

CANADA / JUDGMENT

R. v. J.A.H.

2024 BCSC 260

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2024 BCSC 260 R. v. J.A.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.A.H.,

2024 BCSC 260

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Registry: Chilliwack

Rex

v.

J.A.H.

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Before: The Honourable Justice E. McDonald

Oral Reasons for Sentence

Counsel for the Crown:

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Place and Date of Hearing:

Chilliwack, B.C.

December 22, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 12, 2024

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Introduction

- [1] J.A.H., who I may refer to as "the offender", is being sentenced on a two count indictment. He was charged with sexual touching of G.J. and N.J., who are the complainants and his step-daughters, contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. For count 1, the time period of the indictment for sexual touching of N.J. is from January 1, 2015 to September 1, 2020. For count 2, the time period of the indictment for sexual touching of G.J. is from January 1, 2013 to September 1, 2020.
- [2] On June 22, 2023, following a trial that occurred in the spring of 2023, I convicted J.A.H. of all counts. My reasons for judgment are indexed at 2023 BCSC 1280. Those reasons inform my reasons for sentence.
- [3] The Crown submits that J.A.H. should receive a penitentiary sentence of 10 years for both counts, comprised of four years for count 1 and eight years for count 2 but reduced to 10 years on the totality principle. The Crown requests that the sentences be consecutive.
- [4] The defence submits that a seven-year sentence on count 2 and a three to four-year sentence on count 1 is appropriate. The defence requests that the sentences be concurrent so that J.A.H. serves seven to eight years, but not more than eight years imprisonment.

Circumstances of the Offences

- [5] The offender is the step-father of G.J. and N.J. The majority of the offences occurred in the family home and they started when the victims were children.
- [6] J.A.H. began to sexually interfere with G.J. starting when she was in grade four and the abuse continued while she was in high school. The offences against her included repeated vaginal and anal intercourse, oral sex, as well as touching of her vagina and breasts.
- [7] G.J. could not remember the final time that J.A.H. offended against her before he was arrested. I found that the abuse against G.J. was frequent and it routinely involved unprotected vaginal intercourse. It is clear J.A.H.'s offences were egregious and fundamental violations of G.J.'s sexual integrity.
- [8] J.A.H.'s sexual interference included profoundly harmful manipulation of G.J. designed to convince her that if she did not resist the offences, there would be rewards and benefits. J.A.H. would react with anger and yelling when she resisted and G.J. concluded that submitting to the sexual abuse would make life better for her sisters, mother and herself.
- [9] J.A.H.'s sexual interference of N.J. took place in the mornings. J.A.H. would enter her bedroom, get into the bed and reach underneath N.J.'s clothing to touch her breasts. In the first incident, J.A.H. also touched the top of N.J.'s vagina beneath her clothing. N.J. testified these incidents happened when she was in grade eight or nine and they continued for a period afterwards. She testified that there were approximately five or six incidents in total. N.J. said that the incidents made her feel scared and unsafe. She pushed J.A.H.'s hand away

and he would then leave her bedroom.

- [10] As with G.J., J.A.H. also manipulated N.J. by offering her rewards if she would have sexual intercourse with him. He offered to get her a cell phone and money, but N.J. refused. N.J. described that one of these conversations with J.A.H. took place in the home. J.A.H.'s sexual interference of N.J. violated her sexual integrity and the abuse instilled fear that there was no safe place from his abuse.

Impact on the Victims

- [11] N.J. provided her victim impact statement to the court and described how J.A.H.'s offences against her left her feeling scared and isolated. N.J. described feeling that there was no safe place in the family home and the offences increased her anxiety and depression.
- [12] N.J. says that as a result of the offences, she and G.J. have lost their home and family. They now rely on support and kindness from friends. N.J. states that with the support they are currently receiving from friends, she feels her life is finally looking brighter.
- [13] There was no victim impact statement from G.J. I am not surprised that G.J. chose not to provide such a statement, especially considering the serious and highly invasive sexual offences that J.A.H. subjected her to. During the trial, I heard evidence from G.J. about her experiences during and after the sexual offences by J.A.H. when she was between the ages of eight and 15 years old. As already mentioned, G.J. was subjected to sexual touching by J.A.H. that included vaginal and anal intercourse, oral sex, as well as touching of her vagina and breasts.
- [14] J.A.H.'s sexual touching of G.J. occurred over the course of many years and the type of abuse he inflicted on G.J. was severe. While I do not have G.J.'s victim impact statement, the authorities and evidence received at trial, make abundantly clear the serious harm of sexual offences committed against children like G.J. and N.J.
- [15] G.J. testified that J.A.H. warned her that if she disclosed his sexual touching of her, he would go to jail. J.A.H. also threatened that her mother would be angry, and it would break up her family. It is a sad reality that at this point, each of these threats have come to pass.
- [16] For a victim such as G.J., who testified about not resisting J.A.H.'s sexual abuse to improve the quality of life for herself, her mother and her sisters, it is difficult to fathom the profound and long-lasting consequences that have resulted from the offences. It is clear the harm to G.J. and N.J. is extremely serious. The victims, who are now young adults, have lost significant family contact as a result of reporting the offences.
- [17] The harm resulting from the sexual offences extends beyond G.J. and N.J. to include S.H. She is the daughter of J.A.H. and the step-sister to the victims. S.H. provided her victim impact statement to the court where she describes the many negative repercussions of J.A.H.'s offending. As the young-adult who took charge of reporting the offences to the authorities, S.H. describes feeling betrayed by J.A.H. As a result of the offence, S.H. states

that her view of life has become darker. She describes feeling robbed of her young-adulthood and thrust into the role of protector of the victims at great personal and emotional cost.

