COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Dunnett, 2025 ONCA 392[1]
DATE: 20250530
DOCKET: COA-24-CR-0269 & COA-24-CR-0699

Fairburn A.C.J.O., Gillese and Thorburn JJ.A.

BETWEEN

His Majesty the King

Respondent (Appellant by way of cross-appeal)

and

Noah Dunnett

Appellant (Respondent by way of cross-appeal)

Enzo Battigaglia, D. Lea Scardicchio and Efstathios Balopoulos, for the appellant/respondent by way of cross-appeal

Dana Achtemichuk, for the respondent/appellant by way of cross-appeal

Heard: May 15, 2025

On appeal from the convictions entered by Justice Enno J. Meijers of the Ontario Court of Justice on December 18, 2023, and from the sentence imposed on June 18, 2024.

Fairburn A.C.J.O.:

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

OVERVIEW

[1] The appellant was convicted of two counts of child luring contrary to ss. 172.1(1)(a) and (b) of the *Criminal Code of Canada*, R.S.C., 1985 c. C-46. He was sentenced to a period of 15 months' incarceration, to run concurrent on the second count, along with a two-year probation term. A ten-year *Sex Offender Information Registration Act* ("*SOIRA*") order was imposed: S.C. 2004, c. 10.

[2] Mr. Dunnett appeals from conviction and sentence, and the Crown brings a cross-appeal against sentence. Both parties agree that the trial judge erred in imposing a 10-year *SOIRA* order but disagree on remedy. For ease, I will refer to Mr. Dunnett throughout these reasons as the "appellant".

[3] As I will explain, I would dismiss the appeals, save for substituting a 20-year *SOIRA* order in place of the unlawful 10-year order.

A. BACKGROUND FACTS

[4] The two charges against the appellant arose out of the appellant's online communications with a 13-year-old girl, S.B. and with an undercover police officer posing as a 14-year-old girl with the name "Stacey".

[5] S.B. – who was interested in pursuing a career as a paramedic – followed the appellant on Instagram after seeing that he worked as a paramedic. He followed her back. The appellant's Instagram account, "noah.dunnett", listed his Snapchat username as "gingerman9900".

[6] S.B. and the appellant eventually began messaging over Snapchat. The appellant quickly turned the conversation to sexually explicit matters. During their Snapchat conversation, lasting approximately 10 to 15 minutes, the appellant told S.B. that he was naked in bed and offered to send her “dick pics”. She said no, but he sent what was described by the trial judge as a “blurry” picture of what were thought to be male genitals.

[7] S.B.’s mother contacted the police and reported what happened. Following the report, the police commenced an investigation in which a police officer contacted the appellant online while posing as a 14-year-old girl named “Stacey”.

[8] The communications with “Stacey” were also with “gingerman9900”, and just like with S.B., the communications with “Stacey” quickly turned sexual in nature. The appellant asked “Stacey” if she wanted to see his “thingy”. He also asked her if she was “wet” and touching herself. He then sent a photo of an erect penis.

[9] The appellant was arrested in August 2021, following the execution of a search warrant at his home. In executing the warrant, the appellant’s phone was seized. An examination of the phone revealed that the phone’s name was “Noah’s phone”, the Instagram username was “noah.dunnett”, and the Snapchat username was “gingerman9900”. Both “Stacey” and S.B. were listed as contacts in Snapchat.

[10] The police also noticed similarities between the appellant’s bedroom and the background of the penis picture sent to “Stacey”.

[11] At that time, he was charged with one count of child luring. He was later charged with a second count of child luring and a few other offences. He was ultimately convicted of the two counts of child luring, the one involving S.B. and the other involving “Stacey”.

[12] The Crown’s case was strong.

B. CONVICTION APPEAL

(1) Overview

[13] The appellant raises 21 grounds of appeal against conviction. In oral argument, the focus of his submissions on conviction related to three rulings: (i) the first s. 11(b) ruling (“s. 11(b) #1 ruling”); (ii) the second s. 11(b) ruling (“s. 11(b) #2 ruling”); and (iii) the *Garofoli* ruling. Although the appellant raised other grounds of appeal in his factum, he did not address them in oral argument.

