SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. G*, 2023 NSSC 304

Date: 20230612
Docket: No. 508533
Registry: Digby

Between:

His Majesty the King

v.

W.B.G.

Restriction on Publication: s.486.4(1) Criminal Code

Judge:	The Honourable Justice Pierre Muise
Heard:	June 6, 2023, in Annapolis Royal, Nova Scotia
Oral Decision:	June 12, 2023
Counsel:	Daniel Rideout for the Crown Jonathan Cuming and Michael Curry for W.B.G.

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 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 from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(iii) [Repealed 2014, c. 25, s. 22(2).]

(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).

By the Court:

Introduction

[1] At trial, Mr. G was convicted of having, between April 8, 2013 and April 8, 2019; at or near South Range, Digby County, Nova Scotia, committed a sexual assault on AS, contrary to s. 271 of the *Criminal Code;* and, when she was under the age of 16 years, for a sexual purpose, touched AS contrary to s. 151 of the *Criminal Code*, invited her to touch him, contrary to s. 152 of the *Criminal Code*; and, touched her while in a position of trust or authority, contrary to s. 153 of the *Criminal Code*. He was also convicted of the same set of offences, during the same date range, committed at or near Granville, Annapolis County, Nova Scotia.

[2] As agreed by both parties, the s. 271 offences are conditionally stayed in accordance with the principle against multiple convictions, commonly referred to as the *Kienapple* principle.

[3] There is disagreement regarding whether any of the remaining charges should be stayed. I will determine that question first.

[4] The Crown proceeded indictably on all charges and some of the incidents post-date July 17, 2015. Therefore, all three remaining offences carry a maximum penalty of 14 years' imprisonment.

[5] The one-year minimum penalty for the s. 151 and 153 offences has been expressly declared unconstitutional by our Court of Appeal in R. v. Hood, 2018 NSCA 18. By implication, the one-year minimum for the s. 152 offence would also be unconstitutional, as it would involve the same reasonable hypothetical.

[6] There is a publication ban on the identity of the victim and any information that might disclose her identity.

[7] I am rendering this decision orally. Should it be released in written form, I reserve the right to edit it for grammar, structure and organization, as well as to provide complete citations and references, without changing the reasoning or the result.

Whether Other Charges To Be Stayed Based on *Kineapple*

[8] The Crown recognizes that all of the sexual contact was with a person who was both under 16 and while the accused was in a position of trust or authority in relation to that person. However, it submits that none of these remaining charges should be stayed because each has at least one element that is not part of the other two.

[9] Mr. G submits that he should not be sentenced on both the s. 151 offences and the s. 153 offences because the prohibitions against sexual contact with a person under 16 and with a person in relation to which he was in a position of trust or authority are both aimed at protecting people who cannot consent because of their vulnerability.

[10] It is true that there is no consent where the sexual contact is with a person under 16, in circumstances involving the age gap in the case at hand, or where the accused abuses a position of trust or authority towards the complainant. It is also true that this recognizes the vulnerability of such persons. However, that does not change the fact that the age and position of trust or authority elements are clearly different elements.

[11] Except in limited circumstances which do not obtain in the case at hand, there will not be a sufficient legal nexus or proximity between offences, to justify a Kienapple stay, if there is an additional or a distinguishing element between the offences: ***R. v. Prince***, [1986] 2 S.C.R. 480. The elements of the offences have to be "substantially the same": ***R. v. Crabe***, (1993), 79 C.C.C.(3d) 323 (B.C.C.A.), at p. 330.

[12] It was not the fact that AS was under 16 that made it such that Mr. G was in a position of trust or authority in relation to her. That arose because Mr. G. and his

wife took AS into their home, at times over 50% of the time, to provide her care and a place to stay because she was unable to stay with her mother, and because Mr. G employed AS to work with him in his farming operations.

[13] So, the factual basis required to satisfy the position of trust or authority element is different from that required to satisfy the under-16 element.

[14] For these reasons, the Kienapple rule against multiple convictions clearly does not apply as between the s. 151 offences and the s. 153 offences.

