

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *R. v. S.F.W.*, 2021 NSSC 312

**Date:** 20211108

**Docket:** CRH No. 485947

**Registry:** Halifax

**Between:**

Her Majesty the Queen

v.

S.F.W.

**Restriction on Publication: CCC s. 486.4 and s. 486.5**  
**SENTENCING DECISION**

**Judge:** The Honourable Justice C. Richard Coughlan

**Heard:** November 8, 2021, in Halifax, Nova Scotia

**Oral Decision:** November 8, 2021

**Written Decision:** November 17, 2021

**Counsel:** Katharine A. Lovett, for the Crown  
Damian J. Penny, for the Defence

**Coughlan, J. (orally):**

[1] In a judgment delivered March 25, 2021 S.F.W. was convicted of three offences involving R.E.H.: sexual assault contrary to section 271 of the *Criminal Code*; counseling or inciting a person under the age of sixteen years to touch directly a part of his body for a sexual purpose contrary to section 152 of the *Code*; and for a sexual purpose touch a person under sixteen years directly with a part of his body contrary to section 151 of the *Code*.

[2] The facts surrounding the offences are set out in detail in the judgment of March 25, 2021. The following is a brief summary of the facts for the purpose of this sentencing decision.

[3] R.E.H. was born in November 2002. Her parents separated when she was two or three years old. S.F.W. and R.E.H.'s mother began cohabitating when R.E.H. was approximately five years old.

[4] When R.E.H. was in grade 1 the family, R.E.H., her mother, S.F.W. and two younger siblings moved to a duplex. R.E.H. and S.F.W. had a good relationship. S.F.W. started to change.

[5] R.E.H. believes the first incident occurred when she was in grade two. S.F.W. asked her to lift his bathrobe without any clothes under it and see his genitals. Another time in the basement R.E.H. was forced to see S.F.W. expose his genitals. They had been playing a boardgame. S.F.W. masturbated in front of R.E.H.

[6] S.F.W. made R.E.H. touch his genitals and rub them with her hand. It was a repetitive occurrence. It happened many times. Often when her mother was out R.E.H. was made to touch S.F.W.'s penis. S.F.W. watched when R.E.H. put her hands on his penis. It would end when he ejaculated. S.F.W. told R.E.H. he would give her things or tell her mother things about her which were not true.

[7] Eventually S.F.W. showed R.E.H. pornographic videos and images to show her what he wanted her to do to him. S.F.W. had R.E.H. perform oral sex on him. She was made to touch his penis with her hand and mouth. S.F.W. told her what to do and to look at him. R.E.H. looked up and saw S.F.W. looking down at her.

[8] It happened in the bedroom and basement multiple times. His penis was erect when she put it in her mouth. It ended when S.F.W. ejaculated. He removed his penis from her mouth before he ejaculated.

[9] The incidents ended when S.F.W. and R.E.H.'s mother separated in May 2013.

[10] Toward the end of the time S.F.W. and R.E.H. and the family were living together, S.F.W. made R.E.H. lie on her back and he would rub his penis against her vagina. S.F.W. took his clothes off and told R.E.H. to remove her clothes. His penis was erect when he rubbed against her. R.E.H.'s legs were resting on S.F.W.'s torso. It would end when S.F.W. ejaculated.

[11] Sometimes S.F.W. made R.E.H. kiss him on the lips when she did not want to kiss him.

[12] S.F.W. acted as a parent towards R.E.H.

[13] A presentence report dated June 4, 2021 was prepared.

[14] S.F.W. is currently 51 years of age. He completed grade 12 and obtained a diploma in computer applications and Business Administration. He is certified at several levels of the Information Technology Infrastructure Library (ITIL) and to instruct the Foundation Level of the ITIL Program. He has been a stay-at-home parent since 2014. S.F.W. is financially dependent on his partner who is employed on a fulltime basis.

[15] S.F.W. has ongoing abdominal issues, complications from his appendix rupturing when he was 19 years old and dental problems. He suffers from depression and anxiety. In the past he attended mental health counselling but it ceased due to Community Services not providing further funding.

[16] S.F.W. resides with his common-law partner and their three common children and his partner's two children from a previous relationship.

[17] He does not have a prior criminal record.

[18] A Comprehensive Forensic Sexual Behaviour Presentence Assessment dated June 1, 2021 was prepared by Dr. Michelle St. Amand-Johnson, a clinical and Forensic Psychologist.

