

Citation: R. v. J.J.B.B.
2007 BCPC 0426

Date: 20071219
File No: 82201-2C
Registry: Kamloops

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

J. J. B. B.

**EXCERPTS FROM PROCEEDINGS
REASONS FOR SENTENCE
OF THE
HONOURABLE JUDGE S.D. FRAME**

Restricted Access – SOIRA Application

Counsel for the Crown:	J. Oliphant
Counsel for the Defendant:	D. Campbell
Place of Hearing:	Kamloops, B.C.
Date of Hearing:	December 19, 2007
Date of Judgment:	December 19, 2007

[1] THE COURT: I apologize that I am going to have to read this out. Mr. B. has pleaded guilty to Count 1, the touching for a sexual purpose of a person under the age of 14, being his young niece, between January 1, 2001, and December 31, 2004. She turned eight years old this year. There is a 10 year maximum and 45 day minimum sentence on this offence. Mr. B. has also pleaded guilty to Count 3 being the possession of child pornography, including still photographs and video footage depicting young females under the age of 14 years being sexually assaulted by adult males.

[2] MR. OLIPHANT: Your Honour, if I could just interject for a moment, I think you said the penalty for the child pornography was a 10 year maximum and a 45 day --

[3] THE COURT: This is the sexual -- I have not even got to that. This is the touching for sexual purpose.

[4] MR. OLIPHANT: I don't think there was a minimum at the time that --

[5] THE COURT: Oh, there was not a minimum at the time for the sexual --

[6] MR. OLIPHANT: I don't -- I don't believe so. I think --

[7] THE COURT: I have only got the recent Code.

[8] MR. OLIPHANT: I think that those amendments came in at the same time.

[9] THE COURT: Okay. All right. I stand corrected there was no minimum sentence at the time. Mr. B. has also pleaded guilty to Count 3 being the possession of the child pornography, including still photographs and video footage depicting young females under the age of 14 years being sexually assaulted by adult males. Some of this footage included the video footage he took of his own sexual acts upon his niece. For the time that binds me, there is a five year maximum sentence for this offence. Finally, Mr. B. has pleaded guilty to Count 5, being that he incited a person under 14 years of age to commit bestiality. This person was the same niece. There is video footage he took of these acts which included two different dogs enticed to lick her genitals while he filmed them. There is a 10 year maximum sentence on this offence.

[10] It has been Mr. B.'s intention to plead guilty since he first instructed counsel. However, it was determined that there should be extra care put into the sentencing process including obtaining a psychiatric assessment. The information was sworn on June 15 and the guilty plea was entered on June 27. The reports were requisitioned that date. However, the sentencing was foiled from proceeding because the court ran out of time in I believe it was November and then because of assigned Crown's illness after that.

[11] I consider it a mitigating factor that Mr. B. has pleaded guilty and spared a very young child from testifying in what would have been very traumatizing circumstances. This is particularly so given that attempts by the police to interview her were unproductive. However, given the video footage documenting the sexual acts, that guilty plea is less compelling than it might have been.

[12] Mr. B. has spent the last seven and a half months in custody awaiting this sentencing. In that time he has been in veritable isolation and has not had access to any counselling, although he has been able to access and read some books on sex offending. I am also told that persons facing such charges as these live in dread of having other prisoners allowed into their cells and of other encounters with the general population. While it has not occurred in this case, the fear is apparently always with those who are thus charged. It is therefore submitted and Crown agrees

that it is appropriate that Mr. B. be given two for one credit for this dead time. I am not in agreement with the custom which has evolved of giving two for one credit in all cases. However, I am satisfied that it is appropriate in these circumstances.

[13] The sentence that the Crown seeks is a global sentence of five to six years broken down to three to three and a half for the sexual touching, 12 to 15 months consecutive for the child pornography, and 12 to 15 months consecutive for the bestiality. The Crown also seeks a SOIRA order and a DNA order, as well as forfeiture of all exhibits except an MP3 player which is to be returned to Mr. B. or to someone appearing at Kamloops Rural RCMP on his behalf.

