SUPREME COURT OF YUKON

Citation: *R v DAD*
2022 YKSC 62

Date: 20221125
S.C. No. 21-AP004
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

APPELLANT

AND

D.A.D.

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, D.A.D., pleaded guilty to one charge of sexual interference contrary to s. 151 of the *Criminal Code*, R.S.C., 1985, c. C-46 (the "*Criminal Code*"). Section 151(b), the sentencing provision applicable to D.A.D., provides for a minimum sentence of 90 days incarceration. Conditional sentence orders are not available for offences with minimum sentences (s. 724.1(b) of the *Criminal Code*).

[2] Before the sentencing judge, D.A.D. challenged the constitutionality of s. 151(b), submitting that it violated s. 12 of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*"). He sought that s. 151(b) not be applied to

him and sought a 9-month conditional sentence order. The Crown sought a 4-month jail sentence and argued that s. 151(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 imposed a 6-month conditional sentence and a 15-month probation order on D.A.D.

[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] This appeal was heard at the same time as the appeal of the sentence in *R v GK*, 2021 YKTC 17, as the cases canvassed some of the same issues. Where the issues overlap, I will refer back to *R v GK,* 2022 YKSC 61 ("*GK*"), which contains my full analysis.

[6] For the reasons below, I conclude that the trial judge 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] D.A.D. entered a guilty plea of sexual interference of his cousin, J.B, who was 15 years old at the time of the offence. J.B. was staying at her aunt's house for the summer. D.A.D. was 28 years old and lived beside J.B.'s aunt, in the other half of the duplex.

[8] One evening D.A.D. invited J.B. over. D.A.D.'s common-law partner and children were out at the time. D.A.D. and J.B. watched a movie and engaged in cuddling. D.A.D. fell asleep and later woke up. He put his hand on J.B.'s vaginal area over her shorts and

moved it over her crotch. J.B. pretended to be asleep and D.A.D. stopped when she rolled over.

[9] At sentencing, D.A.D. filed letters of support and a pre-sentence report. The information before the Court was that D.A.D. had quit his job when his employer, who is also his First Nation, learned of the incident. The Court also heard that his relationship with his common-law partner deteriorated after he was charged and he and his partner are currently separated.

[10] The Crown filed victim impact statements for J.B. and her mother.

ISSUES

[11] The questions the court must resolve in a s. 12 challenge to a sentencing provision apply here. These 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] The legal principles of s. 12 that I describe in *GK* are applicable here. To find that the mandatory minimum punishment of 90 days imprisonment for a conviction under s. 151 of the *Criminal Code* is unconstitutional, I must first determine whether such a sentence would be grossly disproportionate for D.A.D., and second, whether it would be disproportionate for other offenders.

a) What constitutes a proportionate sentence for the offence?

[13] The trial judge sentenced D.A.D. 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.

[14] As in *GK*, I am sitting on appeal. The standard of review I describe in *GK* is also applicable in the case at bar.

[15] The Crown here argues that the sentencing judge erred in several ways in deciding that a conditional sentence was appropriate. To resolve the appeal, I need only consider three issues. First, I will consider whether the judge erred when he stated that D.A.D. and J.B. engaged in "cuddling"; second, whether the judge erred in assessing the gravity of the offence; and third, whether he applied the legal principle that conditional sentence orders should not generally be ordered for sexual offences involving children.

Use of the Word "Cuddling"

[16] In his decision, the judge stated that D.A.D. and J.B. engaged in "cuddling". The Crown says the use of that word is problematic because it risks normalising sexual contact with a child. He also says that it is safe to infer that the cuddling was a prelude to a much greater degree of sexual interference.

[17] Cuddling can be both sexual and non-sexual. In the case at bar, the trial judge did not find that the cuddling formed part of the sexual contact. It would therefore be an error for me to re-interpret the facts and find that the cuddling between D.A.D. and J.B. was a prelude to, or formed part of, the sexual contact.

Gravity of the Offence

[18] The Crown submits that the sentencing judge failed to apply *R v Friesen*, 2020 SCC 9 ("*Friesen*") when assessing the gravity of the offence. I agree.

[19] In *Friesen*, the Supreme Court of Canada explained that courts should be careful not to downgrade the seriousness of an offence because it involves touching rather than penetration, cunnilingus, or fellatio. In my opinion, *Friesen* states that the nature of the sexual contact must not be the sole or predominant factor in determining the gravity of the offence. Rather, the court must also give importance to and integrate the harm done to the victim into its assessment of the gravity of the offence.

[20] In the case at bar, the sentencing judge recognized that D.A.D.'s actions had a "significant and profound ongoing negative impact on J.B." (at para. 9). He also acknowledged *Friesen* by stating that the sexual offence was serious and that victims may respond differently to sexual offences.

[21] However, while the judge recognized the impact the offence had on J.B., he did not use that information to determine the gravity of the offence. In this case, the nature of the sexual contact was brief and less invasive than in other instances, but the impact on J.B. was extensive. In her victim impact statement J.B. talks about her substance abuse, self-harm, and other impacts of the assault. Her mother, likewise, describes how J.B. has changed and how the assault has affected herself as well. The trial judge's analysis was flawed because he did not use the impact of the assault to assess the severity of the offence, but addressed only the nature of the sexual contact when he concluded that the offence was at the "lower end of the scale" (at para. 43).

