

CANADA / JUDGMENT

R. v. Alfred

2020 BCCA 384

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 384 R. v. Alfred COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Alfred, 2020 BCCA 384 Date: 20201218 Docket: CA46110 Between: Regina Respondent And Cameron Marvin Alfred Appellant Restriction on publication: A publication ban has been imposed in this case pursuant to s. 486.4(1) of the Criminal Code prohibiting the publication of any information that could identify the complainant. This publication ban applies indefinitely, unless otherwise ordered. Pursuant to s. 16(4) of the Sex Offender Information and Registration Act [SOIRA], no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA. Before: The Honourable Chief Justice Bauman The Honourable Madam Justice Dickson The Honourable Mr. Justice Hunter On appeal from: An order of the Supreme Court of British Columbia, dated May 17, 2019 (sentence) (R. v. Alfred, 2019 BCSC 1452, Smithers Docket 24997). Oral Reasons for Judgment Counsel for the Appellant, appearing via videoconference: I.B. Lawson Counsel for the Respondent, appearing via videoconference: L.A. Vizsolyi Counsel for the Director of Public Prosecution Service of Canada, appearing via videoconference: S.K. Steele J.A. Billingsley Place and Date of Hearing: Vancouver, British Columbia December 10, 2020 Place and Date of Judgment: Vancouver, British Columbia December 18, 2020 Summary: The appellant seeks leave to challenge the constitutionality of s. 742.1(c) of the Criminal Code for the first time on appeal on the basis that it infringes his s. 7 Charter rights. Held: Application dismissed. Despite the recent decision in R. v. Sharma, 2020 ONCA 478, striking s. 742.1(c) on the basis of ss. 7 and 15 Charter violations, the evidentiary record and the interests of justice do not support granting the application. This constitutional challenge could have far-reaching consequences, an evidentiary record was not created in court below, and there is no apparent risk of injustice. As such, the circumstances do not justify departing from the general rule that new issues will not be heard for the first time on appeal. DICKSON J.A.:

Introduction

- [1] Cameron Alfred was convicted of sexual interference of S.V. contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46, following a trial in Smithers, British Columbia. In committing the offence, Mr. Alfred, then 26 years old, had sexual intercourse with S.V., then 13 years old, on two or three occasions in late 2017. S.V. was a willing participant in the sexual activity. Mr. Alfred knew at the time that S.V. was only 13.
- [2] Mr. Alfred's sole defence at trial was a constitutional challenge to s. 150.1 of the Criminal Code, which provides that, subject to certain exceptions, consent is not a defence when a person is charged under s. 151 and the complainant is under the age of 16. The trial judge dismissed the constitutional challenge and convicted Mr. Alfred of sexual interference. In reasons indexed at 2020 BCCA 256, this Court upheld the conviction on appeal.
- [3] The sentence hearing below proceeded on the basis that a conditional sentence was not available to Mr. Alfred because sexual interference is an offence punishable by a maximum sentence of 14 years' imprisonment. Pursuant to s. 742.1(c) of the Criminal Code, a court may not impose a conditional sentence order for an offence for which the maximum term of imprisonment is 14 years or life. Mr. Alfred, who is an Aboriginal offender, sought a suspended sentence and did not challenge the constitutionality of s. 742.1(c) before the sentencing judge. The Crown sought a period of three to four years' imprisonment. On May 17, 2019, after considering relevant authorities, sentencing principles and Gladue factors, the judge imposed a sentence of nine months' imprisonment, followed by 24 months of probation.
- [4] On November 6, 2020, Justice Groberman granted Mr. Alfred leave to appeal his sentence. The ground of appeal stated in the notice of appeal is that the judge erred by failing to "give effect to paragraphs 718.2(d) and (e), as less restrictive sanctions than imprisonment were appropriate in the circumstances of this case." Before us, Mr. Alfred seeks leave to challenge the constitutionality of s. 742.1(c) of the Criminal Code for the first time on appeal on the basis that it infringes his s. 7 Charter right to security of the person. If leave is granted, Mr. Alfred intends to argue that s. 742.1(c) should be read down so as not to deprive him of the application of s. 718.2(e) of the Criminal Code and the possibility of a conditional sentence order. Section 718.2(e) codifies the principle that "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."
- [5] The proposed constitutional challenge is based in large measure on the Court of Appeal for Ontario's recent decision in *R. v. Sharma*, 2020 ONCA 478, which also concerned an Aboriginal offender. In *Sharma*, a majority of the court held that ss. 742.1(c) and 742.1(e)(ii) of the Criminal Code unjustifiably infringe ss. 7 and 15 of the Charter and are, therefore, of no force or effect. *Sharma* was released on July 24, 2020. The Crown has sought leave to appeal to the Supreme Court of Canada, but a decision on that application has yet to be

