v. Ahmed*, *supra* at para. 79.

[35] In Ontario, the sentencing judge should first identify the gravamen of the conduct giving rise to all of the criminal offences, and next determine the total sentence to be imposed. Having determined the appropriate total sentence, the judge should impose sentences with respect to each offence which result in the total sentence, and which appropriately reflect the gravamen of the overall criminal conduct.¹³

[36] With respect to consecutive sentences, section 718.3(4)(b)(i) provides that:

The court that sentences an accused shall consider directing ... (b) that the terms of imprisonment that it imposes at the same time for more than one offence be served consecutively including when (i) the offences do not arise out of the same event or series of events.

[37] There is a broad discretion to impose consecutive sentences if separate legal interests are implicated in the various offences.¹⁴

[38] The Supreme Court of Canada stated in *R. v. Friesen supra*, that “the general rule is that offences that are so closely linked to each other as to constitute a single criminal adventure may, but are not required to, receive concurrent sentences, while all other offences are to receive consecutive sentences”.¹⁵

[39] Section 718.2(d) provides that “an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances”.

[40] Section 718.2(e) provides that “... all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.”

[41] The Supreme Court of Canada discussed the application of this section in *Gladue v. The Queen* and said that section 718.2(e) applies to all offenders, and that imprisonment should be the penal sanction of last resort. Prison is to be used only where no other sanction or combination of sanctions is appropriate to the offence and the offender.¹⁶

[42] In *R. v. Priest, supra* the Ontario Court of Appeal made it clear that much of this is simply a codification of the existing law, especially with respect to youthful first offenders. That case also made it clear however that this principle is of much less importance in cases involving very serious offences and offences involving violence.¹⁷

[43] More recently, the Ontario Court of Appeal stated the following in *R. v. Disher*:

The principle of restraint, as reflected in ss. 718.2(d) and (e) of the *Criminal Code*, directs that a first period of incarceration imposed on a young first offender should be as short as possible, while giving adequate weight to the principles of

¹³ *R. v. Jewell*; *R. v. Gramlick*, [1995] O.J. No. 2213 (Ont. C.A.) at para. 27; *R. v. Ahmed, supra* at para. 85; *R. v. Friesen*, [2019] S.C.J. No. 100 (S.C.C.) at para. 157.

¹⁴ *R. v. Boyd*, [2016] O.J. No. 2584 (Ont. C.A.) endorsement at para. 3.

¹⁵ *R. v. Friesen, supra* at para. 155.

¹⁶ *Gladue v. The Queen*, [1999] S.C.J. No. 19 (S.C.C.) at para. 36; see also *R. v. Proulx, supra*, at para. 20.

¹⁷ *R. v. Priest, supra* at para 17.

general deterrence and denunciation: *R. v. Rocchetta*, 2016 ONCA 577, [2016] O.J. No. 3871, at para. 35. As s. 718.2(e) specifically directs, while the restraint principle should be considered for all offenders, particular attention should be given to the circumstances of Aboriginal offenders, a class of offenders to which Ms. Weaver belongs. Sentencing judges are to give effect to the principles in s. 718.2(e) even where the offence is serious and the sentence involves imprisonment: *R. v. Batisse*, 2009 ONCA 114, [2009] O.J. No. 452, at para. 36.¹⁸

[44] I note that Mr. Rusk does not qualify as a youthful first offender and that the offences are serious ones involving violence. Mr. Rusk has however never been sentenced to imprisonment before this.

[45] The Supreme Court of Canada noted in *Gladue v. The Queen* that section 718 requires a sentencing judge to consider more than the long-standing principles of denunciation, deterrence and rehabilitation. Now a sentencing judge must also consider the restorative goals of repairing the harms suffered by individual victims and by the community as a whole, promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender, and attempting to rehabilitate or heal the offender.¹⁹ As a general matter restorative justice involves some form of restitution and reintegration into the community.

[46] In *R. v. Friesen*²⁰, the Supreme Court of Canada provided a detailed analysis of the sentencing principles to be applied in cases where an adult has sexually abused a child.

[47] The Court started that decision saying:

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.²¹

[48] Only four paragraphs later, the Court stated that:

...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

¹⁸ *R. v. Disher*, [2020] O.J. No. 4849 (Ont. C.A.) released Nov 9, 2020, at para 59.

¹⁹ *Gladue v. The Queen*, [1999] S.C.J. No. 19 (S.C.C.) at paras. 43 and 48; see also *R. v. Proulx*, [2000] S.C.J. No. 6 (S.C.C.), at paras. 18 to 20.

