

CANADA / JUDGMENT

R. v. D.W.L.

2020 BCSC 213

COURT

Supreme Court of British Columbia

DECIDED

29 January 2020

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2020 BCSC 213 R. v. D.W.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. D.W.L.,

2020 BCSC 213

Date: 20200129

Docket: X080610

Registry: New Westminster

Regina

v.

D.W.L.

Restriction on Publication: Pursuant to 486.4(2) C.C.C.

Before: The Honourable Mr. Justice Armstrong

Oral Reasons for Sentence

Counsel for the Crown:

W.M. Stephen, Q.C.

J. Harris

Counsel for the Accused:

G. Garih

Place and Date of Trial/Hearing:

New Westminster, B.C.

January 17, 2020

Place and Date of Judgment:

New Westminster, B.C.

January 29, 2020

- [1] THE COURT: The offender was convicted of sexually touching the victim under s. 151 of the Criminal Code, R.S.C. 1985, c. C-46 [the Code] and with incest under s. 155 of the Code, with reasons that are indexed at 2018 BCSC 2480. These reasons will determine the proper sentence for the single charge of incest. Crown acknowledges that once the offender is sentenced on the incest charge, I should enter a stay of proceedings on the s. 151 charge.
- [2] If a transcript should be required of these reasons, I reserve the right to edit that transcript to ensure it correctly and accurately conforms to my reasoning and decision. Nothing in the reasoning or the result will change. In these reasons, I will refer to the victim by her initials and the offender by his surname. If the transcript is required, I will certainly anonymize the names of both persons.
- [3] In these reasons, I will first summarize the evidence and set out the provisions under which D.W.L. was convicted. I will then turn to a discussion of D.W.L.'s background, the pre-sentence report, and the other aggravating, mitigating and neutral circumstances that have informed my sentencing decision. Finally, I will set out the relevant law, the arguments of defence and Crown on what constitutes an appropriate sentence, before reaching the conclusions.

The Evidence

- [4] K.L. was born in February 2009. At trial, I found D.W.L. guilty of both incest and sexual touching. I accepted K.L.'s testimony that between 2013 and 2016, D.W.L. had touched her in private areas and inserted his penis into her vagina on several occasions, and that these events had occurred in B.C., in the Lower Mainland, as well as Saskatchewan.
- [5] At least one of these events caused K.L. to experience very pronounced pain, leading her to scream out. I found further that D.W.L. had told K.L. not to tell her mother about these incidents, and on at least one occasion indicated to K.L. that he "was sorry and he would never feed it like that or push it in again".
- [6] These offences were committed when K.L. was alone with her father and her mother was involved elsewhere. She was in his sole charge at the time. At times, he would promise K.L. access to a computer to obtain some type of opportunity of sexually touching her.

- [7] D.W.L. was arrested on July 7, 2017, and has remained in custody since that date. That is, he has been incarcerated for 30 months and 22 months; I will defer to counsel's calculation if my calculations incorrect.

The Law

- [8] The elements and penalty for incest are described in s. 155 of the Code:

Incest

155 (1) Every one commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.

- (2) Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and, if the other person is under the age of 16 years, to a minimum punishment of imprisonment for a term of five years.

- [9] Similarly, the sentence under s. 151 for sexual interference of a person under 16 carries a minimum of one year of imprisonment. Section 151 says:

Sexual interference

151 Every person who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years

- (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of one year; or
- (b) [the punishment on summary conviction is then set out]

D.W.L.'s Background

- [10] D.W.L. is 37 years old and has been in custody, as I said, since July 7, 2017.

D.W.L.'s Childhood

- [11] D.W.L. had a very difficult childhood. He was the eldest of six children. He experienced some verbal abuse and rough handling by his parents, and was sexually abused as a child by his maternal grandmother when he was quite young.
- [12] I am informed that D.W.L.'s mother has aboriginal heritage, in that she was half Cree.
- [13] At age 13 or 14, D.W.L. left home and began living in foster care. It appears he had some sexual encounters with his sisters, but little information is given on that point. He remained in the care of the Ministry of Children and Family Development until becoming an adult.
- [14] D.W.L. achieved a Grade 10 education and, between ages 18 and 34, worked in the oil patch for six years and elsewhere in sheet metal and in plastics.

- [15] In submissions, counsel indicated that D.W.L. was not informed about any details concerning "sex" until age 21. His mother had been sexually abused and had never discussed that subject with him. Both his parents drank heavily and were vigorous disciplinarians. His childhood traumas resulted in the destruction of his family relationships and a resentment and abandonment issues. When he married, he was hopeful to leave his former family life troubles behind him and begin a new life.

D.W.L.'s Mental Health

- [16] D.W.L. says that he had few close friends before he married his wife and mother of K.L. It appears he continues to have very few friends.
- [17] D.W.L. separated from his wife in June 2016.
- [18] D.W.L. suffers from depression and post-traumatic stress disorder related to the separation from his wife and family. Since that separation, he has attempted suicide on multiple occasions. At the time of his arrest, he had been in hospital for approximately six months receiving treatment for serious depression and anxiety. While in hospital, he had received nine electric shock therapy treatments and was taking three antidepressant medications.
- [19] No expert opinion or professional reports were reviewed by the authors of the various pre-sentence reports, but Dr. Evan Lopes, a registered psychologist, submitted a report that did not have D.W.L.'s past history to review.
- [20] On his arrest, D.W.L. was deemed to be a high risk of self-harm. In one instance, he was banging his head against a wall with the goal of hurting himself. D.W.L. has been receiving psychological counselling while in custody.
- [21] While D.W.L. denies any substance abuse, one of his suicide attempts involved the use of opiates.
- [22] While in pretrial custody, D.W.L. has experienced an agonizing withdrawal from medications he was receiving in hospital. He was placed into segregation because of his risk of self-harm and he has taken steps to ensure he remains in segregation. I note the comment in his pre-sentence report concerning disciplinary issues in prison apparently misstates the actual circumstances; those notes were prepared by staff to justify his continued segregation, which was carried out at D.W.L.'s request.
- [23] Overall, the treatment of D.W.L.'s depression in prison has been inadequate.

