

INTRODUCTION

[1] J.G. was convicted, after a judge alone trial, of these *Criminal Code* offences:

- a) Count #4: Section 286.3(2) – Influence, or direction of the complainant in the sex trade.
- b) Count #5 Section 286.4 – Advertising the complainant's sexual services.
- c) Count #6 – Section 286.2(2) – Obtaining a material benefit from the complainant's sex trade earnings.
- d) Count #7 – Section 163.1(4) – Possession of child pornography.
- e) Count #8 Section 163.1(3) – Distribution of child of pornography.

[2] I imposed a global sentence of 4 years and six months with certain ancillary Orders.

PRELIMINARY MATTERS

Mandatory minimums.

[3] Section 286.2(2) prescribes a mandatory minimum sentence of 2 years. This mandatory minimum sentence has been declared unconstitutional by the Ontario Court of Appeal in *R. v. Joseph*, 2020 ONCA 733, at para. 143.

[4] Section 286.3(2) prescribes a mandatory minimum sentence of 5 years. This mandatory minimum sentence has been declared unconstitutional in *R. v. Safieh*, 2018 ONSC 4468.

[5] The Crown submits that *Safieh* is wrongly decided and the mandatory minimum sentence is constitutional. The defence submits that *Safieh* was correctly decided. For the reasons articulated in *Safieh*, I conclude that the mandatory minimum provision is unconstitutional.

J.G.'s client profile

[6] J.G. has been in custody awaiting his trial and sentencing. He requested correctional institution records that show the periods when he was subject to institutional lockdown. J.G. seeks enhanced credit for those periods in lockdown on the basis that, during lockdowns, privileges such as visitation, phone calls, showers and ability to leave his cell are curtailed. The institution disclosed the records but also included J.G.'s client profile. The client profile lists personal information about J.G, as well as his disciplinary records. The client profile was not requested by the defence.

[7] Mr. G. submits his disciplinary records are irrelevant. In addition, use of the unrequested disciplinary records, in effect, places an obligation on the defence to produce evidence against itself: a circumstance that does not exist in Canadian jurisprudence.

[8] The Crown submits that the sentencing calculus requires the court to consider the circumstances of the offence and the offender in accordance with the applicable principles of sentencing. Thus, the accused's conduct while in custody is a relevant consideration and must be considered in sentencing.

[9] The sentencing judge has a broad discretion to craft a sentence tailored to the nature of the offence and the circumstances of the offender: *R. v. Nasogaluak*, [2010] 1 S.C.R. 206, at para. 43. From this perspective, the conduct of an offender while in custody is generally relevant to the circumstances of the offender and is an appropriate consideration in sentencing.

[10] The difficulty in this case is how the information was disclosed to the parties. The information was not requested by either Crown or defence. It was not responsive to the defence's request. It is information that the institution gratuitously sent, together with the records the defence requested.

[11] The Crown has a general obligation to disclose. This general obligation to disclose does not extend to the defence: *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. Because of how the information was disclosed, use of this information is tantamount to placing an obligation on the defence to disclose information prejudicial to its position. Therefore, I shall not consider J.G.'s disciplinary records in assessing the appropriate sentence.

[12] In practical terms, this issue is moot in this case. Counsel were permitted to make extensive submissions on the appropriate sentence in the event these records were considered. Therefore, I am aware of the contents of the records. Considering the particular circumstances of the offence and the offender, had I considered the records, my conclusion on the appropriate sentence would not have changed.

Exceptional Circumstances

[13] A court can take judicial notice of a fact that is so notorious or generally accepted that it cannot be subject to debate by reasonable persons or is capable of immediate and accurate verification by resort to sources of undisputed accuracy: *R. v. Find*, [2001] 1 S.C.R. 863.

