WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (2.1), (2.2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
>
> (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (iii) REPEALED: S.C. 2014, c. 25, s. 22(2), effective December 6, 2014 (Act, s. 49).
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
>
> (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and
>
> (b) on application made by the victim, the prosecutor or any such witness, make the order.

(2.1) Subject to subsection (2.2), in proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice may make an order directing that any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

(2.2) In proceedings in respect of an offence other than an offence referred to in subsection (1), if the victim is under the age of 18 years, the presiding judge or justice shall

(a) as soon as feasible, inform the victim of their right to make an application for the order; and

(b) on application of the victim or the prosecutor, make the order.

(3) 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.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b); 2010, c. 3, s. 5; 2012, c. 1, s. 29; 2014, c. 25, ss. 22, 48; 2015, c. 13, s. 18.

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

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Joseph, 2020 ONCA 733
DATE: 20201119
DOCKET: C65085 & C65860

Brown, Trotter and Paciocco JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Steevenson Joseph

Respondent

Vallery Bayly and Craig Harper, for the appellant

Andrew Bigioni and Mark C. Halfyard, for the respondent

Heard: September 15, 2020 by video conference

On appeal from the acquittals entered by Justice Colin McKinnon of the Superior Court of Justice, sitting with a jury, on February 9, 2018 and February 17, 2018, and the sentence, on the convictions, imposed on August 14, 2018, with reasons reported at 2018 ONSC 4646, 415 C.R.R. (2d) 231.

The Court:

OVERVIEW

[1] Steevenson Joseph, 21 years of age at the time of the offences, became engaged for profit in the sale of sexual services by three under-age females, CA (16 years of age), RD (15 years of age), and MM (15 years of age). He was charged with numerous offences and tried by jury.

[2] CA and MM testified at trial. RD did not testify directly at the trial, but testimony that she gave at Mr. Joseph's preliminary inquiry was admitted into evidence. The videos and transcripts of police interviews of each complainant were also admitted pursuant to s. 715.1.

[3] After the trial, Mr. Joseph was convicted of: (1) receiving a financial benefit from sexual services provided by a minor, RD; (2) making and possessing child pornography in the form of photographs that Mr. Joseph took of RD for use in advertising her sexual services; (3) advertising the sexual services of RD and CA; and (4) procuring CA to sell sexual services, contrary to s. 286.3(1) of the *Criminal Code*. As explained in more detail below, this last conviction must reflect the jury's reasonable doubt as to the state of Mr. Joseph's knowledge that CA was under-age.

[4] Mr. Joseph was acquitted of five other charges under s. 286.3 of the *Criminal Code*. Those counts alleged that Mr. Joseph procured RD and MM to provide sexual services and harboured each of the three young women for the

purpose of facilitating the sale of their sexual services. Mr. Joseph was also acquitted of sexually assaulting and sexually interfering with MM.

[5] After a sentencing hearing, the trial judge found Mr. Joseph to be a naïve and youthful first-offender who committed a lapse in judgment by getting involved in the sexual services business at a low point in his life. The trial judge described the offences as "benign" and found that Mr. Joseph had suffered "irreparable damage" from unfair publicity generated by the investigating police force.

[6] During the sentencing hearing, the Crown attempted to enforce mandatory minimum sentences for Mr. Joseph's crimes against RD: two years of imprisonment for the financial benefits offence, pursuant to s. 286.2(2) of the *Criminal Code*, and a further one year of imprisonment for making child pornography, pursuant to s. 163.1(2) of the *Criminal Code*. The trial judge accepted Mr. Joseph's challenges to these mandatory minimum sentences, finding that they constitute cruel and unusual punishment, contrary to s. 12 of the *Canadian Charter of Rights and Freedoms*. He declared them to be of no force or effect and ultimately concluded, after finding that Mr. Joseph was entitled to a credit of nine months for presentence bail conditions, that the fit sentence was a one-year suspended sentence.

[7] This is a Crown appeal. The Crown requests that the acquittals be set aside, and a retrial ordered on the four s. 286.3 charges related to RD and MM,

arguing that the trial judge erred in defining the terms “procure” and “harbour”. The Crown also seeks leave to appeal the sentence imposed, including the declarations that the mandatory minimum sentences under ss. 286.2(2) and 163.1(2) are of no force or effect.

[8] For reasons that follow, we allow the conviction appeal and order a new trial on the s. 286.3(2) charges relating to RD and MM.

[9] We also grant leave to appeal the sentence. We dismiss the appeal relating to the constitutional validity of ss. 286.2(2) and 163.1(2) and affirm the declarations of invalidity made by the trial judge pursuant to s. 52 of the *Constitution Act, 1982*. However, we allow the sentence appeal based on errors of principle made by the trial judge in sentencing Mr. Joseph. We substitute a global sentence of 15 months of imprisonment on the charges for which he was convicted, to be followed by 18 months of probation.

MATERIAL FACTS

[10] For personal reasons, Mr. Joseph, who had been living with his father and step-mother, ended up living on his own. His girlfriend of two years broke up with him. He testified that he was depressed and lonely, testimony that the trial judge accepted during the sentencing hearing.

[11] While at a shopping mall in May 2015, Mr. Joseph noticed and was attracted to CA. He testified that she looked 20 or 21. He struck up a conversation

with her. The two exchanged phone numbers and communicated for a number of days.

A. The Crown Case

[12] CA testified that, during a text conversation on June 2, 2015, Mr. Joseph asked her if she was interested in making money. She was. He paid for her to come to his home by taxi so they could discuss the “personal” business that he claimed to operate. In the conversation that followed, Mr. Joseph asked CA how old she was. She lied and said that she was 18. He explained that she could make money selling sexual services. He told her how much she could earn and how the business worked, including advertising and having sex with callers, either at his house or at a hotel. He told her it was her choice and that he did not want to force her and invited her to think about it. At first, CA, who knew nothing about the sexual services business, was unsure.

[13] CA testified that, after a few days, she and Mr. Joseph met and had sex at a hotel. At that time, she told him that she did not want to take up his offer, but two or three days later she texted him and said she was “down to do it” as she needed the money. Mr. Joseph asked her if she was sure and she said she was.

[14] When CA next went to Mr. Joseph’s apartment, she brought her friend, RD, who was 15 years old at the time. CA testified that RD accompanied her to Mr. Joseph’s apartment after CA told RD that she was going to work with Mr. Joseph

to make money as a sex worker. RD said, “Okay, me too. I’m gonna come with you.” RD’s evidence was somewhat different. She said that CA had been talking a great deal about Mr. Joseph and encouraged her to come, and that she agreed to go and “check it out”, thinking “if I don’t like it then I’ll just not do it.”

[15] When RD and CA arrived at Mr. Joseph’s apartment, Mr. Joseph and three of his friends were present. CA and RD agree in their testimony that the subject of RD’s age was discussed. CA testified that she told Mr. Joseph that RD was 17 years old and that he replied, “I wouldn’t let her do that.” CA then told Mr. Joseph that RD was going to turn 18 years of age later that week. Once again, RD’s testimony is somewhat different. RD said that when they first met, she told Mr. Joseph that she was 18 years old. According to RD, it was only later, after Mr. Joseph discovered that the young women had been lying to him, that Mr. Joseph was told that RD was 17 years of age, turning 18 in a few days. She confirmed that she continued to offer sexual services after that conversation.

[16] CA and RD also agree in their testimony that the topic of the sale of sexual services came up in the presence of Mr. Joseph’s friends. Mr. Joseph and the other young men discussed how the business operated with CA and RD. This included telling CA and RD that they needed to have their pictures taken for an advertisement, so that people would call to arrange sex in exchange for money. CA was under the impression that this was Mr. Joseph’s first time in the business,

because his friends “were telling [her and RD] more about the business thing, so I thought maybe they just trying to show him how things work”.

[17] RD testified that she was nervous, and that CA took her to another room and explained to her what was going on and how to act. CA told her to get ready to have their pictures taken without their faces showing. RD said she did not want to do it, but CA told her it was for the money.

[18] Sexualized photographs were taken that day. It is unclear on the evidence whether Mr. Joseph participated or whether those photographs were taken exclusively by his friends. However, both CA and RD agree that Mr. Joseph took additional photographs of them when they returned to his apartment the next day. The photographs depicted CA and RD, with their heads cropped, wearing underwear and posing in a sexually suggestive manner, and featured their private parts. Mr. Joseph used some of these photographs to advertise their sexual services on an internet site.

[19] RD testified that, when Mr. Joseph told them he had received a call, he told them what they should do when a client arrived, including answering the door, taking the money, and providing the sexual service requested. He said he would be in the washroom when clients were present and, if a client asked to use the washroom, they were to tell the client it was locked and that the landlord needed to come to open it.

[20] Both CA and RD's evidence was that, over the next several days, they provided sexual services to men for money. Mr. Joseph communicated with the men, set the prices for the sexual services, and booked the clients. The arrangement was that CA and RD were to give the money to Mr. Joseph. They did so except on one occasion when RD kept some of the money for herself.

[21] After the first occasion, CA went into the bathroom and cried. During the week that she was selling her sexual services, Mr. Joseph also had sex with CA several times.

[22] On or about the fourth or the fifth day, CA and RD brought a friend from school, AH, to Mr. Joseph's house. RD provided evidence as to her belief that AH was 15 years old at the time. CA and RD had told AH what they were involved in, and AH said she was interested in making money. RD said that CA asked Mr. Joseph if they could introduce him to AH and he agreed. On the bus ride over to Mr. Joseph's apartment, CA and RD explained to AH how the business worked. They agreed to lie to Mr. Joseph, telling him AH was 18. Mr. Joseph took sexualized pictures of AH. No admissible evidence was led that AH engaged in sex for money.

[23] MM testified that AH told her about Mr. Joseph's business and that she could make money fast. MM, who was 15 years old at the time, took the initiative of befriending Mr. Joseph on Facebook. Their chats were flirtatious and the two

exchanged sexualized photographs. MM testified that she told Mr. Joseph she was 16, turning 17, though it is not clear on the evidence when this is alleged to have occurred.

