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judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of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, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 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 from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
>
> (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
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> (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
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> (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shall not be published in any document or broadcast or transmitted in any way.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.

486.6(1) Every person who fails to comply with an order made under any of subsections 486.4(1) to (3) or subsection 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.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. A.B., 2023 ONCA 254
DATE: 20230414
DOCKET: C70250

Nordheimer, Sossin and Copeland JJ.A.

BETWEEN

His Majesty the King

Respondent

and

A.B.

Appellant

Samara Secter and Jocelyn Rempel, for the appellant

Baaba Forson, for the respondent

Heard: March 27, 2023

On appeal from the conviction entered on February 4, 2020, and the sentence imposed on January 6, 2022, by Justice Jodie-Lynn Waddilove of the Ontario Court of Justice.

Copeland J.A.:

[1] The appellant appeals from his convictions[1] for sexual assault, sexual interference, and invitation to sexual touching, and from the sentence imposed.

[1] When sentence was imposed, the convictions on the sexual assault and invitation to sexual touching counts were conditionally stayed, pursuant to the rule against multiple punishments: *R. v. Kienapple*, [1975] 1 S.C.R. 729. A conviction was entered, and sentence imposed, only on the sexual interference count.

The convictions are for offences against the appellant's stepdaughter, when she was between the ages of 10 and 15 years. For the reasons that follow, I would dismiss the conviction appeal, but allow the sentence appeal and substitute a sentence of five years imprisonment.

The Conviction Appeal

[2] The appellant raises three grounds of appeal against conviction. All of the grounds relate to the trial judge's assessment of the credibility of the complainant's evidence. In my view, all of the grounds of appeal amount to an invitation to revisit the trial judge's findings of credibility.

[3] The findings of a trial judge with respect to credibility and reliability are entitled to deference. In *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, at para. 69, the Supreme Court emphasized that appellate courts "must not finely parse the trial judge's reasons in a search for error." A trial judge is the judge of the facts and is uniquely positioned to assess credibility and reliability of witnesses: *G.F.*, at paras. 69, 76-82.

[4] Trial judges strive to explain the reasons for their findings of credibility and reliability. But our law recognizes that it is sometimes difficult for a trial judge "to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events": *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621, at para. 20;

G.F., at para. 81. An appellate court must carefully review a trial judge's reasons in the context of the issues raised at trial and the grounds of appeal. However, if the reasons are sufficient for appellate review and no other error is revealed, there is no basis for an appellate court to intervene in respect of a trial judge's findings of credibility.

[5] I address each of the grounds of appeal raised on the conviction appeal in turn.

(1) The trial judge did not err in her analysis of motive to fabricate

[6] The appellant argues that the trial judge erred by failing to assess the complainant's motive to fabricate the allegations.

[7] At trial, the appellant alleged several motives for the complainant to fabricate the allegations against him. The two primary motives to fabricate asserted were: (i) that the complainant disliked living with the appellant and made the allegations so that she and her mother could stop living with him; and (ii) to provide an explanation to her mother and her friends about why she was cutting her arms.

[8] The appellant argues that the trial judge committed two errors in relation to motive to fabricate. First, the appellant argues that the trial judge held that motive to fabricate was legally irrelevant to the complainant's credibility. Second, the appellant argues that the trial judge made a finding that there was no evidence of any motive to fabricate.

[9] I am not persuaded that the trial judge erred in her consideration of motive to fabricate on the part of the complainant. In particular, the trial judge did not hold that motive to fabricate was legally irrelevant to the complainant's credibility, nor did she hold that there was no evidence of possible motives to fabricate. Rather, the trial judge considered the asserted motives to fabricate and found that they did not lead her to reject the complainant's credibility or leave her with a reasonable doubt in the context of the evidence as a whole.