[14] Mr. Campbell seeks for his client two years incarceration followed by three years of probation, agreeing that all terms set out in the Pre-sentence report are reasonable.

[15] The circumstances of these offences are despicable. That this young child - and indeed her family - must now cope with the effects of such terrible acts must not be forgotten in the sentencing process. Her mother is concerned about how this is going to affect her daughter in the years to come. She should know. She has been through it herself.

[16] The Crown submits that denunciation, general deterrence and separation from society are the key to sentencing in this case. Rehabilitation is very important, but it must come after the other sentencing principles.

[17] There are some statutory aggravating factors I must also consider. Section 718.2(ii.1) because the victim was under 18 and(iii) because Mr. B. was abusing a position of trust; this child was left in his care.

[18] As I said, the circumstances are horrifying and I do not intend to belabour them. The record reflects a more fulsome description. Briefly they are as follows: P.J., the sister of the accused was looking for a video to watch. Her brother had stored some of his personal belongings, including DVDs and videos at her house. She took one of his videos and put it in her VCR. It was her brother sexually assaulting her niece. The footage includes scenes of bestiality. She took the video to the Kamloops Rural RCMP who began this investigation. There are about 30 incidents of sexual contact by Mr. B. of his niece depicted. She is at the ages of three to five in these images. I am told it is very disturbing viewing. Ms. J., when she left the tape with the RCMP, said that she saw enough to identify her niece and she says she will be haunted forever by what she saw.

[19] There are many other graphic details given relating to these offences which were largely similar. They involved Mr. B. filming these while he instructed her to remove her panties, while he touched her genitals, while he licked her genitals, and while he lured two different dogs on at least three occasions to lick her genitals. He used butter to lure the dogs to his purpose. One dog continually walked away and he grabbed its snout to force it into contact with her genitals. On several accounts the girl told her uncle "no" to his demands to remove her panties, tried to stop him from licking her genitals, and ran away from him to the kitchen on one occasion. There is also one instance where he is filming himself masturbating after he has filmed her genitals.

[20] I am told that her mother discovered the assaults shortly before her daughter's eighth birthday. Mr. B. asked if the niece could spend the night and when E.J. asked her daughter if she wanted to go, the girl said no. When asked why not, she related it was because her uncle licks her. She indicated it was in her groin area.

[21] These acts against this child of such incredibly tender years are among the most appalling breaches of trust imaginable, but the tragedy does not end here or, more to the point, it did not start here. Mr. B. and his two sisters are all victims of sexual abuse. His two sisters were

sexually assaulted by their own father. Their mother took them and Mr. B. and fled to B.C. once she discovered this. Tragically, she was raped and murdered while here. Sadly, Mr. B. and his sisters were returned to their father. Ultimately, they were removed from his care when the sexual abuse was learned by the authorities. Mr. B. was eventually returned to his father.

[22] He was himself sexually abused by his grandfather from a young age until into his teens. It is a multi-generational tragedy of monumental proportions. He told his grandmother and an uncle who laughed at him. The disempowerment, as Mr. Campbell says, was so deep it led him to attempt suicide. On the one hand, it is insight into this troubled man whom his counsel describes as a person who is sick and tortured by what he has done. On the other hand, how can a man who was himself sexually abused and who knows the impact sexual abuse had upon his sisters possibly inflict such horrors upon his niece? As his counsel put it, these three adults should be very close because they are survivors of this shared hell. Instead they are irrevocably torn apart by his actions.

[23] Apart from these incomprehensible assaults upon this very young child, Mr. B. was also in possession of a considerable amount of pornography on four computer hard drives and many, many videos and DVDs. There were equal amounts of images of women; bestiality; soiled, stained panties and child pornography. The digital images of child pornography involved explicit sex with young girls between three and ten. There are black and white images dating from the 60's to the present time. One or two involved a woman with a boy, but most were men and girls. Thousands of the images were viewed.

