Citation: *R. v. G.K.*, 2021 YKTC 17

Date: 20210518
Docket: 18-00494
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

G.K.

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Leo Lane — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

REASON FOR SENTENCE

[1] I found G.K. guilty after trial of sexual assault and sexual exploitation, contrary to ss. 271 and 153(1) of the *Criminal Code*, respectively. In the circumstances of this case, the Crown has conceded that the s. 271 charge be stayed conditionally.

[2] The Crown proceeded summarily in this matter. As such, pursuant to s. 153(1.1)(b) of the *Code*, the minimum punishment is a 90-day term of imprisonment.

[3] The defence challenges the constitutionality of this provision, alleging that it violates s. 12 of the *Charter*.

Facts

[4] G.K. was 59 years old at the time of these offences. He is a long-time member of a small community, approximately a two hour drive from Whitehorse. He began working at the village's recreation centre in 2000. In 2018, he became the recreation director for the village, and worked out of the recreation centre. He hired the victim, K.B., as the youth program coordinator in the summer of 2018. She was 17 years old. She reported to G.K., and worked in the recreation centre.

[5] On August 8, 2018, she was working in the kitchen area making snacks for children attending the recreation centre. G.K. entered the kitchen and asked her about her day. She told him that she had recently broken up with her boyfriend. He then questioned her about her love life and her sex life. When asked about her sex life, she testified that she did not know what to say and just answered that it was "o.k.".

[6] K.B. testified that G.K. came towards her from behind and put his hand on her stomach and started rubbing it. He kissed her neck from behind on two occasions, before leaving the kitchen with a smile on his face. She became upset, and ultimately went outside to have a cigarette. Soon thereafter, G.K. joined her and made a sexual comment to her, but this line of conversation changed when other people approached them.

[7] K.B. and G.K. returned inside the recreation centre. She went into the games room/common area and G.K. entered his office. As she did not feel right with what had occurred, she went to G.K.'s office to tell him that she would like the rest of the day off. After hearing her request, he asked her to talk with him upstairs.

[8] Once they were on the second floor, G.K. opened the door of a storage room and let her in. He followed her into the room and closed the door. He told her that if she ever wanted to have sex to let him know. He also told her that she could not tell his wife or anybody else about it. As K.B. did not know how to respond, she replied that she would think about it. He also mentioned that his relationship with his wife was not working for him and that they were not having sexual relations often. G.K. hugged her, and kissed her two more times on the neck before opening the door. She left the building soon after going back downstairs.

Issues

[9] In response to the sexual exploitation offence, the Crown seeks the mandatory minimum punishment of 90 days' incarceration, one year of probation, plus other ancillary orders.

[10] The defence contends that a suspended sentence and probation, or alternatively, a jail sentence served conditionally in the community is the proper response to this crime. Conditional sentence orders are precluded for offences punishable by a minimum term of imprisonment (s. 742.1(b) of the *Code*).

[11] As noted, the defence has filed a Notice of Application challenging the constitutionality of the mandatory minimum sentence in s. 153(1.1)(b), arguing that it amounts to cruel and unusual punishment, and therefore infringes s. 12 of the *Charter*.

[12] Defence counsel contends that the mandatory minimum sentence is grossly disproportionate to other offenders in reasonable hypothetical situations, and accordingly, I should find it to be invalid in this case.

[13] As such, the issues to be decided are, firstly, whether the impugned provision is constitutional, and secondly, what the appropriate penalty is for this offender.

Analytical Process

[14] The Supreme Court of Canada outlined the analytical process to be adhered to when a mandatory minimum sentence is challenged (*R. v. Nur*, 2015 SCC 15). Justice Bennett summarized this process in *R. v. Swaby*, 2018 BCCA 416, at para. 62:

> … First, the court must determine what constitutes a proportionate sentence for the offence based on the objectives and principles of sentencing in the *Code* (para. 46). Second, it must decide, bearing the proportionate sentence in mind, whether applying the mandatory minimum would result in a grossly disproportionate sentence for the offender before the court (para. 46). Third, if the sentence is not grossly disproportionate for that offender, the court must then consider whether any "reasonably foreseeable applications" of the provision will result in grossly disproportionate sentences for other offenders (para. 77). If the answer to either of the latter two questions is yes, then the mandatory minimum sentence is inconsistent with s. 12 and "will fall unless justified under s. 1 of the *Charter*" (paras. 46, 105--106).