- [18] S.H. states the offences have profoundly and negatively impacted her and the victims. S.H. says that she has struggled with anxiety and depression since learning of the offences. Finally, S.H. says that she now feels suspicious of others and she suffers from recurring nightmares and flashbacks. S.H. says that their lives have been permanently altered and her happy family memories are now tainted by the reality of what her father was doing to her stepsisters.
- [19] In *R. v. Friesen*, 2020 SCC 9, at paras. 56-58, the Supreme Court of Canada describes the profoundly negative impact of sexual violence on children. I find that these offences have had the negative and highly impactful consequences on the victims that is described by the court in *Friesen*.
- [20] G.J. and N.J. are dealing with long-lasting negative emotional, physical, social repercussions resulting from J.A.H.'s offences against them. The repercussions include loss of family connection as well as emotional and physical harm. The offences have cost them their happiness and robbed them of a large portion of their childhoods. The victims will be left to deal with these repercussions at every stage of their lives. N.J. and S.H., each describe facing significant mental health challenges.
- [21] Ms. B. is a member of the family with whom G.J. and N.J. now live and she acts as their informal guardian. Ms. B. has observed G.J. withdrawing from life's normal activities. She also reports that N.J. and G.J. have significant trust issues.
- [22] According to Ms. B., G.J. presents as childlike, anxious and nervous. They are careful to avoid frightening G.J. by approaching her without warning because she reacts very badly to being startled. G.J. is fearful of men and she is reluctant to leave home. Both N.J. and G.J. report many physical ailments that Ms. B. believes may be linked to the trauma of the offences.
- [23] G.J. and N.J. have also missed significant amounts of school time. G.J. especially struggles to attend full time post-secondary schooling, which is apparently required to maintain social financial support. Ms. B. states that both N.J. and G.J. would benefit from continued psychological counselling. Ms. B. states that both victims are emotionally guarded and fearful of seeing the offender.
- [24] Each of N.J., G.J. and S.H. have bravely confronted J.A.H.'s profoundly wrongful actions. They are to be commended for their strength and I hope that they will find true healing as the future unfolds.

Circumstances of the Offender

- [25] J.A.H. is presently 55 years old. He is the eldest son of a large family. He and his family were originally from El Salvador. J.A.H. has a primary level education and he told the probation officer that he cannot read or write.
- [26] After his father was murdered, J.A.H. and his family fled El Salvador. Initially, J.A.H. lived and worked in the United States. In the late 1980s, J.A.H. reunited with his mother and younger siblings who were living in Canada at the time. J.A.H. is a permanent resident of Canada, but he is not a Canadian citizen.
- [27] J.A.H. got married and he and his spouse had two daughters. Eventually, J.A.H. and his spouse separated and divorced. J.A.H. has no contact with his eldest daughter but he did maintain contact with his youngest daughter, S.H.
- [28] J.A.H. began a romantic relationship with R., who is the mother of the victims. In approximately, 2013, J.A.H., R. and her children, G.J. and N.J., began living together as a family. Eventually, S.H. came to live with her father, R. and the victims.
- [29] J.A.H. did not have a good relationship with his ex-spouse. J.A.H. testified that when S.H. first asked him if she could come and live with him, his ex-spouse falsely reported to the police that he had kidnapped S.H. J.A.H. reported to the psychologist preparing the psychological assessment that he blames his ex-spouse for putting into S.H.'s head, the false allegations made by N.J. and G.J. In fact, he says that S.H. encouraged and/or orchestrated N.J. and G.J. making the false allegations against him. Meanwhile, J.A.H. continues to reside with the victims' mother and he reports that she, along with all of his friends and family, believe that he did not commit the offences.
- [30] The psychological assessor notes that there is a clear indication that J.A.H. has a problem with self-awareness and minimizing and/or denying the sexual violence. However, the assessor also notes that there is nothing to indicate that his attitudes support or condone sexual violence.
- [31] J.A.H. has no formal training and he acquired his skills in the construction industry working as a concrete finisher through many years of hands-on experience. At some point, J.A.H. began to operate his own company and he provides employment to others, including at some point in the past to S.H.
- [32] J.A.H. has suffered from depression in some periods of his life, for example, following the murder of his father. When he was charged with the offences, J.A.H. developed reactive depression or adjustment disorder and he was referred to a psychiatrist. He is presently taking medication to treat depression.
- [33] J.A.H. reports having very good general health, although this past summer, he was treated for heart related health problems. He reports having suffered a heart attack in the past.