made.

Legal Framework

- [6] Appellate courts generally do not entertain new issues at first instance. As Justice Fitch explained in *R. v. Gill*, 2018 BCCA 144, there are important functional justifications for this general rule. When a new issue is raised for the first time on appeal: (i) the appellate function is compromised where the evidentiary record is insufficient to permit a proper legal analysis; (ii) the opposing party may be prejudiced and procedural fairness may be compromised; (iii) the goal of finality may be undermined; and (iv) there are no considered reasons from below for review. As a result, leave is required before a new issue can be raised and, in most cases, the party seeking to raise it must demonstrate that the record is as complete as it would have been had the issue been raised in a timely way: *Gill* at paras. 9-11; *R. v. Andel*, 2014 BCCA 179 at para. 39.
- [7] Nevertheless, on rare occasions, appellate courts make exceptions to the general rule by exercising their discretion to permit a new issue, including a new constitutional issue, to be raised on appeal: see, for example, *Sharma and R. v. K.R.J.*, 2014 BCCA 382. Before doing so, however, the court carefully scrutinizes the new issue and considers all of the circumstances, including the state of the record, fairness to all parties, the importance of resolving the issue, its suitability for decision and the broader interests of the administration of justice: *Guindon v. Canada*, 2015 SCC 41 at para. 20. Taking into account all relevant factors, the court may decide to hear the new issue, but that discretion will be exercised "sparingly and only where the interests of justice require it": *R. v. Trieu*, 2010 BCCA 540 at para. 56. As Justice Doherty stated in *R. v. Roach*, 2009 ONCA 156, an appellate court "must be satisfied that the new issue raised on appeal can be fully, effectively and fairly addressed on appeal even though it was not raised at trial": at para. 7.
- [8] Appellate courts are especially cautious about hearing a new issue in the absence of a complete evidentiary record if the new issue concerns the constitutional validity of legislation, given the far-reaching consequences of such determinations: *R. v. Lilgert*, 2014 BCCA 493 at paras. 15, 20. Although new arguments based on an evidentiary record laid out for the first time in the court of appeal are occasionally permitted, such occasions are rare. This is so because appellate courts are not the place to develop an evidentiary record given that "[t]he appellate forum and its procedures are not adapted to the weighing of evidence and the finding of facts": *Roach* at para. 8; *R. v. J.D.*, 2018 ONCA 947 at para. 6. That said, where an appellant's legitimate interest in advancing a new issue outweighs the problems associated with assembling an appropriate record, the interests of justice may favour granting leave to raise the new issue for the first time at the appellate level: *J.D.* at paras. 6-7. In all cases, the fundamental consideration is whether refusing to allow a new issue to be raised on appeal would risk an injustice: *R. v. Mian*, 2014 SCC 54 at para. 43; *R. v. Brown*, [1993] 2 S.C.R. 918.

