

CANADA / JUDGMENT

R. v. R.J.H.

2020 BCSC 1070

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1070 R. v. R.J.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. R.J.H.,

2020 BCSC 1070

Date: 20200630

Docket: 41300-3

Registry: Courtenay

Regina

v.

R.J.H. and C.S.

Restriction on publication: Pursuant to ss. 486.4(1) and 486.4(3) of the C.C.C.

Section 16(4) Sex Offender Information and Registration Act ("SOIRA"):

This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before: The Honourable Mr. Justice Baird

Oral Reasons for Sentence

Counsel for the Crown:

J. Boccabella

Counsel for the Accused, R.J.H.:

E. Chesterley

Counsel for the Accused, C.S.:

D. Evans

Place and Date of Hearing:

Courtenay, B.C.

March 3 and June 30, 2020

Place and Date of Judgment:

Courtenay, B.C.

June 30, 2020

INTRODUCTION

[1] THE COURT: This is a sentencing hearing delayed by the Covid-19 pandemic. R.J.H. and C.S. have entered guilty pleas to a charge that they possessed child pornography contrary to s. 163.1(4) of the Criminal Code, R.S.C. 1985, c. C-46, an offence punishable by a term of imprisonment of not more than 10 years. R.J.H. alone has pleaded guilty to a charge of making available or distributing child pornography contrary to s. 163.1(3) of the Criminal Code. This offence is punishable by a maximum term of imprisonment of not more than 14 years.

BACKGROUND

[2] On January 9, 2018, the Courtenay RCMP initiated an investigation of R.J.H. after receiving reliable information that he had been uploading child pornography within his residence at 910 Braidwood Road in Courtenay, BC, from a social media application called Tumblr. A search warrant was duly obtained and executed at that address on February 14, 2018. Both R.J.H. and C.S. were within the residence when the police arrived to search it. Investigation revealed that they had been involved in an intimate relationship for several years and C.S. was pregnant at the time with R.J.H.'s child.

[3] During the search, an Apple iPad belonging to R.J.H. was seized and found to have hundreds of videos and images of child pornography stored in it. An Apple iPhone belonging to C.S. was found to contain various images and one video of child pornography. All of these, that is, all of the illegal material on C.S.'s iPhone, had been digitally transferred to her by R.J.H. There is no evidence that C.S. accessed or downloaded child pornography on her own. These two devices also contained electronic correspondence between R.J.H. and C.S. in which they discussed committing acts of sexual abuse upon their unborn child. The act of writing down such thoughts and sharing them in itself constitutes making and distributing

child pornography.

- [4] Evidence was also found on these devices of communications between R.J.H. and C.S. in which C.S. was encouraged to obtain photographs of her then 10-year-old half-sister, in whom R.J.H. had expressed a sexual interest. C.S. admits that while visiting her half-sister in Alberta, she actually took photographs of her and gave at least one of them to R.J.H. While Crown counsel conceded that this image did not itself qualify as child pornography, nevertheless the inference is readily to be drawn that it was passed on to R.J.H. for his sexual gratification.
- [5] The file's main investigator ultimately reported retrieving 2,782 images of child pornography from R.J.H.'s iPad. These included 306 images depicting sexual abuse of underage females by adult males or females. There were also a number of images of underage females engaged in sexual activity with animals. The investigating constable observed 125 videos of child pornography involving underage females and early-teen females, many of them depicting sexual abuse by adults. Two of the videos depicted babies being sexually abused; another, the sexual abuse of an underage male by an adult female; and yet another depicted an underage female engaged in sexual activity with an animal.
- [6] Finally, the search of R.J.H.'s iPad disclosed numerous electronic communications between R.J.H. and parties other than C.S., during which child pornography was shared, received, and discussed. I have no intention of repeating any of these discussions. It is sufficient to say that they are alarming and sickening and clearly reveal that R.J.H. is a sexual deviant who requires decisive punishment, correction, and long-term treatment.
- [7] On the joint charge of possession of child pornography, there is no doubt that R.J.H. is by far and away the more culpable of the two offenders. As I have said, C.S. did not herself collect or distribute any of the images found on her phone. It is important to emphasise that these were all sent to her by R.J.H. in the midst of his efforts to involve her in his perverted fantasies including ideations about sexually abusing their unborn child and C.S.'s younger half-sister.
- [8] This is where C.S.'s moral culpability comes in. Instead of ceasing all relations with R.J.H. on the spot when he first announced his sexual interest in children, which I consider any normal, self-respecting person would have done, C.S. decided in her own words that, "If you can't beat them, join them." Her primary concern was a selfish one. She was convinced that R.J.H. was losing interest in her and she thought that if she went along with his sexualised messages and fantasies, his interest in her might be rekindled. In particular, she thought that complying with R.J.H.'s demand for photographs of her younger half-sister might reactivate his sexual desire for her as she and her half-sister apparently look alike.
- [9] In other words, C.S. cannot be said merely to have been a passive recipient of the images and messages found on her iPhone. It is a matter of grave concern that she participated in this traffic and did not discourage it. Her moral blameworthiness lies partially in the fact that her personality is so weak, her ethical compass so feeble, that she participated in