²⁰ *R. v. Friesen*, [2019] S.C.J. No. 100

²¹ *Ibid*, at para. 1.

against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.²²

[49] At paragraph 89 the Court wrote that:

All forms of sexual violence, including sexual violence against adults, are morally blameworthy precisely because they involve the wrongful exploitation of the victim by the offender - the offender is treating the victim as an object and disregarding the victim's human dignity.²³

[50] The Court went on to say that:

The fact that the victim is a child increases the offender's degree of responsibility. Put simply, the intentional sexual exploitation and objectification of children is highly morally blameworthy because children are so vulnerable.²⁴

[51] The Court does temper the above comments somewhat, stating:

These comments should not be taken as a direction to disregard relevant factors that may reduce the offender's moral culpability. The proportionality principle requires that the punishment imposed be just and appropriate, and nothing more.²⁵

[52] Sexual assault is a broadly-defined offence that embraces a wide spectrum of conduct.²⁶ The offender's conduct will be less morally blameworthy in some cases than in others. Further, the personal circumstances of offenders can have a mitigating effect.²⁷

[53] The Court emphasizes that:

While sexual violence against either a child or an adult is serious, Parliament has determined that sexual violence against children should be punished more severely.²⁸

[54] Parliament has done so in the following ways:

(1) Parliament has prioritized deterrence and denunciation for offences that involve the abuse of children.

(2) Parliament has identified the abuse of persons under the age of 18 as a statutory aggravating factor.

²² *Ibid*, at para. 5.

²³ *Ibid*, at para. 89.

²⁴ *Ibid*, at para. 90.

²⁵ *Ibid*, at para. 91.

²⁶ *Ibid*, at para. 91. See also para. 113.

²⁷ *Ibid*, at para. 91.

²⁸ *Ibid*, at para. 116.

(3) Parliament has used maximum sentences to signal that sexual violence against persons under the age of 16 should be punished more severely than sexual violence against adults. The maximum sentence for both sexual interference and sexual assault of a victim under the age of 16 is 14 years when prosecuted by indictment. In contrast, the maximum sentence for sexual assault of a person who is 16 years or older is 10 years when prosecuted by indictment. This is a clear indication that Parliament views sexual violence against children as deserving of more serious punishment.

[55] These legislative signals reflect Parliament's recognition of the inherent vulnerability of children and the wrongfulness of exploiting that vulnerability.²⁹

[56] The Court goes on "to offer some comments on significant factors to determine a fit sentence for sexual offences against children."³⁰ These comments are neither a checklist nor an exhaustive set of factors, but they are instructive.³¹ I will be making further reference to these factors later in the Analysis section of these Reasons.

[57] Finally, I note that the Supreme Court stressed that

...courts must also be particularly careful to impose proportionate sentences in cases where the victim is an adolescent. Historically, disproportionately low sentences have been imposed in these cases, particularly in cases involving adolescent girls, even though adolescents may be an age group that is disproportionately victimized by sexual violence.³²

[58] In this case, SD was 13 years old.

[59] I must also take into account the effect that Covid 19 is having on our community at large and in the corrections system in particular. For the reasons expressed by Justice Pomerance of the Superior Court of Justice in *R. v. Hearn*, I too:

...take judicial notice of the fact that: we are experiencing a worldwide pandemic; that control of the pandemic requires that individuals practice social distancing; that social distancing is very difficult to maintain in custodial settings; that inmates are consequently at a greater risk of infection; and that the risk of COVID-19 in prison settings translates into an increased risk for the community at large.³³

[60] I also adopt the following comments made by her in that decision:

IMPACT OF THE PANDEMIC ON SENTENCING PRINCIPLES

15 How does all of this impact the fitness of sentence? Clearly, the pandemic does not do away with the well-established statutory and common law principles. However, the pandemic may impact on the application of those principles. It may

²⁹ *Ibid.*

³⁰ *Ibid.*, at para. 121.

³¹ *Ibid.*, at paras. 121 to 149.

³² *Ibid.* at para. 136.

³³ *R. v. Hearn*, [2020] O.J. No. 1648 (Ont. S.C.J.) per Pomerance J. at para. 14.

soften the requirement of parity with precedent. The current circumstances are without precedent. Until recently, courts were not concerned with the potential spread of a deadly pathogen in custodial institutions.

