
CANADA / JUDGMENT

R. v. A.L.

2019 BCSC 2118

COURT

Supreme Court of British Columbia

DECIDED

27 September 2019

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2019 BCSC 2118 R. v. A.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. A.L.,

2019 BCSC 2118

Date: 20190927

Docket: 105013-2

Registry: Kamloops

Regina

v.

A.L.

Restriction on publication: Section 486.4 of the Canada Criminal Code

Before: The Honourable Madam Morellato

Oral Reasons on Sentence

Counsel for the Crown:

Frank J. Caputo

Counsel for the Accused:

Sheldon Tate

Place and Dates of Trial/Hearing:

Kamloops, B.C.

August 23, 2019

Place and Date of Judgment:

Vancouver, B.C.

September 27, 2019

I. INTRODUCTION

- [1] On July 10, 2019, A.L. was convicted of touching the body of a person under the age of 16 for a sexual purpose, contrary to s. 151 of the Criminal Code. The sentencing hearing took place on August 23, 2019 and judgment was reserved. The sentence imposed and the underlying Reasons are these.
- [2] I note that an order was issued prior to the trial pursuant to s. 486.4 of the Criminal Code prohibiting the publication of the identity of the complainant or any information that would tend to identify the complainant, A.B. While initials are used to protect her privacy rights; the initials used in these Reasons do not correspond to the actual name of the complainant or the offender, to protect the identity of A.B. who is his half-sister.
- [3] Counsel for A.L. seeks a ten-month jail sentence, constituting the approximate time served to date, including a credit of 1.5 days for each day in pre-sentence custody. The Crown seeks two years of new jail time, in addition to the ten months served to date.

II. CIRCUMSTANCES OF THE OFFENCE and the Offender

- [4] The specific circumstances surrounding the offence are set out in my Reasons for Judgment dated July 10, 2019 and need not be repeated here. Suffice it to say that A.L. sexually touched A.B. repeatedly during a ten-month period while he was responsible for her care, after school and during times when her aunt was at work. Additional circumstances are included in a Victim Impact Statement dated August 22, 2019, and a letter submitted by A.L.'s maternal grandfather, dated August 13, 2019.
- [5] A.L. is currently 26 years old; he was 21 and 22 years old during the period in which the sexual touching occurred; during this time, he was living with his aunt, A.B. and A.B.'s older sister. A.B. was 12 and 13 years of age at the time the sexual touching occurred.
- [6] A.L. was raised near Delta, British Columbia. There is no evidence before the Court regarding his early childhood circumstances and little evidence regarding his teenage years and early adulthood. At the time he was charged, he had no previous record of any kind. A.L.'s maternal grandfather, has been a constant and supportive figure throughout his life. In his August 13, 2019 letter, the grandfather notes that A.L. has had a difficult upbringing. He states that his daughter, A.L.'s mother, was a single parent and A.L. had to "quit school at an early age and start working to help support his mother and his brother."

- [7] The grandfather states that at 16 years of age, A.L. started working with him and has worked for him "for many years, in the construction industry." He describes his grandson as a hard-worker, who is quick to learn. He states his grandson is a "very dedicated young man." The grandfather asserts that: "Throughout the years he has been easy going, level-headed, and never had a situation that he is in right now."
- [8] The grandfather points out the strong impact of pre-sentence custody on A.L. and his family, stating:

The last 8 months has been very hard and stressful on my daughter (his mom), myself and [A.L.] as well. We keep in contact with him and support him, and hope he will be back to us soon.

- [9] Counsel for A.L. affirmed that his client plans to live with his grandfather in the Chilliwack area, once he is released from custody; he also plans to work with his grandfather in the restoration business. His grandfather owns a small restoration company and A.L. will be working for him as an "a jack of all trades," as he has in the past. A.L. has a particular affinity for carpentry and electrical work.
- [10] A.B. submitted a victim impact statement. She was 12 and 13 years old at the time of the offences, and is currently 16 years old. She writes:

I have been greatly impacted by [A.L.] in mental and emotional ways. When the crime first started to occur I felt extremely scared and confused. I felt like my childhood innocence was taken away from me. For a long time I became afraid of men and being inside the home. Every day I feared of going home and seeing my brother. I have lost the feeling of what it's like to feel trust and full safety towards a family member. At times I still do feel nervous when I am in the presence of an older man. For two to four years I felt scared of wearing clothing like shorts or T-shirts for fear of my skin showing. My self-worth had been greatly impacted. I used to believe that I wasn't worth anything. Ever since [sic] incident I used to have extreme thoughts self-harm. Due to all these feelings towards myself and others I feel greatly impacted and to this day I am still coping.