serious criminal activity to preserve her own dysfunctional relationship with R.J.H., a person whom every well-adjusted person would have spurned and rejected. To an extent, she enabled and encouraged his offending. One wonders what other forms of highly antisocial conduct she might be capable of if she gets into the wrong company.

- [10] Much of the information I will now refer to about each offender comes from court-ordered presentence reports and psychological evaluations. In the case of C.S., I will also refer to aspects of a second psychological evaluation created for the Ministry of Children and Family Development in their investigations of her fitness as a parent.

R.J.H.

- [11] R.J.H. is the elder of two children born and raised in Comox, B.C. He was not abused or neglected as a child, but his parents separated when he was young due in part to his father's alcohol abuse. R.J.H. and his sister lived with their mother, but she passed away suddenly when R.J.H. was 15. The two siblings went on to live with their maternal grandfather who was a loving and supportive caregiver. I was told on the last hearing date, March 3, 2020, that R.J.H.'s relationship with his grandfather is under some stress at the moment because of the charges before the court. He remains in contact with his sister. His father died when he was 21 years old.
- [12] R.J.H. was diagnosed with Attention Deficit Hyperactivity Disorder when he was in third grade and he struggled academically. He was prescribed medication which had adverse side effects so he discontinued using it. He reported being bullied often as a youth. Despite these difficulties, R.J.H. graduated from high school in the usual order. He met C.S. when he was 20 years old and she was 16. Their relationship ended abruptly when they were arrested on February 14, 2018.
- [13] According to the reports, R.J.H. became sexually active at 17 and has had three sexual partners including C.S. He is sexually attracted to prepubescent girls and is curious about young boys. He started accessing child pornography at the age of 21. He denies having any sexual contact with minors or engaging with children in the community. If he comes across children in his daily life, he wilfully redirects his thoughts and avoids interaction with them.
- [14] R.J.H. started drinking alcohol at 17 and by 19 he was drinking and drugging regularly. He became addicted to cocaine and MDMA and used them daily for months at a time. His relationship with C.S. was marked by mutual substance abuse. R.J.H. points to this as a factor that contributed to his offending behaviour. He reported that he was usually drunk and high when he looked at child sexual abuse images. In this compromised state of mind he was unable to stop himself. He continues to use alcohol and marijuana presently, but believes that he now has control of his consumption, something that he lacked previously.
- [15] Since being arrested and charged, R.J.H. has been bound by the terms and conditions of a bail order. His life has been adversely affected by these charges. It is not difficult to understand why. I am told that in recent times he has lived in a succession of shelters for the

homeless. His income consists entirely of a monthly benefit from the British Columbia Income Assistance Program. He has previously worked in various customer service jobs and has been actively seeking employment, but he has not been able to find any. He feels ashamed and guilty about his offending, especially involving C.S. in it. He reported that he was happy to be caught.

- [16] R.J.H. has acknowledged a history of pedophilic sexual interest and continues to experience arousal from prepubescent females. When asked why, he said, "Because they're small and cute." He confessed to viewing child pornography and masturbating to fantasies of sex with female children on a daily basis. This included fantasies about C.S.'s younger half-sister. He reported that had he not been arrested, he would likely have engaged in sexual activity with this person as well as with his own child. He has a poor understanding of appropriate sexual behaviour and arousal. His deviant misconceptions, as I have said, were not challenged or suppressed when C.S. played into his sexual fantasies.
- [17] The psychologist who evaluated R.J.H. for this sentencing hearing diagnosed him with Paedophilic Disorder, and reported, as well, that he meets the criteria for Alcohol Use Disorder. He presented as being a moderate risk for sexual recidivism. He impressed as having a poor understanding of himself and his sexual deviancy, as well as a poor appreciation of his risk of further child pornography offending and engaging in sexual offending against children, including his own and other children known to him.