16 COVID-19 also affects our conception of the fitness of sentence. Fitness is similar to proportionality, but not co-extensive with it. Proportionality dictates that the sentence should be no more than is necessary to reflect the gravity of the crime and the moral blameworthiness of the offender. Fitness looks at a broader host of factors. A sentence may be fit even if it is not perfectly proportionate. Fitness looks, not only at the length of a sentence, but the conditions under which it is served. As a result of the current health crisis, jails have become harsher environments, either because of the risk of infection or, because of restrictive lock down conditions aimed at preventing infection. Punishment is increased, not only by the physical risk of contracting the virus, but by the psychological effects of being in a high-risk environment with little ability to control exposure.

17 Consideration of these circumstances might justify a departure from the usual range of sentence, such as that contemplated in *R. v. Lacasse*, 2015 SCC 64, para. 58:

There will always be situations that call for a sentence outside a particular range: although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded. The determination of a just and appropriate sentence is a highly individualized exercise that goes beyond a purely mathematical calculation. It involves a variety of factors that are difficult to define with precision. This is why it may happen that a sentence that, on its face, falls outside a particular range, and that may never have been imposed in the past for a similar crime, is not demonstrably unfit. *Once again, everything depends on the gravity of the offence, the offender's degree of responsibility and the specific circumstances of each case.* [Emphasis added.]

18 The "specific circumstances of each case" would, in today's environment, include the ramifications of the current health crisis.³⁴

[61] I also accept the comments made by Justice D.E. Harris of the Superior Court of Justice in *R. v. Vigon-Campuzano*:

52 Lastly, the original sentencing recommendations of counsel were made before the blight of the global COVID pandemic. The fact is, there is now extra hardship in serving a jail sentence both physically and psychologically. This reality, at the outset of what may well be the "second wave," must be taken into account. That is only logical. After all, if additional hardship is properly used in determining pre-trial custody credit under *R. v. Duncan* 2016 ONCA 754, it must also be factored into the crafting of a prospective sentence. Hardship over and above the general burden of serving a jail sentence has always been a proper consideration: see *R. v. Kandhai*, 2020 ONSC 1611 at para. 7; *R. v. Hearn*,

³⁴ *Ibid*, at paras. 15 to 18.

2020 ONSC 2365 at paras. 20, 23-24. It will be apparent, therefore, that I disagree with the Crown's position that COVID is irrelevant.

53 I believe a proportionate sentence can be formulated responding to both the gravity of the offences and the moral responsibility of Mr. Vigon-Campuzano while exercising some restraint in the use of incarceration as a sentencing tool.³⁵

[62] This has been mitigated somewhat here. I adjourned these sentencing proceedings twice, partly because of an injury suffered by Mr. Rusk and partly because of a particular Covid outbreak at the Maplehurst correctional facility. Those adjournments delayed the sentencing four months and the situation is somewhat improved at present.

[63] The maximum sentence for sexual assault of someone under 16 years of age is imprisonment for 14 years when the Crown proceeds by indictment. The mandatory minimum sentence is imprisonment for one year.

[64] The maximum sentence for sexual interference is imprisonment for 14 years when the Crown proceeds by indictment. The mandatory minimum sentence is imprisonment for one year.

[65] The maximum sentence for invitation to sexual touching is imprisonment for 14 years when the Crown proceeds by indictment. The mandatory minimum sentence is imprisonment for one year.

[66] The maximum sentence for exposing his genitals for a sexual purpose to someone under the age of 16 years is imprisonment for two years when the Crown proceeds by indictment. The mandatory minimum sentence is imprisonment for 90 days.

[67] Mr. Rusk did not raise any issues with respect to the constitutional validity of the various mandatory minimum sentences. As he is representing himself, I raised the issue for him and heard submissions from Crown counsel.

MANDATORY MINIMUM SENTENCES

[68] In *R. v. B.J.T.*³⁶ the Ontario Court of Appeal struck down the mandatory minimum sentence in section 151 of the *Criminal Code* (sexual interference) because it contravened section 12 of the *Charter* and was not saved by section 1.

[69] Feldman J.A. noted that a similar conclusion had been reached in five other courts of appeal across the country³⁷ and then stated:

³⁵ *R. v. Vigon-Campuzano*, [2020] O.J. No. 4020 (Ont. S.C.J.) per D.E. Harris J. at paras. 52 and 53. I point out that while Crown counsel in that case apparently took the position that COVID is irrelevant, Crown counsel did not advocate a similar position before me.

