

CANADA / JUDGMENT

R. v. S.H.B.

2022 BCSC 441

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 441 R. v. S.H.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. S.H.B.,

2022 BCSC 441

Date: 20220224

Docket: 41600

Registry: Courtenay

Regina

v.

S.H.B.

Restriction on Publication: Pursuant to 486.4(1) C.C.C.

Before: The Honourable Madam Justice Gropper

(appearing by videoconference)

Oral Reasons for Sentence

Counsel for the Crown:

R.B. Richardson

Counsel for the Accused:

B. Lynskey

Place and Date of Hearing:

Courtenay, B.C.

January 21, 2022

Place and Date of Judgment:

Courtenay, B.C.

February 24, 2022

- [1] THE COURT: I will begin by reiterating what I said when we met last on January 21, 2022, regarding my reasons for the decision to preside at this proceeding by videoconference, and that was to ensure that the matter is dealt with as expeditiously as possible during the COVID-19 pandemic that presented an impediment to travel.

Introduction

- [2] S.H.B. was convicted by a jury on August 27, 2021, of the four counts on the indictment. They are:

Count 1: sexual interference contrary to s. 151 of the Criminal Code;

Count 2: invitation to touching contrary to s. 152 of the Criminal Code;

Count 3: sexual exploitation contrary to s. 153 of the Criminal Code; and

Count 4: sexual assault contrary to s. 271 of the Criminal Code.

- [3] The Crown agrees with the defence that Counts 1 and 2 overlap. Section 151 requires touching; s. 152 requires the invitation to touch. These counts cover the same timeframe. On that basis, Count 2 should be conditionally stayed in accordance with the principle against multiple convictions articulated in *R. v. Kienapple*, [1975] 1 S.C.R. 729. I am satisfied that the offences of sexual touching and the invitation to touch under Counts 1 and 2 have the same factual and legal nexus. Consequently, I direct a conditional stay of proceedings in relation to Count 2.

Circumstances of the Offences

- [4] As mentioned above, S.H.B. was convicted by a jury. Section 724(2) of the Criminal Code, R.S.C. 1985, c. C-46 provides:

(2) Where the court is composed of a judge and jury, the court

- (a) shall accept as proven all facts, express or implied, that are essential to the jury's verdict of guilty; and
- (b) may find any other relevant fact that was disclosed by evidence at the trial to be proven

- [5] In this case, the jury's verdict indicates that the jury accepted that there was at least one occasion between August 23, 2010 and August 22, 2016 when S.H.B. sexually interfered with E.K.; that between August 23, 2010 and August 22, 2016 S.H.B. invited E.K. to touch him for a sexual purpose; that between August 23, 2016 and August 22, 2018 S.H.B., being a person in a position of trust or authority towards E.K., sexually exploited E.K.; and between August 23, 2018 and November 1, 2018 S.H.B. sexually assaulted E.K.
- [6] The jury's verdict is ambiguous in respect of the frequency and duration of these offences.
- [7] E.K. was a credible witness. I accept her evidence in regard to what occurred between S.H.B. and her. Regarding the frequency of the sexual offences, I accept that the frequency was as E.K. described. There were over 100 times when S.H.B. asked E.K. to show him her breasts. He groped her breasts frequently, but less times than he asked her to show her breasts to him. E.K. said that S.H.B. touched her vagina with his fingers and masturbated her vagina 10-15 times. She estimated that oral sex with S.H.B.'s mouth on her vagina happened 15 times. She said that hand jobs, with her hand on S.H.B.'s penis, were the third most common thing and this occurred once a week for a year, and then twice a week when she was 17. E.K. said there were three instances of S.H.B. asking her to masturbate while he watched. S.H.B. masturbated on her chest twice. S.H.B. touched her vagina a couple of times. E.K. said that oral sex occurred between 15-30 times.
- [8] In some cases, E.K. was uncertain or inaccurate in regard to the exact total of the number of times the offences occurred, but that does not affect her overall credibility. I am satisfied that S.H.B. committed sexual offences against E.K. frequently and in the manner and over the years that she described.