III. positions of the Crown and defence

- [11] As noted previously in these reasons, the Crown asserts that, in addition to the time A.L. has spent in pre-sentence custody, the Court should impose a two-year penitentiary sentence, coupled with two years probation. In contrast, counsel for A.L. submits that time served to date would be appropriate.
- [12] The Crown advances a number of sentencing cases from other provinces, noting that it was difficult to find a case that was right on point. It references a number of cases from Alberta and Saskatchewan including: *R. v. L.V.*, [2016] S.J. 324 (C.A.); *R. v. N.A.J.*, [2017] A.J. 1497 (P.C.); *R. v. Kemper*, [2004] A.J. 1236 (C.A.); and *R. v. R.A.S.* [2015] A.J. 52 (C.A.). In response, counsel for A.L. submits that he also was not able to find a case, similar to that before me, which set out a satisfactory sentencing range. Accordingly, he provided submissions in

regard to the specific cases relied upon by the Crown, which I will outline below. I will address each case in their respective order.

- [13] Counsel for the Crown began his review of the case law by referring to R. v. L.V. In that case, the father of a teenage girl was sentenced to four years imprisonment after being convicted of sexually assaulting his daughter hundreds of times over the course of a three-year period, commencing when the daughter was 13 years old. Counsel for A.L. underscored that the father's moral culpability was much higher than that of A.L. and the Crown essential agreed. All of the assaults took place while the daughter was sleeping in her own bed and one of the assaults involved digitally penetration. Further, the father broke through a lock on his daughter's door, placed there to prevent him from entering the room; he also took pictures of his daughter while she was partially nude, sent her suggestive text messages and behaved "like a jealous lover."
- [14] Having considered the facts in L.V., I agree they are clearly distinguishable from those before me; the case is of limited assistance in determining the appropriate range of sentences in this case, other than in highlighting that a four-year sentence would be entirely inappropriate in the circumstances of the case before me.
- [15] In R. v. N.A.J., the court sentenced the offender to 18-months imprisonment, as suggested by the Crown, after he pled guilty to one count of sexual interference involving his two younger step-sisters; he was 20 years old, and the girls were six and seven years old at the time of the offences. The court found he touched their vaginas over their clothing, and that this occurred approximately "four times with the seven year old, and between five or 10 times for her younger sister." The victim impact statements from the step-sisters were taken some seven years later and evidenced what the court described as "devastation"; the girls described self-mutilation which led to hospitalization for one of the girls, while the other considered suicide. At the time of sentencing, the offender was 27 years old.
- [16] The Crown argues that A.L.'s moral culpability is greater than that of the offender in N.A.J. He submits that there were multiple, repeated instances of sexual touching over a ten-month period in this case; significantly greater in frequency than in N.A.J.; accordingly, he argues the severity and scope of sexual touching in the case before the Court is more serious. The Crown also underscores that the accused in N.A.J. pled guilty; he asserts a guilty plea was a mitigating factor in N.A.J. that is not available to A.L. in this case. Counsel for the Crown asserts that the victims in N.A.J. did not have to take the stand, whereas A.B. was required to undertake the trauma of testifying. Therefore, he submits the instant case warrants a sentence greater than 18 months.
- [17] Counsel for A.L. acknowledges that the number of instances of sexual touching alleged in the instant case is greater than in N.A.J. but underscores that in N.A.J. the step-sisters were much younger and more vulnerable. He also asserts that the victim impact statements in N.A.J. revealed a severity of impact in that case that is not found in the instant case. Counsel also points out that the step-brother in N.A.J. had a previous conviction for criminal

harassment and, further, there was evidence that he had a troubled upbringing, suffered from attention deficit disorder; had a limited social network and watched pornography one hour a day. These distinguishing factors, he submits, justify a lower sentence than 18 months in the instant case.