³⁶ *R. v. B.J.T.*, [2019] O.J. No. 4503 (Ont. C.A.) per Feldman J.A.

³⁷ *Ibid*, at para. 71.

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.³⁸

[70] She agreed 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 section 12 of the *Charter*.³⁹

[71] I have found no binding decisions with respect to the mandatory minimum sentences for any of the other offences.

[72] The reasoning in *R. v. B.J.T* would appear to be equally applicable with respect to the mandatory minimum sentences of imprisonment for one year for sexual assault of someone under 16 and for invitation to sexual touching.

[73] Crown counsel argued that this reasoning is no longer as persuasive following the directions given by the Supreme Court of Canada in *R. v. Friesen*, *supra*.

[74] I disagree.

[75] *R. v. Friesen* recognized that sexual assault is a broadly-defined offence that embraces a wide spectrum of conduct.⁴⁰ An offender's conduct will be less morally blameworthy in some cases than in others. Further, the personal circumstances of offenders can have a mitigating effect.⁴¹

[76] That is entirely consistent with the reasoning in *R. v. B.J.T*.

[77] If I had to decide this issue, I would have held that these two mandatory minimums are constitutionally invalid.

[78] Things are not so clear cut with respect to the mandatory minimum of imprisonment for 90 days for the expose genitals offence.

[79] However, I do not have to decide in this case whether any of these mandatory minimums are constitutionally valid.

³⁸ *Ibid*, at para. 72.

³⁹ *Ibid*, at para. 75.

⁴⁰ *Ibid*, at para. 91. See also para. 113.

⁴¹ *Ibid*, at para. 91

[80] In *R. v. Lloyd*⁴² the Supreme Court of Canada stated that:

18 To be sure, it does not follow that a provincial court judge is obligated to consider the constitutionality of a mandatory minimum provision where it can have no impact on the sentence in the case at issue. Judicial economy dictates that judges should not squander time and resources on matters they need not decide. But a formalistic approach should be avoided. Thus, once the judge in this case determined that the mandatory minimum did not materially exceed the bottom of the sentencing range applicable to Mr. Lloyd, he could have declined to consider its constitutionality. To put it in legal terms, the doctrine of mootness should be flexibly applied. If an issue arises as to the validity of the law, the provincial court judge has the power to determine it as part of the decision-making process in the case. To compel provincial court judges to conduct an analysis of whether the law could have any impact on an offender's sentence, as a condition precedent to considering the law's constitutional validity, would place artificial constraints on the trial and decision-making process.

19 The effect of a finding by a provincial court judge that a law does not conform to the Constitution is to permit the judge to refuse to apply it in the case at bar. The finding does not render the law of no force or effect under s. 52(1) of the *Constitution Act, 1982*. It is open to provincial court judges in subsequent cases to decline to apply the law, for reasons already given or for their own; however, the law remains in full force or effect, absent a formal declaration of invalidity by a court of inherent jurisdiction.⁴³

[81] In this case, for reasons set out below, and without applying the mandatory minimums, I am satisfied that the appropriate total sentence is imprisonment for one year. While I would not have imposed this sentence for any one of the offences individually, a ruling by me on the constitutionality of the mandatory minimums would have no practical effect either on the law or on the total sentence imposed on Mr. Rusk.

[82] Accordingly, I do not have to make such a ruling and I decline to do so.

[83] Before applying the above principles of sentence, I must take into account the facts underlying the offences, the impact on the victim and the background of Mr. Rusk.

THE OFFENCES

[84] The facts of this case are set out in much greater detail in my earlier Reasons for Judgment.⁴⁴ The following is a shorter summary of what happened.

[85] SD was 13 years old at the time that these events occurred.

[86] She and a sister were in the garage at the home of another older sister.

[87] Mr. Rusk, who lived nearby and knew the older sister who lived there entered the garage and began talking to the two girls. He did not know either of them.

⁴² *R. v. Lloyd*, [2016] 1 S.C.R. 130

⁴³ *Ibid*, at paras. 18 and 19.

⁴⁴ *R. v. Rusk*, [2020] O.J. No. 4911 (Ont. C.J.)

[88] With respect to count 7 (sexual interference), upon meeting SD, Mr. Rusk hugged her and then placed his hands on her buttocks. He made reference to her giving him a “hardy”, an erection.

[89] With respect to count 4 (expose genitals) and count 6 (invitation to sexual touching), he later asked her if she wanted to see his penis and without waiting for a reply, pulled it out and showed it to her. He asked her to “give him a blow job” and they could measure to see how big his penis got. She said “no” and he put his penis back in his pants.