[15] Mr. G also submits that the Court ought not enter a conviction on the s. 152 offences because there was no evidence the invitation to sexual touching was effected verbally, such that it formed part of the sexual interference and sexual exploitation. In support, he cites ***R. v. P.R.J.***, 2023 BCCA 13. Paragraphs 61 and 62 of that case state:

> [61] In the present case, P.R.J.'s taking of P.'s hand was both an act of sexual interference and the means by which she committed the offence of invitation to sexual touching. In these circumstances, those offences describe different ways of committing the same criminal wrong.
>
> [62] To sum up, in this case the trial judge found that on that night, P.R.J. sexually interfered with P., thereby committing the offence charged in Count 1 of the indictment. P.R.J. did so by digitally penetrating P.'s vagina, kissing P.'s vagina, and placing P.'s had on her vagina. While the taking of P.'s hand satisfied the element of the offence of invitation to sexual touching charged in Count 2, to paraphrase Dickson C.J. in Prince, to separately convict P.R.J. of that offence would be to heap multiple convictions on her in respect to a single

> criminal act without good reasons. What occurred that night was a single act of child abuse that should result in a single conviction. The offence of sexual interference best captures the totality of P.R.J.'s conduct.

[16] As in ***R. v. P.R.J.***, there was no evidence in the case at hand of Mr. G expressly, for a sexual purpose, asking AS to touch him. However, otherwise, the circumstances of the case at hand are different from those in ***R. v. P.R.J.*** in that they did not involve one isolated incident. There were many incidents, spanning a very long period of time. There was not evidence of invitation to sexual touching in relation to all incidents. AS testified that, during some of the incidents, they each removed their clothing and were completely naked. On those occasions, Mr.G removing his clothing and exposing his genitals to AS was clearly an implied invitation to sexual touching. Unlike the taking of the victim's hand in ***R. v. P.R.J.***, it was an act that preceded AS touching him sexually, and not an act that also constituted him touching AS for a sexual purpose.

[17] Consequently, in the case at hand, the acts comprising the invitations were not substantially the same acts as the sexual touching of AS, even though they occurred immediately before sexual touching that was, at times, reciprocal. The implied invitation was an additional element that is not part of the s. 151 offences or the s. 153 offences.

[18] Therefore, the s. 152 offences are not to be stayed pursuant to the Kienapple principle against multiple convictions.

[19] So, he is being sentenced in relation to the s. 151, 152 and 153 offences.

Circumstances of the Offence

[20] The circumstances of the offences are as follows.

[21] Mr. G engaged in multiple incidents of sexual touching of AS, digital penetration of her vagina and anus, and, reciprocal oral sex with her. It occurred while she was 11 to 15 years of age, working for Mr. G, on his farm, and living with him and his wife, at times, over half of the time. Mr. G was in his forties. It would happen in the house where they were living, in Mr. G's father's house in Granville, which was vacant, in the truck while they were making deliveries, and, in the woods while on 4-wheeler rides. It started with him cuddling her, then moved to kissing her neck. Gradually it got to the point where he was touching her buttocks and breasts. Then it became more intrusive, involving digital penetration and oral sex. Those more intrusive acts were interspersed with less intrusive acts. It was pervasive and frequent. Every time they were alone there was at least grabbing of a sexual nature. Sometimes they were completely naked. Sometimes she just had her pants down. At other times they would put their hands down each other's pants.

[22] The child protection agency and police had interviewed her in 2016 when they received a complainant that the relationship between Mr. G and AS appeared to be inappropriate. At that time, she told them nothing inappropriate was happening and that Mr. G was just a father figure. That was about 3 years before she, herself, reported what was really happening. She said she did that to protect him because she was in love with him at the time. He had told her that he had depression and, before she came along, he did not plan to keep living, but she gave him new hope. He would talk about leaving his wife to be with her when she went off to university.

[23] When she was 15 the thought of him following her created anxiety for her. She was spending less and less time at the G's. She started realizing that what she had thought was love really was not love. She stopped working for him. She moved back in with her mother. At that point she felt safe and secure enough to report what he had been doing.

Sentencing Recommendations

[24] The Crown recommends the following sentence and ancillary orders:

- 6 years' imprisonment consecutive to any sentence he may be serving but with the 6 years for each offence being concurrent with each other;
- a SOIRA order for 20 years;
- a DNA order;

- a s. 161 order (including clauses a, a.1, b, and c) for 10 years;

- a s. 109 Firearms Prohibition Order for 10 years; and,

- an order under s. 743.21 of the *Criminal Code* prohibiting communication, directly or indirectly with the victim during the custodial period of the sentence.

