COURT OF APPEAL OF YUKON

Citation: *R. v. Mathieson*,
2019 YKCA 6

Date: 20190220
Docket: 18-YU834

Between:

Regina

Appellant

And

Daryl Michael John Mathieson

Respondent

Restriction on publication: Publication of information that could disclose the identity of the complainant or witness has been prohibited by court order pursuant to s. 486.4 of the *Criminal Code*.

Before: The Honourable Madam Justice Stromberg-Stein
(In Chambers)

On appeal from: An order of the Supreme Court of Yukon, dated November 13, 2018 (*R. v. Mathieson*, 2018 YKSC 49, Whitehorse Docket 18-AP003).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference):	L. Lane
Counsel for the Respondent (via videoconference):	A. Steele
Place and Date of Hearing:	Vancouver, British Columbia February 20, 2019
Place and Date of Judgment:	Vancouver, British Columbia February 20, 2019

Summary:

The Crown applies for leave to appeal the order of a summary conviction appeal court judge concerning a fit sentence for an adult offender who had committed a sexual assault of a 14-year-old girl. The Crown submits the summary conviction appeal judge erred by imposing an unfit sentence; erred by refusing to consider sentences from other provinces and territories; refused to consider the Crown's arguments on parity; erred by deciding not to vary the sentence; and failed to give sufficient reasons for meaningful appellate review. Held: application dismissed. The Crown identified no important question of law where there was a reasonable prospect of success and it is not in the interests of justice to grant leave to appeal in the circumstances of this case. It is troubling that the summary conviction appeal judge reserved judgment and released her reasons three months later, apparently well past the warrant expiry date. From the appeal judge's language in refusing to impose the nine month sentence that she had determined to be a fit sentence, it is apparent she was not prepared to alter the sentence at that time. A better approach would have been to impose the nine month sentence and then stay the sentence as the appellant had likely already served his sentence.

Nature of Application

[1] **STROMBERG-STEIN J.A.**: On November 23, 2017, Daryl Michael John Mathieson pleaded guilty to an offence under s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46 concerning two instances of having sexual intercourse and one instance of oral sex with a 14-year-old girl. He was sentenced in the territorial court on June 13, 2018, to six months, less time served, and 15 months' probation. The Crown appealed the sentence and the appeal was heard on August 24, 2018. On November 13, 2018, Madam Justice Campbell released reasons wherein she determined that a fit sentence would have been nine months. However, she "elect[ed] not to impose the sentence of nine months of imprisonment" and left in place the original sentence. The Crown seeks leave to appeal this decision.

[2] I note the Crown brought their sentence appeal expeditiously. It is troubling that the summary conviction appeal judge reserved judgment and released her reasons three months later and apparently well past the warrant expiry date.

Background

[3] Mr. Mathieson committed the offence in British Columbia but waived the charge to the Yukon.

[4] The British Columbia Crown suggested an appropriate sentence would be 12–16 months followed by 30 months of probation. At the sentencing proceeding, the Yukon Crown sought a 12-month sentence followed by 12 months of probation. Mr. Mathieson's counsel submitted the minimum sentence of six months was appropriate in the circumstances.

[5] At the time the minimum sentence was six months and the maximum sentence was 18 months.

[6] In sentencing Mr. Mathieson to six months followed by 15 months' probation, Cozens T.C.J. reasoned that the objectives of deterrence and denunciation were reflected in the mandatory minimum of six months' imprisonment. He also reasoned that the complainant's age was considered an aggravating factor, but that factor was already incorporated into the mandatory minimum sentence. He found no other aggravating factors, Mr. Mathieson had a low risk of re-offending, and rehabilitation was important as well.

[7] On the sentence appeal, Campbell J. found the sentencing judge had appropriately weighed denunciation and deterrence and appropriately viewed those objectives as incorporated into the mandatory minimum sentence. However, she concluded that Cozens T.C.J. had erred by not treating the complainant's age as an aggravating factor despite the mandatory minimum sentence.