[10] The appellant relies on a particular passage of the reasons for judgment where the trial judge stated: "I find there was no evidence that these theories were relevant to the issue of whether or not the sexual abuse occurred as alleged." The appellant argues that this passage shows that the trial judge failed to consider motive to fabricate as it related to the complainant's credibility. I do not agree.

[11] I acknowledge that the trial judge's use of the word "relevance" introduced some lack of clarity, since the concept of "relevance" is generally applied to "legal relevance." However, when this passage is read in the context of the reasons as a whole and, in particular, in the context of several portions of the reasons where the trial judge discussed the issue of motive to fabricate, it is clear that the trial judge did not conclude that motive to fabricate was legally irrelevant, nor did she find that there was no evidence before the court relevant to possible motives to fabricate. Rather, she made a finding of fact that the complainant did not fabricate the allegations for any of the ulterior motives raised by the defence. That is, the

motivations which the defence had put forward were “irrelevant” in the sense that the trial judge found that they did not motivate the complainant to make the allegations that she did.

[12] It is clear from other portions of the trial judge’s reasons that the trial judge understood that motive to fabricate was a factor that she could consider as legally relevant to the complainant’s credibility. For example, regarding the asserted motive to fabricate of wanting to move out of the appellant’s home, the trial judge found as follows: “In considering all the evidence, as a whole and not in isolation, I do not find that [the complainant] was motivated to fabricate the allegations based on any animosity she had towards [the appellant].” Similarly, later in the reasons, the trial judge found: “I specifically reject the defence theories submitted at trial that [the complainant] was motivated to make these allegations to get her mother’s attention or to move out of [the appellant’s] house. Or that the Me Too movement motivated [the complainant] to disclose what was happening to her.”

[13] These specific findings of fact – that the complainant was not motivated to make the allegations due to the asserted defence theories of a motive to fabricate – demonstrate that the trial judge both understood the legal relevance of motive to fabricate and considered the evidence before the court on that issue. Read as a whole, the trial judge’s reasons show that she simply rejected that the complainant was motivated by any of the ulterior motives proffered by the defence.

(2) The trial judge did not fail to address material inconsistencies in the complainant's evidence

[14] The appellant argues that the trial judge failed to address material inconsistencies in the complainant's evidence. In particular, the appellant argues that the trial judge did not address inconsistencies within the complainant's evidence or between the complainant's evidence and other evidence on three issues: (i) the appellant's possession of pornographic magazines and use of the magazines in the abuse; (ii) whether there was Wi-Fi in the house as it related to the complainant's evidence that the appellant showed her pornographic videos on his phone during the last few months of the abuse; and (iii) whether the sexual touching was ever interrupted.

[15] I do not agree that the trial judge failed to address inconsistencies (to the extent such inconsistencies existed). The reasons of the trial judge demonstrate that she was alive to various inconsistencies in the complainant's evidence. I address each alleged inconsistency raised by the appellant below. But I state my overall conclusion at the outset. The trial judge's reasons show that she appreciated areas of inconsistency in the complainant's evidence, considered them, and assigned them the weight she found appropriate in reaching her credibility findings. No more was required.

[16] This ground of appeal is an argument that the trial judge's reasons were insufficient. In considering an argument of insufficiency of reasons, it is important to bear in mind what is, and is not, required for reasons for judgment to be sufficient to fulfill the functions of explaining why an accused was convicted or acquitted, providing public accountability, and permitting effective appellate review. Reasons for judgment must explain what the trial judge has decided and why. However, a trial judge is not required to expressly address every purported inconsistency in a complainant's evidence or respond to every argument raised by counsel: *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at paras. 15-18, 32, and 64; *R. v. O.M.*, 2014 ONCA 503, 313 C.C.C. (3d) 5, at paras. 22, 28; *R. v. Vuradin*, 2013 SCC 38, [2013] 2 S.C.R. 639, at para. 17; *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788, at para. 30.