- [18] Having considered the facts in each case, there is no doubt that the circumstances set out in N.A.J. are distinguishable from those before me. Nevertheless, of the cases cited, it is more similar, in relative terms at least, than others; therefore, it provides some assistance to the court on the question of parity and the appropriate range of sentences.
- [19] In *R. v. Kemper*, the offender received a two-year jail sentence. The sexual touching occurred 30-50 times over the course of three years in circumstances where Mr. Kemper rented a room in the family home and was considered a family member. Mr. Kemper was 22 years old at the time and the complainant was 10 years old. The sexual touching only ceased after the complainant disclosed Mr. Kemper's conduct. The court found that the complainant continued to suffer serious and lasting emotional harm as a result.
- [20] The Crown asserts that the *R. v. Kemper* case is in some respects similar to that before me, with evidence of "lasting harm" to the complainant. He emphasizes that Mr. Kemper was an adult, viewed as family member, and in a position of trust. Counsel argues the same holds true in this case. A.L. was a family member, A.B.'s half-brother, who was entrusted with babysitting her while their aunt was at work; he asserts this is an aggravating factor, as it was in *R. v. Kemper*, noting that A.L. had ready access to A.B., who was just down the hall, and therefore vulnerable to his advances. Given A.B.'s age and vulnerability, coupled with A.L.'s position of trust, the Crown further argues that the principles of denunciation and deterrence in sentencing are the primary considerations in assessing the appropriate sentence.
- [21] Counsel for A.L. submits that the court's reasons and the sentencing process in *R. v. Kemper*, like other cases in Alberta's sentencing process, should be viewed with caution since the court in that province, as in others, applies a different system of sentencing than do courts in British Columbia. Counsel referred to a type of "tariff sentencing" or "starting point" sentencing process to discern minimum sentences for various crimes in Alberta; he submits this approach is not the approach adopted in British Columbia, where the court's discernment process considers, instead, the appropriate range of sentences. Counsel for A.L. also distinguished *R. v. Kemper*, asserting that the victim impact statement in that case indicated a greater level of trauma.
- [22] Once again, while I agree *R. v. Kemper* is distinguishable in some ways, I am nevertheless of the view that it informs the appropriate range of sentences in cases such as these. I will return to this issue later in my Reasons, when I address the recent decision of our Court of Appeal in *R. v. Williams*, 2019 BCCA 295.

- [23] R. v. R.A.S. is another Alberta judgment advanced by the Crown in which the offender's four-year sentence was upheld by the Court of Appeal. In that case, the victims of the sexual touching were an 11 year old niece and also, R.M.C., the daughter of the offender's best friend, who was repeatedly abused between the ages of 8 to 12 years old. After years of being fondled, R.M.C. finally disclosed the abuse to hospital staff treating her for depression, following a suicide attempt. The Court of Appeal upheld the four-year sentence in the context of repeated acts of sexual touching of a young child, including touching R.M.C.'s breasts and rubbing her vagina beneath her underwear. The court found that the history of taking sexual advantage of R.M.C. while she was a guest in his home, over a long period of time and during a vulnerable time in her life was a major sexual assault that could realistically and foreseeability lead to emotional harm. The Court of Appeal concluded these aggravating factors rendered the four-year sentence proportionate to the seriousness of the offence and the culpability of the offender.
- [24] Counsel for the Crown states that in R. v. R.A.S., the sexual touching and fondling was similar to that in this case, although he acknowledges that the sexual abuse occurred over a longer period of time in R. v. R.A.S. However, he underscores the court's reasoning, at para. 15, that even in the absence of serious psychological harm, contemptuous disregard for the feelings and integrity of the victim have been found to constitute a major sexual assault.
- [25] Counsel for A.L. underscores that R.M.C. was significantly younger and more vulnerable than A.B. and the offender was much older (i.e., 56) than A.L. He submits that A.L.'s comparative youth raises the important principle of rehabilitation. Again, counsel argues that the sentencing process in Alberta is different than in British Columbia, submitting that: "We don't deal with minor and major assaults here in BC." Counsel acknowledged, however, that repeated sexual touching that occurs over a period of time is an aggravating factor. I am of the view that R. v. R.A.S. is not applicable in the circumstances of the case before me, particularly in regard to the years of sexual victimization in that case and the age of the offender.
- [26] The Crown also relies on a decision of the Ontario Superior Court in R. v. K.M., [2017] O.J. No. 4125 where the accused was found guilty of repeated sexual touching of his daughters over "significant periods of time." The sexual touching of the youngest daughter began when she was 3 or 4 years old until she was 14 or 15 years old. The eldest daughter was between 6 and 8 years old when the sexual touching "for the most part" occurred. Both daughters prepared victim impact statements that affirmed the sexual offences against them by their father had a deep and lasting impact on their lives. The father was 52 years old with no prior criminal record. The father was sentenced to three years imprisonment.
- [27] Counsel for the Crown submits that the facts in R. v. K.M. are arguably more serious than those before me, but asserts the sentence was a lenient one. Counsel for A.L. submits that the facts in R. v. K.M. are much more egregious and that the moral culpability of the father in that case was significantly higher given the very young age of the victims and the years of abuse. I am in agreement that the facts of the instant case are distinguishable from those in

