Citation: *R. v. Saplala*, 2022 YKTC 29

Date: 20220516
Docket: 20-00846
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Killeen

REGINA

v.

JOBERT CASTRO SAPLALA

Publication of information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for the Crown
Malcolm E.J. Campbell — Counsel for the Defence

REASONS FOR SENTENCE

[1] KILLEEN T.C.J. (Oral): Jobert Castro Saplala has entered a guilty plea to a charge of possession of child pornography, pursuant to s. 163.1(4) of the *Criminal Code*. The Crown has proceeded by way of summary conviction.

[2] An issue which rose earlier was a challenge brought on behalf of Mr. Saplala to the mandatory minimum sentence of six months' incarceration for this offence. Counsel, on his behalf, has filed a brief and a number of cases. I am just going to say that it is clear that, in many circumstances, this mandatory minimum sentence has been found to be unconstitutional by courts that are able to make that decision. Very often,

the issue after this decision is made is what is the appropriate sentence for this particular person on these particular circumstances. Perhaps, the most noteworthy case, *R. v. Nur*, 2015 SCC 15, from the Supreme Court dealing with a mandatory minimum on a gun case, struck down the mandatory minimum but imposed a sentence that was in excess of the mandatory minimum.

[3] In this case, counsel have agreed that perhaps the appropriate way to proceed is not to deal with the constitutional issue but rather deal with the issue of what sentence is appropriate in all these circumstances and then, if necessary, to return to the constitutional issue.

[4] This is a situation where, on behalf of Mr. Saplala, counsel urges that a conditional sentence order could be imposed and has suggested that a duration of six to eight months would be appropriate in all the circumstances.

[5] Counsel, on behalf of the Crown says, no, in this case, a term of incarceration is called for. Broadly speaking, the circumstances of this offence call for incarceration between 18 and 24 months.

[6] Part of the background to this, I expected, was going to be a significant issue in terms of Mr. Saplala's continued ability to live in Canada. I say that because the information in the Pre-Sentence Report confirms that he is originally from the Philippines. He resided in the Philippines with family and then came to Canada about four years ago as part of a person working through the Yukon Nominee Program. He found work in Whitehorse and was able to remain here. I will get into the circumstances of what has happened since his arrest, but counsel, on his behalf, has now indicated

that, in any event, his visa has expired, meaning he is no longer lawfully entitled to remain in Canada and will be leaving Canada, that is, either voluntarily or more likely by deportation upon the completion of all of the proceedings related to this matter. For those reasons, the issues that might have arisen in relation to the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, do not really have any application.

[7] The circumstances involving this event are set out in the Admissions of Fact filed as Exhibit 1, and I am going to refer to part of it:

> [8] In early 2020, Whitehorse RCMP were notified that Face Book had detected that the [sic] Mr. Saplala, had posted some images on the Face Book social media platform which were deemed to be child pornography.
>
> [9] On 18 February, 2020, pursuant to a Search Warrant, police seized a number of electronic devices associated to Mr. Saplala.
>
> [10] Further investigation revealed that these devices contained fewer than a hundred unique images or videos which constitute child pornography.
>
> [11] Some of these items of child pornography were produced by, and featured Mr. Saplala having sexual relations with teenage males. These items appeared to have been recorded onto his devices while he was still a resident of the Philippines and before he moved to Canada, bringing his devices with him.
>
> [12] The still images of child pornography include mostly males, but some females, ranging in apparent ages of between 2 to 17 years-old.
>
> [13] The majority of the still images feature young males involved in sexual activity with other male children or with adults and include images of penetrative and nonpenetrative sexual activity between children and adults.
>
> [14] The video recordings containing child pornography depict male children ranging in apparent ages of between 5 to 17 years-old. The child pornography video recordings depict young males engaged in explicit sexual activity with other children or with adults, including: fellatio, masturbation, solo masturbation and anal intercourse.

> [15] Police investigation revealed that all the pornography was put on Mr. Saplala's devices in the Philippines, and that it was viewed on occasions after he moved to Canada.

[8] The circumstances of child pornography have been considered many times over the course of years since this became an offence. It is, of course, in the *Code* referred to as child pornography. Increasingly, there has been material put before the courts, including, as in this case, material in the Respondent's Book of Authorities, which I am going to mark as Exhibit 3, so that it is all before the Court. I will also mark the book of authorities filed on behalf of the defence as Exhibit 3, just so that they are on the record.

