Citation: R v Bunn, 2022 MBCA 34
Date: 20220421
Dockets: AR21-30-09609;
AR21-30-09629

IN THE COURT OF APPEAL OF MANITOBA

Coram: Madam Justice Diana M. Cameron
Mr. Justice Christopher J. Mainella
Madam Justice Karen I. Simonsen

B E T W E E N:

	)	***R. D. Lagimodière***
HER MAJESTY THE QUEEN	)	*for the Crown*
	)	
Appellant/Respondent	)	***B. F. Greenberg***
	)	*for the Accused*
- and -	)	
	)	*Appeals heard:*
PERCY WARREN BUNN	)	***November 3, 2021***
	)	
(Accused) Respondent/Appellant	)	*Judgment delivered:*
	)	***April 21, 2022***

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On appeal from 2021 MBQB 71

CAMERON JA

[1] The accused appeals his conviction for sexual assault after trial by judge without a jury. He asserts that the trial judge unevenly scrutinized his evidence as compared to that of the victim, and that she misapprehended the evidence and relied on inferences not available from it, causing her to reach an unreasonable verdict.

[2] The Crown seeks leave to appeal, and if granted, appeals the accused's sentence of 28 months' imprisonment less an enhanced credit of 126 days for pre-sentence custody leaving a go-forward sentence of two years' imprisonment, followed by two years' supervised probation imposed by the trial judge. It contends that the trial judge erred in her assessment of the aggravating factors and failed to appreciate the seriousness of the offence and the accused's degree of moral blameworthiness. In support of its argument, it contends that current sentencing precedents are dated and that sentences for sexual assaults should be increased in light of our deepened understanding of the consequent harm caused to the victims of such assaults. As well, it argues that increased sentences are supported by the following developments in the *Criminal Code* (the *Code*): (1) the enactment of section 718.2(iii.1) requiring a sentencing court to consider evidence that the offence had a significant impact on the victim; (2) amendments to section 718.2(e) requiring the court when considering all available sanctions, other than imprisonment, to ensure that such sanctions are consistent with the harm done to the victim or to the community; and (3) the enactment of section 718.04 requiring the court to give primary consideration to the objectives of denunciation and deterrence where an offence involves the abuse of a vulnerable person—including because the person is Aboriginal and female.

[3] For the reasons that follow, I would dismiss the accused's conviction appeal.

[4] I would grant leave to appeal the sentence imposed. While it is true that sentences should reflect social context and the Supreme Court of Canada has indicated that they should be increased where appropriate to reflect society's deepened understanding of the harm caused by certain offences, the

Court has also indicated that sentencing is a multifaceted exercise requiring a sentencing judge to balance a number of factors in reaching a proportionate sentence. In this case, the trial judge engaged in that exercise, choosing to place significant weight on the accused's *Gladue* factors (see *R v Gladue*, [1999] 1 SCR 688). While the sentence in this case is low, I have not been convinced that it is unfit and I would, therefore, dismiss the sentence appeal.

Facts

[5] The victim and the accused were known to each other. They were both from the same First Nation in Manitoba. The victim testified that, on the night of the incident, she was with her cousin (since deceased) and someone she had just met (the acquaintance) drinking alcohol at the accused's residence. At one point, she became tired and asked the accused if she could lay down somewhere. She said that he told her that she could use the bed in his bedroom, which she did. She stated that she fell asleep fully clothed and awoke to find her pants off and the accused having vaginal intercourse with her. She testified that she pushed him off, knocking herself off the bed in the process. She said that she repeatedly hit the accused and that he kept apologizing to her. The victim testified that she knew that the accused was HIV-positive and that she never would have engaged in sexual intercourse with him based on that fact.

[6] After the incident, the victim continued to confront the accused in his kitchen, in front of the acquaintance. Next, the victim's cousin drove her, at her request, to another residence where the police were contacted. She went to the hospital where she underwent a sexual assault examination. The nurse who completed the sexual assault examination testified that she observed

bruises on the victim's hands, scratches on her chest, bruising on both buttocks and an injury to her shoulder.

[7] At the trial, the acquaintance testified about the events that occurred on the day of the incident, including describing the distressed state of the victim after the incident, as well as the fact that the accused apologized to the victim, but that the accused had said that the sex was consensual.

[8] The accused testified. He said that, sometime after the victim went to bed, he joined her in the bedroom where they talked, hugged, kissed and had consensual sexual intercourse. He testified that the victim told him that she had been worried that he would transmit HIV to her, but that he assured her that his doctor said that it would be "highly unlikely [that] it [would] be transmittable [with] condom use." He said that he initially wore a condom, but that it broke. Nonetheless, he maintained that the victim continued to consent to having sexual intercourse with him without the condom. He said that the sexual intercourse ended when he ejaculated in her.

[9] He agreed that she was upset with him after they had sexual intercourse and accused him of raping her.

The Decision of the Trial Judge

[10] In reaching her verdict, the trial judge conducted a *W(D)* analysis (see *R v W(D)*, [1991] 1 SCR 742). It was her view that, in light of the accused's testimony admitting the sexual intercourse, the only issue for her to determine was consent.

[11] The trial judge found that the accused's detailed evidence about the sexual encounter constituted a stark contrast to his lack of memory about the events that occurred before and after it. She also found his purportedly detailed memory of the incident to be in contrast to the evidence that he had been drinking heavily and that the acquaintance thought that he was still drunk in the morning after the incident. In addition, she found his testimony—that, despite the victim's concern about contracting HIV, she consented to continue to have sexual intercourse after the condom broke—to be illogical and unbelievable. Based on these findings, the trial judge rejected the accused's evidence and found that it did not raise a reasonable doubt.

[12] The trial judge found the victim to be forthright in her testimony, noting that she had no ulterior motive to testify against the accused. She was alive to the fact that the victim had been intoxicated at the time of the incident, but determined that she was not so intoxicated that she could not remember the events or that she was "not credible." She also found the evidence given by the nurse as well as the evidence of the acquaintance to be consistent with the victim's evidence.

[13] After considering all of the above, the trial judge convicted the accused.

The Conviction Appeal

[14] The accused argues that the trial judge applied uneven scrutiny in her analysis of his evidence as compared to that of the victim. He submits that the trial judge found that both he and the victim were intoxicated and were unclear and inconsistent with respect to many of the events that had occurred before and after the sexual encounter. He argues that it was uneven for the

trial judge to accept the victim's evidence about the incident despite her intoxication and lack of clarity while rejecting his on the same basis.