[14] Although I have considered each of the appellant’s grounds of appeal on conviction, the focus of my analysis will be on the issues pressed in oral argument, beginning with the s. 11(b) issues.

(2) Section 11(b) Rulings

[15] The appellant brought two s. 11(b) applications prior to trial. Both were dismissed.

[16] On appeal, the appellant maintains that the trial judge erred in his s. 11(b) #1 ruling by misidentifying four periods of time, totalling 126 days, as defence delay. The appellant maintains that a substantial part of this delay was improperly characterized as defence delay since there was outstanding Crown disclosure at the time.

[17] I do not accept this submission. Although there may well have been outstanding Crown disclosure at the time that the defence delay was accumulating, there is nothing in this record to suggest that the outstanding disclosure interfered with the orderly progress of this case. Rather, the outstanding disclosure was a product of the natural, evolving nature of Crown disclosure made in response to defence requests. The appellant has not explained why or how the outstanding Crown disclosure, provided to the defence long before the actual trial date, caused any delay.

[18] As the trial judge found in the s. 11(b) #1 ruling, what caused the delay was the fact that, among other things, the defence: (i) did not show up for a hearing date and a new date was required; (ii) failed to schedule a Crown pretrial; (iii) requested a second judicial pretrial without any reason for having done so; and (iv) was not available to accommodate a much earlier date for a judicial pretrial.

[19] I have been shown no reason why it was not open to the trial judge to arrive at these factual conclusions or why, having arrived at these factual conclusions, they should have been characterized as anything other than defence delay.

[20] The appellant also argues that the trial judge erred by deducting 45 days for what is colloquially described as COVID-related delay, which the trial judge characterized as a discrete exceptional circumstance. As this court noted in *R. v. Vrbanic*, 2025 ONCA 151, 445 C.C.C. (3d) 430, at para. 64, "the assessment of COVID delay is not an exact science and involves, to some extent, a judgment call." The trial judge, who is from the jurisdiction where this case proceeded, was in the best position to draw upon his knowledge of the local jurisdiction and assess the extent of the COVID-related delay. The 45-day delay assigned to this discrete exceptional circumstance is well within the range of delay that has been acknowledged in other cases as a product of the worldwide pandemic and its impact on the efficiency of the justice system: *R. v. A.N.*, 2025 ONCA 300; *R. v. Balasubramaniam*, 2024 ONCA 403. I see no basis to interfere in relation to these 45 days.

[21] As for the s. 11(b) #2 ruling, it arose from the appellant's second application for a stay of proceedings after a *Garofoli* application had to be adjourned as a result of a personal family crisis experienced by the assigned Crown. This necessarily pushed the trial date back. The additional time caused the trial to

exceed the 18-month ceiling applicable to matters proceeding in the Ontario Court of Justice.

[22] The *Garofoli* hearing was scheduled to proceed on May 15 and 18, 2023. On Sunday, May 14, a Deputy Crown Attorney advised counsel for the appellant that the assigned Crown would be unavailable on May 15. The Deputy Crown Attorney had been informed by the assigned Crown that a serious family crisis had arisen and so he could not meet his court obligations on May 15. Accordingly, the Deputy Crown Attorney appeared in court on May 15 in his stead and asked that the matter be put over to May 18, when the assigned Crown might be able to proceed on the *Garofoli* application.

[23] As it turned out, the assigned Crown's family crisis kept him from attending court all week. Accordingly, on May 18 new dates had to be chosen for the *Garofoli* application. The Crown counsel who appeared in court on May 18 offered an apology for what had happened but reinforced that the matter had been entirely unanticipated and had arisen on the "sudden".

[24] The *Garofoli* application was rescheduled for one month later. Unfortunately, on that date, the assigned Crown was advised that the affiant on the information to obtain the search warrants was not able to attend as he was dealing with a "serious medical family situation", which was described on the record as "grave" and "severe".

