COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.L., 2025 ONCA 9[1]
DATE: 20250108
DOCKET: COA-23-CR-0832 & COA-23-CR-0871

MacPherson, Gillese and Roberts JJ.A.

DOCKET: COA-23-CV-0832

BETWEEN

His Majesty the King

Respondent

and

A.L.

Appellant

DOCKET: COA-23-CR-0871

AND BETWEEN

His Majesty the King

Appellant

and

A.L.

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[1] This appeal is subject to a publication ban pursuant to s. 486.4 of the *Criminal Code,* R.S.C. 1985, c. C-46.

Laura Remigio, for A.L.

Jeremy Tatum, for His Majesty the King

Heard: December 18, 2024

On appeal from the conviction entered on September 29, 2022, and the sentence imposed on July 10, 2023, by Justice Laura A. Bird of the Superior Court of Justice, sitting with a jury.

By the Court:

[1] The appellant was charged with six criminal offences. Following a jury trial, the appellant was convicted of four offences: trafficking of a person under the age of 18; procuring a person under the age of 18; advertising sexual services; and publishing or possessing child pornography. The appellant was acquitted of the charges of administering a noxious substance and receiving a material benefit.

[2] The trial judge made a ruling on the facts underlying the jury's verdict ("the Ruling"). She imposed a conditional sentence of two years less a day (with 18 months on house arrest), plus three years of probation. The Crown had sought a global sentence of six years' imprisonment.

[3] The appellant appeals the convictions. She submits that the verdicts were inconsistent and unreasonable. At the oral hearing of the appeal, the Crown invited the court to stay the procuring charge in accordance with *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[4] The Crown appeals the appellant's sentence as demonstrably unfit. It maintains its position at trial that a penitentiary sentence was warranted and jurisprudentially supported.

[5] At the conclusion of the parties' oral submissions on appeal, we dismissed the conviction appeal, except for the Crown's concession regarding the stay of the procuring conviction, and dismissed the sentence appeal with reasons to follow. These are our reasons.

Background

[6] The appellant and complainant had known each other for many years and were close friends. Both of them had suffered very difficult and abusive upbringings and the appellant had been in and out of foster care.

[7] In early October 2019, the appellant invited the complainant to stay at her apartment. The complainant was 16 years old and the appellant was 19 years old. Over the course of approximately four days, the complainant engaged in paid sex work with several men who came to the appellant's apartment in response to website advertisements that the appellant and the complainant had posted. The appellant had taken revealing photos of the complainant that she and the complainant included on the website advertising the complainant's services. Eventually, the complainant left the appellant's apartment and made a complaint to the police, alleging that the appellant drugged her, threatened her with harm,

and forced her into sex work. The appellant was charged with six criminal offences and convicted of the four offences set out above.

The Conviction Appeal

(1) Issues and Analysis

[8] The appellant submits that the convictions cannot stand because the jury's four guilty verdicts and two acquittals were inconsistent and/or unreasonable. She argues that the convictions depended entirely on the complainant's testimony that the appellant had drugged her and forced her into sex work, which the jury rejected. As such, according to the appellant, without the complainant's testimony, there was no evidence that a reasonably instructed jury could accept to ground a guilty verdict on any of the charges.

[9] We are not persuaded that the jury's guilty verdicts and acquittals are inconsistent or unreasonable. Before an appellate court can interfere with a jury verdict on the ground that it is inconsistent, it must find that the verdict is unreasonable. A verdict is unreasonable if a trier of fact, acting reasonably and properly instructed, could not have reached it. See *R. v. R.V.*, 2021 SCC 10, [2021] 1 S.C.R. 131, at paras. 28, 29; *R. v. Pittman*, 2006 SCC 9, [2006] 1 S.C.R. 381, at para. 6.