[17] I turn now to the three specific areas where the appellant argues that the trial judge failed to address inconsistencies in the complainant's evidence. First, the appellant argues that the trial judge failed to address inconsistency in the complainant's evidence about how recently the appellant had shown the complainant pornographic magazines as part of the abuse, as well as how recent the last incident of abuse was prior to her going to the police.

[18] In her statement to police, which was admitted as evidence at trial pursuant to s. 715.1 of the *Criminal Code*, the complainant said that the appellant kept pornographic magazines (and videos) hidden in his bedroom closet. She noted

that, while she thought the magazines were still in the closet, she had not seen the magazines in “a very long time” because, by that point, the appellant was showing her pornography on his cell phone during the abuse. She also told the interviewing officer that the last incident of abuse had occurred on the Saturday two Saturdays prior to the interview (which was nine days prior).

[19] The complainant’s trial evidence was given 15 months after her police statement. She was asked in cross-examination about how she knew that the pornographic magazines were still in the closet when she spoke to police. She said that she knew because the appellant had touched her the day before the police statement and had used the magazines during that instance of abuse. Later in her cross-examination, the complainant said she “assume[d]” the magazines were still in the closet. When cross-examined about inconsistencies in her responses about when the last abuse occurred and when the magazines were last used, the complainant said she was unsure about some of the specific details of timing.

[20] The reasons for judgment show that the trial judge was alive to these inconsistencies in the complainant’s evidence and considered them in assessing her evidence. I highlight, in particular, the following aspects of the reasons for judgment:

- The trial judge noted that the complainant was 16 years old at the time of the trial, and that the alleged abuse took place when she was between the ages of 10 and 15 years.

- In assessing the complainant's evidence, the trial judge considered the context of her age (consistent with well-established legal principles), and noted that young people may not pay attention to details in the same way as adults and may perceive time differently.

- The trial judge also considered that the abuse was alleged to have happened over close to five years. In her view, given that time period, one would not expect even an adult complainant to be able to recount individual details of multiple incidents of sexual abuse and touching.

- Taking into account the complainant's age, the trial judge found that, overall, the complainant's evidence of abuse over a period of years was "consistent" and "detailed." She found that any inconsistencies or frailties in her evidence were "minor" and did not negatively impact her credibility or reliability. She also found that "any inconsistencies about the frequency, location or duration of the sexual abuse over the five years by [the complainant] are secondary to the main issue, which is whether or not the abuse in fact occurred."

- Further, with respect to the pornographic magazines, the trial judge considered the complainant's knowledge of the magazines (which the appellant testified he kept hidden in a closet) as corroborative of the complainant's evidence that the appellant used the magazines during the abuse.

[21] Taking these factors together, I am not persuaded that the trial judge failed to address inconsistencies in the complainant's evidence in relation to the timing of use of pornographic magazines during the abuse.

[22] Second, the appellant argues that the trial judge failed to address conflicting evidence from the complainant and other witnesses about whether the house had internet. This issue was relevant to the complainant's allegation that, at times, the appellant showed her pornographic videos during the sexual abuse.

[23] In her statement to police, which, as noted above, was admitted as evidence in the trial, the complainant said that earlier in the abuse, the appellant showed her pornographic magazines, but that over time, he showed her pornographic videos and DVDs on the television[2], and near the end of the abuse, when he got a smartphone, he showed her pornographic videos on his phone.

[24] Early in her cross-examination, the complainant said that the appellant "streamed" the videos over Wi-Fi, at least in the last few months of the abuse when he got a smartphone.[3] However, at a later point in her cross-examination, she readily agreed that the house did not have internet service.

[25] Other witnesses testified that the house did not have internet service. Although there was little evidence about the appellant's data plan (and there was no objective evidence of his actual phone contract), what evidence there was suggested that his data plan was limited and that the appellant would not stream

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[2] The appellant admitted in his evidence to possessing pornographic videos and DVDs (there was no suggestion that there was anything unlawful about the type of pornography). He said he kept them locked in a suitcase in his closet.

