

DATE: 2018 06 04

[1] On October 31, 2017, I released my judgment in this matter in which the offender, D.L. was found guilty of sexual assault (s. 271) and sexual interference (s. 151).

[2] The Crown requests that the charge of sexual assault be stayed and the offender be sentenced on the count of sexual interference.

[3] The incident resulting in this conviction for sexual interference occurred between June of 2006 and July, 2008, the victim being born in 2000. The victim testified that she believed the incident in issue occurred when she was six years old.

The Facts

[4] The offender's common law spouse is the sister of the victim's mother.

[5] Given the offender's relationship he was considered "family" and before and after the day in issue the extended families spent a great deal of time together, socially.

[6] On the day in question, the victim was at the offender's home and was in a room known as the office, playing a game on the computer.

[7] No other adults were in the home. The offender was in a position of trust.

[8] The offender came into the office, sat down and put the victim on his lap. He undid her belt and slipped his hand down her underpants and started stroking her vagina. There was no digital penetration.

[9] After some minutes had passed, the victim, feeling uncomfortable, told the offender she had to go to the bathroom. She remained in the bathroom for as long as she thought she could but ultimately she returned to the office. She was again required to sit on the offender's lap and he again put his hands down her underwear and fondled her (without any digital penetration).

[10] Later that same day the offender was lying on the living room couch, fully clothed and had the victim sit on his stomach. He told her to keep what had happened, "our little secret".

[11] The victim did not disclose what had occurred until years later, in February, 2015, when the victim's sister confronted her in regards to the victim cutting herself.

Circumstances of the Offence

[12] Counsel for the offender has raised a number of legal issues relating to the offences in an effort to have the court consider a conditional sentence for his client.

[13] A conditional sentence is not available for an offence that carries a minimum sentence.

[14] The defence relies on section 11(i) of the *Canadian Charter of Rights and Freedoms* which states that an offender, if found guilty of an offence and if

the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

[15] Currently sections 151 (sexual interference) and 271 (sexual assault) as set out in the *Criminal Code of Canada* each have a minimum sentence provision of one year. A number of trial decisions have struck down the one year minimum sentence as a violation of certain Charter Rights.

[16] When the incident occurred, there was no minimum sentence for sexual assault. The offence of sexual interference, at the time, required a minimum sentence of 45 days in custody.

[17] Counsel for the offender submits that, for sentencing purposes, the court should stay the conviction for sexual interference and proceed on the sexual assault conviction, negating any minimum sentence issue. The case, *R. v. W.H.* [2010] N.J. 14, may be of assistance in that regard.

[18] In this regard it seems to me that I would also be required to determine if I have any discretion as to which sentence is to be stayed or does that discretion lie solely with the Crown.

[19] If, however, the sentencing is to proceed on the conviction for sexual interference, counsel for the offender argues that the striking down of the one

year minimum sentence allows me to consider the option of a conditional sentence.

[20] Counsel for the offender relies on the judgment of, M.A. Code J. in, *R. v. Hussein* 2017 ONSC 4202. In *Hussein* the accused was convicted of sexual assault, sexual interference and invitation to sexual touching. It was noted that all carried a minimum sentence of one year of incarceration and that prior to 2012, the offence of sexual interference carried a minimum sentence of 45 days. Further, there was no minimum sentence for sexual assault until 2012 (para. 24).

[21] Code J. in striking down the minimum sentences, reviewed a number of authorities and stated, at paragraph 25,

“Three judges of this Court have struck down these mandatory minimum sentences on the basis that they violate s. 12 of the Canadian Charter of Rights and Freedoms. Section 12 prohibits cruel and unusual treatment or punishment.”

[22] Once a judge with inherent jurisdiction strikes down a law that contravenes the Constitution, the offending section ceases to exist and has no force or effect. (para. 27).

[23] Judgments should be followed unless plainly wrong (para. 27).

[24] Alternatively should the court decide that the original 45 day limitation period applied, the defence asked for the opportunity to make submissions as to its constitutionality.

[25] Crown counsel submits otherwise. She had placed on the record the charge that ought to be stayed and wished the sentencing to proceed on the count of sexual interference. She submits that a conditional sentence is not available for the offence of sexual interference and in any event the conviction requires a period of incarceration.