Effect on the Victim

- [9] E.K. gave evidence about the harm that S.H.B. inflicted upon her. She described how upset she was when S.H.B. used the possible visit of her friend Hannah to require her to meet his sexual gratification. She described beginning to cut herself to release the turmoil in her. She testified to things being "really bad" when she started grade 12, and that she was just hoping to get to the end of the school year so she could graduate and move out. She testified to waking up on November 1, 2018 and feeling that if she did not tell somebody about what was happening that she "was going to die". She then related the extreme upset she felt when, after she disclosed the abuse to her teacher, the teacher told her that he had to notify police, and she described the guilt she felt at that point because she thought she had ruined her family.
- [10] E.K. provided a victim impact statement. In it, she says that she was most affected emotionally. She struggles to hide her emotions. She has some good days, but is often in a state of what she describes as "emotional implosion". She has difficulty making connections with others. She finds it hard to trust other people's intentions. She finds it hard to pursue close relationships. She feels ashamed. She suffers from stress. She thinks back to the

horrible situation in which she was trapped for so many years. She debates going back to her past coping mechanisms of harming herself.

- [11] R.K., E.K.'s mother, also provided a victim impact statement. She described the dark world of hurt and despair she has experienced since learning of S.H.B.'s offences. She has difficulty forgiving herself for bringing S.H.B. into her family and trusting him with E.K.

Circumstances of the Offender

- [12] S.H.B. is 55 years old. He has no criminal record. He denies that he has committed any of the offences.
- [13] S.H.B. is a permanent resident of Canada, but not a Canadian citizen.
- [14] S.H.B. completed high school and some additional courses and he obtained his forklift ticket. He has worked all of his adult life. He is currently working at Walmart.
- [15] S.H.B. was raised by his mother. His stepfather was abusive. He has some equivocal recollection about being touched as a very young child by his stepfather.
- [16] When S.H.B. was in his thirties he tracked down his biological father and connected with him.
- [17] S.H.B. has a son who is now 22 years old. S.H.B.'s ex-wife got full custody of the son when the parties divorced. S.H.B. has found it difficult to maintain a relationship with his son. S.H.B. has a brother in Port Alberni who is aware of the charges. While S.H.B. has family and social ties, he leads a relatively solitary existence.
- [18] S.H.B.'s health is not good. He is overweight. He has a hernia. He suffers from erectile dysfunction. He has hip arthritis, pre-diabetes and high blood pressure.
- [19] S.H.B. did not serve any presentence custody.

Positions of the Parties

Crown

- [20] The Crown submits that a seven- to eight-year jail sentence is appropriate for Counts 1 and 3, to be served concurrently. The Crown asserts that three years in jail is an appropriate sentence in respect of Count 4. It, too, is to be served concurrently.
- [21] The Crown also seeks the following ancillary orders:
- a) a firearms prohibition under s. 109(1)(a) and 109(1)(a.1)(ii);
 - b) a DNA order under s. 487.05;
 - c) a SOIRA order under s. 490.013(2.1); and

- d) an order prohibiting the offender from communicating, directly or indirectly, with E.K. or R.K. while in prison in accordance with s. 743.21.

Defence

[22] The defence asserts that a sentence of five years in jail is appropriate.

Applicable Sentence Authorities

[23] In *R. v. Friesen*, 2020 SCC 9, the Court addressed sentencing of an offender convicted of a sexual offence against a child. At para. 35, the Court states: "Sometimes, an appellate court must also set a new direction, bringing the law into harmony with a new societal understanding of the gravity of certain offences or the degree of responsibility of certain offenders."

[24] The Court recalibrated sentencing for sexual offences against children. At para. 43, the Court states: "It is important for this Court to provide guidance so that sentencing judges impose sentences that accurately reflect the nature of sexual offences against children and their impact on the victim." There are two factors that weigh in the Court's decision to "reset" those ranges for sentencing in these types of cases: (1) a shifted contemporary understanding of the nature and harms of sexual violence against children; and (2) Parliament's direction that such sentences should increase.

[25] At para. 50, the Court states:

To effectively respond to sexual violence against children, sentencing judges need to properly understand the wrongfulness of sexual offences against children and the profound harm that they cause. Getting the wrongfulness and harmfulness right is important. ...

