

WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(3) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(3), read as follows:

486.4(3) CHILD PORNOGRAPHY — (1) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

. . . .

486.6 OFFENCE — (1) Every person who fails to comply with an order made under subsections 486.4(1) to (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

CITATION: *R. v. L.D.*, 2022 ONCJ 480

DATE: 2022 10 24

COURT FILE No.: Niagara Region 998 21 W2023 & 21 SR01512

B E T W E E N :

HIS MAJESTY THE KING

— AND —

L. (D.)

Before Justice J. De Filippis
Heard on May 10 & September 13
Reasons for Sentence released on October 24, 2022

Mr. M. Sokolskicounsel for the Crown
Ms. M. Lipson counsel for the accused

De Filippis, J.:

INTRODUCTION

[1] The defendant pled guilty to two counts; possession of child pornography and bestiality. The Crown proceeded by Indictment. These reasons explain why I accept the Crown position that the defendant must go to jail and reject that of the Defence that a conditional sentence order is appropriate.

THE OFFENCE

[2] In June 2020, a girl and her father moved into the home occupied by the defendant and her husband. The girl, who I will identify as AA, was 14 or 15 years old. She has a younger sister. They had a friend who is also under the age of 16. I will refer to these girls, respectively, as BB, and CC. AA soon began to feel uncomfortable living with the defendant and her husband; she noticed that they stared at her and whispered to each other. Suspicious about what they were saying, AA used the defendant's Netflix password to gain access to her Facebook account. AA typed her own name into the account and discovered numerous messages between the defendant and her husband about her, her sister, and friend. These digital messages depicted, in upsetting detail, the

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sexual fantasies of the defendant's husband with respect to the girls. It is not controversial that the messages constitute child pornography.

[3] AA preserved the digital messages by screen shots. These were turned over to the police. The defendant and her husband were arrested. The police were granted judicial authorization to search the electronic devices belonging to them. A 59 second video found on the defendant's cell phone reveals the offence of bestiality; a dog is called to her and performs cunnilingus.

THE OFFENDER

[4] The defendant is 41 years old. She does not have a criminal record. I have the benefit of a presentence report and a psychological assessment. In addition, the Defence filed four letters of support and a calendar of substance abuse counselling the defendant has undertaken since her arrest.

[5] The psychological assessment is based on interviews with the defendant as well as the presentence report, a prior psychiatric evaluation, and records from the Children's Aid Society. The defendant was surrendered to the Children's Aid Society when she was eight weeks old, by her mother because "she was drinking and too stressed to care for her children". The defendant's father was also an alcoholic. After several failed attempts at family reunification, the defendant was adopted. The defendant reports that her adoptive parents provided for her basic needs and remain supportive to this day. The defendant completed high school but has not been employed for much of her life. She is on the Ontario Disability Support Program because of scoliosis in her neck and knee pain. She also suffers from Attention Deficit Sensitivity Disorder. The defendant met her husband when they were teenagers. They married 15 years ago. She was introduced to pornography and substance abuse at a young age, and both were part of her life until her arrest on the present charges. At the request of her husband, she would role play by "dressing up as a little girl" and there were occasional "threesomes" involving her husband and the father of complainant AA. The defendant explained that she did what was needed to please her husband. She added that she is "thankful" for her arrest on these charges. It has given her a "second chance in life", away from her husband, and she enjoys her daily meetings at Alcoholic Anonymous and Narcotic Anonymous.

[6] The psychologist conducted several described tests and concluded that the defendant meets the criteria for Substance Abuse Disorder and Dependant Personality Disorder. The psychologist opines that the defendant is at a low risk of reoffending if she maintains sobriety and continues with counselling.

[7] Four members of Alcoholics Anonymous wrote letters about the defendant. She is described as a woman who overcame her initial shyness to become an active participant in the counselling sessions. It is obvious that she assists other alcoholics as much as she benefits from their discussions.

THE VICTIMS

[8] AA, BB, and CC jointly submitted a victim impact statement. It is in the form of bullet points, as follows:

- Self harm
- Depression
- Suicidal
- Numb
- Unsafe (felt as though we had to move away)
- Anxiety
- Betrayal
- Loss of trust
- Heartache

SUBMISSIONS

[9] The Crown submits that the defendant should be sentenced to four months in jail, concurrent on both counts. This should be followed by probation for three years and orders, pursuant to s. 161 of the Code and also that she provide a sample of her DNA.

