

CANADA / JUDGMENT

R. v. Sohal

2019 BCSC 2271

COURT

Supreme Court of British Columbia

DECIDED

16 December 2019

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2019 BCSC 2271 R. v. Sohal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sohal,

2019 BCSC 2271

Date: 20191216

Docket: X80523

Registry: New Westminster

Regina

v.

Sandeep Sohal

Restriction on publication: A publication ban has been mandatorily imposed under ss. 486.4(2) and 486.5(1) of the Criminal Code of Canada restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment. This publication ban applies indefinitely unless otherwise ordered.

Section 16(4) of the 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 Madam Justice Maisonville

Oral Reasons for Sentence

Counsel for the Crown:

S. Sidhu

S. Currie-Roberts

Counsel for the Accused:

M.E. Bloom

Place and Date of Hearing:

New Westminster, B.C.

December 16, 2019

Place and Date of Judgment:

New Westminster, B.C.

December 16, 2019

[1] THE COURT: I convicted Sandeep Sohal on September 27, 2018, following a nine-day trial of all counts on an indictment as follows:

Count 1: Sexually assaulting the complainant, S.U., while using a weapon, an imitation firearm, contrary to s. 272(2)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code];

Count 2: Unlawfully confining S.U. contrary to s. 279(2) of the Code;

Count 3: Knowingly uttering or conveying a threat to cause death or bodily harm to S.U. contrary to s. 264.1(1)(a) of the Code.

[2] The predicate offence was committed from May 23 to May 24, 2016. Mr. Sohal threatened S.U. with an imitation firearm and directed her to go to a back bedroom in the basement of the house he lives in with his family where he forced her to perform oral sex and forced her to submit to sexual intercourse.

[3] Mr. Sohal testified at trial. His defence of consent and denial of the use of an imitation weapon was rejected.

[4] The Crown applies to have Mr. Sohal designated a dangerous offender pursuant to s. 753 of the Code and sentenced to a period of custody followed by a long-term supervision order ("LTSO") for a period of ten years. They contend that any sentence short of that is insufficient to protect the public and will not prevent Mr. Sohal from committing a serious personal injury offence in the future.

the position of the parties

Position of the Crown

[5] The following fixed term sentences are sought by the Crown pursuant to s. 753(4)(b) of the Code:

Count 1

Sexual assault with a weapon

Six to Eight years imprisonment

(less time served)

Count 2

Unlawful confinement

Two years imprisonment

(concurrent, less time served)

Count 3

Uttering threats

One year imprisonment

(concurrent, record to reflect time served)

[6] The Crown submits that it is established beyond a reasonable doubt that Mr. Sohal meets the criteria set out in s. 753(1)(a)(i) and (ii) in accordance with s. 753(1) of the Code and he must be designated a dangerous offender.

[7] Mr. Sohal has a prior record for sexual assault as a young offender. Those offences occurred in November 2007 and April of 2008. To establish the patterns required for determination by s. 753(1)(a)(i) of the Code, the Crown relies upon Mr. Sohal's convictions as a young offender.

[8] In the alternative, should Mr. Sohal not be designated a dangerous offender, the Crown seeks that Mr. Sohal be designated a long-term offender pursuant to s. 753.1 of the Code and a fixed sentence as noted in paragraph 5 of these reasons, and an LTSO of ten years be imposed.

[9] The Crown also seeks the following ancillary orders:

- an order pursuant to s. 487.051(1) of the Code, authorizing the taking of samples of bodily substances from Mr. Sohal for the purposes of forensic DNA analysis. Both sexual assault with a weapon and the unlawful confinement are primary designated offences under s. 487.04 and, consequently, the order is mandatory;

- Pursuant to s. 490.012(1) of the Code, an order that Mr. Sohal comply with the provisions of the Sex Offender Information Registration Act, S.C. 2004, c. 10 [SOIRA]. Both sexual assault with a weapon and unlawful confinement are designated offences in s. 490.011(1) and, consequently, the order is mandatory. Section 490.013(2.1) stipulates where an offender is convicted of more than one specified designated offence, the order shall be for life.
- Pursuant to s. 109 of the Code, an order prohibiting Mr. Sohal from possessing weapons for life. This is a mandatory order since Mr. Sohal has been convicted of sexual assault with a weapon and unlawful confinement. Since this is not Mr. Sohal's first conviction for sexual assault with a weapon, s. 109(3) dictates the prohibition shall be for life.
- Pursuant to s. 460 of the Code, the Crown also seeks to disclose to Corrections Services Canada ("CSC") the report from a forensic psychiatrist, Dr. Todd Tomita, any observations of the court with respect to the reasons for finding Mr. Sohal to be a dangerous offender, and a transcript of the trial of Mr. Sohal.

Position of the Defence

- [10] The defence's submission on sentencing was that in respect of the three offences that Mr. Sohal was found guilty of, the appropriate sentence is two years less one day. Defence counsel submits that B.C. Corrections can properly treat medium and high risk sexual offenders.
- [11] Defence's submission is premised on a number of considerations, including that the index offence is Mr. Sohal's first adult conviction and therefore rehabilitation is one of the fundamental principles in sentencing. It is argued that proportionality must be considered by the court along with the principle of restraint.
- [12] It is argued that the sexual offender programs available through B.C. Corrections institutions would be appropriate treatments for Mr. Sohal who would be eligible for them. Specifically, defence counsel refers to the programs at Ford Mountain Correctional Centre or B.C. Corrections' Integrated Transitional and Release Planning Program. Defence counsel argues that these programs are capable of treating medium and high-risk sexual offenders. Defence counsel submits that the treatment programs offered by B.C. Corrections are sophisticated and comprehensive, citing the work done by the B.C. Corrections' Performance Research and Evaluation Unit ("PRE Unit") in developing programs.
- [13] It is also submitted that Mr. Sohal, who is 29 years of age, has prospects for rehabilitation on the basis of the following:
- he has completed several programs while in custody;
 - he has complied with stringent house arrest conditions from after his release on the predicate offence on June 2, 2016, until his conviction, September 27, 2018;
 - he is a polite respectful inmate and works as a cleaner;

· according to letters of support authored by a friend and his family, he has expressed remorse and has insight into his offence; and

· he has the support of his immediate and extended family whom I note are here to support him today.

the offender

[14] He is, again as noted, 29 years of age. He was living with his family in Surrey, B.C., at the time of his arrest. He was not working at that time due to a recent knee surgery and is unclear what his employment history was prior to that.

[15] Mr. Sohal has a criminal record consisting of three convictions, all for which he was sentenced under the Youth Criminal Justice Act, S.C. 2002, c. 1 (the "youth offences"). The predicate offence was committed by Mr. Sohal three-and-a-half years after his youth sentence concluded.

[16] Turning to Mr. Sohal's youth record, it consists of the following convictions:

Convictions

Offence Date

Disposition Date

Sentence

s. 272(2)(b) - sexual assault with weapon/ threats/bodily harm

27-Nov-2007

25-Jan-2010

Open Custody 6 months;

Community supervision 3 months;

Intensive support and supervision 2 Years;

Firearms prohibition 5 years (mandatory);

Forfeiture.

s. 334(b) - Theft \$5,000 or under

27-Apr-2008

s. 272(2)(b) - Sexual assault with weapon/ threats/bodily harm

27-Apr-2008

- [17] The three offences were all committed within a five-month period when Mr. Sohal was 17 years of age. Two of the offences were committed in one day. He has two convictions for sexual assault with a weapon. His conviction for theft occurred in circumstances with sexual overtones.

Sexual Assault with a Weapon - November 27, 2007

- [18] On November 27, 2007, at 9:20 p.m., Mr. Sohal began communicating with the victim on MSN Messenger Chat Service using a false name. The victim was a 16-year-old girl. He began to flirt with her and told her she was beautiful. He then invited the victim to meet him at the schoolyard at Senator Reid Elementary School to smoke some marihuana. The victim agreed to meet him at the schoolyard, which was metres away from Mr. Sohal's home.
- [19] Mr. Sohal arrived wearing a bandana covering the lower part of his face, a hooded sweatshirt, and a hat. He produced a can of bear spray and pointed it at the victim. He demanded that she give him her cellphone and he told her to get on her knees and to perform oral sex on him.
- [20] The victim gave him her cellphone and got on her knees, at which point he told her that if she performed oral sex, he would leave her alone. He then opened the front of his pants and took his penis out. He tried to put his penis in her mouth, but she kept moving her head and saying "no". He asked for her hand, but she did not give it to him. He asked if he could suck on her breast which she refused. She then saw a school janitor approaching and yelled "Fire" and ran away. Mr. Sohal also ran away. Mr. Sohal claimed he was under the influence of the drug, ecstasy, at the time of the offence.

The Attempted Theft - April 27, 2008

- [21] On April 27, 2008, at 2:00 a.m., two 19-year-old women were walking home along 125th Street from 92nd Avenue in Surrey, B.C. They saw Mr. Sohal walking behind them. Mr. Sohal walked past them and then turned around and produced a knife, telling one of his victims to "give everything you've fucking got or give me fucking head". The victim told him that she did not have anything and he said, "Well, give me head then". Mr. Sohal repeated his demands a number of times and touched the victim's stomach and grabbed her breast.
- [22] The second woman phoned the police from her cellphone. When Mr. Sohal discovered that she was speaking to the police, he began to chase both women with the knife. They were able to find a place to hide and Mr. Sohal ran away. He was wearing a hooded sweatshirt and a bandana over the lower portion of his face during the incident.

Sexual Assault with a Weapon - April 27, 2008

- [23] At 10:30 p.m. on April 27, the same day as the attempted theft offence, Mr. Sohal began an online chat with a 17-year-old girl using MSN Chat Service. He knew the victim from school, but identified himself as "Mike" who was a high school acquaintance of the victim. During the conversation, the victim told Mr. Sohal whom she believed to be Mike, that she wanted to party. The victim agreed to meet Mr. Sohal at the schoolyard to smoke marihuana. She asked if she could spend the night with him and he agreed.
- [24] The victim went to the schoolyard to find Mr. Sohal with the lower half of his face covered with a bandana. He produced a knife and told the victim she would be hurt if she did not do as she was told.
- [25] He took the victim by the arm and rubbed himself against her. He placed his hand on her crotch on the outside of her clothing and held a knife close to her stomach. She asked him to move the knife and began to cry. Mr. Sohal told her that she was going to have sex with him and that he would hurt her if she did not. He asked the victim if she had any condoms and she indicated that she did. He demanded one. He took off his pants and directed her to place the condom on his penis. He attempted intercourse with the victim while she was on her hands and knees, but was unsuccessful. He then had vaginal intercourse with her for approximately five minutes while she laid on her back. His face was covered during the entire incident and the knife lay on the ground beside him. When he was finished, he stood up, put his pants on, and ran away.