R. v. K.M. and that a three-year sentence would be more appropriate in circumstances other than those before me.

- [28] The Crown also referred to the decision of the Ontario Superior Court in R. v. R.D., where the accused was found guilty of sexual interference and the sexual assault of his younger sister, including threatening bodily harm. The victim testified the sexual abuse began when she was 9 years old, with touching her private parts and eventually escalated to digital penetration, forced fellatio and intercourse. The court noted that when the abuse began, the accused was a young adult and "being the older brother" presented him with the ongoing opportunity to commit these crimes. The court did not agree, on the particular facts, "that this amounted to being a position of trust or authority." The court noted that most of the cases advanced by the Crown, where substantial penitentiary terms were imposed, involved long term sexual abuse by an offender who was in a classic position of trust such as a father or step-father. The court also noted that several of those cases involved sexual intercourse which was not proven in the case before him. On the issue of mitigation, the court considered that the accused was a youthful first offender when the sexual offences occurred and, further, that he faced physical and mental health issues from an early age. The court sentenced the offender to 30 months in prison for sexual interference contrary to s. 151 of the Criminal Code; along with a concurrent sentence of 30 months for sexual assault; and six months for threatening bodily harm, consecutive to the concurrent 30-month terms.
- [29] Counsel for the Crown acknowledges that the offender in R. v. R.D. was not found to be in a position of trust as a brother, and acknowledged that the sexual interference escalated in a manner that was not evidenced in the instant case. Counsel explains that the sexual touching in R. v. R.D. occurred for approximately five years when the accused was in his late teens and early 20's, and when his younger sister was 10 or 11; as the years progressed the victim turned 16 years old and the brother was charged with sexual assault.
- [30] In this light, the Crown asserts that, in instant case, an appropriate sentence range would be between two to three years, less the time spent in pre-sentence custody. He argues that, had A.L. pled guilty, a sentence of 18-month might have been appropriate. He submits that a plea of guilty coupled with not putting the victim through the rigours of a trial, could justify reducing the sentence by a third or more.
- [31] Counsel for A.L. points out that the degree of sexual interference was more severe in R. v. R.D, spanned a period of five years, and also involved fellatio and intercourse over a number of years. He also emphasizes that the brother physically abused his sister by pouring hot water over her; counsel submits these circumstances and the sentence of 2.5 years, are simply not on par with the instant case.