A Fit Sentence

[15] A sexual offence against a child or a young person must result in a serious response. Parliament has recognized that “adult/youth sexual relationships are inherently exploitative” (*R. v. George*, 2017 SCC 38, at para. 26). The recent Supreme Court of Canada decision in *R. v. Friesen*, 2020 SCC 9, speaks to the focus of the framework in sexual offences being on “wrongful interference with sexual integrity”

(para. 55). Courts must consider the harm caused by sexual offences against children and the wrongfulness of sexual violence. Accordingly, when applying the proportionality principle, courts must "…take into account the wrongfulness and harmfulness of sexual offences against children" (para. 75).

[16] Pursuant to s. 718.01 of the *Code*, I must give primary consideration to the objectives of denunciation and deterrence as this offence involved the abuse of a victim under the age of 18 years. Section 718.2(a)(ii.1) also stipulates that abuse of a victim under the age of 18 is aggravating. I am also mindful of the fact that the offender abused a position of authority in relation to the victim (s. 718.2(a)(iii)), an element of any sexual exploitation offence.

[17] Additionally, in the case at bar, the victim prepared a Victim Impact Statement that has been filed with the Court. G.K.'s crime has had a negative emotional impact on her. She described the negative reaction towards her by some community members because of her choice to proceed with her complaint. She indicated that she felt "degraded" by comments made to her. Importantly, she also expressed in a short poem included in her Victim Impact Statement that G.K. took away her innocence.

[18] G.K. is 61 years of age and resides in a small Yukon community. He has a dated criminal conviction which is not relevant to the matter before me. He has a good employment history, although he lost his job as recreation director following his conviction in this matter, and has been subsequently unemployed.

[19] A number of letters of support have been filed on behalf of G.K. The letters describe him as a community-minded individual who has volunteered significantly over

the years to assist and better his community. As some of the letters reveal, this conviction has led to the break down of his marriage, his withdrawal from the community at large, and to signs of depression.

[20] In addition to the applicable statutorily aggravating factors that I have outlined, I also take into account the 42-year age difference between G.K. and the victim, the power imbalance that existed in this employment relationship, and the invitation he made to the victim to have sexual relations with him while he interfered with her bodily and sexual integrity.

[21] At the same time, I agree with the Crown and defence counsel that G.K. is at a low risk to reoffend. Also, there is an absence of grooming in the case at bar, and the facts reveal that G.K. acted spontaneously. The duration of the sexual offending was short, and the two incidents occurred on the same day, in relatively rapid succession.

[22] The degree of physical interference in this offence was at the lower end of the spectrum, although, as explained in *Friesen*, courts must be careful not to focus excessively on the physical act, as it may detract from an appropriate consideration of the psychological and emotional harm that these offences cause victims.

[23] Crown and defence counsel have filed a number of sentencing decisions with respect to sexual exploitation, sexual assault, and sexual interference offences.

[24] The defence has referred to two cases of sexual assault in which a suspended sentence and probation was held to be the appropriate penalty. In *R. v. L.P.*, 2009 BCPC 279, the 48-year-old offender groped and kissed the 23-year-old victim in

his parked van. He also forced her to fondle his genitals. He had previously supervised her on at least two occasions in his employment capacity. The Court found the accused guilty after trial. The offender had no prior criminal record and a good employment record. The Pre-Sentence Report was also favourable. The sentencing judge dismissed a request for a conditional discharge, but held that a suspended sentence and 12-months' probation was an appropriate penalty.