[24] Constable Eakin previewed the material seized by Constable David. He located numerous images of child pornography. There were four separate hard drives. One had over 40,000 images, most of which appeared to be adult as well as some children. There were over 20 videos containing child pornography.

[25] Mr. B. expresses poor insight into the offences. With respect to the child pornography he says he does not look at kids as sexual beings. He does not get an erection from the images or what he did to his niece. He did it because he was curious. He collected the pornography like bottle caps.

[26] I had the benefit of a Pre-sentence Report before me. That report sets out the tragic history of this family and these events. Among those interviewed was Constable David who described Mr. B. as very intelligent. Constable David was of the opinion that the offences were planned, calculated and deliberate. Certainly the number of years over which these offences took place and the persistent filming of them substantiates this. The report says the offending was progressing in severity and frequency. I am told by Mr. Oliphant that his narrative does not describe the age of the child, the dates of the images described or the increasing frequency, but he too has been told that there was a progression of the acts. Additionally, this is confirmed in the interview of Constable David where he reports the offending pattern was gradually becoming more serious and more offensive. Mr. B. says he has suffered previously from erectile dysfunction and, as stated before, is not aroused by the child pornography or his acts. However, the report indicates that he is aroused when in a position of power and control.

[27] The report includes an interview of the victim's mother. She relates that the events have been traumatic for her and the child. In fact the victim impact statements from the mother and the father show that the family has struggled a great deal to cope with this disclosure and the impact it has had on all of them.

[28] When interviewed by the probation officer, Mr. B. offered little insight into his offences. He stared at the wall with a blank look on his face while discussing the offences showing no emotion. He said he was ashamed and regretful. The interviewer queried whether he was

regretful he was caught or whether he regrets the offences. He minimizes his wrongdoing and denies he offended against the child for over four years. He attributes the offences to depression following a break-up with a common-law partner. However, the offences started about a year prior to the break-up. He attempted to digress from the topic by suggesting the victim's mother is a drug abuser and an inadequate parent. P.J. and the native liaison worker who were both interviewed disagree with this characterization of E.J.

[29] Constable David, P.J., his previous counsellor and the probation officer were all of the view that Mr. B. has a highly manipulative personality. He says what the interviewer wants to hear and simply stares when asked questions he does not want to acknowledge. The probation officer did not get a sense of remorse and notes that Mr. B. even denied certain events despite there being footage of them.

[30] A psychiatric assessment was also done in order to assist with sentencing. However, I have found it to be largely unhelpful. The interview itself only took one hour. The report identifies the chronology of the sexual offences against the child and the history of viewing pornography since 1995 as well as child pornography since 2001. It reports some evidence of progression in the nature of the sexual assaults, including one act of bestiality. The evidence suggests there were at least three occasions of bestiality and that the offences may have dated back to when the niece was three. Although in one place the psychiatrist says there is no history of sexual deviance before 2001, the report states later that there is no history of sexual deviance. This is clearly not the case given the offences spanned at least four years according to the charge dates.

[31] Despite the psychiatrist finding that Mr. B. "showed some remorse related to the index offences, but had difficulty verbalizing what part of the index offences he truly feels remorseful about..." and "There is some minimization or denial, but mostly he is able to recognize the nature of the index offences", the psychiatrist concludes that he has remorse and is at a low risk to reoffend. Only one of what I am told are several tests were applied to assess the risk factor. The assessment says that this is Mr. B.'s first contact with the legal system. In fact, he has two prior albeit unrelated convictions. There is no consideration of whether Mr. B. is a pedophile in this report. Given the nature of the offences, I am able to conclude that he very likely is. In fact, his counsel concedes this. He concedes that without treatment Mr. B. is not at low risk to reoffend.

[32] I am asked to consider Mr. B.'s aboriginal heritage pursuant to s. 718.2(e) of the **Criminal Code**. Mr. Campbell spoke of the cultural genocide of the aboriginal people and how it destroyed the moral compass of these communities. However, I cannot fathom that this section was intended that I should give special consideration to aboriginal offenders who commit heinous sexual offences against small children.

