

CANADA / JUDGMENT

R. v. K.N.R.H.

2024 BCSC 699

COURT

Supreme Court of British Columbia

DECIDED

28 March 2024

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2024 BCSC 699 R. v. K.N.R.H. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. K.N.R.H., 2024 BCSC 699 Date: 20240328 Docket: 112108-3 Registry: Kamloops Rex v. K.N.R.H. Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered. Before: The Honourable Mr. Justice Branch Oral Reasons for Sentence Counsel for the Crown: B. Bellrichard Counsel for the Accused: C.E. Johnson Place and Date of Trial/Hearing: Kamloops, B.C. March 28, 2024 Place and Date of Judgment: Kamloops, B.C. March 28, 2024 Table of Contents Overview.. 3 Facts. 3 Legal Principles. 4 Application of the Principles. 6 Aggravating and Mitigating Factors. 8 The Principle of Proportionality: A Review of Relevant Case Authorities. 9 Imposition of Sentence. 12 Overview

[1] THE COURT: These are my reasons on sentencing. The underlying facts of this unfortunate case are largely set out in my reasons for conviction on the four counts in the indictment, reasons issued on September 6, 2023. I will not repeat the facts recounted in those earlier oral reasons, except as necessary for this judgment.

Facts

- [2] There were certain additional facts and materials provided today relevant to sentencing.
- [3] I was provided with a JUSTIN conviction report, which indicated that the accused did not have a criminal record prior to the incidents in question. But he has had many convictions since these incidents for crimes such as uttering threats, theft, assault, and breach of orders.
- [4] A pre-sentence report and a psychiatric report were prepared, largely to assess the potential viability of a non-criminally responsible defence. Although the reports did not end up supporting the viability of such a defence, they did provide helpful information. Specifically, the reports reflect that the accused suffers from schizophrenia, and that he has periodically suffered from a tenuous grasp on reality, including having delusions. The reports also indicate that the accused had a difficult upbringing characterized by potential sexual abuse by a family member as a child, an early attraction to pornography, inattentive parenting, periods of urgent psychiatric treatment, homelessness, and drug abuse.

- [5] While not contesting this information, the Crown did seek to rely on the fact that the accused was not under active treatment over the summer of 2015 - when the incidents most likely took place. I speak to the relevance of this factor later in my reasons.
- [6] In terms of the victim's situation, there was also some new material. She provided a letter setting out the many impacts of this crime upon her. She has had trouble making social connections. She has had difficulty trusting people, particularly those in her own family. She has had difficulty getting work. This case, and the facts of the case, cycle through her mind constantly. She is disgusted by the concept of having sexual relations. She is on psychiatric medication, and describes herself as suffering from major depression, PTSD, and a panic disorder. She fears seeing the accused in public, and she has engaged in self-harm in the past. Legal Principles
- [7] Section 718 of the Criminal Code sets out the sentencing objectives. The section provides that 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." This purpose is met by the imposition of just sanctions which reflect sentencing objectives such as denunciation, general and specific deterrence, separation of offenders, protection of the public, rehabilitation, reparation, the promotion of a sense of responsibility in the offender and an acknowledgment of the harm caused to victims and the offender's community.
- [8] As stated by the Supreme Court of Canada in *R. v. C.A.M.*, [1996] 105 C.C.C. (3d) 327 (S.C.C.) at para. 82: . . . the relative weight and importance of these multiple factors will frequently vary depending on the nature of the crime and the circumstances of the offender. In the final analysis, the overarching duty of a sentencing judge is to draw upon all the legitimate principles of sentencing to determine a "just and appropriate" sentence which reflects the gravity of the offence committed and the moral blameworthiness of the offender.
- [9] In paras. 80 and 81 of *C.A.M.*, the Supreme Court of Canada discusses the roles of retribution and denunciation in the sentencing process, noting that the concept of retribution is designed to reflect the "moral blameworthiness" of the offender's actions. At para. 80, the Court stated that a court should seek to impose: . . . an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct . . . retribution requires the imposition of a just and appropriate punishment, and nothing more. [Emphasis in original]
- [10] A fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. This principle of proportionality is codified in s. 718.1 of the Criminal Code.

