PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. D.R., 2020 NSPC 46

Date: 20200129
Docket: 8292099; 8292100
Registry: Dartmouth

Between:

HER MAJESTY THE QUEEN

v.

D. R.

Restriction on Publication: S. 486.4 & S. 486.5

Judge:	The Honourable Judge Theodore Tax,
Heard:	in Dartmouth, Nova Scotia
Decision	January 29, 2020
Charge:	Section 155(1) of the **Criminal Code Of Canada**
Counsel:	Gayle Karding, for the Public Prosecution Service of Nova Scotia Carbo Kwan, for the Defence Counsel

PUBLISHERS OF THIS CASE TAKE NOTE that sections 486.4 and 486.5 of the **Criminal Code** applies and may require editing of this Judgement or its heading before publication. Sections 486.4 and 486.5 provide:

486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173, 210, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346, 347,

(ii) an offence under section 144 (rape), 145 (attempt to Commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or Subsection 246(1) (assault with intent) of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983 or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the **Criminal Code**, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any subparagraphs (a)(i) to (iii).

486.5(1) Unless an order is made under section 486.4, on application of the Prosecutor, a victim or a witness, a judge or justice may make an order directing that any information that could identify the victim or witness shall not be published in any document or broadcast or transmitted in any way if the judge or justice is satisfied that the order is necessary for the proper administration of justice.

By the Court:

[1] DR is before the Court in relation to this sentencing decision after having pled guilty to the offence of incest, by having had sexual intercourse with DK, while knowing that DK was his daughter contrary to section 155(1) of the **Criminal Code**. The offence occurred between November 1, 2017 and October 10, 2018.

[2] The Crown proceeded by indictment and DR elected to have his trial in the Provincial Court. During the pre-trial conference, Defence Counsel advised the Court that DR would be changing his plea to guilty with respect to the incest offence. On August 14, 2019, DR pled guilty with respect to the incest offence.

[3] The issue before the court is to determine a just and appropriate sentence in all the circumstances of this offence and this offender.

Positions of the Crown and Defence:

[4] The Crown Attorney submits that the appropriate range of sentencing for the crime of incest for this offender who had sexual intercourse with his daughter is 4 to 6 years in a penitentiary. The Crown Attorney provided several sentencing precedents from Ontario courts which involved similar offenders who were the fathers of the victim and had committed the offence of incest with their biological daughters. It is the position of the Crown that this offence represents a significant abuse of authority by a parent of a vulnerable victim and that the Court should emphasize specific deterrence, general deterrence and denunciation of this unlawful conduct in the sentencing decision.

[5] Defence Counsel submits that the just and appropriate sentence in all the circumstances of this case and this offender would be to suspend sentence and order DR to be subject to the strict terms of a probation order for three years. She recommends that the three-year probation order should initially include a lengthy period on house arrest with limited exceptions with the balance of the probation order being served under the conditions of a curfew with limited exceptions. It is the position of the Defence that there is no need to separate DR from society as the incest did not occur over an extended period of time, being approximately one year with 4 to 6 incidents, the victim was not a young person, being about 23 years old at the time of the incidents and there are several mitigating circumstances.

[6] The Crown Attorney seeks ancillary orders including a firearms prohibition order under s. 109(2) of the **Code** for 10 years, a discretionary order under s.161 of the **Criminal Code** for 20 years, a DNA order under s. 487.051 of the **Code** as the s.155 **Code** incest offence is a primary designated offence within the meaning of section 487.04 of the **Criminal Code** and a 20 year order under the **Sex Offender Information Registration Act (SOIRA)** pursuant to ss. 490.011-490.013 of the **Code**, as the s. 155 **Code** offence is a "designated offence" for the purposes of the **SOIRA.**

[7] Defence Counsel contests all of the ancillary orders sought by the Crown. With respect to the firearms prohibition, she submits that no weapons were involved, and no threats were made to the victim, who was not a minor at the time of these incidents. With respect to the section 161 **Code** order, Defence Counsel submits that DR is not a risk to reoffend, the victim was not under the age of 16 years and if an order is made, it should be limited to a five-year order. She maintains the same position with respect to the **SOIRA** order as there is no need for that order to be for a period of 20 years as that length would also be excessive in the circumstances of this case.

Background Facts:

[8] The background facts to the offence before the court were submitted as an Agreed Statement of Facts pursuant to section 655 of the **Criminal Code** and were signed by DR, his Defence Counsel and the Crown Attorney. The Agreed Statement of Facts was filed as Exhibit 1 during the sentencing hearing, prior to the submissions of counsel on December 3, 2019.