The Youth Sentence

- [26] Mr. Sohal was arrested on May 2, 2008, in respect of the youth offences. He was cooperative on arrest and gave a sworn statement to the police admitting his involvement. On the same day, a search warrant was executed which resulted in the seizure of various articles of clothing including track pants, sweatshirts, and numerous bandanas. A used condom was located in the area surrounding the school on May 3, 2008. DNA of the victim and of Mr. Sohal was located on the condom.
- [27] In preparation for sentencing, Mr. Sohal was evaluated by Dr. Robert Ley, a clinical psychologist retained by the defence, who opined that Mr. Sohal's needs would be best served through a community-based disposition. He indicated that Mr. Sohal would benefit from sex offender treatment, but that appropriate treatment was not available in the youth detention facility. He concluded that Mr. Sohal's need for rehabilitation would not be served in an adult Corrections facility where he would be exposed to inmates with serious antisocial personality tendencies and he would more likely be successful if he were to receive a stringent community-based sentence.
- [28] While he considered Dr. Ley's report in his reasons for sentence, Youth Court Judge Wingham notes that the offences were all very serious and warranted a custodial sentence. In the two sexual assaults, Mr. Sohal's behaviour was predatory and his moral culpability

was high. Additionally, the incident of theft involved sexual overtones. In terms of mitigating factors, Judge Wingham noted that since being arrested, Mr. Sohal had complied with strict bail conditions, had stopped using drugs, and had gone back to school with the goal of becoming a licenced auto mechanic. Finally, he stated,

He has expressed remorse for the offences. That remorse appears from all reports to be genuine.

- [29] In the circumstances, Judge Wingham felt that the imposition of a custodial sentence was required to address the principles of fair and proportionate accountability and meaningful consequences. Mr. Sohal was, accordingly, sentenced to a nine-month custody and supervision order. The first six months were to be served in open custody followed by three months of community supervision. The custodial sentence would be followed by a two-year intensive support and supervision order.

The Predicate Offences

- [30] On the evening of May 23, 2016, S.U. was 18 years of age and lived with her mother and sister. At that time, she had an intravenous ("IV") shunt inserted in her arm in order to receive antibiotics for her tonsillitis. The night began with her and a close friend, A.B., who had been staying with her at her residence for some days watching television and making meals.
- [31] During the evening, S.U. made plans with her friend, D.S., to get together. S.U.'s evidence was that she and D.S. usually saw each other on a regular basis, meeting once or twice a week. They communicated that evening by text message and agreed that D.S., along with his friend who drives a Camaro and they decided to pick S.U. up. The buddy in the Camaro was P.A. who drove his Camaro with D.S. to pick up S.U. and A.B. at S.U.'s residence. S.U. had never met P.A. before.
- [32] The four then drove to Mr. Sohal's residence. Mr. Sohal was introduced to S.U. She was told that he lived at the residence. There were a few other men in the basement suite when S.U. arrived. S.U. recalls that approximately 10 to 12 people were at Mr. Sohal's residence. She did not know Mr. Sohal or any of the others who were at the basement suite. That evening, people were drinking alcohol, talking, and listening to music. Some people were rolling joints of marihuana. Occasionally people would step outside to smoke cigarettes in the yard adjacent to the basement suite.
- [33] S.U.'s initial impression of Mr. Sohal was that he was friendly and funny. He seemed similar to the kind of people that she would hang around with. While S.U. observed guns on the kitchen counter and saw some of the men at the party posing with them, it seemed to her that the larger gun was not real and that the people posing with the guns knew the guns were not real.

- [34] S.U. learned from someone at the party that Mr. Sohal's parents were upstairs, but she never saw them. After a period of time, everybody walked to the nearby elementary school to smoke marihuana as it was not permitted at Mr. Sohal's residence. At the park, some people were smoking marihuana and some were drinking alcohol.
- [35] S.U. testified that she may have had a puff or two of marihuana at the school, but she was not drinking that evening. After a period of time at the school, people returned to the basement suite. On their return, they rolled additional marihuana joints.
- [36] Shortly after their return, the partygoers left to return to the school, except Mr. Sohal, S.U., A.B., and P.A. who stayed behind at the basement suite. At that point, cocaine was produced by either P.A. or Mr. Sohal who suggested that A.B. and S.U. have some. S.U. testified that she did not want to do it, but that Mr. Sohal and P.A. insisted. A.B. and S.U. then snorted an inch-and-a-half line of cocaine each. S.U. had done cocaine before and noted that it gives her a carefree feeling and more energy. Neither Mr. Sohal nor P.A. consumed cocaine at that time.
- [37] After S.U. and A.B. consumed the cocaine, A.B. and P.A. left the basement suite together and S.U. was left alone with Mr. Sohal who locked the door. S.U. then began texting D.S. asking him to come pick her up.
- [38] S.U. testified that once they were alone Mr. Sohal began to suggest to her that he should be repaid for the cocaine. She testified that he asked her to sit on his lap and give him a hug and that he wanted to "hook up". S.U. stated that she told Mr. Sohal that she did want to. S.U. then stood up and Mr. Sohal stood up as well. He put his arms around her and tried to touch her buttocks, she testified.
- [39] S.U. told Mr. Sohal she was not interested and tried to leave the basement suite by walking to the exterior door. Mr. Sohal then produced a gun and pointed it at her. She testified it was a black handgun about 10 inches long. She did not believe this gun to be a fake one. S.U. testified that Mr. Sohal told her that no one would hear her and told her to go to the back room of the basement suite. This room was referred to in the course of the trial as the "weight room" as there was a bench press with weights on it inside the room. She testified that Mr. Sohal was right behind her as she walked to the weight room. She did not feel she could escape.
- [40] Once they were in the weight room, Mr. Sohal told S.U. to take off her clothes and she complied. He then made her snort cocaine off his penis. He next pushed her to the floor and she hit her head on the wall. He lay on top of her and put her legs over his shoulders. She repeated she did want to do it. He did not stop. He then had sexual intercourse with her and did not stop until he got a phone call.

- [41] When she stood up to leave, she was about to open the door when Mr. Sohal appeared behind her. She turned around to see that he had a handgun pointed at her. His hand was an arm's length away from her. He indicated to her that if she had said anything he did not care, no one would know, and he told her to walk to the room that they came from and started walking to that room. Following that assault, Mr. Sohal then started to clean up the basement suite area while S.U. was trying to get dressed and fix her hair.
- [42] At that time, A.B. and P.A. returned. S.U. became more and more distressed. A.B. did not want to leave with her so S.U. said that she had to go outside of the house because she needed air. She told everyone including Mr. Sohal that she was upset by the recent death of a family member, although this was simply a ruse to get out of Mr. Sohal's residence. Once she was out, S.U. ran to a forest near Mr. Sohal's residence and continued to try to reach people with her phone. At that point, she believed it was about 4:30 a.m. to 5 a.m., but no one was responding to her calls. S.U. ended up walking to a McDonald's restaurant in the area at approximately 7:30 to 8 a.m. S.U. sat in the McDonald's restaurant crying for some period of time trying to charge her phone.
- [43] Her friend, P.S., finally answered her phone call. S.U. begged her for a ride. P.S. quickly left home to help and arrived at the McDonald's restaurant at approximately 8:30 a.m. S.U. was still crying and was "a mess". Her head hurt and her right arm looked all bloodied inside where the IV shunt was.
- [44] Together with P.S., they decided to go get the IV shunt checked medically. They drove to the Surrey Memorial Hospital. At the hospital, they were told to go the Jim Pattison Outpatient Care and Surgery ("Jim Pattison") because that was where the IV shunt had originally been put in. After some period of time at Jim Pattison, she was told to go back to Surrey Memorial Hospital. S.U. and P.S. returned to the hospital's emergency department. At that point, S.U. had still not reported the incident to authorities. P.S. was still with her. S.U. was then examined and the IV site was treated.
- [45] At that point, she reported the incident. She underwent a medical exam that evening and samples were taken from her. In the agreed statement of facts before the court at trial, the results of the testing revealed that human semen was identified on the vaginal swabs and that the DNA profiling obtained was of mixed origin, one being a male component that matched that of the known sample for Mr. Sohal. The other component of the sample, which was a female component, matched S.U. The testing was done by a polymerase chain reaction method. The estimated probability of selecting an unrelated individual at random from the Canadian Caucasian population with the same profile was one in 16 quintillion.
- [46] Compounds from cocaine and cannabis were found in S.U.'s blood. On physical examination, S.U. was noted to have bruising as follows:
- 1.5 cm x 4 cm red irregular bruise with pinpoint purple dots throughout;
 - 1 cm x 1 cm brown circular bruise to her inner wrist;

- 3 cm x 0.5 cm red irregular abrasion to inside of her right arm four centimetres down from her elbow crease;

- 1 cm x 1.5 cm red and purple petechiae to her left nipple; and

- 2 cm red linear scratch to her right lower leg five centimetres up from her ankle.

[47] S.U. says her head hurt from hitting the wall and her IV shunt hurt, as well, where she was being held.

[48] I convicted Mr. Sohal of all three offences in the indictment with which he was charged. I find that this was not an impulsive crime, but was rather one where he created an opportunity for the offence to occur.

Evidence at the sentencing hearing

Crown Evidence

Exhibits

[49] The following materials were placed before the court by the Crown:

- Mr. Sohal's adult Corrections file from May 2016 to December 2018, which consists of the CORNET records and client logs;

- Information related to the predicate offence, including the reasons for judgment, excerpts of trial transcripts, and police statements made by Mr. Sohal;

- Information relating to sentencing on the youth offences, including the reasons for sentence, the agreed statement of facts, letters of reference, presentence reports prepared by Psychologist Dr. Ley and Probation Officer Gurpreet Grewal;

- Forensic psychological assessments completed by Roy Josephson, Registered Clinical Counsellor, and Dr. Tisha Gangopadhyay, Registered Psychologist;

- Transcripts of police interviews with Mr. Sohal after his arrest for the youth offences;

- Mr. Sohal's youth Corrections files, which contained:

- o client logs and reports on Mr. Sohal's progress during the entirety of his youth sentence;

- o certificates for completion of treatment programs; and

- o medical and clinical notes.

Admission of Facts

[50] The Admission of Facts set out that Mr. Sohal was placed on a Recognizance of Bail on June 2, 2016, which included conditions that he:

- report in person;

- reside with his parents;
- be bound by a curfew from 8 p.m. to 6 a.m.;
- remain inside his residence from between 6 a.m. to 8 p.m. unless he was in the immediate company of his mother, father, sister, or person approved in advance by his bail supervisor;
- abstain from non-prescription drugs and alcohol;
- not possess any weapons including firearms or imitation firearms; and
- not permit any female friends or guests in his home unless they were in the immediate company of his mother, father, or sister.

[51] The Admission of Facts further note that during the time that Mr. Sohal was subject to the Recognizance of Bail which was from June 2, 2016 until September 27, 2017, when the Recognizance of Bail was revoked by application of the Crown, Mr. Sohal:

- was the subject of occasional curfew checks at his residence and each time a curfew check was performed, Mr. Sohal was in his residence and otherwise in compliance with the conditions of his Recognizance of Bail;
- reported consistently to his bail supervisor on a weekly basis. The only week that Mr. Sohal did not report was when he was in court during his usual sign-in day. On this occasion, he informed his bail supervisor in advance that he was required to be in court and would not be able to report that week;
- was not the subject of any investigation by the police or law enforcement for any offence contrary to the Criminal Code, the Controlled Drugs and Substances Act, S.C. 1996, c. 19 or the Offence Act, R.S.B.C. 1996, c. 338, including any offences related to breaching the Recognizance of Bail;
- was not charged with any offences contrary to the Code, the Controlled Drugs and Substances Act, or the Offence Act including any offences related to breaching the Recognizance of Bail;
- was not the subject of any type of warrant for his arrest including a warrant issued pursuant to s. 524 of the Code.