[25] This all resulted in the trial being scheduled to finish on what the trial judge described as “approximately two months later than the original return date upon which [he] based [his] [s. 11(b) #1] Ruling.” Accordingly, the net delay was now over the 18-month presumptive ceiling.

[26] At the s. 11(b) #2 application, the issue turned on whether the assigned Crown’s family emergency, combined with the affiant’s family emergency, qualified as exceptional circumstances.

[27] The Crown filed evidence – an affidavit sworn by the Deputy Crown Attorney – to explain the assigned Crown’s absence from court on the original dates set for the *Garofoli* application. The Deputy Crown Attorney explained in that affidavit that the assigned Crown had experienced a “personal family situation that unexpectedly unfolded on Saturday, May 13, 2023”, that he contacted her on Sunday, May 14, 2023, and that the personal situation resulted in him having to be off of work “completely” during the week of May 15, 2023. She also explained that the only reason the *Garofoli* application could not proceed on May 15 was that it would have been unprofessional and impossible for a new Crown to step into that application at the very last moment. Specifically, she explained that the matter was complex and involved “substantial, complicated and dense” pleadings, and that the defence had filed a “supplemental argument … very late” in the day that raised “a handful of complicated issues”. In the Deputy Crown Attorney’s sensible view, it

was simply impossible for a new Crown to step in, properly prepare and litigate this matter with less than 24 hours' notice.

[28] The trial judge dismissed the s. 11(b) #2 application. In doing so, he found as a fact that the assigned Crown was ready to proceed with the *Garofoli* application but for the unfortunate "family crisis" that prevented him from appearing in court. The trial judge also accepted what the assigned Crown told the court about the unavailability of his witness, a police officer, due to a sudden family emergency. He concluded that both situations fell into the category of exceptional circumstances.

[29] On appeal, the appellant focusses his argument on what he says is an inadequate factual record filed by the assigned Crown to explain his absence from court during the initial *Garofoli* application dates. The appellant argues that it was not open to the trial judge to conclude that the assigned Crown experienced an unforeseen family emergency, one that precluded his attendance in court, without the assigned Crown giving evidence of his own. In other words, it was not open to the trial judge to accept the word of the Deputy Crown Attorney on this matter. Rather, the trial judge needed a first-hand account of the explanation as to why the assigned Crown was not in court.

[30] I reject this submission.

[31] There was not a scintilla of information on the record to suggest that the assigned Crown was being anything but entirely honest about the emergency that had arisen. Indeed, the trial judge specifically stated that he saw nothing "to suggest any dishonesty or unreliability of the representation that [the assigned Crown] was dealing with a sudden unexpected emergency family situation."

[32] Implicit in the appellant's position that the assigned Crown had to personally "prove it" is the argument that the assigned Crown should have led evidence concerning the personal matter that prevented him from appearing on the *Garofoli* application.

[33] In my view, this position is troubling.

[34] It has been said that trials are not tea parties*: Groia v. Law Society of Upper Canada*, 2018 SCC 27, [2018] 1 S.C.R. 772, at para. 3. Although the stakes can be high, all counsel are expected to resolve matters in a peaceful and orderly fashion: *Groia*, at para. 2. Emotions can run high at trials, but through it all, professionalism and civility must be maintained both outside and inside of the courtroom. This includes being respectful of opposing counsel's need to respond to a personal emergency and respectful of their privacy relating to personal matters.

[35] The justice system could not function if lawyers refused to accept each other's word without good reason or insisted on a "prove it" approach. Quite simply,

there was no need for the assigned Crown to become a witness on this application. The evidence led by the Crown in this case was entirely sufficient. We have not, and hopefully will not, arrive at the point where lawyers facing personal crises must share their most intimate, personal details – along with those of their loved ones – to keep a prosecution on course.

[36] Indeed, one cannot help but reflect on how this matter could have easily been agreed to without the need for any evidence. Such an agreement would simply encompass the accepted fact that the assigned Crown experienced a personal crisis so that the original *Garofoli* application dates could not be met, causing a delay. This would have left the parties to focus on the legal issue, namely how the delay arising from the unforeseen and unfortunate personal event should be characterized from a legal perspective.