[90] With respect to count 8 (sexual assault), at another time that evening, he grabbed her and began “humping” her from behind, grinding his pelvis against her buttocks.

[91] With respect to count 10 (sexual assault), he again touched her buttocks with his hand.

[92] With respect to count 11, he told SD and her sister that he would like to have one of them or both on top of him. He said that he had a “big dick”. This was clearly an invitation for her to touch his body for a sexual purpose

[93] I was satisfied that Mr. Rusk had not taken any steps to lead him to believe that SD was old enough to consent to his acts. I am also satisfied that, in any event, he had done nothing to justify a belief that she had consented.

IMPACT ON THE VICTIM

[94] SD provided a Victim Impact Statement which reads as follows:

I have difficulties meeting new males and I'm a lot more shy around them. I used to walk around with my friends in the evening but now I won't because I don't feel safe. I have a lot of trust issues now so it's harder for me to be social. I avoid the area where it happened because I don't wanna be reminded of the bad memories. I don't like physical contact with males because it makes me feel uncomfortable. I'm scared of being left alone with males I don't know really well. I'm terrified to ever see him again and I'm still afraid he'll come after me.

BACKGROUND OF MR. RUSK

[95] I was provided with a Pre-sentence Report. From this I have learned the following.

[96] Mr. Rusk is now 30 years old.

[97] He is the eldest of two children and has lived in the Orangeville/Dufferin area most of his life. His parents' common-law relationship eventually ended following the birth of their second child, with periods of separation during the relationship due to reported infidelities and domestic conflict.

[98] Mr. Rusk lived with his mother through his formative years and then eventually moved to his father's home permanently as a teenager.

[99] His younger sister resides in Shelburne, and a younger half-brother resides in northern Ontario. Mr. Rusk has fairly regular contact with both siblings via social media and telephone.

[100] Mr. Rusk has resided his father's home for the most part through the years. He sought independence as a young adult and had his own apartment at times, particularly when living with a girlfriend.

[101] He attended two local high schools, in Shelburne and in Orangeville. He completed approximately ten high school credits in the Basic Stream. He left school at the approximate age of 16 years, to pursue fulltime employment.

[102] He was in an accident as a child wherein he and his grandfather were out for a bicycle ride and he was hit by a drunk driver. His mother feels that he struggled in school as a result of the accident.

[103] His father did not recall that Mr. Rusk was hospitalized or suffered head trauma and attributed some of the academic struggles that Mr. Rusk experienced to a disruptive parental and household circumstance during his formative years. He described his ex-partner's efforts at parenting to be lacking in consistency and appropriate supervision, to the extent that their son was exposed to substance use with substances provided directly to him by his mother at a young age.

[104] He has maintained employment, predominantly as a mason's helper or construction labourer, and as a line cook in the restaurant sector. He knows the value of work and recognizes the importance of supporting his child financially, but his use of substances has impacted his ability to support his relationship and daughter financially due to his spending money on illicit drugs.

[105] He was employed as a Line Cook at a restaurant in Orangeville. He started in September 2020 and then went to inpatient rehab for three weeks. After his return he had part time hours earning \$14.00 per hour.

[106] While I was preparing these Reasons. I was informed (see below) that he had obtained new full-time employment.

[107] All sources contacted for the Pre-sentence Report indicated that his use of substances over the years has caused him difficulties in various areas of his life, including attendance at work, his financial circumstance, his relationships with family and friends, his legal standing in the community and his health to the point that he recently saw fit to enter inpatient rehab programming. All agree that he needs further counselling or treatment to address his substance abuse problems.

[108] He started using both alcohol and marijuana as a teenager. His use of alcohol has been problematic for several years. His use of marijuana is said to have diminished in his early adult years.

[109] In approximately 2015 he entered into a dating and then common-law relationship with HL, who he met while working at a local restaurant in Orangeville. They worked and socialized through work together for approximately one year before she agreed to the relationship. She is a few years older and hesitated initially given their ages and work circumstance, but his presentation and character eventually convinced her.

[110] She speaks positively of him as an individual, and as a father to their three-year-old daughter but noted very clearly that she also made concerted efforts to support and assist him in addressing his substance use problem over the years.

[111] Prior to the current court incident their relationship was going through a difficult phase and this matter prompted further distancing and an end to their committed relationship. She supports Mr. Rusk in his role as a father but insists that he address his substance abuse problems before he will be allowed unsupervised access to their daughter. Currently, Mr. Rusk's father supervises any access.

