SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Julian Fitzgerald*, 2024 NSSC 106

Date: 20240130
Docket: *Yarmouth*, No. 510361
Registry: Yarmouth

Between:

His Majesty the King

Plaintiff

v.

Julian Fitzgerald

Defendant

Restriction on Publication: Restriction on Publication: s.486.4CC

Judge: The Honourable Justice Muise

Heard: October 3, 2023, in Yarmouth, Nova Scotia

Counsel: Chelsea Cottreau, for the Plaintiff
Christopher Arisz, for the Defendant

Restriction on Publication: s.486.4CC

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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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

(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:

DECISION ON SENTENCE

[1] I remind everyone that there is a publication ban on any information that might disclose the identity of the victim and of any witness under 18 years of age. Those included FM, HS and SH.

Offences

[2] Julian Fitzgerald is being sentenced in relation to an offence of sexual assault contrary to section 271(1) of the *Criminal Code* and an offence of unlawful confinement contrary to section 279(2) of the *Criminal Code*.

[3] The Crown proceeded by indictment on both charges.

[4] Each offence carries a maximum penalty of 10 years.

[5] There is no minimum penalty.

Circumstances of Offences

[6] The offences occurred on or about September 12, 2019.

[7] The accused was about 30 years of age at the time.

[8] The victim, FM, was only 16 years of age.

[9] She met Mr. Fitzgerald through a mutual friend, HS. She had been informed that Mr. Fitzgerald was paying HS just to hang out with him. Her own family was struggling financially at the time. She thought it would be good if she could also get paid simply for hanging out with him.

[10] So, she started communicating with him on social media.

[11] They had only been communicating maybe two weeks before she met up with him in person.

[12] They arranged to meet to go for a drive, have a chat, and get breakfast and that she would get paid for doing so.

[13] On that day, September 12, 2019, she took the bus to her school. However, she did not go into the school. She walked straight to a local ballfield.

[14] Mr. Fitzgerald picked her up there. They drove around the block and pulled back into the same area, parking in a spot from which you could not see the road.

[15] He locked the doors. That made her feel scared and confused.

[16] He grabbed her by the shoulder, pushed her into the backseat through the middle of the two front seats, and went into the back with her. The force he used was scary to her.

[17] He pulled her pants down, pulled his own pants down, pulled the fabric of her body suit to the side of her vagina, and proceeded to have vaginal intercourse with her, for about 3 to 7 minutes. As this was happening his body weight was on top of her body. He did not use protection. However, he did not ejaculate.

[18] She did not say anything. He did not ask permission and she did not give him permission to do what he did.

[19] She did not consent. She was feeling scared and hurt. She was feeling so many emotions that it was almost as though she was feeling nothing, and ignoring what was happening. She was not really there. She just let him do what he did. It felt disgusting and terrible.

[20] When he finished, he told her to pull up her pants and go. She did pull up her pants. He unlocked the door. She left and walked back to the school. There in a distraught state she indicated to a friend what had happened without providing specifics.

[21] In communications leading up to the meeting, she had told Mr. Fitzgerald that she did not want to engage in sexual activity.

[22] She felt she had to specifically make that clear in communications because, amongst other reasons, she was not sure whether what he and HS had done involved sexual activity.

[23] In retrospect she felt she was very naïve in trusting that he would hang out with her and give her money.

Sentence Recommendations

[24] The Crown recommends 4 to 6 years of imprisonment for the sexual assault and 9 to 12 months of imprisonment for the unlawful confinement, to be served concurrently, as well as the following ancillary orders:

- A SOIRA order for 20 years under s.490.013(2)
- A Primary DNA order under s. 487.051
- A s. 109 Firearms Prohibition Order, which is mandatory, for 10 years and for life for restricted and prohibited firearms
- A s. 743.21 noncommunication order with FM while serving the custodial sentence
- A victim surcharge of $200 per offence

[25] The Defence recommends, for the sexual assault, a period of imprisonment of 2 years less a day, to be served in the community under a conditional sentence order, followed by 2 years' probation. In the alternative, it recommends a period of imprisonment of between 2.5 and 3 years. It concurs with the Crown recommendation regarding the ancillary orders. It also concurs with the Crown's recommendation of 9 to 12 months' imprisonment for the unlawful confinement, to be served concurrently.

Availability of Conditional Sentence

[26] This case does not involve any of the specifically excluded offences in s. 742.1 (c) and (d), so the prerequisites in those parts are not applicable.