D.W.L.'s Criminal Record

- [24] D.W.L. has a previous conviction for publication of intimate images and received a 21-day sentence as time served on March 31, 2017. This offence predates the conviction in this case. He also has a youth record involving sexual misconduct; however, no details of that record were available.

Remorse

- [25] D.W.L. declined to discuss the subject offences with the pre-sentence report authors, but when invited to speak to the court during sentencing hearing, D.W.L. indicated that there were instances of touching of his daughter, but he said he did not have sex with her. The events of sexual contact occurred in Saskatchewan and Alberta, he said, but not British Columbia.
- [26] The offender's assertions are against the findings of fact I made following the trial. While his acknowledgment of touching his daughter in other provinces represents some measure of acceptance of some responsibility, his comments on this point do not mitigate the sentence I must impose.
- [27] In the pre-sentence report process, D.W.L. had refused to permit the release of some medical records relating to his mental health in custody. He said he is now more than happy to release those records, with the exception of one point that was not identified to me.
- [28] Counsel for D.W.L. addressed the events concerning his behaviours with K.L. Although not admitting incest, he argued that D.W.L. was engaged in some kind of experimentation, but stopped due to guilt or shame. He pointed out that in my findings, D.W.L. did not repeatedly move his penis in or out, nor is there evidence that he ejaculated.
- [29] Counsel for D.W.L. addressed the issue of his remorse and his understanding of the effects of his behaviour on K.L. He said D.W.L. recognizes his actions have harmed his daughter and he will not see her again. He prays for her and wishes for her the best. He contends that his hopes of a normal life have been crushed, and his experience with depression and anxiety have worsened.
- [30] Counsel pointed out that in the victim impact statement prepared by K.L.'s counsellors, it is noted that K.L. was struggling with her siblings, but there was no suggestion that her struggles were connected to her father's actions. He noted that the impact statement said that K.L. was "managing well".
- [31] D.W.L. says he would like to recover his cellphone, as it has many photos of his family and it will be the only remnant of the memories he has with his family, all of which are now lost to him.

Victim Impact

- [32] K.L. did not provide an impact statement for understandable reasons. However, the court was provided with a letter from Megan Crofts, a child and family therapist in the community where K.L. lives with her family.

- [33] This letter was in the nature of an opinion issued and a reflection "on behalf of K.L.". Ms. Crofts' role was to support the child in creating this impact statement and to help her through the sentencing process. She said the emotional impact suffered by K.L. has been "life-altering". Some of these effects were caused by the necessity of the family to flee from the violent and abusive situation.
- [34] As K.L. shared her story with the counsellor, she cried. The writer described typical developmental changes between K.L. and her siblings. K.L. drew a picture depicting how she felt about the incidents involving her father. The depiction showed she was feeling fear, upset, and embarrassment. Overall, K.L. is managing well, but has some behavioural issues at school, indicating she is struggling with emotional regulation. She is afraid her father may return and take her away.

Pre-Sentence Reports

- [35] As D.W.L. denied commission of the offences and plans to appeal, he refused to disclose any details concerning the events relating to his conviction to the pre-sentence report writers. He declined to discuss any of the charges during clinical interviews, and did not wish to provide any information in relation to the offences.
- [36] The court was provided a pre-sentence report dated March 12, 2009, and two other reports from the Surrey Regional Forensic Clinic. One report was from March 6, 2018, and the other June 3, 2019.
- [37] After reviewing D.W.L.'s past, including his education and employment history, the report writer, Mr. Shaw, said that D.W.L. had been uncooperative and evasive in answering some questions and refused to discuss the index offences because of his plans to appeal.
- [38] Mr. Shaw's pre-sentence report included a disturbing description of D.W.L.'s early life. His father was an alcoholic and handled his children roughly. He was sexually abused by his maternal grandmother when he was approximately five years old, but did not disclose that abuse until age 12. His mother believed the sexual abuse may have begun as early as age three or four. At age 14, D.W.L. left home and lived in foster care for several years. He said that at age 12 or 13, he did some "sexual experimentation" with his sisters; this appears to be the substance of some youth charges.
- [39] The Ministry of Children and Family Development required his removal from the home, but he was not able to reintegrate and remained in care until adulthood.
- [40] In the past, D.W.L. has seen a psychologist and a counsellor in regard to his offence as a young offender.
- [41] He is experiencing discomforting levels of anxiety and tension. He has considerable anger and resentment, much of which is directed at himself. He is characterized as being uncomfortable in social situations and has little interest in interacting with others.

- [42] D.W.L. now sees value in interventions that address his mental health needs, but rejects the value of any programs relating to sexual offending, in part because he denied these offences. Regardless of this, he is willing to attend and participate in such programs, but would prefer one-on-one sessions. He does not want potential community-served supervision or placement on the National Sex Offender Registry. He states he would prefer to serve a commensurate time in custody instead.
- [43] D.W.L. declined to disclose details of his supervision as a young offender, other than to say that he saw counsellors and psychologists.
- [44] One author outlined the possibilities for D.W.L. if his sentence exceeded two years. These included "designated interventions" for his profile and criminogenic needs. There appear to be a wide variety of programs to improve his ability to avoid violence and substance abuse. He could also be assigned to a sex offender program administered by program officers.
- [45] D.W.L. could be eligible for day parole if he was willing to participate in a correctional plan; otherwise, he would be eligible for release after serving two-thirds of his custodial sentence.

