

CANADA / JUDGMENT

R. v. S.S.M.

2023 BCSC 1339

COURT

Supreme Court of British Columbia

DECIDED

19 July 2023

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2023 BCSC 1339 R. v. S.S.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. S.S.M.,

2023 BCSC 1339

Date: 20230719

Docket: X83650-2

Registry: New Westminster

Rex

v.

S.S.M.

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

Before: The Honourable Justice E. McDonald

Oral Reasons for Sentence

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Place and Date of Trial/Hearing:

New Westminster, B.C.

June 23 and July 19, 2023

Place and Date of Judgment:

New Westminster, B.C.

July 19, 2023

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- [1] THE COURT: I am delivering my reasons for sentence orally. Should the parties request a transcript of the reasons for sentence, I will refer to the people mentioned by their initials rather than by their names. I may also edit the reasons for grammar, to add headings, citations, and quotations, but the result will not change.

Introduction

- [2] On March 7, 2023, following a multi-day trial, I found S.M. guilty of the offences of sexual interference, invitation to sexual touching, and sexual assault. The victim, A.D., is S.M.'s younger cousin.
- [3] A.D. was between the ages of eight and 11 years old when the sexual offences occurred on numerous instances over the approximate two years between January 5, 2016, to December 31, 2018, inclusive.

Circumstances of the Offence

- [4] As mentioned, S.M. is A.D.'s cousin. S.M. is approximately eight years older than her. S.M. committed the offences at A.D.'s family home and at his own home. It is agreed that S.M. and his parents lived with A.D. and her family from May 2013 to October 2016.
- [5] In November 2016, S.M. and his family moved into their own home. A.D. and her family would visit with S.M. and his family at their home after they moved out. A.D. testified that S.M. began to touch her inappropriately not longer after he moved into her family home.
- [6] In my oral reasons for judgment issued on March 7, 2023, following the trial of the matter, I concluded, for reasons explained, that I was satisfied the Crown had discharged its burden of proving beyond a reasonable doubt all of the essential elements of each of Count 1 (sexual interference), Count 2 (invitation to sexual touching) and Count 3 (sexual assault), which offences I concluded took place on many occasions after S.M. had turned 18 years old on or after January 5, 2016, and they continued until December 31, 2018, inclusive.
- [7] I found that S.M.'s offending conduct against A.D. during the period in the indictment included incidents where he used his hand, penis, and tongue to touch areas of A.D.'s body such as her bottom and vagina. During some of the offending conduct, S.M. inserted his fingers into A.D.'s vagina and he instructed A.D. on how to hold his penis and to place his penis in her mouth while he used his hands to pull A.D.'s head towards his penis.
- [8] The severity of the offending conduct varied, for example, from touching A.D.'s bare bottom with his hands to digitally penetrating her vagina.
- [9] While the indictment alleged that the offences occurred from S.M.'s 18th birthday on January 5, 2016, until December 31, 2018, inclusive, A.D. testified that S.M. began touching her in a sexual manner shortly after he moved into the complainant's family home in 2013 (the "Other Incidents"). No charges were laid in respect of the Other Incidents, but the Crown sought to introduce evidence of the Other Incidents at the trial.
- [10] Following a voir dire and for the reasons that I explained in my ruling in respect of the voir dire, I concluded that evidence regarding the Other Incidents was admissible to provide context regarding the relationship of the accused and the complainant in light of allegations of grooming and escalating sexual misconduct over a long period.

Victim Impact

- [11] The victim, A.D., is now 16 years old. A.D. provided a poignant and articulate written statement that describes the immense negative impact of the offences on her and her family. The statement makes clear that on a daily basis, A.D. suffers from the effects of S.M.'s sexual abuse.