[10] The trial judge issued the Ruling in which she found there was sufficient evidence to support the guilty verdicts, notwithstanding the serious deficiencies

and frailties in the complainant's evidence. The fact that the complainant's allegations of having been drugged and forced into sex work were rejected by the jury does not mean that there was no evidence that the appellant had nevertheless facilitated the complainant's sex work. As the trial judge found, the complainant's testimony of the appellant's facilitation of her sex work was corroborated by other undisputed evidence such as texts and photos demonstrating that: the appellant invited the complainant to stay at her apartment; she assisted the complainant in taking and posting revealing photos and advertisements for her services; and she was aware of and encouraged the complainant to carry out paid sex work at her apartment.

[11] We therefore see no basis to interfere with the convictions.

The Crown Sentence Appeal

(1) Issues and Analysis

[12] The Crown submits that a penitentiary sentence was appropriate and proportionate for this offender and these offences and that the conditional sentence imposed by the trial judge was demonstrably unfit. The Crown argues that the trial judge failed to follow the Supreme Court's instructions in *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, by incorrectly elevating the appellant's personal circumstances over the paramount principles of deterrence and denunciation in cases of sexual offences against children. While the Crown recognizes that the

trial judge was entitled to take into account the appellant's mental health and intellectual disabilities, it says she gave excessive weight to those factors.

[13] The Crown submits that based on the trial judge's own findings, she should have imposed a sentence between three to four years in custody. However, given that the appellant has served most of her conditional sentence, if the sentence appeal is allowed, the Crown does not seek the appellant's reincarceration but asks that the requested custodial sentence be stayed.

[14] It is well-established that considerable appellate deference is owed to a sentencing judge's decision. Unless the sentence is demonstrably unfit or the sentencing judge made an error in principle that actually impacted the sentence, an appellate court cannot interfere with the sentence: *Friesen*, at paras. 25-26.

[15] While the trial judge's imposition of a conditional sentence in this case was exceptional, we are not persuaded that she failed to apply the governing principles from *Friesen*, nor that the sentence represents an unreasonable departure from the principle of proportionality or is demonstrably unfit in the particular circumstances of this case.

[16] In *Friesen*, the Supreme Court provided comprehensive guidance concerning the application of sentencing principles for sexual offences against children "so that sentencing judges impose sentences that accurately reflect the nature of sexual offences against children and their impact on the victim": at

para. 43. The Court detailed the extreme harm that sexual offences disproportionately cause children and, therefore, to society as a whole, and concluded that “sentences must recognize and reflect both the harm that sexual offences against children cause and the wrongfulness of sexual violence”: at para. 74.

[17] While requiring lower courts to readjust their sentencing ranges involving sexual offences against children, the Court reiterated the significance of the proportionality principle and the application of mitigating factors to reduce an offender’s moral culpability, saying at para. 91:

> These comments should not be taken as a direction to disregard relevant factors that may reduce the offender’s moral culpability. The proportionality principle requires that the punishment imposed be “just and appropriate…and nothing more” … [T]he personal circumstances of offenders can have a mitigating effect. For instance, offenders who suffer from mental disabilities that impose serious cognitive limitations will likely have reduced moral culpability. [Citations omitted.]

[18] The Supreme Court recently reiterated these principles in *R. v. Bertrand Marchand*, 2023 SCC 26, 487 D.L.R. (4th) 201, at para. 171.

[19] This court addressed the exceptionality of conditional sentences for sexual offences against children in *R. v. M.M.*, 2022 ONCA 441. In *M.M.*, at para. 16, this court noted that, given the Supreme Court’s instructions in *Friesen*, “[c]onditional sentences for sexual offences against children will only rarely be appropriate” and “[t]heir availability must be limited to exceptional circumstances that render

incarceration inappropriate". As an illustration of an exceptional circumstance, this court gave the example of medical hardship that could not be adequately addressed within a correctional facility, expressly stating that exceptional circumstances were not limited to that example.

[20] Chief Justice Tulloch made a similar point in *R. v. Pike*, 2024 ONCA 608, 440 C.C.C. (3d) 281, at para. 182, where he explained this court's use of the term "exceptional circumstances" in *M.M.* He stated that M.M. used "exceptional circumstances" as shorthand for personal circumstances and mitigating factors that are sufficiently compelling to make a conditional sentence proportionate. He also noted that this interpretation is consistent with the principle that "sentencing must focus on proportionality, not pigeonholing cases into ill-defined exceptional circumstance categories".

