

Citation: *R. v. Finn*, 2012 YKTC 106

Date: 20121102
Docket: 12-00254
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON

Before: His Honour Judge Faulkner

REGINA

v.

AARON BRUNO FINN

Appearances:

Eric Marcoux
André Roothman

Counsel for the Crown
Counsel for the Defence

REASONS FOR SENTENCING

[1] FAULKNER T.C.J. (Oral): The accused, Aaron Bruno Finn, is a 56-year-old American trucker. He was returning from Alaska to the lower 48 when he stopped his truck and trailer for inspection at the Beaver Creek, Yukon border crossing on the Alaska Highway. Mr. Finn produced a U.S. passport which the Customs and Border Service Agent involved noted it had on it indications that Mr. Finn had travelled extensively in the Philippines and other Asian countries, which, I gather, are considered high-risk countries for sex tourism and similar activities.

[2] This led the agent to make a further inspection of Mr. Finn's truck and possessions, and in particular led to the inspection of two laptop computers in Mr. Finn's truck. On one of these computers the agent discovered some nude photographs of Mr.

Finn and a very young-looking Filipino girl. This discovery led to further inspection of the computer and, ultimately, to a forensic search and analysis of the computer by RCMP technicians. One of the computers contained over 100 images and seven videos, meeting the definition of child pornography.

[3] The images ranged from posing, where the focus is on the genitals, to sexual activity with adult males, and bestiality. The victims are as young as one year old. A great majority of these pictures involve images depicting nude female children ranging in age from three to 12 years old exposing their genitals or performing solo masturbation acts. Some of the images, however, displayed naked pre-teen female children engaged in sexual conduct with one another and engaged in penetrative sexual activity, anal or vaginal, with adult males. One of the children involved appears to be only approximately a year old.

[4] A couple of pictures had been created by a computer program and depicted scenes of a very young underage girl being raped by one or more adult males. One image involves an underage girl, approximately ten years old, engaging in oral sex with a male dog. The videos on the computer involve pre-teen female children making erotic poses with the focus on their genitals, and two involve two pre-teen females in underwear touching and kissing each other in a sexually suggestive way.

[5] The hard drive for the second computer contained numerous images of child pornography in the form of archived web pages. The web pages contained hundreds of child pornographic images per page and involve female and male children and toddlers exposing their genitals or participating in penetrative and non-penetrative sex with adult

males.

[6] As I have already noted, it was the images of Mr. Finn and a young female that first brought the attention of the Customs Officer to the contents of the defendant's computers. There apparently were also other images of a male believed to be Mr. Finn engaged in sexual acts with young-looking, teen Asian girls. However, the age of these females cannot be determined with precision and as such it cannot be proved that these images constitute child pornography. It should be noted that the offender advised the probation officer preparing the Pre-Sentence Report that he is in a relationship with a 19-year-old Filipino girl who has borne him a child. It may be that this is the female depicted in some or all of these photographs; I do not know.

[7] In any event, the matters that form the charge are those images which are clearly child pornography and, as I understood the evidence, it is not alleged that Mr. Finn, himself, appears in any of those images. Similarly, from the analysis of the computers and the other facts known, there is no indication that Mr. Finn had shared or marketed any of the images that he possessed and imported into the country.

[8] Mr. Finn entered a guilty plea to importing child pornography and the matter is now before the Court for disposition. It is, of course, in Mr. Finn's favour that he has entered a guilty plea and I am satisfied that, although some months have gone by since the charge was laid, the guilty plea comes at a relatively early date because some period of time passed before the forensic analysis of the computer was done and the results were made available.

[9] Mr. Finn has a very dated, relatively minor and entirely unrelated criminal record

in the United States. I think for all intents and purposes he can be treated really as a first offender. His prior record has no particular bearing on the sentence I will impose.

[10] In *R. v. Missions*, [2005] NSCA 82, the Nova Scotia Court of Appeal adopted a categorization of levels of child pornography that had been first developed by the English Court of Appeal in *R. v. Oliver*, [2002] E.W.J. No. 5441. The levels were categorized as follows:

- (1) images depicting erotic posing with no sexual activity;
- (2) sexual activity between children, or solo masturbation by a child;
- (3) non-penetrative sexual activity between adults and children;
- (4) penetrative sexual activity between children and adults; [and]
- (5) sadism or bestiality.

In this case the majority of the videos and images were at the lower levels, but there were a significant number at levels 3 and 4, and at least one which depicted bestiality at level 5.