[3] Other witnesses, including the appellant, also testified that the appellant got a smartphone for the first time in late 2017, which was a few months before the complainant went to police.

videos without internet service. However, the evidence did disclose that the appellant had the technical knowledge to access pornographic videos over the internet once he obtained a smartphone, because he admitted having done so (not during the abuse) at his brother's home over Wi-Fi. In closing submissions, Crown counsel accepted that videos were not streamed over Wi-Fi at the house during the abuse. However, he argued that the manner in which pornography was shown on the appellant's phone was not determinative. Given the appellant's admission in his evidence that he had watched pornography on his smart phone over Wi-Fi at his brother's home, he could have downloaded pornography onto his phone, and the complainant would not necessarily have known whether it was streamed or downloaded when it was shown to her.

[26] The trial judge's reasons on this issue demonstrate that she accepted the complainant's evidence that the appellant sometimes showed her pornographic videos during the abuse. The trial judge was also clearly alive to the relevance of the issue of whether the house had internet. I reach this conclusion based on the following aspects of the trial judge's reasons:

- The trial judge specifically referred to the issue of whether there was Wi-Fi in the house in her reasons in some detail. But she found that whether or not the house had internet access was "not determinative" of whether the appellant showed the complainant pornographic videos.
- The trial judge noted in her reasons that the complainant had testified that the appellant

> showed her pornographic magazines and videos (on television) throughout the years of abuse, and in the last few months of the abuse, showed her pornographic videos on his phone, when he "got his first smart phone."
>
> - The trial judge also referred to the appellant's own evidence that, at some point, he became capable of navigating his cell phone to view pornography.
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> - The trial judge specifically considered the complainant's evidence, early in her cross-examination, that the videos on the phone were "streamed" over Wi-Fi, and found that: "[The complainant] was between 10 to 15-years-old at the time of the incidents, and I accept she would not have known what [the appellant's] cell phone capabilities are or are not, as the case may be, over that period of time."
>
> - In this context, the trial judge found that whether the appellant streamed the videos on his phone in the last few months before the complainant went to police was a "secondary" issue.
>
> - In addition, as with the pornographic magazines, the trial judge found that the complainant's knowledge of the appellant's collection of pornographic videos and DVDs, which he said that he kept hidden and locked in a suitcase, was consistent with the complainant's evidence that the appellant used pornographic videos and DVDs during the sexual abuse.

[27] Considering these aspects of the trial judge's reasons, I am not persuaded that the trial judge failed to address the inconsistency in the complainant's evidence about whether the house had Wi-Fi. While it might have been more fully

explained, the trial judge's handling of the issue does not amount to a reversible error.

[28] Third, the appellant argues that the trial judge failed to address inconsistencies in the complainant's evidence about whether the touching was ever interrupted by someone arriving at the house.[4]

[29] The complainant's police statement included a description of a particular incident of abuse that ended when someone came to the door of the house. The police did not ask the complainant how many times incidents of abuse ended because someone came to the door of the house or if that happened more than once. The complainant also told the police that incidents of abuse "usually" ended when the appellant ejaculated.

[30] In cross-examination, the complainant agreed that it was common for various people to drop by the house without calling first, including the appellant's friend C.T., other neighbours, and people coming for the appellant's mechanics business in the garage. The complainant said there were times that the abuse was interrupted by people coming to the house, but she could not remember the specific number of times that this happened.

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[4] To be clear, there is no-suggestion, either in the appellant's submissions, or in any trial evidence, that anyone, at any time, walked in on and witnessed the abuse. The issue is whether, on some occasions, instances of abuse were cut short by someone arriving at the house.