[19] A Penile Plethysmography (PPG) assessment was scheduled as part of the assessment but was not completed after S.F.W. experienced a significant anxiety attack upon entry to the PPG lab.

[20] In the "Psychological Testimony Results & Personality Profile" section of the assessment, Dr. St. Amand-Johnson stated:

S.F.W.'s test results indicated that he is restrained and well-socialized but may show rigid life adjustment and lack insight and introspectiveness to deal effectively with problems when they occur. His scores suggested effort to place himself in a positive light and to maintain an appearance of adequacy and self-control. A tendency to avoid self-disclosure may have resulted in test profiles that underestimate true problem areas. ...

Finally, persons with S.F.W.'s pattern of test scores may not be amenable to psychological treatment because of their denial and repression tendencies, a sense that they would be fine if simply left alone, and because symptoms may be maintained by secondary gain. S.F.W. may start therapy at the request of others, but well-practiced defenses are likely to arise in response to personal questioning.

[21] Dr. St. Amand-Johnson stated, "from the data available, it can be neither concluded or ruled out that S.F.W. possesses paedophilia arousal" (non-exclusive of other, appropriated sexual interests).

[22] Under the heading "Summary Statement of Risk" the Assessment states:

Overall, a combination of the Static and Stable instruments indicates that S.F.W.'s baseline risk for sexual recidivism is half that of the "average" person adjudicated for crossing legal sexual boundaries. With additional consideration of the PCL-R and SORAG, S.F.W. also poses "low" risk to reoffend in a non-sexually violent manner. If he were to reoffend sexually, his history and current assessment results suggest that it would most likely be against a female child who is well-known to S.F.W. and to whom he has access in an unsupervised or inadequately supervised setting. Risk to strangers is not expected, nor is S.F.W. known to have crossed sexual boundaries relative to a male, although risk for "crossover" cannot be conclusively ruled out, especially with the number of questions that remain regarding S.F.W.'s offence dynamics.

[23] In the "Recommendation" section of the Assessment the following Recommendation deals with contact with children:

**2. Contact with children:** It is recommended that S.F.W. not have unsupervised contact with children. This does not refer to incidental contact with children in public, as risk to strangers is not predicted. However, it does include contact with biological relatives. Note that supervision of contact with his children (both step and biological) has already been a directive of DCS and is currently being provided by S.F.W.'s partner and in-laws.

[24] Victim Impact Statements were prepared and submitted to the Court by R.E.H. and her mother K.E. .

[25] R.E.H. stated for years she blamed herself for what happened to her, thinking she deserved it or that she did not deserve a happy, normal life. For years

she struggled with severe depression and social anxiety. She thought she was a burden and no one would care if she was gone. R.E.H. struggled with school. She could not make friends. Her junior high and high school years were excruciating and lonely. She was alone. R.E.H. does not think she will ever have a normal social life. Her depression continues. However, she has recently graduated from high school and is looking forward to attending university.

[26] K.E., stated she worries for her daughter's mental health and whether R.E.H. will have a normal life.

[27] K.E. now lives with depression. The abuse makes her feel like a failure, a mother who could not protect her child. She does not sleep well, has chronic headaches and body aches. She has nightmares. The whole matter haunts her.

[28] The purpose and principles of sentencing are set out in sections 718 to 718.2 of the *Criminal Code*. Principles relevant to this proceeding are:

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.

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

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

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

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing,

...

(ii) evidence that the offender, in committing the offence, abused the offender's intimate partner or a member of the victim or the offender's family,

(ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,

(iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim,

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

...

shall be deemed to be aggravating circumstances;

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

...

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

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

[29] The Supreme Court of Canada provided guidance to courts as to the sentencing of adults for sexual offences against children in *R. v. Friesen*, 2020 SCC 9. In giving the Court's judgment Wagner C.J.C. and Rowe J. stated at para. 1:

Children are the future of our country and our communities. They are also some of the most vulnerable members of our society. They deserve to enjoy a childhood free of sexual violence. Offenders who commit sexual violence against children deny thousands of Canadian children such a childhood every year. This case is about how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children.

[30] One of the overarching points the Court wished to convey in the case was set out in para. 5.

Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as

informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large.

[31] While not creating a national range for sexual offences, the Court did provide guidance on three specific points: (1) upward departure from prior precedents and sentencing ranges may well be required to impose a proportionate sentence; (2) sexual offences against children should generally be punished more severely than sexual offences against adults; and (3) sexual interference with a child should not be treated as less serious than sexual assault of a child (paras. 107 – 120).