[112] Mr. Rusk does wish to be a part of his daughter's life and realizes that he has to address his substance abuse problem in order to do so.

[113] He is not currently involved in any other relationship and has no other children.

[114] He is currently healthy.

[115] He accessed the services of Canadian Mental Health Association Rapid Access Addictions Medicine Clinic during the summer of 2020 and completed an assessment and short-term counselling until his admission to Westover Treatment Centre. No further appointments are scheduled now that he has attended Westover and has access to discharge aftercare supports.

[116] Information provided by Westover Treatment Centre staff confirmed that the subject was an inpatient from September 28 until October 16, 2020 and completed the program requirements. He was seen to be actively engaged with programming and sought to take on extra household responsibilities. Further aftercare support is available.

[117] He has a criminal record. None of those convictions was for a sexual offence or a violent offence. He has never been sentenced to imprisonment. He was on probation at the time of the current offences. He otherwise completed his other probation conditions including restitution, satisfactorily.

[118] He still maintains his innocence.

[119] He advised the court that he had consumed alcohol every time he had been in trouble with the law. He said he wanted to apologize. He was intoxicated.

[120] Eight days before the original sentencing date, the following letter from Mr. Rusk, dated January 14, 2021, was forwarded to me by the Court office:

I am writing your Honour to let him know since my last court appearance the things that have changed and continue to change in my life. I have remained clean off drugs. I am still living in a stable home environment. I have cut off bad influences or people in my life that have a negative impact on my healthy living choices. I was working part time at Kelsey's Restaurant but due to COVID 19 I have been laid off. I took this opportunity to find full time employment. I started working fulltime December 17th-2020 at Novolex in Orangeville. I am a bag machine setup operator and I am currently making \$18.50 an hour with benefits. I have never had a job with benefits before so this is a big step up for me, not only for myself but for my daughter. The mother of my child doesn't have benefits so i am happy that this now is just something else I can bring to the table to help support our daughter. I just wanted to take this time to thank your Honour for letting me spend Christmas with my daughter and family. In that time i also found new employment and stayed out of trouble. I hope that in the chance that I do receive a conditional sentencing you know that I will do my time with no issues and continue to do my part with my new employment opportunity I now have.

[121] Since then he suffered a significant injury. He told me today that he is again working full time.

[122] He also read a further statement in which he indicated that he is remorseful and apologetic. He stated that the offences occurred at a bad moment in his life and that he has since taken steps to rehabilitate himself. He wishes to be a good father to his daughter and to continue to work full-time.

[123] He also provided me with a positive reference letter from the woman who has been his landlady for the past six months.

ANALYSIS

[124] Doherty J.A. aptly described my task here when he began the judgment in *R. v. Hamilton, supra* by stating:

The imposition of a fit sentence can be as difficult a task as any faced by a trial judge.⁴⁵

[125] Sentencing is not an exact science. The determination of the sentence that is just and appropriate in a given case is "a highly individualized exercise that goes beyond a purely mathematical calculation."⁴⁶

[126] The primary objectives in sentencing Mr. Rusk are denunciation and deterrence but I must not ignore the other principles of sentencing.

[127] I must craft a sentence that is proportionate to the gravity of the offences committed and the degree of responsibility of Mr. Rusk and yet, at the same time, one that is responsive to his unique circumstances.

⁴⁵ *R. v. Hamilton, supra* at para.1; See also *R. v. Lacasse, supra*, at para. 1 and *R. v. Friesen*, [2019] S.C.J. No. 100 (S.C.C.) at para. 43.

⁴⁶ *R. v. Muzzo*, [2016] O.J. No. 1506 (Ont. S.C.J.) per Fuerst J. at para. 59.

[128] I must consider both the aggravating factors and the mitigating factors when determining the appropriate sentence here.

[129] The aggravating factors can be found in the facts of the offence itself. In assessing these, I have noted the list of factors proposed in *R. v. Friesen, supra*, including the following:

- (1) Likelihood to reoffend
- (2) Abuse of a Position of Trust or Authority
- (3) Duration and Frequency
- (4) Degree of Physical Interference
- (5) Age of the victim

[130] With regard to his likelihood to reoffend, I have concerns about him.

[131] Alcohol was a factor in what happened here. Mr. Rusk has problems with alcohol. He has begun addressing these issues recently and appears to be making progress with regard to them but it is still too early to be sure where that is going.