[26] However, before I analyze and rule on any of these legal arguments I will first determine the appropriate sentence. If I determine the offender is to be sentenced to a period in jail of greater than 45 days, these legal arguments are moot.

Circumstances of the Offender

[27] I have had regard to the Pre-Sentence Report filed as Exhibit 2 in the sentencing hearing.

[28] The offender, who is 50 years of age, was born in England and the only family he has is a sister and mother who reside there. He has a good relationship with his family.

[29] The offender, a professional engineer, has resided in Canada since 2002 when he met his common law spouse. He became a landed immigrant in 2005.

[30] The offender has a degree in mechanical engineering and has always been gainfully employed while living in Canada.

[31] The offender was described in the Report as pleasant and co-operative and is said to be willing to accept the consequences of his actions and would comply with any supervision order.

[32] It is noted however, that offender has not expressed any remorse.

[33] The offender did not provide the Report's author with any names of persons to be contacted because he believed this was his own problem and wished to deal with it himself.

[34] Exhibit 4 to the sentencing is a letter from the offender's common law spouse, who has been on long term disability since 2000. She is dependent on the offender financially, physically and emotionally. As a result of her continued relationship with the offender she has, in her words, been disowned by her family.

[35] The offender's common law spouse states that as a result of the conviction her symptoms have worsened in relation to her medical condition which includes anxiety, panic attacks and post-traumatic stress.

[36] She advised the court that if the offender is jailed for any kind of lengthy sentence he would lose his job, face deportation, and they would lose everything.

If the offender was deported and his common law spouse chose to go with him, she would be disentitled to her long term disability benefits because to remain eligible she must be in a position to return to her Ontario employment if her condition improves.

[37] For financial reasons, she would likely then remain in Canada, which would bring an end to her relationship with the offender.

[38] The offender is described by his common law spouse as honest, kind, intelligent and a hard-working member of society and is highly regarded by his peers.

[39] Counsel for the offender submits that if the offender is sentenced to jail for six months or more he may be the subject of a deportation order from which he will have no right of appeal.

[40] The offender has no criminal record.

Impact on the Victim and/or Community

[41] The victim, H.L., as a result of the offence, was violated, physically, mentally and emotionally. For years she kept what had occurred to herself which resulted in her self-harming.

[42] She was violated by someone who was a member of her family, someone she should have been able to rely on and to feel secure when in his company.

[43] After the occurrence and because of family functions, she had to continue to be in his presence and I cannot imagine how insecure and uncomfortable that must have made her feel.

[44] At the request of the victim the Crown read into the record her victim impact statement, which included two poems the victims feels helps describe how she felt (Exhibit 1).

[45] The statement is heartfelt and written by someone who was almost 18 years but has already experienced something no woman or girl ought to ever experience.

[46] She was robbed of her childhood. She could not wait to grow up and have power and control over herself.

[47] Her childhood memories of happy events are overwhelmed by her pre-dominant memory of being violated.

[48] She is not fond of being touched or being physically close to people. She is afraid that if others were ever told of what she went through they would pity her, think she is weak and damaged or that she is messed up.

[49] H.L. when growing up believed she was damaged goods. From the end of her statement I quote,

“He betrayed the trust that I had with a family member whom I thought loved me, for taking my sanity and innocence and for continuing to affect me throughout my life as a young adult.”

[50] The poems included with the statement were quite appropriate and meaningful. As said in the poem entitled, They Say, I quote,

“They don’t know that the fear never stops, never goes away, the shadows never leave, and the hands never stop.”

Legal Parameters

[51] The legal parameters and the issues that arise therefrom have already been noted.

The Positions of Crown and Defence

[52] The Crown seeks a sentence of 18 months in jail and with further mitigation, possibly down to 12 months. She also seeks a two year term of probation.

[53] The Crown seeks a primary DNA order, a section 109 order for 10 years, a SOHRA order for 20 years, and a section 161 order for 10 years.

[54] The Crown submits that the only mitigating factor is the fact that the offender has no criminal record.

[55] The aggravating factors are that the offender was in a position of trust over the victim and the age of the victim.

[56] The Crown submits that the pre-sentence report should be considered a neutral factor because the offender, while willing to accept the consequences of his actions, has not shown any remorse.

[57] The Crown acknowledges there may be immigration issues.