- [12] A.D. says that S.M.'s offences against her have caused her to miss out on many normal childhood and teenage life experiences. Instead of focussing on normal childhood experiences, A.D. feels that she was forced to devote herself to participating in a stressful and time-consuming criminal justice process. A.D. states that S.M.'s sexual abuse damaged her physical and mental health and she attributes that abuse as the cause of her diabetes diagnosis.
- [13] A.D. describes having struggles at school, as well as in her family and social life following the abuse. She feels hypervigilant around males, including male family members. She fears seeing S.M. and his family in the community. In short, it is clear that the sexual abuse has significantly negatively impacted A.D.'s life, despite her determination to be strong and move on.
- [14] In addition to serious negative personal impacts, A.D. describes seeing her parents and sister struggle with the aftermath of the offences. Importantly, A.D. describes that in her family's culture, speaking out about sexual abuse is uncommon and there is a considerable social stigma surrounding sexual abuse.
- [15] While A.D. has acted courageously by disclosing S.M.'s sexual abuse, she explains that she pays a personal cost. For example, it is especially difficult to talk openly with her parents about what she experienced. A.D. feels responsible for the pain and distress of her parents and sister, and she is also aware that they feel badly about not having protected her from the sexual abuse by S.M.
- [16] While A.D. benefits from her family's love and support, it is obvious that the sexual abuse has negatively impacted her and her family by leaving them with many misplaced feelings. The misplacement relates to the fact that it is S.M. who is exclusively responsible for the sexual offences against A.D.
- [17] The negative impact of the sexual offences on A.D.'s family is illustrated by P.D.'s articulate and detailed victim impact statement. P.D. is A.D.'s older sister and P.D. is the person to whom the sexual abuse was first disclosed.
- [18] P.D. describes that since learning of the sexual abuse, her life has been consumed by assisting A.D. and the rest of her family with navigating the criminal justice process. P.D. confirms that since learning of the offences, she and her family have endured stress, fear, helplessness, sadness, anger, and many other distressing emotions.
- [19] P.D. says that while S.M. takes no responsibility for his actions, A.D. and her family have been characterized as liars in their community, and they have endured victim blaming. In other words, despite S.M.'s conviction for the offences, A.D. and her family feel that they have suffered many negative consequences from disclosing the abuse and seeking justice.

- [20] Like A.D., P.D. has struggled in many aspects of her life since A.D. disclosed the offences. She experienced many negative emotional and health consequences in the aftermath. As the eldest child of immigrants, P.D. says she was thrust into the role of family representative as they participated in the justice system. At the expense of focussing on her own life, P.D. was required to take primary responsibility for assisting and supporting her parents and A.D. throughout the process.
- [21] P.D. describes the emotional trauma and upset suffered by A.D., herself, and her parents as intense and ongoing. Like A.D., P.D. feels that S.M.'s actions have robbed her of what ought to have been some of the most carefree and happy years of her young adult life.
- [22] P.D. also explains that S.M.'s wrongful actions and the fact that her family regarded him as akin to a brother carry particular significance because in their culture brothers are supposed to protect their sisters. I heard testimony during the trial of S.M., P.D., and A.D. participating in ceremonies in which S.M. promised to protect A.D. and P.D.
- [23] P.D. describes that since learning of the incidents, their father has become sad and withdrawn, while their mother struggles with anger and hypervigilance over her daughters' safety. P.D. is understandably exhausted by the weight of the responsibility and the stress that she has been carrying.

Circumstances of the Offender

- [24] S.M. was 18 to 20 years old at the time of the offences for which he has been convicted. S.M. was born in India. He and his parents lived in Spain before immigrating to Canada. In May 2013, when S.M. arrived in Canada, he was 15 years old. He started attending high school and he and his parents lived at A.D.'s family home. While A.D. testified that S.M.'s sexual abuse of her began shortly after S.M. arrived at her home and when he was 15 years old, S.M. was charged in respect of the offences as of his 18th birthday; namely, January 5, 2016 to December 31, 2018, inclusive.
- [25] S.M. graduated from high school and he attended post-secondary education. S.M. has completed the training and education necessary to become a Red Seal electrician if he can successfully complete the exam for that certification.
- [26] S.M. has worked either part-time or full-time during his time in Canada, including as part of his training to become an electrician.
- [27] S.M., who is now 25 years old, is a youthful offender with no criminal record. He has significant family support.
- [28] The defence submitted 14 letters in support of S.M., each of which I have read and considered. The letter writers include a number of neighbours who have known S.M. since 2016, and they state that they now regard S.M. as a family member who is a very trustworthy person, including around their female children. Another author is a family friend and business associate of S.M. who reports that he is polite and a helpful individual who works

hard and contributes to his community. One author reports having known S.M. since he was a child in India and having an excellent opinion of his character, describing him as smart, gentle, and a good person.

