

CANADA / JUDGMENT

R. v. Alfred

2020 BCCA 256

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 256 R. v. Alfred

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Alfred,

2020 BCCA 256

Date: 20200910

Docket: CA46110

Between:

Regina

Respondent

And

Cameron Marvin Alfred

Appellant

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Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Abrioux

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: Orders of the Supreme Court of British Columbia, dated December 19, 2018 (R. v. Alfred, 2018 BCSC 2531, Smithers Docket 24997), and February 28, 2019 (R. v. Alfred, 2019 BCSC 261, Smithers Docket 24997).

Oral Reasons for Judgment

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(via videoconference):

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Place and Date of Hearing:

Vancouver, British Columbia

September 10, 2020

Place and Date of Judgment:

Vancouver, British Columbia

September 10, 2020

Summary:

The appellant was convicted and sentenced for sexual interference involving a 13-year-old complainant. He was 12 or 13 years older than the complainant at the time of the offence. The appellant admitted to sexual activity, as well as knowing the complainant's age. At trial, he brought a constitutional challenge to s. 150.1 of the Criminal Code, which denied him a defence of consent because of the complainant's age. The challenge was dismissed. The appellant appealed from his conviction on the ground that the trial judge erred in his constitutional determination. Held: appeal dismissed. The constitutional challenge has no merit in light of jurisprudence from the Supreme Court of Canada holding that children under the age of 16 do not have the capacity to consent to sexual activity with adults and that sexual activity between adults and children is inherently exploitive.

- [1] DEWITT-VAN OOSTEN J.A.: This is an appeal from conviction for sexual interference contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46.[1] The appellant was 25 or 26 years old at the time of the offence. The complainant was 13. The appellant admitted sexual activity, including sexual intercourse. Because of the complainant's age, there could be no consent by operation of law. The appellant acknowledged knowing the complainant's age.
- [2] At trial, the appellant challenged the constitutionality of s. 150.1 of the Code, the statutory provision denying him a defence of consent. The appellant argued that s. 150.1 is overly broad and thereby violates s. 7 of the Canadian Charter of Rights and Freedoms. The trial judge rejected the argument and dismissed the application for a constitutional remedy.
- [3] On appeal, the appellant contends that the judge erred in his constitutional ruling. For the reasons that follow, I would dismiss the appeal. The judge's ruling finds ample jurisprudential support, including dicta that is binding on this Court.

Background

- [4] Between August and December 2017, the appellant had a sexual relationship with the complainant, including two or three incidents of sexual intercourse. As noted, the appellant did not contest the fact of sexual activity. At the time of the offence, he was 25 or 26 years old. The complainant was 13. The appellant knew the complainant's age. He was a close friend of her older brothers. The trial judge described the complainant as not "especially mature or sophisticated": *R. v. Alfred*, 2018 BCSC 2531 at para. 11.
- [5] The appellant did not testify at trial. Instead, his defence lay in a constitutional challenge to s. 150.1 of the Code, which denied him a defence of consent because he was charged with sexual offences involving a complainant under the age of 16. The current version of s. 150.1 was enacted in 2008 along with numerous other criminal law reforms in the Tackling Violent Crime Act, S.C. 2008, c. 6:

150.1(1) Subject to subsections (2) to (2.2), when an accused is charged with an offence under section 151 or 152 or subsection 153(1), 160(3) or 173(2) or is charged with an offence under section 271, 272 or 273 in respect of a complainant under the age of 16 years, it is not a defence that the complainant consented to the activity that forms the subject-matter of the charge.

Exception -- complainant aged 12 or 13

- (2) When an accused is charged with an offence under section 151 or 152, subsection 173(2) or section 271 in respect of a complainant who is 12 years of age or more but under the age of 14 years, it is a defence that the complainant consented to the activity that forms the subject-matter of the charge if the accused
- (a) is less than two years older than the complainant; and

- (b) is not in a position of trust or authority towards the complainant, is not a person with whom the complainant is in a relationship of dependency and is not in a relationship with the complainant that is exploitative of the complainant.

Mistake of age

- (4) It is not a defence to a charge under section 151 or 152, subsection 160(3) or 173(2), or section 271, 272 or 273 that the accused believed that the complainant was 16 years of age or more at the time the offence is alleged to have been committed unless the accused took all reasonable steps to ascertain the age of the complainant.

