SUPREME COURT OF YUKON

Citation: *R v GK*,
2022 YKSC 61

Date: 20221125
S.C. No. 21-AP003
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

APPELLANT

AND

G.K.

RESPONDENT

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

Before Justice K. Wenckebach

Counsel for the Appellant	Tom Lemon (by video conference)
Counsel for the Respondent	Kevin Drolet

REASONS FOR DECISION

Overview

[1] The appellant, G.K., was found guilty of sexual exploitation pursuant to s. 153(1) of the *Criminal Code*, R.S.C., 1985, c. C-46 ("*Criminal Code*"). Section 153(1.1)(b), the sentencing provision applicable to G.K., provides for a minimum sentence of 90 days incarceration. Conditional sentences cannot be ordered where minimum sentences apply (s. 742.1(b) of the *Criminal Code*). Thus, the only form of sentence the judge could order was a jail sentence.

[2] At the sentencing hearing, G.K. challenged the constitutionality of the mandatory minimum sentence, submitting that it violates s. 12 of the *Canadian Charter of Rights*

and Freedoms Part 1 of the Constitution Act, 1982 (the "*Charter*"). He sought that the minimum sentence not be applied to him, and sought a 6-month conditional sentence order. The Crown sought a 90-day jail sentence and argued that s. 153(1.1)(b) is constitutionally compliant.

[3] The trial judge determined that the minimum sentence provision breached s. 12 of the *Charter* and therefore did not apply in the matter before him. He concluded that a conditional sentence was appropriate and imposed a 6-month conditional sentence on G.K., with an additional two years' probation.

[4] The Crown has appealed the trial judge's determination that the mandatory minimum is invalid and seeks that a 90-day sentence of imprisonment be imposed.

[5] G.K.'s appeal was heard at the same time as the appeal of the sentence in *R v DAD*, 2021 YKTC 20 ("*DAD*"), as the two appeals canvassed the same issues. Where the issues overlap, my analysis here applies equally to *DAD*.

[6] For the reasons below, I conclude that the trial judged erred in imposing a conditional sentence and substitute it with a 90-day sentence of imprisonment. I also find that the mandatory minimum provision is unconstitutional.

FACTS

[7] G.K. was the recreation director of his village. In the summer of 2018, he hired the victim, K.B., as the youth program coordinator. She worked in the same building as G.K. and reported to him. He was 59; K.B. was 17.

[8] On August 8, 2018, K.B. came into work. G.K. spoke to K.B., and, during their discussion, questioned K.B. about her sex life. He then came up to her from behind and

put his hand on her stomach, rubbing it. He kissed her on the neck from behind twice, before leaving. Soon thereafter, he met up with her again and made a sexual comment.

[9] K.B. did not feel right about what occurred and asked G.K. for the rest of the day off. He asked to talk to her upstairs. G.K. lead K.B. to a storage room and talked to her about having sexual intercourse. He then hugged her and kissed her twice before opening the door to let her leave.

[10] At sentencing, the Crown filed K.B.'s victim impact statement. G.K. filed letters of support. G.K.'s counsel informed the judge that G.K. had been fired from his job and his marriage had ended because of the charges.

ISSUES

[11] The analytical process for determining whether a mandatory minimum violates s. 12 of the *Charter* frames the legal issues here. The questions the court must resolve when a sentencing provision is challenged under s. 12 are:

a) What constitutes a proportionate sentence for the offence?

b) Would applying the mandatory minimum result in a grossly disproportionate sentence for the offender?

c) If the sentence is not grossly disproportionate for that offender, are there any reasonable hypotheticals in which applying the mandatory minimum would result in grossly disproportionate sentences?

ANALYSIS

[12] Section 12 of the *Charter* states: "[e]veryone has the right not to be subjected to any cruel and unusual treatment or punishment". A sentence will constitute cruel and unusual punishment only if it is grossly disproportionate to the appropriate punishment.

The bar for finding that a sentence is cruel and unusual punishment is, therefore, high. (*R v Nur*, 2015 SCC 15 ("*Nur*") at para. 39).

[13] To find that the mandatory minimum punishment of 90 days imprisonment for a conviction under s. 153(1) is unconstitutional, I must first determine whether such a sentence would be grossly disproportionate for G.K., and then, whether it would be grossly disproportionate for other offenders.

a) What constitutes a proportionate sentence for the offence?

[14] The trial judge sentenced G.K. to a 6-month conditional sentence. With respect, I conclude that a conditional sentence is not appropriate and that a 90-day term of imprisonment is a proportionate sentence.