C.S.

- [18] C.S. was born and raised in Edson, AB. Her mother and father separated before she was born. She lived half-time with each parent until the age of 14. She reported a happy positive childhood free of abuse in either home. Eventually her father began a new relationship and had another child with his new partner. This changed the dynamic of her upbringing and she chose to live full-time with her mother. Eventually they moved to Comox, BC, where C.S.'s mother was raised. C.S. maintained regular contact with her father and half-sister.
- [19] C.S. was a good student, graduating from high school in 2014. At present she is pursuing college courses to obtain her Chartered Professional Accountant's designation. Along the way she has held down a number of part-time jobs to supplement her student loans.
- [20] C.S. met R.J.H. when she was only 16 years old. According to her, their first encounter involved R.J.H. providing her with alcohol and surreptitiously with MDMA prior to engaging in sexual acts with her. This soon became part of a routine for them: they would consume alcohol and drugs, often followed by R.J.H.'s request to watch pornography, and then they would engage in sex. In time, R.J.H. encouraged C.S. to explore deviant sexual interests. At a certain point, R.J.H. admitted his interest in child pornography. C.S. was pregnant at the time and was worried that R.J.H. was no longer sexually attracted to her. She claims to have told R.J.H. that "this needs to stop", but it got to the point where she concluded, as I have previously said, that "If you can't beat them, join them". She hoped that R.J.H. was not a pedophile and that his behaviour would change once their child was born.

- [21] C.S. gave birth to a son on May 4, 2018. The baby was immediately taken from her by child protection authorities. C.S.'s mother has had custody of the child ever since and C.S. spends every day with him under her mother's supervision. Up to now, C.S. has been living with her mother's former foster parent whom she regards as her grandmother. Recently the Ministry has approved a plan that C.S. will live with her mother in Comox. Her focus since being charged has been doing everything possible to regain custody of her son. She has been compliant with all directives and agreements imposed by Ministry case workers. She has gone for counselling and wishes to continue doing so.
- [22] While awaiting disposition of the present charge C.S. was ordered not to have contact with her half-sister. She reported that she would never do anything to hurt her. She thought her sister was safe because she lived in Alberta and R.J.H. had no access to her. But as I have said C.S. went along with his request to provide him with a photograph of her sister. Apparently it depicted the little girl wearing a bathing suit. C.S. is remorseful for doing this and has explained it as a misguided attempt to please R.J.H. She wants to resume a normal life with her half-sister. C.S.'s father has said that he wants the relationship between his daughters to be re-established and normalised. He has no concerns about contact between them.
- [23] C.S. has no history of alcohol or substance abuse other than during her relationship with R.J.H. She has no criminal record. When she first moved to this area from Alberta, she found it hard to connect with people. Eventually R.J.H. came along when she was 16 and she thought it was "cool" to be dating an older man. She was twice impregnated by R.J.H. The first pregnancy was terminated by abortion. The second one, which began when C.S. was barely 19, was taken to term. Neither was planned or wanted and C.S. believes that both were caused by R.J.H.'s intentional removal of her contraceptive ring during sexual activity.
- [24] C.S. reported to investigating clinicians that sexual intimacy with R.J.H. usually occurred while they were high on MDMA. They fell into the previously-described pattern of consuming drugs, watching pornography, and having sex. C.S. reported that she was uncomfortable watching pornography, but did so to please R.J.H. Her constant refrain has been that she feared R.J.H. was losing interest in her and she acquiesced in such activity because she thought it might serve to reignite their sex life.
- [25] Eventually R.J.H. began sending C.S. photos depicting child sexual abuse. She denies being interested or aroused by viewing such images but she did not object or delete them. With respect to the text messages about future sexual abuse of her half-sister and their own baby, C.S. said that most of the time her responses were neutral or simply the idle repetition of thoughts already expressed by R.J.H. She did not find any of these exchanges to be sexually stimulating and had no intention of following through with anything discussed. On the other hand, it cannot be denied that she was an active participant with R.J.H. in the commission of the offence for which she is now taking responsibility.