[27] *R. v. Proulx*, 2000 SCC 5, outlined the proper approach to determining whether a conditional sentence order ("CSO") is an appropriate sentence.

[28] First the Court must be satisfied that the three remaining prerequisites exist:

1. There is no minimum sentence. (That is clearly established as the victim was not under 16.)
2. Both probation and a penitentiary term of imprisonment are inappropriate. (Clearly probation is inappropriate.)
3. The safety of the community would not be endangered.

Appropriate Range

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

[30] As noted in *Proulx*, including at paras 59 and 60, in making the preliminary determination regarding whether a penitentiary term is inappropriate, "the judge need only consider the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2 to the extent necessary to narrow the range of sentence". Then, only if a preliminary determination is made that a penitentiary sentence is inappropriate, and the other prerequisites are met, should the Judge "proceed to the second stage of the analysis: determining whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2. Unlike the first stage, the principles of sentencing are now considered comprehensively. Further, it is at the second stage that the duration and venue of the sentence should be determined, and, if a conditional sentence, the conditions to be imposed."

[31] Therefore, I will examine the relevant objectives and principles with a view to determining whether this case meets the prerequisite to a CSO that a penitentiary sentence be inappropriate.

[32] In going over these objectives and principles I will note points that also relate to whether a CSO would be contrary to or, conversely, satisfy the objectives and principles of sentencing.

[33] *R. v. Friesen*, 2020 SCC 9, addressed the objectives and principles of sentencing 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. …

Objectives of Sentencing

[34] The key objectives of the sentence in this case include:

- denouncing unlawful conduct; and,
- deterring the offender and other persons from committing offences.

[35] These are very serious offences. They are not in any way minor offences. They involved abuse of a person under the age of 18, a statutorily mandated aggravating factor. There was perpetration of violence beyond the sexual violence, which, itself, was highly intrusive. Mr. Fitzgerald preyed upon a victim who was vulnerable because of her naïveté and her family's financial circumstances at the time. Denunciation and general deterrence are paramount objectives.

[36] I must determine a sentence that sufficiently fulfills those objectives when considered along with all other relevant sentencing objectives and principles.

[37] As noted at paragraph 102 of *Proulx*, despite a conditional sentence generally being more lenient than incarceration, it can provide a significant amount of denunciation, particularly when "onerous conditions are imposed and the duration of the conditional sentence is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances". However, as noted at paragraph 106, "there may be certain circumstances in which the need for denunciation is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct".

[38] Similarly, as noted at paragraph 107, " a conditional sentence can provide significant deterrence if sufficiently punitive conditions are imposed and the public is made aware of the severity of these sentences", and, if the offender is amenable to conditions such as being obliged to "speak to members of the community about the evils of the particular criminal conduct in which he or she engaged", that can also have a deterrent effect.

[39] Another objective is separating the offender from society where necessary.

[40] These are offences of a type which often make that necessary. However, if the prerequisites for a CSO are met, as noted at para 108 of *R. v. Proulx*, if complete separation by incarceration is required "it is as a result of the objectives of denunciation and deterrence, not the need for separation as such".

[41] Other objectives include:

- to assist in rehabilitating the offender;
- 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.

[42] A CSO is well suited to addressing these restorative objectives.

[43] The Offender's limited record is a factor which supports rehabilitation being a potentially viable objective. If viable, it is an important objective, as, ultimately, the long-term protection of society is best served by successful rehabilitation.

[44] However, the viability of rehabilitation is significantly diminished by him not accepting responsibility. That is understandable as he maintains his innocence. Therefore, it is not an aggravating factor. It, nevertheless, diminishes the prospects of rehabilitation, including because it makes it such that he is unlikely to seek sex offender assessment and counselling, and, even if he does, it is much less likely to be effective.

[45] I also note that he has not participated in a Sex Offender Risk Assessment, so that his risk of recidivism could be assessed. Further, according to the writer of the pre-sentence report, the Provincial Forensic Sexual Behaviour Program administered in the Community would be expected to take 2 to 3 years from referral. That is longer than could be imposed in a CSO.

[46] The harm that this type of offence does to the victims is reflected in the comments of the victim when she testified and when she spoke to the writer of the PSR. Those impacts included her:

- experiencing the emotional tornado I have already discussed;
- feeling like maybe it was her own fault;
- not wanting to name her aggressor because she was afraid of going through the legal process;
- reviving terrible memories whenever she has to go by the ballfield where it happened;
- having trust issues with men, especially older men;
- experiencing difficulty with her schooling;
- having to attend mental health counselling for support; and,
- feeling guilt over being unable to be the support she would have liked to have been for her mother during her battle with the cancer that took her life.