- [34] J.A.H. reports having no feelings of sexual attraction to children and specifically, to pre-adolescent or adolescent females. He reports his first sexual encounter was at age 17 and that he has had four sexual partners over the course of his lifetime. In other words, there was nothing unusual or traumatic reported by J.A.H. related to his sexual history.
- [35] J.A.H. reports that he consumes alcohol, but his alcohol consumption was never problematic. Since his arrest, J.A.H. has not consumed alcohol. He reports that he has never consumed drugs.
- [36] J.A.H. has been a regular participant in a church community since approximately 2014. He has a close relationship with his elderly mother, siblings and their children. Many of his family members describe J.A.H. as a responsible and caring person who stepped into a father-like role for the family once their father was murdered.
- [37] J.A.H. has support from members of his faith community, including his pastor. Finally, J.A.H. continues to have a stable relationship with R., the victim's mother. J.A.H. and S.H. are no longer in contact and he has no contact with his other biological daughter.
- [38] Many of his relatives and friends provided letters of support describing his positive qualities.
- [39] I was provided with letters informing me about J.A.H.'s positive qualities. Each author describes him as a hard worker who is very committed to supporting his family. For example, an adult niece recalls J.A.H. living with her family for approximately three months when she was under 13 years of age. The niece states that she never observed any inappropriate conduct by J.A.H. during their day-to-day contact. These letters of support paint a picture of J.A.H. that is completely at odds with the circumstances of the offences. However, in my view, such an incongruence is not unheard of in a case such as this.
- [40] J.A.H. addressed the court and he maintained his innocence.

Position of the Parties

The Crown

- [41] The Crown submits that J.A.H. should receive a penitentiary sentence for count 1 of four years and for count 2, eight years and that the sentences should be consecutive. The Crown further submits that after applying the totality principle, an appropriate global sentence for J.A.H. is 10 years.
- [42] In support of the Crown's submissions regarding an appropriate sentence, I was referred to numerous authorities and scholarly sources, including, *R. v. J.A.H.*, 2023 BCSC 1280, *R. v. Allen*, 2012 BCCA 377, *R. v. B.D.M.*, 2021 BCSC 1738, *R. v. Brown*, 2020 BCSC 2168, *R. v. C.M.W.*, 2021 BCSC 1851, *R. v. C.M.W.*, 2022 BCCA 373, *Friesen*, *R. v. G.M.*, 2015 BCCA 165, *R. v. K.V.E.*, 2013 BCCA 521, *R. v. L.M.*, 2008 SCC 31, *R. v. McKay*, 2022 BCCA 374, *R. v. T.A.P.*, 2023 BCSC 316, *R. v. Williams*, 2020 BCCA 286 and *R. v. Z.K.*, 2021 BCSC 1926. I have

considered the cases that the Crown referred me to.

- [43] These cases include some recent authorities on sentences imposed for sexual offences against children. These authorities are relied on to, among other things, support the ranges suggested by the Crown for the offences.

The Defence

- [44] The defence submits that an appropriate sentence is seven years on count 2 is appropriate and a three to four years on count 1. The defence also asks that the sentences be made concurrent with a global sentence of seven to eight years.
- [45] The defence points out that many of the authorities referred to by the parties involve incest, which partly accounts for the length of sentence imposed in those cases. The defence submits that while J.A.H. offended against his stepdaughters, this is not a case where the highly repugnant conduct of incest is at issue.
- [46] Defence counsel referred me to the following authorities: R. v. Brown, 2020 BCSC 2168, R. v. R.A.O., 2021 BCCA 384, R. v. B.L.J., 2023 BCPC 39, R. v. C.C.C., 2021 BCSC 599, R. v. J.L., 2020 ONCJ 456 and R v. W.M., 2010 BCCA 370. I have considered the cases that the defence referred me to.
- [47] In referring to C.C.C., defence counsel points out that Justice Marchand (as he then was) emphasized the need to take note of factors that may reduce an offender's moral culpability. That case involved sentencing an Indigenous offender, who was a step-grandparent and father figure to the Indigenous victim, for sexual interference. It was unknown exactly when the abuse began or how often it occurred, but it concluded when the victim was just 11 years old. The offences included forced vaginal intercourse and other sexual touching that occurred in the family home.
- [48] In that case, the existence of the same historical factors for the offender and the extremely vulnerable victim pulled in opposite directions. At para. 9, Marchand J. stated as follows regarding the offender's circumstances:

C.C.C. has committed monstrous acts but he is not one-dimensional. He is a complex human being. Along with his faults and frailties, he has a number of redeeming qualities. Based on the information in the Gladue report, I can see that, these crimes aside, C.C.C. has overcome his own set of harrowing childhood experiences to lead a productive and prosocial life.

- [49] The defence says that although there are no Gladue factors at issue in the present case, C.C.C. and Friesen, make clear the need to avoid regarding an offender as one-dimensional and exclusively defined by his offending conduct.

- [50] The authorities are clear that in cases involving sexual offences against children - and while recognizing the many factors that increase the moral blameworthiness of persons who sexually offend against children - sentencing judges must not disregard factors that may reduce the moral blameworthiness of the offender. Those factors may include, for example, mental disability causing serious cognitive limitations.