[9] DR is now 44 years old. He is the biological father of the victim, DK, who was born on September [..], 1994. DR was 18 years old when he fathered DK. DK was born in another province and shortly thereafter, DR left that province and returned to Nova Scotia. DR and DK had no contact with one another for about 20 years, until 2015. DR's first real contact with DK came when they both resided in another province, for short period of time, when she was about 21 years old.

[10] While residing in the other province, DR formed a familial relationship with DK and at the same time, through her mother, he learned that DK has had a developmental disability due to illness, since her infancy. At the time of the incest incidents, DK was medically described as having a mental age of 16-year-old.

[11] In 2017, DR moved back to Nova Scotia and established a residence with his common-law partner in the Halifax Regional Municipality. In November 2017, DK moved to Nova Scotia and began residing in DR's residence.

[12] Shortly after DK moved into the residence with DR and his common-law partner, the first instance of sexual intercourse occurred between DR and DK. DK was asleep when DR entered her room wearing only his boxers and proceeded to pull down DK's pyjama pants and panties and put his penis inside her vagina. The incident lasted between 5 to 6 minutes and DR ejaculated on DK's backside.

[13] The next incident occurred during the early morning hours of September 20, 2018, when DK was sleeping in her bed. DK was almost 24 years old at that time. DR came into her bedroom wearing only his underwear, got into bed with her, put DK on top of him and put his penis in her vagina.

[14] On Friday, October 5, 2018, DK was visiting with a friend who lived across the street from her in the HRM. The friend, like DK, had some developmental disabilities. On this occasion, DR was intoxicated at his residence and sent text messages to DK asking her to send naked pictures to him of her friend. DK sent naked pictures of her friend to DR from her cell phone.

[15] On the morning of October 9, 2018, DR had just returned home from a dental appointment and shortly thereafter, DK also returned to the house. When she returned home, DR approached her from behind while he was fully clothed, bent her over the bed pulled down her pants and panties and put his penis in DK's vagina. The intercourse lasted for about 2 to 5 minutes and after that DR and DK went to the bathroom to wash themselves.

[16] On October 10, 2018, DK contacted the police to report that DR had sexually assaulted her. On October 13, 2018, DR was informed that there was a police investigation into DK's allegations of incest and sexual assault. DR was informed of his **Charter** rights and after speaking with the duty counsel, DR voluntarily stated that he had sex with DK on 6 occasions between November 2017 and October 9, 2018.

Victim Impact Statement:

[17] In her Victim Impact Statement, DK described the emotional impact of the offence on her. She stated that she is scared and upset, angry and hurt by DR's actions as it has ruined her friendships in the neighbourhood and her relationship

with her stepsisters and DR's common-law partner. Moreover, she was saddened by the fact that she would not have a dad anymore, but at the same time, was afraid that he might come back and hurt her or her sisters and brothers.

[18] DK also used a space on the form provided where a victim may draw a picture or write a poem or letter to describe the impact of the offence. The drawing made by DK depicts a stick person image of a girl with tears running down her cheeks and then, between her and a stick man, she drew a heart broken in 2 pieces. DK wrote beside that drawing that she was happy to have a dad in her life after a long time of not having one and concluded: "I trusted him to take care of me and he broke that trust with what he did."

[19] In addition, the Crown Attorney also filed Exhibit 3 which was comprised of 2 documents namely: (1) A Disability Support Program Physician, Report dated November 8, 2018 and (2) a Psychological Assessment of DK prepared on May 5, 2009. The Disability Support Report was prepared by DK's physician who stated that, as a result of developmental delay, she was functioning at below 1% for her age in certain aspects of daily living.

[20] The doctor also noted that at age 14 months, DK contracted encephalitis which led to seizures, stroke, paralysis on the right, speech/language difficulties and limited comprehension. In addition, the Doctor noted that, around age 16, DK became subject to mood swings, frustration, anger and depression which had also been noted in the 2009 report which was prepared for the School Board to assist in her transition to secondary school.

[21] The Psychological Assessment prepared for the School Board in 2009 stated that DK's level of cognitive intellectual functioning was "within the extremely low range of ability, well below the 1st percentile and largely consistent with her previous 2005 assessment." The report also indicated that her verbal comprehension, perceptual reasoning, working memory and processing speed were all well below average levels [which were indicated to be in the 25th to 75th percentile of all children of her age in the general population]. Most of DK's evaluations were below the 1st percentile.