[24] MM testified that, on June 16, 2015, AH, who was visiting Mr. Joseph, texted MM to come over and she did so. Mr. Joseph met her at the bus stop. During that visit, Mr. Joseph told MM about the money that could be made selling sexual services. In text messages exchanged between them later that day, MM proposed bringing a gorgeous friend who “wants to make money too”.

[25] CA and RD testified that Mr. Joseph had been expecting them to come to his apartment and provide sexual services on June 17, 2015, but they had decided that they would no longer work for him. Although they found him to be “nice”, they were frustrated that Mr. Joseph was keeping the money, and had decided to work selling sexual services for a friend of RD’s. They did not tell Mr. Joseph this.

[26] MM testified that she visited Mr. Joseph that morning, on her own. She and Mr. Joseph had sex, which MM described as consensual. MM testified that, either before or after sex, they talked more about the “sex trafficking” business, a topic that she raised. She asked questions and he answered them. She agreed with defence counsel’s suggestion that before arriving that morning she was interested in trying the business. She testified that, from the questions she had been asking, Mr. Joseph would have known this. Ultimately, Mr. Joseph told MM that he had a

client that wanted to come over but that the girl that was supposed to sell sexual services to the client had not shown up. He asked her if she would be “down to, like, do it”.

[27] MM stated, “I was still kind of hesitating in the beginning because like I, eh, I wasn’t too, too comfortable doing that”. She said she asked Mr. Joseph further questions, including what would happen if the client became aggressive. Mr. Joseph told her that he would be outside and that she could text him. She asked about what she should do if it was the “cops”. He assured her that “most likely it won’t happen”. She agreed to sell sexual services to the client, and Mr. Joseph said he would go and get condoms. She testified that Mr. Joseph appeared to be very nice and laid-back and that she made the decision on her own.

[28] In fact, the client that arrived, and that MM admitted into the apartment, was an officer, from the Ottawa Police, who was part of a province-wide human trafficking investigation, “Project Northern Spotlight”. When Mr. Joseph returned to the apartment, he was arrested. CA and RD came by the apartment to pick up their belongings while the police were there. MM, CA, and RD were each interviewed, leading to the charges against Mr. Joseph.

B. The Directed Verdict

[29] At the end of the Crown’s case, Mr. Joseph sought and obtained a directed verdict of acquittal with respect to the s. 286.3 charges relating to MM. These s.

286.3 charges alleged that Mr. Joseph procured MM, a person under the age of 18 years, to provide sexual services for consideration (count 6) and harboured her for the purpose of facilitating the offence of obtaining sexual services for consideration (count 7).

[30] In his directed verdict decision, the trial judge concluded that "at the end of the day, procure means to cause someone to do something through reasoning or argument". He held that it would be impossible for a jury, given this definition, to find that Mr. Joseph procured MM.

[31] The trial judge interpreted "harbour" as meaning "to clandestinely or secretly shelter and protect". He held that there was no evidence that Mr. Joseph secretly sheltered or protected MM, and that it was therefore impossible for a properly instructed jury to convict on this charge.

C. Evidence of Mr. Joseph

[32] Mr. Joseph testified. He denied encouraging CA, RD, or MM to provide sexual services for consideration. His testimony contradicted key features of the Crown's case.

[33] He testified that it was CA who raised the issue of sex work, telling him that she planned to go to another city with a friend to work as a sex worker. Since she was persistently talking about needing money, and he had learned about the

business from a friend who was a sex worker, he offered to help her set up business in Ottawa.

[34] He said that there was never any discussion with RD about how the business is conducted, and that he was never told that RD was 17, going on 18. He had been told, all along, that RD was 18. She appeared, to him, to be an adult woman.

[35] Mr. Joseph testified that, when he took the photographs and posted the advertisements, he was helping CA and RD, and believed that what he was doing was legal. He said that while he initially did not profit from doing so, he began receiving some of the money after more people started coming around. He used the money he received for expenses, including the advertisements and food and alcohol for CA and RD.

[36] Mr. Joseph's testimony does not depart materially from MM's evidence with the exception of her claim that she told him she was 16, going on 17. He insisted that AH told him that MM was 18, that MM confirmed this, and that at one point he asked MM for identification. She did not produce any. Mr. Joseph said that he continued to believe that she was 18 because she looked 18 and he is, by nature, gullible. In an earlier police-statement, Mr. Joseph said that his gut told him she was not 18, but he later testified that he was overwhelmed when he said this.

D. The Jury Direction and the Verdicts

[37] All of the procuring and harbouring charges against Mr. Joseph were laid pursuant to s. 286.3(2), applicable where the complainant is under 18 years of age. Conviction of a s. 286.3(2) offence carries a mandatory minimum sentence of five years.

[38] Over the Crown's continued objections, the trial judge directed the jury on the meanings of "procure" and "harbour" consistently with the definitions he had adopted in his directed verdict decision. He also instructed the jury, as agreed by the parties, that to convict Mr. Joseph contrary to s. 286.3(2), the Crown must prove "[t]hat Mr. Joseph failed to take all reasonable steps to ascertain the ages of the complainants as being over the age of 18 years."

[39] The jury acquitted Mr. Joseph of the s. 286.3(2) procuring and harbouring charges involving RD (counts 4 and 5), and the s. 286.3(2) harbouring charge involving CA (count 3). On count 2, the jury acquitted Mr. Joseph of the offence of procuring CA contrary to s. 286.3(2), but convicted him of the included offence of procuring CA contrary to s. 286.3(1), which makes no reference to age. It necessarily follows, given the jury's count 2 finding, that the jury was not satisfied that the Crown had proven beyond a reasonable doubt that Mr. Joseph had failed to take reasonable steps to ascertain CA's age.

[40] The jury also found Mr. Joseph guilty of receiving a financial benefit, contrary to s. 286.2(2) of the *Criminal Code* (count 1). The trial judge had directed the jury that to convict on this count it had to find that "Mr. Joseph knew [that the financial benefit] was obtained by the purchase of sexual services of persons under the age of 18 years, and that Mr. Joseph failed to take all reasonable steps to ascertain the ages of the complainants".[1] Given the jury's doubts regarding whether Mr. Joseph took reasonable steps to determine CA's age, reflected in its verdict on count 2, the conviction on this charge cannot be in relation to CA. It follows that the jury's finding of guilt on this charge was based solely on the benefits that Mr. Joseph received from the sale of sexual services by RD.

[41] What finding did the jury make about Mr. Joseph's mental state relating to RD's age, a relevant sentencing consideration? The trial judge inferred that instead of finding that Mr. Joseph knew that RD was under 18, the jury was satisfied that Mr. Joseph had not taken reasonable steps to determine RD's age, and he ultimately sentenced Mr. Joseph on that basis. Put otherwise, the trial judge

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[1] This jury direction was incorrect. A reasonable steps inquiry is undertaken to determine whether a mistaken belief by the accused that the complainant was under 18 years of age provides a valid defence. Where the Crown can prove that the accused knew the complainant was under 18 years of age, a mistaken belief defence cannot survive, and there is no need to consider reasonable steps. It is therefore incorrect to direct a jury that the Crown must prove the accused's knowledge that a complainant is under 18 years of age and that reasonable steps were not taken. Proof that the accused knew the complainant was under 18 would, standing alone, provide the necessary *mens rea.* The Crown has not appealed this misdirection. We mention it only because the findings made about Mr. Joseph's state of mind relative to the age of the complainants are material in understanding the verdicts and in determining a fit sentence, and those findings can only be understood in light of the jury direction. Our recital of the erroneous jury direction should not be taken as endorsing it as a correct statement of the law.

inferred that Mr. Joseph did not knowingly receive a financial benefit from the sale of sexual services by a minor, but had the lesser degree of culpability of failing to exercise the due diligence in ascertaining her age that the law requires before a mistaken belief in age defence can succeed.[2]

[42] The jury also found Mr. Joseph guilty of making child pornography, contrary to s. 163.1(2) (count 9), and possessing child pornography, contrary to s. 163.1(4) (count 10), based on the sexualized photographs taken by Mr. Joseph and used in the advertisements. These convictions could not have included the photographs of CA, given the jury's doubts, implicit in the count 2 verdict, as to Mr. Joseph's knowledge of CA's age. Since the evidence of AH's age was hearsay, we accept the trial judge's finding that the jury found Mr. Joseph guilty of the child pornography charges based solely on the photographs of RD. Once again, given the trial judge's findings, these convictions must be regarded as flowing from Mr. Joseph's failure to take reasonable steps to determine RD's age.

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[2] This determination by the trial judge is also problematic. To be sure, where a determination material to the sentence is not evident from the verdict, it is for the trial judge to make the requisite finding: *R. v. Ferguson,* 2008 SCC 6, [2008] 1 S.C.R. 96, at paras. 16-19. However, the trial judge had directed the jury that to convict Mr. Joseph under s. 286.2(2) it had to be satisfied that the Crown had established that Mr. Joseph knew that the complainant was under the age of 18 and failed to take reasonable steps to ascertain her age. If the jury followed the trial judge's direction, its factual finding relating to Mr. Joseph's state of belief about RD's age would not be unclear. The jury must have found not only that Mr. Joseph failed to take reasonable steps to ascertain RD's age, but also that he knew that RD was under 18. The Crown has not appealed the trial judge's finding that Mr. Joseph's culpability relating to RD was based solely on the failure to take reasonable steps, so we will proceed on the basis of that finding.

[43] The jury also found Mr. Joseph guilty of advertising sexual services for consideration, contrary to s. 286.4 of the *Criminal Code* (count 8). The age of the complainants was not an element of this charge, and so this conviction relates to both CA and RD.

[44] The jury found Mr. Joseph not guilty of sexual assault against MM (count 11) and not guilty of sexually interfering with MM (count 12). There was no issue that Mr. Joseph had sex with MM and that, given that she was only 15-years old, MM was not legally capable of consenting: see *Criminal Code*, ss. 150.1, and 273.1. Based on the jury charge that was given, it is implicit in these acquittals that the jury was not persuaded that Mr. Joseph failed to take reasonable steps to determine her age.

