COURT OF APPEAL OF YUKON

Citation: *R. v. T.J.H.*,
2023 YKCA 2

Date: 20230417
Docket: 22-YU892

Between:

Rex

Appellant

And

T.J.H.

Respondent

Restriction on publication: A publication ban has been imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This extends to the respondent's name, referred to in this judgment by the initials T.J.H., through which complainants or witnesses could be identified. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Horsman
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated September 26, 2022 (sentence) (*R. v. T.J.H.*, 2022 YKSC 45, Whitehorse Docket 22-AP001).

Counsel for the Appellant (appeared via videoconference):	S. Bailey
Counsel for the Respondent (appeared via videoconference):	D.C. Tarnow
Place and Date of Hearing:	Vancouver, British Columbia March 30, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 17, 2023

Summary:

The Crown applies for leave to appeal the decision of a summary conviction appeal judge allowing the respondent's appeal from a sentencing decision following his guilty plea to charges of sexual interference. The summary conviction appeal judge found that the sentencing judge erred in failing to account for Gladue and mitigating factors. She substituted a conditional sentence for an 18-month custodial sentence. The Crown alleges the summary conviction appeal judge erred in failing to apply principles of appellate deference, and failed to recognize the exceptional nature of a conditional sentence in sexual offences against children. Held: Application dismissed. The Crown's leave application raised issues of law alone, but they were not issues of general significance and there was insufficient merit in the proposed appeal.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] On March 30, 2022, the respondent was sentenced in relation to two counts of sexual interference contrary to s. 151 of the *Criminal Code,* R.S.C., 1985, c. C-46. The two counts arose from separate assaults in 2018 involving separate young girls, aged seven and ten. The respondent was 20 years old at the time of the commission of the offences.

[2] The respondent pled guilty to both counts in the Yukon Territorial Court. He was sentenced to eight months custody on the first count and ten months custody on the second, to be served consecutively, followed by three years of probation.

[3] On appeal, Chief Justice Duncan of the Supreme Court of Yukon, sitting as a summary conviction appeal judge, found that the sentencing judge erred in a number of respects and she imposed an 18-month conditional sentence plus two years' probation: *R. v T.J.H.*, 2022 YKSC 45. The Crown applies for leave to appeal that sentence.

Background

Sentencing reasons of the Yukon Territorial Court

[4] At the original sentencing hearing, the respondent challenged the constitutional validity of the mandatory minimum of 90-days' imprisonment imposed by s. 151(b) of the *Criminal Code* on the basis that it precluded the imposition of a

non-custodial sentence. The sentencing judge accepted this was so, agreeing with other decisions of the Yukon Territorial Court which had found the minimum sentence provision in s. 151 invalid.

[5] Counsel for the respondent submitted that a conditional sentence of four months was appropriate, plus probation. The Crown sought a custodial sentence of between 19 and 22 months, followed by probation.

[6] At the sentencing hearing, the judge was provided with a lengthy *Gladue* report. The *Gladue* report detailed the history of the respondent's family, in particular the attendance of his father, grandparents and great-grandparents at residential schools. As reviewed in the *Gladue* report, the respondent grew up in a home that was characterized by drinking, violence, and child abuse and neglect. He spent time in foster care, and struggled in school. The respondent was sexually assaulted as a child.

[7] In sentencing the respondent to an 18-month custodial sentence, the judge distinguished the offences in this case from other sexual interference cases in which a conditional sentence had been imposed. In particular, he noted the very young age of the victims in this case, and the fact that the respondent was in a position of trust and authority in relation to the seven-year old victim. The sentencing judge stated that if he was considering a conditional sentence order, the sentence would have to approach two years. He considered such a sentence to be "entirely unrealistic" and "not practical" in light of the respondent's living situation: at paras. 17 and 21. The sentencing judge was also not satisfied that a conditional sentence order would "send the right message" of deterrence and denunciation for offences of this nature: at para. 21.

[8] The sentencing judge noted that the respondent had taken steps since the commission of the offences to improve and rehabilitate himself, and that he had extended a sincere apology in court: at paras. 18–19. The sentencing judge did not reference other mitigating factors, including the respondent's youth, lack of criminal record, and early guilty plea.

[9] The reasons for sentence include two references to the *Gladue* report. At para. 14, the sentencing judge noted that he had the benefit of a "very thorough" *Gladue* report, and described its content. The second reference, at para. 28, came after the sentencing judge had determined that a custodial sentence was appropriate. The second reference was in the context of encouragement to the respondent to seek help to address the issues in his background.

Reasons on the summary conviction appeal

[10] On the summary conviction appeal, Duncan C.J. found that the sentencing judge made two errors of law or principle in his analysis.