Circumstances of the Offender:

[22] DR is presently 44 years old. He stated that he was the subject of physical, emotional, verbal and sexual abuse by family members, while he was growing up. He does not know the name of his father. The relationship between his mother and

the stepfather was often violent and on one occasion, he contacted the police to intervene. DR reported that his mother passed away in 2002, adding that "she drank herself to death." His stepfather was killed in a motor vehicle accident when DR was 14 years old. About 15 years ago, he learned that he had a half-brother, but DR has not maintained that relationship due to the personal choices in life of the half-brother.

[23] DR advised the Probation Officer that he was born in Toronto Ontario and at age 3, Child Welfare became involved with the family. For the next 10 years, he was moved back and forth between his mother's house and the care of Child Welfare. While he was with his mother and the stepfather, his mother would often become intoxicated and she would be physically abusive and beat DR as well as having violent episodes with his stepfather.

[24] When DR was 14 years old, he was removed permanently from his home after his stepfather had passed away, and he was placed for adoption. Between the ages of 14 and 17, he bounced between foster homes, group homes and attended several different schools. During that period, he began using illicit drugs and has been smoking cigarettes since he was 8 years old. Finally, at age 17, Child Welfare helped him secure his own apartment and despite being provided with some finances, it was a struggle to maintain the residence.

[25] DR stated that he began using alcohol at age 18 and for a few years thereafter, his life was a struggle. He lived on the streets briefly, was employed for a time and before he was 23 years old, he had fathered 3 children.

[26] In terms of his current family arrangements, he has been in a very positive relationship with his common-law partner since 2010. DR advised the Probation Officer that he is the father of 7 children from 4 different relationships, with the children's ages ranging from 12 to 24 years old. He has limited or no contact with those children at this time.

[27] The Probation Officer contacted DR's common-law partner who confirmed that she has been in a relationship with DR since 2010. She advised the Probation Officer that DR has taken on a father role for her daughter from a previous relationship and that DR has been helpful, caring and courteous in the community. She stated that she was "shocked" to hear about the offence but, said that these events have been a turning point in DR's life.

[28] DR's common-law partner advised the Probation Officer that DR had been the victim of a similar offence at a young age and now feels plenty of guilt and shame, as well as trauma from the past and has sought counselling. She expressed concern that a custodial sentence may be detrimental to DR and his children continuing to have medical and dental benefits from his employment. The counselling has helped DR realize the issues in his life which need to be addressed and he is now addressing those problems through counselling.

[29] DR reported that he left school during grade 11, as school was a struggle and he had poor attendance due to the lack of support or encouragement at home. While going to school, he described periods of bullying and being beaten up by other students. He also informed the Probation Officer that he was diagnosed with ADHD at a young age and that an assessment done about 5 years ago identified a learning disability, mostly with comprehension.

[30] DR confirmed that he has been employed for the last 10 years, which has provided a steady income for the family unit. He had previously worked in fast food restaurants, construction and that from time to time, he had also lived on the street or was drawing income assistance. The Probation Officer spoke with DR's current supervisor, who confirmed that he is a great worker and interacts well with his coworkers. The supervisor was shocked to hear about the offence before the court.

[31] DR advised the Probation Officer that his physical health is good and in terms of his mental health, he mentioned that he had ADHD, anxiety and sleep apnea. In addition, he advised the Probation Officer that he had been diagnosed with posttraumatic stress disorder regarding his childhood and to address those issues, he has been working with a clinical psychologist for the past 6 months.

[32] The Probation Officer contacted DR's clinical psychologist who indicated that he first became connected with DR in March 2019. Since then, they have 15 sessions have been completed and several more were scheduled before the sentencing hearing. The primary focus of their counselling sessions is on DR's PTSD from prior incidents where he was the victim of physical, emotional and sexual abuse by more than one family member.

[33] DR advised the Probation Officer that he accepted responsibility for the offence, that he made the "wrong choice" and that it was a bad decision. He was remorseful and regretted his actions on the victim and also the effects his actions have had on his common-law partner and others. Although he stated that it did not

feel like a typical father/daughter relationship because he had not seen his daughter in over 20 years, DR acknowledged that he is not making excuses and he knows that he "did wrong'.

[34] DR comes before the court without any prior criminal convictions.