Aggravating Circumstances

- [46] The Crown contends the aggravating factors in this case include:
- a) that K.L. was between four and seven years of age at the time of the offences;
 - b) the offences continued over a significant period of time;
 - c) D.W.L. abused his position of trust and authority in relation to K.L.;
 - d) the offence had a significant impact on K.L.;
 - e) that D.W.L. had a dated criminal record for sexual offences;
 - f) that D.W.L. encouraged K.L. not to report his actions to her mother;
 - g) there was more than one instance of sexual intercourse with K.L., and on the one instance she screamed during penetration and was told to keep quite; and finally
 - h) he induced her to accept his advances by providing access to computer games.
- [47] D.W.L. has an adult conviction that occurred, as I have said, after these offences. The Crown contends this conviction can be taken into account under the authority of *R. v. Pete*, 2019 BCCA 244, at para. 40. In that case, the court said that sentencing judges should not treat post-offence convictions as aggravating circumstances calling for a harsher sentence, but that post-offence convictions can be considered for the purpose of "ascertaining an offender's moral culpability and prospects for rehabilitation".
- [48] The latter conviction happened after D.W.L. had posted intimate images of his wife after their separation, and the Crown contends this conviction relates to his moral culpability and prospects of his rehabilitation.

Mitigating and Other Circumstances

[49] The Crown acknowledges that D.W.L.'s childhood sexual abuse by a family member is a mitigating factor.

Neutral Factors

[50] The Crown argues that D.W.L.'s continued denial of the offence reflects an unwillingness to take responsibility. However, the denial is not an aggravating factor, but signals a lack of the usual remorse and responsibility that would be a mitigating factor. As such, this factor can be properly considered as neutral.

[51] Crown repeats its position that these factors may be considered in the assessment of D.W.L.'s prospects for rehabilitation, citing *R. v. G.M.*, 2015 BCCA 165, where the court said at para. 29:

[29] While a party is under no obligation to admit an offence, a continued denial is a material factor to be considered in determining whether a party is likely to re-offend.

The Law

[52] The purposes and principles of sentencing are set out in s. 718 of the Code:

Purpose

718 The fundamental purpose of sentencing is to protect society and 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 to the community that is caused by unlawful conduct;
- (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 or to the community.

[53] Section 718 goes on to describe the importance of assisting rehabilitation of offenders, reparation, and promoting a sense of responsibility in offenders and acknowledgment of harm.

[54] Section 718.01 requires that when this court imposes a sentence for an offence that involved the abuse of a person under the age of 18 years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[55] Additional sentencing principles may be taken into account and include those that are set out in s. 718.2 of the Code:

718.2 A court that imposes a sentence shall also take into consideration the following principles:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

(iv) evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

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

[56] Sentences for sexual offences against children have become more stringent in recent years: see *R. v. K.R.J.*, 2014 BCCA 382, at paras. 33-34, although reversed on other grounds at 2016 SCC 31.

[57] In *R. v. R.J.B.*, 2016 BCCA 428, the court emphasized the need for denunciation of sexual offences against children:

[31] I find the cases relied on by the Crown reflect more serious sexual assaults than are established here, and over longer periods. See *R. v. R.A.J.*, 2010 BCCA 304 (8 years, for 8 years of sexual assaults including anal intercourse); *R. v. R.E.L.*, 2010 BCCA 493 (5 years, for 6 years of sexual assaults including oral sex, digital penetration and sexual intercourse); *R. v. Wesley*, 2014 BCCA 321 (5 years, for sexual assaults of a 7-8-year-old child over several months not including intercourse); and *R. v. O.M.*, 2009 BCCA 287 (5 years, for prolonged sexual assaults including sexual intercourse over 13 years commencing at infancy, with mitigating factors).

[32] In *R. v. O.M.*, Donald J.A., speaking for the Court said this:

[11] Prolonged sexual abuse of a child requires a denunciatory sentence. The cases in the range of four to seven years reflect this. See, for example, *R. v. D.E.H.*, 1999 BCCA 526, 130 B.C.A.C. 320 (six years); *R. v. L.H.S.*, 1999 BCCA 476, 130 B.C.A.C. 1 (five years four months); *R. v. K.K.*, 2001 BCCA 302, 155 B.C.A.C. 229 (four years); and *R. v. G.E.B.*, 2001 BCCA 236, 154 B.C.A.C. 296 (seven years).

[Emphasis added.]

[33] I also note the caution enunciated by this Court about relying on cases decided before the addition of s. 718.01, which "re-set" the balance of sentencing principles for offences against young people. In *D.R.W.* the Court said:

[36] Perhaps the most useful recent case in this jurisdiction pointing to the serious consideration that must be given to cases of abusive, trust-breaking sexual offences against children is *R. v. R.E.L.*, 2010 BCCA 493. In *R.E.L.* this court considered a sentence of five years imprisonment for sexual assault of a stepdaughter, for about six years, commencing when she was six years old. The assaults included fondling, oral sex and attempted intercourse. The accused pleaded guilty, had no prior record, expressed remorse and sought treatment. In upholding the sentence, Mr. Justice Hinkson, for the court, observed that some of the cases to which he was referred and in which lesser sentences were imposed, concerned historical sexual offences. He referred favourably to *R. v. G.C.F.*, [2004] O.J. No. 3177 (C.A.), wherein Mr. Justice Borins commented that:

"[T]he principle of denunciation weighs particularly heavily in cases of offences perpetrated against children by adults in positions of trust."

[31] I find the cases relied on by the Crown reflect more serious sexual assaults than are established here, and over longer periods [of time]. . . . 8 years, for . . . sexual assaults including anal intercourse . . . 5 years, for 6 years of sexual assaults including oral sex, digital penetration and sexual intercourse . . . 5 years, for sexual assaults of a 7-8-year-old child over several months not including intercourse. . . [and] 5 years, for prolonged sexual assaults including sexual intercourse over 13 years . . .