[47] Such specific effects on an individual flow over to the community at large in the way of diminished productivity and higher health care costs. More generally, it leads to distrust and fear, which limits our sense of security and freedom.

[48] 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.*

Other Sentencing Principles

[49] The following sentencing principles also apply.

[50] A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender: S. 718.2.

Aggravating and Mitigating Circumstances in the Case at Hand

[51] The aggravating circumstances include the following:

- The offender abused a person under the age of 18.
- He capitalized on FM's vulnerabilities. Given her young age and that her family was having financial difficulties, the lure of getting $200 or more simply for hanging out would have made it hard for her to resist meeting him.
- In addition, she was a physically tiny teenager, while he was a large and obviously physically strong man in his thirties. The size and strength difference alone would have rendered her vulnerable to acquiescing because of the obvious futility of fighting his advances.
- He used locking of doors, aggression and violence to confine FM and secure her compliance or quell any resistance to his sexual acts.
- The offences had significant detrimental impacts on FM.
- He groomed her in advance through social media, including by requesting nude photos of her and getting photos of her in her underwear and topless but covering her breasts.
- He did not use protection, increasing the risk of transmission of disease, and potentially pregnancy.
- He has a not insignificant prior offence of violence on his record, having been sentenced, in November 2014, to an 18-month

conditional sentence order for an offence of uttering threats. However, it is only a single offence.

[52] The mitigating circumstances include the following:

- He has a supportive mother.

- He has a supportive wife, being an integral part of the family finances and of the lives of her children.

- He has been under release conditions, which he appears to have followed, though with the only restrictions being to stay in NS, report changes of employment or occupation to the police, not communicate with FM, and not go to her residence or school.

- He expresses a willingness to attend for assessment and counselling if directed.

[53] 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 other points I make in the course of discussing the objectives and principles of sentencing.

1. Mr. Fitzgerald 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. Fitzgerald was not in a position of trust in relation to the victim. That is not a mitigating feature, but it is the absence of an aggravating feature that exists in some comparison cases.

3. There was only one incident which lasted less than 10 minutes. However, FM was scared during the incident, which increased its immediate impact.

4. FM was only 16 years of age, and she was vulnerable for the reasons I have described.

5. As already indicated, the act was highly intrusive with a significant degree of physical interference involved, which is an aggravating factor. The act in this case was at the highest level of intrusiveness, ie. unprotected vaginal intercourse, and was accompanied by confinement, aggression and violence to prevent FM from escaping and to ensure compliance.

Parity Principle (s. 718.2 (b))

[54] A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[55] The Defence advanced cases in which sentences for sex offences ranging from 2 years less a day to 3 years were imposed, including:

- **R. v Hall**, 2023 ONSC 5291
- **R. v. Davies**, 2021 BCPC 368
- **R. v. B.J.R.**, 2021 NSSC 26

[56] In *R. v. Hall*, the accused, while 34 years of age, sexually touched his 16-year-old stepdaughter's legs, genital areas and breasts several times. There were no penetrative acts. At the time, the complainant had moved out of the home but not withdrawn from the parental relationship. The court found, however, that he had exposed her to pornography while she was living in the family home and still under the age of 16. He was convicted following trial and, like Mr. Fitzgerald, maintained his innocence.

[57] As a result of the offences, the complainant suffered from depression, anxiety, anger, and low self-esteem. She had trouble trusting people. She felt abandoned. She was finding it hard to love herself.

[58] The court imposed a sentence of two years less a day of imprisonment in consideration of the fact that a lengthier sentence would have had an extreme collateral effect. The Accused, who was a permanent resident from Ireland, would be deported. However, despite the presentence report recommending him as a good

candidate for a community-based sentence, the court refused to order that the period of imprisonment be served in the community under a conditional sentence order because it would be insufficient to achieve the required denunciation and deterrence.

[59] The breach of trust and multiple incidents are features which do not exist in the case at hand. However, the circumstances of the case at hand included highly intrusive unprotected vaginal sex accompanied by violence and confinement, and, there is no indication of any extreme collateral effects upon Mr. Fitzgerald, such as deportation.

[60] The sentence imposed in *R. v. Hall*, is anomalous and explained by the exceptional circumstances arising from the immigration consequences of a lengthier sentence. As such, it does not reflect an appropriate sentence length for the case at hand.