[35] In addition to the Pre-Sentence Report prepared by the Probation Officer, the court was provided with a Forensic Sexual Behaviour Program pre-sentence assessment dated November 3, 2019, which was prepared by Dr. Michelle St. Amand-Johnson.

[36] In the report, Dr. St. Amand-Johnson noted that DR confirmed that he had engaged in sexual intercourse with DK on five or six occasions and that he perceived her as a "willing participant." Dr. St. Amand-Johnson concluded that DR's offending was due to him becoming sexually aroused in response to a physically mature female who he perceived as being similarly interested and due to the fact that he did not subjectively experience a sufficiently strong bond to inhibit his arousal, despite intellectually knowing that she was his biological relative.

[37] In the final analysis, it was the doctor's opinion that DR's risk for sexual recidivism was "below-average." She recommended that DR attend, actively participate in and successfully complete a specialized treatment program for sexual offending delivered at a "low to moderate level of intensity" by professionals specifically trained in the field and to be followed by maintenance sessions.

[38] Dr. St. Amand-Johnson added that the recommended treatment program at the "low to moderate level of intensity" is available in the community, with the earliest possible program for DR to attend being held in late 2020. She also stated that the "low to moderate intensity treatment" program is not available in the federal correctional system, as treatment resources are presently devoted to high-risk cases. Similarly, treatment of any intensity is also not available within the provincial correctional system at the present time. She also recommended that DR continue to engage in psychotherapy to process past traumas in his life and to strengthen his skills for healthy coping and interpersonal problem-solving.

Analysis:

[39] The determination of a just and appropriate sentence is highly contextual and is necessarily an individualized process which depends upon the circumstances of the offence and the offender: see **R. v. Lacasse**, 2015 SCC 64 para.1. The Court is

required to carefully balance the societal goals of sentencing against the moral blameworthiness of the offender and the gravity of the offence, while at the same time, taking into account the victim or victims and the needs of and current conditions in the community: **R. v. M (CA),** [1996] 1 SCR 500 at paras. 91-92.

[40] The fundamental purposes and principles of sentencing are set out in ss. 718 to 718.2 of the **Criminal Code.** Those fundamental objectives of sentencing are to protect the public and to contribute to respect for the law and the maintenance of a safe society, by having one or more of the following goals: denunciation, general and specific deterrence, separation from society where necessary, rehabilitation of the offender, promotion of responsibility in offenders and acknowledgement of the harm done to victims and to the community.

[41] Section 718.1 of the **Criminal Code** sets out the fundamental principle of proportionality in sentencing. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In other words, the severity of a sanction for a crime should reflect or be proportionate to the seriousness of the criminal conduct.

[42] Pursuant to s. 718.2 of the **Criminal Code**, the court that imposes a sentence is also required to consider several other sentencing principles in determining the just and appropriate sanction. Section 718.2(a) of the **Code** requires the court to consider the aggravating and mitigating circumstances which may either increase or reduce the appropriate sentence.

[43] The parity principle found in s. 718.2(b) of the **Code** requires the court to consider that the sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[44] Section 718.2(d) of the **Criminal Code** is a principle of restraint which requires the court to consider that an offender should not be deprived of liberty, if less restrictive sanctions, may be appropriate in the circumstances.

Aggravating and Mitigating Circumstances:

[45] I find that the Aggravating Circumstances are as follows:

- The offence involved sexual intercourse between a father and his biological daughter on 5 or 6 occasions,

- The offender was in a position of trust with respect to his daughter and violated that trust for his own personal gratification [section 718.2 (a)(iii) of the **Criminal Code**],
- DK was a vulnerable victim and although she was about 24 years old at the time when DR engaged in sexual intercourse with her, the evidence established that he knew or ought to have known that she had several developmental disabilities and was functioning at a mental age equivalent to a 16-year-old.

[46] I find that the Mitigating Circumstances are as follows:

- DR is a first-time offender with no prior criminal convictions,
- DR entered an early guilty plea and has spared DK from the trauma of her having to relive and relate these events in court,
- DR has accepted full responsibility for the offence, is remorseful and has expressed regret for the impact on DK and his family,
- DR had a turbulent upbringing and as a young person was himself, the victim of physical, emotional and sexual abuse by family members, was subject to bullying in school, all of which has contributed to PTSD for which he has recently sought counselling,
- The Pre-Sentence Report was generally positive, and the Forensic Sexual Behaviour Assessment indicated that DR was a low risk to reoffend.