[32] In *R. v. O.M.*, Donald J.A., speaking for the Court said this:

[11] Prolonged sexual abuse of a child requires a denunciatory sentence. The cases in the range of four to seven years reflect this. . . .

[Emphasis added.]

[58] In R.J.B., the court went on:

[33] I also note the caution enunciated by this Court about relying on cases decided before the addition of s. 718.01, which "re-set" the balance of sentencing principles for offences against young people. In D.R.W. the Court said:

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"[T]he principle of denunciation weighs particularly heavily in cases of offences perpetrated against children by adults in of trust."

[59] Thus under s. 718.1, the sentence must be proportionate to the gravity of the offence and the degree of the responsibility of the offender, but as noted, denunciation and deterrence are the primary factors. Parity is also an important principle that informs the court on questions of ranges of sentences; consideration must be given to similar offenders and similar offences.

The Crown

[60] The Crown contends D.W.L. should be sentenced to incarceration for a period of between five and eight years, suggesting seven years as the appropriate sentence. In support of its submissions concerning this range, Crown cited a number of authorities, including:

- a. R. v. R.A.J., 2010 BCCA 304, in which the offender was sentenced to eight years in jail for repeated sexual offences against his daughter over an eight-year period. This case predated the mandatory minimum sentence. The details included touching, digital penetration of the vagina, and oral sex, and forced masturbation. The Crown quotes Madam Justice Bennett's comments at para. 30:

I cannot conceive of a more morally blameworthy act than a parent sexually offending against his or her child, particularly, as here, commencing at a young age and being repeated many times over a course of years.

- b. In *R. v. R.M.D.*, 2014 BCCA 56 [R.M.D.], the Crown relied on the reasons in which the accused received a nine-year jail sentence for sexual assault, incest, invitation to sexual touching against his daughter and stepdaughter. That sentence was reduced from nine years to eight years on appeal, in recognition of the fact that the accused had alleged he was sexually offended as a child himself.
- c. In *R. v. G.E.W.*, 2014 BCSC 2597, an Indigenous offender was sentenced to seven years for incest and sexual interference that occurred over an extended period of time.
- d. In *R. v. K.R.J.*, 2014 BCCA 382, (reversed in part, on other grounds, 2016 SCC 31), the offender was sentenced to six years in jail for incest and three years for making child pornography. The case predated the mandatory minimum sentence regime. The accused had one prior arson conviction. There had been three instances of vaginal penetration, and the accused was the victim's father. The Court of Appeal determined that this was not an unfit sentence, recognizing that the offender was the primary guardian of the victim and the abuse continued over a lengthy time, and the court recognized that the sexual exploitation of persons by persons entrusted to nurture and protect children was a particularly heinous crime. In this case, the offender has made video recordings of the offence and kept it to relive the violation of his trust. This was considered a very disturbing aspect of that case.
- e. In *R. v. C.C.P.*, 2016 BCSC 520, the offender was sentenced for four offences, two of which were sexual offences committed against his daughter. He pled guilty to one count of sexual interference and one count of incest involving his daughter. This case post-dated the mandatory minimum sentence regime. There were five separate occasions of offending over the course of a mandatory two months, with four involving intercourse. The offender had told the victim not to tell anyone and supplied her with alcohol. He acquiesced in her drinking and encouraged her to use marihuana. He had an unrelated criminal record, but no meaningful insight into his actions. Donegan J. sentenced the accused to seven years for the incest and three years for sexual interference to run concurrently.
- f. Last, the Crown referred to *R. v. S.S.S.*, 2018 BCSC 2470 [S.S.S.], a decision of Mr. Justice Schultes, who sentenced an offender to an aggregate of seven years for the offences of sexual assault, sexual interference, invitation to sexual touching, and incest. The accused had no criminal record and was at a low risk to offend. He was 80 years of age. He was sentenced to four years for the incest and the other sentences running for seven years to run concurrently.

The Defence

- [61] The defence contends that a sentence of five years, the statutory minimum in this case, is a fit sentence. He referred the court to *R. v. S.C.*, 2016 QCCS 2455 [S.C.], a decision of the Superior Court of Québec. That case concerned convictions for six sexual crimes against young children, including incest. The court described the offence of incest as "the most revolting and repulsive in the Criminal Code". The court found no mitigating circumstances

and substantial aggravating factors. The court reviewed the sentences of incest between two years at the low end, low-medium sentences at four years, and high-medium sentences at six years, with the higher-end sentences at seven years.

- [62] The defence argued that in S.C. there were more acts, more varied acts, and acts continuing even after police involvement, and acts including a second victim. In that case, the accused was sentenced to six years. However, the aggravating factors in S.C. are similar to the factors presented in this case: see paras. 34 to 35.
- [63] The defence also referred the court to R. v. O.M., 2009 BCCA 287, in which an accused abused his natural daughter for 13 years from ages two to 15. The acts began with touching and progressed to sexual intercourse, and happened an average of five days a week, three weeks per month, between her ages of 11 and 14.
- [64] The accused had been sexually abused by a male companion of his mother. He had previous convictions for child sex abuse. The Court of Appeal noted that the trial judge's sentence of two years less a day was unsatisfactory, in light of the egregious crime that involved an offence against a child, early interference with a victim, and offending that occurred over a long period of time. Finally, they noted that the victim was the respondent's own child. In its conclusion, the Court of Appeal increased the offender's sentence to five years' imprisonment.
- [65] The next case cited by the defence was R. v. J.C.J., 2017 ONSC 6704. In that case, the accused was convicted after trial of one count of incest involving his biological daughter. In that case, the accused had a limited criminal record with four non-violent convictions. The victim was "badly bruised both physically and emotionally by the crimes perpetrated against her by her father". The accused had abused his position of trust, had unprotected sexual intercourse with his daughter, and encouraged the daughter to consume alcohol to assist in the commission of the offences.
- [66] There were no mitigating factors. On the incest charge, the accused was sentenced five years' imprisonment with a concurrent three-year sentence for sexual assault.
- [67] The defence relied on R. v. R.J.G., 2007 BCCA 631. In that case, the accused was sentenced to 12 years' incarceration on eight counts of historical sexual offending against four complainants. There were four counts of gross indecency, three of incest, and one of sexual intercourse with a female under age 14. Three counts were in regard to his natural daughter. The sexual contact began when the victims were 10 to 13 years old and continued for a prolonged period of time. The offender had limited insight and acceptance of his responsibility. At one stage, the offender referred to one of his daughters as a whore, and denied and minimized some of his offences. In that case, the accused was sentenced to four years for the offences against each of his natural daughters, and three years for offences against a babysitter. The court reduced the global sentence to 12 years, based on the principle of totality.