- [11] Related to this principle is the concept of parity, whereby like cases should generally be treated alike to the extent possible.
- [12] The aforementioned principles are applied in conjunction with s. 718.2 of the Criminal Code, which includes the following directions: 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, (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, 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;
 - (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. The section includes a series of the aggravating and mitigating circumstances that the court should consider.
- [13] In *R. v. Nasogaluak*, 2010 SCC 6, the Court stated the following:
- [43] The language in ss. 718 to 718.2 of the Code is sufficiently general to ensure that sentencing judges enjoy a broad discretion to craft a sentence that is tailored to the nature of the offence and the circumstances of the offender. The determination of a "fit" sentence is, subject to some specific statutory rules, an individualized process that requires the judge to weigh the objectives of sentencing in a manner that best reflects the circumstances of the case. No one sentencing objective trumps the others and it falls to the sentencing judge to determine which objective or objectives merit the greatest weight, given the particulars of the case. The relative importance of any mitigating or aggravating factors will then push the sentence up or down the scale of appropriate sentences for similar offences. The judge's discretion to decide on the particular blend of sentencing goals and the relevant aggravating or mitigating factors ensures that each case is decided on its facts, subject to the overarching guidelines and principles in the Code and in the case law.
- [44] The wide discretion granted to sentencing judges has limits. It is fettered in part by the case law that has set down, in some circumstances, general ranges of sentences for particular offences, to encourage greater consistency between sentencing decisions in accordance with the principle of parity enshrined in the Code. But it must be remembered that, while courts should pay heed to these ranges, they are guidelines rather than hard and fast rules. A judge can order a sentence outside that range as long as it is in accordance with the principles and objectives of sentencing. Thus, a sentence falling outside the regular range of appropriate sentences is not necessarily unfit. Regard must be had to all the circumstances

of the offence and the offender, and to the needs of the community in which the offence occurred. [citations omitted]

- [14] In cases of sexual assault, the primary sentencing principles are denunciation and deterrence.
- [15] Given that this case involved the sexual touching of a minor, the Supreme Court of Canada's guidance in *R. v. Friesen*, 2020 SCC 9, is germane. In that case, the Supreme Court directed trial courts to impose increased sentences for sexual offences involving children. The Court noted that such cases are inherently violent and inflict profound and chronic harm upon victims, families, and communities. The decision directed judges to consider such crimes' inherent wrongfulness when determining a proportionate sentence. Application of the Principles
- [16] I begin with a consideration of how the facts fit within these general principles.
- [17] In light of (a) the direction that the primary sentencing principles in this type of case are denunciation and deterrence, and (b) the principles set out in *Friesen*, the impact on the victim and other potential victims must be front and centre. Here, the victim's own words about the impact on her are supported by the more general findings about the impact of childhood sexual abuse invoked in *Friesen*, such as the long-term feelings of fear and isolation.
- [18] Turning to the question of moral culpability, I find that but for the potential effect of his mental health struggles, the accused's level of moral culpability would have been at the very high end of the range. I find that his mental health difficulties, do have a somewhat moderating effect on his culpability. I struggle with the Crown's suggestion that the Court should effectively disregard the moderating effect of these mental health problems because he was not under active treatment during the summer of 2015.
- [19] I find it unlikely that he had a period of greatly improved clarity during the relevant time. It is important to acknowledge that:
- a) the accused had serious mental health problems before the abuse;
 - b) he was off his medications at the time of the abuse;
 - c) although he was not receiving active treatment, it appears that this was as much a factor of him simply not attending scheduled appointments set for him over that period, rather than being reflective of medical confidence that he was cured or stable;
 - d) although he was technically discharged from treatment in the summer of 2015, it is not clear the extent to which his potentially unreliable self-reporting may have driven this decision;
 - e) on the days on which the incidents occurred, the victim noted that the accused was acting strangely, which she attributed to possible drug use, but which could also reasonably be attributed to his mental health struggles; and