Victim Impact Statement

[52] A victim impact statement was provided by S.U. and entered as evidence in these proceedings. She wrote her statement in the form of a poem and described feelings of paranoia, pain, a lack of self-respect and dignity, and social isolation. She has been suffering from depression, anxiety, panic attacks, lack of sexual desire, insomnia, night terrors, and posttraumatic stress disorder.

Witnesses

[53] The Crown called four witnesses:

- i) Dr. Todd Tomita, an expert witness, to provide opinion evidence in forensic psychiatry;
- ii) Jody Harbour, the community program manager for Metro Vancouver East Community Corrections with CSC previously employed by CSC in its correctional institutions and regional headquarters;
- iii) Claire McKenzie, the regional manager of the Correctional Release Program with the Parole Board of Canada; and
- iv) Patricia Shea, a community parole officer with CSC.

[54] Dr. Tomita's evidence will be discussed further in the section on risk assessment and treatability.

Jody Harbour

[55] Jody Harbour has been employed as a community program manager for Metro Vancouver East Community Corrections with CSC since 2006. She was previously employed by CSC in correctional facilities and regional headquarters.

[56] Ms. Harbour testified about correctional programming and how it is delivered in CSC institutions and in the community through the Integrated Correctional Program Model ("ICPM"). The ICPM was implemented in 2010 and represents all of the CSC's correctional programming. It is high intensity training delivered within institutions and in community.

[57] She described how an offender participates in ICPM:

- When an offender begins to serve his sentence, he is placed at a CSC Regional Reception and Assessment Centre ("RRAC") for either 70 or 90 days depending on the length of the sentence.
- During the time at RRAC, the offender is subject to an assessment and intake process which includes an assessment of the offender's risk to reoffend. If risk of reoffending is deemed high, the offender is eligible for participation in the ICPM programming. Participation in ICPM is voluntary, but an offender who agrees to participate is expected to participate actively.
- Once an offender has been placed into ICPM programming, they undergo ten sessions in the primer program. Primer sessions are two hours each. The purpose is to identify the offender's risk factors and provide skills to adapt to life in the institution.
- The offender is then placed into a parent institution and commences the main ICPM programming at one of two levels of intensity--moderate or high--depending on whether deemed a moderate or a high risk to reoffend. There are three streams of ICPM programming: sex offender, multi-target, and Aboriginal.
- The sex offender high intensity stream consists of 104 sessions of approximately two hours each. There are five to seven sessions a week and it is designed to reduce the risk of the offender committing further sexual offences.

- Once an offender completes the sex offender stream, there is a continuous maintenance program which consists of 12 weekly sessions of two hours each. The maintenance program can take place in the community or in an institution. It is designed to reinforce and apply skills learned in the main ICPM stream.
- If an offender drops out or fails to actively participate in the programming, it is reflected in records prepared by the institutional parole officers and could impact the offender's ability to apply for parole or statutory release.

Claire McKenzie

- [58] Claire Mckenzie is employed as a regional manager of the Conditional Release Program with the Parole Board of Canada. She has worked there for just a year-and-a-half and, prior to that, was employed by CSC for 12 years.
- [59] Ms. Mckenzie testified that the Parole Board's role is to make decisions respecting an offender's release and reintegration into the community after serving a custodial sentence. Parole Board members are appointed.
- [60] Ms. Mckenzie testified that an offender serving an indeterminate sentence is eligible for day parole after four years and full parole after seven years. An offender serving a determinate sentence is eligible for full parole to the statutory release date and can apply for day parole six months before his eligibility for a full parole.
- [61] Ms. Mckenzie testified about the process followed by CSC when an offender applies for parole. CSC reviews information relating to the offender including information about the predicate offence, psychological assessments, and reports regarding participation in the programming. CSC further reviews a strategy for reintegrating the offender into the community. The Parole Board then decides whether to grant parole to the offender based on the criteria in s. 102 of the Corrections and Conditional Release Act, S.C.1992, c. 20 [CCRA]:
- (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
 - (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.
- [62] If the offender in question is a dangerous offender serving an indeterminate sentence, the test in s. 102 of the CCRA is supplemented by Policy 2.1 which sets out special considerations for the Parole Board to consider. The parole considerations for designated dangerous offenders serving a determinate sentence are the same for non-designated offenders.

- [63] If parole is granted, the Parole Board will set conditions for an offender's release. These include mandatory conditions set out in s. 161 of the Corrections and Conditional Release Regulations, SOR/92-620 [CCRR]. Pursuant to s. 133(3) of the CCRA, the Parole Board may impose further conditions that it considers reasonable and necessary to protect society and facilitate the offender's reintegration into society.
- [64] Ms. McKenzie indicated that statutory release occurs at the two-third mark of a fixed sentence. At that time, an offender must be released unless the CSC recommends the offender be detained until his warrant expiry date and the Parole Board agrees. Section 130(3) and 132(1) of the CCRA guides the Parole Board's decision to detain the offender past a statutory release date. Upon statutory release, the Parole Board sets conditions of release which are determined using the same criteria as full parole conditions.
- [65] Ms. McKenzie testified that the conditions imposed in a long-term supervision order are typically the same as those imposed upon statutory release.
- [66] If an offender breaches the terms of the release, Ms. McKenzie testified that the Parole Board will decide whether to revoke conditional release or re-release the offender back into the community. The test is the same as that used to initially grant release in s. 102 of the CCRA and Policy 2.1.

Patricia Shea

- [67] Patricia Shea is employed as a Community Parole Officer for CSC in Surrey, B.C. Her role relates to the reintegration of offenders into the community following conditional release. She has worked as a Community Parole Officer for 19 years. She testified that a Community Parole Officer becomes involved with an offender six months prior to their release from custody. The Community Parole Officer will prepare reports and provide information concerning the offender to the Parole Board who considers them with a community strategy. The Community Parole Officer will also recommend conditions to the Parole Board specific to an offender and the predicate offence.
- [68] Following release from custody, individuals will typically be housed in a halfway house. Ms. Shea was aware of five halfway houses in Vancouver that will accept sex offenders. She was not aware of any halfway houses in Vancouver which do not house designated dangerous offenders.
- [69] A Community Parole Officer will meet regularly with an offender following their release into the community. The frequency of meetings is based on whether the offender is classified as high risk or a lower risk. Where they are high risk, meetings with the Community Parole Officer occur eight times a month. If the accused is low risk or housed in a halfway house, meetings are less frequent. Meetings typically last 30 to 45 minutes with the purpose of providing support and guidance and monitoring the offender's compliance with release conditions.

[70] Any suspected breach by an offender on parole or statutory release can result in the Community Police Officer taking the formal steps to deal with the suspected breach or suspending the offender's conditional release for up to 30 days. The Parole Board in turn cancels the suspension and returns the offender to the community or revokes conditional release and returns the offender to custody where they deem it necessary. In the case where a parole board has referred a suspected breach of long-term supervision order, it may cancel the suspension of the order or recommend charges for breach of the conditions of conditional release.

Defence Evidence

Exhibits

- The defence placed before the court the following:
 - Two federal government publications of Statistics Canada concerning Canada's population estimates for the first quarter of 2019;
 - British Columbia population estimate;
 - A Public Safety Canada, Corrections and Conditional Release Statistical Overview 2017 Annual Report;
 - The Investigation, Prosecution, and Corrections Management of High Risk Offenders, A National Guide;
 - Corrections material published by B.C. Corrections, including:
 - o B.C. Corrections - Overview;
 - o B.C. Corrections - Reducing Offending;
 - o B.C. Corrections - Cognitive Behavioural Programs,
 - o B.C. Corrections - Sex Offender Intervention, Forensic Psychiatric Services Commission - Overview;
 - o B.C. Corrections - Work Skills;
 - o B.C. Corrections - Ford Mountain Correctional Centre: Forensic Sex Offender Program Brochure;
 - o a profile of B.C. Corrections - Reduce Offending, Protect Communities publication of 2017;
 - o B.C. Corrections Research and Evaluation - Issue 1: Relationship Violence Prevention Program;
 - o B.C. Corrections Research and Evaluation - Issue 2: Offender Program Survey Results;
 - o B.C. Corrections Research and Evaluation - Issue 3: Risk Assessment In British Columbia;

- o B.C. Corrections Research and Evaluation - Issue 4: Nanaimo Correctional Centre Therapeutic Community - Preliminary Impact Analysis and the Strategic Training Initiative and Community Supervision;
- o B.C. Corrections Research and Evaluation - Issue 5: Integrated Offender Management (IOM) - The Case For Working Together;
- o B.C. Corrections Research and Evaluation - Issue 6: The Violence Prevention Program and the Pilot Women's Core Program;
- o B.C. Corrections Research and Evaluation - Issue 7: The Drug Treatment Court Program of Vancouver (DTCV) and Re-offence Rate Research;
- o B.C. Corrections Research and Evaluation - Issue 8: New B.C. Corrections identity management system, supporting research, and preview of ICONII evaluation;
- o B.C. Corrections Research and Evaluation - Issue 9: The Aboriginal Justice Strategy and Relationship Violence Prevention Program - Cultural Edition;
- o B.C. Corrections Research and Evaluation - Issue 10: Highlights evaluations of the Essential Skills to Success Program for Remanded Inmates in the Integrated Offender Management and Homeless Intervention Project (IOM/HIP);
- o B.C. Corrections Research and Evaluation - Issue 11: Highlights Recent Research on Offenders with Mental Illness and High Frequency Offenders;
- o B.C. Corrections Research and Evaluation - Issue 12: Highlights Preliminary Results from the STICS Implementation in B.C. and the rollout of the Thinking Leads to Change Program for Women Offenders;
- o B.C. Corrections Research and Evaluation - Issue 13: Highlights Recent Evidence-Based Changes to Cognitive Behavioural Programs that are Delivered to Offenders to Reduce Criminal Behaviour;
- o Various B.C. Corrections materials (not specific to the matter concerning Mr. Sohal);
- o A Decision-Making Policy Manual for Board Members.

[71] My understanding is that one of the reasons for the defence to adduce the above information was to demonstrate that designated dangerous sexual offenders are a rarity in the Canadian population, inviting the court to draw an inference, that it is more likely than not, that a person is not a dangerous offender.

[72] I do not find that the statistical information placed before the court to be useful. The analysis in these proceedings concerns Mr. Sohal as an individual. The characteristics of the population at large are irrelevant.

[73] The defence also placed a number of B.C. Corrections publications before the court. I likewise do not find these materials to be particularly useful or relevant in determining the issues before the court.

Treatment Certificates

[74] The defence tendered evidence that Mr. Sohal had completed a number of treatment programs while in custody awaiting his sentence. This includes:

- Certificates showing that Mr. Sohal had completed a 10-week treatment program for posttraumatic stress disorder and substance abuse;
- Levels 1 through 5 of Essential Skills for Success course which focused on employability skills;
- Levels 1 through 5 of a Communication Skills and Health Relationships course;
- A course called "Learning to Learn for Life"; and
- Courses on substance abuse, money management, housing, nutrition, health, and discharge planning.

These courses were all taken in the spring and summer of 2019.

Letters of Support

[75] A number of letters of support were also placed into evidence.

[76] Letters were provided by Mr. Sohal's family members including his grandparents, his parents, his sister and brother and brother-in-law. All described Mr. Sohal as a caring family member who assisted his grandparents. Both his sister and his parents wrote of the regret they noted when they spoke with Mr. Sohal on the phone following the predicate offence and indicate that he feels sorry for everything that is happening.