[11] First, she found he erred in law in failing to engage in a proper analysis of the impact of the respondent's significant *Gladue* factors on the sentence. Chief Justice Duncan noted that the sentencing judge did not explain the reasons for his conclusion that a conditional sentence would be "impractical" in light of the respondent's living circumstances: at para. 27. She found that the judge's unexplained conclusion that a conditional sentence order would be impractical, without reference to any *Gladue* factors, was insufficient to demonstrate that the requisite analysis was done: at para. 31. The significant *Gladue* factors that existed in this case, if considered contextually, should have led to an analysis of an option other than a custodial sentence: at para. 34. As a result, Duncan C.J. concluded that the sentencing judge erred in principle, and this error had a material impact on the sentence imposed.

[12] Second, Duncan C.J. found that the sentencing judge erred in failing to consider the mitigating factors of the respondent's relative youth (age 20) at the time of the offences, his lack of prior criminal record, and early guilty plea. The sentencing judge's consideration of aggravating factors was not balanced by an assessment of these mitigating factors: at para. 42. Chief Justice Duncan found that this led to an unreasonable exercise of discretion, which was an error in principle that affected the sentence: at para. 42.

[13] Chief Justice Duncan then turned to consider the question of the appropriateness of a conditional sentence in this case. She noted that the sentencing judge did not engage in any risk assessment or assessment of the rehabilitative potential of the respondent before imposing the custodial sentence. The evidence on the sentencing hearing showed that the respondent had complied with his bail conditions since being charged in December 2020, was motivated to seek and complete alcohol treatment, had no criminal record, and had expressed his sincere remorse. As such, Duncan C.J. concluded that the respondent would not endanger the safety of the community, and he appeared to be at low risk of reoffending: at para. 56.

[14] Chief Justice Duncan acknowledged the significant aggravating factors present and the serious nature of the offences. However, this had to be balanced by consideration of the respondent's personal circumstances and the significant *Gladue* factors. She concluded that the principles of sentencing could be achieved by a strict conditional sentence, including conditions in the nature of house arrest. The conditions imposed include that the respondent must remain inside his residence at all times for the first 12 months of the order, other than for limited specified purposes with the prior written permission of his bail supervisor.

The proposed ground of appeal

[15] In its written submission on the leave application, the Crown argues that the summary conviction appeal judge made the following errors of law:

(1) Failing to accord appropriate deference to the sentencing judge's finding;

(2) Finding the sentencing judge's failure to recite certain mitigating factors to be evidence that he did not consider them;

(3) Concluding the sentencing judge failed to assess the impact of the respondent's *Gladue* factors on his moral culpability;

(4) Finding the sentencing judge's reasons deficient in explaining why a non-custodial sentence was inappropriate in the circumstances; and

(5) Imposing a demonstrably unfit sentence.

[16] In oral submissions at the hearing of the leave application, the Crown somewhat revised the fifth alleged error of law. Relying on *R. v. G.K.*, 2022 YKSC 61, the Crown says that the judge erred in failing to consider the principle that conditional sentences are not appropriate in sexual offences involving children, other than in exceptional circumstances.

Legal framework

[17] The principles to be applied on an application for leave to appeal from the decision of a summary conviction appeal court, including sentencing decisions, are set out in *R v. Winfield,* 2009 YKCA 9 as follows.

> [13] ... [T]he applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).
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> [14] In *R.(R.)*, Mr. Justice Doherty discussed the approach to be taken in deciding whether to grant leave to appeal the decision of a summary conviction appeal court. In this connection, he stated:
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> > [27] The requirement that the applicant obtain leave to appeal in s. 839 provides the mechanism whereby this court can control its summary conviction appeal docket. Access to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal.
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> > ...
> >
> > [37] In summary, leave to appeal pursuant to s. 839 should be granted sparingly. There is no single litmus test that can identify all cases in which leave should be granted. There are, however, two key variables — the significance of the legal issues raised to the general administration of criminal justice, and the merits of the proposed grounds of appeal. On the one hand, if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong,

> though the grounds must at least be arguable. On the other hand, where the merits appear very strong, leave to appeal may be granted even if the issues have no general importance, especially if the convictions in issue are serious and the applicant is facing a significant deprivation of his or her liberty.

[18] An appeal to a court of appeal in a summary conviction matter is an appeal from the summary conviction appeal court and not a second appeal from the trial court. Accordingly, the focus of a leave application is on whether any error of law was committed by the summary conviction appeal judge: *Winfield* at para. 12.

Discussion

[19] The Crown's first four grounds of appeal allege that Duncan C.J. erred, in various ways, in failing to apply an appropriate level of appellate deference to the trial judge's findings. The Crown says that the Duncan C.J. overstepped her role, and intervened on the basis of mere disagreement with the sentencing judge's weighing of relevant factors, including *Gladue* factors. The Crown says that the sentencing judge referenced the *Gladue* report, and that he should be presumed to know the law. Chief Justice Duncan is said to have erred in failing to read the reasons of the sentencing judge functionally and in the context of the live issues at trial: *R. v. G.F.*, 2021 SCC 20 at paras. 68–69; *R v. Friesen*, 2020 SCC 9 at paras. 25–26.

