

R. v. C.W.

Manitoba Judgments

Manitoba Court of Queen's Bench
Judicial Centre of Portage La Prairie

E.H. Leven J.

April 29, 2022.

File No. CR20-03-00553

[2022] M.J. No. 222

Between Her Majesty the Queen, and C.W and D.W, Accused

(231 paras.)

Counsel

J. Funke, For the Crown.

M. Dyck, For the Accused C.W.

M. Cook, For the Accused D.W.

E. Cook, For the Accused D.W.

E.H. LEVEN J.

Submissions by Mr. Funke (Sentence)

1 MR. FUNKE: Thank you.

2 As the Court knows, I did submit some cases in support of the joint recommendation to the Court. I -- I do not propose to review the law. The Court has the cases at its disposal. I simply file those cases to demonstrate to the Court, that the joint recommendation that we're putting before the Court today is within the appropriate range of sentences that are typically imposed for the offences that the Court is dealing with today, so that if the Court had any concerns about the joint recommendation, you had that material at your disposal for reference.

3 THE COURT: Thank you.

4 MR. FUNKE: I can -

5 THE COURT: I do have the cases. I have read them. For -- for the record, why don't I just read the -- the names of the four cases I have.

6 MR. FUNKE: Certainly.

7 THE COURT: We'll just make sure -

8 MR. FUNKE: By all means.

9 THE COURT: -- to -- to be safe that these are the four that you intended me to see.

10 The first one that -- well, no particular order, but on the -- the pile of cases on my desk, the first one is *R. v. Christopher Ronald Jason Pye*, P-Y-E. It's a decision of the British Columbia Provincial Court from 2005.

11 The second one is *R. v. Black*, a 2007 decision of the Saskatchewan Provincial Court.

12 The next one is *R. v. (R.L.M.)*, a 2010 decision of the Alberta Court of Appeal.

13 And, finally, *R. v. Friesen*, F-R-I-E-S-E-N, a 2020 decision of the Supreme Court of Canada.

14 Are those the four cases that you are referring -

15 MR. FUNKE: They are indeed.

16 THE COURT: -- to?

17 MR. FUNKE: They are indeed.

18 THE COURT: I have read them.

19 MR. FUNKE: Very good. Thank you, My Lord.

20 The Court has also received copies of the community impact statements prepared by the Canadian Centre for Child Protection, as I understand it. As well as a community impact statement on behalf of Humane Canada.

21 THE COURT: Yes.

22 MR. FUNKE: I've canvassed those with both my learned friends. We -- we take the position that there's no objection to those materials being filed with the Court. And, in fact, I have a video that was prepared by the Canadian Centre for Child Protection, which is essentially, the community impact statement you received, is a transcript of the video that I'm going to be asking to play in court. Both my learned friends have indicated that they're not objecting to the video being played.

23 It's essentially an opportunity for those individuals to read their statement orally in court without having to be here in person. It does not depart from the community impact statement that was prepared in writing in any meaningful way. There's a few typographical issues that are identified in the report. That identify where it departs from the video, but otherwise it is a verbatim account of the community impact statement.

24 Before I do that, I do want to make some comments, however, about the Humane Society -- or Humane Canada's community impact statement, and -- and in discussions with my learned friend, we're all of the view that the Humane Canada community impact statement departs from what would traditionally be considered a community impact statement.

25 Where it differs from the Canadian Centre for Child Protection is that it actually refers to case law and -- and

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draws the Court's attention to statistics and other information, that that in some cases counsel have objected to with respect to it being tantamount to providing evidence or -- or filing a brief, akin to being an intervenor.

26 And -- and while there may be some dispute as to whether that is appropriate or inappropriate, we are all of the view that it does not have any impact or we're asking the Court to not let the Court depart from the joint recommendation on the basis of those community impact statements.

27 And on that basis, we're saying that we're not asking to litigate that issue today. That the community impact statement is going in without objection, but we recognize that in some cases that may not be the case if there was a dispute as to the appropriate sentence that is being imposed, but given that this is a joint recommendation, then we don't anticipate that that will have any impact on the joint recommendation, it's not a hill to die on today, so to speak.