E. The Mandatory Minimum Sentence Challenges

[45] The trial judge granted Mr. Joseph's challenges under s. 12 of the *Charter*. He declared the mandatory minimum sentence in s. 286.2(2) of the *Criminal Code*, of two years of imprisonment for receiving a material benefit from an offence under s. 286.1(2), to be of no force or effect. He also declared the mandatory minimum sentence of one year of imprisonment under s. 163.1(2) of the *Criminal Code*, for making child pornography, to be of no force or effect.

[46] Both dispositions were predicated, in part, upon "reasonable hypotheticals" in which the trial judge found that the imposition of these mandatory minimum

sentences would be grossly disproportionate having regard to the nature of the offences and the circumstances of the hypothetical offender.

[47] As explained immediately below, after giving Mr. Joseph a sentencing credit of 9 months because of the “oppressive” terms of his bail release, the trial judge concluded that a suspended sentence was fit. On this basis, he also found the mandatory minimum sentences grossly disproportionate when applied to Mr. Joseph.

[48] The trial judge concluded that s. 1 could not be applied because the mandatory minimum sentences lacked proportionality.

F. The Sentence Imposed

[49] The trial judge imposed a suspended sentence of one year, concurrent on all counts, requiring Mr. Joseph to report to a probation officer and not communicate with CA, RD, or MM. Three factors were central to the trial judge’s reasoning.

[50] The first factor was the trial judge’s assessment of the seriousness of the offences and the degree of responsibility of Mr. Joseph. He described the offences as “at the lowest end of the spectrum” and “the least serious conduct” he had witnessed “in the context of prostitution and child pornography cases”. This view was made clear during the trial on at least three further occasions. First, he described the allegations as being “as benign as it gets”. Second, he expressed

his discomfort with the notion that the photographs of the teenagers in their underwear constituted child pornography. Third, he refused to limit public access to those images, commenting that the complainants had allowed the images to be posted, and that, as they had already been online, “no harm” would arise if they were not kept under seal.

[51] In characterizing the seriousness of the offences, the trial judge also mentioned, in his sentencing decision, that Mr. Joseph made very little money and had not used manipulative or oppressive tactics to recruit CA and RD: “Both agreed that that their involvement with Mr. Joseph was voluntary, and they were free to cease engaging in prostitution should they choose.” He noted, as well, that they had stopped working for Mr. Joseph, no victim impact statements had been filed, and CA was progressing well in life. The trial judge noted that the last word relating to RD was that she was couch-surfing and had outstanding warrants for her arrest.

[52] Meanwhile, the trial judge appeared to find Mr. Joseph’s level of moral blameworthiness to be low. He characterized Mr. Joseph as naïve, and his actions and failure to inquire into RD’s age as “a serious lapse of judgment” that occurred during a low point in Mr. Joseph’s life when he was depressed and lonely.

[53] Based on this reasoning, the trial judge sentenced Mr. Joseph proportionately given what he perceived to be offences at the lowest end of the spectrum for the charges laid.

[54] The second factor was the trial judge's finding that "the profound effects of the charges on Mr. Joseph should serve to deter anyone who might be tempted to engage in similar activity." In coming to this conclusion, he featured post-arrest coverage by a newspaper and CBC News that linked Mr. Joseph to a province-wide sex trafficking probe and reported that the young women who worked for Mr. Joseph did so "against their will" and had been "rescued by police". The trial judge described this coverage, for which the arresting police force bore responsibility, as "highly inflammatory, exaggerated and unfair to Mr. Joseph". He stated: "The digital footprint can never be erased."

[55] The trial judge also referenced the "heartbreaking" video statement given by Mr. Joseph and commented that he had been "emotionally and financially destroyed by the very serious charges brought against him due to a serious lapse in judgment occurring at a highly vulnerable time in his life."

[56] Third, the trial judge found that Mr. Joseph had been under "oppressive" bail conditions that "seriously adversely effected" him. With the exception of 36

days of detention after he was charged with breaching his bail conditions,[3] Mr. Joseph was under house arrest from August 21, 2015 to May 16, 2016. On that later date, after a bail review, the house arrest conditions were replaced with a curfew. Initially, the curfew would have prevented Mr. Joseph from accepting an offer of evening employment, but it was varied some two months later to accommodate a job that Mr. Joseph had secured.

[57] Mr. Joseph was also subject to other release conditions while on house arrest, including a prohibition on accessing any personal computer, cell phone or other electronic device capable of accessing the internet. He could not communicate with anyone under 18 unless in the presence of their parent or his father, who initially acted as his surety, and he had to report to the police. After his preliminary inquiry, his bail conditions were varied to permit him to live where he wished and to use a computer for work or school purposes.

[58] During the period that Mr. Joseph was released on bail, the Crown ignored or was slow to respond to correspondence requesting variations. The trial judge set out this history in detail in his sentencing reasons.

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[3] The breach charges were ultimately dismissed because of a *Charter* violation. Neither this pre-sentence custody nor the more than two months that Mr. Joseph was in custody before his initial release were available to be credited by the trial judge, as Mr. Joseph received credit for that detention when sentenced for unrelated offences.

[59] Mr. Joseph testified that he had struggled to find employment because of these conditions. This, and the logistical challenges in reporting at the police station with his surety, caused him great stress. He also said that he was unable to cultivate normal relationships and felt guilty for burdening his family.

[60] The trial judge gave Mr. Joseph the equivalent of nine months of credit for these “oppressive” bail conditions. Having done so, he imposed a suspended sentence.

THE ISSUES

[61] The issues relating to both the conviction and sentencing appeals can conveniently be approached in the following order:

A. Did the trial judge err in interpreting the term “procures”, and, if so, did this error have a material bearing on the acquittals on count 4 (RD) and count 6 (MM)?

B. Did the trial judge err in interpreting the term “harbours”, relating to count 3 (CA), count 5 (RD), and count 7 (MM)?

C. Did the trial judge commit errors of principle in sentencing Mr. Joseph, and, if so, what sentence is fit?

D. Did the trial judge err in finding that the mandatory minimum sentence of two years of imprisonment provided for in s. 286.2(2) of the *Criminal Code* is of no force or effect?

E. Did the trial judge err in finding that the mandatory minimum sentence of one year of imprisonment provided for in s. 163.1(2) of the *Criminal Code* is of no force or effect?

[62] Based on the following analysis, we answer "yes" on the first two issues. We grant leave to appeal the sentence, and answer "yes" on issue "C", but we answer "no" to issues "D" and "E".

ANALYSIS

A. Did the trial judge err in interpreting the term "procures", and, if so, did this error have a material bearing on the acquittals on count 4 (RD) and count 6 (MM)?

[63] Section 286.3(2) of the *Criminal Code* provides:

> Everyone who procures a person under the age of 18 years to offer or provide sexual services for consideration or, for the purpose of facilitating an offence under subsection 286.1(2), recruits, holds, conceals or harbours a young person under the age of 18 who offers or provides sexual services for consideration, or exercises control, direction or influence over the movements of that person, is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of five years.

[64] In directing a verdict of acquittal on the s. 286.3(2) charges involving MM, the trial judge interpreted "procures" as meaning "to cause someone to do something through reasoning or argument".

[65] The trial judge erred in doing so. The definition of “procures” that was adopted by the Supreme Court of Canada in *Deutsch v. The Queen*, [1986] 2 S.C.R. 2, relating to the now-repealed precursor offence of procuring someone for prostitution, continues to apply to s. 286.3: *R. v. Gallone*, 2019 ONCA 663, 147 O.R. (3d) 225, at para. 61. According to the definition expressed in *Deutsch*, at para. 32, “procure” means “to cause, or to induce, or to have a persuasive effect upon the conduct that is alleged”. These are three distinct ways of procuring. “Procure” is not confined to causing someone to do something, let alone causing them to do it through reasoning or argument.

[66] We are not to overturn an acquittal unless we are persuaded with “a reasonable degree of certainty” that the trial judge’s error “might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal”: *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, at paras. 14-15. We are persuaded that the trial judge’s error led to the directed verdict of acquittal on count 6.

[67] Procuring someone to engage in even one act of selling or offering to sell their sexual services is an offence. In the concrete reality of this case, a correctly directed jury might reasonably have convicted Mr. Joseph of procurement relating to the offer MM made to Mr. Joseph to provide sexual services to the undercover officer. Specifically, Mr. Joseph proposed that MM sell sexual services to this client by asking her if she was interested, and there is evidence that, when she

expressed concerns relating to her safety and her possible discovery by the police, he allayed those concerns. On this evidence alone, a finding that Mr. Joseph induced MM to agree to sell her sexual services, thereby procuring her, was entirely possible. The trial judge erred by directing a verdict of acquittal on count 6.

[68] With respect to the acquittal of Mr. Joseph for allegedly procuring RD, count 4, it is the jury direction and not the directed verdict decision that is material. When instructing the jury on the meaning of "procures" with respect to the s. 286.3(2) charges involving both CA and RD, the trial judge said:

> "Procure" means to intentionally cause, induce or persuade someone to do something. "Persuade" means to cause someone to do something through reasoning or argument. "Intentionally cause" means to make happen. "Induce" means to persuade.

[69] The first sentence of this direction correctly reflects the *Deutsch* definition. The trial judge should have stopped there. In *Gallone*, at para. 75, Hoy A.C.J.O., as she then was, encouraged trial judges to stick to this definition, without elaboration. She did so with good reason. The trial judge fell into error in the elaboration he gave. By interpreting "persuade" as "to cause someone to do something through reasoning or argument", an action that would already be caught by the term "cause", the trial judge deprived "persuade" of meaning. He then deprived "induce" of meaning by defining it as meaning "to persuade". He took

three distinct modes of committing the offence and reduced them to one – to "intentionally cause".