A. Overview of Submissions by Counsel

- [32] In summary, counsel for the Crown submits that I should, in any event, consider the objectives and fundamental principles set of in s. 718.01 and ss. 718.1 and 718.2 of the Criminal Code. He emphasizes that I ought to give primary consideration to the sentencing principles of denunciation and deterrence. He also underscores two statutory aggravating factors: 1) that A.B. is under the age 18; and 2) that A.L. was in a position of trust or authority, as her half-brother and babysitter.
- [33] Counsel for the Crown underscores the repeated instances of sexual touching in this case, spanning a period of ten months, in circumstances where A.L. was in a position of trust, as A.B.'s half-brother and babysitter. He argues that these circumstances justify a penitentiary sentence over two years, in addition to the time A.L. has already served. Crown counsel also asserts that the court must take into account that the sexually touching persisted, even though A.B. frequently vocalized her opposition to the sexual touching, and also physically pushed A.L. away from her on repeated occasions. He asserts that in this light, the recommended sentence of two-year sentence plus ten months is rather lenient.
- [34] In response, counsel for A.L. underscores the mitigating factors of A.L.'s youth and the fact that he had no prior criminal record, noting that his failure to appear conviction arose in relation to this case, after being charged. Counsel for the Crown acknowledges that A.L.'s youth is a mitigating factor, as is the fact that he had no criminal record prior to being charged. Counsel for A.L. acknowledges that a sentence of time served to date would be at the lowest end of the sentencing range but urges the court to be mindful of the importance of the principle of rehabilitation in the context of this case. He argues that as a first sentence, the sentence should be as short as possible and should not include a penitentiary sentence, particularly in light of the time served in pre-sentence custody. He further submits that the sentencing range in cases such as this should not exceed a sentence of two years less a day.
- [35] Counsel for A.L. requests that the court carefully consider the letter from A.L.'s maternal grandfather, which affirms A.L. will have family support, along with a place to live as well as a job when he is released.
- [36] During the course of the sentencing hearing, I inquired as to whether counsel could provide me with sentencing cases decided by courts in British Columbia. They agreed to do so and were provided with an opportunity to provide further submissions in writing. They both did so.
- [37] At the hearing, the Crown advanced specific terms for a two-year probation and a number of ancillary order. Counsel for A.L. affirmed that the terms and conditions of probation, as well as all the ancillary orders proposed by the Crown would be appropriate and acceptable.

B. Supplemental Written Submissions of the Crown

- [38] The Crown submitted three additional cases for consideration. The first was the decision in *R. v. Williams*, 2019 BCCA 295 where our Court of Appeal provided a sentencing range of one to three years for sexual interference offences. Counsel notes that Justice J.A. Smith reasoned in that case that sentences within this range may be adjusted higher or lower depending on the aggravating and mitigating factors of each case.
- [39] The Crown characterizes the offender's moral blameworthiness in *Williams* as higher than that of A.L.; counsel does not suggest that the conduct of the two offenders is comparable and does not dispute the sentencing range set out in *R. v. Williams*.
- [40] The Crown also refers to the provincial court decision in *R. v. S.P.S.*, 2019 BCPC 158, which involved a single incident of sexual interference, with the Crown proceeding summarily. In that case, the offender rubbed his erect penis against the victim's vagina and also attempted to lick the victim's vaginal area. The offender was regarded as an uncle. The Crown notes that the offender pled guilty, at an early stage in the proceedings, which spared the victim from testifying: see paras. 10 and 22. The sentence in this case, involving a single incident of sexual touching of a 14 year old victim resulted in a sentence of 15 months' imprisonment.
- [41] The Crown also refers to the decision in *R. v. Bolderson*, 2018 BCPC 268 where the Crown proceeded by indictment, in regard to an offender who was diagnosed with paedophilic disorder. The 79 year old offender abused two victims. In one case the victim was 6-7 years old and the abuse occurred approximately ten times over two years; the abuse involved licking the victim's vagina and belly. The victim regarded the offender as a grandfather. A jail sentence of 27 months was imposed. The second victim, 9, was licked on her vagina and belly one time when she was naked from the waist down. A jail sentence of twelve months consecutive was imposed.
- [42] The Crown asserts that A.L.'s blameworthiness is "on par with, or higher than Mr. Bolderson's." In respect of the first victim, the Crown submits that although the offender in *Bolderson* offended in a more serious manner, A.L. offended more frequently and acted in a cavalier manner in response to A.B.'s demands that he stop the sexual touching.