Analysis

- [51] The sentencing principles that apply to child sexual offences were recently set out by Justice De Witt-Van Oosten in *R. v. C.K.*, 2023 BCCA 468:
- [50] The Criminal Code stipulates that all sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. In *R. v. Bissonnette*, 2022 SCC 23, the Supreme Court of Canada explained what this means:
- [50] The sentence must be severe enough to denounce the offence but must not exceed "what is just and appropriate, given the moral blameworthiness of the offender and the gravity of the offence" Proportionality in sentencing is considered to be an essential factor in maintaining public confidence in the fairness and rationality of the criminal justice system. The application of this principle assures the public that the offender deserves the punishment received
- [51] It follows that "a person cannot be made to suffer a grossly disproportionate punishment simply to send a message to discourage others from offending" In a similar vein "striving for exemplarity to the detriment of evidence of the merit of rehabilitation objectives is incompatible with the principle of individualization" ... Proportionality has a restraining function, and in this sense serves to guarantee that a sentence is individualized, just and appropriate.

[Internal references omitted.]

- [51] Specific to child sexual offences, judges are mandated to prioritize the sentencing objectives of denunciation and deterrence: s. 718.01. The meaning of denunciation and deterrence was also addressed in *Bissonnette*:
- [46] the penological objective of denunciation requires that a sentence express society's condemnation of the offence that was committed. The sentence is the means by which society communicates its moral values This objective must be weighed carefully, as it could, on its own, be used to justify sentences of unlimited severity
- [47] As for the objective of deterrence, it has two forms. The first, specific deterrence, is meant to discourage the offender before the court from reoffending. The second, general deterrence, is intended to discourage members of the public who might be tempted to engage in the criminal activity for which the offender has been convicted When this objective is being pursued, the offender is punished more harshly in order to send a message to the public or, in other words, to serve as an example. General deterrence is an objective that must be

weighed by a court, but the effectiveness of which has often been questioned. These legitimate reservations notwithstanding, the fact remains that the certainty of punishment, together with the entire range of criminal sanctions, does produce a certain deterrent effect, albeit one that is difficult to evaluate, on possible offenders

[Internal references omitted; emphasis added.]

- [52] In accordance with s. 718.2(a) of the Criminal Code, sentences should be "increased or reduced to account for any relevant aggravating or mitigating circumstances". Specific to child sexual offences, certain factors are statutorily deemed as "aggravating": abuse of a family member (s. 718.2(a)(ii)); abuse of a person under the age of 18 (s. 718.2(a)(ii.1)); breach of trust or authority in relation to the victim (s. 718.2(a)(iii)); and evidence of a significant impact on the victim, considering their age and other personal circumstances (s. 718.2(a)(iii.1)).
- [53] The Criminal Code's sentencing framework is supplemented by case law. This includes Friesen, [R. v. Friesen, 2020 SCC 9] which is currently the leading authority on sentencing for child sexual offences in this country and directs sentencing courts to pay particular attention to the harms caused by child sexual abuse: Friesen para. 50.
- [54] Friesen established a new analytical approach to sentencing for child sexual violence. It is an approach that "places children, and the harm they suffer, at the centre of the discussion": R. v. Bertrand Marchand, 2023 SCC 26 at para. 32, emphasis added. The Friesen framework reflects society's deeper understanding of the immediate and long-term impacts of sexual abuse on children, their families, their communities, and society at large: at paras. 50, 60-67, 74-86.
- [55] These impacts include: harm to children's "personal autonomy, bodily integrity, sexual integrity, dignity, and equality"; damage to their relationships with their caregivers and other social relationships; "profound harm" to parents, caregivers, and family members who may be left "feeling powerless and guilty" over their child's experience; and "broader harm to the communities in which children live and to society as a whole": Friesen at paras. 51, 60-64.
- [56] On the latter point, Friesen recognizes that "children who are victims of sexual violence may be more likely to engage in sexual violence against children themselves when they reach adulthood": at para. 64. These offences "can thus fuel a cycle of sexual violence that results in the proliferation and normalization of the violence in a given community": Friesen at para. 64.
- [57] The harms identified and accepted as true in Friesen "impact both the gravity of the offence and the degree of responsibility of the offender": Friesen at para. 75. See also R. v. P.R.J., 2023 BCCA 169 at paras. 53-55 [P.R.J.].