The Principle of Proportionality and the Parity Principle:

[47] In determining the just and appropriate sentence, it is also important for the Court to consider the fundamental principle in sentencing as expressed in section 718.1 of the **Code**. The principle of proportionality reminds judges that the sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility.

[48] I find that the objective gravity of this offence, is, in my opinion, very high. Parliament has legislated that the offence of incest contrary to section 155(1) of the **Criminal Code** is one of the most serious offences in the **Code**. The offence is established if the offender had sexual intercourse with a person, knowing that the other person was within a defined blood relationship, in this case, his child. This is an indictable offence and an offender is liable to imprisonment for a term of not more than 14 years. Moreover, Parliament has legislated that, if the victim was

under the age of 16 years, the offender would be subject to a minimum punishment of imprisonment for a term of five years.

[49] With respect to DR's degree of responsibility or moral blameworthiness for this offence, I also find that it is very high. Notwithstanding the fact that DR had not seen DK for almost 20 years, his moral blameworthiness for the five or six acts of incest by having sexual intercourse with his own daughter remains very high. As the adult and parent in the relationship with DK, whom he knew to be his daughter, even if he had not seen her in many years, his actions on several occasions represented an extreme abuse of his position of trust as a parent for his own sexual gratification.

[50] Furthermore, while it is clear that DK was not coerced or groomed, prior to engaging in sexual intercourse with her father, she could not legally consent to engage in those sexual acts, and I find that it does not reduce DR's moral blameworthiness for this offence. Finally, the fact that DR knew that DK had developmental delays and several aspects of her day-to-day activities had to be monitored by him and his common-law partner, once again, leads to the conclusion that his degree of responsibility for this offence is very high.

Sentencing Precedents to Establish a Range of Sentence:

[51] As I indicated previously, the parity principle found in section 718.2(b) of the **Code** requires the court to consider that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A review of the sentencing precedents provided by counsel or reviewed by the Court may be considered to establish a range of sentence, as a guideline for the trial judge. It does not, however, create any hard and fast rules, nor does the consideration of an appropriate range preclude a greater sentence where the emphasis is upon denunciation, deterrence and the gravity of the offence or a lesser sentence based upon special or significant mitigating circumstances.

[52] In support of the Crown Attorney's sentencing position, she provided several recent cases which involved the same offence:

1. **R. V. W.N**., 2018 ONSC 3443 - in that case like the instant case, the accused pled guilty, had sexual intercourse with his daughter several times over a short period, when the victim was 22 years old, but due to developmental delays, she was functioning at the intellectual level of a 10-year-old. The victim had been removed from the house by

Children's Aid due to an unstable environment and not being adequately cared for when she was four years old. Then, she lived with a maternal aunt and in group and foster homes for several years. Like the instant case, WN had only become "re-engaged" in his daughter's life shortly before the sexual acts which led to the charges before the court. The Court concluded that the offender took advantage of the victim's vulnerabilities and like DR, the offender had been sexually abused as a child.

Key differences in that case to the instant case were that the offender gave the victim money or bought things for her to keep her quiet and compliant. In addition, the offender was 54 years old and had a prior record for a sexual assault in 1983, a sexual assault in 1986 of his girlfriend's daughter and in 1999, he was convicted of three counts of sexual assault by fondling and touching his two young nieces.

The Court noted that the Ontario Court of Appeal had established a range of sentences for a first-time offender dealing with parental incest involving sexual intercourse, at 3 to 5 years imprisonment. Given the offender's prior record and other aggravating circumstances, mitigated by his own history being sexually abused and the gap of 11 years between the previous incident, the Court ordered a jail sentence of 6 years, less presentence custody. The Court also ordered a 20-year **SOIRA** order, DNA, a 10-year weapons prohibition under section 109 of the **Code** and a non-communication order pursuant to section 743.21 of the **Code.**

2. **R. v. J.C.J.,** 2017 ONSC 6704 (CanLii) – The offender was convicted after trial of incest of one incident of sexual intercourse with his daughter as well as a charge of sexual assaulting her. At the time of the offences, the victim was 18 years old and the offender was 39 years old. The victim and the offender had been drinking alcohol together and later, he went back to her bedroom, where she was pretending to be asleep and had unprotected sexual intercourse with her, despite her objections.