[77] An additional letter was provided by a Parvkar Dulai, a director at Gurdwara Sahib Dasmesh Darbar, a Sikh place of worship in Surrey, B.C. Mr. Dulai sees Mr. Sohal and his family on Wednesdays for prayer. He indicated that Mr. Sohal has volunteered to help set up, clean up, and do traffic control duties.

Offer of Employment Letter

[78] The defence tendered evidence that Mr. Sohal had been offered employment as a warehouse clerk with a fibre tech company. The letter was written by a Balkar Sahota and dated July 17, 2019.

Witness

[79] The defence called Carrie McCulley, the director of programs and interventions at B.C. Corrections as its witness.

- [80] Ms. McCulley provided evidence about the programs and initiatives provided by B.C. Corrections. Those initiatives include the Strategic Training Initiative in Community Supervision ("STICS"), which is designed for use by probation officers to change attitudes of offenders using evidence-based practices.
- [81] Ms. McCulley testified that one STICS pilot program saw a reduction in offenders' recidivism risk by 38 percent, but this reduction was not specific to sexual offending.
- [82] She testified that the Sex Offender Treatment and Maintenance Program delivered by the B.C. Forensic Psychiatric Services Commission is a moderate intensity program offered in the provincial system. The treatment program is 12-weeks long and offered four times a year. Sessions are between 60 and 90 minutes. If appropriate, B.C. Community Corrections will refer the offender to the maintenance program.
- [83] Ms. McCulley acknowledged that the efficacy of the Sexual Offender Treatment and Maintenance Program has not been evaluated. She indicated that she believed that sex offenders would benefit from that program, however. She acknowledged that psychologists and psychiatrists are best suited to conduct risk assessments and determine an offender's treatment needs. She relies upon those assessments to place offenders in treatment. She agreed that a forensic psychiatrist might determine that a moderate intensity sex offender treatment and maintenance program might not be the best for an offender's treatment needs.
- [84] Ms. McCulley was shown the completion certificates of Mr. Sohal's participation in various B.C. Corrections programming. She indicated that these programs do not work to reduce risk factors for reoffending and are designed to support an individual through the development and reinforcement of skills to use in everyday life. She testified about impression management, which is participating in programming and engaging in prosocial behaviour to give an impression only. It suggests that one is motivated to take treatment in particular when he or she, an individual, has an upcoming dangerous offender hearing.
- [85] Ms. McCulley testified that probation granted pursuant to the provincial system cannot be revoked or suspended in the same manner as in the federal system.

Dr. Todd Tomita - Risk Assessment and Treatability

- [86] Dr. Todd Tomita is the Chief of Psychiatric Services with the CSC Pacific Institution Regional Treatment Centre. He is a forensic psychiatrist and was retained by the Crown to conduct the assessment of Mr. Sohal ordered by the court pursuant to s. 752.1(1) of the Code. He is the sole expert who testified to the future risk posed by Mr. Sohal or prospects for treatment as the defence declined to call an expert. His report dated March 21, 2019, was entered into evidence.

- [87] Mr. Sohal did not consent to an interview with Dr. Tomita for the purposes of the assessment. Given Mr. Sohal's refusal to participate, Dr. Tomita based his report on materials provided to him by the Crown including Mr. Sohal's youth record; his files from Provincial Corrections, which included psychological assessments; and court documents and transcripts from trial proceedings relating to the predicate offence.
- [88] Dr. Tomita noted that Mr. Sohal's refusal to participate in the assessment left significant gaps in critical data. There was no direct psychological information about Mr. Sohal from the time his youth sentence concluded in late 2012 to the date of the predicate offence. As a result, Dr. Tomita had to modify his approach to risk assessment and was unable to articulate a firm conclusion without caveats. Dr. Tomita further noted that he was unable to make any specific psychiatric diagnosis absent a clinical interview, but that the risk assessment question does not require a psychiatric diagnosis.

Materials Reviewed by Dr. Tomita

- [89] Dr. Tomita reviewed previous psychological assessments conducted on Mr. Sohal. Mr. Sohal's background was set out in the report from Youth Forensic Psychiatric Services completed by Roy Josephson in June 2009 (the "Forensic Psychosocial Assessment Report"). This report set out that Mr. Sohal was born and raised in Surrey and attended all of his schooling there. Mr. Sohal did not have a criminal record prior to committing the youth offences.
- [90] Mr. Sohal received grades in the "C" range until grade 8 when he failed his first class. Between 2004 and 2008, Mr. Sohal's grades worsened and he became increasingly absent from school. He was expelled from school in December 2006. Mr. Sohal subsequently returned to an alternate school program at North Surrey Learning Centre and had been receiving good grades with no reported behavioural problems.
- [91] The Forensic Psychosocial Assessment Report noted that Mr. Sohal had very supportive parents who were in a stable relationship. He has extensive extended family throughout the Lower Mainland and attends special family occasions and prayer sessions at the Sikh temple with his family about once a month. The report noted that Mr. Sohal had continued friendship with peers he had known since elementary school, and preferred staying home and watching TV, playing videogames, or engaging in other sedentary activities at home. He had been a skillful soccer player but he gave that up.
- [92] The Forensic Psychosocial Assessment Report also noted that Mr. Sohal had been relatively isolated prior to committing the youth offences, spending time at home watching television, playing video and computer games, and accessing his computer. He did not have a structure and he was not attending school or having regular peer interactions and social or recreational pursuits.

- [93] Mr. Sohal's report card for December 2009 to April 2010 from the Burnaby School District indicated that he had been enrolled in Grade 12 courses, including Communication 12, Food Studies 12, and Physical Education 12, but had withdrawn from school.
- [94] Mr. Sohal's sexual history was detailed in the presentence psychological assessment report prepared by Dr. Tisha Gangopadhyay, the Crown's expert, in June 2009 in preparation for Mr. Sohal's sentencing on the youth offences. Dr. Gangopadhyay interviewed Mr. Sohal about his sexual development. He reported reaching puberty between 13 and 15, and that he was interested in peer-age females. He had three consensual relationships. He has accessed sexually explicit material on the Internet, mostly of adult women engaging in heterosexual and lesbian sexual activity. He reported having a girlfriend in grade eight and another in Grade 10.
- [95] Dr. Gangopadhyay's report also noted that Mr. Sohal had never participated in counselling or other mental health treatment. While he had expressed having a bad temper when at times he would feel out of control, this has lessened with age.
- [96] Mr. Sohal reported to Dr. Gangopadhyay that he had a number of friends with whom he had been friends since elementary school. He reported that he would smoke marihuana, play basketball, and drink on weekends with his friends. He said that he never suffered physical, emotional, or sexual abuse and was never neglected growing up.
- [97] Dr. Gangopadhyay noted that Mr. Sohal had been smoking marihuana on a daily basis prior to his arrest. He smoked cigarettes and drank a few times a week and acknowledged using cocaine and ecstasy. He maintained that he committed the youth offences while he was under the influence of large amounts of either marihuana or ecstasy.
- [98] Dr. Gangopadhyay's report outlined Mr. Sohal's difficulties in school from his first school suspension in Grade 4 for fighting, another in Grade 5 for theft, a third in Grade 6 for aggressive behaviour, swearing, and disrupting others in class. Mr. Sohal was suspended in Grade 7 five times for fighting, being disrespectful, hitting a teacher in the head with an elastic band, and for numerous referrals to the principal's office for misbehaviour. By Grade 8, his grades had dropped significantly and more suspensions occurred. In Grades 9 and 10, he was barely attending class. Dr. Gangopadhyay's report notes that since his arrest, Mr. Sohal had been doing well in his classes at the North Surrey Learning Centre. She concluded in the report that Mr. Sohal was at a high risk for sexual reoffending, but that sexual offender specific treatment would likely reduce future risk. As well, it was concluded that the features of Mr. Sohal's offences indicated that Mr. Sohal likely has significant deviant sexual interests and in need of further assessment and treatment.
- [99] Dr. Tomita also reviewed a presentence psychological report prepared by Dr. Robert Ley, the defence expert, on November 23, 2009. Dr. Ley opined that Mr. Sohal was likely clinically depressed and dependant on marihuana at the time of the offences. He disagreed with Dr. Gangopadhyay's opinion about the presence of sexual deviance involving sexual arousal in the context of physical violence relying on Mr. Sohal's statement that he was principally

motivated by an intention to rob his victims and only sexually assaulted them when his robbery plans were failing. Based on this, Dr. Ley concluded that Mr. Sohal had a low to moderate risk of reoffending.

- [100] Dr. Tomita states in his report that the assumptions underpinning Dr. Ley's report were incorrect based on Mr. Sohal's acknowledgment during subsequent treatment that he had sexual motivations when he planned the offences by making arrangements through social media to meet the two victims.

Prior Sexual Offender Treatment Noted in Dr. Tomita's Report

- [101] Dr. Tomita reviewed the termination summary from Community Youth Justice Service, which was prepared after Mr. Sohal's community sentence expired October 24, 2012. His plan was to continue living at his family home with grandparents, parents, and siblings. He had planned to attend community college in January 2013. The summary further noted that Mr. Sohal successfully completed a Sex Offender Treatment Program. The summary stated that he was able to articulate his risk and relapse plan and at that time showed considerable insight into his behaviour and mental state when he committed the youth offences.
- [102] The program facilitator at the Youth Forensic Psychiatric Services Sex Offender Treatment Program noted Mr. Sohal's sex offences were part of a broader pattern of antisocial behaviour. He had negative attitudes towards women and his antisocial behaviour began in elementary school. Many of his peer affiliations were antisocial and Mr. Sohal had been involved in undetected crimes with peers. He objectifies women and his negative attitude towards women led to targeting females over the Internet.
- [103] The program facilitator noted it was unclear whether Mr. Sohal was sexually aroused by violent or coerced sex as he denied this being the case. Instead, he told the facilitator he targeted his victims on the perception of them as easy, promiscuous, and willing to trade drugs for sexual favours.

Mr. Sohal's Functioning in Custody

- [104] Dr. Tomita noted that Mr. Sohal was able to conform to rules and expectations in the custodial setting and did not engage in disruptive behaviours. There were no references to substance abuse in custody nor were there any indications of institutional charges.

Risk of Future Sexual Violence

- [105] As noted, Mr. Sohal refused to participate in the assessment. Dr. Tomita thus based his report on a review of the materials submitted by the Crown in evidence including the prior psychological assessments, information related to Mr. Sohal's youth convictions including his Corrections records, and information about the predicate offences.