- [58] Consequently, the harmfulness and the wrongfulness of an offender's conduct must be closely examined when determining a fit sentence for a child sexual offence. It is not enough to acknowledge the relevance of these considerations. The harms that flow from the conduct and the wrongfulness (or blameworthiness) of the offender's actions must be analyzed and applied to the individual circumstances of the case. Critically, they must be reflected in the sentence itself: *R. v. SADF*, 2021 MBCA 22 at para. 34; Nystrom at para. 53.
- [59] As aptly noted by the Ontario Court of Appeal in *R. v. T.J.*, 2021 ONCA 392 [T.J.]:
- [39] Friesen does not simply contain a list of principles and factors to be mentioned in a sentencing decision; it insists that those factors be reflected in a sentence that is of sufficient length to recognize them.
- [Emphasis added.]
- [52] In *R. v. C.K.*, 2023 BCCA 468, DeWitt-Van Oosten J.A. explains that in sentencing for sexual offences against children, the moral blameworthiness of the offender requires scrutiny. DeWitt-Van Oosten J.A. provides an example of how to conduct the moral blameworthiness analysis, emphasizing that is insufficient for sentencing judges to simply outline the Friesen factors. Instead, sentencing judges must demonstrate a careful examination of the offender's moral blameworthiness.
- [53] The salient facts of *C.K.* included that offender groomed and sexually violated his younger stepbrother on hundreds of occasions over a four-year period. The victim was 12 years old when the sexual offending commenced and 16 years old when it ceased. The offender was 20 years old when he commenced his offences and 39 years old when he was sentenced.
- [54] In *C.K.* the offender plead guilty, had significant remorse, no prior criminal record and had undergone significant sex offender counselling such that he was assessed as at a low risk to re-offend. The sentencing judge imposed a CSO of two years less a day followed by probation while the Crown had sought a sentence of four years imprisonment. The Court of Appeal found the sentence demonstrably unfit and allowed the Crown's appeal substituting a sentence of imprisonment of three and one-half years' duration.
- [55] *C.K.* provides a detailed explanation of the objectives of sentencing in the context of sexual offences against children: paras. 50-62. By focusing more on the offender's personal mitigating circumstances than the nature of the offences he committed, the sentencing judge's analysis failed to give close consideration and proper effect to the serious offences the offender had committed and the significant harm he caused his victim.
- [56] Before carrying out the type of examination of moral blameworthiness of the offender that is required, DeWitt Van-Oosten J.A. provides the following succinct summary of the relevant factors engaged in the assessment of moral blameworthiness:

- [71] Assessing an offender's personal responsibility for a crime must consider the offender's state of mind and acts at the time of the offence: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 79, 1996 CanLII 230. Relevant factors include: the level of planning and/or intentionality brought to the crime; the degree, nature and extent of the offender's personal participation in the offence; the means or method by which the crime was committed; the motive or reasons for the offender's participation; the offender's awareness of the legal and moral wrongfulness of their conduct; their awareness of the actual or reasonably foreseeable harms flowing from their conduct (immediate and long-term); and their persistence in perpetrating the offence despite that awareness. See, for example, *R. v. Okimaw*, 2016 ABCA 246 at para. 85 and *R. v. Vader*, 2019 ABCA 488 at para. 16.
- [57] After concluding that the sentence was demonstrably unfit, DeWitt-Van Oosten J.A. reviews post-Friesen authorities to determine a fit sentence for the offender: paras. 97-115. Significantly, in reviewing the numerous authorities, she confirms that (i) a substantial penitentiary term is no longer treated as unusual or reserved for rare or exceptional circumstances, even for a first offender (para. 112); (ii) three and a half years imprisonment for child sexual offending of the nature involved in this case is at the low end of the range, even for a first offender (para. 116); and (iii) but for a number of personal mitigating circumstances enumerated at para. 117, a sentence closer to five years imprisonment would have been a fit sentence.
- [58] Considering the applicable legal principles, I will now examine the relevant factors within the analytical framework for sentencing, including by conducting a substantive and meaningful assessment of J.A.H.'s moral blameworthiness at the time of the offences: C.K., paras. 70-71.

Likelihood to Re-offend

- [59] As mentioned, the offender denies the offences. J.A.H. did advise the probation officer preparing the Pre-Sentence Report that he would "comply with any interventions or programs deemed appropriate upon sentencing" and he expressed willingness to complete a program addressing sexually motivated offences. The probation officer stated J.A.H. could not be assessed regarding attitude and understanding of the offences due to his denial of the offences.
- [60] J.A.H. was assessed by a psychologist to address his risk of future sexual offending. During the assessment, J.A.H. categorically denied committing the offences and any history of abnormal sexual interests or behaviour. Although the assessor notes that the circumstances of the offences suggest "a relatively stable abnormality in the focus of the person's sexual appetites that motives or incites sexual violence" as provided in the definition of sexual deviance, the assessor says there was no evidence of problems with sexual health. The assessor concludes that J.A.H. currently poses a low risk for future sexual violence and there is no need to implement risk management strategies to reduce his risk. However, the assessor notes that J.A.H.'s risk to re-offend would increase by "a small degree if an

adolescent female were to begin living with him".

- [61] The Crown submits that I ought to place little weight on the psychological assessment because it is based on untruthful and deceptive information provided by the offender due to his denying the offences and deflecting blame onto others. The Crown points out that the assessor is unable to identify a reason for the repeated sexual violence against the victims since the offender reports no mental health or substance abuse problems and a stable intimate relationship. The Crown submits that in assessing J.A.H. as having a low risk to reoffend, the assessor is essentially speculating because he is unable to provide any insight into why J.A.H. committed the offences.
- [62] The psychological assessor clearly states that formulating the risk assessment of J.A.H. was challenging because the details of the offences indicate "a relatively stable sexual orientation toward pre-pubescent and/or pubescent children" motivated by "desire for sexual arousal and gratification". The assessor states that the only contributing factors to the offences that he can "identify with any confidence are desire for sexual gratification and likely sexual deviance".
- [63] The assessor also notes that "developing scenarios of plausible future sexual violence is also difficult" and he concludes "if he were to re-offend, the most likely scenario is one in which he gains repeated access to an adolescent female in private". Due to the conclusion that this type of access or opportunity with such a female is unlikely in the future, the assessor concludes "the most likely scenario is one of desistance (i.e., no re-offence) although the risk would increase if only "by a small degree" if he began living with such a female.
- [64] In my view, the assessor has adequately explained the basis for the risk assessment, including the limiting factors that have caused him to conclude the most likely scenario is no re-offence. I accept the assessor's conclusion and explanation as to how he has arrived at the conclusion that J.A.H. is at low risk to re-offend assuming that J.A.H. lacks repeated access to adolescent females. I find that J.A.H. is at low risk to re-offend assuming he will not have repeated access to adolescent females in the future.