28 THE COURT: All right, and just for -- for the record, what I -- I have in front of me and what I've read is I -- the first page of the first document is entitled "Manitoba Community Impact Statement". The name of the individual making the statement Monique St. Germaine; general counsel for the Canadian Centre for Child Protection Inc., and accompanying that is an affidavit of Monique St. Germaine sworn, just a second, I believe, it -- oh, affirmed April 6, 2022. Is -- is that one of the documents that you were referring to.

29 MR. FUNKE: Yes, that -- there's no dispute as to that one because it doesn't contain any type of --

30 THE COURT: Okay.

31 MR. FUNKE: -- argument brief or review of the law or -- or make reference to statistics or other evidence.

32 THE COURT: And the -- the other was from Humane Canada?

33 MR. FUNKE: That's correct.

34 THE COURT: The cover letter is date April 6, 2022 from Hannah Brown; manager of Criminal Justice System Reform Program, Humane Canada. And I take it that that's the -- the video relates to Humane Canada?

35 MR. FUNKE: No, the video links -

36 THE COURT: Oh, the -- the -- I see.

37 MR. FUNKE: -- to Canadian Centre for Child Protection.

38 THE COURT: Okay.

39 MR. FUNKE: Yeah.

40 THE COURT: And we -- we'll get to the video in a moment?

41 MR. FUNKE: In just a moment.

42 THE COURT: All right.

43 MR. FUNKE: Yes. Yeah.

44 THE COURT: All right, so we're all -- I'll invite Mr. Cook and Mr. Dyck to disagree with you if they wish. If they -- if they don't disagree with you, I'll take it as they're agreeing with you.

45 MR. COOK: My Lord, thank you. It's something we've canvassed quite extensively. And -- and my original position was, I don't know if I feel comfortable. I think they go beyond what we normally expect to see in a victim impact or community impact, but we predicate our position on that fact that we have a joint recommendation. If we didn't, I think I'd be a lot more obstreperous to my friend trying to file these documents, but given the position that we take, they're fine going in.

46 THE COURT: All right, Mr. -

47 MR. FUNKE: Just -- just a point of clarification, the Crown is not submitting these. These are community impact statements submitted on behalf -

48 MR. COOK: True.

49 MR. FUNKE: -- of communities which the Crown has agreed to entered into evidence on their behalf, but I'm not filing them. Yeah.

50 THE COURT: All right.

51 MR. FUNKE: But I -- I take my learned friend's point.

52 THE COURT: All right, Mr. Dyck, anything you wish to add to that?

53 MR. DYCK: Nothing further. Thank you.

54 THE COURT: You have nothing to add? Thank you.

55 MR. FUNKE: Very good.

56 THE COURT: Thank you all. All right.

57 MR. FUNKE: Very good.

58 In that case, then, My Lord, perhaps what I'll do is I'll -- I'll ask the Court's permission to play the video-recorded community impact statements presented by Canadian Centre for Child Protection.

59 THE COURT: All right, let's hope the technology cooperates with us.

60 MR. FUNKE: It -- well, it was working as of about 15 minutes ago, so with any luck, it will still be working.

61 THE COURT: We'll keep our fingers crossed.

62 MR. FUNKE: I make no promises.

(VIDEO PLAYED)

63 MR. FUNKE: Thank you, My Lord.

64 One of the conditions that the Canadian Centre for Child Protection imposed on me with respect to that video was that if it were to be played in court, I had to ask that the video be -- if it's going to be filed, that there be a sealing order with respect to the video, so that it not be available to a member of the public when they wish to access the file at a

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later date. And if there's no objection from my learned friends, I will ask that it be filed as an exhibit on the sentencing, but ask the Court to impose a sealing order.

65 THE COURT: I'll give Mr. Cook and Mr. Dyck a chance to -- to comment if they wish. Mr. Cook?

66 MR. COOK: That's with the consent of D W and I.

67 THE COURT: Thank you.

68 Mr. Dyck?

69 MR. DYCK: We're also in agreement.

70 MR. FUNKE: Very good. Thank you.

71 THE COURT: All right, a sealing order will be issued accordingly. Thank you.

(SEALING ORDER ISSUED)

72 THE COURT: Will this be Exhibit S3 ?

73 THE COURT CLERK: S3.

74 THE COURT: S3.

EXHIBIT S3 - Audio Statement (Sealed)

75 MR. FUNKE: And I don't know if the -- the community impact statements have been marked as exhibits in the sentencing? If not, they probably ought to be.