[26] The Court then sets out a number of sociological factors regarding the wrongfulness and harmfulness of sexual offences against children. I include those that are applicable here:

- a) Harms to personal autonomy, bodily integrity, sexual integrity, dignity, and equality, including emotional and psychological harm;
- b) "Relational harm", that is harm to the children's relationships with their families and communities;
- c) The importance of the protection of children in Canadian society; and
- d) The disproportionate impact on girls, links to violence against women.

[27] Ultimately the sentencing judge must account for the potential harms, whether or not they materialized. As the Court states at para. 84:

As a result, courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. Even if an offender commits a crime that fortunately results in no actual harm, courts must consider the potential for reasonably foreseeable harm when imposing sentence

[28] In respect of specific guidance, the Court provided guidance about Parliament's legislative initiatives and the contemporary understanding of the wrongfulness or harmfulness of sexual violence against children in Canada (para. 106). The guidance is in respect of three specific points: (1) an upward departure from prior precedents and sentencing ranges required to impose a proportionate sentencing; (2) sexual offences against children should generally be punished more severely than sexual offences against adults; and (3) sexual interference with a child should not be treated as less serious than sexual assault of a child.

[29] Regarding the second point, sexual violence against children should be punished more severely than sexual violence against adults, but that should not be achieved by lowering sentences for adults (at para.118).

[30] In respect of the third, the Court described that it is an error to treat sexual interference as less serious than sexual assault (para. 120).

[31] At para. 114, the court stated:

it is incumbent on us to provide an overall message that is clear That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances [citing R. v. L.M., 2008 SCC 31] maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances" Instead, a maximum sentence should be imposed whenever the circumstances warrant it .

[32] Beginning at para. 121, the Court set out the significant factors to determine a fit sentence. They are:

- a) Likelihood to reoffend;
- b) Abuse of a position of trust or authority;
- c) Duration and frequency;
- d) Age of the victim;
- e) Degree of physical interference;
- f) Victim participation.

[33] In respect of degree of physical interference, the Court cautioned that sentencing judges ought not to reintroduce the relevance of the occurrence or non-occurrence of penetration; should not assume a straightforward correlation between the type of physical act and the harm to the victim; recognize the wrongfulness of these offences even where physical

interference is less pronounced; not create a hierarchy of physical acts; and cease using terms such as "fondling" or "caressing". As the Court noted in para. 138: "This factor reflects the degree of violation of the victim's bodily integrity. It also reflects the sexual nature of the touching and its violation of the victim's sexual integrity."

[34] The Court also cautioned that sentencing judges ought to take care where it is concerned with the relevance of apparent victim participation. It should not distract from the harm involved in the sexual violence, nor from the responsibilities that adults have toward children.

[35] In addition to Friesen, the Crown relies on two cases:

- a) R. v. R.D.W., 2021 BCSC 1851, where the Court imposed a sentence of eight years in respect of one count of sexual assault over a period of nine years; and
- b) R. v. Z.K., 2021 BCSC 1926, where the offender was sentenced to seven years in respect of a two-count indictment, one count of sexual interference contrary to s. 151 and one count of sexual touching contrary to s. 152. In that case, the offender abused his daughter for about two years commencing when she was in grade 4 and ending just before she began grade 6.

[36] In addition to Friesen, the defence refers to these additional cases:

- a) R. v. Josephson, 2021 BCSC 1947, where the Court notes that where an offender continues to deny the commission of an offence, such denial should not be considered an aggravating factor (para. 32).
- b) R. v. Pham, 2013 SCC 15, that directs that a sentencing judge should consider the collateral consequences of a sentence for a particular offender. In this case, S.H.B. is not a Canadian citizen and, following his period of incarceration, he may be deported from Canada.
- c) R. v. R.G.S., 2021 BCSC 1333, where the offender was sentenced to offences of sexual interference of two complainants, the Court imposed a sentence of three years for one complainant and four years for the other, after applying the totality principle.
- d) R. v. S.F.W., 2021 NSSC 312, where the sentence imposed was six years. The offender was living with the mother of the complainant. The first incident occurred when the complainant was seven, and the sexual offences continued for about five years.