- f) by 2016, the accused seems to have been having more overt and recognizable mental health problems once again, requiring more active treatment.
- [20] The moderating effect of his mental health challenges should not be overstated however. While I accept that his mental health difficulties continued over the relevant period, it is also important to acknowledge that these mental health difficulties did not appear to have played a material role in the offences at issue: i.e., they do not appear to have been the trigger for any plan to commit the offences, and they do not appear to have made up part of any motive. It is possible that they had some impact on his awareness of the degree of wrongfulness of his conduct, or on his ability to be aware of the foreseeable harms from such conduct.
- [21] Considering the questions of personal insight and risk of reoffending, I do have real concerns in light of the fact that:
- a) the accused expressed no remorse;
 - b) the psychiatric report noted that K.N.R.H. seems to lack insight into his own behaviour. In addressing the present allegations, he sought to blame the victim, suggesting she was the aggressor notwithstanding that she was only 12 years old at the time; and
 - c) his subsequent criminal record suggests that the risk of reoffending may be real, particularly given the additional instances of uttering threats. Aggravating and Mitigating Factors
- [22] Turning to the aggravating and mitigating factors, I find that the following are aggravating in this case:
- a) first and foremost given Friesen, the victim was a minor, who can be presumed to have suffered greatly, and potentially permanently, as a result of the abuse;
 - b) the victim was a family member of the accused;
 - c) the accused did abuse a position of trust; and
 - d) the accused declined to plead guilty, resulting in the victim having to go through a painful and difficult trial.
- [23] The accused was older than the victim. It was clear from the victim's evidence that the victim admired and idolized the accused. The accused took advantage of that trust and affection. The case law is clear that it is not only formal legal trust relationships that can be considered aggravating: *R. v. B.L.J.*, 2023 BCPC 39 at paras. 14, 15, and 31.
- [24] That said, I have instructed myself not to improperly "double count" the aggravation caused by the accused's position as a family member, along with his position as a person of trust, given that these factors largely worked in tandem to make the victim more vulnerable to the accused's actions.
- [25] In terms of the mitigating factors, I find that the following are relevant in this case:

- a) the accused's mental health difficulties, although the weight of this factor is somewhat attenuated for the reasons discussed above; and
 - b) the accused's lack of a criminal record at the time of the offences. The Principle of Proportionality: A Review of Relevant Case Authorities
- [26] The parties agreed that at least prior to Friesen, the sentencing range for a case such as this would have been somewhere between two years and six years. It is not yet clear given the absence of appellate guidance how Friesen will affect this range.
- [27] Defence counsel suggested that, given that our Court of Appeal has not yet pronounced on this issue, I should assume that the range remains between two and six years. I find that such an assumption would be inadvisable, given that the Supreme Court in Friesen:
- a) made it clear that the range needed to move up; and
 - b) did provide some guidance when stating that mid-single-digit jail sentences for sexual offences against children should be normal, and upper-single-digit sentences should not be treated as unusual or reserved for exceptional circumstances.
- [28] The Crown provided one authority. In *R. v. Harry*, 2023 BCCA 448, the court effectively imposed a four-year sentence for a single penetrative sexual act on a minor, but in a context where the sentence was moderated to account for Gladue considerations.
- [29] At the end of the day, the Crown proposed the following sentence:
- a) Count 1, sexual interference, 48 months;
 - b) Count 2, sexual assault, a judicial stay of proceedings pursuant to the Kienapple principle;
 - c) Count 3, exposure, 90 days concurrent to Count 1;
 - d) Count 4, uttering threats, 90 days concurrent to Count 1.
- [30] In terms of the effective time served, defence counsel did not quarrel with Crown counsel's calculation yielding a credit of 294 days, resulting in a proposed effective sentence of 1,166 days.
- [31] The Crown also proposed a series of ancillary orders:
- a) a mandatory firearms prohibition pursuant to Criminal Code, s. 109;
 - b) a mandatory DNA order pursuant to the Criminal Code, s. 487.051;
 - c) a mandatory 20-year SOIRA order, assuming the 48-month sentence proposal was accepted, pursuant to the Criminal Code s. 490.012;
 - d) a discretionary order pursuant to Criminal Code s. 161(1)(a.1) on the following terms, "You are prohibited from being within 200 metres of any dwelling house where the victim ordinarily resides for a period of 10 years"; and