[25] As the Crown notes, the Supreme Court of Canada decision in ***R v. Friesen***, 2020 SCC 9, significantly changed the sentencing of individuals for sexual offences against children. It summarizes and relies upon principles and guidelines laid out in ***Friesen***.

[26] The Defence agrees with the principles and guidelines in ***Friesen***, including that ***Friesen*** may require an upward adjustment of sentences, and joins in the recommendation for 6 years' imprisonment.

[27] It takes no issue with the ancillary orders requested except for making some comments on the s. 161 order. It submitted the s. 161 order might not be required to protect the public because Mr. G has been on interim release since 2019 without those conditions. However, it is not opposing it. It only seeks exceptions to permit Mr. G to continue his farming operations on his release from imprisonment.

[28] He submits that, if a s. 161 order is to be imposed, it would be proper to include exceptions to make it reasonably practicable for him to continue running his farming operations.

[29] The Supreme Court of Canada, in ***R v. Anthony-Cook***, 2016 SCC 43, confirmed that the public interest test is the proper legal test to be applied in determining whether to accept a joint recommendation. Under that test, "a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest".

[30] It emphasized the vital importance to the criminal justice system of joint submissions agreed upon in exchange for a guilty plea and the need for a high degree of certainty in such joint recommendations.

[31] In the case at hand, the joint recommendation was not arrived at in exchange for a guilty plea. However, the comments at paragraph 41 of ***R. v. Anthony-Cook*** indicates the basic public interest principle still applies. Those comments were that, if there is not enough certainty a joint recommendation will be accepted, "the parties may choose instead to accept the risks of a trial or a contested sentencing hearing".

[32] The interests of justice and the public interest are well served by accepting a joint submission when the recommended sentence is within the acceptable range, and thus fit and reasonable, even in the absence of a negotiated plea.

[33] Determining the appropriate range of sentence requires the Court to consider the objectives and principles of sentencing.

[34] ***Friesen*** addressed them in detail as they relate to sexual offences against children, with particular emphasis on denunciation, deterrence, proportionality, and how parity relates to proportionality. Prior to applying the objectives and principles of sentencing to the case at hand, I refer to the outline of the relevant points from ***Friesen*** contained in paragraphs 15 to 21 of my decision in ***R. v. Wood***, 2021 NSSC 253, where I stated:

> [15] The main themes in **Friesen** are summarized at paragraph 5 as follows:
>
> > …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.
>
> [16] Those themes are expanded upon in **Friesen** as follows:
>
> • Precedent cases provide the body of sentences that judges use to determine what is a proportionate sentence. When done in a consistent manner, it satisfies the principle of parity: paras 32 and 33.

• "Protecting children from wrongful exploitation and harm is the overarching objective of the legislative scheme of sexual offences against children in the *Criminal Code*": para 42.

• "[S]entencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause": para 50.

• "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": para 51.

• "This … requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that … 'may often be more pervasive and permanent in its effect than any physical harm'": para 56.

• At paragraphs 57 and 58, the Court noted various forms of emotional and psychological harm resulting from such offences, and highlighted that they "are particularly pronounced for children".

• At paragraphs 60 and 61, it discussed the harm caused in the form of damage to the child's relationship with their families and caregivers.

• Paragraphs 62 to 64 describe the forms of harm that families, communities and society suffer. They include, among others:

  • Destruction of trust;

  • Feelings of guilt and powerlessness;

  • The financial and emotional costs of the child's need to recover and overcome behavioral challenges;

  • Resulting social problems;

  • Costs of intervention; and,

  • Medical costs.

• "Sexual violence against children is especially wrongful" because of their vulnerability: para 65.

• "Sexual violence has a disproportionate impact on girls and young women": para 68.

• Indigenous people and other groups that are marginalized or discriminated against, including youth in the care of a government agency, are disproportionately impacted by sexual violence against children, and thus particularly vulnerable: paras 70 to 73.

• "[C]ourts need to take into account the wrongfulness and harmfulness of sexual offences against children when applying the proportionality principle": para 75.