[132] More concerning is the fact that Mr. Rusk displayed a total lack of insight into the concept of consent that night and it would appear that this has not changed since then.

[133] With respect to duration and frequency, all of the offences occurred on the same evening over a period of a few hours.

[134] I am satisfied however that there were five separate and distinct events. These all occurred in close proximity to each other but still in two or three separate locations. There was a short period of time that elapsed between each event.

[135] I am satisfied that consecutive sentences would ordinarily be appropriate here.

[136] With respect to abuse of a trust relationship, there was no such relationship here.

[137] With respect to the degree of physical interference, I note the following comments in *R. v. Friesen, supra*:

We acknowledge that the degree of physical interference is a recognized aggravating factor. This factor reflects the degree of violation of the victim's bodily integrity. It also reflects the sexual nature of the touching and its violation of the victim's sexual integrity.⁴⁷

[138] The five events in this case involved varying degrees of physical interference.

⁴⁷ *Ibid*, at para. 138.

[139] Immediately after greeting SD, someone he did not know, he hugged her tightly enough that he could place his hands on her buttocks. Clearly, in order for him to be able to do this, the front of his body must have been very close to if not touching the front of her body. In addition, he commented that she had caused him to have a “hardy” meaning an erection.

[140] Another time he “humped” her, grinding his pelvis into her buttocks from behind.

[141] Both of them were fully clothed at these times, but these were very physical intrusive acts.

[142] On a third occasion, he placed his hand on her buttocks.

[143] Separate and apart from this he exposed his penis to her and asked her to perform oral sex on him so that they could see how big his penis would get.

[144] The final episode involved him telling SD and her sister that he would like to have one of them or both on top of him. He said that he had a “big dick”. This was clearly an invitation for SD to touch his body for a sexual purpose

[145] Cumulatively, all this would amount to significant physical interference no matter how old the victim was.

[146] In this case, SD was only 13 years old.

[147] I refer back to the comments in *R. v. Friesen, supra* that:

...courts must also be particularly careful to impose proportionate sentences in cases where the victim is an adolescent. Historically, disproportionately low sentences have been imposed in these cases, particularly in cases involving adolescent girls, even though adolescents may be an age group that is disproportionately victimized by sexual violence.⁴⁸

[148] I note that the impact on the victim was significant. It will be a very long time before she gets over this, if in fact she ever does.

[149] There are few if any mitigating factors.

[150] He is relatively young.

[151] He has a prior criminal record. It does not include any sexual offences or offences of violence, but it does clearly reflect his problem with alcohol.

[152] To his benefit he has never been to jail before.

[153] To his detriment, he was on probation when he committed these offences.

[154] He has not expressed any remorse for what he did. Far from it. He pled not guilty. He continued to maintain his innocence even after being convicted. I recognize

⁴⁸ *Ibid* at para. 136.

that he is not to be punished for exercising his right to a trial, but I note here that he is definitely not entitled to the reduction in sentence that would likely have followed a guilty plea or any other expression of remorse. He did express a desire to apologize but did so in such general terms that I question whether that really meant anything.

[155] He has taken steps to address his substance abuse problem. I suspect that this was motivated more by a desire to resume a regular relationship with his daughter, but whatever his motivation this is a positive step. In addition, his recognition of the fact that he will have to follow through if he is to resume contact with his daughter gives me hope that he might in fact do what he needs to.

[156] In addition, his recent efforts to improve his employment situation also suggests that he may be capable of rehabilitation.

[157] Unfortunately, his timing in obtaining this new job could not have been much worse.

[158] After considering all of the above, I am satisfied that even if one were otherwise available here, a conditional sentence of imprisonment would not be consistent with the fundamental purpose and principles of sentencing.

[159] Neither is a sentence of imprisonment in the intermittent range.

[160] Neither would satisfy the need for denunciation and deterrence in this case.

[161] The appropriate sentence for any one of the five events would be imprisonment for three months or more. As I said above, these should be consecutive to one another.

[162] Taking totality into account however, the appropriate global sentence is imprisonment for one year. I would ordinarily apportion this with several consecutive sentences totalling one year. In light of the mandatory minimum sentences, I will be imposing concurrent sentences.

[163] The period of imprisonment should be followed by probation for three years.

[164] I am also satisfied that I should make an order pursuant to section 161 of the *Criminal Code*.

[165] In drafting the terms of that order, I am mindful of comments by both the Supreme Court of Canada and the Ontario Court of Appeal.