[25] In *R. v. Semchuk*, 2011 BCSC 1553, the offender was convicted after trial for sexually assaulting a 9-year-old girl. The historical offence occurred approximately 25 years before the court proceedings. The victim had just completed a race at a track meet, when the offender, her coach and teacher, came up from behind and pressed his legs against her as he rubbed her back and shoulders. He moved his hand onto her chest and rubbed her breasts. This touching lasted for a few seconds, although the victim testified that it felt like an eternity. The offender had been an elementary school teacher for close to 30 years. He retired early when the charges arose. The charges received a great deal of publicity in the small community where he lived. The Court, accepting a joint submission, suspended the passing of sentence, and imposed a two-year probationary term.

[26] It is important to note, as highlighted in *Friesen*, that the maximum sentences for sexual offences have increased over the past few decades. For example, prior to 2005, the maximum term of imprisonment for sexual exploitation where the Crown proceeded summarily was six-months' incarceration. In 2005, the maximum period of imprisonment for this offence increased to 18 months. Finally, in 2015 the maximum

period of incarceration for sexual exploitation where the Crown proceeds summarily increased to two years' imprisonment.

[27] As highlighted by the Supreme Court of Canada, courts should generally impose higher sentences than those that predated the increases in maximum sentences (*Friesen* at para. 100).

[28] Even though a suspended sentence has been found to have a deterrent effect in certain cases (e.g. *R. v. Voong*, 2015 BCCA 285), in my view, in the circumstances of the offence and the offender in the case at bar, a suspended sentence would not sufficiently meet the primary principles of denunciation and deterrence.

[29] Counsel have filed a number of other cases in support of their respective positions. Those that I find most relevant are set out below.

[30] In *R. v. Okoro*, [2018] O.J. No. 2102 (Ont. Ct. J.), the offender was a part-time high school teacher who was found guilty after trial of four counts of sexual exploitation of a 17-year-old female student and four counts of sexual assault of a 19-year-old female student. In terms of the sexual exploitation offences, the offender touched the victim over her clothes while teaching her in class. The victim testified that the sexual touching made her uncomfortable, and caused her confusion and upset. Both victims were afraid to report the incidents fearing that they would fail the course. The sentencing judge found it particularly aggravating that the offences occurred under the guise of the offender giving the victims extra help with their course work. Although brief in duration, these were not isolated incidents. The incidents included the offender rubbing his penis on the victims.

[31] The offender had no prior criminal record. He had lost his job due to the offences, and was the subject of wide spread media attention. He faced a removal order from Canada as a result of the convictions. The sentencing judge imposed 90-day concurrent jail sentences for each of the four sexual exploitation charges, followed by two years' probation.

[32] In *R. v. Careen*, 2012 BCSC 918, the offender was the victim's grade 12 high school history teacher. His wife was the victim's homeroom teacher. Within a 36-hour period, he sent explicit text messages to the victim about having sexual contact with her. No sexual contact occurred. The Court convicted him after trial of sexual exploitation.

[33] The offender was 52 years old, with no prior criminal history. He had the support of his wife, former colleagues, students and parents in the school community. He had lost his employment as a teacher. An assessment concluded that he was at low risk to reoffend. He received a 60-day intermittent jail sentence.

[34] In *R. v. C.L.*, 2013 ONSC 277, the offender was convicted of sexual assault and sexual interference with respect to two separate incidents involving the same victim. The offender was a trusted family friend and neighbour of the 15-year-old victim. The victim referred to him as her uncle. After the two families were out for dinner, the offender put his hand on the victim's thigh and tried to put his hand between her legs while they were sitting in the back of his vehicle. On the second occasion, a number of months later, he led her to his basement where he tried to touch her breasts and legs,

and tried to kiss her. She managed to escape. The Court convicted him of sexual assault and sexual interference.