[10] The Crown anchors his submission in the decision, of the Supreme Court of Canada, in *R. v. Friesen*, 2020 SCC 9 (CanLII). Counsel points out that custody is required because the seriousness of the offence trumps the defendant's personal circumstances and rehabilitative efforts. This, it is said, is the strong message from *Friesen*; recognizing the harm to children through denunciation and deterrence will almost always mean a jail.

[11] Defence submits that a conditional sentence order is appropriate in this case. Counsel pointed out that the defendant's husband pled guilty to making child pornography (in the form of digital messages) and, unlike the defendant has a prior conviction (for assault). It is not in dispute that the defendant's husband instigated the series of messages that constitute the offence. The parties have separated, and the defendant does not intend to reconcile with him. her husband left her with their accumulated debt, and she has declared bankruptcy. The Defence relies heavily on the psychological assessment: Notwithstanding a life of substance abuse and some mental health issues, the defendant has taken positive steps since her arrest to overcome her challenges. She has been assessed at a low risk to re-offend. Counsel emphasizes that the defendant is moving in the right direction and that jail can only hinder this progress.

ANALYSIS

[12] To give context to these reasons it is necessary to make some reference to the offending material. It is a lengthy exchange of text messages between the defendant and her husband. The latter describes in graphic detail what he would like to do to the girls. The defendant's husband takes the lead, but the defendant is not a passive listener. For

example, early in the discussion she states, “I have cameras we can hide”. Later, she sends her husband links to two internet sites that describe sexual acts with a “slutty schoolgirl” and a “very cute teen”. The disturbing conversation about the sexual abuse of girls continues, with the defendant’s husband always taking the lead. It is the defendant, however, who introduces a new topic: “I want to watch u fuck a dog. I want it to lick my pussy while u put ur cock in her pussy”, and then, “I had a dream that we had a dog and u made the dog lick my pussy”. The parties continue in this vein. I need not repeat the additional words for my present purposes. It must be noted, however, that the defendant’s dream became reality – it is the basis of the bestiality offence.

[13] In imposing sentence, I am also guided by Part XXIII of the *Criminal Code*. The following provisions are particularly important:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender

[14] Proportionality means that the severity of a sentence will depend on the seriousness of the offence as well as the moral blameworthiness of the offender; see *R v Lacasse* 2015 SCC 64 (CanLII). Personal circumstances are relevant in determining proportionality in light of the seriousness of the offence, but they do not alter the seriousness of the offence: see *R v Schofield* [2019] B.C.J. No. 22 (BCCA).

[15] In 2012 Parliament amended the *Code* by virtue of the *Safe Streets and Communities Act*, with the effect that a conditional sentence would no longer be available for anyone convicted of an offence that carries a maximum sentence of 10 years or more. In *R v Sharma* 2020 ONCA 487, an aboriginal offender challenged this restriction on the availability of conditional sentences on the basis that it violates sections 7 and 15 of the *Charter of Rights and Freedoms*. In a split decision, a majority of the Court agreed. Although the case was argued with respect to aboriginal sentencing issues, the Crown did not ask the Court to limit its judgment to such offenders and the Court did not

do so. The Crown appealed the decision in *Sharma* and the Supreme Court of Canada has reserved its decision. It remains the law in Ontario. Accordingly, a conditional sentence is available to the defendant, and I must consider that option.

[14] In this case, the child pornography was discovered by the victim. As this involves the abuse of a person under the age of 18, I must give primary consideration to the objectives of denunciation and deterrence. In *Friesen*, the Court provided comprehensive guidance to lower Courts by restating and reformulating certain governing principles in cases of sexual interference. These are the four messages that I take from *Friesen*: (1) Protecting children from wrongful exploitation and harm defines the legislative scheme of sexual offences against children; (2) Understanding this wrongfulness and harm is the critical duty of sentencing judges; (3) The performance of this duty means that those who commit this offence will usually go to jail; and (4) Exceptional circumstances, that justify a non-custodial, are those that mitigate an offender's moral responsibility, such as mental or cognitive disabilities.

[15] Section 742.1 of the *Code* lists four criteria that a court must consider before deciding to impose a conditional sentence: (1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment; (2) the court must impose a term of imprisonment of less than two years; (3) the safety of the community would not be endangered by the offender serving the sentence in the community; and (4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in ss. 718 to 718.2.