[15] In *R v GF*, 2021 SCC 20, Karakatsanis J, writing for a majority of the Court, observed that various appellate courts have repeatedly stated that uneven scrutiny of the evidence is an argument that is notoriously difficult to prove (see para 99). She also observed that the Supreme Court has not yet ruled as to whether it is an independent ground of appeal (*ibid*) and questioned whether it was a "helpful analytical tool to demonstrate error in credibility findings" (at para 100).

[16] Nonetheless, appellate jurisprudence in Manitoba has recognized uneven scrutiny as a ground of appeal while, at the same time, emphasizing that the burden is heavy and a trial judge's credibility findings are owed great deference (see *R v Jovel*, 2019 MBCA 116 at paras 37-38; and *R v Abbasi*, 2020 MBCA 119 at para 20). In *Jovel*, Mainella JA stated that the appellate court must "take care to not overstep its role and retry the case; an evaluation of testimony may only be interfered with where it cannot be supported on any reasonable view of the evidence" (at para 38).

[17] In my view, it is not "clear" from the trial judge's reasons, or the record, that "different standards were applied" (*ibid*). I am not convinced that the trial judge erred in accepting the evidence of the victim. She acknowledged that her evidence had frailties, but she did not find them to be material to the issue of consent in this case.

[18] The trial judge did not unreasonably use the frailties in the accused's testimony about what happened before or after the sexual encounter as an indication that his testimony was unreliable or incredible in that regard.

Rather, she compared, as she was entitled to do, that testimony to his very detailed memory of the sexual encounter to find that to be incredible. As well, the accused's detailed recollection contradicted the evidence that he had been heavily drinking and the acquaintance's testimony that he thought that the accused was still drunk in the morning.

[19] The accused has not demonstrated that the trial judge committed a reversible error in reaching her credibility findings (see *GF* at para 100) nor is there anything apparent in the reasons or on the record to show that the trial judge used a different lens to assess the testimony of the accused and the victim.

[20] Next, regarding the allegation of unreasonable verdict, the test is whether the verdict is one that a properly instructed jury or judge could reasonably have rendered (see *R v RP*, 2012 SCC 22 at para 9). A verdict may also be found to be unreasonable where (*ibid*):

> . . . the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge . . ..

[21] The accused asserts that the trial judge erred when she stated that it was "illogical and unbelievable" that the victim would consent to having sex after the condom broke. He also argues that she erred when she stated that, if he had used a condom, one would expect some mention of it during the discussion in front of the acquaintance after the incident.

[22] The accused argues that the trial judge could not have made the above findings or drawn the inferences as they were not available on the evidence and that they were based on her own moral assumptions. I disagree.

[23] A review of the record reveals that each of these findings was available to the trial judge. I agree with the Crown that the trial judge considered all of the evidence when reaching her conclusions. That evidence included the victim's emotional state after the incident, as well as her testimony that she told the accused that, if she got HIV, she would kill him and herself and that she asked him why he would do that to her when he knew that he had HIV.

[24] It also included the testimony of the acquaintance that the victim was accusing the accused of sexually assaulting her while she was sleeping and that he was responding by saying that he thought that she "wanted it".

[25] Considering the above, I am satisfied that it was reasonable to infer that the accused would have raised the issue of the condom given that, according to his testimony, it was the foundation for the victim's consent.

[26] Finally, the accused argues that the trial judge misapprehended the evidence of the victim. He asserts that the trial judge stated that the victim testified that she had bruising to her hands after the incident. In fact, the victim said that she had sore hands from hitting the accused. She did not testify that she had bruising on her hands. The nurse testified that the victim had bruising on her hands. He further argues that there was no evidence as to when the bruising on the victim's hands and buttocks and the injury to her shoulder occurred.

[27] In my view, the error alleged by the accused is inconsequential and certainly not the type of error that would lead to the conclusion that the verdict was unreasonable. A review of the entire record demonstrates that it was open to the trial judge to find that the injuries observed by the nurse were consistent with the victim's evidence. I am not convinced that the alleged error played an essential part in the reasoning process that led to the conviction (see *R v Lohrer*, 2004 SCC 80 at paras 1, 4, 7-8; and *R v Sinclair*, 2011 SCC 40 at paras 53, 56).

[28] In the result, I would dismiss the conviction appeal.

The Sentence Appeal

The Sentencing Hearing

[29] At the sentencing hearing, the trial judge had the benefit of a pre-sentence report (the PSR), which included information relevant to the accused being an Indigenous male from a First Nation in Manitoba (the *Gladue* factors). As well, the Crown advised the trial judge of the accused's prior criminal record, a copy of which was filed as an exhibit.

[30] While there was no victim impact statement filed, the victim had testified at the trial about the significant effects that the offence had on her. In addition, the trial judge was aware that the victim is an Indigenous female from the same First Nation as the accused.

[31] At the sentencing hearing, the Crown (not represented by the same Crown attorney as on the appeal) reviewed the facts and what it submitted were the aggravating factors. It submitted that the accused's level of moral

blameworthiness was high. The Crown asked the Court to impose a sentence of six years' imprisonment. In support of this position, it argued that the three-year starting point, set out in *R v Sandercock*, 1985 ABCA 218, is dated and that sentences involving sexual assault where the victim is an adult should be revisited and increased.

[32] In making the above argument, the Crown relied on the Supreme Court's decision in *R v Friesen*, 2020 SCC 9. In that case, the Court indicated that, in addition to the increase in maximum sentences that Parliament had enacted for sexual offences involving children, an upward departure from sentencing precedents for such offences was also required on the basis that "courts' understanding of the gravity and harmfulness of sexual offences against children has deepened" (at para 110). By analogy, the Crown argued that the understanding of the harm caused by sexual assaults on adults has also deepened.

[33] The Crown also pointed to legislative changes to the *Code* since *Sandercock* was decided which it said support the imposition of higher sentences for sexual offences against adults. Specifically, it referred to section 718.2(iii.1), which requires the court to consider evidence that the offence had a significant impact on the victim when imposing a sentence. As well, the Crown referred to the enactment of section 718.04, which mandates that the court give primary consideration to the principles of denunciation and deterrence when imposing a sentence where the offence involves the abuse of a person who is vulnerable based on personal circumstances—including on the basis that the victim is Aboriginal and female.

