

CANADA / JUDGMENT

R. v. Braaten

2024 BCSC 2381

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 2381 R. v. Braaten

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Braaten,

2024 BCSC 2381

Date: 20241028

Docket: 76164-2

Registry: Prince George

Rex

v.

Jonathan Tyler Braaten

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Before: The Honourable Madam Justice W.A. Baker

Oral Reasons for Sentence

Counsel for the Crown:

B. Bouchard

L. Baek

Counsel for the Accused:

B.R. Anderson

Place and Date of Hearing:

Prince George, B.C.

September 17, 2024

Place and Date of Judgment:

Prince George, B.C.

October 28, 2024

[1] THE COURT: On April 22, 2024, I convicted the defendant of sexual interference contrary to s. 151 of the Criminal Code, sexual assault contrary to s. 271 of the Code, and invitation to touch contrary to s. 152 of the Code. The facts relevant to my decision are set out in my reasons for judgment which are indexed at 2024 BCSC 676.

Circumstances of the Offences

- [2] Mr. Braaten was charged with the three counts of the period May 1, 2016, to February 28, 2018. On the sentencing hearing, the Crown sought a conditional stay of the charge under s. 271, pursuant to the Kienapple principle, but seeks to maintain the conviction pursuant to s. 152 on the basis that the actus reus is different from the actus reus in relation to the s. 151 conviction.
- [3] The defence accepts that the proceeding under s. 271 should be conditionally stayed, and also submits that the proceeding under s. 152 should be stayed in accordance with the Kienapple principle.
- [4] The offences against K.P. began when the family was living in Calgary, Alberta, where they lived from 2016 to 2017, and continued through the time they lived in Prince George, where they moved in 2017, up until early 2018, just before K.P. turned 10. While K.P. has specific memories of certain times Mr. Braaten touched her, including one incident in the basement in Calgary, she also testified that he touched her frequently, usually in her bedroom, as often as once a month. I accepted the evidence of K.P. and I am satisfied that Mr. Braaten touched K.P. for a sexual purpose between 12 and 20 times from the time she was eight years old until she turned 10 years old.
- [5] I accept the evidence of K.P. that, on more than one occasion, Mr. Braaten asked her to kneel so he could place his penis in her mouth. I am satisfied that these actions support a conviction pursuant to s. 152. However, I am also satisfied that, in the context of the interaction between Mr. Braaten and K.P., substantially the same elements make up both the offence under s. 151 and under s. 152. I find the instruction to K.P. to kneel so he could place his penis in her mouth is sufficiently connected to the actual touching of K.P., such that the Kienapple principle is engaged, relying on *R. v. P.R.J.*, 2023 BCCA 13 at paras. 52 to 54.

- [6] The offence of sexual interference pursuant to s. 151 of the Code best captures the totality of Mr. Braaten's conduct. I conditionally stay the charge pursuant to s. 152, as well as the charge pursuant to s. 271. The sentencing will proceed with respect to the conviction under s. 151 only.

Sentencing Principles

- [7] The principles of sentencing are set out in ss. 718 to 718.201 of the Code, and are summarized in *R. v. Chambers*, 2021 BCSC 1083:
- [39] Under s. 718, the fundamental purpose of sentencing is to protect society and promote respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions. The objectives of these sanctions include denouncing unlawful conduct, deterring offenders and others from committing crimes, separating offenders from society where necessary, rehabilitating offenders, and promoting a sense of responsibility in offenders.
- [40] The relative weight and importance of these multiple factors will vary depending on the nature of the crime and the circumstances of the offender. In the final analysis, the overarching duty of a sentencing judge is to draw upon all legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.
- [8] Section 718.01 has application in the case before me because K.P. was under the age of 18 at the time of the offences. In such cases, the Code requires the court to give primary consideration to the objectives of denunciation and deterrence when imposing sentence.
- [9] Sentencing principles in the context of sexual offences against children have been the subject of a recent and extensive decision by the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9. The Supreme Court emphasized that Parliament has reformed the laws relating to sexual offences against children. Beginning at para. 55:
- [55] These developments are connected to a larger shift, as society has come to understand that the focus of the sexual offences scheme is not on sexual propriety but rather on wrongful interference with sexual integrity. As Professor Elaine Craig notes, "This shift from focusing on sexual propriety to sexual integrity enables greater emphasis on violations of trust, humiliation, objectification, exploitation, shame, and loss of self-esteem rather than simply, or only, on deprivations of honour, chastity, or bodily integrity (as was more the case when the law's concern had a greater focus on sexual propriety)" . . .
- [56] This emphasis on personal autonomy, bodily integrity, sexual integrity, dignity, and equality requires courts to focus their attention on emotional and psychological harm, not simply physical harm. Sexual violence against children can cause serious emotional and psychological harm that, as this Court held in *R. v. McCraw* . . . "may often be more pervasive and permanent in its effect than any physical harm" . . .