[16] The first two criteria are met in this case. As I have noted, the defendant has successfully completed recovery programs and is assessed to be at a low risk of re-offence, provided she remains sober. As such, community safety should not be endangered by the imposition of a conditional sentence. The difficult question is whether such a disposition meets the fourth criterion set out in the legislation.

[17] Denunciation and deterrence can be reflected through a conditional sentence, even in the most serious offences. The Court of Appeal for Ontario made this clear in *R. v. Kutsukake* [2006] O.J. 3771, a case involving criminal negligence causing death.

[18] I need not go through the cases provided to me by both counsel. This case is to be determined on the principle of proportionality, as that has been framed, in child sexual abuse cases, by *Friesen*. I accept the defendant has had a difficult past and may have been subject to a domineering husband. However, she is not alone in facing such challenges.

[19] These offences are serious, especially, the one involving the girls. AA knew something was wrong by the way the defendant and her husband acted around her. This led her to discover the pornographic discussion about her and the other two children. This has had a significant impact on them, as revealed in their joint statement to the Court. Denunciation and general deterrence require a jail.

[20] The defendant is sentenced to two months in custody for the possession of child pornography. The sentence might have been higher, but for the fact that she has done much by way of rehabilitation and I am constrained by the sentence imposed on her

husband. It would be wrong to impose an equivalent or higher sentence on this woman, when her husband took the lead in the offence and I have no evidence he made similar rehabilitative efforts.

[21] The defendant is sentenced to one month for the bestiality offence, to be served consecutively. Canadians will be upset to learn how she mistreated a pet dog. Jail is needed to condemn her conduct.

[22] In addition to the three months custody, the defendant will be on probation for two years on the following terms:

1. Report in person to a probation officer and after that, at all times and places as directed by the probation officer or any person authorized by a probation officer to assist in your supervision
2. Cooperate with your probation officer. You must sign any releases necessary to permit the probation officer to monitor your compliance and you must provide proof of compliance with any condition of this Order to your probation officer on request.
3. Live at a place approved of by the probation officer and not change that address without obtaining the consent of the probation officer in advance
5. Do not associate or communicate, in any way, by any physical, electronic, or other means, or be in the company of [AA, BB, and CC] or their immediate family
6. Do not be within 100 metres of any place where you know any of the above person(s) to live, work, go to school, frequent or any place you know the person(s) to be EXCEPT for required court attendances.
7. Attend for any assessment/counselling/treatment as directed by your Probation Officer.
8. Sign all required releases of information to verify attendance and completion of this assessment/counselling/treatment including, but not limited to, sexual deviant behaviors
9. Do not buy, possess, or consume alcohol or other intoxicating substances.
10. Do not possess or consume any unlawful drugs or substances (refer to the Controlled Drugs and Substances Act) except with a valid prescription in your name or those available over the counter.
11. You shall sign any release of information forms as will enable your probation officer to monitor your attendance and completion of any assessments, counselling or rehabilitative programs as directed.
12. You shall provide proof of your attendance and completion of any assessments, counselling or rehabilitative programs as directed.
13. You are not to have care or control of any animal.

[23] Pursuant to section 161 of the Criminal Code the offender is prohibited, for a period of 10 years, from:

- 1) Seeking, obtaining or continuing any employment, whether or not the employment is remunerated or becoming or being a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 16 years
- 2) Not to use the internet to access, directly or indirectly, any content or application which violates the law, specifically including but not limited to:
 - i. Accessing child pornography
 - ii. Participating in chat rooms or bulletin boards that discuss or promote child exploitation, child pornography, sexualized images of children or other child exploitation material.

[24] The defendant will provide a sample of her DNA and be subject to SOIRA for 20 years¹. She will pay a victim fine surcharge in the amount of \$200 for each count or two days in jail in default. She is given 12 months to pay these surcharges.

Released: October 24, 2022

Signed: Justice J. De Filippis

¹ I originally imposed a 10 year SOIRA order. Since the Crown proceeded by Indictment, it should have been 20 years. On the same day I signed the erroneous order, I issued a new order (and this amended decision) reflecting the mandatory life order. I did so on the authority of *R. v. R.P.* 2018 ONCA 473, endorsing the reasoning of Goldstein J. in *R. v. Alvarenga-Alas*, 2014 ONSC 4725. This confirms that I am not *functus officio* in these circumstances.