[9] The Crown material includes information put together by the Canadian Centre for Child Protection dealing with the nature of child pornography. I am going to comment on that briefly.

[10] First of all, although Parliament, when the law was enacted, referred to it simply as child pornography, generally speaking, what is included in that type of material is a depiction of a child being sexually abused. I say that generally keeping in mind that there may be circumstances where, because of the age definition of 18 for child pornography and the age of consent of 16 in Canada, there may be circumstances where, as a matter of law and as a fact, the sexual event was consensual but it is still a crime to have recorded it and possess, access, or done something else with it.

[11] Secondly, even if the event was consensual, it does not changeF the fact that what Parliament was attempting to protect against is having in existence an image which can be viewed over and over, not simply by those involved in the event, but by others who know those involved in the event or strangers, whether in Canada or right

around the world. I do not think anybody should ever be in a position where a sexual act is recorded and then disseminated worldwide.

[12] The Centre for Child Protection commented on the fact that those who have been the subject of child pornography videos, or videos of sexual abuse being recorded, end up in a position where they are victimized again, potentially every day for the rest of their life, never knowing whether somebody walking down a street will recognize them as having been depicted in the video that they have seen.

[13] The nature of these events is profoundly troubling. A reason why courts have been required to consider significant penalties for those involved is to bring home to all of society the significant nature of this crime. The impact upon those who are depicted in these recordings — whether it is a photograph, a video recording, or whatever else it might be — and who for potentially the rest of their lives are victimized over and over by having these available for others to watch.

[14] The circumstances of this case are complicated in the sense that all of the videos or other images that involve Mr. Saplala were recorded at a time when he was not living in Canada. There is no evidence before us, and I do not know if counsel have any idea as to whether the events depicted in these videos were crimes in the Philippines at the time that the events occurred. It may be that they are. I think I would be wrong to speculate absent expert evidence on the law of the Philippines with respect to these matters. The depiction, for example, of him having a sexual encounter with a teenage boy may well fit within the definition of child pornography, keeping in mind the age of 18, but I do not know whether the event itself was a crime.

[15] What certainly was a crime was that these images were possessed after Mr. Saplala had come to Canada. Whatever the depiction, whatever is the case, certainly some of these must have been criminal depictions of events. A child, for example, a toddler, really, at the age of two, being involved in a sexual matter of some sort is frankly just a despicable thing. Mr. Saplala then chose to have these in his possession over the period of time when he was in Canada. That becomes a serious matter.

[16] We had a discussion — perhaps mostly me talking as opposed to counsel submitting — with respect to the fact that cases involving sentencings on a related type of offence very often describe the events depicted on the material and also record the number of events depicted. I do not know that I can simply say a small number of events, that is, fewer than one hundred, gets great weight as opposed to saying an event that depicts penetrative sexual acts or intercourse necessarily gets higher weight.

[17] What I think I can say with respect to these images is that we are not talking simply about a lower classification of child pornography or child sexual abuse, such as, for example, a few images of a child posing in a provocative manner. We are clearly talking about a type of pornography that, according to the characterization accepted by courts as a result of the decision in *R. v. Missions*, 2005 NSCA 82, involves the second highest level of abuse that can be recorded, that is, a penetrative sexual act.

[18] We are also not dealing with simply one or a handful of images. We are dealing with a relatively significant number, although that number clearly is a small fraction of the numbers that sometimes occur in some of these cases. It is then a factor where the

relatively small number, I suppose, has to be considered — but also consideration has to be given, perhaps more consideration, to the nature of what is depicted. I do not think that there is any simple formula or any other way to characterize this, other than to say that the material clearly is extraordinarily harmful to those who were depicted. Fortunately, apparently the number of those abused or otherwise depicted in these videos or photographs is not as large as is sometimes the case.

[19] Mr. Saplala comes before the Court with no criminal record. The Pre-Sentence Report, which was comprehensive and helpful, was before the Court. It describes him, now at the age of the 32, growing up on the Island of Luzon in the Philippines. His background goes through the family circumstances growing up on a farm. As the oldest child, he was expected to do a significant amount of work, as well as taking a role in taking care of his younger siblings.

[20] The custom, which I think is common in a lot of places, is that, as the oldest child, Mr. Saplala would be given significant resources by the family so that, in turn, he could acquire an education, get a profession or employment, and then assist in supporting the rest of the family and helping everybody else out. To his credit, Mr. Saplala completed a degree. I think it is clear that the nature of the employment and the ability to earn income in the Philippines was such that he would not have earned as much as he was able to earn in Canada. Accordingly, in 2018, he moved to Canada and was working through the Yukon Nominee Program, which had provided him with an ability to take employment at a restaurant located here in Whitehorse and continue to work at that location.