• In assessing the gravity of the offence, courts must "give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences": para 76.

• These must also be considered in determining the offender's degree of responsibility: para 87.

• The sexual exploitation of children, because of their vulnerability, and the interference with their sexual and psychological integrity, aggravates the wrongfulness: para 77 and 78.

• The fact that the victim is a child, and the offenders ought to know of the potential harm, increases their degree of responsibility: paras 88 to 90.

• Paragraphs 79 to 81 describe several potential forms of harm that can manifest themselves during childhood or only become evident in adulthood. Some can rob the child victim of their youth and innocence. Many result in relationship and trust challenges, fear, mental and psychological health issues, sleep disturbances, and anti-social or self-destructive behavior.

• At paragraph 84, the following is stated:

> … courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. Even if an offender commits a crime that fortunately results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence.

• Then, at paragraph 85, it is noted, however, that actual harm "is a key determinant of the gravity of the offence."

• Parliament has mandated that sentences for sexual offences against children must increase by: increasing maximum sentences where the child is under 16; and, requiring courts to give primary consideration to denunciation and deterrence where the victim is under 18: paras 95 to 103.

• Parliament's prioritization of denunciation and deterrence for sexual offences against children is reflective of their wrongfulness and the harm they can cause: para. 105.

[17] Friesen, at paragraph 110, stated that "Courts should … 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'".

[18] Friesen, at paragraph 107, stated:

> We are determined to ensure that sentences for sexual offences against children correspond to Parliament's legislative initiatives and the contemporary understanding of the profound harm that sexual violence against children causes. To do so, we wish to provide guidance to courts on three specific points:
>
> > (1) Upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence;
> >
> > (2) Sexual offences against children should generally be punished more severely than sexual offences against adults; and,
> >
> > (3) Sexual interference with a child should not be treated as less serious than sexual assault of a child.

[19] At paragraph 114, it stated:

> …it is incumbent on us to provide an overall message that is clear … . That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim.

[20] At paragraph 116, it noted that Parliament signaled that sexual offences against children are to be punished more severely than those against adults. It did so by way of the same provisions discussed in relation to increasing sentences, plus those making abuse of persons under 18, and abusing a position of trust or authority, aggravating factors.

[21] At paragraphs 121 to 154, the Court discussed significant factors to consider in determining a fit sentence. They include the following:

1. The greater the risk of re-offence, the greater the emphasis that should be placed on the sentencing objective of separating the offender from

society. Though rehabilitation is to be encouraged, because it offers long-term protection, it can occur through programming within the prison, while ensuring short-term protection.

2. An offender who abuses a position of trust should receive a lengthier sentence than one who is a stranger to the child because the breach of trust is likely to increase the harm and thus the gravity of the offence, and it is aggravating because it increases the offender's degree of responsibility.

3. Significantly higher sentences should be imposed on offenders who commit sexual violence against children on multiple occasions and for longer periods of time.

4. The age of the victim is a significant aggravating factor because dependency and vulnerability are more pronounced in younger children, which impacts both the gravity of the offence and the degree of responsibility.

5. There are several dangers in defining a sentencing range based on the specific type of sexual activity at issue. Significant harm can flow from all types of sexual acts. Friesen strongly cautions 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 hierarchy of physical acts. However, an elevated degree of physical interference is still an aggravating factor.

6. The child victim's participation in the sexual activity is not a mitigating factor, nor even a relevant consideration at sentencing. It is an error of law to treat it as such, even though it "may coincide with the absence of an aggravating factor, such as additional violence or intimidation. It would "undermine the wrongfulness of sexual violence against a child" by shifting blame to the victim, and ignore the fact that sexual offences are inherently violent. It is always the adult's "responsibility to refrain from engaging in sexual violence towards children". Breach of trust or grooming leading to the participation is an additional aggravating feature.
…

Purpose and Principles of Sentencing

[35] The purpose, objectives and principles of sentencing in ss. 718 to 718.2 of the *Criminal Code* are to be considered.

[36] Ss. 718 and 718.01 provide:

> 718. The fundamental purpose of sentencing is 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;
>
> (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 and to the community.
>
> 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.