[166] The overarching protective function of section 161 of the *Criminal Code* is to shield children from sexual violence.⁴⁹

[167] However, an order under section 161 constitutes punishment and is not available as a matter of course. There must be an evidentiary basis upon which to conclude that the particular offender poses a risk to children; the specific terms of the order must

⁴⁹ *R. v. K.R.J.*, [2016] S.C.J. No. 31(S.C.C.). at para. 44; *R. v. Schulz*, [2018] O.J. No. 3526 (Ont. C.A.) at para. 41.

constitute a reasonable attempt to minimize the risk; and, the content of the order must respond carefully to an offender's specific circumstances.⁵⁰

[168] Courts should avoid imposing orders that create overbroad or unreasonable restrictions on an individual's liberty.⁵¹

[169] I am not satisfied that there is an evidentiary basis for me to conclude that Mr. Rusk poses a risk to children on playgrounds etc.

[170] I am satisfied that he should be kept away from SD and that he should not be in a position of authority towards females under 16 years of age.

[171] I am satisfied that the terms set out in the following order constitute a reasonable attempt to minimize any risk that he poses to young girls.

SENTENCE

[172] I sentence Mr. Rusk as follows:

- Count 4 – exposing his genitals for a sexual purpose to SD when she was under the age of 16 – imprisonment for three months;
- Count 6 – inviting SD to sexual touching when she was under the age of 16 – imprisonment for one year concurrent;
- Count 7 – sexual interference with SD when she was under the age of 14 – imprisonment for one year concurrent;
- Count 8 – sexually assaulting SD when she was under the age of 16 – imprisonment for one year concurrent;
- Count 10 – sexually assaulting SD when she was under the age of 16 – imprisonment for one year concurrent;
- Count 11 – inviting SD to sexual touching when she was under the age of 16 – imprisonment for one year concurrent.

[173] That will be followed by probation for three years.

[174] The terms of the probation will require that Mr. Rusk:

1. keep the peace and be of good behaviour;
2. appear before the court when required to do so by the court;

⁵⁰ *R. v. K.R.J.*, *supra* at paras. 48 and 49; *R. v. Schulz*, *supra* at para. 41.

⁵¹ *Ibid*, at para. 25.

3. notify the court or the probation officer in advance of any change of name or address and promptly notify the court or the probation officer of any change of employment or occupation;
4. report to a probation officer within two working days of his release from custody and after that, at all times and places as directed by the probation officer or any person authorized by a probation officer to assist in his supervision;
5. cooperate with his probation officer. He must sign any releases necessary to permit the probation officer to monitor his compliance and he must provide proof of compliance with any condition of this order to his probation officer on request;
6. not contact or communicate in any way, either directly or indirectly, by any physical, electronic, or other means, with SD, AW or MD;
7. not be within 20 metres of any place where he knows them to live, work, go to school, frequent, or any place he knows them to be;
8. attend and actively participate in all assessment, counselling or rehabilitative programs as directed by the probation officer, including alcohol abuse, substance abuse, parenting, or a sexual offender relapse prevention program or any other program recommended by his probation officer;
9. make reasonable efforts to seek and maintain suitable work
10. not seek, obtain or continue any employment, whether or not the employment is remunerated, or become or be a volunteer in a capacity, that involves being in a position of trust or authority with respect to female persons under 16 years of age.

[175] I also make the following ancillary orders.

[176] These are primary designated offences and I make an order pursuant to section 487.051 of the *Criminal Code*, authorizing the taking from Mr. Rusk of any number of samples of one or more bodily substances, including blood, that are reasonably required for the purpose of forensic DNA analysis.

[177] They are also designated offences pursuant to section 490.011 of the *Criminal Code*. Accordingly, I make an order pursuant to section 490.012 of the *Criminal Code*, that Mr. Rusk comply with the provisions of the *Sex Offender Information Registration Act* for life.

[178] I also make an order pursuant to section 161 of the *Criminal Code* prohibiting Mr. Rusk for five years from:

(a.1) being within 50 metres, of any dwelling-house where SD ordinarily resides;
or

(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 being in a position of trust or authority towards female persons under the age of 16 years.

[179] Pursuant to section 109 of the *Criminal Code*, for the next ten years Mr. Rusk is prohibited from owning, possessing, or carrying any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance.

[180] Finally, I make an order pursuant to section 743.21 of the *Criminal Code* prohibiting any contact or communication by him with SD during the custodial portion of his sentence.

Released: May 28, 2021

Signed: Justice D.A. Harris