[34] Counsel for the accused (not the same as counsel on the appeal) submitted that many of the aggravating factors referred to by the Crown were not, in fact, aggravating. He submitted that the sentence suggested by the Crown was unsupported by the jurisprudence and was unfit. He asked the Court to consider a sentence in the three-year range to allow for the mitigating factors, as well as the *Gladue* factors referred to in the PSR. Among other suggestions, he advocated for a sentence of 28 months' imprisonment, to be followed by a period of supervised probation. He also asked the Court to consider the time that the accused had spent in pre-sentence custody.

[35] Regarding section 718.04, counsel for the accused submitted that the offence was committed in 2017 and that the legislative changes did not occur until 2019 and, therefore, should not be applied. He clarified that the trial judge had the facts before her and that she could consider them aggravating as she saw fit, just not that she was compelled to do so.

The Decision of the Trial Judge

[36] In her written reasons, the trial judge stated that the nature of the offence for which the accused had been convicted required that denunciation and deterrence be the determinate factors. She reviewed the circumstances of the offence and those of the accused.

[37] In considering the aggravating factors, she accepted that it was aggravating that the victim had been sleeping at the time of the offence and was therefore vulnerable. However, she rejected the Crown's argument that the assault was planned. She also refused to accept the Crown's submission that it was aggravating that the accused had not used a condom and that that

would have had a further psychological consequence given the victim's knowledge of his HIV status.

[38] The trial judge found that there were no mitigating factors. However, she found that the accused had significant *Gladue* factors. She noted, among other things, that his father and grandfather were survivors of residential schools and that he himself had attended day school. As a result, he had been alienated from his traditional, spiritual and cultural practises. She also mentioned the problems with substance abuse that the accused and his family had grappled with over many generations.

[39] Relying on the Saskatchewan Court of Appeal case of *R v Chanalquay*, 2015 SKCA 141, she took judicial notice of the effects that the accused and his family had suffered from colonialism and residential and day schools, listing a number of them. She stated that, based on the jurisprudence and section 718.2(e) of the *Code*, she was required to consider all available sanctions and refrain from depriving the accused of his liberty where a less restrictive sanction would be appropriate.

[40] She dismissed the Crown's argument that sentences for sexual assault committed against adult victims should be increased based on society's and the courts' increased understanding of the harm that such offences cause. In this regard, she distinguished *Friesen* on the basis that the Supreme Court was dealing with sexual offences committed against children in that case. She did not address the legislative changes.

[41] The trial judge concluded by imposing a sentence of 28 months' imprisonment and allowed for an enhanced credit of 126 days for pre-sentence

custody, leaving a go-forward sentence of two years' imprisonment, to be followed by two years' supervised probation.

The Grounds of Appeal

[42] The Crown lists two main grounds of appeal: (1) that the trial judge erred in her assessment of the aggravating factors and relevant sentencing principles, and (2) that the trial judge failed to appreciate the seriousness of the offence and the accused's moral blameworthiness. It submits that each of these errors resulted in an unfit sentence.

Standard of Review

[43] In *R v KNDW*, 2020 MBCA 52, Chartier CJM summarized the well-known standard of review for sentencing decisions (at para 10):

> Appellate intervention is only justified in cases where a sentencing judge makes an error in principle that has a material impact on the sentence or when the sentence is demonstrably unfit. An error in principle includes an error of law, a failure to consider a relevant factor, or an erroneous consideration of an aggravating or mitigating factor (see *R v Lacasse*, 2015 SCC 64 at paras 41, 43-44, 49, 51; and *Friesen* at para 26).

[44] A demonstrably unfit sentence has been described as "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate" or representing a "substantial and marked departure". These expressions demonstrate the "very high threshold" applicable to appellate review of the fitness of a sentence (*R v Lacasse*, 2015 SCC 64 at para 52).

Ground 1—Did the Trial Judge Err in Her Assessment of the Aggravating Factors and Relevant Sentencing Principles?

[45] The Crown argues that, while the trial judge acknowledged that the principles of denunciation and deterrence were paramount in sentencing for a major sexual assault such as this, her analysis did not consider relevant aggravating factors. Specifically, the Crown alleges that the trial judge (a) failed to consider the harm experienced by the victim, including the added fear resulting from her knowledge of the accused's HIV status; (b) erred when she declined to find that the offence was planned; and (c) misapprehended the accused's criminal record.

Harm to the Victim

[46] Regarding harm to the victim, the trial judge stated (at para 5):

> In looking at the seriousness of the offence in the case before us, non-consensual sexual intercourse with a sleeping complainant is characterized as a major sexual assault and carries a maximum sentence of ten years. The harm to a victim inherent in such wrongful interference with her sexual integrity is now widely recognized by the courts. Similarly, it was recognized by the Supreme Court of Canada in the 2019 decision of . . . ***Friesen*** . . . , that women and Aboriginal women are disproportionately victimized and vulnerable with respect to such assaults. While this particular victim did not give a Victim Impact Statement, the court can assume that a certain amount of emotional and psychological harm to the complainant results from any major sexual assault.

[47] At the sentencing hearing, the Crown argued that, given the accused's HIV status, it was aggravating that, by his own admission, he did not wear a condom. It argued that, considering the victim's knowledge of his

HIV status, the psychological and emotional impact on her would be significant.

[48] In declining to consider the above to be an aggravating factor, the trial judge found that the Crown had not proven beyond a reasonable doubt that the accused had not worn a condom. She stated that the victim testified that she did not know whether the accused had worn a condom.

[49] On the other hand, the accused testified that he continued to have sex with the victim after the condom had broken and until he ejaculated inside of her. That constituted a clear admission against interest. Undoubtedly, it would have been open to the trial judge to have accepted that evidence even though she rejected the accused's evidence that the victim consented to sexual intercourse with, and later without, the use of a condom.

[50] Nonetheless, the trial judge stated that she did not accept any part of the accused's evidence as to the events in the bedroom (except, of course, his admission that sexual intercourse had occurred). Having made this finding, the trial judge did not consider the issue of harm resulting from the accused's HIV status and the victim's knowledge of it.

[51] Specifically, the reasons of the trial judge do not mention any actual harm, psychological or otherwise, suffered by the victim. She did not acknowledge the victim's testimony about the effect that the incident had on her or the trauma she described resulting from her knowledge of the accused's HIV status.

[52] In her testimony, the victim described her reaction to the accused after the incident. She stated:

> . . .
>
> And I did threaten him, if I did have it, I'd kill him, along with myself.
>
> . . .
>
> I just asked him why -- why would he do this to me . . . when he knew he had that, like, why would he do that to me?
>
> . . .

[53] She also stated that she would never consent to having sexual intercourse with a man who had HIV.