[15] As I am sitting on appeal, I must show deference to the sentencing judge's decision (*R v Friesen*, 2020 SCC 9 ("*Friesen*") at para. 25). An appeal court can only intervene on a sentence appeal if "(1) the sentence is demonstrably unfit … or (2) the sentencing judge made an error in principle that had an impact on the sentence ..." (at para. 26). An error of law, a failure to consider a relevant factor, or an error in consideration of an aggravating or mitigating factor all constitute errors in principle (at para. 26).

[16] In the case at bar, Crown counsel says that the judge mischaracterized the facts and misapplied *Friesen* in several ways. The Crown also provided submissions on the application of *R v Sharma* (2022 SCC 39). I agree with Crown that the trial judge committed two errors, although only one is material. I will therefore not address all the Crown's submissions, but will assess whether the judge mischaracterized facts, whether he considered the future potential harm to K.B., and whether he took into account that

conditional sentences are generally not appropriate for sexual offences involving children.

Mischaracterization of the Facts

[17] The Crown submits that the trial judge mischaracterizes some of the facts. In his sentencing decision, the trial judge stated that "[t]he duration of the sexual offending was short, and the two incidents occurred on the same day, in relatively rapid succession" (*R v GK,* 2021 YKTC 17 at para. 21). The Crown disputes this finding, saying that the sexual assault was protracted.

[18] The Crown is asking me to re-interpret the facts. Appeals concern errors, not different interpretations of the facts (*LL v R*, 2016 QCCA 1367 at para. 79). The sentencing judge was in the best position to make findings of fact, and I do not disturb those findings.

Future Potential Harm to K.B.

[19] The Crown says that the trial judge erred because he did not consider the future harm that K.B. may suffer. I agree.

[20] In *Friesen* the Supreme Court of Canada stated that courts must identify the potential for reasonably foreseeable harm when fashioning a sentence, stating, "[w]hen they analyze the gravity of the offence, sentencing judges thus must always take into account forms of potential harm that have yet to materialize" (at para. 84).

[21] In the case at bar the trial judge did not consider the future potential harm to K.B. and thus committed an error. How a court is to assess the potential for harm may be challenging. Here, the trial judge had a victim impact statement before him and drew from it in discussing the actual harm to K.B. This could, possibly, have also provided

some indication about potential future harm. Moreover, the Crown has a role to play and should provide submissions to the trial judge about the future potential harm the victim may encounter.

[22] I do not find this error material, however. The judge recognized the significant impact G.K. already had on K.B. It is a small step from there to also conclude that there could be future harm to K.B., as well. I conclude that the judge's overall assessment would have remained the same, even if he had considered the future potential harm to K.B.

Conditional Sentence Orders are Not Generally Appropriate in Sexual Offences Involving Children

[23] Although not phrased as such, the thrust of the Crown's submissions is that given the nature of sexual offences against children and the moral blameworthiness of the offender, a conditional sentence order should not have been granted. I would restate the Crown's argument. In my opinion, the judge's second error was that he failed to give effect to the principle that sexual offences involving children should not generally result in conditional sentence orders.

[24] The sentencing judge referred to a case, *R v DR* (2003), 169 OAC 55 ("*DR*"), that stated that conditional sentence orders should only rarely be granted in sexual offences involving children and stated that he generally agreed with that idea. He went on, however, to state that there is no offence in which a conditional sentence order is presumptively inappropriate. He determined that a conditional sentence order would be proportionate in G.K.'s case.

[25] *DR* had very different facts to the case at bar and was a brief decision that did not analyze the issue. The trial judge did not have the benefit of other case law that would have assisted him in determining if a conditional sentence order was appropriate in the circumstances of the case before him.

[26] In addition to Ontario, courts of appeal across jurisdictions have determined that, in general, true jail sentences should be imposed in sexual offences involving children, especially where there is a breach of trust, and that conditional sentence orders are generally not appropriate (*R v Hagen*, 2021 BCCA 208 ("*Hagen*") at paras. 41-42; *R v MS*, 2003 SKCA 33 at para. 11; *R v Paradee*, 2013 ABCA 41 at paras. 15-16; *R v JAG*, 2008 MBCA 55 at paras. 22-23).

[27] Jail sentences are frequently more appropriate because sexual offences involving children are, by their nature, serious offences. Sexual offences violate a child's integrity and control over their body. Sexual violence can have profound consequences on the child, affecting their sense of self, their relationship with their families, and with the wider community. These consequences can last for years (*Friesen,* at paras. 77, 81). Even a single instance of sexual violence can "permanently alter the course of a child's life" (*Friesen* at para. 58, citing *R v Stuckless*, 2019 ONCA 504 at para. 136).