[32] The Court also set out significant factors to determine a fit sentence including (a) likelihood to reoffend (paras. 122–124); (b) abuse of a position of trust or authority (paras. 125–130); (c) duration and frequency (paras. 131–133); age of the victim (paras. 134–136); (e) degree of physical interference (paras. 137–147); and (f) victim participation (paras. 148–154).

[33] The Crown is seeking a period of imprisonment of six years. In addition, the Crown is seeking a DNA order pursuant to section 487.051 of the *Criminal Code*; a Sex Offender Information Registration Order for life, pursuant to section 490.013(2.1) of the *Code*; a firearms prohibition for 10 years pursuant to section 109 of the *Code*; an order pursuant to section 743.21 of the *Code* prohibiting S.F.W. to communicate with R.E.H. during his custodial sentence; and an order pursuant to section 161 of the *Code*.

[34] S.F.W.'s first lawyer Mr. Drew Rogers submitted an appropriate sentence on the facts of this case is imprisonment of 4.5 to 5 years. Mr. Rogers filed a supplementary sentencing brief bringing to the Court's attention the sentencing decision *R. v. APL*, 2021 NSSC 238. The Defence submitted given the facts in *APL* the six year sentence imposed supports the range of sentence for S.F.W. proposed by the Defence, and perhaps even suggests a sentence toward the lower end of the defence range would be the fit sentence.

[35] S.F.W. fired his lawyer and retained Mr. Damian J. Penny to represent him on the sentencing. Mr. Penny filed a brief bringing the sentencing decision of *R. v. Wood*, 2021 NSSC 253, to the Court's attention and submitted the sentence imposed in *R. v. Wood* of four years and seven months would be appropriate for S.F.W. The facts of *R. v. Wood* are very different from the facts of this case. S.F.W. breached a position of trust in regard to R.E.H. . At the time of the offences

he acted as a step-parent to R.E.H. Mr. Wood did not breach a position of trust or authority. At the time of the offences R.E.H. was between the ages of seven and ten years old, much younger than the victim in *R. v. Wood*. The Defence does not oppose the DNA order; or the firearms prohibition. The Defence leaves the imposition of an order pursuant to section 161 of the *Code* to my discretion. If S.F.W. is convicted of only one offence the Defence submits the SOIRA order should only be for 20 years, not life.

[36] In determining an appropriate sentence a judge must consider the particular circumstances of an offence and the offender.

[37] I have read the submissions of both Crown and Defence counsel, the cases to which I have been referred, the presentence report, the Comprehensive Forensic Sexual Behaviour Presentence Assessment and the victim impact statements filed by R.E.H. and K.E. . I also heard the oral submissions of counsel.

[38] A mitigating factor in this case is that S.F.W. does not have a prior criminal record.

[39] The following are aggravating factors in this case:

1. The age of the victim. R.E.H. was between the ages of seven and ten years old when S.F.W. sexually abused her.
2. Breach of trust or position of authority. S.F.W. acted as a step-parent to R.E.H. from the time he began cohabitating with R.E.H.'s mother when R.E.H. was approximately five years old until they separated in May 2013 when R.E.H. was 10 years old. During the time the sexual abuse occurred R.E.H. was under S.F.W.'s protection, as he was a person acting as her parent. As the Court said in *Friesen* "all other things being equal, an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child". (para. 130).
3. The repeated nature of the abuse. S.F.W. sexually abused R.E.H. over a period of three or four years and only ended after S.F.W. and R.E.H.'s mother ceased cohabitation. The frequency and duration of sexual violence can significantly increase the harm to the victim. Sexual violence against children that is committed on multiple occasions for longer periods of time should attract significantly higher sentences. (*Friesen* para. 133).



4. The nature of the sexual abuse. The sexual abuse perpetuated against R.E.H. by S.F.W. involved a range of abuse which escalated over time.
5. The harm done to R.E.H. The victim impact statement prepared by R.E.H. sets out the severe impact the sexual abuse had on her. As previously set out, section 718.2(a)(iii.1) mandates such evidence of the impact on a complainant is an aggravating factor.

[40] Earlier in this decision I set out a portion of Dr. St. Amand-Johnson's summary statement of risk for recidivism, although the assessment contains qualification on its conclusions as a result of lack of data, it appears S.F.W.'s risk for sexual recidivism is half that of an "average" person adjudicated for crossing legal sexual boundaries.