- [68] Finally, the defence relied on *R. v. P.M.*, 2012 ONCA 162, concerning an offender who had forced anal and vaginal intercourse with his daughter over 13 months. The victim was 13 and 14 years of age, and there were approximately 10 incidents.
- [69] The respondent came from a dysfunctional family where alcoholism was the root of an emotional abusive environment, but there was no suggestion he was sexually abused as a child. He became a heavy drinker after serving in Afghanistan with the Canadian Army and suffered post-traumatic stress disorder. He had pedophilia proclivities that made him a long-term management risk. The accused had made videos of his offences, and his behaviour was extremely callous. The accused was extremely remorseful throughout the offences he had committed. He was sentenced to six years' imprisonment.
- [70] The Court of Appeal viewed the making of child pornography as an aggravating factor, but the offender could not be punished twice for the same act. The trial judge had imposed concurrent sentences of five years' imprisonment for incest, sexual interference, and sexual assault committed against the respondent's daughter, and one year consecutive for the child pornography offences. The Court of Appeal felt the sentences were lenient, but was not persuaded that the sentences were unfit.
- [71] Overall, I note that trial judges are required to take into account the totality principle in crafting global sentences. The process was complicated in that case by the pornography production and the appeal court deferred to the discretion of the trial judge, upholding the global sentence of six years, notwithstanding that if the pornography charge had stood alone it would have merited a longer period of incarceration than one year.

Indigenous Background

- [72] When this matter was last before the court in September, defence counsel revealed that D.W.L.'s mother was in fact an Indigenous person. As a result, I directed that a Gladue inquiry (*R. v. Gladue*, [1999] 1 S.C.R. 688) be carried out and a report provided to the court. In the interim, I have now been given a copy of the Gladue report prepared by Andrea Smith and dated December 13, 2019. I was also provided with an updated pre-sentence report completed January 14, 2020, that took into account additional details concerning D.W.L.'s Indigenous background.
- [73] Ms. Smith reports that D.W.L.'s Indigenous ancestry came through his Cree maternal grandfather. Ms. Smith reviewed much of D.W.L.'s background and the details set out in the previous pre-sentence reports. It was clear that there was a history of sexual abuse among D.W.L.'s relatives, and that he was sexually abused by his grandmother multiple times between ages three and 10. Ms. Smith noted that he also had memories of being sexually abused by another female later in his school life. Ms. Smith noted that D.W.L. is not very connected to his Indigenous community, and knows nearly nothing about his Indigenous family history. She reviewed his troubled mental health history.

- [74] Ms. Smith noted that D.W.L. has not actively pursued connections with the Indigenous community and is not familiar with the Indigenous spiritual beliefs. He is, however, open to learning about Indigenous tradition, but is unable to say it will be helpful for him. He said there was some shame around his grandmother's Indigenous ancestry and "therefore no one in the family talked about it".
- [75] Ms. Smith reviewed a summary of systemic issues that affect Indigenous people and that are present in D.W.L.'s life. These include:
- sexual abuse as a childhood;
 - a history of foster care;
 - a loss of cultural community connection;
 - substance abuse [heroin, alcohol, crystal meth];
 - mental health issues including manic depressive disorder, PTSD, borderline personality traits;
 - intergenerational trauma [specifically sexual abuse];
 - lack of community connections and support; and
 - poor relationship with biological mother.
- [76] The updated pre-sentence report was completed by Randy Shaw on January 14. Mr. Shaw was unable to contact D.W.L.'s mother about her Indigenous background. D.W.L. had reported to him that she was of Cree ancestry. His father indicated that his mother was Ojibwe, but did not have Indian status.
- [77] Mr. Shaw reported that D.W.L.'s mother had been sexually assaulted by her own father when she was young. His mother severed contact with her side of the family as a result of the sexual abuse of D.W.L.
- [78] The report notes that D.W.L. did not reside on a reserve, and that his Indigenous heritage was rarely discussed or acknowledged. He has little knowledge of Indigenous cultural programs and was not sure if he wanted to pursue that aspect of his history. Mr. Shaw also notes that Mrs. L, K.L.'s mother, is Métis.
- [79] The report concludes that D.W.L. is "disconnected from his extended family as a result of intergenerational sexual abuse". He attributes his mother's abusive behaviour toward him and his brothers to her history of sexual abuse. He states he has learned about the history of residential schools in Canada and the struggles faced by many Indigenous people living both on and off reserves. However, he notes he has no knowledge of any extended family members suffering through such an experience.
- [80] Finally, the letter from Monica Singh, a mental health court worker at the Surrey Provincial Court, discussed D.W.L.'s involvement with Court Services Support and Assistance Programs for persons with mental health needs. She comments on his mental health, with particular

emphasis on his severe anxiety and depression. She reviewed D.W.L.'s history of incarceration and segregation and the difficulties he experiences while in their institution. He suggested segregation because of difficulties he was encountering with sharing bunks with other inmates. He suffers panic attacks and struggles with his anxiety and depression. She opined that D.W.L. may have been misunderstood by corrections staff because of his severe anxiety and depression.