[54] Thus, not only did the victim not consent to having sex with the accused, but she also did not consent to taking any type of risk that she might contract HIV from someone who she knew had it.

[55] In *R v Mabior (CL)*, 2010 MBCA 93, rev'd in part 2012 SCC 47, but not on this point, the accused did not disclose his HIV status to several women with whom he had sexual intercourse, both with and without a condom. In discussing the victims' perspectives, Steel JA, writing for the Court, stated (at para 148):

> . . . From the complainants' points of view, any risk of contracting HIV is too great because any sexual encounter "could be 'the one', whether the odds are 1 in 100 or 1 in 10,000" [*R v JAT*, 2010 BCSC 766] at para. 54). . . .

[56] Fortunately, the victim in this case did not contract HIV. Nonetheless, the victim's lack of knowledge as to whether she had contracted the virus before learning this fact and its consequent psychological impact, as

well as the need for testing and/or whatever other medical intervention was required, constituted an aggravating factor. In my view, the trial judge committed an error in principle in not considering it as such. Later, I will discuss the effect of this error on the sentence imposed.

Planning and Premeditation

[57] Next, the Crown argues that the trial judge erred in declining to find that the accused planned the sexual assault. At the sentencing hearing, the Crown argued that the facts of this case were similar to those in *R v JAW*, 2020 MBCA 62. In that case, the accused's appeal of a sentence of 39 months' imprisonment was dismissed in circumstances where the accused had entered his bedroom where he knew that the victim was sleeping, locked the door and forced sexual intercourse on the victim, who awoke and resisted the accused. Despite her resistance, the accused did not stop until another person in the residence threatened to break down the bedroom door.

[58] In upholding the sentence, this Court stated (at para 22):

> This was a serious, premeditated sexual assault committed on a person whom the accused had known for a long time and whom he knew was particularly vulnerable on the night of the offence. Not only had she been consuming alcohol and marihuana, she was asleep. Moreover, he knew that she was mourning the recent loss of her young child. In all of the circumstances, we are not persuaded that the sentence is demonstrably unfit.

[59] While the facts in this case are somewhat similar to *JAW*, it was open to the trial judge, based on the evidence, not to find that the accused had planned the assault. That factual finding is subject to deference, and I am not

convinced that the Crown has demonstrated that the trial judge committed a palpable and overriding error in this regard.

Misapprehension of the Accused's Criminal Record

[60] Finally, the Crown argues that the trial judge misapprehended the accused's criminal record, thereby causing her to fail to consider the principle of the protection of the public.

[61] The accused has a lengthy criminal record spanning the period from 1985 to 2009, which was filed as an exhibit at the sentencing hearing. It includes numerous convictions for alcohol-related offences, including many convictions for driving while impaired and driving while over .08, as well as offences of violence. His most significant sentence was in 1995 when he was sentenced to 30 months' imprisonment for the offence of assault causing bodily harm and four months' imprisonment, concurrent, for the offence of assault.

[62] In her reasons, the trial judge stated that the accused last offended in 1994—that was in error. He was also convicted (1) in 2000 for driving while impaired, (2) in 2007 for two charges of driving while impaired and one charge of driving while disqualified, and (3) in 2009 for one charge of theft under $5,000.

[63] In support of its argument, the Crown also relies on the following passage in *R v Wright*, 2010 MBCA 80 (at para 16):

> In summary, although a sentencing judge cannot punish an accused again for previous convictions, a prior criminal record can assist that judge in determining the normative character of that accused and, when that record shows repeated related criminal

> behaviour, it may be viewed as an aggravating factor (thereby causing the sentence to be increased along the appropriate range of sentences) in order to better address certain objectives of sentencing more particular to the offender, such as specific deterrence, protection of society and/or the prospects of rehabilitation.

[64] The Crown argues that the accused's record is aggravating to the extent that he admitted in the PSR that most of his criminal convictions were the result of the consumption of alcohol. As well, his sister stated that he is violent when he drinks. Relying on *R c LP*, 2020 QCCA 1239 at paras 110-12, it argues that, for violent crimes where the accused knows that he can become violent when intoxicated, but nonetheless continues to drink, alcohol consumption can be an aggravating factor.

[65] While the trial judge misspoke when she stated that his last conviction was in 1994, the accused's last conviction for an offence involving violence was in 1995. This is relevant because, at the sentencing hearing, the Crown emphasized the accused's convictions for violent offences, disobeying court orders and failing to comply with the terms of his release and not his more recent drinking offences and theft. It argued that the accused's criminal record disentitled him to leniency. It also argued that his record demonstrated that he had the opportunity to rehabilitate himself in the past, but that he had not done so. It did not mention *LP* nor did it argue that his record should be considered as aggravating.

[66] The trial judge recognized that the accused had a history of criminal involvement from an early age and for an extended period of time. She also noted that there were gaps in his record.

[67] In addition, the trial judge mentioned the accused's problem with alcohol abuse and that his sister reported to the probation officer who prepared the PSR that the accused was "violent" or occasionally violent when drinking. She stated that substance abuse played a role in this offence and that, while it did not excuse his behaviour, it was relevant to the determination of sentence. She did not characterize it as either mitigating or aggravating.

[68] A review of the reasons of the trial judge demonstrates that it is clear that she considered the accused's record and alcohol abuse to be part of the adverse effects that he and his family had suffered as a result of colonialism and residential and day schools. She considered that, in the past, the accused had participated in treatment programs and was willing to do so on a go-forward basis, rather than characterizing it as a failure to rehabilitate. In weighing and balancing the factors, she chose to give significant weight to these *Gladue* considerations in assessing the accused's moral culpability, despite the serious nature of the offence. In these circumstances, I am not convinced that the trial judge's misstatement of the accused's criminal record constituted a palpable and overriding error that would have affected the sentence she imposed. The *Gladue* factors in this case were significant.

Ground 2—Did the Trial Judge Fail to Appreciate the Seriousness of the Offence and the Accused's Moral Blameworthiness?

The Application of Friesen

[69] The Crown argues that the trial judge erred in her consideration of its position that, in accordance with the principles set out in *Friesen*, sentences for sexual assaults against adults should be raised in consideration of society's

and the courts' deepened understanding of the significant harm caused by such offences.