[33] In any event, I am referred to the annotations in **Martin's Criminal Code** of this particular section which provides some guidance in this case. The purpose of the provision is to ameliorate the serious problem of over-representation of aboriginal people in prison and to encourage judges to have recourse to a restorative approach to sentencing. The mother of the victim is not interested in restorative processes at this time. I am to consider the unique systemic or background factors that may have played a part in bringing the offender before the court and the types of sentencing that may be appropriate because of Mr. B.'s heritage. I am also mindful that the purpose of this section is not to automatically reduce the sentence because of heritage. It is improper to assume that aboriginal people themselves do not believe in the importance of the objectives of denunciation, deterrence and separation from the community. The reality is that the more serious the offence the more likely sentencing of aboriginal and non-aboriginal people will be similar. In any event, the Skeetchestn Band Chief says that it has no restorative justice program which would serve as a benefit to Mr. B. The native liaison worker concurs.

[34] Reference letters were provided in support of Mr. B. I will not go through each of these letters in great detail. They are from friends and past counsellors and psychologists. They confirm the anguish and depression he struggled with in relation to his past and his attempts to have intimate relationships. He is described as having a very giving nature, a man who is caring and considerate. People expressed shock that he has been charged with the offence and describe a man who is prepared to face the challenge of his penalty and who is willing to seek treatment. He does not appear to have any alcohol or substance abuse problems. He certainly seems to have a lot of support and he will need it in the years to come. He is truly fortunate to have so many people willing to come forward and speak on his behalf.

[35] Both counsel have provided me with a number of cases to guide me on the appropriate sentence in the circumstances. Both concede that none of their cases are directly on point since this one involves child pornography, touching for a sexual purpose, and inciting a child to commit bestiality. Fortunately, such a constellation of horrors is not a frequent occurrence. Unfortunately, it leaves me with cases which do not bear sufficient resemblance to this case to be a full and proper guide.

[36] The Crown's cases involve sexual touching cases where the offender has committed offences over a number of years. In *R. v. E.S. 2001 SKCA 38*, the sexual touching went on for 10 years and were more invasive incidents. There was no child pornography or bestiality. The court said at paragraphs 5 to 7:

5 The gravity of this offence is self evident. It is difficult to imagine anything more harmful to a child than abuse of this nature from a person in such a position of trust. Where the child should have received love and nurture, she received abuse for the self-gratification of another. The long period of time over which the abuse occurred and the large number of incidents are aggravating factors, as is the fact that the abuse continued until the child became mature enough to end it.

6 There are no mitigating factors, although some compassion must be shown for the respondent's age and physical frailties and some credit given him for pleading guilty and thus sparing the child the obligation to testify.

7 Although the charge is of sexual touching rather than sexual assault the conduct is, given the age of the child, just as serious as sexual assault.

The sentence was increased to three and a half years in that case. In this case, the offences did not stop until the child reported to her mother. In fact, to that point, the evidence suggests the offences were escalating. As in *E.S.*, this child is very young and the offence is just as serious as sexual assault.

[37] In *R. v. Black 2007 SKPC 46*, there was sexual touching and bestiality, but the bestiality did not involve the child. There were three children victims in this case and over a year of offending. The offenders taped and photographed some of the offences. This case dealt with the female component of a husband and wife offender team. He had been sentenced to eight years. The court finds that three years is the threshold for these offences. The case was considered more serious in nature. The court imposed a sentence of four years for each of the sexual touching counts as well as one year consecutive for the child pornography and one year concurrent for the bestiality. I note that the child pornography was limited to their filming of their offences and there was no evidence of dissemination.

[38] *R. v. Jakobsen 2006 BCSC 379* was referred to by both counsel. It was a case of possession of child pornography and is our most recent case in this jurisdiction. There were nine images of child pornography and five videos of child pornography. He had a prior conviction for sexual assault of a five year old. He was in denial of his offences. Mr. B. is in denial of any

sexual interest in the children despite the graphic nature of his offences. He also minimizes his offences. There is an important passage at paragraph 19 of this decision which I will refer to:

Possessors of child pornography create a market for those who abuse and exploit children. Eliminating a market for child pornography will go far to eliminating the motivation to harm children who are violated, used and abused in the production of such repugnant material. Those who possess child pornography perpetuate the harm to society in general and to vulnerable children in particular.