- [57] A number of this Court's decisions provide insight into these forms of harm. In *R. v. L. (D.O.)* . . . *L'Heureux-Dubé J.* emphasized the emotional trauma that the nine-year old complainant experienced from sexual violence . . . Similarly, in *McDonnell, McLachlin J.* (as she then was) stressed the emotional harm of "the violation of the child victim's integrity and sense of self-worth and control over her body" that the child victim experienced as a result of being sexually assaulted while sleeping . . . The likely result of the sexual assault would be "shame, embarrassment, unresolved anger, a reduced ability to trust others and fear that . . . people could and would abuse her and her body" . . .
- [58] These forms of harm are particularly pronounced for children. Sexual violence can interfere with children's self-fulfillment and healthy and autonomous development to adulthood precisely because children are still developing and learning the skills and qualities to overcome adversity . . . For this reason, even a single instance of sexual violence can "permanently alter the course of a child's life" . . . As *Otis J.A.* explained in *L. (J.-J.)*, at p. 250:
- [translation] The shattering of the personality of a child at a stage where [the child's] budding organization as a person has only a very fragile defensive structure, will result -- in the long term -- in suffering, distress and the loss of self-esteem.
- [10] Section 718.2(a) of the Code sets out statutory aggravating factors, three of which are engaged in the case before me. These are s. 718.2(a)(ii.1), the victim was less than 18 years old; s. 718.2(a)(iii), the offender abused a position of trust or authority in relation to the victim; and s. 718.2(a)(iii.1), the offence had a significant impact on the victim, considering their age and personal circumstances.

Circumstances of the Offender

- [11] Mr. Braaten is 40 years old and has no history of criminal behaviour. He has been employed as a manager and estimator with Rock-Tech Paving in Prince George for the past two years. He works throughout Northern B.C. He has trade qualifications and has been employed continuously in the construction industry throughout his adult life.
- [12] Mr. Braaten is engaged to and lives with his partner in Quesnel, B.C. They have been in a relationship for four years. His partner is aware of his conviction and supports him. Mr. Braaten has one son who is 16 years old and lives in the Okanagan, and one daughter who is 15 years old and is a sister to K.P.
- [13] Mr. Braaten has no mental health diagnosis and no history of a substance abuse disorder. He does smoke cannabis on weekends and periodically during the week. He has used cocaine on several occasions and he is a social drinker.
- [14] Mr. Braaten was assessed by Dr. Sirkia of the B.C. Forensic Psychiatric Services Commission to determine his risk of reoffending. Dr. Sirkia found Mr. Braaten's risk for sexual reoffending to be in the low range with low prioritization. He found that specific sex offender treatment was unnecessary. Dr. Sirkia noted that while individual counselling was

not indicated at the time of assessment due to Mr. Braaten's ability to cope with the stress of his involvement in the criminal justice system, that could change in the future. He noted that Mr. Braaten at the time of the assessment had not revealed his conviction in this case to his employer or generally in his social group. When he is sentenced and his community learns of his conviction, he may have difficulty coping and may benefit from counselling.

- [15] At the sentencing hearing, Mr. Braaten indicated that he is prepared to engage in sexual offender counselling and treatment.

Factors to be considered in sentencing sexual offences against children

- [16] In Friesen, the Supreme Court of Canada set out six factors to be considered when sentencing offenders convicted of sexual offences against children. I will consider these in turn.

Risk of reoffending

- [17] Mr. Braaten relies on the report of Dr. Sirkia wherein the testing undertaken resulted in an assessment that Mr. Braaten was at low risk of reoffending. I have some difficulty with this report, as it is clear from the report that Mr. Braaten takes no responsibility for his actions and his ability to cope with the criminal justice system is attenuated by the fact that he has not disclosed his conviction to his community. Much of the narrative in the report is comprised of Mr. Braaten's view of his former wife and their relationship, while denying his involvement in the offences. He denies any deviant sexual interest, particularly of underage children.
- [18] While Mr. Braaten's failure to accept responsibility is not an aggravating factor, I have some difficulty accepting the assessment of risk determined by Dr. Sirkia. There are too many outstanding questions regarding Mr. Braaten's understanding of his actions. As stated by Dr. Sirkia, "It is likely though that Mr. Braaten will never admit to his offences, as having sexually abused his stepdaughter would be highly egodystonic (i.e., against his view of himself) and distressing for him to accept."
- [19] I am not satisfied that Mr. Braaten is at low risk of reoffending. However, I am also not satisfied that he is at high risk of reoffending. I find the evidence on this point to be inadequate to make a finding, and therefore this factor is neutral.
- [20] The following factors are aggravating and have been proven beyond a reasonable doubt.