   The offender had been placed in foster care as an infant but enjoyed a supportive childhood, graduated from high school and had been employed as an automotive technician for 15 years. At the time of the sentencing, JCJ was 43 years old and had been in a relationship with his spouse for 15 years, with the couple sharing three daughters who

were 13, 10 and eight years old. In addition, JCJ also had two adult daughters from prior relationships, including the victim.

The offender had a limited prior criminal record for non-violent crimes. JCJ had recently engaged in counselling focusing on his relationship with his spouse and children.

The victim in that case, like the instant case, stated that she had lost a relationship with her young siblings, the security of having a home, and her trust in people. The offender had only met the victim when she was 17 years old and had no parental relationship with her prior to that time. The Court concluded that the daughter was a vulnerable victim.

In JCJ, like the instant case, the offender provided the court with several letters of support. The Court stated, at para. 35, that little weight would be attributed to those letters as "the type of offences at issue are ones which other members of the offender's family or the public rarely see."

The Court concluded that the offences of incest and sexual assault were very serious, and that deterrence and denunciation were to be emphasized, in imposing a sentence of 5 years of imprisonment, with a concurrent sentence of three years for the sexual assault. The ancillary orders sought by the Crown were also imposed.

3. **R. v. P.F**., 2019 ONCJ 38 - The offender, who was 39 years old, pled guilty to an incest charge for having sexual intercourse with his 17-year-old daughter, over three-week period. The offender and victim's mother had separated when she was a toddler. The offender had minimal contact with the victim until she was 15 years old, when she came to live with him. The offender had grade 9 education, was diagnosed with ADHD in school, had a spotty work history and had abused drugs and alcohol. He had a several prior convictions for crimes of dishonesty, breaches of court orders and violence, but no prior sexual offences.

   A Sexual Behaviour Assessment report prepared by a forensic psychiatrist concluded that this was a crime of opportunity, rather than having any pedophilic interests. The offender believed that his daughter shared responsibility for what had occurred. He had maintained that she had brought drugs into their home, which they

both used, the sexual relationship was consensual and that it had been initiated by her.

The Court ordered four years of incarceration for the incest offence and one-year consecutive for the offence of making child pornography because he had taken naked photographs of himself with his daughter.

[53] In support of her sentencing position, Defence Counsel provided the following precedents:

1. **R. v. M.T.P.,** [1999] O.J. No. 827 - this was an endorsement judgement of the Ontario Court of Appeal in relation to an appeal by the offender of a sentence of two years less one day for incest, to be followed by three years probation. The offender had pled guilty to acts of incest with his two daughters. In the case of one daughter, the sexual relations began when she was aged 21 or 22 and continued for about eight years and with respect to the other daughter, the acts of incest occurred on two occasions when she was 30 years old. When the appeal was heard, the offender had already served nine months of the sentence.

   The Court of Appeal stated that they were not aware of any precedent setting out sentencing guidelines for incest involving adults. The Court noted, at para. 4, that the daughters were now adults and therefore, there was not the same dependency and vulnerability that exists between a father and a child, although there still was a position of trust. The Court held that the trial judge had erred in principle by not recognizing that fact as an "important characteristic" and that this was not a case of child abuse, but was related to society's condemnation of incest.

   In addition, the Court of Appeal noted that the offender had virtually no contact with his children during their formative years and that he had not established a "traditional parental relationship." Therefore, the conduct which was subject to denunciation, was the relationship itself. The offender had shown remorse by his plea of guilty. Furthermore, since the appeal was argued on the basis of being a choice between a conditional sentence or continuing as a custodial one, the Court concluded that the appeal should be granted, the sentence reduced to the time served, to be followed by the two years of probation as ordered by the trial judge.

2. **R. v. K.V.E**., 2013 BCCA 521 - The offender was 78 years old when he pled guilty to acts of incest between 1974 and 1990, with his 3 daughters, while they were between the ages of 4 and 18. The abuse progressed from sexual touching to full intercourse and also involved the use of force and threats.

   The offender had cooperated with the police, the psychological reports indicated a lack of awareness and the sentencing judge believed that KVE was remorseful. The Crown had recommended a sentencing range of 5 to 6 years for each of the three complainants on the incest charges and 2 years consecutive for a sexual interference charge with his granddaughter for a total of 17 years. Defence Counsel recommended a range of 3 to 5 years for each count of incest, with the sexual interference charge, with all of the sentences to be served concurrently. The trial judge ordered three concurrent 5-year terms for the incest offences and a 2-year concurrent term for the sexual interference charge.