[14] I am sentencing J.G. in the midst of a global pandemic. Globally to date, there have been 69,069,399 confirmed cases of COVID 19 infections, 1,572,423 deaths, and 44,529,814 recoveries.²

[15] J.G. is in custody awaiting sentence. J.G.'s cell is small, making physical distancing difficult. He has a cell mate. When not in lock down, he is required to mingle with approximately 30 other inmates. None of the inmates wear masks, unless when subject to a 14-day COVID-19 isolation protocol. J.G. claims he is

² [COVID-19 Update: US and Global Cases, Deaths, and Recoveries as of December 10, 2020 \(patientcareonline.com\)](https://www.patientcareonline.com/news/2020/12/10/covid-19-update-us-and-global-cases-deaths-and-recoveries-as-of-december-10-2020)

not given access to hand sanitizers and has a reduced opportunity to engage in one of the established COVID-19 infection prevention protocols – hand washing.

[16] Correctional authorities are taking stringent precautions to reduce or eradicate the transmission of COVID-19 amongst inmates; however, empirical evidence demonstrates that in comparison to the general population, COVID-19 infections are five times higher in provincial institutions and nine times higher in federal institutions.³ Currently, the impact of COVID-19 is a relevant consideration in sentencing: *R. v. Hearn*, 2020 ONSC 2365; *R. v. Chol*, 2020 ONSC 6644. The current impacts of COVID-19 in correctional institutions makes this case an exceptional one.

SUMMARY OF THE FACTS

[17] In the summer of 2018, the complainant was in conflict with her parents. She wanted more personal autonomy. Her parents did not know that she also wanted to work in the sex trade. She sought J.G.'s assistance. He assisted her. Between June 27, 2018 and July 22, 2018, she worked in the sex trade. J.G. set up and managed her sex trade work. He had a strong influence on her sex trade work. He was 24 years old. She was 17 years old.

³ Valarie Ouelle & Joseph Loiero, "COVID -19 taking a toll in prisons, with high infection rates, CBC News analysis shows" (17 July 2020) online: CBC News <https://www.cbc.ca/news/canada/prisons-jails-inmates-covid-19-1.5662470>

[18] J.G.'s conduct included arranging accommodation for sex trade work; arranging for clients; taking pornographic pictures of the complainant; and advertising the sex services. The advertisements included pornographic pictures of the complainant. J.G. placed 16 advertisements offering sexual services by the complainant during that period.

[19] He communicated with prospective clients; provided the complainant with some protection; negotiated fees; and monitored how much time the complainant spent with clients. The complainant also participated in these activities. J.G.'s role was to assist her by setting up and managing the sex trade enterprise and teaching her about the sex trade. He provided her with guidance on how to carry out the trade. J.G. influenced the complainant's activities in sex trade work. He received 50 percent of the complainant's sex trade earnings.

LEGAL PRINCIPLES

[20] Section 718 of the *Criminal Code* sets out the objectives of sentencing as follows:

- a) to denounce unlawful conduct and the harm caused to the victim or community.
- b) to deter the offender and others from committing offences.
- c) where necessary, to separate offenders from the community.

- d) to rehabilitate offenders.
- e) to provide reparation for the harm done to victims or the community
and
- f) to promote a sense of responsibility and acknowledgment in the
offender for the harm done to the victim or the community.

[21] No particular sentencing objective trumps the others. It falls to the sentencing judge to balance the sentencing objectives to determine which objectives warrant greater emphasis in the circumstances of the offender and the offence: *R. v. Nasogaluak*, [2010] 1. S.C.R. 2016.

[22] A “sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”: *Criminal Code*, section 718.1. A court must consider the mitigating and aggravating circumstances of the case: section 718.2(a).

[23] Aggravating factors include evidence that the offence had a significant impact on the victim, considering their age, health, financial situation and other personal circumstances: section 718.2(a)(iii.1) and that in committing the offence the offender abused a person under 18 years old: section 718.2(a)(ii.1).

[24] In imposing a sentence involving the abuse of a person who is vulnerable because of her personal circumstances, the court shall give primary consideration to the objectives of denunciation and deterrence of the offensive conduct: section 718.04.

Systemic racism as a mitigating factor.

[25] J.G. submits that it is not in dispute that there is systemic racism in Canadian society. He asserts that as a Black person, he has experienced systemic racism and that the impacts of systemic racism should be a mitigating factor in sentencing. I agree.