- [29] Many of S.M.'s relatives provided letters of support, indicating that in their experience, S.M. is a hardworking and trustworthy individual who deserves the opportunity to make reparations, something they describe S.M. as willing to do if given the opportunity.
- [30] In the letters from individuals who have observed S.M.'s work, they describe him as skilled, diligent, and extremely reliable. Several authors expressed concerns about providing S.M. with the opportunity to redeem himself by making a positive contribution in the future, something they say he is willing and capable of doing.
- [31] The letters submitted by the defence indicate that S.M. has a good support network consisting of family, friends, neighbours, and work associates.

Offender's Attitude Towards the Offences

- [32] S.M. denies, as he has done throughout, his guilt for the offences. S.M.'s failure to acknowledge responsibility for the offences is not an aggravating factor on sentencing and it is merely the absence of a mitigating factor.
- [33] Since S.M. denies his guilt and the court has no insight into the factors that may have led him to commit the offences. The corrections official who met with S.M. indicated that due to S.M.'s denial that the offences occurred, they could not explore the circumstances surrounding his involvement in the offences.
- [34] S.M. did indicate to the corrections official that he was open to completing any interventions the court deemed appropriate. However, it was noted that the available programs are most suitable for individuals who acknowledge their offending behaviour and who are willing to work on self-management plans to manage offending behaviour.

Risk Assessment

- [35] I have been presented with a pre-sentence report prepared by a probation officer. As mentioned, there is little in the way of risk assessment in the report because S.M. denies that he committed the offences.
- [36] Defence counsel points out that S.M. complied with all conditions imposed on him following his arrest and there is no suggestion that S.M.'s conduct since his arrest has involved offending behaviour of any kind.

Sentencing Positions of the Parties

[37] As a preliminary issue, there is a dispute between the Crown and the defence regarding the application of the principles set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729, 1974 CanLII 14 (SCC) to the counts of the indictment.

[38] The Crown submits that the factual and legal bases for Count 3 (sexual assault) are the same as for Count 1 (sexual touching). Therefore, the Crown submits that Count 3 ought to be conditionally stayed pursuant to the principles in *Kienapple*. However, the defence submits that since all three offences involve the same factual and legal nexus, Count 2 (invitation to sexual touching) and Count 3 (sexual assault) should be conditionally stayed.

[39] In *R. v. D.L.W.*, 2013 BCSC 1327, the court discusses the application of the *Kienapple* principle and states as follows:

[328] The *Kienapple* principle is known as the rule against multiple convictions. In *Kienapple v. The Queen*, 1974 CanLII 14 (SCC), [1975] 1 S.C.R. 729, 15 C.C.C. (2d) 524 at 539, Laskin J. held:

If there is a verdict of guilty on the first count and the same or substantially the same elements make up the offence charged in a second count, the situation invites application of a rule against multiple convictions.

[329] The *Kienapple* principle was clarified by the Supreme Court of Canada in *R. v. Prince*, 1986 CanLII 40 (SCC), [1986] 2 S.C.R. 480. *R. v. Prince* indicates that there must be a relationship of sufficient proximity, both factually and legally, in order for *Kienapple* to apply. In determining the question of whether there is a sufficient factual nexus between the two charges, the Court stated:

[20] In most cases, I believe, the factual nexus requirement will be satisfied by an affirmative answer to the question: Does the same act of the accused ground each of the charges? As Côté demonstrates, however, it will not always be easy to define when one act ends and another begins. Not only are there peculiar problems associated with continuing offences, but there exists the possibility of achieving different answers to this question according to the degree of generality at which an act is defined: [citations omitted]. Such difficulties will have to be resolved on an individual basis as cases arise, having regard to factors such as the remoteness or proximity of the events in time and place, the presence or absence of relevant intervening events (such as the robbery conviction in Côté), and whether the accused's actions were related to each other by a common objective. In the meantime, it would be a mistake to emphasize the difficulties. In many cases, including the present appeal, it will be clear whether or not the charges are founded upon the same act.

[330] The legal nexus is determined by looking at the relationship between the offences. The Court in *R. v. Prince* stated:

[32] [T]he requirement of sufficient proximity between offences will only be satisfied if there is no additional and distinguishing element that goes to guilt contained in the offence for which a conviction is sought to be precluded by the Kienapple principle.