[21] While at that restaurant, he apparently was a good worker. He was described by his supervisor as reliable, and always on time. He got along with his colleagues. He was neat, clean, and organized, and was a quick learner. The supervisor indicated they never had any issues with him, and he was eager to learn and take on different jobs and responsibilities within the restaurant.

[22] Mr. Saplala was let go as a result of these charges being laid. The release order prevented him from being with people under the age of 18. Public locations, such as a restaurant, would necessarily have meant that customers of that age would have been present and, indeed, I am guessing, as with most restaurants, some of the staff were under the age of 18.

[23] As a result of the Yukon Nominee Program requiring that he was to work specifically at Boston Pizza, he was not permitted to work anywhere else. Accordingly, after his arrest in March 2020, he has been without employment. He has been living in a facility in Whitehorse known as the Connective Support Society (the "Connective"). It was formerly the John Howard Society. I am told that it is actually in a wing of the Whitehorse Correctional Centre that is no longer used for correctional purposes. In that location, he has been able to have a place to live, a place to keep him warm, fed, and dry, but not in a place where he is able to do a lot of other things of use.

[24] Mr. Saplala's counsel advises me, and I accept, that to help with supporting his family, he has been collecting recycling, and returning it to get the money which he then sends back to the Philippines. I am guessing that the income for Mr. Saplala must have been a significant source of income for his family and allowed them to live in a way that

was different from what otherwise would have been the case. That was presumably the whole purpose of the custom of having the eldest child take on the role of education, then employment, then income to help the rest of the family.

[25] Mr. Saplala told me that he is ashamed of what he has done. I accept that. I think that his actions have no doubt had a significant impact upon his family so that in addition to his remorse of what he did, he has the shame of knowing what he has caused to his family.

[26] The circumstances surrounding this offence have to be given considerable weight. Section 718 of the *Code* sets out provisions that a court is broadly required to look at in deciding a sentence. Those have to include the fact that the gravity of this offence is significant. While I do not sentence him on the basis of having produced child pornography and do not sentence him on the basis of having been involved with sexual activity with children, it does not change the fact that he had in his possession material of a very significant nature.

[27] Perhaps more importantly when I look at his level of responsibility for this offence, I have to consider that he had knowledge of exactly what was involved in some of this material, having been involved in it himself. As indicated, so much of the concern about these events is that we have abuse of young people being recorded. The distribution of that, the possession by others, maybe for a whole variety of reasons, but it is probably the case that if there were no people who wanted to view this, there would be much less of this material at least put on display on the Internet. I do not know

whether we can say there would be fewer of these things recorded for somebody's personal purposes, but I suspect that there would be less on the Internet.

[28] The response of many is to come before the Court and say, "Well, I was just curious. I'm not a danger. I'm not involved in sexual activity of this sort." I have to say, frankly, I often find that to be difficult to accept. In this case, Mr. Saplala does not advance that position and obviously his interest in these matters has been clearly determined by what he himself has done.

[29] There are other things to look at under s. 718, including his prospects for rehabilitation. That is an issue that I have to look at carefully because the admissions include the fact that what was done was done prior to him coming to Canada in 2018. The offence is possessing it after he came to Canada. The offence is necessarily having viewed it, as has been described. I do not accept that he was simply viewing it for the purpose of collating it so he could delete it later. If somebody wanted to delete it, it would be pretty easy to delete them one item at a time when you found them.

[30] It does not appear that the activity of acquiring more of these or possessing more of these was continued after coming to Canada. Mr. Saplala's explanation, which I accept, is that he knew it was an offence here. It appears to be a situation where he was simply incapable of getting rid of it, for whatever reason, but was not continuing to be involved in attempting to acquire it. That tells me that his prospects for rehabilitation are likely quite high. That is also combined with everything else that I know about him — the fact that he is a good worker, and the fact that he is a responsible young man

without any other criminal record. Frankly, his prospects for rehabilitation seem to be relatively high.

[31] I have to consider the need to deter him and others. With respect to deterrence of Mr. Saplala specifically, it strikes me that he has already had a significant period of time to think about this. He appeared to me to be genuinely expressing remorse about this matter, and I accept that. I do not know what type of sentence would now be needed to impose upon him, a personal deterrent. He does not strike me as one of those people who is likely to commit further offences unless he is given the significant period of incarceration to tell him that what he did was wrong. He knows that.