[61] *R. v. Davies* involved sexual acts committed by an 18-year-old accused upon a 16-year-old complainant. Like the case at hand, it involved highly intrusive sexual acts while the victim was confined in a vehicle. The acts included vaginal intercourse, digital vaginal penetration, cunnilingus and forced fellatio. However, there were the following mitigating features. He was youthful (ie. only two years older than the victim). He had no criminal record. The offences were out of character for him. He suffered from anxiety and depression which had intensified since his arrest. He had suffered the collateral consequences of being unable to take advantage of a full baseball scholarship to a college in the United States. In addition, he would no longer be able to pursue his dream of becoming a commercial pilot. Further, there was an absence of some of the aggravating features that exist in the case at hand. For example, there was no indication of any luring or preplanning. The accused and the complainant had been partying with others. They decided to go for a drive. He drove to a secluded location where the offence occurred. The court nevertheless found the accused was of high moral culpability. Recognizing that it was at the lower end of the appropriate range for the circumstances, the court imposed a 2 ½ year period of imprisonment. In contrast, Mr. Fitzgerald was 30 years of age, i.e. almost twice FM's age. He had a prior offence of violence on his record. He prayed on FM's vulnerabilities and situation with the promise of money, ostensibly for just hanging out. His circumstances are completely different from those of Mr. Davies. Therefore, the *Davies* case is not particularly helpful in determining a fit and proper sentence for the case at hand. In addition, it is a provincial court level decision from another

province. Therefore, it has little influence on the decision I must make in the case at hand.

[62] In *R. v. B.J.R.*, the offender sexually assaulted his 16-year-old daughter by removing her shorts and performing cunnilingus. He, himself, disclosed to the authorities, expressed remorse and pled guilty despite having no recollection of the event. However, he had taken few steps towards rehabilitation. It caused significant actual harm to the victim and family, resulting in his other children having no contact with him. I imposed a sentence of three years' imprisonment. The Defence submits the sentence in the case at hand should be no higher because of the breach of trust involved and the late guilty plea. That argument ignores the points which follow.

- Despite the guilty plea having been entered late, which reduced its mitigation effect, it was entered without any joint recommendation on sentence and with the accused having no recollection of the event. That indicated real remorse and a desire to save the victim from having to testify in front of a jury. As such I still found it to be a "strong and meaningful mitigating factor".

- Mr. R. having disclosed to the authorities displayed a level of cooperation.

- He had no prior record.

- The level of intrusiveness was lower than the case at hand.

- Mr. R did not confine the victim and did not use aggression or violence beyond the sexual assault.

[63] The one aggravating factor of breach of trust is significant. However, there are much fewer aggravating factors, and many more mitigating factors, in *R. v. B.J.R.* than in the case at hand. Consideration of all of the relevant factors supports the proportionality of a sentence higher than that imposed in *R. v. B.J.R.*

[64] The Crown provided the following comparison cases for the sexual assault:

- *R. v. R.H.S.*, 2022 SKPC 39;
- *R. v. E.F.*, 2021 ABQB 272;
- *R. v. K.M.*, 2020 NSSC 278; and,
- *R. v. Vandekerckhove*, 2021 MBQB 61.

[65] In *R. v. R.H.S.* , the 30-year-old accused confined, assaulted and sexually assaulted the 17-year-old victim. She was being driven to her grandmother's home by the accused and his uncle. She had become concerned about how the accused was behaving and tried to exit the vehicle. She was prevented from doing so. They drove to a bushed area. There, he forced her on the ground, causing minor bruises, pulled down her clothing and underwear, and penetrated her vagina with his penis until he ejaculated outside of her. He was convicted at trial. He had a lengthy criminal history, but Gladue factors were at play. He was being sentenced in relation to other offences as well. However, the sentences of imprisonment imposed, prior to remand credit, were: in relation to the sexual assault, 4 ½ years; in relation to the assault charge, 6 months; and, in relation to the unlawful confinement, 2 years. Being a provincial court decision from another jurisdiction it also does not carry significant weight. However, the actions committed by the accused are similar to those committed by Mr. Fitzgerald. As noted by the Crown, in both cases, the acts of confinement and violence amounted to domination and control of the victim to facilitate the sexual assault. Though *R.H.S.* involved greater aggression, both involved overpowering violence. Though Mr. Fitzgerald does not have a lengthy criminal record, there are no Gladue factors to consider in his situation. As such, on balance, they are closely comparable cases.

[66] In *R. v. E.F.*, the offender was convicted following trial of sexual interference and luring by telecommunication. The court sentenced him to four years' imprisonment.