[28] In addition, sexual offences against children have, at their core, a combination of elements that increase the gravity of the offence. The Supreme Court of Canada has stated:

> … It is inherently exploitative for an adult to apply physical force of a sexual nature to a child. … This exploitation is rooted in the power imbalance between children and adults, the potential harm that sexual interference by adults poses to children, and the wrongfulness of treating children not as

> persons with equal dignity but instead as sexual objects to be used by adults. … (*Friesen* at para. 78)

[29] The moral blameworthiness of the offender is also often higher in sexual offences involving children because the offender is, or ought to be, aware of the profound affect the offence will likely have on the victim (*Friesen* at para. 90).

[30] As well, Parliament has determined, through s. 718.01 of the *Criminal Code*, that denunciation and deterrence are the primary principles to be considered in sentences of sexual offences involving children.

[31] Thus, because the gravity of the offence and moral blameworthiness of the offender will generally be high and because of the primacy of the principles of denunciation and deterrence, usually only a jail sentence will be proportionate for sexual offences involving children.

[32] This does not create a presumption that conditional sentences will not be ordered in sexual offences involving children. There will still be times where the facts justify a conditional sentence, as an offender's specific circumstances may affect the judge's findings about their moral blameworthiness (*Hagen* at para. 42). Thus, conditional sentences have been upheld where the accused has extensive cognitive impairments (*R v Scofield,* 2019 BCCA 3; *R v Swaby*, 2018 BCCA 416). A conditional sentence order may also be proportionate where there are significant *Gladue* factors.

[33] In other cases, however, conditional sentence orders were rejected even where there were mitigating factors, including that the accused was a first-time offender, that they were otherwise an upstanding citizen and had complied with release conditions. The court's reasoning is that those mitigating circumstances were not sufficient to reduce the offender's moral culpability to such a degree that a conditional sentence was

reasonable (*R v Horswill*, 2019 BCCA 2 ("*Horswill*")). As the Ontario Court of Appeal stated when substituting a jail sentence for a conditional sentence: "[i]t is not unusual for individuals who commit this kind of offence to have jobs or to otherwise be individuals of apparent good character" (*R v D(RW)* (2005), 199 OAC 254 at para. 12).

[34] Granting a conditional sentence order for sexual offences involving children, especially where there is a breach of trust, in the absence of specific circumstances, would not be in accordance with the legal principles established by courts across Canada.

[35] Turning to the case at bar, there are no specific circumstances that support imposing a conditional sentence. While the nature of the sexual contact was brief, the effect of the harm to K.B. was significant. As well, as K.B. was a young person at the time of the offence, the circumstances of the offence are aggravating. Given K.B.'s victim impact statement, it can be expected that she will continue to experience repercussions from the assault into adulthood.

[36] The nature of the contact is not as significant as other cases in which jail sentences were imposed rather than conditional sentences (e.g. *Horswill*). Those factors do not support granting a conditional sentence, however, but are better reflected in determining the length of the sentence.

[37] G.K.'s moral blameworthiness is also high. G.K. was 42 years older than K.B. and was her work supervisor. He took advantage of a person who was doubly vulnerable, because of K.B.'s age and because of his position of authority. He was or should have been aware of the harm he would likely cause K.B.

[38] That he has a good employment history, support from family and friends, and has volunteered and contributed to the community are factors in determining an appropriate sentence, but do not assist in determining whether a conditional sentence is appropriate. Similarly, the negative consequences G.K. has experienced may be taken into consideration in fashioning a sentence, but do not provide the basis for imposing a conditional sentence.

[39] I therefore conclude that a conditional sentence is not appropriate in this case and would substitute a 90-day term of incarceration.

b) Would applying the mandatory minimum result in a grossly disproportionate sentence for the offender?

[40] As a 90-day term of incarceration is the minimum sentence under s. 153(1.1)(b), the mandatory minimum sentence would not be grossly disproportionate for G.K.

c) If the sentence is not grossly disproportionate for that offender, are there any reasonable hypotheticals in which the applying the mandatory minimum would result in grossly disproportionate sentences?

[41] I conclude that there are reasonable hypotheticals in which applying the mandatory minimum would result in grossly disproportionate sentences.

[42] The judge at sentencing considered three hypotheticals. The first was the hypothetical based on *R v Hood*, 2018 NSCA 18 (“*Hood*”) at para. 150. The trial judge considered it and noted that *Hood* was determined before the Supreme Court of Canada’s decision in *Friesen*. He therefore did not base his conclusion that the mandatory minimum violated s. 12 of the *Charter* solely on the facts of *Hood*, but went on to consider two other hypotheticals.