[32] Perhaps in terms of deterrence, the greatest thing is the shame that he has brought upon himself. I know that he has close family members living nearby. His contact with them was frequent before he was charged. As a result of younger relatives living in that home, he no longer has that frequent contact with them. His family must all know about this. My guess is that his parents and siblings in the Philippines would be well aware of the fact that for his own sexual gratification, he possessed this material and that has now dramatically changed their circumstances because of his inability to send back money. I expect that that shame weighs on him as heavily as anything that might be done by this Court, in terms of him personally.

[33] In terms of general deterrence though, I am still required to consider what it is that society calls for in terms of a sentence to make sure that others are aware of how serious all of this is. Many cases have been put before the Court dealing with child pornography sentences. A few things come out of that.

[34] It is pretty clear that when this offence originally became an offence, which was not all that long ago, many of the sentences imposed were dramatically shorter than what might be imposed now. As is often the case, as time goes on and greater consideration is given to the nature of the crime, we realize the impact that a crime like this has upon others and decide that sentences of 14 days, 45 days, 90 days simply do not get the message across. Parliament has considered that by the imposition of higher terms of incarceration — whether a maximum term or a minimum term, whether it is constitutional or not — it does not really change the fact that we are beginning to recognize that significant terms of incarceration are called for.

[35] Perhaps most importantly, this Court, together with every other court in the country, was told by the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9, to look at the nature of sexual victimization of children and the profound impact that has upon them and correspondingly upon their families, their friends, and ultimately all of society. *Friesen*, in a comprehensive decision, went through the nature of what is required to deter others from committing offences involving sexual exploitation of children.

[36] When I look at that, I think I have to consider that possessing depictions of a child involved in sexual activity is a crime which sometimes can be difficult for authorities to uncover. Sometimes the very nature of the events itself means that those who are forced to participate in it may never want to talk about it. The trauma of being abused is compounded by the trauma of having to talk about it. It may be that unless the matter comes to the attention of the authorities, for example, by being posted on a social network page, nobody ever learns about it. Accordingly, it is more important to

make certain that everyone understands that a harsh penalty will be imposed to try to prevent the acts from happening in the first place.

[37] Counsel for the Crown, in going through a number of decisions, has said that earlier decisions may not fairly reflect what *Friesen* has now told us and has, for that reason, suggested 18 to 24 months' incarceration is called for.

[38] Counsel on behalf of Mr. Saplala has also represented the types of sentences that were imposed earlier and said, yes, maybe those are not appropriate now but still, you do not move from sentences of weeks' incarceration to something approaching the maximum sentence without a careful consideration of all of the other factors.

[39] When I look to these events, including the nature of what it was that Mr. Saplala possessed, I have to say that it strikes me that a significant term of incarceration is called for. I would not have thought that a term of 18 months was called for these offences even considering what has been said by the Supreme Court of Canada in *Friesen*, but a sentence in the range of 15 months might well be said to be appropriate based on the material. I think that I have to keep in mind that general deterrence or the need to denounce these types of crimes have to be paramount factors in my consideration.

[40] Mr. Saplala's background though cannot be ignored. I know the fact that he has no record is a factor that I am entitled to look at. It does not mean that he suddenly gets a gigantic discount, but it certainly does mean that, combined with the likelihood that his rehabilitative prospects are high, it means that the sentence can be tempered.

[41] I also look to the fact that he has been on this release order for the last 26 months. As I said earlier, I attribute no blame to anybody about this. But when I am looking at the sentence to be imposed, I think I have to consider the fact that the order prohibited him from doing several things and it required that he remain in Yukon unless given written permission from his bail supervisor to leave. So, we have somebody who had come to Yukon specifically to have employment with a local restaurant. He lost the employment and the ability to earn an income when he was charged with these offences for reasons that are completely reasonable. He then could not leave the Yukon. I do not know why a bail supervisor would have allowed him to move because, absent a job somewhere else, it would not have made any sense to allow him to do that. Indeed, the prospect of attempting to get away from this jurisdiction to avoid the proceedings might well have been something that a person would consider, although there is certainly nothing to indicate that Mr. Saplala is that sort of person.

[42] The result then has been that for a period of about two years, he has been in a position where he is in limbo sitting, presumably, in a room at the Connective collecting recycling, and thinking about the shame that he caused himself by his acts. I think that has to be considered because the bail order, the time that it took to get before this Court, may not be the fault of anybody but it has had a significant impact upon Mr. Saplala.