[26] There is evidence of the impacts of systemic racism in Canadian society generally and how it manifests itself in the Canadian criminal justice system specifically. My analysis focuses on how the impacts of systemic racism against Black people should be considered in sentencing because that is how the issue has been framed by J.G. However, despite different historical origins of systemic racism, it is reasonable to extend my conclusions to include Indigenous peoples and other People of Colour.

[27] Systemic racism means the “social production of racial inequality in decisions about people and in the treatment they receive.”⁴ In practice, this means

⁴ Report of the Commission of Systemic Racism in the Ontario Criminal Justice at p.39.

that systemic racism produces the circumstance where an individual subject to it goes through life with “one hand tied behind his or her back,” i.e., at a significant disadvantage.

[28] In contemporary times, racism does not necessarily arise from deliberate action, however its impacts, inadvertent or otherwise, are now better understood. The Black experience with systemic racism in Canadian society is rooted in the country’s history of colonialism, slavery and segregation.⁵

[29] Racism⁶ can be conceptualized as a psychological injury that functions as a stressor for the target of racism.⁷ Over time, repeated microaggressions, racial harassment, and institutional racism can result not only in stress reactions that give rise to negative mental and physical outcomes for Black people who are the targets of this racism, but also in trauma and post-traumatic stress symptoms.⁸

⁵ Akwasi Owusu-Bempah & Carl James, “Expert Report on Crime, Criminal Justice and the experience of black Canadians in Toronto, Ontario” (2018).

⁶ It is important to note that racism can be expressed in myriad forms, including discrete discriminatory events, racial harassment, microaggressions, and institutional racism.

⁷ Robert T. Carter, “Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress” (1997) 35:1 *The Counseling Psychologist* 13, at pp. 16-19 [Carter, “Race-Based Traumatic Stress”].

⁸ *Ibid.*

[30] Microaggressions are subtle attacks and invalidations of Black people that are “delivered incessantly,”⁹ and as such, have powerful negative impacts on the mental health of Black people,¹⁰ both individually and collectively.¹¹

[31] There are inequalities in access to and the provision of mental health services, which has a significant impact on the mental health of Black people and communities.¹²

[32] Racism is a traumatic experience for Black people,¹³ and institutionalized racism has led to intergenerational trauma for Indigenous peoples.¹⁴ There is a

⁹ *Ibid.*

¹⁰ Derald Wing Sue, ed, *Microaggressions and Marginality: Manifestation, Dynamics, and Impact* (Hoboken: John Wiley & Sons, Inc., 2010), at pp. 15-16 [Wing Sue, *Microaggressions and Marginality*].

¹¹ Michael M. Gale et al, “A Meta-Analysis of the Relationship Between Internalized Racial Oppression and Health-Related Outcomes” (2020) 48:4 *The Counseling Psychologist* 498, at 501.

¹² Ontario, Ontario Human Rights Commission, *Racial Inequality in Access to Health Care Services*, by Sana Halwani (Toronto: Queen’s Printer for Ontario, 2004) [OHRC, *Access to Health Care*]; Senate of Canada, Standing Senate Committee on Social Affairs, Science and Technology, *Out of the Shadows at Last: Transforming Mental Health, Mental Illness and Addiction Services in Canada*, 38-1 (May 2006) (Chair: Hon. Michael J.L. Kirby), at p. 78 [Standing Senate Committee on Social Affairs, Science and Technology, *Out of the Shadows*].

¹³ Canada, Canadian Human Rights Commission, *Strengthening the Commission’s Handling of Race-Based Cases*, by Mark Hart, Catalogue No Hr4-53/2020E-PDF (Ottawa: Industry Canada, 2020), at pp. 7 and 65-67 [CHRC, *Race-Based Cases*].