- e) a waiver of the victim fine surcharge.
- [32] Although a few options were proposed, defence counsel's primary sentencing proposal was for:
- a) a sentence yielding new jail time of two years exactly, after any time-served deduction;
 - b) a three-year supervision and Rogers order; and
 - c) the same ancillary terms proposed by the Crown, save that the s. 161 order should provide that the order would not be applied on written consent of the victim, where such communication was for the purposes of reconciliation.
- [33] Defence counsel did not take much issue with the suggestion that the Crown's proposal falls within whatever the new appropriate range should be for the subject offences after the Friesen decision, but argued that the defence proposal was more advisable and appropriate for the accused specifically, and for the community generally. The defence proposal would provide society with a longer period over which the accused's conduct would be treated, managed, and supervised in the community.
- [34] If all the sentencing objectives were equally balanced, and if this case had been considered before Friesen, I would have been inclined to accept defence counsel's proposal. However, given that: (a) the focus of the sentence must be on denunciation and deterrence; and (b) the decision in Friesen has directed trial courts to increase custodial sentences to reflect the pain being caused to abused youths generally (pain that I find is being suffered here specifically), I find that the Crown's proposal is more reasonable, and is reasonable generally.
- [35] I find that it would not be appropriate to push any custodial sentence down below its new appropriate level simply to maximize the community supervision period.
- [36] In any event, I note that under the Crown's proposal, assuming the default statutory release program is allowed to operate, there will be about 13 months during which the accused will be supervised in the community. This period should allow adequate time to ensure that his mental health conditions and drug abuse difficulties are stabilized and guided by an appropriate treatment regime prior to his full independent re-entry into society. Imposition of Sentence
- [37] K.N.R.H., if you could please stand up. This is and has been a difficult case. The crime you committed was a horrible one, in that you abused a member of your family who was not yet an adult.

- [38] On the other hand, I accept that your level of responsibility is reduced given that you have lived a very difficult life, in which you have had to try and manage difficult mental health challenges and drug problems. Given how these factors pulled against each other, but guided always by what the Supreme Court of Canada has told me I must do in the Friesen decision, I find that the sentence proposed by the Crown is an appropriate fit in all the circumstances. You may be seated.
- [39] To recap, I impose a sentence of 1,166 days, determined as follows: · Count 1, for sexual interference, 48 months; · Count 2, sexual assault, I will enter a stay of proceedings pursuant to Kienapple; · Count 3, exposure, 90 days concurrent to Count 1; · Count 4, uttering threats, 90 days concurrent to Count 1; to which is applied a pre-trial custody credit of 294 days.
- [40] As well, I would impose the following ancillary orders:
- a) a mandatory firearms prohibition pursuant to the Criminal Code, s. 109;
 - b) a mandatory DNA order pursuant to the Criminal Code, s. 487.051;
 - c) a mandatory 20-year SOIRA order pursuant to s. 490.012;
 - d) an order pursuant to s. 161(1)(a.1) on the following terms, "You are prohibited from being within 200 metres of any dwelling house where the victim ordinarily resides for a period of 10 years"; and finally
 - e) I confirm that there is a waiver of the victim fine surcharge, given your difficult financial situation.
- [41] Any residual issues, counsel?
- [42] CNSL B. BELLRICHARD: No, Justice.
- [43] CNSL C. JOHNSON: No, Justice.
- [44] THE COURT: Thank you. "The Honourable Mr. Justice Branch"

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Prepared on 29 October 2026 · Esheria