76 THE COURT: Why don't we mark the Canadian Centre for Child Protection statement as the next exhibit. That would be S4.

77 MR. FUNKE: That makes sense.

EXHIBIT S4 - Canadian Centre for Child Protection Impact Statement

78 THE COURT: And the Humane Canada exhibit as S5. I'll just give Madam Clerk a chance to input that.

EXHIBIT S5 - Humane Canada Impact Statement

79 MR. FUNKE: Thank you, My Lord.

80 So -- so clearly some of the harms that the victims in the community impact statement referred to don't apply in this case. There's no indication that the community sexual -- or, sorry, the -- the sexual abuse material in this case, child sexual abuse material in this case was ever shared or distributed with anyone other than the accused.

81 So the specific harms that they talk about in terms of being approached or identified by people who have viewed it on the internet wouldn't apply to this case, so they are talking about the general survivor experience of victims of child sexual abuse material.

82 One of the specific comments that they did make, however, that is applicable to these circumstances is the ongoing fear that the complainants have, whether it's based on fact or not. That there may have been exposure to somebody else or that they live with the fear that there may be people that have seen it. And whether or not that is borne by the facts, doesn't change the fact that those children are likely to still experience those anxieties as they go forward.

83 And so that -- that's one of the aspects of the community impact statement that is -- that is directly relevant to the circumstances before the Court. I'll say no more about that.

84 In terms of the victims themselves, they were approached and were given an opportunity to file a victim impact statements. We did not receive responses from either of them.

85 The Court in *Friesen* clearly indicates that the Court can take judicial notice of the fact that there are harms that flow from the production of child pornography or child sexual abuse material as it's come to be known. The impact on victims whether or not they provide direct evidence to that and certainly that is something that informs the joint recommendation that we are putting before the Court today.

86 In terms of the pre-sentence reports that were prepared with respect to -- to D W, there were some comments in the report that that I had just reviewed with my learned friend. I suspect that he's going to clarify those on the record?

87 MR. COOK: (NO AUDIBLE RESPONSE)

88 MR. FUNKE: Yeah, and so with those clarifications being made, almost all of my concerns with respect to the contents of Ms. W's presentence report are addressed. It -- it's something that I suspect become more relevant with respect to a future application for parole.

89 Given the fact that it's a joint recommendation today, I submit to the Court that there's nothing in the pre-sentence report that ought to cause the Court any concern with respect to accepting the joint recommendation that you will be hearing about in a few moments or cause any concern with the fitness or appropriateness of that recommendation.

90 With respect to Mr. W's pre-sentence report, I have to be candid, there were contents of that report that cause me a great deal more concern with respect to Mr. W's comments, but again because it's a joint recommendation, they are not so egregious that it would -- I would submit to the Court that it should cause the Court any concern with respect to accepting -- the joint recommendation remains a fit and appropriate disposition.

91 Mr. W will likely have to answer for those comments at a Parole Board hearing in the future. I suspect that it will become more relevant at that point. And as a result, I'm not going to go into the report in detail and identify those comments other than to say that had it not been a joint recommendation, the Crown would have spent a considerable period of time on Mr. W's attitude towards the offence and his attitude towards the victims where that -- were that not -- not the case.

92 Having said all that, I can tell the Court what the joint recommendation is that we're putting before the Court. With respect to the complainant; [Victim 1] (phonetic), it is a joint recommendation for two and a half years.

93 We are submitting to the Court that with respect to the complainant; [Victim 2] (phonetic), it is one and a half years consecutive for a total of four years.

94 With respect to the bestiality count, we are jointly recommending to the Court, that an additional one year be imposed for that count, but that it be served concurrently to the other time that's imposed resulting in a total disposition of four years.

95 We are submitting to the Court that totality has already been considered in the context of arriving at that joint recommendation. And as a result, we are submitting to the Court, there ought to be know further reduction in the sentence for that principle.

96 I can advise the Court that with respect to each of the accused, I've received a confirmation of their time in custody calculation because each of them did spend a period of time in custody before they were able to secure their release.

97 With respect to C W, he spent 13 days actual time. That should be rounded up at one and a half. I'll leave it to my learned friend to make a calculation because I'm not good at math on my feet.

98 With respect to D W, she had 12 days in custody. At time and a half, that would be a nice, round, even 18 days that she should be receiving credit, so with the four years should be imposed less the 18, a credit, equivalent days she's already served in custody for a go-forward basis of whatever the math works out to be.