[43] I will just turn briefly then to the issue of the determination as to whether or not the minimum applies in this case. Despite the arguments put before me, I do not need to deal with that issue. If I were compelled to deal with the issue, I would agree with other decisions that have determined that the minimum should not apply in these

circumstances — courts that have the ability to do that have found that unconstitutional — but the sentence, in my view, for this case has to be longer than the six-month period of incarceration that would be the minimum under the legislation. Accordingly, I simply decline to deal with that challenge on the basis that is moot.

[44] The second thing is the issue of a conditional sentence. While many of the circumstances here would be consistent with a conditional sentence being appropriate, in Mr. Saplala's circumstances, it simply makes no sense to me that an order of that sort would be made. A conditional sentence is often imposed when all of the other factors that are considered are met and there is no danger to the public and it is otherwise consistent with the principles of sentencing. Nothing that Mr. Saplala has done in Canada makes it likely that he presents a danger to the public, but that is not really the issue to deal with now. Mr. Saplala cannot work lawfully in Yukon. He is indeed not even entitled to be in Canada.

[45] To impose upon him a conditional sentence order right now strikes me as being a situation where I would simply be continuing the limbo for no purpose whatsoever. I would be requiring that the funders of the Connective continue to have Mr. Saplala live there for no good reason, not so he could be employed, not so that he would be taking counselling, not so that he could be doing anything productive, but simply as a holding place for him to remain until his deportation is completed.

[46] I do not think that a conditional sentence in these circumstances would have been appropriate in any event based on the circumstances of this offence, including the

nature of some of the material which are the basis of these charges. It does not make any sense in Mr. Saplala's circumstances.

[47] I had indicated that, on the material itself, a sentence of something around 15 months might have been appropriate. Considering the bail issue, considering his exemplary background, considering the remorse that he has shown, considering the prospects for rehabilitation, and considering the shame as a deterrent, I have determined that that can be reduced. I would impose a term of 11 months' incarceration. He has been in custody for five days, which is equivalent to eight days when he is given enhanced credit. Accordingly, I am going to describe 11 months' incarceration as 335 days less eight days, meaning the sentence going forward from today's date is 327 days' incarceration.

[48] I am ordering that Mr. Saplala be bound by the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 10 years from today's date.

[49] I am ordering that the material that has been seized is to be forfeited and destroyed.

[50] I am ordering the costs and surcharge to be waived.

[51] I am ordering that no probation is to be imposed. It would simply be a waste of time, given the proceedings which I expect to take place with his deportation.

[52] I made the order under the *Sex Offender Information Registration Act* because I am compelled to do so. I am not compelled to make a s. 161 order, but I think that it is

appropriate, as I do not know the timeframe precisely for Mr. Saplala leaving Canada. Accordingly, out of an abundance of caution, I am making an order pursuant to s. 161 for a period of five years. During that period, he is prohibited from attending a public park or public swimming area where persons under the age of 16 are present or can be reasonably expected to be present or daycare centre, school ground, playground, or community centre.

[53] Mr. Saplala is prohibited from seeking, obtaining, or containing any employment whether or not the employment is renumerated or becoming or being a volunteer in any capacity that involves being in a position of trust or authority towards persons under the age of 16 years.

[54] Mr. Saplala is prohibited from having any contact including communicating by any means with a person who is under the age of 16 years unless he does so under the supervision of a person whom the Court considers appropriate.

[55] I will just pause to note that it seems unlikely that that could be done.

[56] Mr. Saplala is not to use the Internet or any other digital network unless he is doing so for the purpose of communicating with family members in the Philippines or with counsel on his behalf who may be assisting him with respect to any proceeding out of this matter or anything involving proceedings under the *Immigration and Refugee Protection Act*.

[DISCUSSIONS RE DESTROYING/FORFEITURE OF DEVICES]

[57] The two of you look at the draft. If you are in agreement, I will sign it once it is presented. If you are not in agreement, we can return and have some further discussion.

[58] THE CLERK: Your Honour, Count 1 is still outstanding.

[59] MR. SINCLAIR: Crown directs a conditional stay of proceedings.

[60] THE COURT: There is a mandatory requirement that a DNA order be given. It is a primary offence. I am going to require that a sample of his DNA is to be provided to the Correctional authorities by no later than June 30, 2022.

_____

KILLEEN T.C.J.