- [9] In *Quan v. Cusson*, 2009 SCC 62, Chief Justice McLachlin laid out a framework for determining whether to permit a party to raise a new issue for the first time in the appellate context: at paras. 36-38. The first question to address is whether the proposed issue is actually new: see, for example, *K.R.J.*, where the substance of the issue in question was argued in the court below, although it was not framed as a constitutional issue as proposed on appeal. If the issue is, in fact, new, the second question is whether the evidentiary record and the interests of justice support granting an exception to the general prohibition. In answering this question, among other things, the court may consider whether entertaining the new issue on appeal could lead to a different outcome: *Gill* at para. 12.
- [10] As I have noted, Mr. Alfred seeks to raise a new issue in this case based on the recent decision of the Court of Appeal for Ontario in *Sharma*. In *Sharma*, the Court granted the appellant leave to challenge ss. 742.1(c) and 742.1(e)(ii) of the Criminal Code under s. 7 of the Charter for the first time on appeal. The appellant had pursued only a s. 15 Charter challenge in the court below, although initially she had also mounted a s. 7 challenge and built the evidentiary record on that basis, before abandoning the argument. In these circumstances, the Court granted her application to raise the s. 7 challenge anew on appeal:
- [137] We were satisfied that these considerations weighed in favour of hearing the s. 7 challenge in this appeal. Importantly, during oral argument, the Crown conceded that it would suffer no prejudice from an adjudication of the s. 7 issue. The parties built the evidentiary record at trial on the basis that the s. 7 issue would proceed. Similarly, on this appeal, the parties all submitted materials to this court to be used if the s. 7 challenge went forward. They addressed s. 7 in their written material and prepared to make oral submissions. We had the benefit of knowledgeable interveners representing affected stakeholders to assist with all aspects of the issue. The court also prepared to hear the issue, which was ripe for decision on a rich evidentiary record, together with the s. 15 challenge. We concluded, therefore, that it was in the interest of the administration of justice for the court to proceed to hear and decide the issue.
- [11] In *J.D.*, the same court allowed the appellant to challenge for the first time on appeal orders made below pursuant to ss. 161(1)(a) and (b) of the Criminal Code under s. 11(i) of the Charter. Its exercise of discretion in this regard was largely based on the Supreme Court of Canada's ruling in *R. v. K.R.J.*, 2016 SCC 31, which was released after the sentence was imposed. Although the court in *J.D.* recognized that both parties would inevitably tender evidence related to the justification of any potential Charter infringement, which was a concern, it was satisfied that, to the extent such evidence might conflict, "those questions can be adequately, if not ideally, resolved" through affidavits and related cross-examinations, and with the benefit of case management: at para. 6. It went on to conclude that the interests of justice favoured permitting the appellant to raise the constitutional challenge, having regard to the potential significant negative impacts of the orders upon him and the apparent merits of the new argument in light of *K.R.J.*: at para. 10.

- [12] In contrast, in *Lilgert* this Court declined to grant leave to the appellant to challenge the validity of ss. 219, 220 and 222(5)(b) of the Criminal Code under s. 7 of the Charter on appeal because it was not first advanced at the trial level. In doing so, Justice Donald emphasized the exceptional nature of granting leave to raise a new constitutional issue on appeal and the importance of a complete evidentiary record to the proper determination of such issues. After noting the parties' disagreed on the sufficiency of the record and identifying the need for an accused person to advance his or her entire defence at trial, he concluded that the appeal was not "an exceptional circumstance in which the interests of justice demand that the new Charter issue be heard": at para. 18. In explaining his view further, he said this:
- [22] In this case, the interests of the judicial system in maintaining the principle of finality, as well as the interests of the Crown and the public in ensuring that this court only consider striking down legislation where a proper evidentiary foundation exists, weigh in favour of denying leave to argue the Charter issue on appeal. I would therefore not grant such leave.
- [13] In *R. v. DeYoung*, 2017 NSCA 13, Justice Farrar also declined to grant leave to the appellant to raise a new constitutional argument at the appellate level. The appellant in that case wished to argue that s. 742.1 of the Criminal Code is contrary to ss. 7 and 12 of the Charter because it precludes a conditional sentence for the sexual assault of a 14-year-old, an offence for which the maximum sentence is 14 years' imprisonment. Although he acknowledged that Charter arguments can sometimes be raised for the first time on appeal, he considered it inappropriate to grant leave in the circumstances of that case. In reaching this conclusion, he agreed with Crown counsel "that the failure to raise the issue before the sentencing judge, the absence of any record relating to the alleged infringement and the inability of the Crown to call evidence to satisfy a s. 1 justification is prejudicial to the Crown"; all of this informed his determination: at para. 20. He also concluded the proposed new ground of appeal did not raise an arguable issue (although, notably for present purposes, this decision preceded *Sharma* and did not concern an Aboriginal offender): at paras. 23-27.
- [14] With these principles and precedents in mind, I turn to Mr. Alfred's application.