[70] Appropriately, Mr. Joseph concedes that the trial judge erred. However, he argues that the error is harmless because it cannot reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. We disagree.

[71] We do not accept Mr. Joseph's submission that the inclusion of the *Deutsch* definition in the trial judge's charge suggests that the jury reasoned properly. Given that the trial judge provided an erroneous explanation of what the elements of the *Deutsch* definition mean, no comfort can be taken from its inclusion.

[72] Nor do we accept that, in convicting Mr. Joseph of procuring CA, the jury must have rested their decision on "inducement" or "persuasion", showing that they were not misled by the trial judge's erroneously narrow definition. On the evidence, a jury could well have found that Mr. Joseph "intentionally caused" CA to sell sexual services, the mode of commission that the trial judge invited the jury to use. Specifically, CA's evidence was that Mr. Joseph introduced her to the possibility of making the money she needed by selling sexual services. A jury could have concluded that, but for this act by Mr. Joseph, CA would not have sold the sexual services that she ultimately provided. In these circumstances, we reject the inference that the jury must have ignored the misdirection.

[73] Since this ground of appeal cannot be rejected on the basis that the jury was not misled by the misdirection, the material question becomes whether the evidence relating to RD could realistically have supported a conviction, had the *Deutsch* definition been furnished to the jury without additional, erroneous explanation. We are persuaded that it could have. RD testified that when she first went to Mr. Joseph's apartment, she had not yet decided whether to work for Mr. Joseph selling sexual services. She said that, after her arrival at his apartment, Mr. Joseph participated in discussions in which the business was explained. Mr. Joseph admitted in his testimony that he answered her questions. RD said in her s. 715.1 statement that Mr. Joseph even told her the business was "legal" when the proposed advertising was discussed. On this evidence, a jury could reasonably find that Mr. Joseph induced RD to work for him, selling sexual services.

B. Did the trial judge err in interpreting the term "harbours", relating to count 3 (CA), count 5 (RD), and count 7 (MM)?

[74] We agree with the Crown that "harbours" includes "to shelter". The trial judge interpreted "harbours" more narrowly, as requiring secrecy. He committed this error both in his directed verdict decision relating to MM (count 7), and in his jury direction relating to CA (count 3) and RD (count 5).

[75] Specifically, in his directed verdict decision, the trial judge defined "harbours" in s. 286.3 as "to clandestinely or secretly shelter and protect". During

argument, the trial judge repudiated the Crown's submission that "harbours" simply means "to shelter", commenting that, given the seriousness of the offence and its penalty, the term must be confined to "criminal harbouring" rather than the "very benign" definitions of harbouring. He expressed the view that including the mere provision of shelter, which would include providing a safe place where sexual services could be transacted, within "harbouring" would not be consistent with the decision in *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 S.C.R. 1101. In his ruling, the trial judge relied on dictionary definitions that he found spoke of secrecy, concealment, and hiding as representing the ordinary meaning of the term.

[76] Consistent with the definition used in the directed verdict application, the trial judge directed the jury that "harbours" means "to secretly shelter and protect". The jury subsequently asked for a more detailed definition. The trial judge told the jury that "secretly shelter and protect" means to "hide them".

[77] The governing modern principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo and Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21. Applying these principles, we are persuaded that the correct definition of "harbours" includes the simple provision of shelter, whether secretly or not.

[78] To begin, the ordinary meaning of the term “harbours” cannot carry the weight the trial judge assigned it, since the term “harbour” carries more than one ordinary meaning. Contrary to the conclusion reached by the trial judge, in *R. v. D’Souza*, 2016 ONSC 2749, 339 C.C.C. (3d) 494, at para. 146, Conlan J. expressed the view that using “the simplest language possible”, “harbour” means “to shelter”. In *R. v. Anwar*, 2020 ONCJ 103, 62 C.R. (7th) 402, at para. 127, McKay J. said that harbour means “to give shelter or refuge”. There is, therefore, controversy about the ordinary meaning of the term.

[79] Although the ordinary meaning of a term may not be the same as its dictionary meaning, dictionary meanings can nonetheless be instructive in identifying ordinary meaning. The trial judge relied upon definitions that describe “harbours” as affording lodging or shelter to a fugitive, criminal, or illegal alien, including to “receive secretly and conceal a fugitive from justice”; “to shelter or hide a criminal or wanted person”; and “to clandestinely shelter, succour and protect offenders against the law”. He found that all of these definitions included a clandestine element in the word’s meaning.

[80] However, other definitions, including the primary definition in some dictionaries, do not require or even connote secrecy. For example, the primary definition of “harbour” in the *Canadian Oxford Dictionary*, 2nd ed, is “to give shelter to (esp. a criminal or wanted person)”. This definition recognizes the common connotation of concealment, but in no way requires concealment. Similarly, neither

the primary definition of “harbour” in the *ITP Nelson Canadian Dictionary of the English Language*, 1998, “[t]o give shelter to”, nor its secondary definition, “[t]o provide a place, home, or habitat for”, require or even connote secrecy.

[81] Hence, the ordinary meaning of the term “harbours” does not settle things. It is ambiguous. That ambiguity is resolved when its meaning is considered, as it must be, in the context of s. 286.3 of the *Criminal Code*.

[82] First, the French version of s. 286.3 uses the word “héberge.” This means “to accommodate”, “to put up” or “to give shelter”: *The New Collins Robert French Dictionary*, 5th ed., *sub verbo* “héberger”. “Héberge” does not carry a connotation of secrecy*: R. c. Leblanc*, 2018 QCCQ 6481, at paras. 59-77. Therefore, to import into s. 286.3 the secrecy element that is occasionally included in the English term “harbours” would distort the French version of s. 286.3, which is equally authoritative. In contrast, omitting secrecy from the English term “harbours” would be consonant with the French term without distorting the equally authoritative English version. In these circumstances, the “shared meaning rule” of statutory interpretation, described in *R. v. Daoust*, 2004 SCC 6, [2004] 1 S.C.R. 217, at para.30, requires that “harbours” be interpreted consistently with “héberge”, in other words, as meaning “to shelter”, whether secretly or not.

[83] Second, s. 286.3 provides for a range of conduct that is criminal when undertaken for the purpose of facilitating an offence under s. 286.1. One of those

modes of commission occurs if a person “conceals” another. A person who secretly shelters another is necessarily concealing them. Therefore, if the term “harbours” included only the provision of secret shelter, it would add nothing to s. 286.3, contrary to the presumption against tautology.

[84] Mr. Joseph submits that the “associated words rule” produces the opposite result. The principle relating to associated words, affirmed in *R. v. Goulis* (1981), 125 D.L.R. (3d) 137 (Ont. C.A.), at p. 142, holds that “[w]hen two or more words which are susceptible of analogous meanings are coupled together they are understood to be used in their cognate sense”. Mr. Joseph urges that the words “conceal” and “harbour” are frequently associated in the *Criminal Code* and must give each other meaning. The trial judge engaged in similar reasoning in his directed verdict ruling, inferring that other sections in the *Criminal Code* that use the word “harbour” support giving that term “clandestine meaning”.

[85] Without intending to settle the meaning of other provisions of the *Criminal Code* where the words “harbour” and “conceal” are used in the same provision, this reasoning is problematic in the context of s. 286.3, for two reasons. First, as *Goulis* itself illustrates, the “associated words rule” operates to assign meaning to each of two associated words. It does not operate to make one of those associated words meaningless within the section, as importing secrecy into the term “harbour” would do. Second, this court already determined in *Gallone*, at para. 69, that the modes of commission identified in s. 286.3 are to be read disjunctively, not in

association. The rule against redundancy governs, and supports giving harbour the broader meaning of “to shelter”.

[86] Third, a purposive interpretation of s. 286.3 does not favour a secrecy requirement, as the trial judge concluded. As we will explain shortly, a purposive interpretation in fact favours reading “harbour” as including the provision of shelter, whether secretly or not.

[87] It is instructive to begin, however, with the trial judge’s reasoning. In concluding that a purposive interpretation of s. 286.3 requires a secrecy requirement, the trial judge expressed concern that if “harbour” included the simple provision of shelter, it would criminalize the laudable activity of providing a safe place where sex workers can engage in lawful sex work, contrary to the objective outlined in *Bedford*.

[88] We are not persuaded that interpreting “harbour” in this way leads to this outcome. As the Crown points out, harbouring is only an offence if it is done “for the purpose of facilitating an offence under subsection 286.1”. A “purpose” requirement imposes a “high” “specific intent” *mens rea*: *R. v. Khawaja*, 2012 SCC 69, [2012] 3 S.C.R. 555, at paras. 45-47; *R. v. Legare*, 2009 SCC 56, [2009] 3 S.C.R. 551, at para. 32. More than knowing facilitation is required: “the accused must *specifically intend* his actions to have this general effect” (emphasis in original): *Khawaja*, at para. 46; see also *R. v. Briscoe*, 2010 SCC 13, [2010] 1

S.C.R. 411, at paras. 16-18. In the case of s. 286.3, that general effect is the effect of "facilitating an offence under subsection 286.1": *R. v. Boodhoo and others*, 2018 ONSC 7205, at paras. 32-33; *R. v. Antoine*, 2019 ONSC 3843, at para. 40.

[89] McLachlin C.J. explained in *Khawaja*, at paras. 44-53, that the "purpose" *mens rea* worked to prevent s. 83.18 of the *Criminal Code*, a participation in the activity of a terrorist group offence, from exceeding its purpose by punishing "individuals for innocent, socially useful or casual acts which, absent any intent, indirectly contribute to a terrorist activity". The same holds true for s. 286.3. Its "purpose" *mens rea* prevents the conviction of those who would provide safe shelter to a sex worker without the intention of facilitating an offence under s. 286.1(1) or s. 286.1(2). Simply put, the concern that generated the trial judge's conclusion that a purposive interpretation of s. 286.3 requires a secrecy requirement does not exist.