[37] In conclusion, none of the grounds of appeal related to the s. 11(b) rulings are meritorious.

(3) *Garofoli* Ruling

[38] The appellant sought to challenge prior judicial authorizations pertaining to the seizure of data from his iPhone. He was unsuccessful. Had he succeeded in excluding the evidence, the Crown would not have been able to lead evidence that the appellant's phone was connected to the "gingerman9900" Snapchat account and the "noah.dunnett" Instagram account when the search warrant was executed.

Additionally, the Crown would have been unable to show that both S.B. and "Stacey" were listed contacts on his Snapchat account.

[39] On appeal, the appellant submits that the trial judge made five errors in dismissing the *Garofoli* application.

[40] I see no errors in the trial judge's approach but, even if there were errors, this would be a case where the curative proviso pursuant to s. 686(1)(b)(iii) of the *Criminal Code* would apply. I say this because, even if there had been a s. 8 breach and the evidence had been excluded under s. 24(2) of the *Charter*, the Crown's case on identity remained overwhelmingly strong.

[41] The Crown's case included the photos sent from the account "gingerman9900" to the undercover officer, which were clearly taken in the appellant's bedroom. Further, there were striking commonalities between the appellant and "gingerman9900":

- the name associated with the "gingerman9900" account was the appellant's name, Noah Dunnett
- the appellant and "gingerman9900" both lived in the same general geographical area
- both were paramedics with the same paramedic service, and
- both had red hair

[42] Accordingly, although I should not be taken as agreeing that there are any errors in the trial judge's *Garofoli* ruling, there is no need to assess the alleged

errors on appeal. Even if the appellant is correct, the curative proviso would apply here.

(4) Balance of the Grounds on the Conviction Appeal

[43] As noted, the appellant raised other grounds of appeal on conviction in his factum, although he did not advance them in oral argument. These include the failure to apply *W.D.*, a failure to apply "plausible theories and other reasonable possibilities inconsistent with guilt", and misapprehension of evidence, among others.

[44] I see no merit in these grounds of appeal. Accordingly, the appellant's conviction appeal is dismissed.

C. APPEAL OF SENTENCE AND *SOIRA* ORDER

(1) Sentence Appeal

[45] The trial judge imposed a 15-month sentence on each count, to be served concurrently. Both the appellant and the respondent challenge the sentence.

[46] As I will explain, I see no basis for intervening on sentence.

(a) Decision below

[47] At trial, the Crown asked for a five-year sentence and the defence asked for a lengthy conditional sentence order and probation.

[48] He first reviewed the facts and noted that the interaction with S.B. was “very short lived” (10 to 15 minutes in duration). The appellant quickly escalated the conversation to sexual matters and offered to send the 13-year-old child “dick pics”. He ultimately sent a “blurry” picture of what S.B. thought was genitalia. This essentially ended their interaction.

[49] As for the undercover officer who reached out after S.B.’s mother was in touch with the authorities, the appellant sent a picture of an erect penis. The appellant’s interactions with “Stacey” were “on and off” for a number of hours during a single day.

(b) No basis to intervene on sentence

[50] This court can intervene to vary a sentence only where the trial judge has made an error of law or an error in principle that had an impact on the sentence imposed or where the sentence is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, at para. 11. A sentence is demonstrably unfit where it is “clearly excessive or inadequate” or where it represents a “substantial and marked departure” from sentences imposed in similar situations: *Lacasse*, at para. 52.

[51] In oral argument, the appellant advanced only one submission – the sentence is unfit because the trial judge refused to order that the 15-month term could be served as a conditional sentence order in the community.

[52] I would reject this submission. The trial judge, having noted the relevant jurisprudence and the aggravating factors at work in this case, concluded that a conditional sentence order was not appropriate. This conclusion is entitled to deference.