[70] In dismissing this argument, the trial judge stated (at para 24):

> In addition to aggravating factors, the Crown has argued, in light of the sentence imposed in ***Friesen***, and because of the passage of time and changes in societal attitudes toward sexual assault, that the court should be imposing more stringent sentences generally for sexual offences against adult complainants. I find that that argument runs counter to the express statement of the Supreme Court of Canada in ***Friesen***, at paragraph 118, that their decision should not be taken as an indication that stronger sentences are warranted or not warranted for those who offend sexually against adults. . . .

[71] *Friesen* states (at para 118):

> We would emphasize that nothing in these reasons should be taken either as a direction to decrease sentences for sexual offences against adult victims or as a bar against increasing sentences for sexual offences against adult victims. As this Court recently held, our understanding of the profound physical and psychological harm that all victims of sexual assault experience has deepened (*Goldfinch* [*R v Goldfinch*, 2019 SCC 38], at para. 37). . . .
>
> [emphasis added]

[72] I agree with the Crown that the principles in *Friesen* should not be limited to cases involving sexual offences against children. Historically, the law has recognized that sentences may be raised or lowered to bring them into harmony with prevailing social values. This well-established principle was recently reinforced in *R v Parranto*, 2021 SCC 46 at paras 22-23. Also see *R v Stone*, [1999] 2 SCR 290 at para 239; *Friesen* at para 35; and *R v Petrowski*, 2020 MBCA 78 at para 40.

[73] In *Friesen*, the Supreme Court stated, "[A]s this Court recognized in *Lacasse*, sentences can and should depart from prior sentencing ranges when Parliament raises the maximum sentence for an offence and when society's understanding of the severity of the harm arising from that offence increases (at para 108 (emphasis added); see also *Lacasse* at paras 62-64, 74).

[74] The Court explained that the first justification for raising sentencing ranges for sexual offences against children involved recognition of Parliament's decision in 2015 to increase maximum sentences for such offences. It stated that the increase should "shift the range of proportionate sentences as a response to the recognition of the gravity of these offences" (*Friesen* at para 109). Quoting from *R c Régnier*, 2018 QCCA 306 at para 78, the Court endorsed the statement that "[i]n certain cases, a sentencing judge . . . 'must feel free to impose sentences above' a past threshold" (*ibid*).

[75] In the case of sexual assault involving adult victims, Parliament has not raised the maximum penalty. It has remained at 10 years' imprisonment since the enactment of section 271 of the *Code*, which came into effect on January 4, 1983.[1]

[76] On the other hand, as referenced in *Friesen* at para 118, the Supreme Court underscored our increased understanding of the effects of sexual assault as explained in *R v Goldfinch*, 2019 SCC 38 (at para 37):

> . . . Sexual assault is *still* among the most highly gendered and underreported crimes (J. Desrosiers and G. Beausoleil-Allard, *L'agression sexuelle en droit canadien* (2nd ed. 2017), at pp. 41-42). Even hard-fought battles to stop sexual assault in the

[1] see Bill C-127, *An Act to amend the Criminal Code in relation to sexual offences and other offences against the person and to amend certain other Acts in relation thereto or in consequence thereof*, 1st Sess, 32nd Parl, 1982 (assented to 27 October 1982), SC 1980-81-82-83, c 125

> workplace remain ongoing (compare, e.g., K. Lippel, "Conceptualising Violence at Work Through A Gender Lens: Regulation and Strategies for Prevention and Redress" (2018), 1 *U of OxHRH J* 142, and C. Backhouse, "Sexual Harassment: A Feminist Phrase That Transformed the Workplace" (2012), 24 *C.J.W.L.* 275). As time passes, our understanding of the profound impact sexual violence can have on a victim's physical and mental health only deepens. Parliament enacted s. 276 to address concrete social prejudices that affect trial fairness as well as the concrete harms caused to the victims of sexual assault. Throughout their lives, survivors may experience a constellation of physical and psychological symptoms including: high rates of depression; anxiety, sleep, panic and eating disorders; substance dependence; self-harm and suicidal behaviour. A recent Department of Justice study estimated the costs of sexual assault at approximately $4.8 billion in 2009, an astonishing $4.6 billion of which related to survivors' medical costs, lost productivity (due in large part to mental health disability), and costs from pain and suffering. The harm caused by sexual assault, and society's biased reactions to that harm, are not relics of a bygone Victorian era.
>
> [footnotes omitted]

[77] I pause here to note that, in *Sandercock*, the Court also recognized the significant harm that is inferred from the very nature of the sexual assault. It stated, among other things, that it included (1) the fear of another attack, (2) a feeling that the victim is somehow to blame, (3) a sense of violation or outrage while at the same time, (4) a lingering sense of powerlessness in that such an offence "tends to destroy that sense of personal security which modern society strives to offer and humanity so obviously wants" (at para 16).

[78] Despite the inferred harm recognized in *Sandercock*, and while *Goldfinch* was not a case concerning sentencing, the reference in *Friesen* to *Goldfinch* at para 37 may reasonably be considered to be a recognition that

society's and the courts' knowledge of the harm caused by sexual assault against adults is increasing over time in the sentencing context.

[79] I am aware of one appellate decision that has adopted *Friesen* in the consideration of sentencing for sexual assault involving adult victims. In *R v Kolola*, 2021 NUCA 11, the accused appealed a sentence of 30 months' imprisonment imposed for forcing sexual intercourse on a sleeping victim. In dismissing the accused's appeal, the Nunavut Court of Appeal stated (at para 36):

> . . . While *Friesen* dealt with sexual abuse of children, the caution about relying on dated precedents in cases of sexual abuse of adult victims is equally applicable. Our understanding of the gravity and harmfulness of sexual offences has evolved and courts must recognize that dated precedents may constrain a sentencing judge's ability to impose a proportionate sentence in these cases. . . .

[80] In summary, society and the courts are continuing to recognize the significant harm caused to adult victims of sexual assault. This must be reflected in sentences imposed by the courts. On the other hand, the courts must balance this with Parliament's maintenance of the maximum sentence for the offence of sexual assault which has been in place since 1983.

Legislative Change

[81] Even though Parliament has not increased the maximum sentence for sexual assault on an adult, the Crown argues that it has signalled a need for change based on legislative amendments that the Crown contends are relevant to the accused. At the sentencing hearing, the Crown referred to section 718.2(a)(iii.1) of *Code*, which requires a sentencing court to consider

evidence that the offence had a significant impact on the victim. It also referred to section 718.04, which requires the sentencing court to give primary consideration to the objectives of denunciation and deterrence when imposing a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances—including because the person is Aboriginal and female.