- [106] Based on the available information, Dr. Tomita assessed Mr. Sohal's risk for future sexual offending using an actuarial or statistical assessment tool called the Static-99R and a structured professional judgment risk tool, the Risk for Sexual Violence Protocol ("RSVP").
- [107] Mr. Sohal's lack of participation limited Dr. Tomita's assessment in certain respects as there was no direct psychological information about Mr. Sohal from November 12, 2012, to the date of the predicate offence. Notably, Dr. Tomita was unable to determine whether Mr. Sohal had carried out his stated plan for his education, whether he had avoided significant levels of marihuana and other substances, and whether he had maintained a prosocial network of friends and acquaintances. Because of this, Dr. Tomita was unable to assess the most common method for dangerous and long-term offender assessments, the Psychopathy Checklist-Revised (the "PCL-R") to determine whether Mr. Sohal had a psychopathic personality.
- [108] Mr. Sohal's risk for future sexual offending was evaluated using the STATIC-99R, which considers 10 risk items including:
- 1) Age at release from index sexual offence;
 - 2) Living with a partner for at least two years;
 - 3) Any index non-sexual convictions involving violence;
 - 4) Any prior non-sexual convictions not involving violence;
 - 5) Number of prior sexual offences;
 - 6) Number of prior sentencing dates;
 - 7) Any convictions for non-contact sexual offences;
 - 8) Any unrelated victims;
 - 9) Any stranger victims; and
 - 10) any male victims.
- [109] Dr. Tomita was able to complete the STATIC-99R by relying on the materials he reviewed without interviewing Mr. Sohal.
- [110] Dr. Tomita noted that Mr. Sohal was either in custody or under legal supervision in the community between the ages of 18 and 22. He had little opportunity to reoffend during that period and no occurrence of offence was detected. He committed the predicate offence in May 2016, three-and-a-half years after completing his youth sentence.
- [111] Based on the results of the STATIC-99R, Dr. Tomita placed Mr. Sohal on the "highest nominal risk level", which he described as "well-above average risk". This indicates Mr. Sohal is at a high risk of future sexual offending.

[112] Mr. Sohal's risk for future sexual offending was further evaluated using the RSVP which examines 22 risk factors organized in the following five categories:

- 1) Sexual violence history;
- 2) Psychological adjustment;
- 3) Mental disorder;
- 4) Social adjustment; and
- 5) Manageability.

[113] The RSVP involves the exercise of discretion and requires the application of clinical skills, knowledge, and experience. The risk factors in the RSVP that appeared relevant to Mr. Sohal's risk of perpetrating future violence included chronicity of sexual violence, psychological coercion and sexual violence, physical coercion and sexual violence, and problems with substance abuse. Dr. Tomita noted there were gaps in the data, but he assumed other relevant risk factors that were present until clarified by a further evaluation including the extreme minimization or denial of sexual violence, attitudes that support or condone sexual violence, sexual deviance, and problems with substance abuse.

[114] Dr. Tomita elaborated on the risk factors identified in the RSVP in his report.

- **Chronicity of Sexual Violence:** Mr. Sohal's first sexual offence occurred when he was 17 in November 2007. The youth offences occurred over a short span of five months. Mr. Sohal was then in custody or under legal supervision until he was 22, three-and-a-half years before he committed the predicate offence. In light of his relatively youthful age, Dr. Tomita considered Mr. Sohal's sexual violence to be chronic in nature. At trial, Dr. Tomita affirmed this position indicating that in this context "chronic" means persistent over time, reoccurring, and difficult to eradicate.

- **Physical coercion and sexual violence:** Mr. Sohal engaged in physical coercion by threatening physical harm with a knife in the youth offences, with an imitation firearm that the claimant believed was real in the predicate offence.

- **Psychological coercion and sexual violence:** In the youth offences, Mr. Sohal engaged in psychological coercion by using the promise of access to drugs to arrange meetings with the victims. Mr. Sohal further provided the victim in the predicate offence with cocaine and demanded sex later as payment after she had consumed the cocaine.

- **Attitudes that support or condone sexual violence:** Dr. Tomita noted the Youth Correctional and Forensic Records suggest that Mr. Sohal has a tendency to objectify women which was corroborated by a self-report given by Mr. Sohal when he was in sex offender treatment. Dr. Tomita further noted that when Mr. Sohal was on bail, the probation officers overheard him telling his grandparents that the officers were visiting in relation to "pussy" charges. Dr. Tomita notes it was difficult to say with certainty whether this was an enduring concern given Mr. Sohal's

refusal to participate in the assessment.

· Sexual deviance: Dr. Tomita noted he could not make any definitive diagnosis of sexual deviance given that he did not interview Mr. Sohal. He did note, however, the following similarities between the youth offences and the predicate offence: each incident involved the use of a weapon, an element of planning to isolate the victim, and drug use or the promise of drugs. There did not appear to be elements of sadistic or gratuitous violence making it more difficult to determine whether deviant sexual interests or an antisocial attitude and entitlement were driving the offences. Militating against the conclusion that the offences were purely driven by an antisocial attitude was the broader pattern of antisocial behaviours that were present prior to the commission of the youth offences.

· Problems with substance abuse: Dr. Tomita noted that drug and alcohol use was a feature of the predicate sexual offence and his prior sexual offences and he also provided cocaine with some foresight that he was going to request repayment with sex from the victim. Mr. Sohal's ability to provide drugs to his victims was used to create opportunities to sexually assault them.

[115] Dr. Tomita concluded that Mr. Sohal's sexual offending is predominantly driven by antisocial and narcissistic entitlement coupled with sexist views of women. Dr. Tomita could not rule out the presence of some degree of sexual deviance given the absence of a broader pattern of functional problems that reflect the presence of problematic, antisocial, or narcissistic personality traits.

[116] Dr. Tomita opined that Mr. Sohal is most likely to reoffend in the same manner he has in the past with sexual violence against females in their late teens or early adulthood. Dr. Tomita stated that the nature of sexual violence is likely to be forceful fellatio or vaginal intercourse. If he were to reoffend, he would likely cause psychological harm and could use more serious levels of physical violence if he continued to use weapons. There was no indication that his violence will escalate to life-threatening levels.

[117] One of the critical risk factors that stood out to Dr. Tomita was the fact that Mr. Sohal offended against strangers. His victim pool encompassed women that he had just met and could offend against immediately when an opportunity presented itself.

[118] Dr. Tomita also opined that Mr. Sohal might reoffend as soon as he is presented with an opportunity. Dr. Tomita noted that Mr. Sohal responded well to youth legal supervision and legal supervision may mitigate imminent sexual violence.

[119] It was also notable to Dr. Tomita that Mr. Sohal committed the predicate offence in his home, particularly in light of the family distress that his previous sexual convictions caused. Being in his family home and potentially being caught by family members did not dissuade him from committing the predicate offence. Also of note was the fact that the victim's ability to identify Mr. Sohal did not dissuade him.

- [120] Dr. Tomita noted that Mr. Sohal reoffended after successfully completing the sex offender treatment, indicating that the treatment was not effective in preventing a subsequent offence. Dr. Tomita opined that he requires treatment in a high-intensity sexual offender treatment program followed by maintenance treatment both in custody and in the community. Absent data regarding Mr. Sohal's social and psychological functioning from the time he was 22 onward, Dr. Tomita was unable to opine on Mr. Sohal's current level of treatability. The recent information about his pretrial functioning speaks to his ability to conform to the expectations of the institution or community conditions and does not indicate whether he will respond to future treatment aimed at reducing risk.
- [121] Ultimately, Dr. Tomita concluded that Mr. Sohal presents a moderate to high risk to reoffend with sexual violence. Mr. Sohal's scores are in the highest risk category of the Static-99R which is a widely used sex offender risk assessment tool that has been developed and validated on many Canadian sex offender populations. The RSVP likewise suggested that Mr. Sohal was at a moderate -- is at a moderate to high risk of sexual offending with the caveat that Dr. Tomita was unable to score risk factors related to psychosocial functioning and level of psychopathy due to Mr. Sohal's refusal to participate in the assessment.
- [122] Dr. Tomita further opined that Mr. Sohal's pattern of sexual offending suggests a likelihood of chronic risk given that he reoffended after receiving a legal sanction and completing sex offender treatment. Even if some degree of responsiveness to his future treatment is assumed, the absence of obvious explanations for Mr. Sohal's behaviour such as severe substance use or a more problematic level of personality dysfunction--indicates that his risk is narrowly located within the sexual offending context.
- [123] Finally, Dr. Tomita stated that it is difficult to draw any firm conclusions about how long Mr. Sohal's future risk will remain significant. From a psychiatric perspective, Mr. Sohal's risk-relevant clinical conditions are likely to be of long duration. Personality and sexual preferences do not change with the passage of time. Maladaptive behaviours produced by personality and sexual preference, however, can lessen over time as evidenced by lower rates of sexual offending in older groups of offenders, but this is not a consideration in Mr. Sohal's case as he was still in his 20s. As such, a long period of parole supervision is likely to be necessary as a community risk management strategy.

Cross-Examination of Dr. Tomita

- [124] In cross-examination, Dr. Tomita was questioned about his ability to draw conclusions about Mr. Sohal's risk of reoffending given the gaps in data resulting from Mr. Sohal's refusal to participate in the assessment. Dr. Tomita agreed with the proposition that behaviour such as sexual and violent offending are complex. However, he would not agree that predicting future sexual or violent offending is very complicated or that it becomes more complicated when there are gaps in data. He did agree that the gaps in data make it more difficult to draw conclusions on the risk of sexual offending without caveats.

- [125] Dr. Tomita did not agree in cross-examination that the STATIC-99R did not take into account the fact that Mr. Sohal did not reoffend during the two years he was on bail following the commission of the predicate offence. The critical issue is the amount of time in which there was an opportunity to offend.
- [126] Dr. Tomita was also cross-examined about his finding that Mr. Sohal is a recidivist chronic offender that cannot control his behaviours, but he was in the house with A.B. for some period of time and he did not sexually assault her. Dr. Tomita did not agree to that. Dr. Tomita indicated the fact that there is no evidence that A.B. was not sexually assaulted is not because Mr. Sohal is not substantially or pathologically intractable nor did he agree that there is no evidence that A.B. was sexually assaulted during that time and that that was because the risk assessments of the doctor performed were not helpful and were unreliable.
- [127] Dr. Tomita agreed that there was no evidence that Mr. Sohal was a psychopath.
- [128] Dr. Tomita agreed that he was provided with some updated information on Mr. Sohal's circumstances and behaviours. While on bail, Mr. Sohal has been helping his grandparents and has been polite in his interactions with his bail supervisor. He did not agree that these behaviours go to risk, stating that someone can be polite and high risk. Dr. Tomita agreed that Mr. Sohal seeking employment in the institution and helping another inmate get a mattress were positive behaviours. He would not indicate that this was an indicator of Mr. Sohal's treatability.

LAW

General Principles

- [129] The Supreme Court of Canada has confirmed that a court must be guided by the fundamental purpose and principles of sentencing contained in ss. 718 to 718.2 of the Criminal Code when interpreting the dangerous offender provisions, and I refer to R. v. Johnson, 2003 SCC 46, at para. 23. The relevant provisions for consideration by the court are as follows:

PART XXIII -- Sentencing

Purpose

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society 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 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.

Fundamental principle

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

Other sentencing 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,
 - (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

all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

The Dangerous Offender Regime

[130] At the core, the dangerous offender provisions are preventative sanctions. While the other purposes of sentencing are relevant, the primary objective of the dangerous offender regime is the protection of the public from the risk of violent or sexual reoffending by the offender in question, and I refer to Johnson at para. 19 as well as R. v. Lyons, [1987] 2 S.C.R. 309. Per the Alberta Court of Appeal in R. v. Neve, 1999 ABCA 206 at para. 55, the regime is aimed at "a very small group of offenders whose personality characteristics and particular circumstances militate strenuously in favour of preventive incarceration".

[131] The provisions dealing with dangerous and long-term offenders are set out in Part XXIV of the Code. Section 753 creates a two-stage process consisting of a designation stage followed by a penalty phase. As was explained by the court in *R. v. Boutilier*, 2017 SCC 64 at para. 31:

... The designation stage is concerned with assessing the future threat posed by an offender. The penalty stage is concerned with imposing the appropriate sentence to manage the established threat.