¹⁴ Ontario, Ontario Human Rights Commission, *Minds that Matter: Report on the consultation on human rights, mental health and addictions* (Toronto: Queen’s Printer for Ontario, 2012), at p. 35 [OHRC, *Minds that Matter*]; Senate of Canada, Standing Committee on Canadian Heritage, *Taking Action Against Systemic Racism and Religious Discrimination Including Islamophobia*, 42-1 (February 2018) (Chair: Hon. Hedy Fry), at p. 103 [Senate Standing Committee on Canadian Heritage, *Taking Action Against Systemic Racism*].

link between racial discrimination and harassment, and post-traumatic stress disorder.¹⁵

[33] Contemporary understanding of the impacts of systemic racism definitively demonstrates that past and ongoing formal and informal discrimination, limits access to social economic opportunity among Black people.¹⁶

[34] Systemic racism creates low socio-economic status which corresponds with poorer health outcomes. Thus, poverty, housing segregation, unemployment, high incarceration rates and other forms of social inequity has been linked to poorer health outcomes amongst Black people.¹⁷

¹⁵ OHRC, *Minds that Matter*, *supra* note 12 at p. 69; Government of Canada, Minister of Public Works and Government Services Canada, *The Human Face of Mental Health and Mental Illness in Canada*, Catalogue No HP5-19/2006E (Ottawa: Ministry of Public Works and Government Services Canada, 2006), at p. 16 [Canada, *Human Face of Mental Health*].

¹⁶ Leonard E Egede & Rebekah J Walker. "Structural Racism, Social Risk Factors, and Covid – 19 – A Dangerous convergence for Black Americans" (2020). 383:12 *New Eng J Med*; Ingrid RG Waldron, "The Impact of Inequality on Health in Canada: A multidimensional framework" (2010), online: Diversity & Equality in Health and Care <https://diversityhelathcare.imedpub.com/theimpact-ofinequality-in-canada-a-multidimensional-framework.php?aid+1943>

¹⁷ *Ibid*; Richard A. Opiel Jr et al., "The fullest Look Yet at Racial Inequality of Coronavirus" (5July 2020), online: The New York Times < <https://www.nytimes.com/interactive/2020/07/05/us/coronavirus-latino-african-americans-cdc-data.html>; Kelly Grant, "Data show poverty, overcrowded housing connected to COVID-19 rates among racial minorities in Toronto" (2 July 2020) online: The Globe and Mail <<https://www.globeandmail.com/canada/toronto/article/article-data-show-poverty-overcrowded-housing-connected-to-covid-19-rates>

[35] A 2018 report of the Ontario Human Rights Commission reported that Black people are disproportionately represented in police actions resulting in stops, arrest, use of force, shootings and deaths.¹⁸ There are disparities in the treatment of Black people in pretrial detention, sentencing and release conditions.¹⁹

[36] Thus, in contemporary times, the deleterious impacts of systemic racism on Black people in society and in the criminal justice system is a notorious fact.

[37] Such a circumstance was described by the Supreme Court of Canada in relation to Aboriginal persons. A court must take judicial notice of the history of colonialism; displacement and residential schools and how that history translates into lower socio-economic status, drug and alcohol abuse, addiction, suicide and incarceration for Aboriginal people. These facts provide important context for sentencing Aboriginal persons: *R. v. Ipeelee*, [2012] 1 S.C.R. 433.

[38] In *Ipeelee*, the Supreme Court provided additional guidance on how sentencing judges should interpret section 718.2(e), which requires a sentencing judge to consider all “available sanctions, other than imprisonment, that are

¹⁸ Ontario Human Rights Commission, *A Collective Impact: Interim report on the inquiry into racial profiling and racial discrimination of Black persons by the Toronto Police Service* (Government of Ontario, November 2018); Canada, The Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator: 2014-2015* (Ottawa: Ministry of Public Safety, 2015).

¹⁹ Canada, The Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator : 2014-2015* (Ottawa: Ministry of Public Safety, 2015).

reasonable in the circumstances and consistent with the harm done to victims or to the community with particular attention to the circumstances of aboriginal offenders.” Currently, there is no such specific legislation in relation to Black people. However, the court in *Ipeelee* observed that background and systemic factors are also relevant considerations in sentencing non–Aboriginal offenders.

[39] In addition, the Ontario Court of Appeal in *R. v. Borde*, 2003 CanLII 4187 (Ont. C.A.), at para. 32, observed that the principles of section 718.2(e) that:

.. are generally applicable to all offenders, including African Canadians, are sufficiently broad and flexible to enable a sentencing court in appropriate cases to consider both the systemic and background factors that may have played a role in the commission of the offence”.