[20] In his reply to the Crown's leave application, the respondent does not argue that the first four errors alleged by the Crown are not errors of law. Instead, he says that there is no merit to these arguments and that this case does not raise questions of general public importance. I agree that an allegation that a summary conviction appeal court judge has erred by failing to adhere to a standard of appellate review is an allegation of an error of law: *R. v. Pierone*, 2018 SKCA 30 at para. 15. As such, the first criterion for leave is established in relation to the Crown's first four alleged errors.

[21] In relation to the Crown's fifth alleged error, the respondent notes that the fitness of a sentence *per se* does not raise a question of law alone: *R v. Thomas*

(No. 2) (1980), 53 C.C.C. (2d) 285 (B.C.C.A.). The Crown refined its fifth alleged error in the course of oral submissions. The Crown now says that Duncan C.J. erred in principle in failing to recognize that custodial sentences should be imposed in sexual offences involving children absent exceptional circumstances. I accept that the alleged error, as framed by the Crown in oral argument, is an issue of law.

[22] Nevertheless, I conclude that leave to appeal is not warranted in this case. The legal issues raised by the Crown are not matters of general significance to the administration of justice, but rather involve the fact-specific application of established principles. Furthermore, the Crown has not shown that its proposed appeal has a reasonable prospect of success.

[23] Chief Justice Duncan stated the correct standard of appellate review. She cited *Friesen* for the proposition that sentencing judges are entitled to significant deference by the appellate courts: at para. 8. The issue in this case was not whether Duncan C.J. ought to interfere with a sentencing judge's assessment of *Gladue* factors and weighing of aggravating and mitigating factors. The reasons of the sentencing judge did not reflect any consideration of *Gladue* factors in assessing the respondent's moral blameworthiness, or any reference to the significant mitigating factors that were present in this case.

[24] In her approach to the reasons for sentence on appeal, Duncan C.J. acknowledged that judges are presumed to know the objectives of sentencing and are not required to state every thought process in their reasons: at para. 31. At the same time, she noted that a sentencing judge's reasons must demonstrate they have substantively grappled with relevant *Gladue* and mitigating factors, and that they have turned their mind to how those matters affect moral culpability: see paras. 31–32. She found there was no indication that the sentencing judge had undertaken the necessary analysis in this case: at para. 31.

[25] I see no reasonable possibility that the Crown will succeed on appeal in establishing legal error by Duncan C.J. in applying principles of appellate deference in this case. As Duncan C.J. notes, s. 718.2(e) of the *Criminal Code* mandates a

sentencing judge to take into consideration: “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”. Yet there is no indication in the reasons for sentence that the respondent’s significant *Gladue* factors, or the significant mitigating factors, were considered in crafting an appropriate sentence. This error was compounded by the lack of clarity in the judge’s reasons for rejecting the option of a conditional sentence, and his unexplained reference to the impracticality of such a sentence.

[26] Much the same can be said of the Crown’s fifth ground of appeal, which is the alleged error of Duncan C.J. in failing to recognize the exceptional nature of a conditional sentence in sexual offences involving children. The serious nature of the underlying offences provided the context for her analysis. Chief Justice Duncan noted that even in cases of grave sexual violence, *Gladue* factors must still be considered: at para. 30. She referenced other decisions in which conditional sentences were imposed in sexual offences involving children. Chief Justice Duncan also referred to *Friesen*, which is the leading decision on sentencing for sexual offences against children. In light of her reasons, it cannot be said that Chief Justice Duncan misunderstood or overlooked any principle relevant to sentencing in the context of these offences.

[27] To the extent that the Crown’s proposed appeal turns on the allegation that Duncan C.J. erred in finding a conditional sentence was a fit and proportionate sentence in this case, that does not raise an error of law. As noted in *G.K.*, there is no legal presumption that a conditional sentence will not be ordered in sexual offences involving children; the facts of a case may justify a conditional sentence, including where there are significant *Gladue* factors: *G.K.* at para. 32. Here, the Chief Justice concluded that a conditional sentence on strict terms was justified by the compelling *Gladue* factors, the significant mitigating factors (the respondent’s age, lack of criminal record, and early guilty plea), the respondent’s compliance with bail conditions, and his motivation to seek and complete treatment. While the Crown

may disagree with the fitness of the sentence imposed, I am not persuaded that there is a reasonable prospect that the Crown would succeed on appeal in showing that Duncan C.J. erred in law in her analysis.

Disposition

[28] The Crown's application for leave to appeal the decision of summary conviction appeal judge is dismissed.

"The Honourable Madam Justice Horsman"