[21] While exceptional, there is no rigid rule that conditional sentences can never be imposed in the appropriate case: see, for example, *R. v. Faroughi*, 2024 ONCA 178, 435 C.C.C. (3d) 1. Reflecting the individualized nature of sentencing, conditional sentences for sexual offences against children have been upheld in exceptional cases where the court is satisfied that the sentencing judge adverted to the relevant governing principles and there was no basis to interfere with the factual findings of exceptionality: see, for example: *R. v. Singaqti*, 2024 NUCA 10, at para. 15; *R. v. T.J.H.*, 2023 YKCA 2, at para. 27; *R. v. Germain*, 2022 ABCA 257,

at paras. 84, 85; *R. v. R.B.B.*, 2024 NSCA 17, at paras. 41, 45. That is the case here.

[22] As reflected in her reasons, the trial judge was well aware of the instructions from the Supreme Court in *Friesen*. She referred to it as a case “sending a very strong message about the need for denunciatory and deterrent sentences in offences involving child victims.”

[23] However, the trial judge correctly noted that the denunciatory and deterrent message in *Friesen* does not change the fact that sentencing is an individualized process that must satisfy the fundamental principle of proportionality. The trial judge pointed to the mitigating effect of an offender’s mental disabilities on moral culpability as set out in paragraph 91 of *Friesen*, referenced above.

[24] Using that passage as a foundation, the trial judge provided this assessment of the appellant:

> In this case, I am satisfied that [the appellant’s] background, which includes her mental health challenges and developmental delays, were causally linked to her offending behaviour. Furthermore, I accept that [the appellant’s] own exploitation at the hands of older men also contributed to these offences. [The appellant’s] background must be looked at in its totality. Not only does she have significant intellectual delays that have impacted her ability to reason and understand the consequences of her behaviour, but she also had virtually no adult guidance or support growing up. To the contrary, she was sexually exploited by two older men. The breach of trust by the lawyer [sex with his client leading to disbarment] was particularly egregious.

> [The appellant's] own history of exploitation and her inability to obtain a basic education or employment undoubtedly contributed to her becoming involved in the sex trade industry herself. This put her in a position to encourage and assist [the complainant] to do the same, which is the conduct that forms the subject matter of these offences.

[25] The Crown does not take issue with the trial judge's findings about the appellant's mental disabilities and their causal effect on her moral culpability for the offences. Nor does the Crown argue that the trial judge was not entitled to rely on paragraph 91 of *Friesen*. We do not accept the Crown's submission that the trial judge inflated the appellant's mental disabilities or her particular vulnerability to exploitation if incarcerated. The trial judge's findings regarding the appellant's limited intellectual capacity and her background supported the trial judge's conclusion that the appellant was less morally culpable.

[26] The Crown's argument essentially boils down to a disagreement with the weight that the trial judge placed on the mitigating circumstances of the appellant's mental disabilities and background. It is well established that unless it is clearly unreasonable, the weight placed by the trial judge on particular mitigating circumstances will not disclose a reviewable error of principle: *Friesen*, at para. 26; *Singaqti*, at para. 15.

[27] We can find no fault with the trial judge's application of the relevant governing sentencing principles and her weighing of the relevant factors in this case. Her imposition of a conditional sentence in the particular circumstances of

this case was open to her. This case was exceptional. It does not change the sentencing range for these offences nor does anything in these reasons alter the exceptionality of the imposition of a conditional sentence in sexual offences against children: *Faroughi*, at para. 100.

Disposition

[28] The appellant’s conviction appeal is dismissed except that the procuring conviction is stayed on consent. The Crown’s sentence appeal is dismissed.

Released: January 8, 2025 “J.C.M.”

“J.C. MacPherson J.A.”
“E.E. Gillese J.A.”
“L.B. Roberts J.A.”