   The Court of Appeal allowed the Crown appeal and stated that the trial judge had given insufficient weight to the principles of deterrence and denunciation. The mitigating factors did not offset the aggravating factors or the gravity of the offences. The offender had sexually, physically and psychologically abused his daughters for over 10 years and then preyed upon his granddaughter. The imposition of concurrent sentences by the trial judge had failed to effectively impose a sentence for the offences committed against three of the four victims. The appeal was allowed, and the Court substituted a sentence of 10 years in prison, after considering the totality principle.

3. **R. v. P.B.K**., 2013 ONSC 427 - the offender pled guilty to having had sexual intercourse with his biological granddaughter over 80 times during a four-year period, which began when she was about 20 years old and the offender was about 60 years old. The granddaughter had lived with the offender and his wife since she was four years old. He described it as a consensual relationship and was of the view that he and the victim were both equally guilty of the incest offence.

   The offender was an aboriginal man who was 66 years old at the time of the sentencing hearing. He had no prior criminal record. PBK had been forced to attend an Indian Residential School at age 6, and thereafter, he was subjected to excessive discipline, loss of culture and

to rape attempts by member of a religious order. He abused alcohol as a teenager, but overcame his issues in his 30's.

The offender and his wife had been married for 42 years and they had seven children together. PBK's wife remained very supportive of her husband and was heavily reliant on him for her daily needs as she suffered from diabetes, was legally blind and had a degenerative back condition. After overcoming his alcohol issues, the offender became an alcohol and drug abuse counsellor, had worked as a heavy equipment operator, acted as a native Justice of the Peace and became a public speaker as a survivor of the residential school system.

The victim stated that the incest had a devastating effect on her and led her to drop out of a nursing program. She felt shame, sadness, anger and anxiety throughout the incestuous relationship with her grandfather. In addition, she lost her ongoing contact and close relationship with the extended family and was in counselling for depression and anxiety.

The Crown recommended a custodial sentence of 18 to 24 months with 2 to 3 years of probation to follow. Defence Counsel recommended a 12 to 18-month community-based sentence followed by two years probation.

The court imposed a sentence of 15 months imprisonment followed by 24 months probation. The court found that the offender had groomed the victim through a steady and deliberate progression of sexual contact. In addition, while the victim did not resist and may have even acquiesced, the court held that this was not a case of voluntary and informed consent between independent adults.

The Court stated that a high degree of moral blameworthiness was attributable to the offender and that the offender had violated the victim's trust in the worst possible way over a prolonged period, which caused immediate and likely, long-term emotional damage. Given the repugnant nature and circumstances of the offence and in consideration of the principle of proportionality, a community-based sentence was not appropriate or reasonable in the circumstances.

The court also considered the unique circumstances of PBK as an aboriginal offender, but the trial judge ultimately concluded that the repugnant nature of the offence and the violation of a position of trust

> required deterrence and denunciation of the conduct in the "strongest possible terms."

The Just and Appropriate Sentence:

[54] It is apparent from a review of the case law provided by counsel and reviewed by the Court, amply supports a range of sentence from 3 to 5 years in a federal penitentiary, which overlaps the range that was recommended by the Crown Attorney. It is also fair to say, as the Ontario Court of Appeal said in **MTP**, there are not a lot of reported decisions setting out sentencing precedents for incest involving adults. However, in this case, while DK was chronologically almost 24 years old when her father, DR committed between four and six acts of incest with her. I find that the facts of this case established that, due to developmental deficiencies, the victim was effectively functioning at a mental age of a 16-year-old with several significant deficits in certain aspects of daily living.

[55] As I indicated previously, with respect to the principle of proportionality, I have found that DR's degree of responsibility or moral blameworthiness or this offence is very high. In addition, I have also determined that the objective gravity of this offence is also very high. There can be no doubt that, in committing this offence of incest by DR having sexual intercourse with his biological daughter, he significantly abused his position of trust as her parent for his own sexual gratification at the expense of and in complete disregard for the devastating effect on his own, very vulnerable child.

[56] The fact that DK had only "re-engaged" in a family relationship with DR a few months before the first incident of incest, and for many years, she had not in a parental relationship with DR, does not, in my opinion reduce his moral blameworthiness for the series of acts of incest which occurred mainly during a one-month period of time in the fall of 2018. DR knew of DK's developmental delays and abused his position of trust as a parent and committed an offence which strikes at the very moral fibre of our society.