[53] The appellant also raised six other grounds of appeal on sentence in his factum, but they were not pressed in oral argument. The additional submissions include that the trial judge misapprehended the evidence and that he improperly considered the appellant's lack of remorse, among others. In my view, none of the additional grounds raised by the appellant provide a basis to interfere with the trial judge's sentencing decision.

[54] In bringing its cross-appeal, the Crown submits that the trial judge made three errors in principle in his sentencing decision.

[55] First, the Crown argues that the trial judge erred by failing to impose consecutive sentences. As these were two separate events – one involving an actual child and the other an undercover officer – consecutive terms were warranted. At a minimum, argues the Crown, the trial judge failed to explain, as he was duty bound to do, why he imposed a concurrent and not a consecutive term. The Crown maintains that the absence of any reasoning on this point is particularly concerning since the Crown asked for consecutive sentences.

[56] I would not give effect to this ground of appeal.

[57] Although these matters certainly could have attracted consecutive terms, the trial judge was not required to proceed in this way: *R. v. Bertrand Marchand*, 2023 SCC 26, 431 C.C.C. (3d) 1, at para. 98. Read as a whole, the trial judge's reasons are clear as to why he imposed concurrent terms. He determined what he thought was the appropriate global sentence for the entirety of the appellant's conduct, having regard to the principle of totality, and then imposed a concurrent term. Although the trial judge did not expressly state it, his reasoning indicates that he considered the 15-month term appropriate given the 10 to 15 minutes of online contact with S.B., followed by the police investigation involving the undercover officer about a week later. Deference is owed to the trial judge's decision to impose a concurrent term: *R. v. Delchev*, 2014 ONCA 448, 323 O.A.C. 19, at paras. 15, 16.

[58] Second, the Crown argues that the trial judge erred by failing to prioritize deterrence and denunciation as the primary sentencing principles. Although Crown counsel acknowledges that the trial judge had regard to these principles, she argues that, after rejecting the appropriateness of a conditional sentence order, he failed to properly account for these principles in determining the final sentence.

[59] Respectfully, I do not read the trial judge's reasons in this way. The trial judge specifically quoted from *R. v. Folino* (2005), 77 O.R. (3d) 641 (C.A.), a passage that highlights the sentencing goals of denunciation and deterrence when sentencing for child luring offences. He later averted to this court's authorities and Supreme Court authorities "regarding the perniciousness and prevalence of this crime that targets vulnerable children" noting that "the denunciatory deterrent weight that this case should carry cannot be met by a conditional sentence." Although it is true that the trial judge mentioned these primary sentencing principles in the context of rejecting a conditional sentence, it cannot be said that he did not have the principles in mind. Reading his reasons as a whole, I am satisfied that he understood denunciation and deterrence as the primary sentencing principles to be applied in this case.

[60] Third, the Crown maintains that the trial judge failed to recognize the seriousness and harmfulness of the crime of child luring. I do not read the reasons in the same way. As he said, "[t]he Supreme Court has made it abundantly clear that these crimes against children are to be treated seriously, with significant deterrent sentences." He also noted the increased moral blameworthiness associated with offenders who intentionally target children who are "particularly vulnerable, particularly in the online world where they are exposed to predators within the expected safety of their homes." In my view, the trial judge clearly understood the seriousness of this crime.

[61] At its core, the Crown's submissions amount to an assertion that the sentence is demonstrably unfit. In advancing this submission on appeal, the Crown cautioned that the sentencing range for child luring offences has increased since the release of *R. v. Friesen*, 2020 SCC 9, [2020] 1 S.C.R. 424.

[62] I acknowledge that the range for this offence has indeed increased since *Friesen*, reflecting the growing prevalence of these insidious crimes targeting vulnerable children online, a deeper understanding of the harm they inflict, and an increase in the maximum sentence available for such offences. This increase in the range for these types of offences was addressed by this court in *R. v. M.V.*, where the upper range was identified as five years: 2023 ONCA 724, 169 O.R. (3d) 321, at para. 87. In *M.V.*, the court did not specify a floor for the sentencing range but did explain that the floor for the indictable offence should not be higher than the ceiling for the same offence if the Crown proceeded summarily: at paras. 85, 87-88. This court subsequently confirmed that a five-year sentence may be appropriate in more egregious child luring cases: *R. v. A.V.*, 2025 ONCA 6, at para. 11.