[58] Counsel for the offender seeks a two years less a day conditional sentence (house arrest) and is not opposed to a two year probation order.

[59] Alternatively, if a custodial sentence is deemed inappropriate counsel seeks a sentence of no more than six months less a day.

[60] Defence counsel is agreeable to a counselling term in the sentence and agrees with a s. 109 order, a DNA order, and a 20 years SOIRA order. He opposes an order under s. 161 on the grounds that there is no evidentiary basis for such an order.

Case Law

[61] *R. v. T.D.S.* [2017] O.J. No. 5955 is an authority provided by the Crown. At paragraph 31, the court quotes the decision of Justice Moldaver in *R. v. D.D.* [2002] O. J. No. 1061 (ONCA), para. 34 in which it was stated,

“The overall message however, is meant to be clear. Adult sexual predators who would put the lives of innocent children at risk to satisfy their own deviant sexual needs must know that they will pay a heavy price. In cases such as this, absent exceptional circumstances, the objectives of sentencing proclaimed by Parliament in s. 718(a), (b) and (c) of the Criminal Code, commonly referred to as denunciation, general and specific deterrence, and the need to separate offenders from society, must take precedence over the other recognized objectives of sentencing.”

[62] From paragraph 44 of *D.D.* the court stated,

“To summarize, I am of the view that as a general rule, when adult offenders, in a position of trust, sexually abuse innocent young children on a regular and persistent basis over substantial periods of time, they can expect to receive mild to upper single digit penitentiary terms.”

[63] It is important to distinguish the case before me from the facts in the *D.D.* case in which there was regular horrific abuse over a period of time.

[64] *R. v. G.B.* [2016] O.J. No. 5360, is a decision of the Ontario Court of Appeal dealing with a historic sexual assault of a child and the trial judge convicted the appellant of sexual assault and sexual interference but stayed the assault conviction. The appellant was sentenced to 21 months in jail.

[65] In *G.B.* the offender, on one occasion, came into the bathroom naked where the three or four year old victim was taking a bath. He forced her to perform fellatio on him.

[66] On the appeal it was argued that while the sentence may be within the appropriate range, given that the appellant was a first offender, the sentence was excessive.

[67] The Court of Appeal denied leave to appeal sentence exercising deference to the decision of the trial judge and at paragraph 61 stated,

“I would not accept these submissions. In his reasons for sentence, the trial judge identified the relevant sentencing factors pertaining to both the offence and the offender. Having done so, it was for him to determine how to balance those factors in this case. He imposed a sentence that is within the range for this type of offence, which involved violating the sexual integrity of a young child and a breach of trust.”

[68] *R. v. H.S.* [2014] O.J. No. 1974, is a decision of the Ontario Court of Appeal. The Crown appealed a sentence of two years less a day conditional imprisonment following a guilty plea to having sexual intercourse with a female between 14 and 16 years old and illicit sexual intercourse with a foster daughter. The sexual behaviour occurred several times resulting in a pregnancy. The victim was described by the trial judge as a broken woman.

[69] The Court of Appeal allowed the sentence appeal finding the sentence to be manifestly unfit and substituted a sentence of three years imprisonment, less credit for one year that the appellant had served on the conditional sentence.

[70] The Crown, in the case before this court, asked me to have regards to para. 48, in which Epstein J. A. wrote,

“The negative effect of crime on its victims is always an important consideration on sentencing... B.H.’s account of how the sexual abuse impacted her life is tragic.”

[71] It is submitted by the Crown that, as in *H.S.*, the impact of the crime before me has had a tragic impact on H.L., a submission I accept.

[72] *R. v. Barua* [2014] O.J. No. 248 is another Court of Appeal decision relied on by the Crown. The appellant was convicted of sexual assault and sexual interference and imposed a ten month custodial sentence. The victim was an eight year old boy who was being babysat by the appellant's wife. The appellant lay down on the mattress on which the victim was sleeping. Pulled down his pants, kissed him, touched and licked his penis and humped him.

[73] The appeal court determined that the sentence was not manifestly excessive for a first time offender who committed a serious sexual assault against a young child. From paragraph 34 I quote,

"The trial judge correctly concluded that a sexual assault on a young victim in the circumstances of this case would normally attract a medium to high range reformatory sentence even for a first offender."