Analysis

- [15] Mr. Alfred contends that the interests of justice favour granting him leave to raise the proposed s. 7 Charter challenge to s. 742.1(c) of the Criminal Code, despite his failure to advance it first at the trial level. In support of his position, he emphasizes Justice Feldman's statement in *Sharma* that the impugned provision's removal of a judge's ability to impose a conditional sentence in circumstances similar to these undermines the purpose and remedial effect of s. 718.2(e) in addressing the substantive inequality between Aboriginal and non-Aboriginal people manifested within the criminal justice system. In other words, Mr. Alfred says, the proposed new issue has apparent merit in light of the *Sharma* decision. He also emphasizes the prejudicial effect that denying leave would have for him personally, namely, the loss of a strong argument in an otherwise challenging sentence appeal and the related risk of incarceration. In his submission, these factors weigh heavily in favour of

granting leave in this case.

- [16] Mr. Alfred contends further that an evidentiary record sufficient to address the legislative history and purpose of the provisions in question, together with any s. 1 justification, can be built in this Court by way of affidavit evidence. In his submission, no credibility and reliability questions are likely to arise and, to the extent they might, they can be dealt with adequately by cross-examination. Moreover, he says: Sharma was not decided until after the sentence was imposed; as K.R.J. did in J.D., Sharma's release changed the relevant legal landscape; and his failure to mount the challenge at trial, while unfortunate, was not tactical in nature. Finally, he submits, given the Sharma decision, other accused persons will inevitably bring similar constitutional challenges in trial courts throughout British Columbia and an early determination by this Court will assist them by promptly clarifying the law.
- [17] I am not persuaded by these submissions.
- [18] As Mr. Alfred concedes, the proposed constitutional challenge to s. 742.1(c) of the Criminal Code raises a new issue for the first time on appeal. As he also concedes, it does so in the absence of a complete (or any) evidentiary record in respect of critical factual questions or considered reasons from the court below. While I accept that his failure to raise the challenge at the sentence hearing was not tactical, it was nevertheless incumbent upon Mr. Alfred to do so at first instance at that level: Lilgert at para. 15. More importantly, if leave is granted, the fact that he did not raise the challenge below means the Crown would be prejudiced in responding to a potentially far-reaching constitutional challenge to key Criminal Code sentencing provisions, at least to the extent that it would lose the usual opportunity to build an evidentiary record in its preferred forum, the trial court.
- [19] Also importantly, the effect of Mr. Alfred's failure to raise the constitutional challenge below on this Court's ability to address it "fully, effectively and fairly" for the first time on appeal is significant. Although the absence of an evidentiary record from the court below is not necessarily insurmountable, laying out a factual foundation for the determination of a complex constitutional issue at the appellate level does not comport with the orderly progress of litigation and attempting to do so presents institutional challenges for this Court. To repeat, appellate courts are not the place to develop evidentiary records because this forum and its procedures are not adapted to the weighing of evidence or the finding of facts: Roach at para. 8.
- [20] Further, in my view, as the Crown's application for leave to appeal Sharma to the Supreme Court of Canada is presently outstanding, the new issue proposed is not ripe for determination by this Court outside the usual process adhered to by our judicial system. Nor am I convinced that refusing to allow the constitutional challenge to be raised on this appeal would risk an injustice. Bearing in mind all of these factors, together with the importance of maintaining the principle of finality, I do not consider the circumstances sufficiently exceptional to justify departing from the general rule that a new issue should not be entertained at first instance on appeal.

Conclusion

[21] For these reasons, I would dismiss the application.

[22] BAUMAN C.J.B.C.: I agree.

[23] HUNTER J.A.: I agree.

[24] BAUMAN C.J.B.C.: The application is dismissed. [Submissions by counsel re: bail extension]

[25] BAUMAN C.J.B.C.: Bail extension is granted. The appellant is to surrender at the Smithers sheriff's office on April 30, 2021 at 9:00 a.m. or on the date set for the hearing of the sentence appeal, whichever date occurs first. "The Honourable Madam Justice Dickson"

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