- [81] In submissions, Crown expounded on the role and impact of the Gladue principles in the report presented about D.W.L.
- [82] The Crown submitted that seven years would be an appropriate sentence to reflect his past difficulties and historical factors that relate to his Indigenous background. Crown indicated that the report was helpful in highlighting the maternal abandonment he had experienced throughout his life.
- [83] Crown contends that D.W.L. does not have connections to his Indigenous heritage and, in its submissions, his Indigenous status referenced in the Gladue report is already incorporated into the analysis and submissions it has made. Crown pointed to the fact that being Indigenous heritage does not automatically result in a discount of an appropriate sentence. Discounts are based on a proposition that a person's historical Indigenous connections can result in reduction in the moral blameworthiness for an offence.
- [84] Crown set out the principles from *R. v. Ipeelee*, 2012 SCC 13, with emphasis on s. 718.2(e). She said sentencing judges are encouraged to consider restorative approaches to sentencing and to use different methods of analysis in determining fit sentences. The court must consider: (a) the unique systemic background factors which may have played a part in bringing the Indigenous offender to court; and (b) types of sentencing procedures and sanctions which may be appropriate in the circumstances because of an offender's Indigenous heritage.
- [85] The Supreme Court of Canada said that s. 718.2 directs this court to inquire into the causes of a problem and endeavour to remedy it to the extent that the remedy is possible through the sentencing process. Just sanctions cannot operate in discriminatory manners. Judges are required to take into account Indigenous offenders' circumstances in an endeavour to achieve truly fit and proper sentences, referring to para. 75.
- [86] Section 718.2(e) does not require an Indigenous offender to establish a direct causal link between his circumstances and his offending: see para. 83.
- [87] Crown fairly referred me to *R. v. J.L.M.*, 2017 BCCA 258 [J.L.M.], in which the Court of Appeal confirmed that there was no requirement that an Indigenous offender be connected to their Indigenous community for Gladue principles to apply: para. 32.

[88] It is clear from J.L.M. that unique systemic and background factors that may have played a part in the offender's behaviours may bear on his culpability to the effect that it affects their level of moral blameworthiness: see para. 36.

[89] I observe that the Gladue report author opined that there were a number of "systemic issues that affect Indigenous people that are present in D.W.L.'s life".

Analysis and Conclusions

[90] I will first deal with the ancillary orders requested by the Crown. There was no dispute or disagreement concerning these terms.

[91] The ancillary orders I am prepared to make are as follows:

- a) that a DNA sample pursuant to s. 487.051 of the Code be given, as this is a primary designated offence;
- b) that an order pursuant to s. 490.012 of the Code, D.W.L. will comply with the sex offender registration period for a period of 20 years;
- c) under s. 109 of the Code, D.W.L. will be prohibited from possession of any of the items referred to in s. 109 for life;
- d) an order under s. 743.21 that D.W.L. may not communicate with K.L., directly or indirectly, during the custodial portion of his sentence; and
- e) taking into account s. 161 of the Code, and particularly 161(a.1), D.W.L. will not attend within two kilometres of a dwelling place where K.L. normally resides, such order to take effect on the date the accused is released from custody and shall remain in place for a period of 10 years from that date.

[92] The Crown recognizes that the orders under s. 161 are a form of punishment.

[93] Further, D.W.L. is prohibited from seeking, obtaining, or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in any capacity that involves being in a position of trust or authority towards persons under the age of 16 years. This order is pursuant to s. 161(1)(b).

[94] Concerning the orders under 161(1)(a), (c), and (d), I am not prepared to make those orders in these circumstances.

[95] Pursuant to s. 737(2) of the Code, D.W.L. will pay the victim surcharge of \$200.

[96] Turning back to the appropriate length of the custodial sentence. A number of principles can be drawn from the foregoing authorities.

[97] First, a number of recognized aggravating factors are present in this case:

1. The offence was against D.W.L.'s own child, a relative to whom he was in a position of trust. D.W.L. used that position of trust to pressure K.L. to keep quiet and not report his actions to her mother. Both the authorities and s. 718.01 and 718.2(a) of the Code suggest an increased sentence with a focus on sentencing goals of denunciation and deterrence in these circumstances;
2. There were several instances of the offence over a significant period of time;
3. The offence was severe enough to cause significant pain to K.L., causing her to cry out;
4. The interference with the victim was early, in that it began when K.L. was still a small child;
5. K.L. was directed to conceal the offence from her mother, notwithstanding D.W.L.'s assurance to her that the acts would not be repeated; and
6. D.W.L. offered inducements to K.L. in order to advance his sexual contact with her.

[98] Second, I note and counsel for D.W.L. has pointed out, a number of recognized aggravating factors are absent in this case. These would be neutral features:

1. D.W.L. did not possess or create child pornography;
2. D.W.L. did not encourage K.L. to consume any intoxicants in order to facilitate the offence;

Relative to the severity of the acts itself, D.W.L. points out:

3. that the nature of the sexual intercourse did not involve thrusting or ejaculation.
4. D.W.L. did not interfere with any other persons, and
5. none of D.W.L.'s offences occurred outside of his home or with non-family members.

[99] Third, I note there are some recognized mitigating factors:

1. D.W.L. was a victim of sexual abuse in his childhood, and
2. he appeared to express some remorse for his behaviour when he spoke to the court during the sentencing process. He seemed to recognize that there was some damage caused to his daughter, but he contended it was mostly in Saskatchewan and Alberta, but not B.C.