[74] Because the sentence was not manifestly excessive the appeal court was of the opinion that they could not interfere with the sentence of the trial judge (para. 35).

[75] *R. v. Bachewich* [2007] A. J. No. 629, is a decision of the Alberta Court of Appeal. The appellant was convicted of sexual assault of a nine year old girl. The victim was a friend of the appellant's daughter. The victim fell asleep on the couch in the living room and awoke during the night and found herself in the

appellant's bed. The appellant's hand was under her pyjamas and under panties, stroking her vagina. It continued for a minute or two without any digital penetration.

[76] The appellant was 50 years old without a criminal record. He was sentenced to 12 month's imprisonment.

[77] The appellant submitted that the range of sentencing on these facts began at six months and that a six to nine months sentence would be appropriate. The offence involved a single touching of a child's vagina for a brief duration and was said to be a minor sexual assault, a factual situation similar to the one before me.

[78] From paragraph 13 and 14 I quote,

"There is a considerable range of sentence for sexual assault of a child short of penetration. The ultimate sentence depends not only on whether it is a single incident but also upon other aggravating and mitigating factors. Here the child fled her own home and sought protection with the appellant. She was particularly vulnerable. The appellant place her in his bed between him and his daughter. In almost all of the cases described above, there was a guilty plea which was a significant mitigating factors. Here there was none.

The standard of review requires that the sentence be outside the range. In this case we do not view the sentence of 12 months imprisonment as being inordinately high on the facts of this case."

[79] *R. v. R.P.* [2006] O.J. No. 4250 is again a decision of the Ontario Court of Appeal. The appellant had briefly fondled the victim's vagina on two occasions

and the trial judge sentenced the appellant to 17 months. On appeal the sentence was reduced to 12 months. The appellant had no criminal record.

[80] *R. v. J. L.* [1993] O.J. No. 1518, is an older decision of the Court of Appeal for Ontario. The trial judge imposed a sentence of 30 months for sexual assault.

[81] The sentence was reduced to 15 months for what the court described as a single incident of “aggressive fondling”. A mid-range reformatory sentence was deemed appropriate.

[82] On these authorities, among others, the Crown submits that a conditional sentence is not appropriate. Even a single occurrence of fondling ought to result in a significant period of incarceration.

[83] Authorities were also provided by counsel for the offender in support of a conditional sentence.

[84] In *R. v. L.F.W.* [2000] 1 S.C.R. 132, an accused was convicted of one count of indecent assault and one count of gross indecency. The offences occurred at a time when the victim was between 6 and 12 years of age and the accused was between 22 and 28 years old. The trial judge imposed a 21 month conditional sentence which was appealed by the Crown and the Newfoundland Court of Appeal dismissed the appeal.

[85] The appeal to the Supreme Court of Canada was also dismissed.

[86] The victim and the accused were cousins and lived next door to each other. There were 10 to 12 incidents of forced masturbation and fellatio. The accused told the victim he had a gun suggesting if she told her family would be endangered.

[87] The accused had no criminal record and a good work record. He was a family man with the support of his children.

[88] The trial judge deemed the aggravating factors to be the victim's age, the repetitive nature of the crimes, the impact on the victim, and the abuse of a familial trust. Mitigating factors were the absence of further criminal conduct and a good community relationship.

[89] The trial judge determined there was no risk to the community if he served his sentence in the community. The accused had lead a good productive life. Despite the absence of remorse the Court determined that incarceration was not needed for specific deterrence (para. 8).

[90] From paragraph 9 I quote,

"In determining whether to exercise the discretion to impose a conditional sentence, the trial judge also considered the principles of denunciation and general deterrence. In that regard, he stated that the stigma of trial and conviction should not be minimized, and that a conditional sentence may indeed serve the purposes of denunciation and general deterrence if meaningful conditions are imposed and enforced. He also found that a community service order was appropriate in this case. The respondent was

proficient in construction and had previously performed valuable volunteer work in the community utilizing that skill.”

[91] From para. 20 I quote, “although the respondent committed terrible offences and did not express any remorse, the conditional sentence imposed by the trial judge was nevertheless within the acceptable range of sentences that could have been imposed in the circumstances.”

[92] A conditional sentence can provide significant denunciation and deterrence especially if onerous conditions are imposed which might include house arrest (para. 20).