[40] I do not equate the historical reasons for systemic racism of Black people to those of Aboriginal people. Failure to recognise the distinctions in their unique histories is misguided. However, *Ipeelee* stands for the proposition that in circumstances where the impact of systemic racism is a notorious fact, judicial notice is warranted.

[41] Therefore, I take judicial notice that as a longstanding legacy of slavery, systemic racism continues to have a negative impact on the education, earning power, employment opportunities, medical and mental health, substance abuse and addiction, criminalisation and incarceration of Black people in Canada. This fact provides important context for evaluating evidence in the assessment of the

appropriate sentence for a Black offender: *R. v. Jackson*, 2018 ONSC 2527 (CanLII).

[42] As previously mentioned, section 718.2 requires the sentencing judge to consider mitigating and aggravating factors. There are certain consistent factors that mitigate and aggravate a sentence. Examples of mitigating factors include²⁰:

- Youth
- Advanced age
- Absence of a prior criminal record
- Remorse
- Mental illness
- Physical infirmity
- Uncharacteristic behaviour
- An early guilty plea
- Provocation
- No prior incarceration.
- [substance abuse]
- [drug addiction]

Examples of aggravating factors include:

- Extreme violence
- Gratuitous cruelty to the victim
- Permanent emotional or physical injury to the victim
- Offences committed while on mandatory supervision

²⁰ Gary Clewley, Paul McDermont & Rachel Young, “*Sentencing – The Practitioner’s Guide*” (Toronto, Carswell, 1995), at pp. 1-10 – 1-11.

- Offences committed while on bail
- Offences committed while on probation
- A prior consistent criminal record
- A recent conviction
- Profit from offence
- Absence of restitution
- A child victim
- An elderly victim
- Use of a weapon
- Prevalence of the offence in the community
- A pattern of criminal conduct against the same victim.

[43] As can be seen from the above list, mitigating factors include but are not limited to, factors that are deleterious to the offender. Since systemic racism visits deleterious mental, physical and socioeconomic impacts on Black people, Indigenous people and other people of color, it is reasonable to conclude that the deleterious impacts of systemic racism are mitigating on sentence.

[44] The contextual facts reveal that deleterious impacts on Black people is an indisputable effect of systemic racism. Further, failing to consider systemic racism's impacts on factors such as employment, education and health, while appearing to be a neutral application of sentencing principles, may actually conceal a strong bias against racialized individuals in the sentencing process: *Ipeelee*, at para. 67; *R. v. Jackson*, at paras. 105-115.

[45] For reasons previously articulated, it is reasonable to conclude that the impacts of systemic racism are a mitigating factor in sentencing. Thus, when determining the appropriate sentence in accordance with the process articulated in *R. v. Nasogaluak*, the degree of mitigation is determined in relation to the particular circumstances of the offence and the offender.

[46] Since the impacts of systemic racism on Black people is a notorious fact, it is not necessary for a Black offender to prove its impacts before it can be considered a mitigating factor.

[47] The objective is not to achieve a reduction, moderation or increase in sentence. Rather, the objective is to include a contemporary, more nuanced and informed understanding of the impacts of systemic racism to achieve a fair, just and appropriate sentence, taking into account the principles of sentencing, the circumstances of the offender and the offence. Within this context, the effect of the impacts of systemic racism on sentencing is one of degree, the extent of which is determined after careful weighing by the sentencing judge. It follows, therefore, that the closer the link between the deleterious impacts of systemic racism and the moral blameworthiness of the offence, the greater the degree of mitigation shall be.

[48] Thus, further mitigation may be achieved where the impacts of systemic racism on the individual and or the offence can be delineated with greater specificity. Non exhaustive and mutually exclusive examples include:

- a) evidence of the impacts of systemic racism on the offender's educational attainment, employment, family circumstance, socio-economic status; health status; treatment by law enforcement etc.
- b) impacts of discrimination on the offender's criminal behavior.
- c) Impacts of discrimination on the offender's behavior.
- d) The particular circumstances of the offender and the offence determines which sentencing objectives are paramount: *R. v. Nasogaluak*, at para. 43. Regardless of which sentencing objectives are paramount, rehabilitation remains an important sentencing objective: *R. v. Briscoe*, [2019] O.J. No. 2031, at para. 16. Within that context, information on how the impacts of systemic racism on the particular offender may be reduced to promote his or her rehabilitation is a relevant consideration.
- e) other relevant evidence.