The Objectives of Sentencing

[37] The objectives of denouncing unlawful conduct, and, deterring the offender and other persons from committing offences, are of paramount importance when dealing with sexual offences, especially when committed against a person under the age of 18. In the case at hand, the victim was only between the ages of 11 and 15. Therefore, pursuant to s. 718.01, I am statutorily directed to give primary consideration to the objectives of denunciation and deterrence. Also, because the person abused is vulnerable as a female, pursuant to s. 718.04, I am, as well,

statutorily directed to give primary consideration to the objectives of denunciation and deterrence.

[38] Another objective is, where necessary, separating the offender from society. ***Friesen*** notes that "mid-single digit penitentiary terms for sexual offences against children are normal" and "substantial sentences can be imposed where there was only a single instance of sexual violence". The circumstances of the case at hand easily require a penitentiary sentence, to give effect to proportionality, parity and the requirement that primary consideration be given to denunciation and deterrence.

[39] A further objective is to assist in rehabilitating the offender. Mr. G has not accepted responsibility. He maintains his innocence. That is not an aggravating factor. It is the absence of a mitigating factor and diminishes the prospects of rehabilitation. He has not participated in, nor explored, sex offender assessment or counselling. So, there is little or nothing indicating that Mr. G is likely to be rehabilitated. That said, there will be programming available in the institution, that will hopefully help promote rehabilitation.

[40] Other objectives are: to provide for reparations for harm done to victims and the community; and, promoting a sense of responsibility in the offender, and

acknowledging the harm done to the community. I will deal with these objectives together.

[41] True reparation is likely impossible in relation to the victim.

[42] Unfortunately, no sentence imposed will provide true and full reparation for the inevitable harm caused to the victim by having her sexual integrity violated repeatedly by someone who was expected to care for her and protect her.

[43] There is no victim impact statement.

[44] During her testimony at trial, AS described or exhibited some of the actual harm caused to her. It included the following:

1. She was clearly overcome with strong negative emotions, causing deep pain, when she spoke of believing she was in love with Mr. G at the time, and only realizing when she got older that what had been happening was not love.

2. It was clear, when she was testifying, that she was feeling the pain of the abuse, particularly when discussing the more intrusive acts.

3. He had said to her that, when she went to university, he would leave his wife and go with her. The thought of him following her caused her to have anxiety.

4. She only felt safe enough to report after she stopped working for Mr. G and was able to move back in with her mother.

5. She is more susceptible to manipulation by other people.

6. She finds herself more anxious and depressed.

7. She sometimes has trouble with physical touch.

8. She sometimes has trouble remembering things, or only remembers things later, as her brain sometimes will block things out due to being triggered about the trauma.

[45] I must also take into consideration the reasonable potential for additional harm that is not yet apparent to the victim, as expressed in ***Friesen***, some of which I have already outlined in the excerpt from my decision in ***R. v. Wood***.

[46] There is still some hope for recovery. As stated at paragraph 59 of ***Friesen***:

> In emphasizing the harmfulness of sexual offences against children, we do not intend to stereotype child victims of sexual violence as forever broken. To the contrary, it takes great "strength and courage" to survive sexual violence as a child …. Frequently, child victims make "valiant and repeated efforts to have someone believe their allegations … . Many victims go on to live healthy and meaningful lives with fulfilling and loving relationships. Offenders cannot rob children of their "strength, compassion, love for others and intelligence" and "resolve to take back their lives".

[47] AS displayed great courage, strength and maturity in presenting her evidence. Her explanations of why she protected Mr. G, during the 2016 investigation into

whether there was an inappropriate relationship, showed great insight and introspection. It is hoped that these same attributes will help heal her inevitable psychological and emotional wounds.

[48] A sentence involving imprisonment can serve to acknowledge the level of harm done, not only to the victim herself, but also to the community at large, and promote a corresponding sense of responsibility in the offender.

[49] Mr. G has not pursued a sexual offender assessment, nor rehabilitative counselling. That may be futile given his denial of the offence. However, it still suggests he, likely, does not fully appreciate the level of harm this type of offence brings to victims, families and communities.

[50] As indicated in ***Friesen***, in addition to the detrimental impact upon the victim, these types of offences also have a detrimental impact on the victim's family, the community at large, and society in general.