[93] A conditional sentence can be imposed even where aggravating circumstances exist (para. 24).

[94] *R. v. B.S.* [2004] O.J. No. 1170 is a decision of the Ontario Court of Appeal. The appellant had been convicted of several counts of sexual assault involving a 14 year old complainant over a number of months. The appellant was 33 years of age.

[95] It was determined that the offences had a serious impact on the victim.

[96] From para. 3 and 4, I quote,

“We are nevertheless of the view that the sentence of 12 months imprisonment for this first offender was manifestly excessive. As serious as the conduct was, exacerbated by the trust relationship twelve months imprisonment was outside the appropriate range for this kind of conduct for this type of offender...”

Despite the strain these offences have put on the appellant's marriage, the appellant's wife remains supportive. The appellant has an excellent work record and is a key man in the small firm where he is employed. That employment is still available to him. The appellant also has strong support within the community."

[97] Fresh evidence was lead as to the additional hardship that would be visited on the appellant's family if he was incarcerated.

[98] The Court of Appeal set aside the custodial sentence and imposed a 12 month sentence to be served in the community in accordance with the conditions of a conditional sentence order to commence from the date the order is signed.

[99] In *R. v. A.C.* 2012 ONCA 608 an accused was sentenced to a two year conditional sentence followed by three years of probation. The case involved a historic assault on a teenage relative involving, placing his penis near her vagina, trying to kiss her, lying on top of her and touching under her shirt.

[100] In *R. v. Akbari* 2014 ONSC 5198 47 year old accused attempted several times to touch a 13 year old girl's genitals and rubbed her chest. A conditional sentence of nine months was imposed. O'Marra J. noted that though a conditional sentence is no longer available, it was available at the time the offence was committed and therefore by operation of s. 11(i) of the *Charter* is available.

[101] In *R. v. Anderson* 2017 ONSC 1322 the accused was sentenced to concurrent conditional sentences where there were three complainants over which the accused was in a position of authority.

[102] What I take from all of these authorities is that there is a wide range of sentencing options available and application of which are very fact dependent.

[103] It is also clear that the Parliament of Canada, in amending sections 151 and 271 to include minimum sentences, believed that such crimes were serious enough to require in all cases, a period of incarceration.

Mitigating and Aggravating Factors

[104] I find that the fact that the offender has no criminal record and has been a productive member of the community to be mitigating factors. He has the support of his common law spouse and a good work record.

[105] As noted, the age of the victim when the offence occurred and the offender's position of trust in regards to the victim, and the lack of remorse are aggravating factors.

[106] The pre-sentence report, while favourable, I find to be a neutral factor.

Principles of Sentencing

[107] The *Criminal Code of Canada* sets out the following provisions in regards to sentencing:

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 acknowledgement 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 considerations 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 circumstance relating to the offence or the offender, and without limiting the generality of the foregoing,
 - (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
 - (iii) evidence that the offender, in committing the offence, abused a position of trust or authority in relation to the victim;

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, with particular attention to the circumstances of Aboriginal offenders.

742.1 if a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life.

Reasons

[108] In *R. v. Bauer* 2013 ONCA 691, the Ontario Court of Appeal stated, at paragraph 19,

"It is of paramount importance that children be protected from seducers and predators through sentences that emphasize the principles of denunciation and deterrence"

[109] Returning to the 2017 *Hussein* decision of Code J., from paragraph 35, I quote,

"The appropriate range of sentence in cases involving external sexual touching of children were reviewed extensively by Linhares de Sousa J. in *R. v. M.L.* supra (2016 ONSC 7082), and I will not repeat her summaries of these cases. In the most mitigated cases, sentences of 90 days imprisonment were imposed. In the more aggravated cases, especially those involving breaches of trust and some repetition, sentences between six months and fifteen months were imposed...the case at bar, of course, involved some external sexual touching but it also involved a single act of intercourse. In cases involving acts of oral sex with children, somewhat longer sentences of 17 months or 18 months have been imposed, as these assaults are more

invasive... In *R. v. Manjra* 2009 ONCA 485, the Court held that 17 months was “within the range for this offence, even for a first offender,” where the accused committed an act of cunnilingus with a 7 year old girl. He was at the low end of a trust relationship. With the victim who was the child of a neighbour.”