[35] The offences seriously impacted the victim. She became reluctant to trust other men fearing that she would be victimized again. The offender had no prior criminal antecedents, and a good work history. His family continued to support him. The Summary Conviction Appeal Court reduced his six-month jail sentence to one of 90 days intermittent. His sentence also included a two-year probationary term.

[36] In *R. v. J.P.*, 2019 ONSC 7047, a jury convicted the accused of one count of sexual interference. He touched his step-daughter's buttocks when she was between 11 and 14 years of age. It is unclear whether this was over or under her clothing. The offender had no prior criminal history. He had a good work history and was the sole source of financial support for his wife and young children. He had the support of his family and community members. The Court did not receive any information with respect to victim impact.

[37] The Court sentenced the offender to a 60-day intermittent jail term followed by two years' probation.

[38] In *R. v. J.L.M.*, 2017 BCCA 258, the offender communicated with his niece for the purposes of obtaining sexual services, and obtaining sexual services for consideration. The victim was 16 years old, and the offender, 46. Both were Indigenous. The offender knew that his niece was addicted to hard drugs. In April 2011, he texted the victim that he was going to hire someone for sexual services. She replied that she might be interested because she needed money. She ultimately went to his

house and masturbated the offender. He touched her breasts. He gave the victim $150 and cigarettes.

[39] The offender had no previous criminal record. His mother attended residential school. He endured poverty, bullying, and racism growing up. His parents were physically, emotionally, and mentally abusive to him. As an adult, he suffered from physical and mental health issues. He was at low risk to reoffend.

[40] The offence caused the victim debilitating effects.

[41] The sentencing judge imposed a seven-month term of imprisonment. On appeal, the British Columbia Court of Appeal found that the six-month mandatory minimum sentence was unconstitutional, and imposed a stringent nine-month conditional sentence order.

[42] In addition to these cases, I have also considered the decision in *R. v. M.R.*, 2020 ONCA 281, in which the Court of Appeal upheld a 10-month term of incarceration for a sexual exploitation offence in which the Crown had proceeded by indictment. The offender and the victim's mother were in an intimate relationship. The offender and the victim had a positive longstanding relationship. Although the age of the victim is not stated, based on the elements of the offence, she would have been between 16 years and 18 years less a day. The offence involved a single incident in which the offender massaged the victim's back. He pushed her shirt up, and used massage oil. He straddled her upper legs, undid her bra strap and massaged her whole back. He attempted to move his hands under her breasts, but she prevented him from doing so.

He kissed and licked her back, and she could feel his beard. He ground his hips into her buttocks after which he lay on top of her.

[43] The Court of Appeal held that the sentence was not unreasonable or demonstrably unfit, especially in light of the victim's youth and the offender's position of trust in the family dynamic.

[44] The decision in *R. v. D.M.*, 2021 BCSC 379, involved a sexual exploitation offence in which the Crown proceeded by indictment. The Court found D.M. guilty of four separate incidents of sexual exploitation against his daughter over the course of a two-year period when the victim was between 16 and 18 years old. She and her younger brother were living with their father. The offences took place after the death of the victim's mother. The four incidents may be described, respectively, as touching or cupping the victim's breasts, flicking her nipple, patting her on her buttocks, and giving her an intimate massage during which the offender's erect penis poked against her buttocks. These incidents occurred in a highly sexualized environment in which the offender made inappropriate comments about the victim's body.

[45] The offender was in his late fifties when he committed these offences. He had a dated and unrelated criminal record. He worked in the forest industry hauling logs. He described being depressed after the unexpected death of his wife. At the time of sentencing, his 16-year-old son still resided with him. The offender was at low risk to reoffend. The victim did not file a victim impact statement, but the sentencing judge found that the victim's vulnerability was an aggravating factor.

[46] The Court found the one-year mandatory minimum penalty under s. 153(1.1)(a) to be unconstitutional, and imposed a 90-day intermittent jail sentence, plus a probationary term of two years.