[331] If one of the offences has a distinct element, the Kienapple principle may still apply in certain circumstances. These circumstances were summarized by Lambert J.A. in *R. v. Andrew* (1990), 1990 CanLII 984 (BC CA), 46 B.C.L.R. (2d) 325 at 330 (C.A.), as follows:

- 1) Where the offences are of unequal gravity, Kienapple may bar a conviction for a lesser offence, notwithstanding that there are additional elements in the greater offence for which a conviction has been registered, provided that there are no distinct additional elements in the lesser offence. (Prince p. 499)
- 2) Where an element of one offence is a particularization of essentially the same element in the other offence. (Prince p. 500)
- 3) Where there is more than one method, embodied in more than one offence, to prove a single criminal act. (Prince, p. 501. But I have used "criminal act" instead of "delict")
- 4) Where Parliament has deemed a particular element to be satisfied on proof of another element. (Prince p. 501)

[332] Lambert J.A. went on to say at 331:

In summary, in deciding whether the Kienapple principle is applicable in any case, this is the course that should be adopted:

A. Look at the facts, in the context of the offences, and ask whether only one wrongful act, in both its physical and mental elements, is involved.

B. Look at the offences, in the context of the facts, and ask whether there is an additional or distinguishing element in one offence that is not contained in the other. If there is, the Kienapple principle does not apply unless the additional and distinguishing element is covered by one of the four types of situations enumerated by Chief Justice Dickson as I have set them out above.

The two tests which I have described should be undertaken together. Each of the tests becomes an empty exercise unless the two tests complement each other. It is a double test; not two consecutive tests.

[40] When I consider the factual and legal nexus between the matters at issue in Counts 1 and 2, I conclude that a distinguishing element exists between these two offences: invitation to sexual touching under s. 152 of the Criminal Code, R.S.C. 1985, c. C-46 [Code] requires proof that the accused "invited, counselled, or incited the complainant to touch with a part of the body the body of the accused" and this element is not part of sexual interference under s. 151 of the Code: *R. v. P.R.J.*, 2023 BCCA 13 at paras. 51-61.

- [41] As a result, I find that pursuant to the principles in *Kienapple*, it is only Count 3 that ought to be conditionally stayed, and I direct a stay of Count 3.
- [42] The Crown submits that S.M. should receive a penitentiary sentence of six to seven years in relation to Counts 1 (sexual touching) and Count 2 (invitation to sexual touching), to be served concurrently. The Crown also seeks a number of ancillary orders, none of which appear to be opposed.
- [43] The defence submits that a fit sentence is either: (a) a conditional sentence order ("CSO") of two years less a day with a maximum of three years' probation; or, (b) a three-year penitentiary sentence for Count 1, assuming that Counts 2 and 3 are stayed. However, regarding the request for a conditional sentence order of two years less a day, the defence acknowledges that while the court is not precluded from imposing a CSO as an available remedy, the authorities do not appear to support the imposition of a CSO based on the facts that are before me.
- [44] I agree with defence counsel's assessment that recent authority indicates that a conditional sentence order for two years less a day would not be a fit sentence in the circumstances, including because there are no factors specific to S.M.'s physical condition, mental, or cognitive state at the time of the offences that, when properly analyzed, might attenuate his personal responsibility: *R. v. P.R.J.*, 2023 BCCA 169 at para. 57, citing *R. v. Hagen*, 2021 BCCA 2018 at para. 43.

The Law

- [45] The duty of a sentencing judge has been described as the obligation to design a "just and appropriate punishment that addresses the principles of sentencing and is proportionate to the culpability of the offender": *R. v. Williams*, 2021 BCSC 705.
- [46] The fundamental principles of sentencing are set out in the Code in s. 718 and in s. 718.01. There is a particular rule for cases where the victim is under the age of 18 years old, which places primary consideration on denunciation and deterrence.
- [47] In *R. v. D.J.H.*, 2022 BCSC 1743 at para. 35, the court notes that in respect of the sentencing objectives in s. 718 and in cases where the victim is under the age of 18 years old, placing primary consideration on the objectives of denunciation and deterrence means that the sentence imposed must be sufficient to reflect society's disapproval of subjecting a child (who in the present case, was between the ages of eight and 11 years old at the time of the offences), to serious acts of sexual abuse. On the other hand, deterrence requires fashioning a sentence significant enough to deter the offender from future offending behaviour, i.e. "specific deterrence", while also sending a message to the larger community that such offences will result in significant penalties, i.e. "general deterrence".
- [48] Section 718.2 requires the sentencing judge to consider a number of additional principles:

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

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,
 - (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,shall be deemed to be aggravating circumstances;
- (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;
- (c) where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- (d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders

[49] In the present case, there is a disagreement as to the circumstances that might constitute aggravating factors. The Crown's submission is that the court should, based on A.D.'s evidence that the sexual abuse started shortly after S.M. moved into her home in May 2013, and continued up to and after S.M.'s 18th birthday, treat that as an aggravating factor.