[26] In the court-ordered psychiatric assessment of C.S., the evaluating clinician made the following observations of the offender, all idiosyncrasies of grammar and diction in the original:

From psychiatric assessment, it appears that C.S.'s offence of sexual violence occurred in the context of her relationship with the co-accused. Firstly, there appears to be vulnerabilities in her self-identity, self-esteem, and self-confidence that were precipitated by problems with adjustment moving from Alberta to British Columbia, with difficulties establishing peer groups during the process of integrating into secondary school system at a later age and with the need to seek acceptance, approval, and affection from others. These stressors likely enabled the relationship with the co-accused to be fostered, and subsequently C.S. appears to rely on the relationship to meet her psychological needs. Further, given the age difference with C.S. being younger than the co-accused, there seems to have been misperceptions by [C.S.] in terms of the status, dynamics and roles of each partner in the relationship. It also appears that C.S. had limited communication and assertiveness skills to express her needs, desires, conflicts, and boundaries. Further, the presence of illicit substance use at the start of C.S.'s relationship with the co-accused may have precipitated her own disinhibition and established a pattern of watching pornography and engaging in sexual intimacy with the co-accused. These circumstances have possibly contributed to the progressive sexual deviant behaviours presented by the co-accused. C.S.'s inexperience, complacency, insecurity, and need to satisfy her partner perhaps allowed for further escalations of sexually deviant behaviours. C.S. seemed to have engaged passively in the acts of sexual violence with receipt and possession of child pornography, though there seems to be escalated behaviours subsequently with taking photographs of her younger half-sister, reportedly communicating to the co-accused that she was grooming her half-sister, becoming pregnant and discussing sexual acts upon their child. However, once separated from the co-accused, there does not appear to be a persistence of sexual violence or deviant behaviours. Further, C.S. does not meet the criteria for mental disorder or paraphilic disorder.

[27] I should stress, as well, that since the termination of her relationship with R.J.H., C.S. has stopped abusing substances.

[28] The psychologist who examined C.S. for the purposes of her dealings with child welfare authorities formed the view that C.S. fell into a "subjugated" category of women coerced into criminal behaviour by manipulative and domineering male co-offenders. I am persuaded that this opinion is sustainable. In my view, C.S. was the subject of coercion from the very beginning of this relationship. She was inculcated into the use of drugs and alcohol. She was sexually abused and then rejected. She was emotionally and psychologically dependent on her dysfunctional connection with R.J.H., and as he became more interested in viewing child pornography than in sexual relations with her, she acquiesced in his behaviour for fear of alienating him. That said, her active engagement in the offending cannot be overlooked and is a serious aggravating factor.

SENTENCING PRINCIPLES

- [29] The fundamental purpose of sentencing is to protect society and contribute 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 such 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.
- [30] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender, it should be increased or reduced to account for any relevant aggravating or mitigating factors relating to the offence or the offender, and it should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.
- [31] When it comes to offences involving the creation, possession, or distribution of child pornography, and the abuse of children generally, the governing sentencing principles without any debate or question are those of denunciation and deterrence: see s. 718.01 of the Criminal Code; *R. v. Watson*, 2018 BCCA 329 at para. 23; *R. v. Inksetter*, 2018 ONCA 474 at para. 16. Rehabilitation, though important, is a secondary consideration, see *R. v. Prince*, 2018 BCSC 987 at para. 93.
- [32] It is well recognised that the creation, acquisition, and distribution of child pornography has grown into a significant criminal industry of international reach that has led to the enslavement and violent abuse of legions of defenceless victims. The suppression of this vile traffic and the punishment of persons involved in it are the main preoccupations of law enforcement in this domain. The overall objective is to protect this most vulnerable demographic of the world population, to prevent and deter child sexual abuse, and to punish offenders. A jail sentence is almost always imposed for offences such as those at bar.
- [33] In *R. v. Hamlin*, 2019 BCSC 2266, the court at para. 32 set out a number of principles to be borne in mind when determining a proportionate sentence in cases involving child pornography:

- (a) the gravity of offences involving child pornography, as reflected by Parliament's choice to impose a mandatory minimum sentence, cannot be ignored. See, for example, the Ontario Court of Appeal's remarks about child pornography as a pervasive social problem in *R. v. Inksetter*, 2018 ONCA 474 at paras. 23-25;
 - (b) except in exceptional cases, the sentencing range for possession of child pornography starts with incarceration: see *Swaby*, at paras. 66-67; and, *Alexander*, at paras. 40-42; and
 - (c) BC courts have indicated a broad sentencing range of four months to two years for possession of child pornography: see *Alexander*, at paras. 37-39.
- [34] Sentences may range as high as five years where child pornography is possessed for the purpose of distributing it or where there is actual distribution or transmission of child pornography to other people: *R. v. Prince* at para. 77.
- [35] Sentencing is an individualised process, of course. No two cases are alike. But it is important for the sake of consistency and parity to consider the range of sentences established by previous judgments in roughly analogous cases.
- [36] In *R. v. Kwok*, [2007] O.J. No. 457 (Ont. S.C.J.) at para. 7 the court summarised the various aggravating and mitigating circumstances courts have considered in child pornography cases:

Aggravating Factors

- a criminal record for similar or related offences;
- whether there was also production or distribution of child pornography;
- the size of the collection;
- the nature of the collection, including the age of the children and the relative depravity and violence depicted;
- whether the offender is a pedophile or otherwise seen as a danger to children; and
- whether the offender contributed to the sexual victimisation of children for profit by purchasing the pornography rather than merely downloading it from the internet.

Mitigating Factors

- the youthful age of the offender;
- the otherwise good character of the offender;
- the extent to which the offender has shown insight into his problem;
- genuine remorse;
- willingness to engage in counselling or treatment;

- the entry of a guilty plea; and
- the extent to which the offender has already suffered for his crime.

[37] The mandatory minimum one-year sentences for possessing and accessing child pornography under ss. 163.1(4) and (4.1) of the Criminal Code were found to be unconstitutional in Hamlin at para. 34. The mandatory minimum one-year sentence for distributing child pornography was found unconstitutional in R. v. Mollon, 2019 BCSC 423 at paras. 112 and 113.

DISPOSITION

1) R.J.H.

[38] In seeking a 40-month jail sentence for R.J.H. the Crown relies on the following cases: R. v. Gauthier, 2019 ONCJ 626; R. v. Inksetter, previously referred to; R. v. Régnier, 2018 QCCA 306; R. v. Jonat, 2019 ONSC 1633; R. v. Prince, previously mentioned; R. v. C.C., 2016 ONSC 6386; R. v. Golding, 2018 ONCJ 320; R. v. Downing, 2018 ABPC 257; R. v. Kim, [2019] O.J. No. 5267; R. v. Bell, 2018 BCPC 187; and R. v. Mollon, previously mentioned.

[39] Mr. Chesterley, on behalf of R.J.H., did not submit any cases of his own, but critiqued the Crown's cases and suggested that they were, for various reasons, distinguishable. He submitted that an appropriate jail sentence in this case is one of six to 12 months incarceration.

[40] The cited decisions indicate a sentencing range of roughly between one and four years in R.J.H.'s case for possessing and making available or distributing child pornography. I have decided, principally because of R.J.H.'s youthfulness and the absence of any criminal history, that the upper end of the range is too high. I have considered each of the authorities, but will not review them individually. Instead I will focus on those that I find to be the closest comparators.

[41] In Prince, the accused possessed between 330 and 350 images and six to eight videos of child pornography depicting all manner of sexual abuse against children as young as toddlers. He actively distributed and solicited child pornography by communicating with others online through a peer-to-peer network, seeking to grow and share his collection which he organised into subfolders. The accused was 26 to 27 years old at the time of his offences and 35 by the time of sentencing. He denied responsibility and demonstrated no insight into his offending which took place over an approximately 12-month period. Mitigating factors included the offender's "dramatic and damaging" upbringing and relevant Gladue factors. He also had support from his father to help him achieve stability. He was sentenced to 12 months for possession, three years for possession for the purpose of distributing, and three years for distributing or making available child pornography.