[43] The Crown submits that the judge erred in the formulation of the hypotheticals. I disagree.

Downgrading the Wrongfulness of the Offence and Harm Done to the Victim

[44] In the two hypotheticals the judge relied on, the facts included that the offender either kissed or touched the victim. The Crown says that the judge's hypotheticals downgrade the wrongfulness of the offence and the harm done to the victim by treating kissing and touching as marginal transgressions, contrary to *Friesen*.

[45] In my opinion, the Crown misinterprets *Friesen*. In *Friesen*, the Supreme Court of Canada does not state that the court should not use the nature of the sexual touching as a factor in determining a sentence. In fact, it affirms the opposite, stating: "[o]f course, increases in the degree of physical interference increase the wrongfulness of the sexual violence" (at para. 145).

[46] *Friesen* stands for the principle that the court must not make assumptions about the seriousness of the offence based on the nature of the sexual touching. Rather, the court must recognize that any sexual violence against children is harmful and consider the actual harm to the victim when assessing the seriousness of the offence.

[47] The hypotheticals the sentencing judge used included facts about the circumstances of the offence with its actual impact on the victim: while the sexual contact did involve kissing or touching, they also identified the impact on the victim. The hypotheticals thus not only address the nature of the sexual contact, but also how it affected the victims. In this way, they address the concerns *Friesen* raises about minimizing the harm done to victims.

Potential Future Harm

[48] This leads to the Crown's other criticism. Crown says that the hypotheticals do not consider the reasonable potential future harm to the victims. Crown makes this submission because, in one hypothetical the victim says that they have overcome the incident, while in the second the victim says that they are upset about the assault but are also supportive of restorative justice by way of circle sentencing. Crown suggests that these statements should not be taken into account by a judge. Rather, the judge should presume future harm.

[49] However, disregarding a victim's statements about whether or how an assault has affected them is not what *Friesen* stands for. As always, the judge must consider a victim's statements about the impact of the assault on them.

[50] The trial judge crafted the hypotheticals to include circumstances of the offence, the effect on the victim, and the circumstances of the offender. The hypotheticals are not problematic.

Whether the Offenders in the Hypotheticals Were in a Position of Trust or Authority

[51] The Crown also says that the hypotheticals do not create a scenario in which the offender is in a position of trust or authority. For the purposes of the appeal, I need only consider the hypothetical involving the student teacher.

[52] That hypothetical is an amalgamation of the facts from *Hood* and *R v Aird*, 2013 ONCA 447 ("*Aird*"). In the hypothetical, the offender is described as a 23-year-old student teacher with a degree in mathematics, who is hired to tutor a 17-year-old high school student. The offender has serious mental health issues, and while in mental

distress, the tutor kisses the student on the lips. Crown says that the facts were changed sufficiently, specifically from *Aird*, that it can no longer be determined if the tutor was in a trust relationship with the student in the hypothetical.

[53] I do not find the Crown's submissions persuasive. The key facts in the hypothetical are the same as in *Aird*. Just like in *Aird*, in the hypothetical it can be inferred that the victim and his parents would trust the offender because of her profession (at para. 32) and would trust the offender to schedule her tutoring with the victim where and when she chose, without interference (at para. 35).

[54] In *Aird*, the victim was described as naïve, which is lacking here, but that goes to understanding how the offender in *Aird* was able to groom the victim. As well, the offender's age in the hypothetical is different, but I do not believe that impacts whether the offender here would be in a position of trust over the victim.

[55] It can, therefore, be concluded from the hypothetical that the offender was in a position of trust. It also points to the conclusion that, for some offenders, a 90-day prison sentence would be grossly disproportionate.

[56] The Supreme Court of Canada has warned that criminal provisions with broad application are vulnerable to *Charter* scrutiny. It stated: "…[T]he reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. …" (*R v Lloyd*, 2016 SCC 13 at para. 35). Section 153(1) applies to a broad spectrum of relationships, can be committed by offenders in very different circumstances, and in innumerable ways. The reach of the

provision means that the minimum sentence can be grossly disproportionate for some offenders.

[57] I therefore find that s. 153(1.1)(b) of the *Criminal Code* violates s. 12 of the *Charter*.

CONCLUSION

[58] I allow the appeal to the extent that I set aside the trial judge's conditional sentence order and replace it with a 90-day custodial sentence, deemed served.

[59] I also declare the mandatory minimum sentence in s. 153(1.1)(b) of the *Criminal Code* to be invalid and of no force or effect.

WENCKEBACH J.