The sentence I impose must reflect the need for this deterrence, denunciation and protection of society, in particular our children. The offender in that case was given six months and three years probation.

[39] Similarly in *R. v. North (2001), 165 C.C.C. (3d) 393 (Alta. C.A.)*, there were 2,000 images of child pornography in 100 videos. There were no charges of sexual touching or bestiality. The sentence was increased to 12 months on appeal. And again in that case the court says at paragraphs 10 and 11:

The primary goal of child pornography laws is to prevent harm to children: [Referring to] *R. v. Sharpe*, supra at 75. Child pornography inflicts harm on children in several ways. Children are clearly abused in its production, it can be used to groom or seduce victims, and it may reduce pedophiles' inhibitions respecting abuse of children. Because the market for child pornography is fueled by the demand of those who wish to possess it, criminalizing it may reduce that demand...

[40] And on to paragraph 11:

Courts have found denunciation and deterrence to be the primary sentencing objectives for this offence and sentences of incarceration are often imposed.

[41] In *R. v. W.G.R. (B.C.C.A.), [1991] B.C.J. No.3230 (B.C.C.A.)*, the accused had an atrocious upbringing. He was charged with gross indecency on his daughter and inciting his granddaughter to touch parts of his body. This was obviously separated by some years as both victims were of a tender age when the offences occurred. The accused appealed his 18 month order which was dismissed. The sentence was found to be at the low end of the range. There were exceptional circumstances in that case which included participation in sex offender programs and the accused's horrific background. There is certainly a terrible background to Mr. B.'s history.

[42] In *R. v. W.J.T.*, [1998] B.C.J. No.439 (B.C.C.A.), there were sexual assaults of two young girls. The sentence was three years. The Court of Appeal was asked to consider whether a conditional sentence could be imposed because such sentencing had not been in effect when the original sentence was passed. The court determined that three years incarceration was appropriate.

[43] Finally, the Crown provided me with *R. v. G.R.H. 2004 B.C.P.C. 286* which provides that sexual assault by a person in a position of trust normally requires a prison term. The court had been asked to consider a conditional sentence order.

[44] The defence also provided me with a number of cases. In *R. v. S.J.W., [2004] B.C.J. No.2939 (B.C.P.C.), aff'd [2004] B.C.J. No.667 (B.C.C.A.)*, there were three instances of touching a child aged 11. There was a low risk of recidivism and a sentence of nine months probation was imposed. There are many more instances of sexual touching in the case before me and while it seems obscene to rate these offences on a continuum it is necessary to do so when considering degree for the purposes of sentencing. To that end the incidents before me were more serious than those in *S.J.W.*

[45] In *R. v. R.K.L.*, [2004] O.J. No.5163 (O.C.J.), there were 10 incidents. The victim was his niece. He received nine months. It would have been 12, but for his early guilty plea. There were at least 30 recorded instances of sexual touching in the case before me.

[46] In *R. v. J.D.*, [1998] O.J. No.3132 (O.C.J.), there were three counts of sexual touching. The accused denied the allegations and he was sentenced to 12 months.

[47] In *R. v. J.D.M.*, [2001] B.C.J. No.923 (B.C.S.C.), the accused after trial was found guilty of several counts of sex assault. The victim was his stepdaughter and he was in a position of trust. She was aged six to eleven for the offences. He received two years less a day. There were no mitigating factors and he was unrepentant.

[48] In *R. v. Hall*, [2005] B.C.J. No.2590 (B.C.C.A.), aff'g [2005] B.C.J. No.1393 (B.C.S.C.), the accused received 20 months. The child involved was between the age of four and five. He was the uncle. He blamed others and was not remorseful.