[82] In its factum, the Crown also referred to *LP*, which discusses an amendment to section 718.2(e) of the *Code* made in 2015 which added the consideration of "harm done to victims or to the community" as a consideration in the application of the principle that "all available sanctions, other than imprisonment" should be considered "with particular attention to the circumstances of Aboriginal offenders" (at paras 67, 73).

[83] Thus, I will briefly review the history and jurisprudence regarding these sections.

Section 718.2(a)(iii.1) of the *Code*

[84] Section 718.2(a)(iii.1) states:

> **Other sentencing principles**
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> **(a)** a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
>
> . . .
>
> **(iii.1)** evidence that the offence had a significant impact on the victim, considering their age and other

> personal circumstances, including their health and financial situation,
>
> . . .

[85] This section was enacted in 2012 pursuant to section 2 of the *Protecting Canada's Seniors Act*, SC 2012, c 29. The legislative summary of this *Act* states: "This enactment amends the [*Code*] to add vulnerability due to age as an aggravating circumstance for sentencing purposes."

[86] Despite the title of the enacting legislation and its stated purpose, courts have recognized the plain wording of the section and have applied it in circumstances where there has been significant impact on a victim who was not elderly (see, for example, *R v Al-Shimmary*, 2017 ONCA 122 at paras 8-9; *R v Quash*, 2019 YKCA 8 at paras 27-32; *R v LSN*, 2020 BCCA 109 at para 81; *R v Letkeman*, 2021 MBCA 68 at para 60; and *R v Sidhu*, 2022 ABCA 66 at para 76).

[87] Certainly, all victims of sexual assault suffer a significant impact. However, I would not necessarily interpret this section as a direct signal from Parliament that would indicate an increase in sentences in sexual assaults involving adult victims was intended.

Section 718.2(e) of the *Code*

[88] Section 718.2(e) of the *Code* states:

> **Other sentencing principles**
> **718.2** A court that imposes a sentence shall also take into consideration the following principles:
>
> . . .

> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[89] The history of the current section 718.2(e) demonstrates that it was amended in 2015 pursuant to clause 24 of Bill C-32, *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, 2nd Sess, 41st Parl, 2015 (assented to 23 April 2015), SC 2015, c 13, s 2 (Bill C-32) to include a consideration of harm done to victims and to the community (the amendment). The purpose of the amendment was described in *LP* as follows (at para 73):

> On this matter, it is important to underline that section 718.2(*e*) of the [*Code*] was amended in 2015, which is after *Ipeelee* [*R v Ipeelee*, 2012 SCC 13] was rendered, to add "harm done to victims or to the community" as a consideration in sentencing Indigenous offenders. In the parliamentary debates, the Minister of Justice stated that "(a)dding a requirement that the court also consider the harm done to victims and to the community would help to ensure there is a proper balance between the rights of offenders and those who have been victimized by offenders' behaviour".
>
> [footnotes omitted]

[90] The amendment was not passed without Parliamentary discussion. Throughout the legislative process, most of the concerns raised regarding the amendment involved its potential to clash with sentencing principles to be considered when dealing with Aboriginal offenders, as stated in section 718.2(e) and as interpreted by the Supreme Court in *Gladue* and *R v Ipeelee*, 2012 SCC 13. For example, at the second reading of Bill C-32, the Hon Irwin Cotler expressed concern that it "would appear to limit the

application of the Gladue principles by specifying that the sentence must be 'consistent with the harm done to victims or to the community'."[2]

[91] In response, the Hon Robert Goguen, said that the importance of *Gladue* principles would have to be recognized should section 718.2(e) be amended. He stated, "Certainly [the amendment] will be made the intent of [Bill C-32], as the legislator has intended, while respecting the rights of [A]boriginals and their communities."[3]

[92] In *R v Johnny*, 2016 BCCA 61, the Court considered the argument that the effect of the amendment was to diminish the consideration to be given to the appellant's *Gladue* factors. It stated (at para 21):

> . . . As for the Crown's comment regarding [the victim's] equally unfortunate background, counsel argued that the judgment relayed a "subtle tone" that [the appellant] now comprises "part of a separate category of offenders disentitled from meaningful and comprehensive *Gladue* consideration because his victim was also plagued by the effects of colonialism as articulated in *Ipeelee* and *Gladue*." I do not agree. The fact that the sentencing judge was required to consider s. 718.2(e) does not mean she was to ignore the effects of the offender's conduct on his community – whether it be Aboriginal or not – or on the various individuals who have suffered and continue to suffer as a result of the loss of deceased. . . .

[93] In *R v AD*, 2019 ABCA 396, the Court made extensive comment on the interplay between the consideration of harm done to the victim or to the

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[2]Bill C-32, *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, 2nd reading, *House of Commons Debates (Hansard)*, 41-2, vol 147, No 72 (9 April 2014) at 4497 (Hon Irwin Cotler)

[3] Bill C-32, *An Act to enact the Canadian Victims Bill of Rights and to amend certain Acts*, 2nd reading, *House of Commons Debates (Hansard)*, 41-2, vol 147, No 95 (3 June 2014) at 6165 (Hon Robert Goguen)

community and how the circumstances of the victim as an Aboriginal woman should affect the sentencing of the accused. It stated (at para 27):

> Consideration of the victim, in this case the fact that she was an Aboriginal female, does not negate or otherwise trump the necessity of courts, when sentencing offenders, paying particular attention to the circumstances of Aboriginal offenders (s 718.2(e)). Rather, it requires that, in having regard to the circumstances of Aboriginal offenders, the courts do not discount the lives of or harms done to *Aboriginal victims of crime, their families and their communities* (*R v Whitehead*, 2016 SKCA 165 at para 83 . . .). The appropriateness of considering not only the nature of the victim, but the broader community, was recognized in *R. v. Williams*, 2011 BCCA 194 at para 9 . . . where the Court of Appeal, in upholding the sentence imposed on an Aboriginal offender who sexually assaulted an Aboriginal girl, observed that "(t)here is much to be said for the sentencing judge's concern for the protection of Aboriginal victims such as this child, and for the role of deterrence in the Aboriginal community."

[94] The Court stated that, consideration of the circumstances of Aboriginal victims is "arguably necessary in order to meaningfully achieve the fundamental purpose of sentencing, namely the protection of the public" (at para 29).

[95] In *LP*, the majority of the Court reiterated that section 718.2(e) must not be seen as discounting the lives or harms done to Aboriginal victims of crime, as well as their families and communities, and that the sentencing judge must have concern for the protection of Aboriginal victims and promoting deterrence in Aboriginal communities (see para 81).