C. Supplemental Written Submissions of the Defence

- [43] Counsel for A.L. underscores that in *R. v. Williams*, at para. 71, the court reasons as follows, regarding the applicable range of sentences in such cases:
- [71] In sum, sentences for sexual interference in this jurisdiction generally falls within a range of one and three years' imprisonment. In rare circumstances, they might attract a conditional sentence order (e.g. Scofield) or a sentence above three years (e.g. Yanulik). The more invasive the sexual activity and the more significant the aggravating factors the higher the sentence. However, a proportionate sentence must also give weight to attenuating personal circumstances and mitigating factors that may reduce the offender's moral

blameworthiness.

- [44] Counsel submits that of particular importance is the court's discussion in Williams, at paras. 51-57, which explains the differing sentencing regimes in Canada. He notes that appellate courts in the Yukon, Ontario, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador have taken the approach of sentencing ranges whereas Alberta, Saskatchewan and Manitoba have adopted a "starting point" approach. Counsel argues that while cases from the latter three provinces can be helpful in some respects, they are at odds in others.
- [45] As regards the reasons in R. v. S.P.S., counsel argues that the case is of "little help" to this court. He submits the reasons are not aligned with the range of sentences suggested by Williams, and further argues that is also at odds with other cases submitted by the Crown itself. The facts involved a 39 year old uncle and a 14 year old niece. Counsel submits the case appeared to involve a single incident, as his friend noted, but the accused was grossly intoxicated and the incident may have involved penile penetration. Counsel also notes that, while unclear, it seems the 15-month sentence (with a maximum of 18 months) may have been imposed to facilitate a sex offender program at Ford Mountain Correctional Centre (see para. 26).
- [46] Finally, counsel for A.L. submits that R. v. Bolderson, 2018 BCPC 268 is clearly distinguishable from the facts at bar for the following reasons: Mr. Bolderson offended on multiple occasions with two girls, one of whom was 9 and the other between 6 and 8 years of age, while he was 79 years old. Mr. Bolderson kept his house open to kids in the neighbourhood, had one girl call him Grandpa Gary, and was regarded by her as a father figure; further, he groomed the children with pop, snacks and coins and, on at least one occasion, provided money to her and her friends. Mr. Bolderson had a prior conviction for conspiracy to import marijuana and served a 48-month sentence. He was also determined by a forensic psychologist to have a paedophilic disorder in spite of his denial that he was attracted to young girls (para. 22). The court also found that his attitude towards his offending was considered "troubling" (para. 18); he stated that the girls liked the sex activity and that he enjoyed it. He also believed one of the girls was responsible for his actions. Again, this case is quite distinguishable from the facts of the instant case.

IV. LEGAL FRAMEWORK AND ANALYSIS

- [47] Section 718 of the Criminal Code sets out the fundamental purposes of sentencing as follows:
718. to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
- (a) to denounce unlawful conduct and the harm done to victims or the community ;

- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[48] Sections 718.01, 718.1 and 718.2 of the Criminal Code set out additional principles that must also be considered. For example, when a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it must give primary consideration to the objectives of denunciation and deterrence (s. 718.01); the court must also consider aggravating and mitigating circumstances (s. 718.2(a); and the sentence must be in parity with other offenders (s. 718.2(b)). Accordingly, a sentence should be increased or reduced to account for any aggravating or mitigating circumstances of the offence or offender: see also Williams at para. 71). Furthermore, at s. 718.1, the Criminal Code affirms the fundamental principle that sentences must be applied in a manner proportionate to the gravity of the offence and the degree of responsibility of the offender. Of course, sentences should also assist in rehabilitating offenders (s. 718(d)).

[49] Having considered and reconsidered all the cases before me, I found the very recent decision of our Court of Appeal in Williams of particular assistance in applying the above principles in cases of sexual interference. At para. 70, the court refers to its decision in R. v. Scofield, 2019 BCCA 3 in considering the appropriate range of sentences in cases such as this, and reasons:

. With respect to the appeal from sentence, the Court [in Scofield] increased the sentences to concurrent 12-month conditional sentence orders, while the dissenting judge would have increased the concurrent sentences to 16-month conditional sentence orders. The Court noted that the range of sentence for sexual interference is broad, falling within the mandatory minimum of one year (before that provision was struck down) and the maximum of 14 years. However, the sentences actually imposed have generally fallen within a narrower range of 9-18 months for the less invasive activity of sexual touching, and up to three years where sexual intercourse or other forms of more invasive sexual activity have occurred. As to the range of sentence for the offence of sexual interference, the Court indicated that it did not disagree with the range identified by the judge, but found it unnecessary to definitively decide that issue:

[59] The judge identified a range of 9 to 18 months' imprisonment and accepted the range could go as high as three years' imprisonment. In relation to sexual assault involving intercourse under s. 271 of the Code, this Court identified a range of two to six years' imprisonment: R. v. Akumu & Boima, 2017 BCSC 1051 at para. 50, citing R. v. Pouce Coupe, 2014 BCCA 255. In this case, for this offence, the Crown suggests a range of two to three years.

- [60] I do not dissent from the 9- to 18-month range the judge identified, but I note that the cases at the lower end of the range tend to involve less egregious forms of sexual touching than this case. In any event, the choice of a sentencing range, or of a category within a range, is within the sentencing judge's discretion and does not itself constitute a reviewable error: Lacasse at para. 51.
- [50] As noted by counsel in the instant case, the court in Williams observed that sentences for sexual interference in this jurisdiction fall within a range of one and three years' imprisonment. Notably, the court observed that sentences actually imposed have generally fallen within a narrower range of 9-18 months for the less invasive activity of sexual touching.
- [51] I am very mindful that A.B. was subjected to repeated sexual touching over the course of ten months and that A.L. persisted despite her protests. As well, A.L. was put in a position of responsibility by caring for his younger half-sister while his aunt was working. The Crown's arguments in this regard are well taken, although I have also considered the ruling of the court made in R. v. R.D., where the court found the older brother was not "in a position of trust or authority." The court observed in R. v. R.D. that most of the cases advanced by the Crown (where substantial penitentiary terms were imposed) involved long term sexual abuse by an offender who was in a classic position of trust, such as a father or step-father. The court also noted that several of those cases involved sexual intercourse which was not proven in the case before him. These considerations are also instructive in this case. Nonetheless, while A.L. was not in a "classic" position of trust, in determining the appropriate sentence, I have also considered that he was trusted by his aunt to take proper care of A.B. who was younger and smaller in stature; accordingly, A.B. was particularly vulnerable. Further, the principle of denunciation and deterrence are of primary importance in this context.
- [52] Nevertheless, the principle of rehabilitation cannot be disregarded. A.L. is a young man with no prior criminal record. He has a supportive and loving home to go to when he is released. He has also developed vocational skills and has a job waiting for him once his prison term is completed. When his counsel was describing the type of work he would be doing along with his grandfather after he was released, A.L. was keen to assist his counsel in clarifying for the court the nature of the restoration and renovation work he would be doing as part of his grandfather's business. A.L.'s counsel underscored that as a young man with no criminal record, A.L. had a particularly difficult time in pre-sentence custody, as a result of being segregated from the remainder of the prison population. His grandfather's letter also underscored the particularly difficult time his grandson experienced in prison in pre-sentencing custody.
- [53] There is little doubt that this has been a very difficult time for all concerned, particularly A.B. Having considered the principles addressed above, as well as the case law and the specific circumstances of this case, I am of the view that a penitentiary sentence is not appropriate. I find that a sentence of 15 months less credit for the time A.L. has already

spent in pre-sentence custody is the appropriate sentence. A.L. will not be given credit for the 14 days of pre-sentence time served as a result of his failure to appear. This sentence falls within the range for sexual interference discussed in Williams; it also embodies the primary importance of denunciation and deterrence, incorporates a consideration of aggravating and mitigating factors, but does not compromise the principle of rehabilitation in the process.

- [54] Counsel are agreed on a probation period of two years, as well as its terms, and also agree on the ancillary orders that should be issued. I will address these later in these Reasons. The probationary terms add an extra and significant measure of public protection.

V. IMPOSITION OF SENTENCE

A. Jail Sentence

- [55] A.L., will you please stand.