[8] In the process of determining a fit sentence, Campbell J. reviewed a number of cases that she viewed as "comparable to the one before" her. She found cases from the courts of Alberta, Saskatchewan, and the Northwest Territories to be of less relevance:

> [63] … In these jurisdictions, sentencing is guided by the use of starting points and categories of offences, such as "major sexual assault". However, Yukon does not subscribe to the starting point approach nor does it subscribe to the use of categories of sexual assault or sexual interference in sentencing. These decisions, while still informative with regard to factors and principles applicable to sentencing, are therefore of less relevance in determining a fit sentence for [Mr. Mathieson].
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> [Citation omitted]

[9] In contrast, she found the decisions of courts in Yukon and British Columbia particularly relevant, because the case had been waived from British Columbia. She found courts of those jurisdictions generally imposed sentences of 12–18 months in similar circumstances, with the exception of two Yukon cases that imposed sentences of less than 12 months. She then considered that the principle of proportionality trumps the principle of parity, per *R. v. Lacasse*, 2015 SCC 64. She also considered that Mr. Mathieson is Aboriginal and the importance of the principles of rehabilitation and restraint.

[10] She then considered mitigating factors. Mr. Mathieson had waived his matter to the Yukon and entered an early guilty plea. He also has a long-standing issue with drug and alcohol abuse but had exhibited insight and remorse, and had made sustained efforts at dealing with his substance abuse and mental health issues. She concluded a sentence below 12–18 months was warranted and a fit sentence would have been nine months. Nonetheless, she elected not to impose the sentence because Mr. Mathieson had "likely been released from prison, having already served the imprisonment portion of the sentence".

Submissions

[11] The parties provided written submissions. Although they did not deal with all of their written submissions in their oral submissions, I have considered those as well.

[12] The Crown and Mr. Mathieson agree the test for granting leave to appeal from a summary appeal court was set out by Frankel J.A. in *R. v. Winfield*, 2009 YKCA 9:

> [13] To obtain leave to appeal from the decision of a summary conviction appeal court, the 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).

[13] The Crown submits the summary conviction appeal judge erred by imposing an unfit sentence. In written submissions, the Crown also submits the summary conviction appeal judge erred by refusing to consider sentences from other provinces and territories and refused to consider the Crown's arguments on parity. The Crown submits that the summary conviction appeal judge erred by deciding not to vary the sentence and by failing to give sufficient reasons for meaningful appellate review.

[14] Partly in oral submissions, and in written submissions, Mr. Mathieson submits the Crown has not met the *Winfield* test. The Crown's ground concerning fitness of sentence does not give rise to a legal question of importance or principle; the Crown's ground concerning inter-provincial parity has no reasonable prospect of success after *Lacasse*; the Crown's ground concerning refusal to consider the Crown's arguments on parity has no reasonable prospect of success; and the Crown's ground concerning variation of the sentence mischaracterizes what the judge in fact did. In Mr. Mathieson's submission, the appeal judge did vary the sentence, but stayed it, and her decision in that regard is discretionary and fact-based and gives rise only to a question of mixed fact and law.

Analysis

[15] Relevance of extra-jurisdictional case authorities is not a question of law where there is any reasonable prospect of success for the Crown. As the British Columbia Court of Appeal (which is not this Court, as I am sitting as a judge of the Court of Appeal of Yukon) has explained, sentencing norms can diverge significantly between jurisdictions, and sentencing judges should be mindful of the local norms: *R. v. Bui*, 2013 BCCA 168 at para. 22.

[16] From the appeal judge's language in refusing to impose the nine month sentence she had determined to be a fit sentence, it is apparent she was not prepared to alter the sentence at that time. There is precedent for what she did in *R. v. O.,* 2012 BCCA 129 at paras. 84–87. Another way which the judge could have approached this, and perhaps a better approach, would have been to impose the

nine month sentence and then stay it as Mr. Mathieson had likely already served his sentence and it would "serve no useful purpose": see, e.g. *R. v. Suter*, 2018 SCC 34, wherein Moldaver J. determined that a fit sentence would have been one of 15–18 months, but refused to impose that sentence given the accused had already served 10.5 months of his sentence: at para. 103. Justice Moldaver explained it would "serve no useful purpose".

[17] In my view the Crown has not identified that the proposed grounds of appeal involve a question of law alone, that the issues are of importance, and that there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. It is not in the interests of justice to grant leave to appeal in the circumstances of this case.

[18] I would dismiss the Crown's application for leave to appeal.

"The Honourable Madam Justice Stromberg-Stein"