99 We are also seeking ancillary orders. First and foremost, I'm asking the Court to consider -- and I apologize to my learned friends, I hadn't reviewed this with them before, but it occurred to me this morning, a 743.21 order under the *Code* simply prohibiting either of them from having contact with the named complainants while they serve the custodial portion of their sentence.

100 Ordinarily, they wouldn't be allowed to do that, in any event, but this just provides extra -- extra clarity for the -- for the institution where they may be serving their sentences,

101 In terms of the other ancillary orders that we did discuss, we're in an agreement that a DNA order ought to be imposed. These are primary designated offences.

102 That because each of them offended against two distinct complainants, a lifetime *SOIRA* order should be imposed. So that's the *Sexual Offenders Information Registry Act* order. And because it's two -- two offences against two different complainants, the *Criminal Code* indicates that it must be a lifetime order.

103 The Crown is seeking a ten-year 161 order. Conditions are:

104 That neither accused may be in a public park or other public place unless you are with -- or, sorry, it should be the standard wording of the condition with the following exception:

105 Except that you may be in a public park if you are with another adult who is aware of your convictions and is not either of the co-accused. So, like, Chuck and D can't be together in public park and claim that they're in compliance because they're in each others' company, it has to be a third person.

106 Under Section (b), as well, no exceptions.

107 Under Section (c), as well -

(UNREPORTABLE SOUND)

108 MR. FUNKE: -- there should be exceptions to the order under Clause (c) including, except while supervised and in the direct presence of the parent or guardian -

(UNREPORTABLE SOUND)

109 MR. FUNKE: -- of the child, as long as they are not the parent or guardian of the child.

110 THE COURT: I'm -- I'm sorry, one -- one more time?

111 MR. FUNKE: So they -- so the exception is, while supervised -

(UNREPORTABLE SOUND)

112 MR. FUNKE: I don't know -

113 THE COURT: Mr. Cook, what -- is that -- you indicated earlier that Emily Cook would be joining us on the phone -

114 MR. FUNKE: No. No. No.

115 THE COURT: -- could that be her trying to phone the courtroom?

116 MR. COOK: No, Emily Cook is -

117 MR. FUNKE: She's present in the -

118 THE COURT: Oh, I'm sorry, my -- I apologize. I apologize, Ms. Cook.

(UNREPORTABLE SOUND)

119 MR. COOK: Ms. Cook, come forward then.

120 THE COURT: So we simply -- simply don't know who's trying to phone the courtroom?

121 MR. FUNKE: Maybe just leave it off the hook, Madam Clerk, so it stops ringing.

122 So I'll repeat that -

123 THE COURT: All right.

124 MR. FUNKE: -- so there's no confusion.

125 THE COURT: I -- I apologize and -

126 THE COURT CLERK: He's going to keep calling back. (INDISCERNIBLE) my apologies.

127 THE COURT: All right, very good.

128 I'm sorry, Mr. Funke, one more time?

129 MR. FUNKE: Thank you very -

130 THE COURT: Except while supervised?

131 MR. FUNKE: Yes, My Lord. I'm glad that we're not unfairly maligning Ms. Cook any further.

132 So with respect to 161 (c), the standard wording of the condition with the following exceptions:

133 Except while supervised and in the direct presence of the child's parent or guardian, so long as C or D W are not the guardian. And that person is aware of your convictions and the conditions of this order.

134 There should be a further exception while they're in the company of their grandchildren in the privacy -- I'm not sure how my learned friend wants to word that. The -- the anticipation is that they can be alone with their grandchildren, but they can't be alone with any other child. That's the upshot. I leave it to my learned friend to suggest the specific wording that it wants to use for that.

135 THE COURT: Okay, does -- has any of this been provided in writing to Madam Clerk already?

136 MR. FUNKE: No.

137 THE COURT: No? Okay, so we'll -

138 MR. FUNKE: We have -- we do have the exceptions in writing and so I've told Madam Clerk that after the sentencing hearing, I will be able to assist her with the precise wording that we've agreed to.

139 THE COURT: Good. Good. Thank you. Thank you very much. Go ahead.

140 MR. FUNKE: I would just -- I would hand it to her, except it's an e-mail between counsel, which is privileged and there's some -- my own handwriting on it, so I don't want to provide it to the Court.