[47] The facts in the case at bar are dissimilar to many of the cases that I have referred to in the sense that many of the cases involved family members or family friends. The sexual exploitation convictions in *Okoro*, although in a teacher/student setting, offer some similarities. However, unlike the matter before me, the offending behaviour was not an isolated incident. The sexual exploitation in *Careen* encompassed numerous texts, extending over 36 hours, about having sexual contact with the student victim. The decision in *J.P.*, although not a sexual exploitation offence, does involve an isolated incident of sexual touching by a person in a position of trust.

[48] To recap, in the *Okoro* case, a 90-day jail sentence was imposed, while in *Careen* and *J.P.*, the respective Courts imposed an intermittent jail sentence of 60 days. I note that all three cases were decided before *Friesen*.

[49] Accordingly, these decisions support the view, post-*Friesen*, that an appropriate penalty in the matter before me is a lower end custodial sentence in the three to four-month range.

Appropriate Sentence absent the Mandatory Minimum Sentence

[50] If a conditional sentence were available, the question is whether it would be appropriate in this case. As Ruddy J. stated in *R. v. Pye*, 2019 YKTC 21, at para. 42:

> The appropriateness of a conditional sentence, if available, requires a balancing of the often-conflicting principles of denunciation and deterrence on the one hand, and rehabilitation and the application of s. 718.2(e) on the other.

[51] As indicated, there are statutorily aggravating factors with respect to this offence. Additionally, s. 718.01 stipulates that the sentencing objectives of denunciation and deterrence outweigh other objectives. On the other hand, s. 718.2(e) requires a court to consider all available sanctions other than imprisonment that are reasonable in the circumstances, and consistent with the harm done to victims.

[52] The objective of denunciation is the manner in which a sentence demonstrates and communicates society's condemnation of an offender's conduct (*R. v. C.A.M.,* [1996] 1 S.C.R. 500, at para. 81). Sexual offences committed against children are crimes that our society abhors (*Friesen*, para. 105).

[53] The objective of deterrence in the present case is not only focused on G.K., but on the community of employment supervisors. The sentence that this Court imposes must deter those individuals from committing similar offences.

[54] The question to be determined is whether deterrence and denunciation in this case can only be achieved through a jail sentence. As stated in *Pye*, at para. 46:

> …Deterrence can take many forms, including the imposition of criminal charges, a criminal record, and the stigma that flows from the very public nature of criminal justice proceedings, particularly in the smaller communities one finds in the Yukon, where such offences rarely go unnoticed by the media and are regularly debated in the court of public opinion.

[55] I would add that denunciation can be achieved in situations where an in-custody jail sentence is not imposed. As noted in *R. v. Proulx*, 2000 SCC 5, jail sentences served conditionally are a punitive sanction while at the same time offering restorative objectives, such as making reparations to the community. The Court in *Proulx* stated at para. 100:

> …However, even where restorative objectives cannot be readily satisfied, a conditional sentence will be preferable to incarceration in cases where a conditional sentence can achieve the objectives of denunciation and deterrence as effectively as incarceration. This follows from the principle of restraint in s. 718.2(d) and (e), which militates in favour of alternatives to [page 115] incarceration where appropriate in the circumstances.

[56] And at para. 41, the Court stated:

> … A conditional sentence may be as onerous as, or perhaps even more onerous than, a jail term, particularly in circumstances where the offender is forced to take responsibility for his or her actions and make reparations to both the victim and the community, all the while living in the community under tight controls.

[57] I take judicial notice of the fact that serving a conditional sentence in the Yukon attracts a substantial level of supervision and intervention, especially in the smaller communities.

[58] I appreciate that some cases have held that conditional sentences of imprisonment should be used sparingly in matters involving the abuse of children. I agree with this pronouncement. At the same time, as articulated in *Proulx*, at para. 81, "…it would be both unwise and unnecessary to establish judicially created presumptions that conditional sentences are inappropriate for specific offences".