[67] He was 48 years of age at the time. The victim was 15. He had met her on an Internet messaging application. He travelled to her area for business and met up with her in a hotel after exchanging a large number of sexually explicit messages with her. He engaged in unprotected vaginal intercourse, and, after leaving the hotel for a while returned for further sexual relations which were interrupted by the police locating him there. The court's view of his behaviour is described at paragraph 71 as follows:

> EF preyed on AB's clear vulnerability. He located her easily using the Chat Hour app. He knew that she was 15 years old. He knew that she had very significant

> personal problems, and that she was not living with either of her parents, but was living in a group home – a facility which attempts to help troubled youth. The depth of her vulnerability was clear given her eager acceptance of the opportunity to meet with him, to have sex with him, and to stay in a hotel with him without any coercion. The evidence at trial established that EF's only purpose was to use AB for his own sexual gratification. The lurid and depraved content of the messages he sent to her in the two days before they met can admit of no other conclusion.

[68] The court did not find that there was a sufficient likelihood of re-offence to constitute an aggravating factor. It found that there was no breach of trust. It was a not a situation of sexual violence committed on multiple occasions. There was an age gap of more than 30 years. The offender suffered from mental health issues at the time, and his rights to counsel had been breached on arrest, which constituted mitigating factors. It was aggravating that he gave the victim alcohol and did not use a condom.

[69] The circumstances of the *E.F.* case, have some similarity to the case at hand as both involved luring or grooming of the victim and agreeing to meet through social media. Both also involved a victim rendered vulnerable by her home situation, as well as unprotected vaginal intercourse. However, there is no evidence that Mr. Fitzgerald suffers from mental health difficulties and, unlike the accused in the *E.F.* case, he unlawfully confined and used aggression towards FM. That would tend to render his actions more serious. Therefore, the case does support a sentence of four or more years' imprisonment as being in an acceptable range for Mr. Fitzgerald.

[70] *R. v. K.M.,* involved forced intercourse with a 15-year-old using physical force, aggression and a threatening manner, in the face of her pleading for it to stop. It caused some vaginal tearing. He had just met her through a mutual friend. The force applied in that case was more extreme than that in the case at hand. The victim's arm and head had struck the floor, stunning her, and causing her to lose her breath. Again, that was greater violence than the case at hand, but in both cases the victim was overpowered. When she had pleaded with him to stop, he ordered her to be quiet in an aggressive and threatening manner. The victim had been diagnosed with PTSD from the ordeal. The court found that the accused was not in a position of trust. However, the age difference made is such that he was in a position of authority. Since he was only 21 years of age at the time of sentencing, it is unclear why. He had a youth criminal record and had acquired an adult criminal record since the offence. However, he suffered from a hyperactivity disorder which caused him to act impulsively. The violent acts in the case at hand were not quite

as aggressive as those in *K.M.* However, Mr. Fitzgerald is not youthful like Mr. M. was and does not suffer from a mental health disorder like he did. Overall, comparing the circumstances in that case to those in the case at hand, makes the five-year sentence imposed one that would be within an acceptable range for the case at hand.

[71] In *R. v. Vandekerckhove,* the 25-year-old accused communicated with a 13-year-old indigenous victim for about a week. While giving her a ride somewhere he parked and forced her to perform fellatio upon him and then digitally penetrated her vagina. She did not resist because she was afraid of being harmed. However, once able to exit the vehicle she ran to a local store and called the authorities. Those circumstances are comparable to the circumstances in the case at hand. However, there were multiple mitigating factors in that case which do not obtain in the case at hand. They include that the accused: had entered an early guilty plea; was a first-time offender; had had a difficult childhood; had insight into his offending behaviour; and, had experienced sexual abuse as a child. This plethora of mitigating factors does not obtain in the case at hand. I highlight that the PSR notes that, in contrast, Mr. Fitzgerald had a normal childhood, in which he had the guidance and support of both parents and did not suffer any form of abuse. Therefore, the 40-month period of incarceration in that case is not reflective of an appropriate range for the case at hand.

[72] *Friesen, supra*, at paragraph 15, clearly stated that "mid-single digit penitentiary terms for sexual offences against children are normal and … upper-single digit and doble-digit penitentiary terms should neither be unusual nor reserved for rare or exceptional circumstances" and "substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim".

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

[73] I have also considered the principle that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances. All available sanctions other than imprisonment (or as it relates to the possibility of a CSO, to echo the wording in Proulx, "incarceration") that are reasonable in the circumstances should be considered for all offenders.