[31] The appellant relies on the following exchange as showing inconsistency on the part of the complainant:

> Q: When did that happen? [that the abuse was interrupted by a knock at the door]
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> A: I don't remember specifically. It has happened once or twice.
>
> Q: Just once or twice? Even though [C.T.] came over every day? Once or twice in a five or six-year time period that happened?
>
> A: I don't remember specifically. There was a lot of times.
>
> Q: No. You said there was a lot of times. But you said you were only interrupted once or twice.
>
> A: I can't remember. But it did happen.

[32] In the context of a 16-year-old witness, who alleged that sexual abuse occurred over a period of more than four years, when she was between the ages of 10 and 15 years, this exchange is thin ground on which to argue there was a significant inconsistency in the complaint's evidence. The complainant told police about one particular occasion where an incident of abuse was interrupted by someone attending at the house. She told police that the abuse "usually" (but not always) ended with the appellant ejaculating. She said in cross-examination that there were occasions when the abuse was interrupted by someone coming to the door, and that she did not remember how many times that had happened.

[33] As I have already noted, the reasons for judgment demonstrate that in assessing the complainant's evidence, the trial judge considered her age, both at

the time of the allegations and when she testified, and the practical reality that where abuse involves multiple allegations over a period of years, it is unrealistic to expect a witness to recount details of specific incidents. The trial judge was entitled to consider these factors in assessing the credibility and reliability of the complainant's evidence. Although I am sceptical that there is any real inconsistency on the issue of how many times the abuse was interrupted by someone attending at the house, the trial judge's reasons are sufficient to address whatever inconsistency there may have been.

[34] In sum, the trial judge provided sufficient reasons for her findings of credibility and reliability.

(3) The trial judge did not materially misapprehend evidence

[35] The appellant argues that the trial judge misapprehended two aspects of the evidence. One relates to the relevance of evidence of visits to the home by C.T., a friend of the appellant. The other relates to whether there was evidence of why the complainant was cutting herself.

[36] The test for misapprehension of evidence sufficient to warrant appellate intervention is stringent. The misapprehension must be of substance rather than detail; it must be material, rather than peripheral, in the reasoning of the trial judge. In addition, it must not merely be part of the narrative of the judgement, but an essential part of the reasoning process resulting in conviction: *R. v. Morrissey*

(1995), 22 O.R. (3d) 514 (C.A.), at p. 541; *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, at para. 2.

[37] The appellant argues that the trial judge's finding that the evidence of the appellant's friend, C.T., was not "relevant" to whether the alleged sexual acts with the complainant occurred, and was "peripheral", shows a misapprehension of evidence. The appellant argues that C.T.'s evidence about frequently visiting the appellant's home unannounced was relevant to the defence theory that the complainant's evidence that the assaults usually ended with the appellant ejaculating was improbable. In the appellant's submission, the complainant's version of events – that the assaults usually ended in the appellant ejaculating – is less probable because, given C.T.'s frequent visits to the house, it is more likely that the assaults would have ended by being interrupted.

[38] I see no error or misapprehension by the trial judge in relation to the evidence of C.T. C.T.'s evidence was to the effect that he lived nearby the home that the appellant shared with the complainant and her mother; that he was a long-time friend of the appellant; and that he would visit the appellant's home two or three times a day, without calling in advance. He testified that when he visited the appellant's house, the appellant would either be in the garage (where he did mechanic work), or inside the house. C.T.'s evidence was clear that he would not enter the home unannounced. If the appellant was not in the garage, C.T. would

knock on the door of the house to see if the appellant was home, and wait for the appellant to let him in.

[39] I disagree with the appellant's submission that the trial judge misapprehended the evidence in finding C.T.'s evidence to be "peripheral" and not "relevant" to whether the abuse occurred.