Range of Sentence

[37] The maximum sentence when the Crown proceeds by indictment for Count 1 (sexual interference) is:

10 years from 2008 to July 16, 2015.

14 years from July 17, 2015 to present.

[38] S.H.B. began offending against E.K. from 2011 when she was 11, until she was almost 15, when the maximum sentence was 10 years. After that, the maximum period of jail was 14 years and that occurred for a year up to E.K.'s 16th birthday.

[39] The maximum sentence for Count 3 (sexual exploitation) is 14 years for the entire period of time of the offending, each year when E.K.'s age range was 16-18 years.

[40] Count 4 (sexual assault) refers to the time beginning at E.K.'s 18th birthday. The maximum sentence where the Crown proceeds by indictment is 10 years, where the complainant is over the age of 16.

Aggravating and Mitigating Factors

Aggravating

[41] The Crown submits that the following are aggravating factors:

- 1) Breach of trust and authority;
- 2) Grooming and emotional manipulation;
- 3) Frequent and prolonged offending (seven years);
- 4) The age range of the victim: ages 11-18; and
- 5) The emotional impact on the victim.

Mitigating

[42] The mitigating factors are that S.H.B. has no criminal record and, since he was charged with these offences, he has abided by the bail conditions. He also has a significant employment history.

Sentencing principles

[43] Sections 718-718.2 of the Criminal Code set out the principles of sentencing that apply.

[44] The fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society. A sentence should have one or more of the following objectives:

- to denounce unlawful conduct;
- to deter the offender and others from committing offences;
- to separate offenders from society where necessary;
- to assist in rehabilitating offenders;
- to provide reparations for harm done to victims or the community; and

· to promote a sense of responsibility in offenders in acknowledgment of the harm done to victims and the community.

- [45] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. A sentence should be similar to sentences imposed on similar offenders for similar offences.
- [46] An offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances. All available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.
- [47] Section 718.2 sets out statutorily specified aggravating factors. Those that apply here are:
- (ii) evidence that the offender, in committing the offence, abused . . . a member of the victim or the offender's family,
- (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years, [in respect of Counts 1 and 3];
- (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim, [and]
- (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health . . .
- [48] Friesen notes at para. 95 that Parliament expressed its will by increasing the maximum sentence and by prioritizing denunciation and deterrence in sentencing for sexual offences against children.

Discussion

- [49] I have set out the non-exhaustive list of factors to determine a fit sentence for offences such as these as set out in Friesen.
- [50] The first factor is the offender's risk to reoffend. I have a presentence report and a psychological report that have been marked as exhibits in this sentencing hearing.
- [51] The psychologist's report is somewhat ambiguous in respect of risk factors. It states that: [S.H.B.] does not present with routine offender management needs, or low risk for sexual offending. I am unable to exclude deviant sexual interests at present With respect to risk scenarios I am unconvinced that [S.H.B.] is at an elevated risk for sexually assaulting females with whom he does not have a prior acquaintanceship. Vulnerable, young females in a dependent relationship with him may be more at risk than those who are not.
- [52] I find that S.H.B.'s offences were opportunistic. He offended against E.K., who is the daughter of his common-law wife, and who was his stepdaughter. Similar circumstances are unlikely to be repeated. In respect of this factor, I find it neutral.

[53] The second factor to consider is whether the offender abuses a position of trust to commit a sexual offence against a child. In Friesen, the Court notes that "any breach of trust is likely to increase the harm to the victim and thus the gravity of the offence." (para. 126). The Court continues:

The spectrum of relationships of trust is relevant in determining the degree of harm. A child will likely suffer more harm from sexual violence where there is a closer relationship and a higher degree of trust between the child and the offender. This is likely to be the case in what might be described as classic breach of trust situations, such as those involving family members.

[54] Friesen notes that the presence of trust may inhibit children from reporting sexual violence and that that barrier may be "particularly pronounced where the perpetrator of the sexual violence resides with the victim and [as] a parent or caregiver." (para. 128).