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

[22] Similarly to *GK*, 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. Again, like *GK*, I would rephrase the issue: 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.

[23] The trial judge did not have the benefit of case law that states that, to achieve a proportionate sentence for sexual offences of children, particularly where there is a breach of trust, in general, a term of imprisonment will be required. The legal principles about the use of conditional sentence orders for sexual offences involving children are found in *GK.*

[24] In the case at bar, there are several aggravating factors in the circumstances of the offence. J.B. was under the age of 18 at the time of the offence. As noted above, while the degree of the physical interference was low and the physical contact was not sustained, the effect of the assault on J.B. was profound. D.A.D. is J.B.'s adult cousin and thus violated his position of trust when he assaulted her. D.A.D.'s actions affected not only J.B. personally, but it has affected her mother and their familial relationships: J.B. and her mother both describe feeling distant from the side of the family related to D.A.D.

[25] From the information provided, it can also be predicted that J.B. will suffer future harm. J.B. has worked hard to deal with the harm that D.A.D. has caused to her,

including by attending treatment for her alcohol use, but it is likely that J.B. will continue to deal with various aftereffects of the assault in the future.

[26] There are both mitigating and aggravating factors in the circumstances of the offender. The aggravating factors are that D.A.D. should have been aware of the harm he would likely cause J.B. In addition, while he says he accepts responsibility for the offence, he also says that J.B. was a "willing participant" (at para. 37).

[27] On the other hand, the mitigating factors include that D.A.D. is Indigenous. Pursuant to s. 718.2(e) of the *Criminal Code* I must consider all other sentencing sanctions other than imprisonment that are appropriate. In this case, although D.A.D. was raised in a loving and relatively stable home, his family went through the residential school system, and that, along with other aspects of colonialism, must be taken into account. He has attended counselling since the incident, as well. In addition, he has contributed to the community, was gainfully employed until he was charged, and has the support of members of his family.

[28] The question before me is whether, on these facts, including D.A.D.'s personal circumstances, a community-based disposition is proportionate (*R v Hagen*, 2021 BCCA 208 ("*Hagen*") at para. 41). D.A.D.'s work, contributions to the community, and support from family are not the type of factors warranting ordering a conditional sentence. However, *Gladue* factors can impact the assessment of the offender's moral blameworthiness and lead to the conclusion that a conditional sentence is proportionate (*Hagen* at para. 43). In this case, I have reviewed all of the factors, including the gravity of the offence, the *Gladue* factors, and that D.A.D. is somewhat ambivalent about his responsibility for the offence. I conclude that a conditional sentence is not appropriate.

[29] I would therefore substitute a 90-day term of imprisonment.

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

[30] As a 90-day term of incarceration is the minimum sentence under s. 151(b) of the *Criminal Code*, the mandatory minimum sentence would not be grossly disproportionate for D.A.D.

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?

[31] The Crown submits that the judge erred in following the decision in *R v Pye*, 2019 YKTC 21 ("*Pye*"), in which the court found that s. 151(b) of the *Criminal Code* violated s. 12 of the *Charter*. The Crown says that, as *Pye* was decided before the Supreme Court of Canada's decision in *Friesen*, the sentencing judge here should have engaged in a new analysis of the constitutionality of s. 151(b). The Crown also submits that reasonable hypotheticals lead to the conclusion that a 90-day jail sentence is not grossly disproportionate.

[32] I agree with the Crown that the sentencing judge should have conducted his own analysis. However, I also find that there are reasonable hypotheticals in which applying the mandatory minimum would result in a grossly disproportionate sentence.

[33] *Friesen* requires the court to change the way it determines sentences for sexual offences involving children: sentences must increase; factors must be taken into consideration in ways they may not have before; and factors must be balanced differently than may have been before. As the approach to sentencing for sexual

offences involving children has changed, decisions that were made before *Friesen* must be treated with caution. In my opinion, it would be unsafe to rely on *Pye* for its analysis of the constitutionality of the mandatory minimum of s. 151(b) of the *Criminal Code*.

[34] There are cases that have decided the constitutionality of s. 151(b) post-*Friesen*, such as *R v CBA*, 2021 BCSC 2107 ("*CBA*"). C*BA* described a hypothetical in which the offender touches the victim once, on the thigh or buttocks, and in which there is no foreseeable potential for harm. The court also noted that the offender, could, in these circumstances, have intellectual disabilities or *Gladue* factors that would reduce the offender's moral culpability (at paras. 47, 51).

[35] The Crown takes the position that this hypothetical is not appropriate because there is always foreseeable potential for harm.

[36] Cases may arise in which the victim states that they have suffered minimal or no harm. In those cases, it would be open to a court to conclude that there is no foreseeable potential for harm. Thus, the hypothetical in *CBA* is reasonable.

[37] Using the *CBA* hypothetical, and adding to it, it is entirely possible that a young adult, with intellectual disabilities, significant *Gladue* factors, or both, would come before the court for having touched a victim once on the buttocks or thigh. A 90-day jail term for such an offender would be grossly disproportionate.

[38] I therefore find that the mandatory minimum in s. 151(1)(b) of the *Criminal Code* violates s. 12 of the *Charter*.

CONCLUSION

[39] 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.

[40] I also declare the mandatory minimum sentence in s. 151(1)(b) of the *Criminal Code* to be invalid and of no force or effect.

_____
WENCKEBACH J.