[51] The common impact they can have on an individual victim, such as depression, anxiety, anger, low self-esteem, and other mental health difficulties, can flow over to the community at large in the way of, among other things, social issues requiring intervention, diminished productivity and higher health care costs.

[52] It leads to distrust and fear, for the victim and the community at large, limiting our sense of security and freedom.

Other Sentencing Principles

[53] The following codified sentencing principles also apply:

> 718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
>
> 718.2 A court that imposes a sentence shall also take into consideration the following principles:
>
> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> > ....
> >
> > (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
> >
> > (iii)evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
> >
> > (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, …
> >
> > ....
>
> shall be deemed to be aggravating circumstances;
>
> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
>
> ….
>
> (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

> (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders … .

Proportionality (s. 718.1)

[54] Given the circumstances of the offences, their frequency and pervasiveness, the level of intrusiveness, the breach of trust, the inherent wrongfulness of sexual exploitation, the long period over which it went on, the actual harm suffered, and the potential harm that may surface, it is a very grave offence.

[55] The same points establish a high degree of responsibility in the offender. He had to know that committing such acts on an 11 to 15-year-old, who lived with them, at some points over half of the time, and who they were providing care for, would have a detrimental impact on her, her family, and the community.

[56] The victim was vulnerable because of her age, being unable to live with her mother due to her mother's husband having a conviction for a sexual offence against a child, being under the care of Mr. G and his wife and also being employed by Mr. G, during the times the abuse occurred.

[57] He was able to have frequent access to her, without another adult present, because: he was trusted to protect and care for her; and, they worked together, including at locations away from where Mr. G and his wife lived, at a farmhouse that Mr. G locked when they were in it, in the vehicle and in wooded areas. He

orchestrated and took advantage of those circumstances for his own self-gratification, irrespective of the impact on the victim.

[58] There is no evidence establishing a diminished level of capacity on the part of the offender which would show diminished responsibility.

[59] There is no indication Mr. G had a difficult childhood. That is an absence of a mitigating factor that is often present.

[60] He acted alone in the illegal acts. They continued repeatedly and fairly regularly for about 5 years. The offences were not the product of a momentary lapse of judgement. They involved planning, manipulation and secrecy. He was solely and fully responsible for the offending behaviour.

Aggravating and Mitigating Circumstances in the Case at Hand

Aggravating Circumstances

[61] The aggravating circumstances in the case at hand include the following:

1. The offender abused a person under 18, a statutorily mandated aggravating factor under s. 718.2(a)(ii.1).

2. He was in a position of trust in relation to the victim, a statutorily mandated aggravating factor under s. 718.2(a)(iii). It approached the

level of a parent as he and his wife were looking after her when she lived with them and he at least presented as a father figure to her. That augments the aggravating effect. In addition, during many of the incidents the victim was doing some work in his business. Therefore, he was also in a position of authority in relation to her because of that.

3. The victim was vulnerable because of: her age; being unable to live with her mother when her mother was with her stepfather; her relying on the G's for a place to stay and someone to care for her; her working for Mr. G; her being in love with Mr. G; him manipulating her by saying he would leave his wife for her; and, generally her being vulnerable as a female.

4. The offence involved direct, skin to skin, application of force to multiple parts of her body, including feeling her breasts, buttocks and vagina; cunnilingus; and digital penetration of her anus and vagina. It also involved him having her fellate him and stimulate his penis with her hand. Those include highly intrusive acts with a significant level of physical interference, which is an aggravating factor.

5. It is made even more aggravating by the fact that it occurred repeatedly and pervasively, every time they were alone, over a period of about five years.

6. There was a large age gap between Mr. G and AS.

7. The offence had a significant impact on the victim, as revealed by her evidence at trial. The impact that can reasonably be expected is also significant, given that the abuse occurred during ages when AS would have been just starting to develop physically and discovering her sexuality, which can be a confusing and emotional time even in the absence of such abuse. He robbed her of the chance to live and experience her transition into adolescence in a healthy way. She can never get that back. These harmful impacts are also a statutorily mandated aggravating factor under s. 718.2(a)(iii.1).

Mitigating Circumstances

[62] The mitigating circumstances in the case at hand include the following:

1. He has no criminal record, having gone 49 years without acquiring one.

2. He is the owner and operator of a fruit farming operation and hires multiple employees.

3. He has complied with the release conditions he has been under since July 12, 2019, albeit with the most restrictive condition being to remain in Nova Scotia.