[55] In Friesen, the Court notes that the abuse of the position of trust is an aggravating factor because it increases the offender's degree of responsibility. An offender who stands in a position of trust in relation to a child owes a duty to protect and care for that child that is not owed by a stranger. The breach of duty of protection and care enhances the moral blameworthiness. The abuse of the position of trust also exploits the children's particular vulnerability to trusted adults which is especially blameworthy (para. 129).

[56] At para. 130, the Court notes that "an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child." The court should not fail "to give legal effect of the increased gravity of the offence and the degree of responsibility of the offender in cases that involve an abuse of trust relationship."

[57] In this case, S.H.B. was in a position of trust in relation to E.K. He was her stepparent but he was her "dad" as she referred to him. He did the majority of the parenting of E.K. He had significant contact and influence over her on a day-to-day basis from age 11 throughout the entire offending period of seven years. E.K. looked to him for parental guidance and decisions. They shared similar interests and actively encouraged each other, particularly in their artistic endeavours.

[58] Although E.K. admitted that she hated it, she did assist S.H.B. with his work in delivering newspapers for several years. S.H.B. used these opportunities to get her to agree to sexual activity.

[59] S.H.B. abused his authority to affect and restrict E.K.'s day-to-day activities, such as the use of her phone or computer or seeing her friends. He did this as a means of extracting sexual favours from her.

- [60] S.H.B. manipulated E.K. from age 11. Her life was a series of "bargains" or "negotiations" over the number and kind of sexual favours she would provide to S.H.B. She described an example of this occurring when she was 12. S.H.B. told her that he can fix it so she did not fail grade 6, but she would have to come up with a mutually agreeable sexual favour to provide to him in exchange for his help. S.H.B. forced her to think up the sexual favour which in essence made her a party to it.
- [61] The third factor set out in Friesen is that sexual offences against children that are committed on multiple occasions for longer periods of time should attract significantly higher sentences.
- [62] I have accepted E.K.'s evidence that the offences started when she was 11 and continued, without abatement, until two months after she turned 18. There was a "ramping up" of the sexual acts that S.H.B. insisted upon. They occurred most frequently when E.K. was 14-15 years old. The offences were repeated and prolonged. They only ended when E.K. reported them to her teacher when she was in grade 12.
- [63] The fourth factor is the age of the victim. S.H.B. started offending against E.K. shortly after he moved into her family home when she was 11, and continued to do so until she was two months past her 18th birthday.
- [64] The fifth factor is the degree of physical interference. E.K. described many sexual incidents including "flashing," rubbing of her breasts and vagina, masturbating S.H.B. to ejaculation, his masturbating on her chest, and cunnilingus. S.H.B. attempted to have her agree to fellatio, vaginal and anal sex. She refused, by agreeing to perform other sexual activities that she found less distasteful but were still upsetting to her.
- [65] The sixth factor is victim participation. As noted, S.H.B. negotiated with E.K. about what sexual acts she would perform. The defence argues that while this bargaining is coercion, it is less predatory in that S.H.B. was bargaining with E.K. as almost an equal.
- [66] This is simply wrong. E.K. was not an equal. There was no quid pro quo: what S.H.B. was bargaining for was how E.K. would service him sexually. It is also contrary to the reasons in Friesen. This type of reasoning creates a hierarchy of sexual acts: for example, she did not have to perform fellatio if she let him perform oral sex on her.
- [67] This type of bargaining was referred to in Friesen (at para. 52) where the Court notes that: "children under the age of 16 lack the capacity to consent to sexual contact with an adult. [and] a child's participation in such contact is not a mitigating factor and should never be equated to consent." The Court also states: "Instead, personal autonomy refers to a child's right to develop to adulthood free from sexual interference and exploitation by adults".
- [68] Friesen continues at para. 151 by noting that judges must be clear that there is no defence of implied consent in Canadian law or that a failure to resist or silence or passivity does not constitute consent. A victim's participation should not distract from the harm the victim suffers as a result of sexual violence (para. 152). A victim's participation as a result of a

campaign of grooming by the offender or a breach of an existing relationship of trust. In no case should a victim's participation be considered a mitigating factor. Where the breach of trust or grooming led to the participation, that should only be seen as an aggravating factor (para. 153). Finally, "a victim's participation should never distract the Court from the fact that adults always have the responsibility to refrain from sexual violence towards children." "Adults, not children, are responsible for preventing sexual activity between children and adults" (para. 154).