POSITION OF THE PARTIES

[49] The Crown seeks a global sentence of 5.5 years with deductions of credit for pre-trial custody at a rate of 1.5 to 1 and credit for lock down days at a rate of 1 to 1. The Crown seeks a number of ancillary orders as set out below.

[50] J.G submits that a global sentence of 4 years is appropriate. He submits that with credit for pretrial custody and days he has spent in lock down in the midst of the COVID-19 pandemic, he is in a time served position. J.G. takes no issue with the ancillary orders sought by the Crown. He seeks credit for pretrial custody at a rate of 1 to 1.5 and additional credit for time spent in lock down at 1 to 1.

ANALYSIS

[51] In accordance with the process articulated in *R. v. Nasogaluak*, sentencing requires the sentencing judge to consider the circumstances of the offender and the offence in deciding which sentencing objectives are paramount, on route to determining a fair and just sentence. This process, of necessity and by statutory compulsion, requires a consideration of the mitigating and aggravating factors.

[52] My assessment of the personal circumstances of J.G and the circumstances of the offence invariably involves an assessment of the mitigating and aggravating factors in this case.

Aggravating factors

[53] J.G. engaged in the impugned conduct despite his knowledge that the complainant was under 18 years old. She was 17-year-old. This is an aggravating factor: section 718.2(ii.1).

[54] In her victim impact statement, the complainant described the deleterious impacts of J.G.'s conduct. She was under 18 years old. She was naive. His actions caused damage to her mental and physical health. Considering her age, the deleterious impact of J.G.'s conduct on the complainant's personal circumstances including her mental and physical health is particularly aggravating: section 718.2(iii.1).

[55] Section 718.2 illustrates a recognition that her apparent willingness to participate in the sex trade is not a mitigating factor, given her age and degree of maturity. In fact, her age introduces a heightened level of aggravation.

[56] In other words, acquiescence by a 17-year-old to participate in sex trade work under the influence, guidance and management of J.G. is not mitigating because of the complainant's level of maturity, evidenced by her age and naivety. See also *R. v. Joseph*, 2020 ONCA 733 (Ont. C.A.), at paragraphs 97-99.

[57] J.G. was a strong influence on the complainant. He facilitated the sex trade advertisements for her services; directed her to choose a name for herself

for her sex trade ads; he sent partially-nude pictures of the complainant to himself using Snapchat; he prepared and “collaborated” with her advertisement content and pricing; and he influenced her to lie about her age, saying she was 20 years old instead of 17 years old.

[58] J.G. actively managed her sex trade work and he “helped her carry out her sex trade work”; he “controlled the communications hub” of the sex trade operation - such as the cell phones; he communicated with the clientele; he influenced her movements in the sex trade, and he questioned (and directed) the length of time she should be spending with any sex-trade-client.

[59] He did not instruct the complainant to stop summer school and focus on the sex trade work; however, he strongly influenced and guided her toward the decision to drop out of summer school and focus on sex trade work.

[60] J.G was ready to protect the complainant with a firearm. This was in furtherance of her sex trade work.

[61] J.G earned 50 percent of all of the complainant’s earnings from sex trade work. He obtained a material benefit from the complainant’s sex trade work.

[62] J.G actively advertised the complainant’s sexual services. He took pornographic pictures of the complainant. He included them in advertisements.

He distributed them directly to prospective clients or posted them on a sex trade advertisement site. He posted 16 such advertisements.

[63] J.G. controlled the complainant's sex trade operations. He was in possession of the communications hub, which were the cell phones.

[64] J.G.'s criminal record is lengthy. His accumulation of offences began when he was a youth. I focus on his adult convictions, of which there are at least 11. Most of his convictions have been for administration of justice, robbery and weapons charges.

[65] In 2014, he was convicted of Procuring a "prostitute", Obstruct Justice and Breach of Release. This is his longest sentence. He received credit for 192 days of pre-sentence custody. He was placed on probation for 30 months.