141 THE COURT: I see, okay. As -- as long as it allows Madam Clerk to prepare an official record --

142 MR. FUNKE: Make sure that it -

143 THE COURT: -- exactly as counsel want the wording.

144 MR. FUNKE: Yeah, very good.

145 THE COURT: Okay.

146 MR. FUNKE: And, finally, with respect to 161(d), the standard condition -- no, sorry, it's not the standard condition, the condition should read as follows:

147 You must not communicate with anyone under the age of 18 years. You must not access any child pornography. You must not access any images of children who are depicted to be or who appear to be under the age of 18 years old who are naked or who are portrayed in a sexual manner.

148 I'm also seeking a condition that they not have access to social media of any kind.

149 My learned friends may be asking the Court to consider an exception for that for the purpose of communicating with the grandchildren, and I leave it to the Court whether or not that can be accommodated.

150 There's also a request for a Section 160(4) order. Under Section 160(4) of the *Criminal Code*, it allows the Court to impose a ban on the possession of animals where the Court is of the view that it's in the interest of justice to do so.

151 I note that with respect to the bestiality count that the accused have pled guilty to, the evidence in support of that count, My Lord, was obtained from videotaped evidence that was seized from the home of both co-accused at the

time that a search warrant was executed following the disclosure of the production of the child sexual abuse material in this case.

152 That video evidence had date stamps going back as far as ten years, so the -- the date range of the offence to which they pled was in 2008 to 2018. And in reviewing that material with the RCMP internet child exploitation unit, we identified, at minimum, seven different animals all of which were dogs that both accused were engaged with. That they had recorded their sexual activity with.

153 The concern that the Crown has -- my learned friends are asking for a ban of a shorter duration. The concern that the Crown has is that this is the type of offence that is extremely difficult to detect.

154 Typically if people own animals, they own them in the privacy of their home or on a property that they owned that is far from prying eyes. Animals have no capacity whatsoever to report offending behaviour against them. They simply lack that capacity in any meaningful way.

155 The only reason that this series of offences were uncovered was because the accused chose to make a recording of them for their own benefit to watch at a later date. That alone would not have resulted in there being discovered. It was only because they also offended against two young people; two minor children who then approached authorities. It was as a result of those disclosures being made, that the authorities then began an investigation. And as a result of that investigation, the RCMP sought a search warrant. As a result of executing that search warrant, they seized exhibits and other items from the home of the accused and it was only upon review of those items that they found the digital recordings that the accused had made of their activities with the animals.

156 If any one of those steps in that chain had not existed, we would have never discovered this offence.

157 And I say to the Court that where the accused had demonstrated that they've engaged in a prolonged pattern of behaviour, of sexual activity involving animals, which we have to be clear is criminal in nature, the only way to protect animals going forward; the only way to protect animals going forward is by prohibiting these individuals from possessing them. There's no other mechanism the Court can impose that would keep animals safe.

158 And if these individuals were allowed to have animals in their care, I submit to the Court that there would always be a risk that those animals may be abused for the sexual gratification of either of the accused. So the Court is being asked, on behalf of the Crown, for a lifetime ban under Section 160(4).

159 Finally, there's also a request for the forfeiture of all exhibits seized. My learned friend, on behalf of Ms. D W, has asked that there be an exception for that, so that any items seized that did not afford evidence of the offence be returned to the parties, and I have no difficulty with that. If -- if something was seized from their home, which did not result in anything of evidentiary value being discovered, it remains the property of the accused and it ought to be returned to them.

160 My learned friend and I will be following up with the RCMP ICE unit to determine whether or not, if there are exhibits that contain child sexual abuse material, if that's on a specific component of the device that can be removed, and the RCMP are content at the balance of the device would not contain residual images or copies of that image or video, if that could be returned. If those conditions can be met, then the Crown will also agree to those items being returned, but that's something that we're not able to determine today.

161 THE COURT: By device, you mean something like a cell phone or a laptop computer -

162 MR. FUNKE: Cell phone, laptop, gaming console -

163 THE COURT: -- or tablet?

164 MR. FUNKE: -- whatever it is. I'm not exactly sure what all the items -

165 THE COURT: Okay.

166 MR. FUNKE: -- were.

167 THE COURT: All right, so ...

168 MR. FUNKE: But -- but there's certainly -

169 THE COURT: Okay.

170 MR. FUNKE: They -- they seized every electronic device -

171 THE COURT: Right.

172 MR. FUNKE: -- in the home of the accused that could possibly contain that. And not -- and what we do know is that not all of them contained evidence.