[96] To be sure, courts continue to consider the *Gladue* principles as they relate to the circumstances of Indigenous offenders since the amendment. Sometimes, the Indigenous circumstances of the offender affect the ultimate

sentence imposed, and sometimes not (see, for example, *Chanalquay* at paras 57-60; *R v Guimond (MJ) et al*, 2016 MBCA 18 at paras 6-7; *Johnny* at paras 21, 33; *R v Whitehead*, 2016 SKCA 165 at paras 81, 85, 88; *R v Delorme*, 2017 SKCA 3 at para 81; and *R v Macintyre-Syrette*, 2018 ONCA 706 at paras 5, 22).

[97] Thus, a review of the jurisprudence reveals that courts have interpreted section 718.2(e) in a manner that recognizes the harm done to victims and communities while still giving effect to *Gladue* considerations.

Section 718.04 of the *Code*

[98] In this case, while section 718.04 had not been enacted at the time of the offence, it was in force at the time that the accused was sentenced.

[99] Section 718.04 states:

> **Objectives – offence against vulnerable person**
> **718.04** When a court imposes a sentence for an offence that involved the abuse of a person who is vulnerable because of personal circumstances — including because the person is Aboriginal and female — the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

[100] This provision, among others, was enacted as part of Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 1st Sess, 42nd Parl, 2019 (assented to 21 June 2019) (Bill C-75) that was introduced in 2018. In the second reading of Bill C-75, the Hon Jody Wilson-Raybould noted that

one of its key areas of reform was to bolster the response of the justice system to intimate partner violence.[4]

[101] The first draft of Bill C-75 did not contain section 718.04. The addition of this section was suggested during consideration of Bill C-75 at the Standing Senate Committee on Legal and Constitutional Affairs. The suggestion to include section 718.04 (which was worded slightly differently at the time) was in response to multiple witness speeches regarding the vulnerability of Indigenous women and girls in Canada, and the need to take heightened rates of violence into consideration.[5]

[102] As occurred with the amendment to section 718.2(e) in 2015, concerns were raised that the inclusion of section 718.04 might contradict and/or interfere with the application of *Gladue* principles.

[103] Mr. Matthias Villetorte, Senior Counsel and Team Lead of the Department of Justice Canada, provided his opinion that the section was a direction to sentencing courts to "treat this more seriously, and obviously for sentences imposed to reflect the gravity of what the crime is."[6] He repeated the intent of section 718.2(e) and the Supreme Court's interpretation of it in *Gladue* and *Ipeelee*, concluding that the proposed section 718.04 would "not impede a sentencing judge from imposing a sentence that is proportionate in the circumstances."[7]

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[4] See Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, 2nd reading, *House of Commons Debates (Hansard)*, 42-1, vol 148, No 300 (24 May 2018) at 19602-604 (Hon Jody Wilson-Raybould)
[5] Senate, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 42-1, No 62 (16 May 2019)
[6] *Ibid*
[7] *Ibid*

[104] The Canada, Legal and Social Affairs Division, Parliamentary Information and Research Service, *Legislative Summary of Bill C-75: An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts* (Legislative Summary), Publication No 42-1-C75-E (Ottawa: Library of Parliament, 2019) by Laura Barnett et al describes sections 718.04 and 718.201 (abuse of an intimate partner—court to consider increased vulnerability of female victims, particularly Aboriginal female victims) as addressing two recommendations in the Canada, National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1b (Ottawa: NIMMIWG, 2019) (the MMIWG Report); as well as some of the concerns noted by the Supreme Court in *R v Barton*, 2019 SCC 33.

[105] In *Barton*, writing on behalf of the majority of the Supreme Court, Moldaver J stated (at para 204):

> . . . [T]o better ensure Indigenous women and girls receive the full protection and benefit of the law in sexual assault cases, our criminal justice system should take reasonable steps to address biases, prejudices, and stereotypes against Indigenous women and girls openly, honestly, and without fear. . . .

[106] In *LP*, the Quebec Court of Appeal noted that section 718.04 is included as a sentencing objective (see para 77). The Court reiterated that "[t]he protection of vulnerable female Indigenous victims as a sentencing consideration is not a novelty, and was judicially considered prior to the enactment" of the provisions (at para 80). It reinforced that the provisions

were intended to address recommendations in the MMIWG Report and the concerns expressed by the Supreme Court in *Barton* (see para 80).

[107] In *Kolola*, the Nunavut Court of Appeal held that "[s]ection 718.04 codified the long standing and well-established common law principle where Courts have considered denunciation and deterrence the primary sentencing considerations in cases involving the abuse of a victim who is vulnerable because of their personal circumstances" (at para 34; see also *R v Alcorn*, 2021 MBCA 101 at para 60).

[108] In *R v CD*, 2021 NUCA 21, the Court upheld a sentence of nine months' imprisonment for two counts of sexual interference that the accused had committed against his granddaughter. Both were Inuk. In dismissing the appeal, the Court rejected the accused's argument that the sentencing judge failed to properly consider the *Gladue* factors and erred in his consideration of section 718.04 when he characterized the fact that the victim was Aboriginal or female as an aggravating factor. The Court held that it was not a reviewable error to use the word "aggravating" in reference to Parliament's direction in section 718.04, as the Aboriginal or female status of a vulnerable victim is relevant in sentencing (at para 39). It stated that the use of the word "aggravating" by the trial judge should simply be taken as referring to the "indicia of gravity" surrounding the offence (*ibid*).

[109] In the Alberta Court of Appeal case of *R v McDonald*, 2021 ABCA 262, the Court considered sections 718.04 and 718.201. It reinforced that those sections give primary consideration to the objectives of denunciation and deterrence where the victim is an Indigenous woman and intimate partner of the accused. It then stated (at paras 29-30):

> As observed by the British Columbia Court of Appeal in ***R v Nahanee***, 2021 BCCA 13 at para 85, leave to appeal granted 2021 CanLII 58913 (SCC):
>
> > The effort at reconciliation that, in part, motivates the *Gladue* approach to sentencing, is not served by sentences that do not sufficiently deter violence against Indigenous children.
>
> That comment is equally apt in the case of violence against Indigenous women.

[110] In summary, section 718.04 mandates sentencing courts to give primary consideration to the objectives of denunciation and deterrence in circumstances where the victim is vulnerable because of personal circumstances—including because the person is Aboriginal and female. It is not intended to diminish *Gladue* principles. The application of *Gladue* principles will not necessarily result in a lesser sentence, but they may, depending on the circumstances. Nonetheless, the principles of denunciation and deterrence often mandate a harsher sentence in the interest of the protection of the public.