Extended period of time of abuse

[21] The abuse extended over the course of two years beginning when K.P. was approximately eight years old and ending around the time she turned 10 years old. K.P. has distinct memories of several incidents and testified she was abused approximately once a month, but could not remember the distinct features of the ongoing abuse as the incidents blended together. I find that the length of time over which the abuse occurred and the frequency of the abuse is aggravating.

The age of K.P.

[22] The age of K.P. is a statutory aggravating factor. K.P. was a younger victim, being less than 10 years old at the time of the abuse, which exacerbates the seriousness of the offence.

Position of trust

[23] Mr. Braaten stood in the shoes of a parent towards K.P. since she was one year old. He was in a position of trust, also a statutory aggravating factor. She lived in his home as a dependent child. The abuse happened in her home where she should have been safe, secure, and protected.

Impact on the victim

[24] I have also considered the impact on K.P. from this abuse. K.P. provided a victim impact statement. The abuse suffered by K.P. has had a significant impact on her. This meets the condition of a statutory aggravating factor.

[25] As a child, K.P. was unable to understand that what was happening to her was not her fault. She blamed herself, she felt she was a disgusting person, and she was afraid to tell her mother what was happening to her.

[26] Her relationships with young men have been negatively impacted. When she engages in normal romantic behaviour, she feels Mr. Braaten's hands all over her again. She feels ill when she is with boyfriends, and feels sick that she has to explain to them what happened to her and how it affected her.

[27] K.P. has issues with trust now and only feels comfortable when she locks herself in her room. She has experienced panic attacks and flashbacks. She began cutting herself when she was 12 years old to release her from the pain she felt in reliving her memories of abuse.

[28] K.P. ended her victim impact statement with the following:

There is no way to put into words the lasting effects his actions have made on my life, and my families life. He knew what he was doing, he knew this would shatter me, my life, my existence, my sense of self. I wish he could experience even a fraction of the fear and anguish he has caused me, yet nothing could truly compare to the depths of my feelings, both then and now.

- [29] K.P.'s mother also provided a statement which confirms the impact on K.P. She recounts how K.P. has lost herself, struggled in school, experienced panic attacks, and retreats to her room as the only place she feels safe. She has made a promise to K.P. to never leave her alone in a room with a man. She recounted how K.P. went from being an outgoing, happy, smart girl to someone terrified to go anywhere and who trusts no one.
- [30] K.P.'s mother described the impact on her personally and on her other two children. She says the actions of Mr. Braaten have destroyed the very foundation of their family.

Mitigating Factors

- [31] The following mitigating factors have been proven on a balance of probabilities:

Lack of criminal record

- [32] This is Mr. Braaten's first criminal conviction. Mr. Braaten has established that he is a first-time offender. He has not been charged with any other offences since the charges before me.

Compliance with terms pretrial

- [33] After the abuse was disclosed, the family separated and Mr. Braaten has not seen his children for many years. Mr. Braaten has complied with his bail conditions in place since November of 2021, which prohibited him from contacting any person under the age of 16. This means that he has been bound by bail conditions to not see his two biological children for almost three years. He has reported to Corrections consistently and has no breaches for failure to report.

Community support

- [34] Mr. Braaten has the support of his family, including his partner, his partner's mother, his brother, his brother's partner, and his father. All members of his support group wrote letters which were entered into evidence on this sentencing hearing, indicating their love for Mr. Braaten and their intention to keep supporting him regardless of his conviction and ultimate sentence.

Crown Position

- [35] The Crown seeks a five to seven year term of imprisonment with a number of ancillary orders as a sentence proportionate to the gravity of the offence and Mr. Braaten's moral culpability. The Crown relies on the following authorities:
- a) R. v. C.R.J., 2023 BCSC 1151. In C.R.J., the victim was seven years old and was abused multiple times by her mother's partner in her bedroom at night. The court sentenced C.R.J. to a 4.5 year sentence.

- b) R. v. Z.K., 2021 BCSC 1926. In Z.K., the victim was the young daughter of the accused. The abuse was frequent and went on for two years. The court noted that although there was a single charge, there were repeated acts of abuse which resulted in the victim being retraumatized and increased the likelihood of long-term harm. The court sentenced Z.K. to a seven-year jail sentence.