[50] The defence submits that A.D.'s evidence regarding the uncharged conduct was admitted for the narrow purpose of allowing A.D. to tell her story and to assess her credibility, but for no other purpose. The Crown referred me to *R. v. Cromwell*, 2021 NSCA 36, as authority for treating uncharged incidents as aggravating factors in sentencing.

[51] The Supreme Court of Canada has made clear that courts may consider evidence establishing the commission of an uncharged offence as an aggravating factor on sentencing, provided it is not for the purpose of punishing the accused for the uncharged offence: citing *R. v. Angelillo*, 2006 SCC 55 at para. 32. In particular, evidence of uncharged offences may be relevant to establishing the offender's character, their risk of re-offending, and their chances of rehabilitation: *R. v. McDonald*, 2017 BCCA 271 at paras. 14-17.

[52] Importantly, at para. 32 of *Angelillo*, the Court states:

If the extrinsic evidence is contested, the prosecution must prove it. Since the facts in question will doubtless be aggravating facts, they must be proved beyond a reasonable doubt . . .

[53] In the present case, the evidence concerning the pre-charge conduct of S.M., in other words, the Other Incidents, was admitted for certain relevant purposes at trial. Although I accepted A.D.'s evidence about the sexual abuse that began shortly after S.M. moved into her home, that conduct was not charged conduct and it was not subject to the requirement of proof beyond a reasonable doubt of its essential elements. A Gardiner hearing would be required for that conduct to be used as an aggravating factor, and since no such hearing was held, it cannot be considered.

Determination of a Fit Sentence

[54] To determine a fit sentence, I must first consider, as provided by s. 718.1 of the Code, the fundamental principle that the sentence imposed must be proportionate to the seriousness of the offence and the degree of the offender's responsibility. I must also consider the parity principle in s. 718.2(b), recognizing that the sentence I impose in this case should be consistent with or similar to other sentences for similar offences committed by similarly-situated offenders: D.J.H. at paras. 32-33.

[55] In *R. v. Friesen*, 2020 SCC 9 at paras. 42, 50 and 90, the Supreme Court of Canada provides clear instructions for sentencing judges in cases involving sexual abuse of children, including that sentences for sexual abuse of children must increase and the sentencing judges must properly understand the wrongfulness of sexual offences against children and the profound harm caused to them.

[56] Because A.D. was under the age of 18 at the time of the offences, I must give primary consideration to the objectives of denunciation and deterrence, as required by s. 718.01 of the Code. I must also recognize the principles of s. 718(d) and 718.2(d) that require me to fashion a sentence that will, to the greatest extent possible, allow S.M. to be reintegrated into society and to impose the least-restrictive penalty that can be justified in the circumstances.

[57] Considering all of the circumstances and submissions, I find the following aggravating factors:

- a) A.D.'s young age at the time of the offences, namely that she was between the ages of nine and 13 years old, is a significant aggravating factor;
- b) The significant impact of the offences on A.D., especially given that S.M. was considered to be part of the family and A.D. regarded him as akin to her brother, is an important aggravating factor;

- c) The sexual offences occurred on many occasions, including inside A.D.'s family home over a two-year period, and during these offences, A.D. was repeatedly victimized, which goes to the seriousness of the conduct and to S.M.'s moral culpability;
- d) The nature of the sexual offences escalated over time and the activity took on a pattern of grooming to include highly-invasive sexual activity, for example, digital penetration of A.D.'s vagina, which reflects a high degree of violation of her bodily and sexual integrity, and a great risk of potential harm; and
- e) That S.M. told A.D. that if she told anyone about the offences, she would be disbelieved and her parents would no longer love her and they would disown her.