[40] In my view, the appellant's argument on this issue overstates the nature of the complainant's evidence in relation to how the assaults would end. As I have outlined above, the complainant said that there were occasions where incidents of abuse ended because they were interrupted by someone attending at the house. However, she said she could not recall how many times that happened. Although the complainant described the assaults happening multiple times a week, she did not say they happened continuously 24/7. Looking at C.T.'s evidence, together with the complainant's evidence that, on some occasions, the sexual assaults were interrupted by someone arriving at the house, C.T.'s evidence had little probative value on the question of whether the assaults occurred. I see no misapprehension of C.T.'s evidence in the trial judge's conclusion that it was peripheral and not relevant to whether the assaults occurred.

[41] The second alleged misapprehension of evidence raised by the appellant relates to the evidence that the complainant was cutting herself in the time period prior to disclosing the sexual assault allegations. The appellant argues that the trial

judge misapprehended the evidence in finding that the court received “no evidence” about the reasons that the complainant may have been cutting herself. The appellant argues that this was a misapprehension of the evidence because, according to him, there was evidence that she was cutting herself because of a break-up with her boyfriend. The appellant argues that the asserted misapprehension was material because it related to a motive to fabricate – that is, the suggestion that the complainant made the allegations against the appellant in order to provide an explanation for her cutting herself.

[42] I am not persuaded that the trial judge materially misapprehended the evidence on this issue. The complainant mentioned the cutting in her police statement in recounting the circumstances that led her to disclose to a friend that she had been sexually assaulted. In the police statement, apart from the cutting forming part of the narrative of disclosure, there was no discussion of why she was cutting. The complainant was asked about the cutting in cross-examination. She readily agreed that she had engaged in cutting behaviour. But when she was asked if she told her friend that she did it because of a boy or because of her boyfriend, she said that she did not remember saying it was about anyone. When pressed, she agreed it was “possible” she said that. The suggestion put to her in cross-examination is not itself evidence. And the agreement that it was “possible” she said that it was about a boy, in the context of her lack of memory of saying that, does not rise above speculation.

[43] The complainant's friend E.L.S. testified in examination-in-chief that another friend had asked the complainant about the cutting (in the presence of E.L.S.), and that the complainant said something like that it was about a boy. E.L.S. testified that she assumed this was in reference to the complainant's boyfriend, but she was not sure if the complainant actually said it was about her boyfriend. However, in cross-examination, E.L.S. agreed that she could not recall for sure what the complainant said during that conversation.

[44] In my view, although it may have been an overstatement to say there was "no evidence", as opposed to very little and weak evidence, as to why the complainant was cutting herself, the evidentiary foundation about why the complainant was cutting herself was exceedingly slim. Given the weakness of the evidence, any misapprehension of the evidence on this issue was not material.

[45] In sum, I am not persuaded that the trial judge made errors in her reasoning process leading to conviction which would justify appellate intervention.

The Sentence Appeal

[46] The primary ground of appeal against sentence is that the trial judge imposed a sentence in excess of that sought by Crown counsel without giving notice to the parties and an opportunity to make submissions. At trial, the appellant sought a conditional sentence of two years less a day, or in the alternative, two to three years imprisonment. The Crown sought a sentence of five years

imprisonment. The trial judge imposed a sentence of seven years imprisonment (as well as a number of ancillary orders, which are not contested).

[47] The appellant further argues that the trial judge relied on unproven aggravating factors, "double-counted" the complainant's age as an aggravating factor, and that the seven-year sentence was manifestly unfit.

[48] The appellant argues that, if the court finds error, a four-year sentence of imprisonment should be substituted.

[49] In light of the decision in *R. v. Nahanee*, 2022 SCC 37, 418 C.C.C. (3d) 417, the Crown concedes that the trial judge committed an error in principle in failing to give notice and an opportunity to make submissions prior to exceeding the sentence sought by the Crown at trial. However, the Crown argues that the appellant has failed to establish any of the three grounds for appellate intervention set out in *Nahanee* where there is such an error. The Crown argues that the seven-year sentence was fit.

[50] The trial judge did not have the benefit of the decision in *Nahanee*, as the appellant was sentenced shortly before the decision was rendered. However, I agree that she erred in principle in failing to give notice and an opportunity to make submissions prior to imposing a sentence higher than that sought by the Crown.