[132] The onus rests with the Crown to prove beyond a reasonable doubt all of the elements to establish that an offender is dangerous pursuant to s. 753 of the Code, and I cite *Boutilier* for that at para. 41. If the Crown does not prove the necessary elements in s. 753, the offender cannot be declared a dangerous offender. At that point, the court may proceed to s. 753.1(1) of the Code, treat the application to find an offender to be a long-term offender and impose a sentence in accordance with these provisions or the court may impose a determinate sentence for the predicate offence.

Step 1: The Designation Stage

[133] Before designating an offender as dangerous, a sentencing judge must be satisfied on the evidence that "the offender poses a high likelihood of harmful recidivism" and that his conduct is "intractable", meaning behaviour that the offender is unable to surmount: *Boutilier* at para. 27. At the designation stage of the analysis, the sentencing judge must conduct a prospective assessment of dangerousness.

[134] The Crown argued that Mr. Sohal should be designated a dangerous offender under either s. 753(1)(a)(i), the repetitive behaviour provision, or s. 753(1)(b), the failure to control impulses. Section 753(1) of the Code states:

Application for finding that an offender is a dangerous offender

753(1) On application made under this Part after an assessment report is filed under subsection 752.1(2), the court shall find the offender to be a dangerous offender if it is satisfied

- (a) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (a) of the definition of that expression in section 752 and the offender constitutes a threat to the life, safety or physical or mental well-being of other persons on the basis of evidence establishing
- (i) a pattern of repetitive behaviour by the offender, of which the offence for which he or she has been convicted forms a part, showing a failure to restrain his or her behaviour and a likelihood of causing death or injury to other persons, or inflicting severe psychological damage on other persons, through failure in the future to restrain his or her behaviour.

- (b) that the offence for which the offender has been convicted is a serious personal injury offence described in paragraph (b) of the definition of that expression in section 752 and the offender, by his or her conduct in any sexual matter including that involved in the commission of the offence for which he or she has been convicted, has shown a failure to control his or her sexual impulses and a likelihood of causing injury, pain or other evil to other persons through failure in the future to control his or her sexual impulses.

[135] Under each subsection of s. 753(1), the Crown must prove that the predicate offence is a "serious personal injury offence" within the meaning of s. 752 of the Code. A serious personal injury offence includes:

752(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

[136] The three definitions in s. 753(1)(a)(i) to (ii) are disjunctive. The court may find that a dangerous offender designation is supported by any one of the definitions: Boutilier at para. 18. Similarly, the court may find that a dangerous offender designation is supported by the definition in s. 752(1)(b) alone.

[137] I note that the dangerous offender regime was amended by the Tackling Violent Crime Act, S.C. 2008, c. 6 [Bill C-2]. The amendments to the Code came into force July 2, 2008. Prior to that date, s. 753(1) of the Code reads, in part, as follows:

753(1) The court may on application made under this part following a filing of an assessment report under 752.1(2) find the offender to be a dangerous offender if it is satisfied

- (4) If the court finds an offender to be a dangerous offender, it shall impose a sentence of detention in the penitentiary for an indeterminate term.

[Emphasis added.]

[138] The change in wording of s. 753(1) from "may" to "shall" at the designation stage was, at least in part, a response to judicial interpretation of the dangerous offender regime and, in particular, the Supreme Court's decision in Johnson. In that case, the court held that even where the criteria in s. 751(1) are met, the sentencing judge had discretion at the designation stage to consider whether the risk presented by the offender could adequately be controlled in the community, and whether it would thus be appropriate to designate the offender as a long-term offender instead.

[139] Since the 2008 amendments, the sentencing judge must make a dangerous offender finding at the designation stage if satisfied that the statutory conditions are met. The sentencing judge's discretion now comes into play at the penalty phase. There is no longer a mandatory indeterminate sentence triggered by a dangerous offender designation. The court still has the discretion to sentence an offender to something other than an indeterminate sentence if the evidence at the hearing establishes that another type of sentence would adequately

protect the public against the commission by the offender of murder or a serious personal injury offence.

Designation under s. 753(1)(a)(i) of the Code

[140] A court must impose a dangerous offender designation under s. 753(1)(a)(i) where the offender has engaged in a repetitive pattern of conduct demonstrating a failure to restrain his behaviour, coupled with a likelihood of causing death, injury, or severe psychological damage to other persons through the offender's inability to restrain future behaviour.

[141] A pattern of repetitive behaviour is not defined in the Code. The court in *R. v. Pike*, 2010 BCCA 401 indicated at para. 26 that in order to establish the prescribed "pattern of repetitive behaviour" under s. 753(1)(a)(i), the Crown must prove the following elements beyond a reasonable doubt:

1. A pattern of repetitive behaviour;
2. The predicate offence must form part of that pattern;
3. [The] pattern must show a failure by the offender to restrain his or her behaviour in the past; and
4. [The] pattern must show a likelihood of death, injury or severe psychological damage to other persons through failure to restrain his or her behaviour in the future.

[142] In *R. v. Tremblay*, 2010 ONSC 486, the meaning of "pattern" under s. 753.1(a)(i) was defined as follows:

[96] To constitute a pattern, there must be a common element in the behaviour, something that connects prior incidents together in a manner that justified considering them as a whole. A pattern of behaviour is something more than a mere history of criminal activity. Similarity can supply the requisite degree of connection. However, "similarity can be found not only in the types of offences but also in the degree of violence or aggression threatened or inflicted on the victims ... [and] similarity in terms of kinds of offences is not crucial when the incidents of serious violence and aggression are more numerous" Generally, in order to meet the requirements of a pattern, the fewer the incidents, the more similar they must be. [Citations omitted.]

[143] While there must be a number of significant relevant similarities between each example of the pattern, there may be differences between each example so long as the differences leave the key significant relevant elements of the pattern in place: *R. v. Dow*, 1999 BCCA 177 at para. 25; *R. v. Walsh*, 2017 BCCA 195 at para. 34.

[144] The Crown must further establish a likelihood that the offender will cause harm in the future. Justice Karakatsanis, as she then was, in Tremblay noted in determining whether there is a present likelihood that the offender will fail to restrain his behaviour in the future, the sentencing judge may refer to the offender's past failure to restrain his behaviour and any expert opinions tendered by the parties (at para. 98).

[145] The Crown need only to establish beyond a reasonable doubt that there is a "reasonable possibility"--not a certainty or probability--that the offender will cause death, injury, or severe psychological damage by failing to restrain his behaviour in the future: Tremblay at para. 98. Ultimately, it is for the sentencing judge, rather than psychiatrists called by the Crown or defence, to determine the key elements of a pattern and the likelihood of reoffence: Dow at para. 29.

Designation under 753(1)(b)(i) of the Code

[146] Section 753(1)(b) of the Code is aimed specifically at sex offenders, R. v. M.O.B., 1999 BCCA 84, at para. 23. In addition to proving that the offender committed a "serious personal injury offence", the Crown must also prove beyond a reasonable doubt that:

- a) the offender's past conduct shows a failure to control his or her sexual impulses; and
- b) the likelihood that he or she would cause injury, pain, or other evil to persons through his failure in future to control his sexual impulses

See R. v. Schwartz, 2000 BCSC 40 at para. 26.

[147] Section 753(1)(b) does not require proof of a pattern of behaviour. Instead, the prospective dangerousness is measured by the offender's conduct in any sexual matter including the predicate offence, any other past behaviour evincing a likelihood of inflicting future harm upon others: R. v. Dadmand, 2018 BCSC 729 at para. 26.

[148] The court must be satisfied beyond a reasonable doubt of the likelihood, rather than the certainty, that the offender will cause future injury, pain, or other evil to other persons: M.O.B. at paras. 23-25. In this context, "likelihood" means more than simply a possibility, it means more probably than not: R. v. Allan. 2009 BCSC 1245 at para. 194.

Step 2: The Penalty Stage

[149] If the offender is designated a dangerous offender, the sentencing hearing proceeds to the penalty stage. Section 753(4) provides:

Sentence for dangerous offender

- (4) If the court finds an offender to be a dangerous offender, it shall
 - (a) impose a sentence of detention in a penitentiary for an indeterminate period;

- (b) impose a sentence for the offence for which the offender has been convicted -- which must be a minimum punishment of imprisonment for a term of two years -- and order that the offender be subject to long-term supervision for a period that does not exceed 10 years; or
- (c) impose a sentence for the offence for which the offender has been convicted.

[150] Section 753(4.1) indicates that the sentencing judge must impose an indeterminate sentence of incarceration unless he or she is satisfied that there is a reasonable expectation that a lesser measure will adequately protect the public. A "reasonable expectation" is a "confident belief, for good and sufficient reasons" to be derived from the quality and cogency of the evidence heard on the application": *R. v. Bragg*, 2015 BCCA 498 at para. 34, citing para. 291 of *R. v. Walsh* at 2011 BCSC 1911.

[151] In exercising his or her discretion under s. 753(4), the sentencing judge must impose the least intrusive sentence required to achieve the primary purpose of the statutory scheme, and I refer to *Boutilier* at para. 60.

[152] There is no presumption that an indeterminate sentence is appropriate. As was explained in *Boutilier* at paras. 68 and 70:

[68] Under s. 753(4.1), the sentencing judge is under the obligation to conduct a "thorough inquiry" into the possibility of control in the community: *Johnson*, at para. 50. The judge considers all the evidence presented during the hearing in order to determine the fittest sentence for the offender:

The judge should ... take into account all the evidence available before making a determination, which will inevitably require a thorough investigation. Once such an investigation has been conducted, it will be up to the judge to determine the sentence; there is no obligation on any of the parties to prove on any standard the adequate sentence one way or another.

(*Neuberger*, at p. 4-4.1; see also p. 10-10.)

[70] The framework a sentencing judge should adopt in exercising his or her discretion under s. 753(4.1) has been aptly explained by Justice Tuck-Jackson of the Ontario Court of Justice: *R. v. Crowe*, No. 10-10013990, March 22, 2017. First, if the court is satisfied that a conventional sentence, which may include a period of probation, if available in law, will adequately protect the public against the commission of murder or a serious personal injury offence, then that sentence must be imposed. If the court is not satisfied that this is the case, then it must proceed to a second assessment and determine whether it is satisfied that a conventional sentence of a minimum of 2 years of imprisonment, followed by a long-term supervision order for a period that does not exceed 10 years, will adequately protect the public against the commission by the offender of murder or a serious personal injury offence. If the answer is "yes", then that sentence must be imposed. If the answer is "no", then the court must proceed to the third step and impose a detention in a penitentiary for an indeterminate period of time. Section 753(4.1) reflects the fact [page974] that, just as nothing less than a sentence reducing the risk to an acceptable level is required for a dangerous

offender, so too is nothing more required.

[153] The Court of Appeal in Bragg, at para. 55, citing *R. v. M.* (N.J.), [2005] O.J. No. 1178 (C.A.), identified three elements that must be present to achieve the goal of protecting the public by reducing the risk of recidivism to an acceptable level:

- (1) there must be evidence of treatability that is more than an expression of hope;
- (2) the evidence must indicate that the offender can be treated within a definite period of time; and
- (3) the evidence of treatability must be specific to that offender.