[59] Since sentencing is an individualized process in which the sentencing judge has considerable discretion in crafting an appropriate sentence, the determination of a fit sentence must include an examination of the specific circumstances of both the offender and the offence.

[60] In terms of whether a conditional sentence would be appropriate, if available, in this case, I find firstly that a conditional sentence would not endanger the community as G.K. is a low risk to reoffend.

[61] In terms of whether a conditional sentence for this offence and offender would be consistent with the fundamental purpose and principles of sentence, I am cognizant of the principle of proportionality. In *R. v. Lacasse*, 2015 SCC 64, at para. 12, the Supreme Court of Canada stated that "determining a proportionate sentence is a delicate task".

[62] Having considered the circumstances of the offence and of G.K., as set out above, I am of the view that, despite the aggravating factors, the purposes and principles of sentencing could be achieved by way of a strict conditional sentence of a greater length than a straight jail term, which includes reparations to the community.

Section 12 Analysis

[63] Based on my view that a jail sentence served conditionally would fall within the range of sentences for this offender and this offence, it is appropriate, therefore, to consider the constitutionality of s. 153(1.1)(b) insofar as it affects the matter before me.

[64] As mentioned, G.K. does not argue that the mandatory minimum sentence is grossly disproportionate as it relates to him and his offence. He argues that it is grossly disproportionate to a hypothetical offender who might reasonably fall within the scope of a s. 153(1.1)(b) offence.

[65] A sentence will infringe the prohibition against "cruel and unusual" punishment under s. 12 of the *Charter* if it is grossly disproportionate to the appropriate punishment, when the nature of the offence and of the offender are considered (*R. v. Lloyd*, 2016 SCC 13; and *Nur*).

[66] As explained in *Lloyd* at para. 24, "[t]his Court has established a high bar for finding that a sentence represents a cruel and unusual punishment". In order to meet this threshold, the sentence must be "so excessive as to outrage standards of decency" and be "abhorrent or intolerable" to society.

[67] The hypotheticals must be reasonable, as opposed to "remote" or "far-fetched" scenarios. They would capture "circumstances that are foreseeably captured by the minimum conduct caught by the offence" (*Nur* at para. 68).

[68] The elements of the offence of sexual exploitation are that a person in a position of trust or authority sexually exploits a young person between the age of 16 and 18 years less a day. The exploitation occurs when the offender, for a sexual purpose, touches the young person, or invites the young person to engage in touching.

Reasonable Hypotheticals

[69] The decision in *Friesen* reminded all courts of the seriousness and destructiveness of the abuse of children. In that case, the offender sexually brutalized a young child after coercing her mother to bring the child into the bedroom. The facts of the case were horrendous, and merited a significant jail sentence.

[70] The Crown contends that in any reasonable hypothetical, once the breach of trust or authority is fleshed out, the resulting scenario, in the context of sexual exploitation, will never result in a 90-day jail sentence being grossly disproportionate.

[71] At the same time, it must be remembered that there are a wide range of fact patterns and offenders when dealing with offences of a sexual nature, even in situations where the offender is in a position of trust or authority.

[72] The Court in *R. v. Hood*, 2018 NSCA 18, struck down the one-year mandatory minimum sentence for sexual exploitation. In doing so, the Court varied the fact pattern of Ms. Hood, by considering a first year high school teacher in her late twenties with no criminal record. She suffered serious mental health challenges. While in a manic stage, she texts one of her high school students to ostensibly inquire about a school assignment. She directs the conversation from casual to sexual. They agree to meet in a private location where sexual touching occurs. The teacher pleads guilty and expresses sincere remorse. If the student were 17 years old, this scenario would cover the elements of sexual exploitation.

[73] The Court of Appeal held that it was unlikely that this hypothetical crime would even draw jail time. In the Court's view, the range of sentence would be between a suspended sentence and a brief period of incarceration and probation. I realize that this decision predates *Friesen*.