[90] What, then, is the purpose of s. 286.3? It is the same purpose that underpins all commodification of sexual services offences, as described in the Department of Justice, *Technical Paper – Bill C-36* (Ottawa: Department of Justice, 2014), at pp. 3-9. Parliament enacted these provisions in order to eradicate prostitution to the extent possible while largely immunizing the sellers from prosecution. Criminalizing the provision by third parties of shelter, when this is being done for the purpose of facilitating an offence under s. 286.1(1) or s. 286.1(2), is consistent with this purpose. On the other hand, it is difficult to imagine

why Parliament would permit a person, for the purpose of facilitating an offence contrary to s. 286.1, to provide a place where that offence can occur, so long as this is done openly and not secretly.

[91] We are, therefore, persuaded that the trial judge misdirected the jury as to the meaning of “harbours”. This error was material to the acquittals entered on counts 3 (CA) and 5 (RD). It was not contentious at trial that, as part of his business plan, Mr. Joseph arranged for CA and RD to sell sexual services from his apartment. A jury could find that this satisfied the term “harbours”. Further, Mr. Joseph conceded at trial that if the jury found that he harboured CA or RD, he had done so for the purpose of facilitating an offence under s. 286.1.

[92] The trial judge also erred in interpreting “harbours” in his directed verdict decision relating to MM (count 7). That error also mattered. Although the sale of sexual services by MM was not consummated, there was clear evidence that Mr. Joseph provided MM with a place from which she would sell sexual services to the officer, and that this was done for the purpose of facilitating an offence under s. 286.1.

C. Did the trial judge commit errors of principle in sentencing Mr. Joseph, and, if so, what sentence is fit?

[93] The trial judge committed errors of principle in sentencing Mr. Joseph. These errors had an impact on the global sentence that the trial judge imposed

and therefore justify our intervention: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 41. Specifically, he erred: (1) in characterizing the seriousness or gravity of the offences he was sentencing and in situating Mr. Joseph's degree of responsibility; (2) by placing undue weight on the bail conditions that had been imposed on Mr. Joseph; and (3) by relying on publicity to find a reduced need for general deterrence. We would set aside the sentence imposed by the trial judge. A fit sentence would be a global sentence of 15 months of incarceration, followed by 18 months of probation.

(1) Mischaracterizing the Seriousness of the Offences and the Degree of Responsibility

[94] We agree with the Crown that the trial judge erred by failing to appreciate the seriousness or gravity of the offences he was sentencing, and in situating Mr. Joseph's degree of responsibility. We will begin with the sexual commodification offences.

[95] As this court recognized in *Gallone*, at paras. 91-93, Parliament has chosen to treat the commodification of sexual services as criminal on the basis that prostitution is inherently exploitive and "those who sell their own sexual services [are] victims who need support and assistance, rather than blame and punishment". In his sentencing decision, the trial judge does not reflect an appreciation of this. Instead of treating the offences as inherently exploitive, with

CA and RD as victims, the trial judge evaluated CA and RD's degree of responsibility when situating the seriousness of what Mr. Joseph had done.

[96] Specifically, the trial judge described how CA and RD each made "voluntary" decisions to sell their sexual services, and he noted that CA had criticized Mr. Joseph for not generating enough business, and that RD was "anxious to get involved". Although Mr. Joseph was not convicted of offences involving MM, in comments he made during the trial, the trial judge also described MM as "keen" and challenged the Crown's reliance on MM's vulnerability by commenting, inappropriately, that this was "not [MM's] first rodeo."

[97] In making the comments about CA and RD in his sentencing decision, the trial judge was not simply rehearsing neutral evidence. The trial judge's particularization of the readiness of each of these young persons, including MM, to get involved makes it evident that he found the voluntariness of the complainants to be significant. It was not.

[98] Nor was the trial judge merely noting the absence of coercion by Mr. Joseph, a relevant consideration in determining the seriousness of what Mr. Joseph did. Three facts drive this conclusion: the trial judge had already mentioned the absence of coercion before he described the conduct of CA and RD as voluntary; his comments about the readiness of CA and RD to get involved focussed not on Mr. Joseph but on the interest these victims had in selling their sexual services;

and at no point did he speak of the offences as inherently exploitive. We are satisfied that the trial judge erred in principle by considering the responsibility of the victims in identifying the seriousness of the offences, and by failing to appreciate the true nature of the offences he was sentencing.

[99] This error is aggravated by the fact that RD was a child. She was a 15-year-old and so, in law, incapable of consenting to the sexual activity that the sale of sexual services entails. Although a mistaken belief in age can lessen the degree of responsibility of the offender, it is wrong to treat the voluntariness of children to engage in sexual activity, including sexual transactions, as a material consideration in situating the seriousness of an offence: *R. v. Friesen*, 2020 SCC 9, 444 D.L.R. (4th) 1, at paras. 151-153.

[100] Although, as a 16-year-old, CA was not entirely incapable of consenting to sex, it is arguable that because of her age she was legally incapable of consenting to sex in exchange for money. Pursuant to s. 153, a 16-year-old is incapable of consenting to sexual activity within an exploitive relationship. The relationship between the person who obtains sexual services for consideration and the sex worker is one that Parliament has chosen to treat as inherently exploitive. It is therefore possible that even CA could not consent to what was transpiring. However, we need not decide this question to make the critical point. The trial judge should not have treated the voluntary participation of the complainants, including CA, as reducing the seriousness of the offences.

[101] The trial judge failed, as well, to convey an understanding of the seriousness of the child pornography that Mr. Joseph made. Two events during the trial reflect his belief that the child pornography offence that Mr. Joseph was ultimately convicted of was anything but serious. First, during argument, he expressed discomfort with the fact that these photographs even qualify as child pornography. Second, he refused the Crown's request to limit public access to the photographs during the trial. He commented that if they were "the kind of child pornography that we normally call child pornography" he would exclude the public, but there would be "no harm, in my view, by showing these photographs when, when they were on Back Page anyway" and "these young women allowed it."

[102] This latter episode is troubling. It is another instance of the inappropriate assignment of responsibility to children for their own sexual exploitation. In addition, if these images proved to be child pornography (as they ultimately did) the trial judge's decision would result in the unnecessary publication of child pornography. The trial judge should have ordered that the images not be publicly displayed during the trial. But that is an aside, albeit an important one. The instant point is that these two episodes reflect what is apparent in the sentencing decision itself. When judging the seriousness of the offence, the trial judge erred by focusing only on how "shocking" the images themselves were. What made the child pornography offence serious was not how revealing or graphic the images were, but that, by design, they depicted RD, a child, as sexually available, and that they

were created by Mr. Joseph for his own profit, an aggravating circumstance pursuant to s. 163.1(4.3) of the *Criminal Code*. Neither or these considerations found expression in the trial judge's reasons for sentence. As a result, he erred in his assessment of the seriousness of the child pornography offence.

[103] Unfortunately, there are many commodification of sexual services offences and many child pornography offences that are more serious than those Mr. Joseph was convicted of committing. The trial judge was correct in noting that the offences Mr. Joseph committed did not include the common aggravating features of coercion, violence or intimidation and implying that, in relative terms, the images of RD were not shocking, as many such images are. However, it was wrong for the trial judge to use the word "benign" when referring to these offences, even when speaking in relative terms.

[104] In addition to failing to appreciate the seriousness or gravity of the offences he was sentencing, the trial judge understated Mr. Joseph's degree of responsibility for those offences. Even giving due deference to the trial judge's acceptance that Mr. Joseph was depressed, struggling, and naïve, the trial judge was wrong to conceive of Mr. Joseph's commission of these offences as a "serious lapse of judgment". Mr. Joseph made a considered decision to embark upon an escort business by using the sexual services of young persons for his own profit. In CA's case, he knew she was young and in need of money, and, in RD's case, he failed to even take reasonable steps to determine her age. The enterprise was

carried out over the course of a week and ended only when CA and RD quit. Mr. Joseph caused CA to sell her sexual services, and provided RD, a 15-year-old, with the opportunity to work as a sex worker, for close to a week. These are serious crimes.

[105] The errors in principle by the trial judge in assessing both the seriousness of the offences and Mr. Joseph's degree of responsibility had an obvious impact on the sentences imposed. These errors distorted the trial judge's proportionality assessment pursuant to s. 718.1 of the *Criminal Code*, a major driver in ascribing a fit sentence.

[106] Moreover, the offences against RD involved the exploitation of a child. The trial judge was therefore obliged, pursuant to s. 718.01 of the *Criminal Code*, to emphasize denunciation and deterrence in sentencing Mr. Joseph. The trial judge's decision shows a careful focus on Mr. Joseph's rehabilitative potential and demonstrates commendable attention in attempting to gauge the impact of the sentence on Mr. Joseph. However, his reasoning, and the sentence imposed, do not reflect the prominence of the principles of denunciation and deterrence that the law requires. This, too, affected the sentence the trial judge imposed.

(2) Placing Undue Weight on Bail Conditions

[107] The trial judge gave Mr. Joseph the equivalent of nine months "credit" because of bail conditions that had been imposed on him pending trial. The trial

judge did not say explicitly that without such credit he would have sentenced Mr. Joseph to nine months in custody instead of imposing a suspended sentence, but that is the implication. Otherwise, why would he have quantified the mitigation with such precision and described it as a "credit"? We are persuaded that in giving Mr. Joseph the equivalent of nine months credit, the trial judge placed unreasonable emphasis on Mr. Joseph's bail conditions. Moreover, he erred in principle in assessing the mitigating effect of the bail conditions by considering their necessity. Mitigation for bail conditions is to be based on how punitive those conditions were, not how necessary they were.