[11] I should add that, in my own view, that while I find the categorization from *Missions*, which has been adopted in many cases in Canada, to be helpful, there is, in my view, one additional consideration, and that is the question of the age of the children involved, and as has been noted here in this case, some were but infants.

[12] The cases on sentencing in child pornography make it clear that the primary focus of sentencing must be on denunciation and deterrence. It should also be noted that in referring to cases from years past that, as the Crown points out, Parliament has now imposed, for all of these sorts of offences, minimum punishments. In the case of

the present offence, Parliament has now imposed a minimum of one year and a maximum of ten years for the offence of distributing, transmitting, exporting or importing child pornography, where, as here, the Crown proceeds by indictment.

[13] In fixing the quantum of sentence, I also note that although Mr. Finn now stands convicted of importing child pornography, and indeed that is what he did, it appears that this importation occurred primarily because the road from Alaska goes through Canada. There is no indication that he intended to do more than proceed through this country to the U.S., with his computers in tow. In that sense, Mr. Finn's crime is more akin to cases of possession than those of distributing or importing. At the same time, as I said, he did in fact import these images into the country, and at the same time the images and videos were very numerous and, as noted, contained material depicting very young children and material the courts have categorized as being the worst kind of child pornography.

[14] The Crown sought a sentence of two years. Defence counsel suggested 18 months would be adequate. In so doing, he pointed to the likelihood of Mr. Finn facing additional consequences on completion of his sentence in Canada. First, it appears that although Canadian authorities released his truck and trailer, it was seized by U.S. Customs when a driver, acting upon Mr. Finn's behalf, attempted to re-enter the United States with the vehicle. Moreover, Mr. Roothman says that it appears likely that Mr. Finn will face further charges in the U.S. for exporting the material in question from that country.

[15] While the financial consequences to Mr. Finn from the loss of the vehicle are certainly relevant, it appears to me that the extent of further consequences by Mr. Finn

in the States is simply speculation at this point. It would be more logical to take the consequences suffered by Mr. Finn in Canada into account after his return to the U.S. when authorities there decide whether or not to prosecute him and, if they do, the extent of further penalties to be imposed.

[16] Given the one year minimum sentence required by law, and noting again the nature and quantity of the child pornography imported by the offender, I conclude that a sentence well above the minimum of one year is warranted. Accordingly, I sentence Mr. Finn to a period of imprisonment of two years. However, he is entitled to credit for his pre-trial custody, which is now just over five months. Mr. Roothman produced documentation concerning Mr. Finn's institutional record since he has been in custody and it was conceded that this information justified allowing credit at the rate of 1.5 to one, or a total of seven and one half months. Accordingly, in Mr. Finn's case, there is a remanet of 16 and one half months yet to be served.

[17] There was some discussion of a probation order; however, it appears that Mr. Finn, who is an American and, in light of his prior record, not even admissible to Canada, will be deported as soon as he is released from custody here. Quite frankly, the material before the Court in terms of the Pre-Sentence Report did not particularly suggest that there would be any point or purpose in imposing a probation order.

[18] There remains, however, the question of a number of other ancillary orders, some of which are mandatory and some of which are not. Firstly, there will be an order whereby the offender will comply with the provisions of the *Sex Offender Information Registration Act*, S.C. 2004, c. 10, for a period of 20 years. There will be an order

whereby he will provide samples of bodily substances for the purposes of DNA analysis and banking. There will be an order whereby he will not have in his possession any firearms, ammunition, explosive substances or other items more compendiously described in s. 109 of the *Criminal Code* for a period of ten years following his release from imprisonment, and prohibited weapons or other similar items described in s. 109 of the *Criminal Code*, for life.

[19] There will be an order declaring forfeit to the Crown the computers and peripherals seized from Mr. Finn. Finally, although, as I have indicated, Mr. Finn will in all probability not be found in Canada after release, nevertheless, having regard to the nature of the offence here, in my view, it is appropriate to impose an order under s. 161 of the *Criminal Code*, more particularly, s. 161(1), and that order should be as set out in the *Criminal Code* as it stood at the date of the offences in question. As I noted in earlier discussions with counsel, it has since been amended. That order should be in effect for a period of ten years.

[20] Finally, having regard to all of the circumstances and the impossibility at this point of Mr. Finn earning any income, the surcharge will be waived.

[21] MR. MARCOUX: I would ask the clerk to enter a stay of proceedings on the remaining counts.

[22] THE COURT: Thank you.

FAULKNER T.C.J.