[74] However, this hypothetical may be further altered. A 23-year-old student teacher with a university degree in mathematics is hired to tutor[1] a 17-year-old high school student. The student teacher is doing her teaching practicum at the same school the student attends. The student teacher suffers from serious mental health issues. During one of the tutoring sessions in a private location, while in mental distress, she puts her hand on the student's shoulder, leans over and kisses the student on the lips. The student gets up and leaves. She later reports this to her parents who contact the police. The student teacher is subsequently charged with sexual exploitation (s. 153(1.1)(b)). She pleads guilty and is remorseful. At the time of sentencing, she is successfully undergoing treatment, and is at low risk to reoffend. A psychologist treating the offender opines that a term of imprisonment would negatively impact the offender's treatment and recovery. The Victim Impact Statement indicates that the victim has overcome this incident.

[75] Another reasonable hypothetical in this jurisdiction would be that of a 20-year-old Indigenous male residing in a remote northern community, only accessible by plane. He is the supervisor of camp counsellors at a summer cultural camp. The previous summer, he dated a 16-year-old female when they were both camp counsellors. She

[1] A tutor may be found to be in a position of trust in relation to a student – *R. v. Aird,* 2013 ONCA 447 (paras. 23-36)

ended the relationship. Now 17 years of age, she has returned as a camp counsellor for the summer, and the male is her direct supervisor. He has had an unenviable upbringing, and has witnessed alcohol abuse amongst family members; has experienced physical abuse, and misuses alcohol himself. His parents attended residential school. One evening, the staff get together to socialize, and consume some alcohol. He and the female engage in general conversation around a camp fire. As the conversation progresses, he misreads the situation, and concludes that she is still interested in him. He leans over and kisses the female on the lips. The incident is reported to the police. The 20-year-old is charged with sexual exploitation. He pleads guilty and is remorseful. He has no prior criminal history. The victim, although upset that he kissed her, is supportive of restorative justice by way of a circle sentencing.

[76] For those who observe or participate in the day-to-day criminal matters across this country, these hypotheticals are neither far-fetched nor remotely imaginable.

[77] In both of these scenarios, the circumstances strongly indicate that a minimum term of imprisonment would not only be excessive, but would be grossly disproportionate.

[78] In both scenarios, the mandatory minimum sentence would wholly frustrate the sentencing principle of employing available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to the victim (s. 718.2 of the *Code*).

[79] The circumstances of these reasonable hypothetical offences and offenders strongly suggest that a minimum term of imprisonment of 90 days would be intolerable in the eyes of society.

[80] It is also worth considering that a 90-day jail sentence, unlike those of greater length, allow the offender the flexibility of serving their sentence intermittently. Clearly, this offers a benefit to the offender in that the jail time may be served at a time when they would not otherwise be working (e.g. on weekends). Continued employment is undoubtedly an important factor for an offender to maintain a residence. In the second reasonable hypothetical outlined above, the offender, at the time of sentencing, has garnered permanent employment at the local grocery store during weekdays. If sentenced to a mandatory minimum sentence, both logistically (infrequent flights) and financially (unaffordable airfare), the offender would be unable to seek an intermittent sentence to serve their sentence on weekends. This absence of flexibility in sentencing could negatively affect the hypothetical offender through employment loss, and/or loss of housing.

[81] There is a wide spectrum of conduct that may amount to a position of trust or authority in relation to a young person. The Court in *Friesen* stated that "[trust] relationships arise in varied circumstances and should not be all treated alike".

[82] In striking down the one-year mandatory minimum sentence for sexual exploitation prosecuted by indictment, the Court in *R. v. E.O*, 2019 YKCA 9, leave to appeal ref'd [2019] S.C.C.A. No. 268, stated at para. 53:

> …Although the offence exists to regulate the behaviour of responsible adults, the mandatory minimum sentence does not sufficiently account for the variety of ways in which an adult may fail to meet their duty to young people. …

[83] In *Lloyd* at para. 35, McLachlin, C.J. stated:

> …in light of *Nur*, the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.