[154] "Treatability" refers to both an offender's amenability to treatment as well as the prospects for the success of treatment in reducing the offender's risk of reoffending: *R. v. Little*, 2007 ONCA 548 at para. 40. A sentencing judge cannot be "satisfied" that there is a reasonable possibility of controlling an offender's identified risk in the absence of evidence that the means to do so are, in fact, available: *R. v. Trevor*, 2010 BCCA 331 at para. 35.

[155] An offender's attitude is also a significant factor in the assessment of treatability. An offender's past history, treatment record if any, diagnoses, and motivation for change may all shed light on his attitude and treatability: *R. v. B. (R.)*, 2011 ONCA 328 at paras. 14-15; *R. v. Ominayak*, 2012 ABCA 337 at para. 34.

Evidence in Dangerous Offender Proceedings

[156] A dangerous offender hearing is a sentencing hearing to which the rules of evidence relating to sentencing hearings apply. Section 726.1 of the Code dictates that the court "shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender".

[157] In a dangerous offender application, the court should have the greatest possible range of information to make an accurate evaluation of the danger posed by the offender: *R. v. Jones*, [1994] 2 S.C.R. 229 at paras. 124-127.

[158] Relevant hearsay evidence is admissible to prove disputed facts. The offender's character, conduct, and attitude are all factors to consider in dangerous offender applications: *Dadmand* at paras. 52-54.

Analysis

Mr. Sohal's Refusal to Participate in the Assessment

[159] Mr. Sohal declined to participate in the s. 752.1 assessment. He was not obliged to do so and no adverse inference can be drawn from his failure to do so. At the same time, an offender who does not participate in the assessment is not entitled to the benefit of the most favourable inferences in the face of knowledge gaps flowing from their non-participation: M.O.B. at para 28; R. v. Ackerman, 2002 BCSC 1323 at para. 98, rev'd on other grounds at 2004 BCCA 434; R. v. McDonald, 2015 BCSC 2088 at para. 37.

[160] In R. v. Alexcee, 2001 BCSC 1806, aff'd, 2003 BCCA 376, the offender participated in an assessment conducted by a defence expert, but refused to submit to an assessment ordered by the court. Justice Parrett stated at paras.106 to 107:

[106] In many respects this presents a significant problem. The accused, in exercising his right to silence, not only chose to refuse to speak to Dr. Reimer but to do so with Dr. Haymond. This presents a difficulty on its own but when combined with the fact that he chose not to testify on this hearing, a more difficult problem emerges. The authorities make it clear that the court is not entitled to draw any inference from the exercise of the right to silence. Equally, the accused, particularly on a sentencing hearing, is not entitled to the best possible inference from a procedure in which he has chosen not to subject himself to either cross-examination or the assessment of the expert ordered to assess him.

[107] To put it bluntly, the accused is not entitled to testify through the expert hired to appear on his behalf while avoiding, through conscious decision, both the assessment ordered by the court and cross-examination.

Has the Crown Established that Mr. Sohal is a Dangerous Offender under s. 753(1)(a)(i) and/or s. 753(1)(b) of the Code?

[161] Mr. Sohal's conviction for a serious personal injury offence satisfies the first element of the test under s. 753(1)(a)(i) and (b).

[162] The Crown's submission is that Mr. Sohal's youth record, coupled with the predicate offence, reveals a pattern. Specifically:

- the victims were young females ranging from 16 to 18 years of age;
- with the exception of the victim who was a schoolmate, the victims were strangers to Mr. Sohal;
- Mr. Sohal used a weapon (pepper spray, knife, and then in the predicate offence, an imitation firearm) to intimidate the victim;
- while brandishing a weapon, Mr. Sohal demanded that his victims comply with sexual requests;
- each victim was forced to the ground during the commission of the offence;

- each victim was sexually assaulted;
- in each sexual assault, the weapon was in his possession or close by him;
- drugs were used as a ploy to manipulate the victims; and
- Mr. Sohal was motivated by a sexual purpose.

[163] The Crown further submits that Mr. Sohal's previous conviction for an attempted theft shares similarities with the three convictions for sexual assault with a weapon. These similarities includes the use of a weapon, demands to comply with sexual requests, sexual activity by Mr. Sohal, and the age and gender of the victims. Additionally, in the first sexual assault on November 27, 2007, the theft on April 27, 2008, and the predicate offence, Mr. Sohal demanded the victims give him "head". In both the second sexual assault on April 27, 2008, and the predicate offence, the accused engaged in forced vaginal intercourse.

[164] There can be no question that the age and gender of Mr. Sohal's victims are similar and the characteristics of the offence are indicative of a pattern. I do note, however, that in this case, Mr. Sohal's youth record is the central evidence for establishing the pattern of repetitive behaviour required by s. 753(1)(a)(i).

[165] Some general observations about criminal youth proceedings are helpful. In *R. v. D.B.*, 2008 SCC 25, Justice Abella, writing for the majority, observed that:

[1] Young people who commit crimes have historically been treated separately and distinctly from adults. This does not mean that young people are not accountable for the offences they commit. They are decidedly but differently accountable.

[166] The court further commented on the diminished moral culpability of offenders stating that:

[41] we have a separate legal and sentencing regime for young people, namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment.

[167] I find that youth convictions should be considered and weighed differently than adult convictions. While a youth record can be used as a basis for an application of this nature, the presumption is one of diminished moral culpability. The onus is on the Crown to show that a youth record establishes the requirement of a dangerous offender application--that those have been met.

[168] I note that Mr. Sohal's youth offences were committed ten months and five months respectively, before he was no longer a young person as defined in s. 2 of the Youth Criminal Justice Act. He served the entirety of his youth sentence and completed sex offender treatment after becoming an adult. In the circumstances, I do not find a high degree of diminished moral culpability.

- [169] I note, also, that there is a gap of eight years between Mr. Sohal's youth offences and the predicate offence. However, he had limited opportunity to reoffend during this time as he was under strict supervision following the conclusion of his custodial sentence on the youth offences.
- [170] Despite the fact that the offences establishing the pattern of repetitive behaviour were committed when Mr. Sohal was a youth, I find that his criminal history of violent sexual offences established the pattern of repetitive behaviour required by s. 753(1)(a)(i). Each of the sexual offences committed by Mr. Sohal displayed a high degree of similarity. I am satisfied that the similarities in the offence are such that there is a "repetitive pattern" to them as that term is used in the authorities and that this element is proven beyond a reasonable doubt.
- [171] Section 753(1)(b) does not require proof of a repetitive pattern of behaviour. Instead, the Crown must show that the offender's past conduct shows a failure to control his or her sexual impulses, and a likelihood that the offender will cause future harm by failing to control his sexual impulses. Mr. Sohal's youth record evinces a clear failure to control his sexual impulses in the past.
- [172] In summary, I am satisfied beyond a reasonable doubt that Mr. Sohal has engaged in a pattern of repetitive behaviour, of which the predicate offence forms a part that demonstrates a failure to restrain his behaviour in the past. I am also satisfied beyond a reasonable doubt that Mr. Sohal has failed to control his sexual impulses in the past. The critical question before the court is the likelihood that Mr. Sohal will fail to restrain his behaviour or control his sexual impulses in the future.
- [173] Dr. Tomita evaluated Mr. Sohal's risk of reoffending using the RSVP and the STATIC-99R. He was not able to evaluate the adjustment risk factors in the RSVP given that he could not interview Mr. Sohal. His refusal to participate in the assessment did not limit Dr. Tomita's ability to perform a risk assessment using the STATIC-99R. Based on these assessments, Dr. Tomita found that Mr. Sohal posed a moderate to high risk of reoffending with sexual violence. He found that the risk factors identified as a result of Mr. Sohal's previous convictions were present during the predicate offence. As a result, Dr. Tomita concluded that Mr. Sohal's risks in relevant conditions are likely to be of long duration and will not change with the passage of time.
- [174] Dr. Tomita noted that Mr. Sohal had completed a Sex Offender Treatment Program as a young offender. The program facilitator indicated that Mr. Sohal responded well to treatment and presented a moderate risk for sexual recidivism. Dr. Tomita was concerned that participation in the Sexual offender treatment program did not prevent Mr. Sohal from reoffending with sexual violence and indicated that Mr. Sohal will likely only receive a benefit from treatment if he honestly discusses issues of sexual deviance. To date, he has not done so and there was concern during the previous sex offender treatment that he was not forthcoming about sexual deviant interests.

- [175] I accept Dr. Tomita's conclusion that Mr. Sohal poses a chronic risk and is likely to reoffend with sexual violence. I accept that this risk is difficult to eradicate or reduce. I also find that, should Mr. Sohal repeat his conduct in the future, his victims would suffer psychological harm and/or injury.
- [176] Ultimately, I am satisfied beyond a reasonable doubt that Mr. Sohal's conduct is deep-seated and intractable, and that he should be designated a dangerous offender under either s. 753(1)(a)(i) or s. 753(1)(b). Past sex offender treatment did not prevent Mr. Sohal from reoffending. While evidence of future treatability remains uncertain due to Mr. Sohal's nonparticipation in the assessment, there is no persuasive evidence that his future treatment prospects are any better.

What is the Appropriate Penalty?

- [177] Section 753(4.1) of the Code indicates that a court must impose an indeterminate period of custody on a dangerous offender unless there is a reasonable expectation that a lesser measure will adequately protect the public. There is no presumption that an indeterminate sentence should be imposed. The three options available to the court are:
- 1) the imposition of a sentence under the usual sentencing regime;
 - 2) the imposition of determinate sentence followed by an LTSO for a maximum period of ten years; or
 - 3) an indeterminate sentence.
- [178] In the determination of a fit sentence, I must consider all the evidence in the proceedings, including the offender's background, previous criminal history, the offences for which he has been convicted in the past, the predicate offence, as well as the opinion in respect of Mr. Sohal's risk level and treatability. The sentence must be adequately tailored to Mr. Sohal and consistent with the principle of sentencing.
- [179] Once a person is designated a dangerous offender, the protection of the public becomes an enhanced sentencing objective among the other principles that must also be considered: Boutilier at para. 34. However, the law is clear that I must impose the least intrusive sentence required to achieve the primary purpose of public protection: Boutilier at para. 60.
- [180] Now that I have designated Mr. Sohal a dangerous offender, I must assess whether the risk arising from his behaviour can be adequately managed outside of the more severe indeterminate sentence.
- [181] The Crown suggested a fixed sentence of six to eight years followed by a ten-year LTSO. They submit that this is the least restrictive sentencing option in which there is a reasonable expectation that the public will be adequately protected.

- [182] The defence submits that an appropriate sentence for Mr. Sohal is two years less a day, arguing that Mr. Sohal has demonstrated exceptional circumstances. The defence submits that the exceptional circumstances are Mr. Sohal's age and that he has strong prospects for rehabilitation, and is motivated to make changes in his life. The evidence respecting Mr. Sohal in this regard was from the certificates that he earned, as well as the support of his family, which was clear from the letters in support.
- [183] Having found Mr. Sohal to be a dangerous offender, I am prevented by s. 753(1)(b) of the Code from imposing a period of imprisonment for a term of less than two years.
- [184] I further reject the defence's proposition that Mr. Sohal has demonstrated exceptional circumstances. There is no evidence that he has strong prospects for rehabilitation, and Dr. Tomita opined that he poses a chronic risk of reoffending with sexual violence. Dr. Tomita indicated that Mr. Sohal is only likely to make progress in sexual offender treatment if he is open about his sexual deviance, which he has yet to do. As Ms. McCulley indicated in her evidence, the treatment programs that Mr. Sohal completed prior to sentencing for the predicate offence do not address his risk factors, and may be an attempt at impression management leading up to the dangerous offender hearing.