173 THE COURT: Okay.

174 MR. FUNKE: And so there is no question that some items are to be returned. There may be some further discussion in terms of which items may be able to be returned if certain modifications are met.

175 THE COURT: Okay.

176 MR. FUNKE: And so I've undertaken to work with my learned friend along with the RCMP to try and to ensure that the accused's rights to have their property returned to them is given effect.

177 THE COURT: All right.

178 MR. FUNKE: And unless the Court has any questions or comments for -- for me, those are my submissions, My Lord. I think I've addressed everything.

179 THE COURT: One -- one question regarding the Section 160(4) ban on possessing animals -

180 MR. FUNKE: Yes?

181 THE COURT: -- whether it be a lifetime or some shorter duration, is -- is it necessary that it apply to all animals? For example, I -- I imagine something like a goldfish would be non-contentious. Can -- can the order be more finely crafted? For example, it could apply only to dogs? It could apply to dogs and cats or perhaps there's some creative wording that everyone could agree upon. It seems there's -- there's no logical reason to ban something like goldfish for example?

182 MR. FUNKE: I think -- I think the physicality of the type of offence that the accused face would be difficult, if not impossible, to perform with a fish, despite what Monty Python might have you believe. But, nevertheless, I -- I have no difficulty with there being an exception for fish. But for -- for any oxygen breathing animal, I'm not sure how else to phrase it. Any vertebrate -

183 THE COURT: M-hm.

184 MR. FUNKE: -- that exists on the land and in the air, those species types cover such a broad variety of animals that trying to narrow it by genus, might be difficult for the Court. You -- you -THE COURT: I know.

185 MR. FUNKE: If the Court is going to do that, you might be embarking on a very difficult process to identify animals or some variation, wouldn't lend itself to the potential same harms being visited on it .

186 For example, birds, my learned friend and I had discussed birds before we came into the courtroom. Well, there's no question that there are sexual offences committed against certain varieties of birds and so -- and there's case law to support that. So -so one would say that, Well, birds can't be an exception because they -- the clarification is too broad.

187 The same goes with various types of mammals, some dogs would be vulnerable. Some dogs might not be vulnerable.

188 Some cats might be vulnerable. Some breeds of cats might not be vulnerable.

189 And I think we get into a debate that's too narrow and too finely tuned in that regard for the Court to be able to have any confidence that it can capture the types of harms that the order is intended to prevent.

190 THE COURT: All right.

191 MR. FUNKE: Particularly with respect to large mammals, those are clearly more vulnerable.

192 If -- if the Court wants to say that they can keep things, like, gerbils and rodents and other things like that, I -- I don't know. I leave it to the Court that the only way to ensure that animals are not subjected to these harms is to not to allow the accused to have animals.

193 THE COURT: Okay.

194 MR. FUNKE: Now, I appreciate that there may be some benefit that people ordinarily derive from the companionship and company of keeping a pet and that is sometimes a very valuable thing to have in life. I think that these two individuals have forfeited that privilege by virtue -- by virtue of their conduct and that that is a consequence of their offending behaviour.

195 THE COURT: All right, how -- how old are the accused now approximately?

196 MR. COOK: Sixty-one for D.

197 MR. DYCK: Sixty-three for -

198 THE COURT: Sixty-one and sixty-three? All right, thank you.

199 MR. FUNKE: There's been a -- a number of exemptions to the orders that I am asking the Court to consider under 161 specifically, that the accused will have unfettered access to the grandchildren. They have access to other family members in the company of those children's supervisors and guardians. That -- and the accused will have the benefit of each other's company going forward.