4. He has the support of his wife and family.

5. He suffers from asthma, depression, hypothyroidism, psoriasis and gastro-esophageal reflux disease, and is on medications for these conditions, making incarceration more difficult for him than someone who is healthy.

6. His incarceration will seriously threaten the viability of his farming operations. At trial we heard evidence that he was working it essentially 7 days per week and getting up in the early morning hours to make deliveries. Having to pay someone for that work will greatly increase expenses. In addition, his wife, Shelly G., testified that Mr. G is the only one who currently has the certification, training and experience required to apply sprays, including pesticides and fungicides. Following multiple days of rain it is especially important that they be applied to protect the plants and prevent crop loss. Since Mr. G was found guilty in December 2022, they have been taking steps to have her trained and certified. She has passed the exam. However, she has not yet completed the practical

training required. Even once she is certified, she will not have Mr. G's level of experience. About 30 people rely upon the farm remaining viable for their employment. Sobeys, Foodland and other retail outlets throughout Southwestern Nova Scotia also rely on the farm to supply them with produce.

Friesen Factors

[63] I will also address the relevant factors outlined at paragraphs 121 to 154 of ***Friesen***, for determining an appropriate sentence for a sexual offence against a child, even though there is some overlap with points that I have already made in the course of discussing the objectives and principles of sentencing.

1. Mr. G has not taken any rehabilitative initiative. This increases the risk of re-offence and militates in favour of placing greater emphasis on separating the offender from society. Both short-term protection of the community and rehabilitative programming can be accomplished and accessed through a period of imprisonment.

2. Mr. G was in a position of trust in relation to the victim which approached that of a parent. It greatly increases his level of responsibility, as well as the likely harm and gravity of the offence, thus militating in favour of a lengthier sentence.

3. Unfortunately, the sexual violence against AS was repeated and pervasive, over about 5 years. Therefore, the principle that a sentence increase should follow if the sexual violence had been committed on multiple occasions and for longer periods of time is a weighty factor in the case at hand.

4. AS was only 11 years old when it started, only 15 when it ended, and vulnerable for the reasons I have described. That increases the gravity of the offence and Mr. G's degree of responsibility.

5. As already indicated, the acts were highly intrusive, with a significant degree of physical interference involved, including digital penetration of her vagina and anus and reciprocal oral sex, which is an aggravating factor. The acts in this case were at the highest level of intrusiveness.

6. The fact that, after the initial period of sexual contact, AS became a willing participant is not mitigating and not legally relevant on sentencing. Mr. G clearly knew the sexual violence against AS was wrong, as he had coached her on what to say if she was ever interviewed about their relationship. Yet he repeatedly exploited his frequent unsupervised contact with AS for his own self-gratification, when he

was trusted to keep her safe. That, combined with the absence of factors diminishing responsibility, reveals a high level of moral culpability.

Parity Principle (s. 718.2 (b))

[64] A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This principle, of course, recognizes that no two cases are identical, and that the Court is not to take a cookie-cutter approach to sentencing.

[65] Counsel have provided multiple comparison cases.

[66] They agree that the comparison cases showing the most appropriate range are those where sentences of 5 to 7 years were imposed. Those include the following:

1. ***R. v. AMB***, 2022 NSSC 262;
2. ***R. v. APL***, 2021 NSSC 238;
3. ***R. v. G.P.W.***, 2021 NSSC 192; and,
4. ***R. v. K.M.***, 2020 NSSC 278.

[67] The facts in those cases are varied and some are significantly different than those in the case at hand. For example, one involves one incident of violent rape by an 18-year-old on a 15-year-old. However, the constellations of mitigating and

aggravating features in those cases support a 6-year sentence in the case at hand as being within an acceptable range.

[68] That is not to say that a higher sentence would be outside the acceptable range. The constellation of factors in the case at hand could clearly also justify a higher sentence.

Restraint (s. 718.2 (d) & (e))

[69] I have considered the principle that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances, and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.

[70] In my view, no sanction less restrictive than imprisonment is appropriate in the case at hand. However, the principle of restraint still applies in determining an appropriate length of sentence.