[110] In *Hussein* the offender was sentenced to 15 months imprisonment.

[111] The abuse in the matter before me, did not occur during a chance meeting. The offender went into the room where the six year old victim was playing on the computer and put her on his lap, undid her pants and place his hand down her panties and fondled her vagina.

[112] After the victim went to the bathroom the pattern was repeated.

[113] The abuse was calculated.

[114] In regards to deterrence and denunciation, I accept that in regards to specific deterrence the offender is embarrassed and humiliated as a result of the trial and conviction. There is no doubt he wants to minimize those persons who know about the conviction. This is the probable reason he did not provide to the author of the pre-sentence report, the names of collateral contacts.

[115] I doubt any further specific deterrence is required.

[116] However, taking into account the paramount principles of general deterrence and denunciation, I am of the opinion that a conditional sentence is not appropriate regardless of whether it is even available.

[117] Those principles can only properly be met when taking into account the case law, the circumstances of the case, including the age of the victim, and the aggravating and mitigating circumstances, by some term of imprisonment in a provincial facility.

[118] That is not to say that I did not give serious consideration to the offender's submission that a conditional sentence ought to be imposed. I took into account the impact a jail term would have on the offender and his spouse. I also had regard to the immigration implications.

[119] However when considering the impact of the abuse on the victim and the case law and to send the message that such acts will not be tolerated, a conditional sentence is not appropriate.

[120] In that regard I rely on the 2014 decision in *R. v. Barua*, supra, in which there were similar facts and the Court of Appeal spoke of a medium to high range reformatory sentence even for a first offender.

[121] In the more recent 2016 decision, the Ontario Court of Appeal in *R. v. G.B.*, supra, voiced the opinion that 21 months was within the range of sentence for offences which violated the sexual integrity of a young child and a breach of trust (para.61).

[122] In the somewhat older (2007) the Alberta Court of Appeal, on similar facts sentenced 50 year old first time offender to 12 months incarceration.

[123] The fact that the offender before me did not plead guilty and a trial was held which required the victim to testify, is not an aggravating factor. An accused has a right to a trial. However, if he had pleaded guilty and had he shown remorse, both which would have been significant mitigating factors, perhaps more consideration would have been given to a conditional sentence, assuming for the moment that option existed.

[124] I also rely on the dicta in the Hussein decision wherein it was stated that six months is the bottom end of the sentencing range for sexual crimes in which there was a breach of trust.

[125] While the circumstances of this matter warrant a jail term, this assault is at the lower end of the spectrum of sexual offences. I say that without losing sight for a second of the impact this incident has had on the victim, H.L.

[126] Accordingly, I am sentencing the offender, D.L., on the charge of sexual interference to six months less a day in jail, after which he shall remain on probation for two years. Such a sentence is proportionate to the circumstances of the offence.

[127] The conviction for sexual assault is stayed.

[128] By reaching this conclusion, I am not required to have regard to any further consideration of the legal issues outlined above.

[129] I accept that, further to s. 11(i) of the Charter, if there is an applicable minimum sentence for sexual interference, it is 45 days.

[130] Given the sentence I have imposed, the constitutionality of such a minimum sentence is irrelevant.

[131] The offender is not prejudiced by the fact the charge of sexual assault is to be stayed. Proceeding in regards to a conviction under either offence would result in the same sentence.

Final Decision

[132] I sentence the offender, D.L., to a sentence of six months less a day, in jail, followed by two years of probation.

[133] The conditions of probation include the mandatory conditions in 732.1(2) and (3)(a)(b).

Ancillary Orders

[134] An order will issue requiring the offender, D.L., to provide a DNA sample, pursuant to s. 487.04 of the *Criminal Code of Canada*.

[135] An order will issue pursuant to s. 109(1)(a) of the Code prohibiting the offender, for a period of 10 years from possessing weapons as set out therein.

[136] A SOIRA order for 20 year order will issue.

[137] An order under sections 161(1) (a.1) and (b) for 10 years will issue.

Bielby J.

Released: June 4, 2018

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COURT FILE NO.: CR-16-1395

DATE: 2018 06 04

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

HER MAJESTY THE QUEEN

- and -

D.L.

Defendant

REASONS FOR SENTENCE

BIELBY J.

Released: June 4, 2018