- [69] I agree with the Crown that S.H.B. was aware of the influence that he had over E.K.'s life and that he manipulated that influence to gain compliance from her.
- [70] With the exception of the likelihood to reoffend, all of the Friesen factors are present in this case. S.H.B. repeatedly abused his position of trust and authority over E.K., over the period from age 11-18, on countless occasions. He engaged E.K. in a variety of sexual acts. He manipulated and groomed her, while maintaining that she had some negotiating power in this sordid relationship of his creation. He was the adult.
- [71] S.H.B.'s offences were of the highest moral blameworthiness.
- [72] As noted in Friesen, mid-single-digit penitentiary terms for sexual offences against children are normal.
- [73] In *R. v. R.G.S.*, Justice Fleming addressed the fundamental principle of sentencing in the Friesen context at para. 136:

I begin with proportionality, the fundamental principle of sentencing, which requires a sentence to be proportionate to the seriousness of the offence and the degree of responsibility of the offender. In applying this principle, I am directed by Friesen to give effect to the inherent wrongfulness, potential harm, and actual harm of [the offender's] sexual offences against [the victim], focusing on the harm to their personal autonomy, their bodily and sexual integrity, their dignity, and their relationships with family and friends. . . . In addition to considering the mitigating and aggravating factors, which include several of the significant factors identified in Friesen, I am required to balance the objectives of sentencing, giving primacy to the sentencing objectives of denunciation and deterrence.

- [74] In this case, S.H.B.'s offences reflected each of the aggravating factors set out in Friesen, with the exception of the likelihood to reoffend. Thus, this is not a case where a mid-single-digit sentence of five years is appropriate.
- [75] I appreciate the sentence in *R.G.S.* was three years on one count and four years on the other, but in that case the number of specific incidents were far less than here and the offender was an uncle, not a stepparent. In that case, the total sentence amounted to 8.5 years, but Justice Fleming adjusted that for totality to seven years.

- [76] Neither am I convinced that the six-year sentence imposed in S.F.W. represents the appropriate sentence. I agree with the defence that the facts are similar, although the offending occurred in S.F.W. over three years, not seven as is the case here. In that case, the Crown sought a six-year sentence and that is what the court imposed.
- [77] The cases referred to by the Crown, in my view, are more apt in this case.
- [78] In *R. v. C.K.W.*, Justice Brown imposed an eight-year sentence on a father after conviction by a jury. The father repeatedly sexually assaulted his daughter over an 11-year period. At the time of the offences, the maximum sentence available was 10 years' jail. The Crown sought an eight- to 10-year sentence.
- [79] In *R. v. Z.K.*, the Court imposed a sentence of seven years, having found that Z.K. abused his daughter for approximately two years, commencing when she was in grade 4. She was the ages nine to 11 when the offending occurred. There were multiple assaults that included him touching her breasts, rubbing her vagina, masturbating in front of her, and fellatio. The assaults stopped when the complainant refused to spend any more time at the offender's residence. The maximum sentence available to the court was 10 years and the Crown sought a 10-year sentence.
- [80] Justice Duncan addressed the point made in *Friesen*, that is to emphasize the psychological and emotional harm, as well as bodily integrity at (para. 24). She referred to a decision of *R. v. R.A.J.*, 2010 BCCA 304, where Bennett J.A. said at para. 30: "I cannot conceive of a more morally blameworthy act than a parent sexually offending against his or her child, particularly, as here, commencing at a young age and being repeated many times over a course of years." The court imposed a 10-year sentence on the offender.
- [81] Justice Duncan noted that offences in *R.A.J.* were different, in that they went on for longer and were more physically invasive, but concluded at para. 71, that
- the impact on the victims of both cases was significant, and to both of them, the abuse was at the hands of a parental figure must have seemed like a life sentence from which there was no escape. In both cases as well, the matters went to trial and the young complainants had to testify.
- [82] I make the same observations here.
- [83] The defence relies on the decision of *R. v. Pham*, and seeks an adjustment in the length of sentence imposed to reflect the collateral circumstances that S.H.B. faces, that of deportation, as he is not a citizen of Canada.
- [84] Unlike cases where the length of sentences impacts whether or not an offender will be deported, S.H.B. will likely face deportation. Any reduction of sentence in this case will not avoid the collateral consequences of deportation. The consideration here is the disproportional impact of the custodial sentence to be imposed.