[41] After considering the purpose and principles of sentencing, the circumstances of the offences and S.F.W., the submissions and the material filed, I have determined the sentence for S.F.W.

[42] S.F.W., will you please stand.

[43] I sentence you for Count 3, that S.F.W. for a sexual purpose touched R.E.H., a person under the age of sixteen years with a part of his body contrary to section 151 of the *Criminal Code* to a sentence of incarceration for 6 years to be served in a federal institution.

[44] Count 1, sexual assault is stayed on the basis of the principle set out in *R. v. Kienapple*, [1975] 1 S.C.R. 729.

[45] For Count 2, for a sexual purpose, S.F.W. invited, counselled or incited R.E.H., a person under the age of sixteen years to touch directly a part of his body contrary to section 152 of the *Criminal Code* to a sentence of incarceration for six years to be served concurrently to Count 3. The charge under section 152 has additional and distinguishing elements to the charge pursuant to section 151 and is not to be stayed.

[46] The sentencing hearing for S.F.W. was originally scheduled to be held on June 29, 2021. That morning he requested an adjournment as his partner's parent was very ill. The hearing was adjourned to August 12, 2021. S.F.W. did not appear that morning and a warrant was issued. S.F.W. was taken into custody on August 13, 2021. S.F.W. fired his lawyer. Eventually S.F.W. hired Mr. Penny and the sentencing hearing was scheduled for November 8, 2021. S.F.W. was in custody

from August 13, 2021 to November 8, 2021, a period of 88 days. Based on the submissions of the Crown and Defence, I determine S.F.W. is to be given credit for presentence custody at the rate of one and a half for one, which is 132 days. Deducting the 132 days from the total of six years, results in a total sentence of five years and two hundred and thirty-three days.

[47] I grant an Order authorizing the taking of samples of S.F.W.'s bodily substances reasonably required for the purpose of forensic DNA analysis pursuant to section 487.051 of the *Criminal Code*.

[48] I order that S.F.W. comply with the *Sex Offender Registration Act* for life pursuant to section 490.013(2.1) of the *Criminal Code*.

[49] I order a 10 year weapons prohibition Order pursuant to section 109 of the *Criminal Code*.

[50] I order that S.F.W. be prohibited from communicating with R.E.H. during his custodial sentence pursuant to section 743.21 of the *Criminal Code*.

[51] The Crown is also seeking an order pursuant to section 161 of the *Criminal Code*. The section requires the sentencing judge to consider an order prohibiting certain activities set out in the section.

[52] The Supreme Court of Canada considered this section in *R. v. K.R.J.*, 2016 SCC 31 in giving the Court's judgment. Karakatsanis, J., stated at paras. 47 and 48:

47 As well, the design of s. 161 is consistent with its purpose of protecting children from sexual violence. Section 161 orders are discretionary and "subject to the conditions or exemptions that the court directs" (s.161(1)). They can therefore be carefully tailored to the circumstances of a particular offender. The discretionary and flexible nature of s.161 demonstrates that it was designed to empower courts to craft tailored orders to address the nature and degree of risk that a sexual offender poses to children once released into the community. Failure to comply with the order can lead to a term of imprisonment for up to four years (s.161(4)).

48 Further, I agree with the line of cases holding that s.161 orders can be imposed only when there is an evidentiary basis upon which to conclude that the particular offender poses a risk to children and the judge is satisfied that the specific terms of the order are a reasonable attempt to minimize the risk: see *A (R.K)*, at para. 32; see also *R. v. R.R.B.*, 2013 BCCA 224, 338 B.C.A.C., at paras. 32-34. These orders are not available as a matter of course. In addition, the content of the order must carefully respond to an offender's specific circumstances.

[53] I am prepared to grant a prohibition order pursuant to section 161(1)(c) that S.F.W. have no contact, including communicating by any means, with a person who is under the age of 16 years, excluding incidental contact in public unless in the immediate presence of that person's parent or guardian, other than S.F.W., or under the direction of the Department of Community Services for a period of 15 years. In the Comprehensive Forensic Sexual Behaviour Presentence Assessment, Dr. St. Amand-Johnson recommended S.F.W. not have unsupervised contact with children except incidental contact with children in public. In addition the Assessment sets out the Department of Community Services recommended for ongoing supervision of contact with children in S.F.W. and his partner's home.

Coughlan, J.