- [56] You have been found guilty of the offence of touching the body of a person under the age of 16 for a sexual purpose, contrary to s. 151 of the Criminal Code. Had you not spent any time in pre-sentence custody, the term of imprisonment I would have imposed on you for this offence is 15 months imprisonment. The actual time you have spent in pre-sentence custody to date is 255 days. You will not receive any credit for the 14 days served for your previous conviction in relation to your failure to appear. I am granting you the usual credit 1.5 days for each day in pre-sentence custody, for a total credit of 362 days of enhanced pre-trial custodial credit. Accordingly, the sentence imposed on you regarding the offence of touching the body of a person under the age of 16 for a sexual purpose, contrary to s. 151 of the Criminal Code is 15 months, less 362 days for enhanced pretrial custodial credit, resulting in a balance of 94 days.

- [57] Upon your release, you will be subject to two years probation. You may now be seated as I list the conditions of probation and the ancillary orders applicable to you.

B. Probation

- [58] For the two years following your release from custody, you will be subject to the following conditions of probation:
1. You must keep the peace and be of good behaviour.
 2. You must appear before the court when required to do so by the court.
 3. You must notify the court or the probation officer three days in advance of any change of name or address, and promptly notify the court or the probation officer of any change of employment or occupation.
 4. You must have no contact or have any communication, directly or indirectly, with A.B.

5. Providing you know of A.B.'s location, you must not go to or be within 2000 meters of any residence, school or workplace of A.B. The exception is as follows: while in a moving motor vehicle on your way to another place.
6. You must report in person to a probation officer at 45960 Wellington Avenue, Chilliwack, B.C. within two business days after your release from custody, unless you have obtained, prior to your release, written permission from the probation officer to report elsewhere or within a different time frame. After that, you must report as directed by the probation officer.
7. If at any time prior to the expiration of this order, you are arrested, detained or have served a sentence for another offence, you must report to the probation officer within two business days of your release from custody.
8. You must reside at a residence approved in advance by the probation officer. You must provide your probation officer with your phone number, and you must not change your residence or your phone number without permission from your probation officer.
9. When you first report to the probation officer, you must tell the officer the names of all permanent and temporary occupants of your residence and immediately tell him or her of any change.
10. You must provide your probation officer with the particulars of your employment or relationship status. You must inform your probation officer within two business days of any change in your employment relationship status.
11. You must carry a copy of this order and any written permission from your probation officer with you but all times when you are outside your residence. If a peace officer stops you for any reason, upon the request of the peace officer, you must immediately provide the peace officer with a copy of this order and written permission without being requested to do so.
12. You must not go to any public park, public swimming area, or community centre where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, or playground.
13. You must have no contact or communication directly or indirectly with, nor be alone in the presence of, any person you know to be or appears to be under the age of 16 years.
14. You must not engage in activities, volunteer work or employment that could bring you in contact with persons under the age of 16 years without the written permission of your probation officer and when so engaged, you must carry this permission.

15. You must not date, or enter into a marriage or common-law relationship that has the care access to children under the age of 16 years until you have identified to your probation officer the person with whom you propose to enter into such a relationship and your probation officer has informed that person of your history as described in your criminal record and these Reasons for Judgment.
16. You must attend, participate in and successfully complete any intake, assessment, counselling or program as directed by the probation officer. Without limiting the general nature of this condition, the intakes, assessments, counselling or programs may relate to sexual offence prevention.

C. Ancillary Orders

[59] As noted previously, at the sentencing hearing, counsel for A.L. was in agreement with the ancillary orders sought by the Crown. Accordingly, having considered the matter, I order as follows:

1. The count on the indictment is a primary designated offence under s. 487.04(a). Pursuant to s. 487.051(1) of the Criminal Code, I make an order in Form 5.03 authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Databank.
2. Pursuant to s. 109(1) and s. 109(2) of the Criminal Code, you are: prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any crossbow, restricted weapon, ammunition and explosive substance during the period that begins on the day on which this order is made, and ending not earlier than ten years after your release from imprisonment after conviction for this offence; you are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
3. The offence of sexual interference under s. 151 is a designated offence under s. 490.011(a) of the Criminal Code. Pursuant to s. 490.012(1) and 490.013(2)(b) of the Code, you are required to comply with the Sex Offender Information Registration Act for 20 years.

[60] That concludes the sentencing.

"MORELLATO J."

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