[63] Relying on *M.V.*, the Crown suggests that two years is the lower end of the range. However, like Paciocco J.A. in *M.V.*, I would not go so far as to suggest a bottom end of the range. This is not with a view to minimizing the gravity of this crime or the seriousness with which it should be addressed and punished. However, the circumstances of the offence encompass a broad spectrum of conduct.

[64] By way of illustration, *M.V.* received a 4-year sentence for conduct that well exceeded what took place in this case. For instance, the child luring offences were aggravated by the young ages and the degree of immaturity of the victims (8 and 10), the extensive, sexually explicit nature of the communications, the duration of the communications (approaching 3 months), the appellant's efforts to compel the victims to produce child pornography, and the sharing of images of the children that constituted child pornography with another person: *M.V.*, at para. 57.

[65] Yet the Crown here is asking here for a 3-to-4-year sentence for fundamentally different conduct. Although the trial judge could have imposed a higher sentence, that alone does not render it demonstrably unfit. The trial judge understood the seriousness of the offence, the vulnerability of S.B., the devastating impact it had on her and the primary sentencing principles. He also took into account what he considered to be numerous mitigating factors, including that the appellant was a young man (21 years old at the time of offence) with no criminal record. He also had strong family and community support.

[66] In my view, although the appellant's sentence was undoubtedly lenient, it does not rise to the level of a demonstrably unfit sentence, particularly when considered alongside the two-year probation order, which included a treatment clause. Deference is owed to the trial judge.

(2) *SOIRA* Appeal

[67] The parties agree that the trial judge erred in imposing a 10-year *SOIRA* order, as any such order in this case was required to be for a term of 20 years or life. The minimum duration was 20 years since the maximum term of imprisonment for the offences was 14 years: *Criminal Code,* s. 490.013(2)(b). The judge also had the discretion to increase the duration of the *SOIRA* order to life: *Criminal Code,* s. 490.013(3). Although the parties agree that there was an error, they disagree on the appropriate remedy.

[68] The appellant maintains that if the trial judge had known that a 20-year term was the statutory minimum term for an offence of this nature, he would have concluded that the impact of the *SOIRA* order on the appellant's person, including on his privacy or liberty interest, would be grossly disproportionate to the public interest in protecting society through the effective prevention and investigation of sexual crimes: see *Criminal Code,* s. 490.012(3)(b). Accordingly, he says this court should vacate the order.

[69] The Crown argues that the trial judge concluded that the appellant should not be exempt from the presumptive inclusion in the *SOIRA* scheme and there was nothing grossly disproportionate about imposing this order. The trial judge's only mistake was his misreading of the *Criminal Code*, which led to a failure to appreciate that the statutory minimum term for the order was 20 years.

[70] I agree with Crown counsel.

[71] There is nothing in the reasons to suggest that the trial judge was of the view that a *SOIRA* order would meet the grossly disproportionate criteria governing s. 490.012(3)(b) of the *Criminal Code*. Nor do I see anything in the record to support this position.

[72] As found by the trial judge, there is nothing that would displace the presumptive imposition of a *SOIRA* order. I therefore set aside the 10-year term and replace it with a lawful order of 20 years.

D. CONCLUSION

[73] The conviction appeal is dismissed. Leave to appeal sentence is granted to the appellant but his sentence appeal is dismissed.

[74] The Crown is granted leave to appeal sentence on the cross-appeal and the appeal is granted, only to the extent of increasing the term of the *SOIRA* order from 10 years to 20 years. In all other respects, the Crown sentence appeal is dismissed.

Released: “May 30, 2025 JMF”

“Fairburn A.C.J.O.”
“I agree. E.E. Gillese J.A.”
“I agree. Thorburn J.A.”