[58] The Crown submits that while S.M. never occupied a traditional position of trust vis-à-vis A.D., nevertheless in their specific cultural context, S.M. was supposed to protect A.D. and not victimize her. I agree that S.M. was not in a traditional position of trust with A.D., and while the family regarded him as like a brother figure, slightly younger than P.D., I do not find that he was put in charge of A.D.'s care. Rather, S.M. was treated as a close family member and sibling-like figure to A.D. However, as I mentioned earlier, I have taken into account S.M.'s role as a sibling-like figure to A.D. as it relates to the severity of the impact of the offences on her.

[59] The Crown submits, and I agree, that S.M.'s continued denial of the offences is a neutral factor in terms of sentencing. S.M. is entitled to deny that he committed the offences, notwithstanding his conviction for the offences. I have already addressed how that impacts the information that is available to me as the sentencing judge.

[60] Considering all of the circumstances and submissions, I find the following mitigating factors:

- a) S.M. has no criminal record;
- b) S.M. is a youthful offender, having committed the offences when he was between the ages of 18 and 20 years old, and he is now 25 years old;
- c) S.M. has the benefit of a strong social and family network, who provide him with ongoing support, including by providing the court with many letters of support; and
- d) S.M. has successfully pursued education and training and employment throughout the period that is at issue, and he has also worked as a volunteer.

[61] While not strictly an aggravating or mitigating factor, defence counsel informed me that S.M. is liable to a collateral consequence that flows as a result of his conviction, pursuant to the Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA]. This collateral consequence is relevant to the principles of individualization and parity, and the weight to be given to the collateral consequences is case specific: *R. v. Pham*, 2013 SCC 15 at paras. 11-12.

- [62] In respect of the collateral consequence, I note the defence submission that a CSO, while possible, is not likely to be an appropriate sentence, as well as the further defence submission that regardless of whether the court accedes to either side's request for a three-year or a six- to seven-year sentence, the collateral consequence under IRPA is already triggered.
- [63] Therefore, while I am aware there is a collateral consequence to S.M. pursuant to IRPA, in the particular circumstances that are before me, it is a neutral factor.
- [64] The Crown referred me, in addition to Friesen, to a number of cases that could be useful for purposes of parity, all of which I have considered, including:
- a) R. v. B.L.J., 2023 BCPC 39 - where, following a trial, a sentencing judge imposed a seven-year sentence on a middle-aged offender who engaged in four incidents over a number of years involving intercourse, digital penetration, and other sexual touching of his great niece, who was between the ages of six to 11 during the offences. In B.L.J., the offender had no criminal record and he continued to deny his guilt for the offences.
 - b) In R. v. Z.K., 2021 BCSC 1926 - where, following a trial, a sentencing judge imposed a seven-year sentence on a father with no criminal record, aged 36 to 38 at the time of the offences, for offences committed against his daughter who was nine to 11 years old at the time. The offences included sexual touching of the complainant's breast, digital penetration, and forcing his penis into her mouth, and this occurred once or twice per month for approximately two years.
 - c) Finally, R. v. Nahanee, 2021 BCCA 13 - where, following a guilty plea, the sentencing judge imposed a six-year sentence and a four-year sentence for a total sentence of eight years on an offender who was 19 at the time he engaged in repeated sexual offences, including intercourse and digital penetration of his nieces while they lived in the same home. For the offences against one of the offender's nieces, who was 13 at the time of the offences, which included repeated sexual intercourse over a long period of time, the sentencing judge imposed a six-year sentence. As aggravating factors, the complainant was found to have abused a position of trust as the uncle of the complainants and to have exposed the complainants to the additional risk of unprotected sexual intercourse. There were mitigating factors in Nahanee similar to the case at bar, except for the guilty plea and an expression of true remorse. Ultimately the Court of Appeal dismissed the appeal from sentences, finding that the sentence imposed were not unfit.
- [65] The defence counsel points out that for many of the cases relied on by the Crown, the offender was in a position of trust, the offender was not a youthful offender, or the offending conduct was more severe, for example, involving unprotected sexual intercourse.
- [66] The defence counsel referred me to a number of cases, all of which I have considered, including R. v. Klair, 2021 BCSC 1976 where, following a trial, the offender's conviction for eight offences of sexual touching and sexual interference against four younger relatives in a

large extended family, the sentencing judge imposed a three-and-a-half-year sentence on the offender. At the time of the offences, the offender was between the ages of 19 and 23 years old, and the victims were between the ages of nine to 13 years old. The offences occurred while the victims shared a bed with the offender and, in some instances, the offender forcibly held the victim down while touching their genitals, and the most invasive offence involved the offender shoving an object into a victim's anus.