[108] The propriety of treating "stringent bail conditions, especially house arrest", as a sentencing consideration was affirmed in *R. v. Downes* (2006), 205 C.C.C. (3d) 488 (Ont. C.A.), at para. 33. Although it is not uncommon to speak of providing "credit" for stringent bail conditions, "pre-trial bail is conceptually a mitigating factor" in assessing a fit sentence: *R. v. Panday*, (2006), 205 C.C.C. (3d) 488 (Ont. C.A.). Mitigation is given because stringent bail conditions can be punitive and therefore "akin" to custody: *Downes*, at para. 29. The criteria to be considered in assessing the weight of the mitigation to be given therefore include the amount of time spent on bail conditions; the stringency of those conditions; their impact on the offender's liberty; and the ability of the offender to carry on normal relationships, employment and activity: *R. v. Place*, 2020 ONCA 546, at para. 20. The mitigating effect that such considerations have on the sentence to be imposed falls within the discretion

of the trial judge: *Downes*, at para. 37. However, where a trial judge places unreasonable emphasis on any mitigating factor, appellate intervention is warranted: *Lacasse*, at para. 49. The same holds true in the case of mitigation for strict bail conditions. We are persuaded that the trial judge exercised his discretion unreasonably when sentencing Mr. Joseph by giving excessive weight to the bail conditions he was under.

[109] Mr. Joseph was under house arrest for approximately eight months: the time between August 21, 2015 and May 16, 2016, interrupted by 36 days of incarceration after Mr. Joseph was arrested for breach of recognizance. Mr. Joseph has already been credited for that time in custody on unrelated charges. The house arrest terms were not inordinate. The usual exceptions applied during the time that Mr. Joseph was experiencing house arrest, including for employment, education, and the medical needs of Mr. Joseph and his immediate family.

[110] The curfew that followed was not onerous. It required Mr. Joseph to be at his residence between 7:00 p.m. and 6:00 a.m. The only unusual feature of the curfew is that it did not provide an exception for employment. After Mr. Joseph found employment that required evening work, albeit after some delay, the curfew was varied to begin at 10:00 p.m. Apparently, that delay did not cost Mr. Joseph his new job.

[111] The balance of the bail conditions imposed were no doubt unpleasant and stressful, but they were not particularly stringent or punitive in nature, and they were further loosened in November 2016, when Mr. Joseph was discharged after his preliminary inquiry on the human trafficking charges. Although the trial judge found that the bail conditions affected Mr. Joseph's physical and mental health and prevented him from advancing in life, during his release on bail Mr. Joseph was able to secure employment, develop a relationship with a woman, and have a child.

[112] In the circumstances, we would not interfere with the decision to treat Mr. Joseph's bail conditions as mitigating. However, granting Mr. Joseph credit for the equivalent of nine months of incarceration was so excessive as to be unreasonable. Credit may be given for stringent bail conditions other than house arrest, but house arrest is the most material condition. The mitigation Mr. Joseph received approximated 1:1 credit for the time he was under house arrest. The trial judge that decided *R. v. Fobister,* 2010 ONCA 7 had given similar mitigation, prompting this court to comment, at para. 2, that the "case law does not support credit at this level". The reason the case law does not do so is clear. "Bail is not jail", even where house arrest is imposed, and it is an error to equate them: *Lacasse*, at para. 112; *R. v. Ijam*, 2007 ONCA 597, 87 O.R. (3d) 81, at para. 36; and see *Downes*, at paras. 26-28. Even bearing in mind the period during which Mr. Joseph was under curfew, and the effect and duration of the remaining

conditions, the mitigation provided by the trial judge effectively treated bail as though it was jail.

[113] The mitigation granted by the trial judge was not only excessive, the trial judge committed an error of principle in weighing the mitigation to be given. In his submissions, defence counsel focused on how unreasonable the bail release conditions were, and he criticized the Crown's conduct in opposing or ignoring requests for variation. In his Reasons for Sentence, the trial judge dealt extensively with failures by the Crown to accommodate variation requests. The trial judge paraphrased defence counsel's argument as submitting that Mr. Joseph "was either needlessly in custody or on strict bail conditions for over two and a half years." In determining that he would give Mr. Joseph "a credit of nine months of equivalent custody", the trial judge expressed his agreement with this submission.

[114] By considering the need for the bail conditions in evaluating the mitigation to be given, the trial judge erred in principle. The relevant inquiry is whether bail conditions were punitive enough to be akin to punishment, thereby warranting mitigation. Focus should therefore be on the effect of the conditions, not whether the Crown acted reasonably in promoting or perpetuating those conditions. The appropriateness of the bail conditions is not relevant, and it was an error for the trial judge to have considered it: *Place*, at para. 21.

(3) Misusing Publicity to Reduce the Need for General Deterrence

[115] There is controversy relating to the role that publicity should have in sentencing an offender: see *R. v. Zentner*, 2012 ABCA 332, 539 A.R. 1, at paras. 36-51. We do not have to engage the appropriate use of publicity in depth in order to resolve this appeal. The issue can be addressed narrowly. It is an error in principle to rely on pretrial publicity to determine whether the need for general deterrence has been satisfied. The trial judge erred by using publicity for this purpose.

[116] In *Zentner*, at para. 42, the Court of Appeal of Alberta commented that, although there is authority permitting publicity to be considered, "authority for [publicity] as a relevant factor where general deterrence is necessary, is slim." As the *Zentner* court pointed out, at para. 46, using publicity to satisfy the need for general deterrence would undermine the general deterrence sentencing objective, since general deterrence is promoted through the publication of a deterrent criminal sanction. If the sentence is reduced because of pretrial publicity, the sentence will be less effective in achieving general deterrence.

[117] Moreover, it will generally be unrealistic to ascribe general deterrent properties to the collateral consequences experienced by a specific offender. It is one thing to anticipate that the pattern of sentences imposed on others for a kind of criminal conduct will demonstrate to potential offenders that the cost of that kind

of criminal conduct is too high. However, it is a bridge too far to anticipate that others will somehow learn of and consider the collateral consequences on another when deciding whether to engage in such conduct.

[118] More importantly, using publicity as satisfying the need for general deterrence is contrary to principle. As a sentencing consideration, the adverse effects of publicity are a "collateral consequence" as defined in *R. v. Suter*, 2018 SCC 34, [2018] 2 S.C.R. 496. As Moldaver J. explained in *Suter*, at para. 47, the concept of collateral consequences "includes any consequence arising from the commission of an offence, the conviction for an offence, or the sentence imposed for an offence, that impacts the offender", and which can encompass "physical, emotional, social, or financial consequences". Publicity obviously qualifies as a "collateral consequence".

[119] Moldaver J. went on to describe the role that collateral consequences play in identifying a fit sentence. He said that collateral consequences "are not necessarily 'aggravating' or 'mitigating' factors under s. 718.2(a) of the *Criminal Code"*, nor is their relevance tied to their impact on the offender's moral blameworthiness or the seriousness of the offence: *Suter*, at para. 48. They are relevant, if at all, in determining how the individual circumstances of the offence and the offender affect the appropriate "individualized" sentence: *Suter*, at para. 46. As Moldaver J. put it, at para. 48:

> The question is… whether the effect of those consequences means that a particular sentence would have a more significant effect on the offender because of his or her circumstances. Like offenders should be treated alike, and collateral consequences may mean that the offender is no longer "like" the others, rendering a given sentence unfit.

[120] Of course, general deterrence has to do with the effect a sentence will have on others, not with whether a particular sentence would have a more significant effect on a specific offender. Put otherwise, trial judges are to use publicity, if at all, in determining the impact that publicity had on the personal circumstances of the offender, not in assessing whether general deterrence is required. It is a misuse of publicity, and hence an error in principle, to use collateral consequences such as publicity to offset the need for a deterrent sentence.

[121] Yet this is how the trial judge used publicity in this case. In explaining that a suspended sentence was a fit sentence, he said: "[T]he profound effects of the charges on Mr. Joseph should serve to deter anyone who might be tempted to engage in similar activity. In my view, the goal of deterrence to others has been achieved in this case." When he said this, the trial judge could only have been referring to the "irreparable damage" he found the publicity to have caused, as he had already credited Mr. Joseph with the equivalent of nine months of incarceration because of his "oppressive bail conditions", the only other event he found to have had profound effects on Mr. Joseph. The trial judge therefore erred in using the adverse effects of publicity to satisfy the need for general deterrence.

[122] Without question, this affected the suspended sentence the trial judge imposed.

(4) A Fit Sentence

[123] Because of the errors that occurred, and their impact on the sentence imposed, the considerable deference ordinarily owed to trial judges in determining the sentence does not apply: *Lacasse*, at paras. 41-44. It falls to us to perform our own sentencing analysis to determine a fit sentence: *Lacasse*, at para. 43; *Friesen*, at para. 27. For the following reasons, we conclude that a fit sentence would be 15 months concurrent on each of the four charges that Mr. Joseph stands convicted of, followed by 18 months of probation on the terms imposed by the trial judge. A suspended sentence would not be a fit sentence.

[124] The fundamental principle of sentencing identified in s. 718.1 of the *Criminal Code* requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. A sentence must therefore be fit, both for the offence and the offender.

[125] We have already described the circumstances and seriousness or gravity of the offences. The offences were serious, albeit approaching the lower end of the spectrum of seriousness for the grave crimes Mr. Joseph was convicted of committing.

[126] Those crimes must also be taken to have had a significant impact on the complainants, their families and the community at large, even without victim impact statements having been filed. In *Friesen*, at paras. 75-76 and 80, Wagner C.J. and Rowe J. directed courts to recognize, in such cases, not only the actual harm proven to have been done to the immediate victims but also the potential harm that flows from such offences. This includes the serious risk of long-term harm that sexually exploited children are exposed to, as well as the consequential harm that the sexual exploitation of children has for the victims' families, and the community.

[127] We have already commented, as well, on Mr. Joseph's degree of moral fault, a central consideration in assessing his degree of responsibility. With respect to his moral fault, we add that we do not accept the Crown's submission that Mr. Joseph bears the high moral blameworthiness described by Wagner C.J. and Rowe J. in *Friesen*, at para. 90, that applies to those who "intentionally" sexually exploit and objectify children. The jury had a reasonable doubt about the state of Mr. Joseph's knowledge relating to CA's age, and the trial judge, in a finding that has not been appealed, concluded that Mr. Joseph's culpability relating to RD arose from his failure to take reasonable steps to confirm her age. Mr. Joseph therefore bears the moral fault of someone who intentionally chose to objectify and exploit the sexual dignity of young women he believed to be of age, reasonably in the case of CA, but negligently in the case of RD. Similarly, although his moral fault relating to the child pornography is heightened by his profit motive, he did not

intend to create child pornography. He was negligent in doing so. To be clear, Mr. Joseph's moral fault remains significant. The obligation to take reasonable steps before engaging youthful individuals in sexualized activity is a heavy one, and the failure to discharge that obligation is not to be taken lightly. Nonetheless, the significant moral fault that follows cannot be equated with the knowing exploitation of children.