- [85] At the time that Pham was decided, the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA], provided that a non-citizen "sentenced in Canada to a term of imprisonment of two years loses the right to appeal a removal order against him". The Provincial Court of Alberta judge imposed a sentence of two years on Mr. Pham upon his conviction for the production of marihuana and the possession of it for the purposes of trafficking. The judge did so without considering that such a sentence would cause Mr. Pham to be deported. The deportation point was not argued before the trial judge.
- [86] Mr. Pham appealed his sentence. Despite the Crown's concession that the sentence should be reduced by one day, the Alberta Court of Appeal disagreed and dismissed the appeal. In allowing Mr. Pham's appeal, the Supreme Court considered that parity and the correctional imperative of sentence and individualization should inform the sentencing process and that s. 718.2(b) justifies different sentences if the personal circumstances of the offender are different. The Court concluded that collateral consequences may be considered in the sentencing.
- [87] Pham establishes the following principles regarding collateral circumstances and their effect on sentencing:
- 1) the weight to be given to collateral consequences should be determined having regard to the type and seriousness of the offence. The court must still impose a sentence that is proportionate to the gravity of the offence and the degree of responsibility of the offender;
 - 2) the court must not impose inappropriate or artificial sentences in order to avoid collateral consequences;
 - 3) the collateral consequences must not dominate the exercise or skew the process in favour or against deportation;
 - 4) the further the sentence is varied from the range of otherwise appropriate sentences to avoid collateral consequences, the less likely it is to remain proportionate to the gravity of the offence and the degree of responsibility of the offender; and
 - 5) a trial judge is not compelled to adjust the sentence to avoid the impact of collateral consequences. It is at the trial judge's discretion to conclude that even a minimal reduction is inappropriate for the particular offence and for the particular offender. Collateral consequences are but one relevant factor, amongst others.
- [88] In the circumstances here, I decline to reduce the sentence based upon the potential collateral consequences that S.H.B. may face. He has been convicted of grave offences and there with a high degree of responsibility and moral blameworthiness. Pham sets out the principles to be applied where an offender will be deported, but in that case the length of sentence was determinative of whether that would occur and the difference was only one day. The two years less a day sentence was considered appropriate where the future prospects of the offender could be assisted or improved by reducing it from two years to two years less a day. That is not the case here.

[89] S.H.B., would you please stand.

[90] I find that a sentence of seven and one-half years' imprisonment on Counts 1 and 3 to be served concurrently is the appropriate sentence. I also find that a sentence of three years in respect of Count 4 properly reflects the purpose and principles of sentencing for you, an offender who has engaged in the type of sexual offences against E.K. that occurred in this case. The three-year term in relation to Count 4 will be served concurrently with the seven-and-one-half-year term on Counts 1 and 3.

[91] I make the following ancillary orders:

- 1) under s. 109(1) and (2) of the Criminal Code, you are prohibited from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, and explosive substances during the period that begins on the day which this order is made and ending not earlier than 10 years after release from imprisonment after conviction for these offences. You are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, or prohibited ammunition for life;
- 2) under s. 487.051 of the Criminal Code, I grant an order authorizing the taking of samples of bodily substances from you for the purpose of registration in the DNA National Databank;
- 3) under s. 490.013(2.1) of the Criminal Code, you are required to comply with the Sex Offender Information Registration Act for life; and
- 4) under s. 743.21 of the Criminal Code, you are prohibited from communicating, directly or indirectly, with E.K. or R.K. during your sentence of imprisonment.

[92] Thank you, sir, you may be seated. That concludes my reasons for sentence in this matter.

"Gropper J."

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