Abuse of a Position of Trust/Authority

- [65] J.A.H. was the stepfather to the victims. They called him "dad" and thought of him as their father. When J.A.H. first came into their lives, the victims described being happy to have a father. J.A.H. committed the offences while the victims' mother was out and at times when he was the adult in charge at home.
- [66] G.J. recalled J.A.H. telling her that if she did not submit to the sexual offences, he would report to her mother that she had misbehaved. Both victims described that J.A.H. was very influential with their mother and they understood that upsetting J.A.H. would bring them into conflict with their mother.

- [67] I have no difficulty concluding that the J.A.H. gravely abused his position of trust by committing the offences.

Duration and Frequency of the Abuse

- [68] The duration and frequency of the sexual interference of G.J. was extensive. It began in grade four and the last incident happened when she was in high school, although she could not remember the date or time of the last incident before J.A.H. was arrested. G.J. described the sexual interference as frequent, for example, she said it weekly during certain periods in her life. The sexual interference was less frequent during other periods, for example, when G.J. got a little older and she learned how to avoid him.
- [69] Despite G.J. not recalling the precise calendar of when J.A.H. offended against her, I find that the duration and frequency of the sexual interference he inflicted on G.J. was extensive. At some points, it was a frequent, at least weekly, and at later points there was less frequency but it continued over many years.
- [70] Like, G.J., N.J. was also unable to state the exact dates when J.A.H. sexually interfered with her. Based on remembering which bedroom she occupied, N.J. testified that the sexual interference first occurred when she was in approximately grade eight. The duration and frequency of J.A.H.'s offending against N.J. was shorter and less frequent than it was for G.J.
- [71] N.J. testified that the sexual interference happened on five or six occasions over a period of many months. I find that the duration and frequency of J.A.H.'s sexual interference of N.J. occurred over a period of months, and it involved approximately five or six separate incidents.

Age of Victims

- [72] Both victims were children when the offences began. G.J. was in grade four and N.J. was in grade eight or possibly, grade nine, when the offences began. The youth of the victims is clear aggravating factor.

Degree of Physical Interference

- [73] All the physical interference at issue here is inherently wrongful and serious. J.A.H.'s degree of physical interference with N.J. involved using his hands to touch her bare breasts and one-time, he touched the top of her vagina beneath her clothing. J.A.H.'s degree of physical interference with G.J. involved frequent vaginal and anal intercourse, oral sex, as well as touching of her vagina and breasts.
- [74] I also find that J.A.H. knew that his sexual interference with G.J. would cause her pain because he told her at the outset of the first incident of sexual intercourse. G.J. gave evidence that she did experience physical pain while J.A.H. sexually interfered with her and she told him so.

J.A.H.'s State of Mind and Acts at Time Offences

- [75] Again, as he is entitled to do, J.A.H. maintains that the offences never occurred. Therefore, this is not a situation where the court has information concerning the offender's level of remorse or insight into the offences.
- [76] Regarding the level of planning and intentionality brought to the crimes, there was evidence that I accepted of J.A.H. taking steps to plan and hide his offences. For example, he separated G.J. from her sister and took her into his locked master bedroom to sexually interfere with her. J.A.H. also took opportunities, for example, when he knew that G.J. was showering, to speak to N.J. and try to manipulate her into having sexual intercourse with him. In my view, there is ample evidence to demonstrate that J.A.H. planned and tried to conceal his sexual interference of the victims.
- [77] The degree, nature, and extent of J.A.H.'s personal participation in the offences is significant. He alone initiated and carried out the sexual offences against N.J. and G.J. Both G.J. and N.J. described tactics they employed to try to avoid the sexual inference. For example, N.J. described pulling at her top to prevent J.A.H. from touching her breasts and pushing his hand away. G.J. described trying to stay with her sisters to avoid being alone with J.A.H.
- [78] The means and methods that J.A.H. employed in committing the offences included sneaking into N.J.'s bed and sexually interfering with her while she was asleep or just waking up. His means and methods also included, as I mentioned earlier, deliberately isolating G.J. and taking her into a locked room to sexually abuse her. J.A.H. also employed threats and inducements to the victims as part of his sexual interference.
- [79] Indeed, J.A.H.'s methods were highly effective. G.J. testified that if she just let J.A.H. sexually interfere her, he would be happy - not angry - and it would result in a better day for her and the rest of her family. The means and methods that J.A.H. employed to commit the offences were devious, extremely harmful and they indicate a high level of moral blameworthiness.
- [80] J.A.H.'s motives or reasons for sexually interfering with his stepdaughters appears solely related to his own sexual gratification. There is no evidence that J.A.H. suffered any childhood sexual abuse or other reason that may explain his motives for committing the offences. Rather, there is evidence the sexual offences were about satisfying J.A.H.'s own sexual gratification and this also represents a high level of moral blameworthiness.
- [81] Again, while J.A.H. denies the offences occurred, there is evidence, which I have already discussed, of the steps he took to conceal his behaviour while he sexually offended against the victims. J.A.H. also threatened G.J. that if she told anyone about his sexual offences against her, the police would come, he would go to jail, and her mother would be angry with her. Despite being aware of these threatened consequences, J.A.H. persisted in committing the sexual offences against G.J. and N.J.