[51] *Nahanee* is clear that a sentencing judge must notify the parties if they are considering imposing a higher sentence than that sought by the Crown, and

provide an opportunity to make submissions. However, the failure of a trial judge to provide notice and an opportunity for submissions is not sufficient, standing alone, to justify appellate intervention. An appellate court may only intervene either where the appellant can show that the error in principle had an impact on the sentence; where the trial judge has given insufficient reasons for imposing a harsher sentence than that sought by the Crown; or where the trial judge relied on flawed or unsupportable reasoning for imposing the harsher sentence: *Nahanee*, at paras. 4, 44-46, 52, 59, 66. It is important to note that the insufficient reasons branch of *Nahanee* is clear that, in this context – where an appellant was denied notice and an opportunity to make submissions about the imposition of a harsher sentence than that requested by the Crown – the inquiry on appeal is whether the sentencing judge provided sufficient reasons "for imposing the harsher sentence."

[52] In my view, the reasons of the trial judge are insufficient to justify her exceeding the five-year sentence sought by the Crown and imposing a seven-year sentence. The trial judge gave no reasons for exceeding the Crown position. She gave no reasons why the five-year sentence sought by the Crown was insufficient for purposes of denunciation and general deterrence. Further, looking at the record as a whole does not provide a basis to conclude that sufficient reasons – or any reasons – were given for exceeding the sentence sought by the Crown.

[53] There is no question that the sexual offences committed by the appellant were very serious, as the trial judge correctly recognized. The appellant was in a

position of trust towards the complainant. The abuse began when the complainant was 10 years old and continued for more than four years. The sexual acts were repeated and serious, although did not include penetration. The appellant groomed the complainant using pornographic materials. The offences had a profound impact on the complainant and on her mother. Denunciation and deterrence were the primary sentencing principles at play in this case. These principles demanded a penitentiary sentence, as the trial judge also correctly recognized.

[54] In *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424, the Supreme Court held that sentences imposed for sexual offences against children must recognize the wrongfulness of such offences and the severe and long-term harm that children suffer as a result. The court further held that mid-single digit penitentiary terms are normal for these types of offences, and that upper single-digit and double digit-terms should not be unusual or reserved for exceptional circumstances.

[55] The appellant was a first offender. Unquestionably, denunciation and deterrence were the predominant sentencing factors in this case. However, five years is a significant penitentiary sentence for a first offender. Where incarceration is required, indeed, even where a penitentiary sentence is required, the principle of restraint dictates that the sentence imposed not be longer than is necessary to achieve other sentencing goals, such as denunciation and deterrence: *R. v. Batisse*, 2009 ONCA 114, 241 C.C.C. (3d) 491, at paras. 32-33; *R. v. Hamilton* (2004), 72 O.R. (3d) 1 (C.A.), at para. 96.

[56] Appellate courts will accord significant deference to a sentencing judge's assessment of the length of sentence necessary to achieve goals such as denunciation and deterrence. However, in this case, the trial judge's reasons for sentence fail to provide any explanation for why the five-year sentence sought by the Crown was inadequate, in the circumstances, to achieve the goals of denunciation and deterrence.

[57] In my view, in the circumstances of this case, the goals of denunciation and deterrence are achieved, while also weighing the other relevant sentencing principles, by a sentence of five years imprisonment. The four-year sentence sought by the appellant is insufficient in light of the gravity of the offences and the presence of significant aggravating factors.

Disposition

[58] I would dismiss the conviction appeal. I would grant leave to appeal sentence, allow the sentence appeal, and reduce the sentence to five years imprisonment. All of the other ancillary orders remain in effect.

Released: April 14, 2023 "IN"

"J. Copeland J.A."
"I agree. I.V.B. Nordheimer J.A."
"I agree. Sossin J.A."