[49] In *R. v. Gurr*, [2007] B.C.J. No.2325 (B.C.S.C.), it was a case of luring children over the Internet and possession of child pornography. He had 200 pictures, considerably less than in this case. He received three months for possession plus 12 months for luring. He also had three years probation.

[50] In this case, I cannot accede to the defence request for a sentence of two years plus three years of probation. The allegations; the length of time over which the offences occurred; the number of times the incidents occurred; the attempts by this very young and very vulnerable child to stop her uncle; the fact that he recorded the events and the impact this has had and will have on her and her family simply do not support such a sentence. When I consider the offences of sexual touching in the context of global sentencing with the offences of the bestiality and the vast amount of child pornography, including the graphic and voluminous footage of this young victim, the principles of deterrence, denunciation and separation from the community cannot be satisfied with the sentence sought by defence.

[51] I must say that I am disheartened that three years is considered the threshold for sentencing and I am disheartened by the range of sentences I have seen in these cases. To place such a low threshold on cases of this nature where very young children are involved does not seem appropriate. Similarly, to impose three or six months or even 12 months for possession of child pornography despite the strong language in the cases about the purposes of denunciation and deterrence, to prevent harm to children, seems terribly inconsistent.

[52] However, I am bound by the cases that precede my decision. Both counsel are very experienced criminal lawyers and have done a number of sex offender cases. They have worked hard to put before me the ranges considered appropriate for these offences. I will sentence in accordance with those submissions.

[53] In my view the appropriate sentence for Count 1 is three and a half years. Three years is the threshold and these were multiple grievous offences. For Count 3, 12 months consecutive as a reflection of the quantity of child pornography including footage and stills of the niece and considering the strong language in the cases regarding deterrence - with which I concur. And for Count 5, 15 months consecutive, considering that there were three instances of inciting bestiality, all involving this young victim. This is a total of 69 months with credit for 15 months, leaving 54 new months to serve.

[54] There will be an order that you comply with the **Sex Offender Information Registration Act** which order will be in effect for a period of 20 years. There will be an order under s. 161 of the **Criminal Code** --

[55] MR. OLIPHANT: And, I'm sorry, Your Honour. I neglected to find out what the --

[56] THE COURT: -- I am going to put that qualifier in -- prohibiting you from attending a public park or public swimming area where persons under the age of 14 years are present or can reasonably be expected to be present; or a daycare centre, school ground, or playground; or from a community centre where persons under the age of 14 years are present or can reasonably be expected to be present; from seeking, obtaining, or continuing any employment, whether or not the employment is remunerated; or becoming or being a volunteer in a capacity that involves being in a position of trust or authority towards persons under the age of 14 years; or from using a computer system within the meaning of section 342.1(2) for the purpose of communicating with a person under the age of 14 years --

[57] MR. OLIPHANT: The duration of that order.

[58] THE COURT: I was going to suggest the 20 years that I am putting in the **SOIRA** order --

[59] MR. OLIPHANT: Thank you.

[60] THE COURT: -- unless there is submissions sought on either.

[61] MR. OLIPHANT: No.

[62] MR. CAMPBELL: No submissions.

[63] THE COURT: There will be an order for the production of a DNA sample and the wording for that -- Madam Registrar that is number 336. You shall attend at the RC -- oh, I suppose in this case the RCMP are going to have to attend to obtain the sample.

[64] MR. OLIPHANT: Yes, yes, they will.

[65] THE COURT: So that is not 336, Madam Registrar. On the attendance of the RCMP in order -- you will make yourself an order for -- available in order for a sample or samples of your bodily substances to be taken for purposes of registration in the National DNA Databank in accordance with the provisions of Part XV of the **Criminal Code**.

[66] There will be an order that all exhibits be forfeited to the Crown for destruction except for an MP3 player which shall be returned to Mr. B. or to someone appearing at Kamloops Rural RCMP on his behalf.

[67] MR. OLIPHANT: I think that covers everything, Your Honour.

[68] MR. CAMPBELL: Thank you, Your Honour.

[REASONS FOR SENTENCE CONCLUDED]