- [82] By telling G.J. that the family would break up and he would go to jail if she told anyone about his sexual abuse, this demonstrates that J.A.H. was fully aware of the wrongfulness of his actions and the harm he was inflicting on his victims. Indeed, as I already mentioned, J.A.H.'s threatened consequences have come to pass.
- [83] When I consider J.A.H.'s moral culpability and degree of responsibility against the substantive elements of the offences and together with all of the evidence, I conclude that he is highly blameworthy and culpable. As part of the evidence and the overall circumstances, I have taken J.A.H.'s personal background, which includes a family history of fleeing violence in El Salvador, into account.

Mitigating Circumstances

- [84] There are very few mitigating circumstances other than J.A.H. does not have a criminal record.
- [85] Once again, J.A.H. denies that the offences occurred. The absence of remorse, the lack of insight into the offences and the decision to take the matter to trial are not aggravating factors, but they are the absence of mitigating factors.
- [86] Regarding the absence of a criminal record, the significance of this mitigating factor is reduced by the fact that the offences were committed over many years against two victims. I find that this mitigating factor exists, but it will be given little weight.
- [87] J.A.H. says he is willing to attend counselling which is a positive sign that holds out hope for future rehabilitation. Other mitigating factors include that J.A.H. has been employed full time for many years and he has financially supported his family. He has also fully complied with restrictive conditions of the release order.

Aggravating Circumstances

- [88] There are numerous aggravating circumstances present in this case. These factors lead me to conclude that the gravity of the offences and the moral blameworthiness is elevated.
- [89] There are two statutory aggravating factors present: ss. 718.2(a)(ii.2) and 718.2(a)(iii) abuse of person under age of 18 and abuse of position of trust.
- [90] Additional aggravating factor is that abuse occurred in the victims' home; the frequency of sexual interference inflicted spanned years; the victims were young when offences began to occur; the sexual interference of G.J. was extremely invasive including forced vaginal and anal penetration; the sexual interference caused psychological harm to both victims; J.A.H did not use a condom when he forced vaginal and anal penetration on G.J. which exposed her additional health risks; and, G.J. was convinced by J.A.H. that not resisting the offences would lead to rewards or the absence of negative outcomes for herself and her sisters.

Collateral Consequences

- [91] J.A.H. is not a Canadian citizen. There is no dispute that because of the offences, there is a collateral consequence associated with possible deportation. There is no submission that the appropriate sentences ought to be such that they might avoid the potential collateral consequences under the Immigration and Refugee Protection Act, S.C. 2001 c. 27.
- [92] Therefore, while I am aware of the potential collateral consequence to J.A.H., which is relevant to the principles of individualization and parity, I find this is a neutral factor.

Denunciation, Deterrence, Protection of the Public

- [93] Denunciation and deterrence are the primary objectives for sentencing the offender as provided by s. 718.01 of the Code: Friesen, paras. 95, 101-105. The fact that the offences are sexual offences against children requires me to impose a sentence that recognizes and reflects the significant harm of the offences and Canadian society's understanding that these offences are inherently wrong and deeply harmful.
- [94] In other words, following the guidance in Friesen, the sentence I am to impose will recognize that J.A.H.'s conduct, which involved preying on and sexually abusing his young stepdaughters for years beginning when they were young children, requires a significant penitentiary term to denounce the offences, protect the public and to personally deter him from offending in the future.

Rehabilitation

- [95] The prospect of rehabilitation is a factor that I must also consider. J.A.H. denies the offences occurred, which is something he is fully entitled to do. I have nothing to suggest that he has insight into his offences. In addition, J.A.H. has confirmed his willingness to engage in counselling which is positive since it may assist with gaining insight into his offences and rehabilitation.
- [96] I find that there is some possibility for rehabilitation, but I find that considering all the circumstances, it is of secondary importance.

Proportionality and Parity of Sentence

- [97] As noted earlier, the Crown's position is that the sentences imposed on J.A.H. must be consecutive while the defence submits that the sentences imposed should be concurrent.
- [98] The Crown submits that before applying the totality principle, the sentence for each offence against each victim should be:
- Count 1 - sexual interference of N.J. - four years;
 - Count 2 - sexual interference of G.J. - eight years.

[99] The Crown submits the sentences for count 1 and count 2 should be served consecutively with a total sentence of 12 years to be reduced on the totality principle to 10 years.

[100] The defence submits that an appropriate sentence for each offence against each victim should be:

- Count 1 - sexual interference of N.J. - three to four years;
- Count 2 - sexual interference of G.J. - seven years.