200 I -- I submit to the Court that whatever benefit it might -- that might flow to the accused in having animals is outweighed by the ever present risk that those animals may be further victimized

201 THE COURT: All right.

202 MR. FUNKE: -- and as a result, I take the position that there ought to be no exceptions.

203 THE COURT: Is it -- is it conceivable that there might be great-grandchildren in the lifetime of the accused? If they're simply 61 and 63 today and they might live to -- into their 90s, would -- would there be any probably adding or potential -

204 MR. FUNKE: No.

205 THE COURT: -- great-grandchildren into the order?

206 MR. FUNKE: No difficulty at all.

207 THE COURT: Okay.

208 MR. FUNKE: Grandchildren or great-grandchildren, yeah.

209 THE COURT: Okay.

210 MR. FUNKE: Yeah, there's no concern.

211 I want to be clear that there's indication from the Crown's perspective that either of the accused pose a risk of harm -

212 THE COURT: Okay.

213 MR. FUNKE: -- to their own grandchildren or great-grandchildren.

214 THE COURT: All right.

215 MR. FUNKE: Nothing to suggest that that is the case.

216 THE COURT: Thank you. I may have a couple of questions later, but we'll turn it over to Mr. Cook.

(PROCEEDINGS CONTINUE)

Submissions by Mr. Funke (Sentence)

217 MR. FUNKE: So just in terms of Mr. Cook's comments, the only issue I take with respect to his commentary is with respect to his reference to the *Basov* case, I can advise the Court that I took the liberty of drawing it up on Westlaw while my learned friend was making his submissions and in terms of the circumstances of this case, it -- it would fall into the third category identified in the *Oliver* decision from -- from Britain that was adopted by the Manitoba Court of Appeal in *Basov*.

218 Category 3 is defined as non-penetrative sexual activity between adults and children, so -- just so that the record is clear, it is the Crown's position that it does fall into the first and third categories in *Basov* depending on what -

219 THE COURT: All right.

220 MR. FUNKE: -- was depicted in the images and videos that were recorded.

221 In terms of social media, I -- I take my learned friend's comment that it's difficult to define precisely what falls in the definition of social media and what does not.

222 The difficulty with identifying a particular platform, Facebook, is that we don't know what platforms will come out next year or two years from now, three years from now or ten years from now.

223 And, for example, nobody anticipated that TikTok would take over the world. Well, it's the largest single, social media platform in the world right now. And it got there very, very quickly. That type of revolution could happen with the next platform. And so the problem with identifying specific platforms that exist today is that the -- the internet is a wild and rapidly evolving landscape where the Court cannot possibly contemplate what the next platform might be that could be exploited in similar ways as Facebook was in this case.

224 And it's referred to in the PIS that was attached to the pre-sentence report, Your Honour. It -- it wasn't a singular brief or occasional contact between the accused and the victim; [Victim 1], it was consistent contact of a grooming nature for four months between June and October 2018, so it was a -- it was a concerted and dedicated effort to -- and that's how they communicated with him. That's how they set up all the meetings. That's how they tried to get him to come to their home. They even enticed him to sneak out of his house and told him that if he needed a place to hideout for a while, he could stay at their place.

225 So -- so, I mean, these were insidious types of -- of commentary. So I say to the Court that the Court cannot diminish the -- the substantial risk of harm that flows from these individuals, in the Crown's submission, having them have access to social media platforms.

226 In terms of my learned friend; Mr. Dyck's comments about his client's relationship with alcohol, I agree there's no indication that either Mr. or Ms. W were intoxicated during these offences. What is clear, however, is that they provided alcohol to the minor children that they offended against.

227 And in the case of [Victim 2], he described being so heavily intoxicated as a result of that he had very little recollection of the events, but hadn't been for the fact that those events were -- were memorialized in both video and still images, we wouldn't have a full extent of what occurred. So -- so his relationship with alcohol is something that I think needs to be clearly defined. And so that's the only issue I take with respect to my learned friend's comments.

228 Finally, with respect to the calculation of time in custody, I took the opportunity during my learned friend's submissions, 13 days works out to time and a half at 19.5. I submit to the Court that we should round that up, so that Mr. C W's sentence should be reduced for the credit equivalent of 20 days' time in custody.

229 THE COURT: Thank you.

230 MR. FUNKE: Those are my only comments in response, My Lord.

231 THE COURT: Thank you.

EXCERPT CONCLUDED

IN THE MATTER OF THE QUEEN V. C W AND D W

I, KARI SHORT, Court Transcriber, HEREBY MAKE OATH AND SAY that the foregoing typewritten pages being numbered T One (T1) to T Twenty-One (T21), inclusive, contain a true and correct transcription of the recorded proceedings taken herein to the best of my knowledge, skill and ability.

COURT TRANSCRIBER

R. v. C.W.

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