Mitigating Factors

[66] J.G. is a young man. He is 27 years old.

[67] J.G. has maintained gainful employment through a temp agency. He has worked in waste management and has engaged in factory work.

[68] J.G. has expressed remorse for his actions. He is 5 credits short of a high school diploma. He expressed an intention to return to school to complete his education and to seek and maintain gainful employment.

[69] Despite the numerous entries in his criminal record, he has always received minor sentences. The longest custodial time reflected on his criminal record is 192 days of pretrial custody. There are some gaps in his criminal record.

[70] He did not apply violence to or threaten the complainant, either directly or indirectly. He was not convicted of exploiting the complainant within the meaning of section 279.04.

[71] J.G. is a Black man, he is a member of a racialized community. The legacy of slavery and systemic racism continue to have a negative impact on the education, earning power, employment opportunities, medical and mental health, substance addiction and abuse, criminalisation and incarceration of Black people. This provides important context and is a mitigating factor.

[72] His mother raised him and his two brothers as a single mother in public housing. This was a housing project built by his mother's church and intended for Black families. The family has lived there for 22 years. His mother suffered from severe depression, which adversely impacted her ability to parent J.G. and his two brothers. J.G.'s father was hardly in his life and when he was a toddler, his father left the family, went to the United States and never returned. He has recently met his stepsister.

[73] His mother O.F. said her son dealt with systemic racism in the school. She recalled an incident where a very young J.G. and another young white child were caught loitering together in the school. J.G. was suspended. His white friend was not. On another occasion, a very young J.G. was suspended for making a gun shape with his hand.

[74] When J.G. was 9 years old, the police were called because J.G. threw a ball at another student. Thus, at the age of 9, J.G. had his first encounter with the police. J.G.'s first criminal charge is assault with a weapon. At a very young age, J.G. was charged because he threw a snowball at another person.

[75] J.G. is active in the lives of his niece and nephew, and he has a two-year-old daughter.

Caselaw

[76] Caselaw submitted by the Crown was helpful in analysing the details of criminal conduct, similar to the conduct for which I must sentence J.G., however, though the offenders in those cases were sentenced for similar offences, the offences included the serious offence of human trafficking. J.G. was acquitted of that offence: Mr. Crosdale received a global sentence of 5.5 years: *R. v. Crosdale*, [2019] O.J. No.77 (S.C.J.). Mr. Jordan received a global sentence of 9 years: *R. v. Jordan*, 2019 ONCA 607. Mr. Burton received a global sentence of 10.5 years: *R. v. Burton*, [2018] O.J. No. 1250 (O.C.J.).

[77] This comment by Justice Bale in *R. v. Chisholm et al*, 2018 ONSC 7802, at para. 50, illustrates the impacts of the nature and circumstances of each offender and offence:

Because every offender and every offence is different, it is not possible to put the decided cases into any sort of order from least serious to more serious, or to fit the present case into a specific place in any such order. There are too many variables, including the number of victims, the degree of coercion or control, the amounts earned by the victims and the amounts taken by the offenders, the vulnerability of the victims and the period of time over which the offence occurred.

....

[78] *Chisholm* is a comparable case. A jury convicted Deshon Boodhoo, Kemoy Chisholm and Keon Chisholm of the same offences as J.G.

[79] The complainant was 16 years old with a troubled relationship with her mother. She was kicked out of her mother's home. Then, she was kicked out of her boyfriend's home. She met Keon Chisholm. After some discussion, she agreed to enter sex trade work. She was to receive 60 percent of the proceeds and Keon Chisholm was to receive 40 percent. The complainant provided pictures of herself which Keon Chisholm included in sex trade advertisements he posted.

[80] Deshon Boodhoo was brought in to set up and manage the sex trade work. He provided guidance and helped manage the sex trade operation. Kemoy Chisholm later joined. He played a lesser role.

[81] The enterprise earned about \$18,000 before expenses. The complainant was sexually assaulted and robbed by a client. The sex trade work continued for six weeks. It ended when the accused abandoned the complainant at a drug store close to her mother's home because of concerns that the police were closing in.