- [42] In *Golding*, the 46-year-old accused possessed 612 images and 168 videos of child pornography. The material depicted various kinds of sexual abuse including penetration, bestiality, and group assaults of children between six and 14. He shared a good deal of material over the internet through a peer-to-peer network, but did not communicate with other individuals. He had a previous conviction for sexual assault against a child when he was a youth. His lengthy criminal record was otherwise unrelated. Mitigating factors included a difficult upbringing, being exposed to alcoholism and sexual assault in the home. He had support from his family and his partner and he had taken some steps toward rehabilitation through counselling. He pleaded guilty and demonstrated some limited insight and remorse for his victims. His risk of future sexual re-offending was low. The offender in that case was sentenced to 18 months in jail for possession and three years for making available videos of child pornography.
- [43] In *Bell*, the 36-year-old accused distributed child pornography over the internet using a messaging application on his cell phone, including images, videos, and written material created during messages exchanged with other users. He used the same application to engage in the internet luring of a child under the age of 18 for the purpose of facilitating a child pornography offence. He possessed 110 images and one video depicting various sexual acts involving children as well as bestiality. Aggravating factors included the accused's active sharing of his collection and thoughts, helping to grow and strengthen the online child pornography community. He encouraged recipients of his written child pornography to engage in sexual conversations with him about creating "incest families" and sexually abusing children together. He participated in the possession and distribution of such materials over an approximately 15-month period. He lacked insight and minimised his offending which was driven by sexual interest in children. He was considered a low to moderate risk to re-offend. He had no criminal record, had been regularly employed, did not abuse alcohol or drugs, and had no history of abuse or mental illness. Mitigating factors included his early guilty plea, willingness to attend treatment, and cooperation with the RCMP investigation. He was sentenced to two years for making and two years for distributing or making available child pornography as well as one year for internet luring.
- [44] Using these cases as a guide, in my view a fit range of sentence for this youthful first offender on guilty pleas to the very serious offences before the court is between two and three years in a penitentiary. The nature of R.J.H.'s collection is appalling. It includes the worst possible depictions of child sexual abuse. Its size is significant, larger than in many of the cases relied on by the Crown, though smaller than the massive collections in the tens of thousands of images seen in cases *Inksetter* and *Régnier*. That R.J.H. shared and grew this collection by communicating with others online is an aggravating factor in the present case.
- [45] R.J.H. was not involved in a child pornography distribution network of the magnitude described in some of the more serious cases with sentences of three years or more such as *Gauthier*, *Inksetter*, *Jonat*, or *Prince*. R.J.H.'s distribution took place in the more limited context of online communications with various individuals and with C.S. Nevertheless, he

was an active participant in the pernicious, harmful and blameworthy trafficking of child pornography. This is not a case of passively receiving or making such material available. Bell is a reasonably close comparator, factually speaking, with a two-year sentence for distribution, though the court noted in that case, and I strongly agree, that a longer sentence might very well have been warranted in the circumstances.

- [46] It is an aggravating feature of both of R.J.H.'s offences that he is a moderate risk to re-offend sexually coupled with his diagnosed Paedophilic Disorder. Although he seems to be developing some insight, in my view he fails even now to properly understand or appreciate his own sexual deviancy and risk to children. His sexualisation of his unborn child and C.S.'s younger half-sister is particularly alarming. He exploited C.S.'s vulnerability for his own gratification, using drugs and alcohol as tools to involve her in his deviant sexual desires and fantasies. He has not as yet started with any counselling or treatment, and the difficult and lengthy process of his rehabilitation has hardly begun.
- [47] As mitigating factors, as I have said, R.J.H. is still a relatively young person. It appears that substance abuse may have contributed to his offending. He had a somewhat difficult childhood, though not an abusive one. He has pleaded guilty and taken responsibility for his crimes. He has spared the public expense of conducting a trial. He has been on bail for over two years now on reasonably strict conditions and has committed no breaches.
- [48] Stand up, please, Mr. H.
- [49] THE ACCUSED R.J.H.: Yes, sir.
- [50] THE COURT: In all of the circumstances, taking into account all of the mitigating and aggravating factors, the cases cited by counsel on both sides, and the relevant sentencing principles, I have decided that a fit and proportionate aggregate sentence in your case is 30 months in a federal penitentiary. I hereby impose a sentence of 15 months for possession of child pornography and 30 months for making available or distributing child pornography. These sentences are to be served concurrently. Counsel have agreed that R.J.H. spent the equivalent of 77 days in custody prior to being released on bail and this time is to be deducted from his sentence.
- [51] You may be seated.
- 2) C.S.
- [52] In seeking a jail sentence of between 10 and 14 months for C.S., the Crown relies on the following cases: R. v. Prince; R. v. A.R., 2018 ONCJ 613; and R. v. S.L.G., 2019 BCPC 149. I have also considered R. v. C.H., 2020 BCSC 323, and R. v. Hamlin. The sentences in these cases range from three to 14 months for possession of child pornography.
- [53] The defence seeks a conditional jail sentence in the range of 9 to 12 months, relying on R. v. Hartsgrove, [2004] O.J. No. 6071; R. v. Walker, 2017 BCSC 2726; R. v. G.H.K., 2005 BCPC 618; R. v. C.H., 2020 BCSC 323; R. v. Qusted, 2019 BCPC 95; and R. v. A.B.C., 2018 BCSC 2346. The