Proportionality (s. 718.1)

[74] It is a fundamental principle of sentencing that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[75] These are clearly very grave offences, committed by a person who preyed on the vulnerability of his victim, and who was solely and completely responsible for the offences.

[76] Also, the fact that he started assaulting her immediately after returning and parking away from the road, indicates that he went there planning to engage in that activity.

[77] There was nothing diminishing his level of responsibility.

Range of Sentence Less Than 2 Years

[78] Considering these objectives, principles, factors and points I have noted, in the circumstances of the case at hand, the sentence suggested by the Crown for the sexual assault of 4 or more years' imprisonment is not inappropriate. Rather, a sentence of less than 2 years' imprisonment, in the circumstances would clearly be inappropriate.

[79] Consequently, the prerequisite to a CSO that a penitentiary sentence be inappropriate has not been established.

[80] In light of this conclusion, it is unnecessary to determine whether the safety-of-the-community prerequisite has been established.

[81] As the CSO prerequisites have not all been met, a CSO is not available.

[82] Even if the prerequisites had been met, a CSO would not be consistent with the fundamental purposes and principles of sentencing in ss. 718 to 718.2 for the reasons canvassed while determining range or duration of sentence.

[83] In addition, as stated in *R. v. M.M.*, 2022 ONCA 441, at paragraph 16:

> "Conditional sentences for sexual offences against children will only rarely be appropriate. Their availability must be limited to exceptional circumstances that render incarceration inappropriate – for example when it gives rise to a medical hardship that could not adequately be addressed within the correctional facility."

[84] According to the PSR, Mr. Fitzgerald does not have any health issues that would make incarceration more difficult. He presents as a strong, healthy and capable man. There is no indication of any other exceptional circumstances.

SENTENCE

[85] Considering the objectives, principles and factors I have already canvassed, and despite capable argument from Counsel for Mr. Fitzgerald that a shorter period of imprisonment would be appropriate, I find that, in the circumstances of the case at hand, a sentence of at least 4 years' imprisonment for the sexual assault is appropriate. Applying the principle of restraint, I will limit the sentence to 4 years.

[86] The unlawful confinement was part of the same event and used to facilitate the sexual assault. Therefore, I agree with the parties that it is appropriate to order that the sentence for the unlawful confinement offence be served concurrently.

[87] The parties also jointly submit that 9 to 12 months' imprisonment is the proper range of sentence for the unlawful confinement offence. I agree. That range is supported by a comparison of the circumstances in the case at hand with those in *R. v. Blazevic and Baba*, 2012 ONSC 875, and *R. v. Kugarahjah,* 2022 ONCJ 469.

[88] Again, applying the principle of restraint, I find that 9 months' imprisonment is appropriate in the circumstances.

[89] For these reasons, I sentence Mr. Fitzgerald to:

- 4 years' imprisonment for the sexual assault, consecutive to any sentence he may currently be serving; and,
- 9 months' imprisonment for the unlawful confinement, to be served concurrently.

Ancillary Orders

[90] The parties join in recommending the appropriateness of the following ancillary orders. I agree that they are appropriate and order the following for the reasons noted:

- A DNA order, as sexual assault and unlawful confinement are primary designated offences listed in subsection (a) of the definition in s. 487.04,

making a DNA order absolutely mandatory, and leaving no discretion to decline to make the order on the basis of grossly disproportionate impact;

- A S. 109 Firearms Prohibition Order, as it is mandatory, in relation to both offences, for a minimum period ending 10 years following release from imprisonment and for life in relation to restricted and prohibited firearms;
- A SOIRA Order for 20 years, as section 271 is a designated offence under s. 490.011(1)(a), making it such that, under s. 490.012(1) a SOIRA order is mandatory, and as the offence carries a maximum term of imprisonment of 10 years, making it such that, pursuant to s. 490.013, the SOIRA order is to be for a duration of 20 years;
- A s. 743.21 Order prohibiting communication with FM while serving the custodial sentence, as she expressed fear of Mr. Fitzgerald and such contact would likely cause additional harm; and,
- $400 in victim surcharges (ie. $200 per offence) forthwith, as the Crown proceeded by indictment and subsection 737(2.3) provides that imprisonment alone does not constitute undue hardship, which requires, under subsection (2.2), inability to pay, and, the PSR noted that Mr. Fitzgerald has no debts and has been earning a good income from employment with a lobster buyer and self-employment as a painter, from which he has been able to put money aside.

Muise, J.