[82] J.G.'s criminal conduct included most of the same conduct as all three accused in *Chisholm*; however, unlike in *Chisholm*, he did not procure the complainant. J.G.'s impugned conduct is best described as active involvement and strong influence. In comparison to *Chisholm*, J.G. received a larger percentage of the proceeds of the sex trade work.

[83] Just like in *Chisholm*, the complainant was a willing participant. She was older than the complainant in *Chisholm*, but still underage. She did not suffer any violence. The period of the sex trade was two weeks instead of the six weeks in *Chisholm*. The accused in *Chisholm* abandoned the complainant. J.G. did not abandon the complainant in this case.

[84] Deshon Boodhoo was 22 years old. He had no criminal record. He received a global sentence of 3 years 4 months. Kemoy Chisholm was 26. He had a significant criminal record. He received a global sentence of 4 years. Keon Chisholm was 22 years old. He had a criminal record. He received a global sentence of 3 years 2 months and 5 days: *Chisholm et al*, at paras. 58-78.

The Appropriate Sentence

[85] Unlike any of the persons sentenced in *Chisholm*, J.G.'s criminal record includes a conviction and sentence for a sex trade offence under the old provisions of the *Criminal Code* – "Procuring".

[86] Considering the nature of the offences and the offender, deterrence and denunciation are the paramount sentencing objectives in sex trade offences. Rehabilitation, however, remains an important objective. The pernicious and deleterious effects of these types of offences are obvious and do not warrant extensive comment. These offences should usually attract a penitentiary sentence.

[87] Considering the mitigating and aggravating factors in this case, the appropriate sentence is 4 years and six months. As of the date of sentencing, J.G. has spent 866 days in pretrial custody. 203 of those days have been under lock down.

[88] J.G. shall receive credit of 1.5 to 1 for each day of pretrial custody, a total of 1299 days. He can receive additional credit for the 203 days of lock down: *R. v. Audet*, 2020 ONSC 5039. Due to the current impact of the COVID-19 pandemic on inmates in the correctional institutions, I will give 1.5 to 1 additional credit for each day J.G. has spent in lock down. This is an additional credit of 304 days. In effect, J.G. shall receive 1603 days of credit for pretrial custody.

[89] J.G. is sentenced to a global sentence of 4 years and six months. As per section 718.3(7), the sentence for the section 163.1 offences shall be served concurrently to each other, but consecutive to the other sentences imposed. The breakdown is as follows:

1. Count #4: Section 286.3(2) – Influence, or direction of the complainant in the sex trade: 1460 days (4 years) with credit for 1460 days of pre-trial custody. A time served situation.
2. Count #5: Section 286.4 – Advertising the complainant’s sexual services: 730 days (two years) with credit for 730 days of pre-trial custody. To be served in accordance with Count #4. A time served situation.
3. Count #6: Section 286.2(2) – obtaining a material benefit from the complainant’s sex trade earnings: 730 days (two years). To be served concurrent to count # 4 and 5. A time served situation.
4. Count #7: Section 163.1(4) – Possession of child pornography – the sex trade advertisements. 183 days (6 months and three days) to be served consecutive to count # 4, 5 and six with credit for 144 days of pretrial custody. He shall serve an additional 39 days in custody.

5. Count #8: Section 163.1(3) – Distribution of child pornography – sex trade advertisements. Sentenced to 180 days (6 months and three days) to be served consecutive to count 4, 5 and 6 but concurrent to count 7, with credit for 144 days of pre-trial custody. He shall serve an additional 39 days in custody concurrent to count 7.
6. A DNA Order per section 487.05 on section 286.3(2) - Count#4 and Counts # 7 and 8
7. A Section 109 Order for life on section 286.3(2) - Count #4 and 163.1 Counts #7 and 8
8. A SOIRA Order for life for Counts 4,7,8
9. A Section 743.21 non communication Order with the complainant M.W. and her parents, stepparents and siblings for the duration of his time in custody.
10. A Forfeiture Order for cell phones and pornographic material.

Barnes J.

Released: February 10, 2021

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

J.G.

REASONS FOR SENTENCE

Barnes J.

Released: February 10, 2021

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