[57] Justice Moldaver (as he then was) stated in **R. v. D(D),** 2002 CanLII 44915 (ONCA) at para. 44 that he was not setting out any fixed or inflexible guidelines, however, he added that, as a general rule, when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent bases over substantial periods of time, they can expect to receive mid to upper single-digit penitentiary terms. When the abuse involves full intercourse and is accompanied

by other acts of physical violence, threats of physical violence or other forms of extortion, the offender will likely face even longer penitentiary terms.

[58] In this case, while DR's offence involved several acts of sexual intercourse with DK, there is no evidence of physical violence or threats of physical violence or extortion. While each case will turn on its own facts and sentencing is a highly individualized exercise, from my review of the case law, I find that the just and appropriate length of the sentence for this offence would be within a range of 3 to 5 years.

[59] The length of sentence within the range will certainly depend on many factors including the age of the victim, the duration and frequency of the incest or sexual assaults, the prior criminal record of the offender, the physical and psychological effects on the victim and the presence or absence of collateral violence or remorse by the offender

[60] In terms of the sentencing options available to the Court, there is no doubt that, pursuant to section 742.1(c) of the **Criminal Code**, that the imposition of a conditional sentence order of imprisonment in the community is not an available sentencing sanction, given the fact that the indictable offence of incest contrary to section 155 of the **Code,** is subject to a maximum of 14 years in prison.

[61] Furthermore, given the fact that I have found that the appropriate range of sentence is 3 to 5 years in penitentiary for an offender who has committed incest by having sexual intercourse with his or her biological child, that range of sentence leads me to the conclusion that the imposition of a suspended sentence, as recommended by Defence Counsel, would not be an appropriate disposition in all the circumstances of this case.

[62] In my opinion, the imposition of a suspended sentence, would be a substantial departure from sentences imposed for similar offenders who had committed similar offences in similar circumstances. Moreover, I cannot accept the recommendation of a suspended sentence as it would be wholly inadequate at addressing the principle of proportionality based upon DR's very high degree of responsibility and the gravity of this offence as well as the paramount sentencing purposes being placed upon specific and general deterrence as well as a categorical denunciation of the unlawful conduct.

[63] In the final analysis, after having taken into account the appropriate range of sentence for this very serious offence of incest, the aggravating circumstances and

also several significant mitigating circumstances, as well as the other purposes and principles of sentencing, I hereby impose a sentence of imprisonment in a federal penitentiary of 42 months.

[64] Given the imposition of a 42 month or 3½ year sentence of imprisonment in a federal penitentiary, I find that it would be an undue hardship to impose the surcharge for victims.

Ancillary Orders:

[65] In addition, I hereby make the following ancillary orders which were sought by the Crown Attorney:

(a) Given the fact that the section 155 **Criminal Code** offence of incest is a primary designated offence within the meaning of section 487.04 of the **Criminal Code**, DR will be required to provide a sample of his DNA pursuant to section 487.051 of the **Code**;

(b) Since the incest offence it is a designated offence referred to in section 490.011 of the **Code**, I hereby make an order pursuant to section 490.012 of the **Code** requiring the offender to comply with the **Sex Offender Information Registration Act** for 20 years as required by section 490.013(b) of the **Code** as the offence was subject to a maximum term of 14 years imprisonment;

(c) A mandatory weapons prohibition shall issue pursuant to section 109(1)(a) of the **Criminal Code** for a period of 10 years;

(d) The Crown Attorney had asked the court to consider imposing a 20-year order pursuant to section 161 of the Code. An order under that section is discretionary and may be for life or any shorter duration that the Court considers desirable. In all the circumstances of this case, I find that it is appropriate, in this case for an order be made pursuant to section 161 of the **Code** for a period of 10 years, which will start on the date upon which the offender is released from imprisonment for the offence. The order will prohibit DR from:

i) being within 500 m of any dwelling where DK ordinarily resides;

ii) seeking, obtaining or continuing any employment whether or not the employment is remunerated, or becoming or being a

volunteer in a capacity, that involves being in a position of trust or authority towards persons under the age of 16 years;

iii) having any contact – including communicating by any means – with a person who is under the age of 16 years, unless the offender does so under the direct supervision of another person over the age of 18 years.

(e) Finally, the Crown Attorney had sought and Court is prepared to grant the additional ancillary noncommunication order pursuant to section 743.21 of the **Code** which shall prohibit the offender from communicating, directly or indirectly with the victim [DK] during the custodial period of the sentence.

Theodore Tax, JPC