[101] The defence submits the sentences for count 1 and count 2 should be served concurrently with a global sentence of seven to eight years.

[102] In support of the defence submission that the sentences should be served concurrently, I was referred to *R. v. Brown*, 2020 BCSC 2168. In that case, at paras. 82-83, Justice Schultes notes that imposing consecutive sentences in relation to various counts for numerous sexual offences against multiple children would lead to a total sentence that was excessive. He also notes that by reducing individual sentences to fit within an overall eight-year sentence while remaining consecutive to each other would have a "distorting effect on their relationship to the underlying offending". Ultimately, in the circumstances of that case, to achieve the objective of totality, the sentences were imposed on a concurrent basis. However, as I will later explain, I do not conclude that imposing consecutive sentences in relation to the various counts at issue here would exceed what I have determined is appropriate.

[103] In *R. v. T.A.P.*, 2023 BCSC 316 at paras. 182-188, Justice Ker helpfully sets out the principles applicable to deciding whether individual sentences should run concurrent or consecutive to each other. At paras. 184 and 189, Ker J. notes that s. 718.3(7) provides sentences for certain offences, such as sexual interference (which are the offences committed against the two children here), must be consecutive to each other. Justice Ker goes on to point out that while the sentences must run consecutive to each other, "adjustments need to be made to account for the totality principle": *T.A.P.*, para. 189.

[104] In *R. v. Li*, 2009 BCCA 85, the court recommended a two-stage approach for sentencing an offender convicted of multiple offences:

[28] The first stage is to determine the appropriate sentence for each offence, and decide whether the individual sentences should be made consecutive or concurrent. If consecutive sentences are imposed, then the second stage is to determine whether the sentences, in the aggregate, offend the totality principle. If the sentence, as a whole, is unduly harsh or disproportionate, then the length of the individual sentences should be adjusted in order to arrive at an appropriate global sentence. See *R. v. P.P.H.*, 2003 BCCA 591.

[105] I agree with the Crown that there should be no "free ride" to the offender for having offended against multiple victims. I have also concluded that J.A.H.'s moral culpability is at the high end having committed sexual offences against his step-daughters over significant

periods of time. While fully acknowledging the egregious offending against his step daughters, J.A.H. has otherwise led a productive and positive life. Designing an appropriate sentence is extremely difficult, especially since the harm caused by J.A.H. offences is far reaching and likely to last the lifetime of his victims.

[106] In considering all the circumstances, the statutory provisions and the sentencing principles in Friesen and C.K, I conclude appropriate sentences that could be imposed before adjusting for totality would be as follows:

- Count 1 - sexual interference of N.J. - three years;
- Count 2 - sexual interference of G.J. - eight years to be served consecutive to Count 1.

[107] Section 718.2(c) of the Code requires that when sentencing an offender for a number of offences, the sentencing judge ensures that the aggregate will not exceed the sum of the parts. The sentencing judge is to consider the combined sentence to determine that it is not unduly long or harsh and to ensure the sentence for multiple offences is not disproportionate to the gravity of the offences and the offender's degree of responsibility.

[108] Having imposed consecutive sentences in this case, I will now consider the adjustments that may be necessary to account for the totality principle.

[109] In that regard, I note that imposing a global sentence of 11 years - being the sum of the sentences that I imposed for each offence above, would be unduly long and harsh. Therefore, I elect to reduce J.A.H.'s global sentence and I will now set out the reductions for each offence.

[110] The actual sentence imposed will be as follows:

Disposition

[111] J.A.H., please stand up. The sentences that I impose on you are as follows:

- 1) On Count 1 of the indictment - the sexual interference of N.J., I sentence you to a period of incarceration of three years.
- 2) On Count 2 of the indictment - the sexual interference of G.J., I sentence you to a period of incarceration of seven years, consecutive to Count 1.

[112] Therefore, your total global sentence is ten years' imprisonment.

[113] As the convictions against J.A.H. are for indictable offences where sexual violence occurred and the maximum sentence is greater than ten years, I also impose the following orders:

- a) Pursuant to ss. 490.011, 490.012(1) and 490.013(2)(b) of the Code, there will be an order requiring J.A.H. to comply with the provisions of the Sex Offender Information Registration Act, S.C. 2004, c. 10 for life.

- b) Pursuant to s. 743.21 of the Code, I order J.A.H. to have no contact or communication directly or indirectly with N.J. or G.J. for the duration of his custodial sentence.
- c) Pursuant to s. 487.051(1) of the Code there will be a DNA order in relation to both counts and I authorize the taking of samples of bodily substances from J.A.H. reasonably required for the purposes of forensic DNA analysis.
- d) Pursuant to s. 109(1)(a) and(2) of the Code, there shall be a firearms prohibition for a period of ten years prohibiting J.A.H. 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, and J.A.H. is prohibited from possessing any prohibited firearm, prohibited weapon, prohibited device and prohibited ammunition for life.
- e) Pursuant to s. 743.2 of the Code, I order that a copy of these reasons for sentence, as well as Exhibit 1 from the sentencing and the reasons for judgment from June 22, 2023, be forwarded to the Correctional Services of Canada.

[114] I would like to thank counsel for their helpful submissions.

"E. McDonald J."

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