[128] Mr. Joseph's moral fault is not aggravated by additional abusive behaviour towards the young women. He used no threats, force, intimidation or cruelty to advance his purpose.

[129] However, notwithstanding the trial judge's apparent suggestion to the contrary, Mr. Joseph does not benefit from the fact that his exploitation of CA and RD ended before his arrest. This is not a case where he saw the error of his ways. CA and RD left on their own accord.

[130] No aggravating factors relating to Mr. Joseph, the offender, have been identified. There are mitigating factors. Specifically, we defer to the trial judge's findings that the offences occurred during a period of stress and that Mr. Joseph was remorseful. We also bear in mind the important consideration that he is a youthful first offender.

[131] We do not consider the bail conditions to have been as stringent as the trial judge found them to be but we agree that the conditions that required Mr. Joseph

to be under house arrest for approximately eight months, as well as the curfew that followed, were stringent enough to mitigate Mr. Joseph's sentence. These conditions operated punitively, and they impacted Mr. Joseph's liberty, including during the brief period that the curfew impeded Mr. Joseph's employment opportunities. The fit sentence we identify reflects this mitigation.

[132] Unlike the trial judge, we give little weight to the pretrial publicity that Mr. Joseph experienced. Although the media coverage was inaccurate, it was not egregiously so. It had roots in reality. Even if the young women did not work against their will, RD and MM were both incapable, as 15-year-olds, of providing consent to sexual activity and, as indicated, it is arguable that the inherently exploitive nature of sexual commodification undermined 16-year-old CA's capacity to consent to have sex with clients. Though perhaps not rescued by the police, MM was prevented, by Mr. Joseph's arrest, from engaging in sex work at the age of 15. The arrest also ended CA's involvement in the sexual services business.

[133] Mr. Joseph has now been convicted of the offences under consideration. While the publicity surrounding his arrest may have contained exaggerations, significant stigmatization was inevitable given the offences he committed. As a matter of principle, the mitigating force of collateral circumstances that are "almost inevitable" is "greatly diminished": *Suter*, at para. 49; *Zentner*, at para. 43; *R. v. Zaneri*, 2012 ABCA 279, 536 A.R. 224, at para. 8. While the pretrial publicity may

serve to reduce, to some extent, the role of specific deterrence in this case, it carries little weight.

[134] Which of the sentencing objectives identified in s. 718 of the *Criminal Code* should be given priority in the circumstances just described? It is not contested that general deterrence and denunciation are the paramount sentencing principles for consideration, particularly relating to the offences involving RD, who must be recognized to be a minor for the purposes of sentencing: *Friesen*, at paras. 101-102. Even for the sexual commodification offences involving CA, it has long been accepted that the sentencing goals of general and specific deterrence are to be pursued: *R. v. Murray* (1995), 169 A.R. 307 (C.A.), at para. 10. That said, there is no need, in the circumstances of this case, to stress specific deterrence in crafting Mr. Joseph's sentence given the trial judge's findings of how devastating the entire criminal experience has been for Mr. Joseph. It is not necessary to punish Mr. Joseph further in order to keep him from doing this again. However, general deterrence and denunciation remain paramount considerations.

[135] Especially in light of the fact that Mr. Joseph is a youthful first offender who has expressed remorse, rehabilitation is also an important sentencing objective, and enhanced restraint should be used in imposing any sentence of incarceration: *R. v. Priest*, 110 C.C.C. (3d) 289 (Ont. C.A.), at pp. 294-296; *R. v. Borde* (2003), 172 C.C.C. (3d) 225 (Ont. C.A.), at para. 36.

[136] In the circumstances, and notwithstanding the principles of restraint that apply, we are of the view that Mr. Joseph must receive a sentence of incarceration. A sentence without incarceration, such as the suspended sentence imposed by the trial judge, would be disproportionately low, and therefore unfit.

[137] In imposing that sentence of incarceration, it is appropriate to sentence Mr. Joseph to a concurrent, global sentence on all charges. The charges are closely interwoven.

[138] What is the appropriate range of sentence for the crimes Mr. Joseph is convicted of committing? In *R. v. Miller*, [1997] O.J. No. 3911 (Gen. Div.), at para. 39, the court offered a sentencing range for the now-replaced offence of "living off the avails of prostitution" of 12 months to five years. Citing changes in the sexual commodification offences, as well as the more developed appreciation of the nature and harm of such offences, the Crown offered a sentencing range for our consideration of 12 months to eight years imprisonment. Mr. Joseph agrees, citing the 12 months to eight years sentencing range identified by Brothers J. in *R. v. Webber*, 2019 NSSC 265, at para. 57, for the related offence of receiving a financial benefit from the offence of trafficking in a person under the age of 18, contrary to s. 279.02 of the *Criminal Code*.

[139] In *Friesen*, at para. 39, Wagner C.J. and Rowe J. encouraged appellate courts to exercise care in establishing sentencing ranges and to give explicit

guidance when doing so. We have not received the kind of argument required to enable us to establish a precedential sentencing range for sexual commodification offences, including where child pornography has been created.

[140] We are satisfied, however, that the low end identified by the Crown and Mr. Joseph is an appropriate marker or guidepost. *Webber*, at paras. 45, 46, and 49, cited examples of one-year sentences imposed for the offence of "living off the avails of prostitution" in *R. v. Simmons*, 2005 NSCA 39; *R. v. Almond and Pandher*, 2006 BCSC 1706; and *R. v. Lukacko* (2002), 59 O.R. (3d) 58 (C.A.). Although it will be uncommon, in exceptional circumstances even lower sentences may be imposed for sexual commodification offences, such as the eight-month sentence in *R. v. Robitaille*, 2017 ONCJ 768, 400 C.R.R. (2d) 51, a case addressed in more detail below.

[141] For the reasons expressed, we are satisfied that an appropriate sentence in this case falls near the lower end of the range. The offences, although grave and serious by nature and potential harm, were committed without aggravating circumstances by a youthful first offender who, although intentionally embarking on a business in the sale of sexual services, did not intentionally involve children. In CA's case, he did so by honest, reasonable mistake, but, in RD's case, he was negligent by involving her without determining her age. He is remorseful.

[142] Although incarceration is required in these circumstances, a reformatory sentence rather than a penitentiary sentence should be imposed. Specifically, a sentence of 15 months of imprisonment would satisfy the principles of sentencing, bearing in mind all aggravating and mitigating factors. This period of incarceration is to be followed by 18 months of probation to address rehabilitation considerations.

D. Did the trial judge err in finding that the mandatory minimum sentence of two years of imprisonment provided for in s. 286.2(2) of the *Criminal Code* is of no force or effect?

[143] The trial judge was correct in finding the mandatory minimum sentence of two years of imprisonment provided for in s. 286.2(2) of the *Criminal Code* to be of no force or effect pursuant to s. 52 of the *Constitution Act, 1982*. In reasonable hypothetical cases, this mandatory minimum sentence constitutes cruel and unusual punishment, contrary to s. 12 of the *Charter*. It cannot be justified pursuant to s. 1 of the *Charter*.

[144] Section 286.2 provides:

> Everyone who receives a financial or other material benefit, knowing that it is obtained by or derived directly or indirectly from the commission of an offence under subsection 286.1(2), is guilty of an indictable offence and liable to imprisonment for a term of not more than 14 years and a minimum punishment of imprisonment for a term of two years.

[145] The bar for establishing that a mandatory minimum sentence constitutes cruel and unusual punishment in contravention of s. 12 of the *Charter* is high. The mandatory minimum sentence must impose a "grossly disproportionate sentence – that is, a sentence that is 'so excessive as to outrage standards of decency' and 'abhorrent or intolerable' to society, but not one that is merely excessive" (citations omitted): *R. v. Morrison*, 2019 SCC 15, [2019] 2 S.C.R. 3, at para. 143.

[146] Moldaver J. affirmed in *Morrison*, at para. 144, that when a mandatory minimum sentence is challenged under s. 12, the court is to begin by assessing "whether the provision results in a grossly disproportionate sentence when applied to the offender before the court". If the answer is "no", "the second question is whether the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on other offenders."

[147] A "reasonable hypothetical", for the purpose of the second question, is one that is "reasonably foreseeable", even if "unlikely to arise", as opposed to "far-fetched", "marginally imaginable", or "remote": *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773, at paras. 56-57, 62, 68-70. In fashioning reasonable hypotheticals, courts may "take into account personal characteristics relevant to people who may be caught by the mandatory minimum": *Nur*, at para. 76.

[148] In this case, the trial judge found s. 286.2(2) to be unconstitutional on both bases: the two years of imprisonment required would be grossly disproportionate both when applied to Mr. Joseph and in reasonable hypothetical cases.

[149] With respect to whether the mandatory minimum sentence of two years of imprisonment would be grossly disproportionate if applied to Mr. Joseph, we do not accept the trial judge's reasoning, which was based on his erroneous determination that a suspended sentence would be fit. Given our finding that 15 months of imprisonment followed by probation of 18 months would be a fit sentence in this case, the appropriate question is whether the additional nine months of imprisonment required by the mandatory minimum sentence would be a "grossly disproportionate" sentence, bearing in mind that a two-year sentence would move Mr. Joseph's incarceration into a penitentiary. Without question, the sentence required by s. 286.2(2) is significantly longer and more serious in kind than the fit sentence we propose. While this disparity may satisfy standards of gross disproportionality, we need not decide whether it does so. Even if applying s. 286.2(2) to Mr. Joseph would not be grossly disproportionate, the provision's reasonably foreseeable applications will impose grossly disproportionate sentences on other offenders, thereby contravening s. 12.