The appellant does not fall within the ss. 150.1(2) exception. Nor is this a case in which a mistaken belief in the age of the complainant arose on the evidence (ss. (4)).

- [6] The appellant's constitutional challenge was held in abeyance until the trial judge determined the trial on its merits. Once the judge found that the Crown proved the charged offences beyond a reasonable doubt, the application proceeded: *R. v. Alfred*, 2019 BCSC 261 at para. 5 ("Constitutional Ruling").
- [7] For purposes of his constitutional claim, the appellant described the complainant as a willing participant in the sexual activity. He contended that there was nothing in the facts to suggest that he used force or coercion with the complainant or that he exerted pressure on her to engage in sexual activity. The trial judge accepted those facts, as they were consistent with the complainant's evidence: *Constitutional Ruling* at para. 11.
- [8] The essence of the constitutional complaint was that s. 150.1 criminalizes sexual conduct with complainants under the age of 16 (with limited exceptions), even though there may be no evidence of manifest exploitation or an abuse of power: *Constitutional Ruling* at para. 29.
- [9] From the appellant's perspective, the effect of this provision extends well beyond the purpose of the legislative scheme of which it forms an integral part. The mere age of the accused is dispositive of criminal culpability, resulting in a conviction for (and condemnation of) every accused who does not meet one of the s. 150.1 close-in-age exceptions, without any consideration of whether "power has been used by [that] accused to overbear the complainant's will with the objective of sexual gratification": *Constitutional Ruling* at para. 29.
- [10] The trial judge rejected this argument. Citing *R. v. A.B.*, 2015 ONCA 803, and other cases, he found the appellant's characterization of Parliament's objective too narrow. Instead, s. 150.1 is intended to:

[39] protect children from sexual contact with adults or the invitation to have sexual contact by adults because of the inherent power imbalance between children and adults, and the consequences that flow from that power imbalance. That being its purpose, it is clear that a sexual relationship between a child and an adult, even where consensual and non-exploitative, falls within the type of conduct the legislative scheme is intended to address.

[Constitutional Ruling; emphasis added.]

[11] To the extent that the appellant's challenge took issue with Parliament's authority to draw "bright line [age] boundaries" in criminalizing sexual activity, the judge also concluded that the appellant's position was without merit:

[42] as recognized in A.B. and other authorities, bright line boundaries exist in many areas of the law and do not necessarily infringe s. 7 of the Charter so long as they are reasonably related to the legislative goal. In A.C. v. Manitoba (Director of Child and Family Services), 2009 SCC 30, for instance, the Court noted that while age-based legislative distinctions have an element of literal arbitrariness, they are a common and necessary way of ordering society, and are "currently employed to determine when a person can marry, vote, drive, consent to sexual intercourse and sell property" (at para. 110).

[12] The trial judge dismissed the application for a constitutional remedy on the ground that the appellant did not establish a Charter violation. In light of that outcome, he did not consider it necessary to address whether any such violation (or limit), had it been established, is reasonable and demonstrably justified under s. 1.

Issue on Appeal

[13] Did the trial judge err in his constitutional ruling? This involves a question of law alone and the standard of review is correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 8; *R. v. Pipping*, 2020 BCCA 104 at para. 95.

Discussion

[14] In my view, it is not necessary to engage in a lengthy analysis of the appellant's contentions on appeal. It is readily apparent that the challenge to s. 150.1 is fundamentally flawed. I agree with the Crown that the appellant's articulation of the legislative purpose underlying s. 150.1, which forms the linchpin of his constitutional complaint, wrongly presumes that children under the age of 16 have the capacity to consent to sexual activity with adults. It also fails to recognize the inherently exploitive nature of sexual activity between adults and children and its well-established real and apprehended harms.

[15] The Supreme Court of Canada has pronounced on both of these issues against the appellant. His appeal cannot succeed.