defence authorities cover a range of sentences from a conditional discharge in Hartsgrove, to an intermittent 90-day sentence in Walker, to conditional jail sentences of 12 to 14 months in Qusted, A.B.C., and G.H.K., to a conventional or "real" jail sentence of six months in C.H. It may be that A.B.C. is the best comparator on the facts.

- [54] In my view there is nothing exceptional in C.S.'s case that could justify a departure from the general rule that people convicted of possession of child pornography must receive a jail sentence. A conditional discharge is completely out of the question, and I doubt that Hartsgrove has any application given the state of the law today. A suspended sentence would not be fit either, and indeed the defence has not suggested one. I would note, as well, that sentences for this type of offending have been going up over the years for the very good and simple reason that the global traffic in child pornography is increasing. The imperative of punishing and deterring those involved in it is of rising importance.
- [55] In the case at bar, as I have said before, C.S. did not actively seek out, access, or download the child pornography found on her iPhone nor did she possess anything like the volume of material collected by R.J.H. However, she did nothing to distance herself from the material or from R.J.H.'s offending. She did not delete the material from her device, report R.J.H., or sever ties with him as certainly she ought to have done. Instead, she participated in R.J.H.'s deviant fantasies including active discussions with him about committing acts of sexual abuse on her half-sister and their unborn child. She provided R.J.H. with a photograph of her sister after he expressed a sexual interest in her, potentially placing this person at risk. Her conduct overall is worthy of strong deterrence, condemnation and rebuke.
- [56] However, in my view, C.S.'s participation in the offence must be viewed in the context of an abusive and domineering relationship with R.J.H. and the coercion to which she was subjected from the very beginning. I accept that her moral blameworthiness is lower than the offenders in the majority of the cases relied on by the Crown. She was pregnant at the time she learned of R.J.H.'s interest in child pornography and she did not want to lose her relationship with him. In this state of heightened vulnerability, she made some very bad decisions that she sincerely regrets. She has pleaded guilty. She has expressed sincere and strong remorse for her offence. She is still very young, only 22, is otherwise of good character, a capable student, a productive member of society consistently employed when not at school. She is pursuing a useful career as an accountant. She has undertaken counselling and wishes to continue doing so. She has suffered the extrajudicial consequence of having lost custody of her newborn son, and in all likelihood she will face a long process of working with the Ministry of Children and Families to regain custody. She is a low risk to re-offend.
- [57] I have already mentioned that the minimum mandatory jail sentence for this offence, Ms. S., has been declared unconstitutional in a case called Hamlin and is no longer of any force or effect in British Columbia. This removes the only bar in the present case to the imposition of a conditional jail sentence. Having given the matter a great deal of thought, I have concluded that in all of the circumstances a conditional jail sentence will not endanger the

safety of the community and is consistent with the fundamental purposes of sentencing set out in ss. 718 to 718.2 of the Criminal Code. Fair-minded citizens evaluating the situation objectively would conclude that such a disposition has a suitably deterrent and punitive effect while respecting the principle of restraint set out in s. 718.2(e) of the Criminal Code.