Long-term Supervision Order (LTSO)

- [185] I accept Dr. Tomita's opinion that Mr. Sohal poses a moderate to high risk to reoffend with sexual violence and that his risk is chronic. Dr. Tomita was concerned about Mr. Sohal's pattern of sexual offending against strangers, making it more difficult to manage his risk in the community. Mr. Sohal's risk-relevant conditions, being his personality and sexual preferences, will not change over time. As he is now 29, he is unlikely to age out of his maladaptive behaviour shortly.
- [186] Dr. Tomita was uncertain whether treatment would have a real risk-reducing benefit for Mr. Sohal, but was of the opinion that if Mr. Sohal was motivated and honest about his risk factors, he could be treated.
- [187] Dr. Tomita additionally noted that Mr. Sohal should be monitored for a period of time after treatment and would require a lengthy period of legal supervision as part of his community risk management. Dr. Tomita was uncertain whether Mr. Sohal's risk would be contained once any period of legal supervision ends.
- [188] It is clear to me that a conventional sentence in custody alone would not sufficiently protect the public from Mr. Sohal. Without the intensive supervision of an LTSO, he would not be adequately supported or supervised.
- [189] The purpose of an LTSO is twofold: (i) to protect the public, and (ii) to rehabilitate and reintegrate offenders back into the community: *R. v. Ipeelee*, 2012 SCC 13 at para. 50. The supervision period in an LTSO is not intended to be penal, but is rather to accomplish the goal of preventing future crimes: *R. v. R. (J.W.)*, 2010 BCCA 66 at para. 43.

[190] I conclude that the protection of the public requires Mr. Sohal to be subject to external controls for a very extensive period of time. In my view, the imposition of a determinate sentence followed by the maximum period of long-term supervision, will empower the CSC and the National Parole Board over a sufficiently long period of time to plan for and eventually manage Mr. Sohal's reintegration into the community such that public protection can be achieved.

[191] I acknowledge that this means there will come a point where Mr. Sohal will be released from custody regardless of whether he has completed the recommended sex offender treatment or made progress towards managing his risk. In that event, CSC and the Parole Board will still have some tools to manage his risk over the next decade. If Mr. Sohal makes no progress at all, it can be expected that he will not be able to comply with the conditions of the LTSO and will find himself back in custody.

determination of the fixed sentence

Cases Cited by Counsel

[192] Having determined that Mr. Sohal's custodial sentence will be followed by a long-term supervision order, I must now determine the appropriate period of incarceration. The parity principle in s. 718.2(b) of the Code mandates that:

a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances

[193] In written submissions, both the Crown and defence provided the court with various authorities to justify their respective positions. I note at the outset, before I consider them in more detail, that previous decisions are helpful to establish general ranges for similar offences and similar circumstances. However, sentencing is ultimately an individualized process that is based on the offence, the offender, and the most applicable principles of sentence in that particular case.

[194] The cases cited by the Crown include:

- R. v. Pouce Coupe, 2014 BCSC 255;
- R. v. Caouette, [1994] B.C.J. No. 2558 (C.A.);
- R. v. Macdonald, 2014 BCSC 2409;
- R. v. Muhammad, 2004 BCCA 396; and
- R. v. Reis, 2011 BCSC 319 [Reis].

[195] Defence also cited Muhammad and Reis. Defence further cited:

- R. v. Kane, 2012 BCSC 1601 [Kane];
- R. v. B.S.B., 2008 BCPC 1526;

- R. v. Darling, 2002 BCCA 627;
- R. v. Dhillon, 2018 BCSC 807;
- R. v. Hume, 2016 BCCA 230;
- R. v. Nadeau, 2017 BCPC 158;
- R. v. Reddemann, 2017 BCSC 1731; and
- R. v. Toenders, 2017 BCSC 2520.

[196] My task is to impose a sentence that is similar to others imposed on persons in similar situations who do similar things. I have reviewed and considered all of the cases submitted by counsel, and I turn now to a discussion of the cases I find relevant to sentencing Mr. Sohal.

[197] The case most relevant on the facts is Reis where the accused was convicted of a sexual assault with a weapon and an unlawful confinement. The accused invited the victim to his residence shortly after they met. He then forcibly brought her to the bed and forced anal and vaginal intercourse and made the victim perform fellatio. He occasionally expressed anger towards the victim for causing him pain and discomfort and would brandish a small bat and a ceremonial sword. He intimidated and threatened the victim and insisted she consume drugs. She was prevented from leaving the residence, but was finally able to escape after she begged a mutual acquaintance who had come to the residence to take her away.

[198] At the time of sentencing, that accused was 42 years of age and did not have a criminal record. He had strong family support and submitted numerous letters of reference speaking to his positive social and family behaviour. After the incident, the offender took the rehabilitative step of attending a residential treatment program for cocaine addiction. A psychological assessment noted that the accused was at a moderate to high risk for sexual recidivism and needed to participate in a sexual offender program commensurate to his risk level. Justice Schultes imposed a sentence of five years' imprisonment for the sexual assault with a weapon with two years concurrent for the conviction for unlawful confinement.

[199] In Muhammad, the accused was convicted of sexual assault with a weapon after he arranged for the young victim who was involved in the sex trade to provide massage services at his apartment. When she arrived, he violently sexually assaulted her multiple times while holding a knife. The sexual intercourse was unprotected and the victim suffered non-serious injuries from the knife during the assault. The accused was 20 years of age at the time of the offence and was noted to have a difficult background. It was unclear whether he had a criminal record. The sentencing judge imposed a five-year sentence. The Court of Appeal dismissed the offender's appeal from sentence given the high level of violence and the complete lack of consideration for the victim.

[200] In Macdonald, the 42-year-old offender pleaded guilty to a number of offences arising from an assault on his 19-year-old former girlfriend. The accused had invited the victim to meet him and he picked her up and they went for dinner. He then drove the victim to a remote location, tied her hands and feet, and threatened her with an imitation gun and had forced anal and vaginal intercourse with her. The offender had a limited criminal record which included a conviction for assault with a weapon and two convictions for assault. The Crown and defence proposed a joint submission of six-and-a-half years' imprisonment which was accepted by the sentencing judge as a fit sentence which appropriately balanced the aggravating and mitigating factors.

[201] Finally, I find Kane to be relevant to these proceedings as it was the only case provided to me by counsel which involved an offender with a history of committing sexual offences. In Kane, the 47-year-old offender had a prior criminal record which included two convictions for sexual assault. The offender attacked the victim while she walked down an unlit trail at night knocking her unconscious. Her injuries were consistent with forced sexual intercourse. The sentencing judge imposed a sentence of five years' imprisonment followed by a ten-year long-term supervision order.

aggravating and mitigating factors

[202] In order to compare the above cases to the circumstances at hand, I must consider the aggravating and mitigating factors in the present case.

[203] The Crown submits, and I accept, that the following are aggravating factors:

- the victim was 18 years of age at the time of the offence and the Mr. Sohal was 26. Given the disparity in the age, the victim was particularly vulnerable;
- the victim was getting over an illness and had a medical device in her arm at the time of the offence. While Mr. Sohal was forcing her to have sexual intercourse with him, he held onto her arms at the site of the IV shunt. She was injured so badly, she had to go to the hospital;
- Mr. Sohal had unprotected sexual intercourse with the victim and his semen was found in her vagina. This exposed her to the risk of a sexually transmitted disease and an unwanted pregnancy;
- the victim did not want to consume cocaine and only took some because of Mr. Sohal's insistence and over her protests. This occurred shortly before the commission of the offence and the victim stated that the cocaine had an effect on her. Mr. Sohal forced her to consume cocaine again during the offence, this time off his penis;
- Mr. Sohal pushed the victim to the floor during the offence causing her to hit her head on the wall injuring her head; and
- the offence had a significant psychological impact on the victim as evidenced by her victim impact statement.

- [204] The Crown further submits that Mr. Sohal's use of an imitation firearm is an aggravating circumstances. While I note the Supreme Court of Canada's statement in *R. v. Lacasse*, 2015 SCC 64 at para. 164, that an element of an offence cannot constitute a factor. The victim believed the imitation firearm to be real. Mr. Sohal's actions in brandishing what the victim believed to be a deadly weapon was psychologically coercive and distressing. I further note that Mr. Sohal's criminal record is an aggravating factor. This is his third sexual assault with a weapon and the fourth offence in which a threat of violence was used in an actual or attempted sexual contact.
- [205] The only mitigating factors before the court are the continued support Mr. Sohal receives from his family and the recent attempts at rehabilitation. As noted above, the recent attempts at rehabilitation did not address Mr. Sohal's risk factors for reoffending. Another mitigating factor that I consider is his offer of employment.
- [206] I read the facts of the cases to be that as highlighting the importance of factors such as the offender being confined in the residence, threatened with a weapon, forcing her to submit to vaginal intercourse. Like in the predicate offence, the offender in Reis demanded that the victim consume drugs as part of the assault. However, the assaults in Reis was a first offence. While the sexual conduct by the offender in Reis which involved forced anal intercourse was more intrusive than the circumstances at hand, Mr. Sohal appears to have engaged in a higher degree of physical violence than the offenders in both Reis and Muhammad. I note the physical restraint used and the nature of the assault in Macdonald was more aggravating, but the offender's unrelated criminal record was, compared to the circumstances at hand, less aggravating. Kane is relevant, as well, in that it involved an offender with a prior criminal history of sexual offending. However, the crime in question did not involve a weapon or a forcible confinement.

Sentence

- [207] Taking into account all the circumstances of the offender and the offence and the principles of sentencing, I find that an appropriate sentence for Mr. Sohal on the count of sexual assault with a weapon contrary to s. 272(2)(b) of the Code is six years in custody. This sentence will bring home to Mr. Sohal and others the utter unacceptability of this kind of offence, but it is not so long as to put the prospect of rehabilitation and reintegration into the community completely beyond his reach.
- [208] I also impose a sentence of six years for unlawful confinement and six years for uttering threats, both to be served concurrently to the sentence for sexual assault with a weapon.

[209] The Crown notes that Mr. Sohal has been in custody since his conviction, since September 27, 2018. As well, I have heard from defence counsel on this point. To date of the sentencing, December 16, 2019, he will have been in custody for 444 days. He was also in custody for nine days pending his judicial release on this matter from May 25, 2016 to June 2, 2016. The total time that Mr. Sohal has been in custody is 453 days. Mr. Sohal is therefore entitled to a credit on a 1.5:1 basis of 689 days equivalent to 23 months.

[210] Mr. Sohal, please stand.

[211] I have designated you to be a dangerous offender.

[212] As well, I am sentencing you to six years, that there will be significant time in custody taken into account in assessing your sentence.

[213] I have, as well, make the following ancillary orders:

- 1) a DNA order pursuant to s. 487.051 of the Criminal Code;
- 2) a compliance with the provisions with SOIRA under s. 490.012(1) of the Criminal Code, pursuant to the provisions of the Criminal Code, this order shall be for life;
- 3) a weapons prohibition pursuant to s. 109 of the Criminal Code;
- 4) a long-term supervision order for a period of ten years following the sentence; and
- 5) disclosure of these reasons and a transcript of the trial and Dr. Tomita's report to Correctional Service Canada.

"Maisonville J."

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