[100] In accordance with Ipeelee and J.L.M., I take into account D.W.L.'s Indigenous heritage. I note Ms. Smith's comments and lists of systemic issues that affect Indigenous people that are also present in D.W.L.'s life. D.W.L.'s heritage may very well have had an impact, as he comes from a family situation in which sexual abuse had existed through at least two generations. It is important that the contextual evidence does not require a causal link between the status as an Indigenous person and the conduct that finds him guilty of this serious offence. Nonetheless, his personal history has certainly affected his behaviours, choices, and blameworthiness. Also, his status as an Indigenous person may very well have impacted him in ways that are not obvious or clear at this stage.

- [101] D.W.L.'s failure to take responsibility for his actions and failure to express remorse for his criminal activity are factors that are neutral in terms of aggravating/mitigating aspects of sentencing, but are factors that influence my conclusions regarding the likelihood of his rehabilitation.
- [102] Although D.W.L. declined to express remorse, counsel's submissions and his own comments to the court did demonstrate some measure of remorse or recognition or responsibility for actions against his daughter.
- [103] D.W.L. is clearly a disturbed individual who possessed the proclivity for unlawful sexual activity with a child before these offences were discovered. I accept that the revelation of his crime has ended any hope he might have of a relationship with his wife or his children. This has caused him very significant loss that will be visited on him throughout the balance of his life. He has descended into despair and has attempted to take his own life.
- [104] The aggravating factors in this case are compelling because of K.L.'s age, the fact that the offence was incest, and that it has had a dramatic effect on K.L. and indeed the entire family as it stood prior to these events.
- [105] Deterrence and denunciation are the primary goals in punishing parents who sexually abuse their children and abuse their trust. Children are incredibly vulnerable and the sentence must reflect society's abhorrence of this behaviour.
- [106] D.W.L. bears a high level of moral blameworthiness stemming from the actions themselves. He used inducements to secure her involvement and failed to restrain his impulses as previously described by his wife.
- [107] He argued that the victim impact statement reflects K.L.'s difficulties concerning her family and struggles with her siblings, and argues that these features of her behaviour are not connected to his behaviour. There are portions of the impact statement reflecting the difficulties K.L. has experienced as a result of the abuse, and D.W.L.'s arguments avoid the unchallenged assertions that K.L. suffers fear, upset, and embarrassment due to his behaviour.
- [108] I note Schultes J. comments in S.S.S., finding that an eight-year sentence was appropriate when additional aggravating factors were present, such as infliction of anal sex, extended periods of abuse, breaches of directions with regard to children, prior records for public masturbation, and additional victims being present. Those indicia are not present in this case.
- [109] In my view, and based on the conclusions set out in the above-noted decisions, and virtually all of the cases cited by the parties, the range of sentences for this offence is clearly between five years and eight years.
- [110] In my view, the comments made by the Court of Appeal in R.M.D. are apposite to this case.

- [111] In R.M.D., the accused was convicted of incest of his daughter and sexual assault of a stepdaughter. He was sentenced to a global nine years' incarceration, including five years for the incest. After the sentencing hearing, the offender disclosed that he had been sexually abused as a child. Hall J.A. went on to say this:
- [23] The judge, in sentencing the appellant, indicated that he would have been minded to impose sentences aggregating five and one-half years relating to the assaults on the daughter and four and one-half years relating to the assaults on the step-daughter but he reduced the total from ten to nine years as a global sentence. As Bennett J.A. noted in R. v. R.A.J., 2010 BCCA 304 (CanLII) at para. 26, this Court has sustained substantial sentences imposed in incest cases. In the case of R. v. O.M., 2009 BCCA 287 (CanLII), this Court increased to five years a sentence of two years imposed by a sentencing judge for incest. That offender, I note, had previously been convicted for an offence of child sexual abuse, a circumstance treated as aggravating by this Court. In the course of his reasons, Donald J.A. made this observation at para. 13:

An offender like this respondent, who was himself a victim of abuse, must be treated with compassion. Why the cycle of abuse carries on is a mystery, but the respondent needed to protect his daughter, not give way to his deviant impulses, and to make every effort to bring the cycle to an end.

- [112] In R.M.D., the court reduced a five-year sentence for incest to four years, based on the new revelation about the offender's abuse as a young child, thus reducing the global sentence to a total of eight years.
- [113] What is important is that this sentence assists D.W.L. in his rehabilitation and promoting his sense of responsibility in a way that addresses the purposes of sentencing described in s. 718 of the Code. The goal must be balanced against the primary goals of denunciation and deterrence.
- [114] I am satisfied that a sentence of seven years' incarceration would have been appropriate for D.W.L., but for the obvious difficulties caused by his own history of being abused as a child, his dysfunctional family life and upbringing, his aboriginal status, and the order made under s. 161. His current fragile psychological and emotional state, stemming in large part from these offences, is also a factor I take into account. The effects of D.W.L.'s past behaviours stem from the influences of his Indigenous status, notwithstanding that he was not connected to the Indigenous community or aware of his Indigenous status, and that coupled with the many issues affecting his life as a child and as an adolescent, reduced his moral blameworthiness overall to some extent, and in the context of the facts of this case. Further, it bears noting that his relationship with his wife and child are forever extinguished, and this factor has caused great suffering to him during his incarceration after arrest, and will continue to have a serious impact on him into the future. As such, I find it appropriate to consider a reduced sentence.