[84] In my view, there are reasonably foreseeable hypotheticals, such as those described above, for which the mandatory minimum sentence of 90 days in jail would be grossly disproportionate, and therefore in violation of s. 12 of the *Charter*.

[85] Accordingly, I find that the section is invalid in relation to the case before me.

[86] In light of the Supreme Court of Canada decision in *Nur* at paras. 111-118, the Crown has conceded that if there is a breach of s. 12, the provision is not saved by s. 1.

Sentence

[87] Having found that the mandatory minimum sentence is invalid and not applicable to G.K., I will impose what I consider to be the appropriate penalty in all the circumstances. As set out earlier, the appropriate sentence in this matter would be a three to four-month jail term plus probation. The Court in *Proulx* held that a significant amount of denunciation can be provide by a conditional sentence through its conditions,

and where its duration "…is extended beyond the duration of the jail sentence that would ordinarily have been imposed in the circumstances". In the result, I sentence G.K. to a six-month term of imprisonment to be served conditionally. The statutory terms are that you:

1. Keep the peace and be of good behaviour;

2. Appear before the court when required to do so by the court;

3. Report to a conditional sentence Supervisor within two working days, and thereafter, when required by the Supervisor and in the manner directed by the Supervisor;

4. Remain within the Yukon unless you have written permission from the Supervisor;

5. Notify the Supervisor, in advance, of any change of name or address, and promptly, notify the court or the conditional sentence Supervisor of any change of employment or occupation;

[88] Additionally, you are subject to the following conditions:

6. You are to have no contact directly or indirectly or communication in any manner with K.B.;

7. Do not attend any known place of residence, employment or education of K.B.;

8. Reside at a residence approved by your Supervisor, abide by the rules of the residence, and do not change that residence without the prior written permission of your Supervisor;

9. Remain in your residence or on your property at all times, subject to the following exceptions: except with the prior written permission of your Supervisor, including for the purposes of employment including travel directly to and directly from your place of employment, for the purposes of attending programming and counselling including travel directly to and directly from programming and counselling, for the purposes of performing community work service as directed by your Supervisor, and for obtaining the necessities of life, to a maximum of four hours per week, to be scheduled with and approved in advance by your Supervisor. You must answer the door or the telephone to ensure that you are in compliance with this condition. Failure to do so during reasonable hours will be a presumptive breach of this condition;

10. Not possess or consume alcohol and/or controlled drugs or substances that have not been prescribed for you by a medical doctor;

11. Attend and actively participate in all assessment and counselling programs as directed by your Supervisor, and complete them to the satisfaction of your Supervisor, for any issues identified by your Supervisor, and provide consents to release information to your Supervisor regarding

your participation in any program you have been directed to do pursuant to this condition; and

12. You must perform 40 hours of community work service as directed by your supervisor within the first five months of this Order.

[89] Following the completion of the conditional sentence of imprisonment, you will be subject to a probation order for a period of two years.

[90] The statutory terms of a probation order apply. All other conditions will be the same as outlined in the conditional sentence order, except that there will be no house arrest condition, and no community work service condition.

[91] I also make the following ancillary orders:

- An order under s. 487.051 of the *Code* for the provision of samples of DNA for analysis and recording. As sexual exploitation is a primary designated offence, the order is mandatory; and

- An order under s. 490.012 to comply with the provisions of the *Sex Offender Information Registration Act* for a period of 10 years.

[92] The Crown has not indicated an intention to seek a weapons prohibition under s. 110 of the *Code.* Nonetheless, I have considered whether it would be appropriate. Taking into account all of the circumstances, I find that it is unnecessary in this matter.

[93] Based on the Crown's concession in this case, I enter a conditional stay of proceedings in respect of the s. 271 sexual assault charge on the basis of the *Kienapple* principle (*R. v. Kienapple*, [1975] 1 S.C.R. 729).

[94] The victim surcharge is $100. I order that this amount be paid within three months.

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CHISHOLM T.C.J.