Defence Position

- [36] The defence submits that an appropriate sentence would be three years and agrees with the ancillary orders proposed by the Crown. The defence relies on the following cases:
- a) R. v. P.R.J., 2023 BCCA 169. In P.R.J., the accused abused her young daughter on one occasion when she was severely intoxicated and misusing prescription medications. The mother was the child's sole caregiver and the harm of being removed from her home due to her mother's conduct aggravated the harm experienced by the child. The Court of Appeal found that the mother's intoxication did not mitigate her moral blameworthiness. The Court of Appeal sentenced the offender to three years in jail.
- b) R. v. Josephson, 2021 BCSC 1947. In Josephson, the victim was 10 years old and the offender was her stepfather. The child was abused on two occasions over one weekend. The court was of the view that a three-year custodial sentence would be appropriate, but ordered a two-year sentence to allow for a probationary order following the custodial term, which was the sentence proposed by the Crown.
- c) R. v. N.S.N.C., 2020 BCSC 1843. In N.S.N.C., the victim was five years old and the offender was 18 years old. The victim was the nephew of the offender. While the offender was caring for the victim, the offender sexually assaulted the victim on two occasions over a relatively short period. The court sentenced the offender to a three-year jail sentence.
- d) R. v. T.C.S.T., 2023 BCSC 1656. In T.C.S.T., the victim was 12 years old and the offender was her 60-year-old stepfather. The victim's mother encouraged her to spend time with the offender, including to learn Tai Chi from him. During Tai Chi sessions over nine months when the offender was alone with the victim, the abuse occurred. The offender pled guilty at an early stage of the proceeding and was profoundly and genuinely remorseful for his offending and the harm it caused the victim. The Crown and defence made a joint submission for a three-year jail sentence which was accepted by the court.

Sentence

- [37] I find the cases relied on by the Crown to be representative of the appropriate range of sentence for the conviction before me. The cases relied on by the defence reflect factual differences which distinguish them from the facts before me, namely the frequency of the abuse in P.R.G., Josephson, and N.S.N.C., and the significant mitigating factors in the case of T.C.S.T.

- [38] I find the range of sentence in this case to be four to seven years' imprisonment.
- [39] The proportionality principle requires the sentence I impose to reflect the significant harm he inflicted on K.P. The abuse he perpetrated began when she was a young child and continued for several years. The harm was inflicted in her own home and in her own bedroom, where she should have been secure, by her caregiver. K.P. was vulnerable and dependent on Mr. Braaten.
- [40] As the Supreme Court of Canada has noted in Friesen, courts must focus on the violations of trust, humiliation, objectification, exploitation, shame, and loss of self esteem which result from sexual abuse of children.
- [41] At paragraph 142, the Supreme Court in Friesen stated:
- [142] . . . courts should not assume that there is any clear correlation between the type of physical act and the harm to the victim. In assessing the significance of the degree of physical interference as a factor, as Christine Boyle writes, "judges should think in terms of what is most threatening and damaging to victims" . . . Judges can legitimately consider the greater risk of harm that may flow from specific physical acts such as penetration. However, as McLachlin J. explained in McDonnell, an excessive focus on the physical act can lead courts to underemphasize the emotional and psychological harm to the victim that all forms of sexual violence can cause . . . Sexual violence that does not involve penetration is still "extremely serious" and can have a devastating effect on the victim . . . This Court has recognized that "any sexual offence is serious" . . . and has held that "even mild non-consensual touching of a sexual nature can have profound implications for the complainant" . . . The modern understanding of sexual offences requires greater emphasis on these forms of psychological and emotional harm, rather than only on bodily integrity . . .
- [42] The impact on K.P. is clear. I accept that she has suffered from serious psychological harm arising from the abuse which continues to this day. This harm has manifested itself in her cutting herself, locking herself in her room, being too fearful to tell her mother at the time the abuse was happening because of the impact her disclosure would have on her family, panic attacks, flashbacks, struggles in school, lack of trust, and disruptions of normal relationships with her peers.
- [43] I find Mr. Braaten is highly morally blameworthy in his deliberate, sustained sexual exploitation of K.P., his stepdaughter, for his own gratification. The sentence in this case must reflect the principles of denunciation and deterrence which are paramount in the cases of sexual abuse of children.
- [44] Mr. Braaten, could you please stand. For the reasons I have expressed, I sentence you to five years in custody from today's date and I grant the following ancillary orders:

- You must provide a DNA sample pursuant to s. 487.051 of the Code reflecting the fact that s. 151 is a primary designated offence.
- Pursuant to s. 743.21 of the Code, Mr. Braaten is prohibited from contacting K.P. during his custodial period.
- Pursuant to s. 490.012 of the Code, Mr. Braaten must comply with the Sex Offender Information Registration Act for a period of 20 years.
- Pursuant to ss. 109(1)(a) and s. 109(2), Mr. Braaten is prohibited from possessing any firearms or other items specified in those sections for 10 years.

"W.A. Baker J."

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