Conclusion Regarding Increased Sentences

[111] It is manifestly clear that adult victims of sexual assault typically suffer significant harm. That harm was recognized at the time of *Sandercock* and our understanding of it continues to deepen, as was stated in *Goldfinch*.

[112] In addition, Parliament has chosen to legislate sentencing considerations targeting the recognition of significant harm to victims in section 718.2(a)(iii.1) and harm to victims or communities when considering section 718.2(e). With the enactment of section 718.04, it has also mandated

the consideration of denunciation and deterrence for offences involving vulnerable persons—including because the person is Aboriginal and female.

[113] On the other hand, often increases in sentence are responsive to legislated increases in minimum and/or maximum sentences. In this case, Parliament has not increased the maximum sentence for the offence of sexual assault since it was enacted in 1983.

[114] Typically, sentencing ranges develop over time and increases in sentences and sentencing ranges are generally incremental in nature (see *R v Ruizfuentes*, 2010 MBCA 90 at para 20; and *Petrowski* at para 29). As was stated in *R v Wright* (2006), 216 CCC (3d) 54 (Ont CA) (at para 22):

> "Ranges" are not embedded in stone. Given their nature as guidelines only, I do not view them as being fixed in law, as is the case with binding legal principles. They may be altered deliberately, after careful consideration, by the courts. Or, they may be altered practically, as a consequence of a series of decisions made by the courts which have that effect. If a range moves by virtue of the application of individual cases over time, it is not necessary to overrule an earlier range that may once have been in vogue; it is only necessary to recognize that the courts have adapted and the guidelines have changed.

[115] However, in some cases, "an appellate court must also set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders" (*Friesen* at para 35; see also *Parranto* at para 22; and *Alcorn*).

[116] Sometimes an appellate court will establish a sentencing range in recognition of a particular need (see *R v Smith*, 2019 SKCA 100 at para 44).

[117] As for starting points, the majority decision in *Parranto* stated (at para 20):

> . . . The primary rationale for the use of starting points is to "reduce idiosyncratic decision-making" . . .. In *Sandercock*, for instance, a three-year starting point was established to address the "wide, and unjustified, divergence amongst judges about appropriate sentences for rape and equally serious forms of sexual assault" (*Arcand* [*R v Arcand*, 2010 ABCA 363], at para. 102). The starting point stated in *Sandercock* was intended to ensure that the harms caused by a particular category of offence — "major sexual assaults" — are consistently accounted for in sentencing.

[118] It is also helpful when courts are presented with an evidentiary record, which allows the sentencing court to assess the request for an increase in sentencing range or starting point. I would also add that evidence of the prevalence of a certain type of crime might also be helpful. That type of record is not present here.

[119] The Crown relies on the comments in *Goldfinch* and the enactments and amendments to the *Code* discussed above and asks this Court to give guidance.

[120] In *Parranto*, the majority explained that there are two types of guidance that can be provided by appellate courts. It stated (at para 15):

> . . . Appellate guidance may take the form of quantitative tools (such as sentencing ranges and starting points), non-quantitative guidance explaining the harms entailed by certain offences, or a mix of both . . ..

[121] Regarding the offence of sexual assault against children, in *Friesen*, the Court stated (at para 113):

> Much like the offence of impaired driving causing death, sexual offences against children can cover a wide variety of circumstances (see *Lacasse*, at para. 66). Appellate guidance should make clear that sentencing judges can respond to this reality by imposing sentences that reflect increases in the gravity of the offence and the degree of responsibility of the offender. . . .

[122] In cases of sexual assault involving adult victims, there exist a wide variety of circumstances, including the nature of the offence, the nature of the relationship between the offender and the victim, the harm caused to the victim and the community and the vulnerability of the victim, including circumstances that she is Indigenous and female. The intent of these reasons is to provide non-quantitative guidance regarding the nature of harm caused by sexual assault to adult victims and the intent of the legislative changes discussed in these reasons. Sentencing judges must feel free to respond to these considerations and impose sentences that reflect society's and the courts' deepened understanding of the harm caused in light of the legislative provisions discussed by increasing sentences where appropriate.

Effect of the Error in Principle and Fitness of the Sentence Imposed

[123] Absent an error in principle that has a material impact on the sentence or a demonstrably unfit sentence, appellate courts must show deference to the decisions of sentencing judges. In this case, I cannot conclude that the trial judge's error in principle had a material impact on the sentence nor was the sentence imposed demonstrably unfit.

[124] The trial judge did consider denunciation and deterrence, the harm in general caused to the victim and the fact that the victim is Indigenous. However, she chose to include restoration and rehabilitation in consideration of the *Gladue* factors specific to this accused. As the majority stated in *Parranto*, neither starting points nor ranges "incorporates other potential mitigating circumstances or *Gladue* factors, nor should it" (at para 46).

[125] While the trial judge erred in not considering the specific harm caused to this victim regarding her knowledge that the accused had HIV, her fear of contracting HIV and the consequent psychological effects on her, I am of the view that, had she considered them, it would not have affected the rehabilitative aspect of the sentence she imposed. The error here is not material.

[126] As well, the sentence imposed is similar to the sentences imposed in similar cases to this, which considered harm to the victim, the characteristics of being Indigenous and female, as well as *Gladue* principles. See, for example, *Chanalquay* (sentence of two years less a day sustained by Saskatchewan Court of Appeal, but only on the condition that the accused be placed on probation); and *Kolola* (30 months for sexual intercourse with a sleeping victim upheld by Nunavut Court of Appeal).

[127] However, while I cannot say that the sentence imposed was unfit in this case, it was on the low end of the range, especially given the comments made in *Goldfinch*, the legislative changes that I have discussed and this Court's decisions in *JAW* (39 months upheld for sexual intercourse with a sleeping victim); and in *R v CCC*, 2019 MBCA 76 (three and one-half years upheld for sexual intercourse with a sleeping victim).

[128] As was stated by Monnin JA in *R v Murphy (MP)*, 2011 MBCA 84, "[C]hoosing not to interfere with the discretion exercised by the sentencing judge, is not an endorsement of the specific sentence" (at para 20). Rather, "[i]t is but another example of applying a deferential standard of review" (*ibid*).

[129] In the result, the accused's conviction appeal is dismissed. Leave to appeal sentence is allowed, but the appeal is dismissed.

Cameron JA

I agree: Mainella JA

I agree: Simonsen JA