- [115] D.W.L., would you please stand, sir. In the circumstances, I am satisfied that a proper sentence for your offence under s. 155 of the Criminal Code will be incarceration for six years, based on the factors I have noted above. You will receive credit for your time served, which I have calculated at 30 months and 22 days, at the rate of 1.5 days per day served, and thus your sentence will be in the order of 25 months and 28 days, and that is just subject to discussing with counsel the mathematical calculation to ensure that I have it correct.
- [116] MS. STEPHEN: All right, one other thing, My Lord, with respect to the SOIRA order.
- [117] THE COURT: Yes.
- [118] MS. STEPHEN: I have spoken with Ms. Harris this morning, and she and I both agree that when we go through all of these various sections, it actually should be a period of life, not 20 years, because of the previous offence.
- [119] THE COURT: Oh, okay.
- [120] MS. STEPHEN: The sexual assault, I'm not sure if my friend agrees with that or not. I can walk you through the various sections. It is still an order under s. 490.012, but it is subsection (3) that applies, and then when you look at s. 490.13, it is subsection (5) that applies to make it for life.
- [121] THE COURT: So could you give me that section again?
- [122] MS. STEPHEN: Yes, it is sexual -- still the order is made under s. 490.012, and the order is made under subsection (1).
- [123] THE COURT: Sorry, if I have it now, I --
- [124] MS. STEPHEN: 490.012 --
- [125] THE COURT: Yes, yes.
- [126] MS. STEPHEN: -- subsection (1) is the general order.
- [127] THE COURT: Right.
- [128] MS. STEPHEN: Subsection (3) applies because D.W.L. has a previous sexual assault offence conviction.
- [129] THE COURT: Yes.
- [130] MS. STEPHEN: And then you go to the duration of the order, which is set out, which is governed by s. 490.013, and it's subsection (5) that applies, an order made under subsection 490.012(3), which is the one we just looked at, applies for life.
- [131] THE COURT: And sorry, I have not looked at both, the other conviction is --
- [132] MS. STEPHEN: For sexual assault for -- of other children, that's in my colleague's sentencing submissions.

[133] THE COURT: Right.

[134] MS. STEPHEN: And she refers to the youth convictions that were unsealed for the purpose of this sentencing.

[135] THE COURT: Right, okay.

[136] MS. STEPHEN: So he had two convictions for sexual assault in 1997, as I understand it.

[137] THE COURT: Right.

[138] MS. STEPHEN: And so obviously the SOIRA was not applicable at that time, so -- so that's how we get to life rather than 20 years.

[139] THE COURT: All right. Maybe Mr. Garih wants -- might want to think about that.

[140] MS. STEPHEN: Yes, fair enough. And then with respect to the actual number, obviously I'm not aware, I'm just going on what Your Lordship said, is --

[141] THE COURT: My -- he was arrested on July the 7th.

[142] MS. STEPHEN: Of 2017.

[143] THE COURT: 2017, and that is --

[144] MS. STEPHEN: All right, that is 30 months and 22 days.

[145] THE COURT: Right.

[146] MS. STEPHEN: Right. And then my understanding is that he gets credit for that at 1.5.

[147] THE COURT: Yes.

[148] MS. STEPHEN: Would be 45 months and 33 days, or basically 46 months.

[149] THE COURT: Forty-six, I had 46 months and three days.

[150] MS. STEPHEN: Okay, that's right.

[151] THE COURT: Right.

[152] MS. STEPHEN: All right, and then you've done the arithmetic of --

[153] THE COURT: And the balance I have is 25 months and 28 days.

[154] MS. STEPHEN: So six years is 72 months, isn't it?

[155] THE COURT: Right.

[156] MS. STEPHEN: Minus 46.

[157] THE COURT: Forty-six, minus three days.

[158] MS. STEPHEN: Okay, so that's six -- yes, I think your arithmetic is right, thank you.

[159] THE COURT: All right.

[160] MR. GARIH: If I can just have a brief moment to review the section from my friend's Criminal Code?

[161] MS. STEPHEN: Sure, yeah. And while my friend is doing that, could I just clarify with respect to s. 161, so you made -- you did make the order under (a.1), but declined the other ones?

[162] THE COURT: Right. Now, yes, I am sorry.

[163] MR. GARIH: Yes, I have reviewed the sections and the way they work with one another, and I don't have any reply to my friend's submissions.

[164] THE COURT: Thank you. Do you have a -- I just do not have it with me, the Crown's position on the 161?

[165] MS. STEPHEN: I have my colleague's submissions. While I am not sure she has -- I don't. I have her -- what -- the ancillary orders that she requested and what she had -- and I think this is contained on page 18 of her submissions.

[166] THE COURT: All right.

[167] MS. STEPHEN: Written submissions. It's (e), do you have that, My Lord?

[168] THE COURT: Sorry, I do not have it with me. I did not bring --

[169] MS. STEPHEN: All right, I can hand you the copy that I have. I'm -- as I say, I was actually looking for something to do with the SOIRA order when you were -- when you were making your comments and I --

[170] THE COURT: Right.

[171] MS. STEPHEN: I think I missed part of it.

[172] THE COURT: That is -- sorry, in her submissions, she asked for the order under 161(a.1).

[173] MS. STEPHEN: Yes.

[174] THE COURT: And (e) -- no.

[175] MS. STEPHEN: And then (a), (b), and (c) were --

[176] THE COURT: She said you may find an order under these, as appropriate in the circumstances, and then she said there was no evidence the internet had ever been used. So I -- because she -- because of the nature of the offences and that it was restricted to this one child, I was not persuaded, certainly by the Crown, at least, that orders under (a), (c), and (d) were necessary or appropriate.

[177] MS. STEPHEN: All right, and so I'm just asking about (a.1) and (b) then.

[178] THE COURT: Yes.

[179] MS. STEPHEN: So you did make those orders?

[180] THE COURT: I am sorry, I -- yes, I did.

[181] MS. STEPHEN: Okay, so (a.1) and (b), the orders are made.

[182] THE COURT: Right.

[183] MS. STEPHEN: Okay, all right, thank you.

[184] THE COURT: Thank you.

"Armstrong J."

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Prepared on 25 October 2026 · Esheria