Sentence

[71] Considering the directions in ***Friesen***; the objectives, principles and factors that I have noted; the comparison cases; and the circumstances of the case at hand, the jointly recommended sentence of 6 years' imprisonment is within a fit and

proper range of sentence. It would not bring the administration of justice into disrepute or be contrary to the public interest to accept it.

[72] So, I sentence you, Mr. G, to 6 years' imprisonment for the s. 151 offence committed at or near South Range, Digby County, consecutive to any sentence you may be serving, and to 6 years' imprisonment on each of the remaining s. 151 and s. 153 offences, to be served concurrently. There was one set of charges for the South Range offences and another identical set of charges for the Granville, Annapolis County offences. However, all incidents at both locations were advanced and treated by the Crown as part of the same ongoing pattern of abuse. In the circumstances, the jointly recommended approach to concurrency of the additional sentences would not bring the administration of justice into disrepute and is not contrary to the public interest. Having said that, the proven s. 152 offences are much less extensive and pervasive. Therefore, I will impose a sentence of 3 years' concurrent in relation to each of those offences.

Ancillary Orders

[73] In relation to the DNA order requested, s. 151, 152 and 153 offences are primary designated offences in subsection (a) of the definition in s. 487.04. Therefore, a DNA order is absolutely mandatory. There is no discretion to decline

to make the order on the basis of grossly disproportionate impact. So, a DNA order will issue.

[74] There is a request for a s. 109 Firearms Prohibition Order. It is mandatory for a minimum period of 10 years, and for some specified items, for life. There is no indication Mr. G was subject to any prior firearms prohibition. In the circumstances of this case, there is no need to extend the prohibition past the 10-year minimum. Therefore, as required by s.109, I grant the s.109 Prohibition, starting today and ending 10 years after his release from imprisonment, in relation to the items listed in s.109(2)(a), and, also as required by s.109, for life in relation to items listed in s.109(2)(b).

[75] There is a request for a SOIRA Order. All of the offences are designated offences under s. 490.011(1)(a). Pursuant to s. 490.013 (2)(b), the SOIRA order is to be imposed for 20 years because s. 490.013(2.1) was declared unconstitutional and of no force and effect in ***R. v. Ndhlovu***, 2022 SCC 38.

[76] The Crown is also seeking a s. 161 order including clauses a, a.1, b, and c, for 10 years. Those clauses provide for prohibiting the offender from:

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

(a.1) being within two kilometres, or any other distance specified in the order, of any dwelling-house where the victim identified in the order ordinarily resides or of any other place specified in the order;

(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 persons under the age of 16 years;

(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 supervision of a person whom the court considers appropriate; …"

[77] The Defence is not opposed to the order. It is only seeking exceptions, which the Crown is open to, provided they are crafted to ensure sufficient protection remains, and which they have discussed. There is clearly an evidentiary basis upon which to conclude that Mr. G poses a risk to children if he has unsupervised contact with them, and that a s. 161 order will minimize that risk, including as it

relates to farm employees under 16. The proposed 10-year length is in-keeping with comparative lengths imposed by this Court.

[78] The farm hires many workers under 16. It would be detrimental to the farm and to the students who rely on farm work for summer jobs if Mr. G was unable to hire them. So, (b) and (c) will be subject to the following exception: “except as necessarily incidental to hiring and supervising farm workers, provided there is an adult, who is aware of the offences for which this order is being made, immediately present whenever Mr. Gilliatt has any direct contact or communication with a person under 16”.

[79] Mr. G delivers farm produce to schools by himself, it would strain the business farm finances if he had to hire someone to do that with him or for him. So, to (a) will be added the following exception: “except as necessarily incidental to delivering farm products as part of his farming operation, provided there is an adult immediately present, which may include an adult that is already at the location where the delivery is being made”.

[80] I also grant an order under s. 743.21 of the Criminal Code prohibiting Mr. G from communicating, directly or indirectly with AS during the custodial period of the sentence.

[81] The parties jointly recommend that the victim surcharges be waived. Given the length of his sentence and the detrimental impact it is likely to have on the profitability of his farming operation, it is proper to do so, as it would likely cause undue hardship to him due to inability to pay. So, the victim surcharges are waived.

Pierre Muise, J.