[150] To make this point, we need not rely on the hypothetical crafted by the trial judge in this case, which the Crown contends would not be caught by s. 286.2(2).

The hypothetical relied upon by Greene J. in *Robitaille*, at para. 117, where s. 286.2(2) was found to contravene s. 12, makes the point eloquently:

> This… hypothetical involves an offender whom just turned 18 in the days preceding the offence…. [T]he offender is a sex trade worker herself, suffering from addictions and a history of sexual abuse. The offender's pimp takes 50% of the money she earns and also deducts the costs of living from her income. The victim, a runaway and two months shy of her 18th birthday starts to work for the offender's pimp in order to make some money. The offender's pimp instructs her to teach the victim the rules of the trade and to help purchase the victim clothing. In return, the offender is given 10% of all of the victim's earnings. Two days later, the victim's family locates the victim, the police are called, and the offender and her pimp are arrested. The victim advises that she serviced three clients over the two days all of which were hand job[s]. As promised, the offender received 10% of the victim's earnings.

[151] In our view, even bearing in mind the paramountcy given to general deterrence and denunciation, it would be grossly disproportionate to impose a penitentiary sentence on a victim-offender who acts at the behest of an abusive pimp on whom she is dependent, in the circumstances described.

[152] A related hypothetical, which is no doubt "reasonable" because it bears similarity to evidence presented in this case, may make the point with even less room for controversy. Assume that CA had turned 18 just before Mr. Joseph recruited her, and that she then introduced her high-school friend RD, who was not yet 18, to Mr. Joseph, at RD's request, so that RD could also make money. If Mr.

Joseph gave CA a $50 “bonus” for doing so, and CA was prosecuted, s. 286.2(2) would require that CA receive a sentence of two years in a penitentiary. That sentence would not merely be excessive. It would be “abhorrent or intolerable”.

[153] The mandatory minimum sentence in s. 286.2(2) therefore offends s. 12 of the *Charter*. The Crown has not suggested that, if this is so, s. 286.2(2) can nonetheless be upheld under s.1. This is not surprising. As Karakatsanis J. observed in *Morrison*, at para. 188, “it is difficult to imagine how a mandatory minimum sentence which is found to be grossly disproportionate because it outrages our society’s standards of decency could represent a justifiable infringement under s. 1 of the *Charter*”.

[154] This is particularly so given the minimal impairment requirement, which requires Parliament to show “the absence of less drastic means of achieving the objective ‘in a real and substantial manner’” (citation omitted): *Nur*, at para. 116. There were less drastic, real and substantial means available to Parliament to achieve its sentencing goals without producing grossly disproportionate sentences. Parliament could have drafted s. 286.2(2) in a way that described conduct that attracts significant moral blameworthiness, as suggested in *Nur*, at para. 117, or it could have provided “for residual judicial discretion to impose a fit and constitutional sentence in exceptional cases” as was suggested in *R. v. Lloyd*, 2016 SCC 13, [2016] 1 S.C.R. 130, at para. 3. There is no apparent basis for

finding that the minimal impairment requirement is met relating to the mandatory minimum sentence provided for in s. 286.2(2).

[155] The trial judge was therefore correct in declaring the mandatory minimum sentence in s. 286.2(2) to be of no force or effect, pursuant to s. 52 of the *Constitution Act, 1982*.

E. Did the trial judge err in finding that the mandatory minimum sentence of one year of imprisonment provided for in s. 163.1(2) of the *Criminal Code* is of no force or effect?

[156] At the time that Mr. Joseph made the child pornography, s. 163.1(2) provided:

> Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of
>
> (a) an indictable offence and liable to imprisonment for a term not exceeding ten years and to a minimum punishment of imprisonment for a term of one year; or
>
> (b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding two years less a day and to a minimum punishment of imprisonment for a term of six months.

[157] Almost immediately after Mr. Joseph committed the offence, an amended version of s. 163.1(2) came into force: *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23, s.7. Section 163.1(2) now provides:

> Every person who makes, prints, publishes or possesses for the purpose of publication any child pornography is guilty of an indictable

> offence and liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year.

[158] Even though Mr. Joseph is entitled to the benefit of the lesser punishment, as the Crown had elected to prosecute Mr. Joseph for an indictable offence, the amendment did not change the one-year minimum sentence he faced for making child pornography.

[159] In *Lloyd*, at paras. 26-27, McLachlin C.J. commented in the context of a drug trafficking offence that carried a one-year minimum sentence:

> On its face, a one-year sentence for an offender with a prior conviction for a drug offence who is convicted for trafficking or possession for the purpose of trafficking in a Schedule I drug, such as cocaine, heroin or methamphetamine, may not seem excessive….
>
> The problem with the mandatory minimum sentence provision in this case is that it "casts its net over a wide range of potential conduct": *Nur*, at para. 82. As a result, it catches not only the serious drug trafficking that is its proper aim, but conduct that is much less blameworthy. This renders it constitutionally vulnerable.

[160] The same is true of the minimum sentence provided for in s. 163.1(2). It catches "making" everything from the kind of shocking photographic images or videos of active sexual violation that the trial judge appears to have been alluding to in this case, to images of teenagers that feature their sexual organs or anal regions clad in underwear, even when such images are taken for private consumption: see *Criminal Code*, s. 163.1(1). It also captures a broad range of

moral blameworthiness, applying to those who capture sexualized images of others knowing that that they are minors, as well as those who honestly believe that their subject is an adult but fail to take reasonable steps to ascertain whether their belief is true.

[161] It is again unnecessary to determine whether, in the circumstances, a one-year mandatory minimum sentence of imprisonment would be grossly disproportionate had Mr. Joseph only been convicted of making child pornography contrary to s. 163.1(2), for the purpose of advertising RD's sexual services with a view to his own profit. Reasonable hypotheticals demonstrate the point.

[162] Once again, the Crown takes issue with the hypothetical that the trial judge relied on in this case, an 18-year-old "photographing young women sunbathing on a beach wearing thong bikinis without determining whether they are eighteen years of age or under". The Crown says that this is not an offence because there is no indication that the "dominant characteristic of the photographs… was the depiction, for a sexual purpose, of a sexual organ or the anal region". That, of course, depends on the nature of the photograph. Even taking a photograph with a zoom lens in a fashion that would remove any such equivocation would be unlikely to warrant anything close to a year of imprisonment.

[163] A variation of the reasonable hypotheticals used by this court in *R. v. John*, 2018 ONCA 702, 142 O.R. (3d) 670, at para. 29, when striking down the six-month

minimum sentence for possessing child pornography, provided for in s. 163.1(4)(a) of the *Criminal Code*, provides another example. An 18-year-old who receives a "sext" (a sexually suggestive digital image) on Snapchat (a phone application that displays images only briefly) from his 17-year-old girlfriend, and who, for his own private use, screen-captures the image after promising his girlfriend that he would not do so, has made child pornography. He does not qualify for the private use exception recognized in *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, at para. 116, since he does not have the consent of his girlfriend to "make" a screen-capture image. His conduct is offensive, but a year in prison for this offence is not only excessive, it would outrage society's standards of decency.

[164] One final reasonable hypothetical. Section 163.1 catches visual representations, whether or not created by mechanical means, that depict the sexual organs of a person under eighteen years of age, for a sexual purpose, or that depict such persons engaged in explicit sexual activity. This includes cartoon or anime images, which are not uncommonly found in child pornography collections: see, for example, *R. v. Butler-Antoine*, 2020 ONCA 354; *R. v. Poxleitner*, 2020 ABCA 136, 389 C.C.C. (3d) 116, leave to appeal to S.C.C. requested, 39333; *R. v. B.D*., [2008] O.J. No. 6040 (C.J.). There are sound policy reasons for including such depictions in the definition of child pornography, as Ratushny J. explained in *R. v. Mahannah*, [2013] O.J. No. 6330 (S.C.), at paras. 11-15, a case where an accused with no prior record possessed only cartoon and

anime child pornography, under the mistaken belief it was legal. Mr. Mahannah, who received a time-served sentence with 45 days credit for pre-sentence custody, did not make child pornography, but this line of cases leads to yet another reasonable hypothetical. Pursuant to s. 163.1(2), a trial judge would be obliged to sentence to a year in jail a person who draws for their own purposes even one lewd cartoon or anime style doodle that meets the definition of child pornography, no matter their personal circumstances or their level of moral fault.

[165] The mandatory minimum sentence in s. 163.1(2) contravenes s. 12 of the *Charter* by requiring cruel and unusual punishment in reasonable hypothetical cases. Once again, the Crown has chosen, with good reason, not to attempt to demonstrate that, if s. 163.1(2) requires grossly disproportionate sentences, this is demonstrably justifiable under s. 1 of the *Charter.* The trial judge was correct in finding the mandatory minimum sentence in s. 163.1(2) to be of no force or effect.

CONCLUSION

[166] The conviction appeal is allowed. The acquittals on counts 3, 4, 5, 6 and 7 are set aside, and a new trial on counts 4 and 5, relating to the complainant RD, is ordered. We also order a new trial on counts 6 and 7, relating to the complainant MM. At the request of the Crown, the charge in count 3 of harbouring relating to CA is stayed.

[167] Leave to appeal sentence is granted. The appeal relating to the constitutional validity of ss. 286.2(2) and 163.1(2) is dismissed, and we affirm the declarations of invalidity made by the trial judge pursuant to s. 52 of the *Constitution Act, 1982*. However, the appeal as to quantum of sentence is allowed, and we substitute a global sentence of 15 months of imprisonment on the charges for which he has been convicted, to be followed by 18 months of probation.

[168] The ancillary sentencing orders have not been appealed and remain unaffected.

Released: “DB” NOV 19, 2020

“David Brown J.A.”
“Gary Trotter J.A.”
“David M. Paciocco J.A.”