[58] Ms. S., I conclude that your involvement in this offence was active, but also that you were manipulated into it. I am imposing a jail sentence, albeit one to be served in the community, because of the gravity of the offence and the degree of your residual responsibility for committing it. The possession of child pornography contributes to a vicious cycle of violence that draws in children all over the world. To that extent you have participated in a profoundly antisocial and damaging activity. I feel some sympathy for you, and to a degree I feel sorry for you, but nonetheless for the reasons given I have concluded that a jail sentence is necessary in your case. Do you understand?

[59] THE ACCUSED C.S.: Yes.

[60] THE COURT: In my view, a fit and proportionate sentence in C.S.'s case is a 12-month jail sentence to be served in the community subject to the following conditions:

1. You are to keep the peace and be of good behaviour.
2. You are to appear before this court when required to do so by this court.
3. You are to report to a conditional sentence supervisor by 4:00 p.m. on Thursday, July 2, 2020, and thereafter as and when directed by the conditional sentence supervisor.
4. You are to remain within the jurisdiction of this court unless you are given permission to go outside the jurisdiction either by your conditional sentence supervisor or by an order of this court.
5. You must notify your conditional sentence supervisor of your residential address of 555A Anderson Road in Comox, British Columbia, and you are to give the conditional sentence supervisor the fixed-line phone number of that residence and not change either your address or phone number without the approval of your conditional sentence supervisor or a court order.
6. You are to abstain absolutely from the consumption of substances banned by the Controlled Drugs and Substances Act, S.C. 1996, c. 19, except such substances as are prescribed for you as medicine by a member in good standing of the BC College of Physicians and Surgeons.
7. You are to abstain absolutely from the possession and consumption of alcohol.
8. For the first six months of this order, you must remain inside your residence 24 hours per day, except in case of medical emergency.

9. For the subsequent six months of this order, you will obey a curfew between 9:00 p.m. and 6:00 a.m. daily. You are not to be found outside your residence during those hours except in case of medical emergency.
 10. You must present yourself immediately at the door of your residence or answer the phone therein whenever a peace officer or your conditional sentence supervisor attends at the residence or rings the number to check on your compliance with the house arrest and curfew conditions of this order.
 11. You must attend, participate in, and successfully complete any intake assessment, counselling, or program as directed by your conditional sentence supervisor.
 12. You must complete 100 hours of community work service within 10 months of this order.
- [61] Once this conditional sentence order has expired, I order you to comply with the terms and conditions of a probation order of 12 month's duration. This is principally to give you access to additional counselling if you need it. The terms and conditions of the probation order are:
1. You are to keep the peace and be of good behaviour.
 2. You are to report to this court when required to do so by this court.
 3. You are to report to your probation officer forthwith upon the termination of your conditional jail sentence and thereafter as directed.
 4. Under the supervision of your probation officer, you are to attend, participate in, and successfully complete any intake, assessment, counselling, or program as directed by your probation officer.

ANCILLARY ORDERS

- [62] Pursuant to s. 487.051 of the Criminal Code I hereby order both R.J.H. and C.S. to provide samples of their DNA forthwith by the least intrusive means available.
- [63] Pursuant to s. 490.012 of the Criminal Code, I make an order in Form 52 requiring C.S. to comply with the Sex Offender Information Registration Act, S.C. 2004, c. 10 for a period of 20 years, and I order R.J.H., because he has been convicted of multiple offences as set out in s. 490.013(2.1) of the Criminal Code, to do so for life.
- [64] I further order forfeiture of the electronic devices seized from the offenders during the February 14, 2018 search of their home.
- [65] Finally, pursuant to s. 161 of the Criminal Code I hereby prohibit R.J.H. for a period of 25 years from:
- (a) attending a public park or public swimming area where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, playground or community centre;

- (b) seeking, obtaining or continuing any employment, whether or not the employment is remunerated, or becoming or being a volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years; and
- (c) having any contact -- including communicating by any means -- with a person who is under the age of 16 years, unless the offender does so under the supervision of a person whom the court considers appropriate.

[66] I have considered the Crown's submission for a similar order of prohibition against C.S., but in my view she does not herself pose a direct threat to children and such an order would be unnecessary and excessive.

[67] Anything else?

[68] THE CLERK: My Lord, Count 3, there will --

[69] THE COURT: Mr. Boccabella will take care of that.

[70] MR. BOCCABELLA: I direct a stay on the remaining count.

[71] THE CLERK: Thank you, My Lord.

"Baird J."

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