- [67] In Klair, the victims of the abuse reported experiencing similar impacts to those of A.D., including feeling blamed and disbelieved by extended family members.
- [68] In my view, the offending conduct at issue in Klair is factually distinguishable. The offences in Klair did not involve repeated escalating offences against one young victim.
- [69] As to the likelihood of S.M. to re-offend, there is nothing to assist me in that regard, given that S.M. denies the offences and, in those circumstances, no risk assessment could be conducted. However, I have drawn no adverse inference against S.M. because he continues to deny that the offences occurred. As for the position of trust, I have not found that S.M. exercised a traditional position of trust because, for example, he was not put in charge of A.D.
- [70] As for the duration and frequency of the offences, they occurred frequently over a two-year period and they escalated in severity. A.D. was between the ages of nine and 13 when the offences occurred. The nature of the sexual interference and the sexual touching, while not involving vaginal sexual intercourse, did involve invasive digital penetration of A.D.'s vagina, touching of A.D.'s breasts and vagina, including with S.M.'s penis, and placing A.D.'s hands and mouth on S.M.'s penis. The nature of the sexual interference and sexual touching was serious, with a pattern of increasing severity and the potential damage from the offences is heightened by the sibling-like relationship between S.M. and A.D.
- [71] Against this, I acknowledge that S.M. is a youthful offender with no criminal record and with good family support and a strong educational and employment background.
- [72] Taking all of the factors, statutory objectives, and the evidence and authorities into account, I conclude that an appropriate and fit sentence for each of Count 1 and Count 2 that is ultimately proportional to the seriousness of the offences and S.M.'s degree of responsibility, is four years and six months of imprisonment.
- [73] In deciding whether to impose a consecutive or concurrent sentence, I am assisted by *R. v. Nystrom*, 2023 BCCA 232, where the Court of Appeal states at para. 35:
- [35] Consecutive sentences for multiple offences may be imposed where the offences do not arise from the same event or series of events . . . Conversely, concurrent sentences may be imposed where "the acts constituting the offence were part of a linked series of acts within a single endeavour" . . . A decision to impose consecutive or concurrent sentences is to be treated with the same deference owed to judges concerning the length of the sentences . . .

[74] In my view, the acts constituting the offences were a series of linked acts within the endeavour of sexually abusing A.D. As such, I conclude that imposing a concurrent sentence on S.M. is appropriate.

Imposition of Sentence

[75] S.M., please stand.

[76] I impose on you a sentence of four years and six months for each offence in the indictment, to be served concurrently. The sentences will be entered as follows:

- on Count 1, four years and six months imprisonment;
- on Count 2, four years and six months imprisonment to be served concurrently with the sentence imposed on Count 1.

Therefore, I am sentencing you to a term of imprisonment of four years and six months in total.

[77] You may have a seat, S.M.

[78] There will also be the following ancillary orders:

- a) Pursuant to s. 487.051(1) of the Code, there will be a DNA order in relation to both counts. Pursuant to s. 487.051(1), I authorize the taking of samples of bodily substances from S.M. reasonably required for the purpose of forensic DNA analysis.
- b) Pursuant to s. 109(1) and (2) of the Code, there shall be a firearms prohibition for a period of 10 years prohibiting S.M. from possessing any firearm, other than a prohibited firearm or restricted firearm, and any cross-bow, restricted weapon, ammunition, and explosive substance during the period that begins on the day on which this order is made, and ending not earlier than 10 years after your release from imprisonment after conviction for these offences, and S.M. is prohibited from possessing any prohibited firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.
- c) Pursuant to s. 490.011(a) and 490.012(1) and 490.013(2)(b) of the Code, there will be an order requiring S.M. to comply with the provisions of the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA] for 20 years; and
- d) Pursuant to s. 743.21 of the Code, I order S.M. to have no contact or communication, directly or indirectly, with A.D. for the duration of his custodial sentence.

[79] Regarding Crown's request for orders pursuant to s. 161 of the Code, in light of all of the circumstances, including because S.M. will be required to comply with SOIRA for a lengthy period, I am not convinced that it is necessary to make the orders sought and I therefore decline to do so.

[80] That concludes my oral reasons for sentence. Counsel we may now adjourn.

"E. McDonald J."

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Prepared on 26 October 2026 · Esheria