Challenging Legislation on Grounds of "Overbreadth"

- [16] The appellant challenged s. 150.1 under s. 7 of the Charter. That provision guarantees everyone the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".
- [17] As correctly noted by the trial judge, prosecuting the appellant for sexual interference and sexual assault engaged his "liberty" interest because of the potential for imprisonment: *R. v. Moriarity*, 2015 SCC 55 at para. 17. The question in the constitutional application was whether the deprivation of liberty contravened one or more principles of fundamental justice: *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 55. To succeed on his application, the appellant bore the onus of showing an infringement on a balance of probabilities: *S.L. c. Commission scolaire des Chênes*, 2012 SCC 7 at para. 23; *R. v. Collins*, [1987] 1 S.C.R. 265 at 277.
- [18] The principle of fundamental justice advanced at trial was that a law must not be overly broad. It cannot go "too far" by interfering with conduct that "bears no relation to the object": *Carter* at para. 85. "[O]verbreadth addresses the situation where there is no rational connection between the purposes of the law and some, but not all, of its impacts": *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 112 (*italics in the original*); *Moriarity* at para. 2.
- [19] The test for judicial interference on the ground of overbreadth is not easily met: *Bedford* at para. 119. The applicant must establish that there is "no connection, in whole or in part, between [the] effects [of the impugned law] and its purpose": at para. 119 (*italics in the original*).

Purpose of Section 150.1

- [20] The appellant says the trial judge erred in law by failing to analyze s. 150.1 in "its full context" when identifying its legislative purpose: *Moriarity* at para. 26. In turn, that error irreparably tainted the judge's s. 7 determination because it resulted in a failure to appreciate the lack of connection between some of the effects of the legislation and Parliament's objective.
- [21] The appellant contends, contrary to the judge's finding, that Parliament did not intend s. 150.1 to protect children from all sexual activity with adults: *Constitutional Ruling* at para. 39. Rather, this provision "was enacted with the expressed intention of protecting children from sexual predators and sexual exploitation" (*emphasis added*). Its objective is to "prevent older accused persons from taking advantage of the youth of a complainant for the purpose of sexual exploitation" (*appellant's factum* at iii, para. 36).
- [22] In support of his position, the appellant points to the close-in-age exceptions found in s. 150.1 and says they reflect Parliament's recognition that people who do not have the "power and sophistication" to sexually exploit should be exempt from criminal culpability. The

logical extension, he contends, is that people who fall outside of those exceptions because Parliament has decided that they do have the "power and sophistication" to exploit were intended only to be deprived of the defence of consent when they actually use that power with an exploitive objective (appellant's factum at paras. 38, 39).

- [23] In light of that purpose, the appellant says denying the defence of consent to everyone other than those who can invoke a close-in-age exception is overly broad. "[N]ot every sexual partner chosen by a person under 16 is an exploitative predator just because the partner happens to be outside the age exceptions, and not every person under 16 may be vulnerable". According to the appellant, "the blanket ban against sexual contact between persons under 16 and partners over the age exceptions is obviously overbroad, because it treats all such partners as exploitative sexual predators" (appellant's factum at paras. 24, 25). This includes, of course, the appellant.
- [24] In response, the Crown submits that the trial judge correctly understood the purpose of s. 150.1 in light of the legislative and jurisprudential history of this provision. It is "incontrovertible" that s. 150.1 protects children from sexual activity with adults because of an inherent power imbalance (respondent's factum at para. 45). The Crown says the appellant wrongly equates a child's participation in sexual interaction with an adult with a lack of exploitation. That notion has been "firmly dismissed by courts across this country" (respondent's factum at para. 48). In *R. v. Scofield*, 2019 BCCA 3, for example, this Court held that the participation of a child "does not make the sexual activity less serious, less exploitative, or reduce the moral culpability of the offender" (at para. 37; emphasis added).
- [25] In support of the Constitutional Ruling, the Crown points to a number of authorities that have considered s. 150.1, at both the appellate and trial levels. This includes *R. v. Hajar*, 2016 ABCA 222, a sentence appeal involving a 20-year-old offender and 14-year-old complainant. At paras. 30-44 of that decision, the Court addresses the legislative and policy rationale underlying Parliament's election to set the age of consent at 16. Among other things:
- [40] Parliament recognized that given the inherent power imbalance between adults and children, children in the protected category were incapable of giving true consent to sexual acts with adults not within the close-in-age exception. Increasing the age of consent was intended to better protect 14- and 15-year-olds from undue influence, persuasion and manipulation by adults to engage in sexual activity. Parliament's deliberate and reasoned decision to reject the concept of any type of "consent" for those below the age of consent is supported by social science, neuroscience and medical research data. It demonstrates that children under 16 do not possess the psychological maturity and decision-making competence to agree to sexual activity with those outside the close-in-age exceptions. And most especially, it reveals how the power imbalance between children and those in the proscribed age groups undermines true consent.

[Emphasis added.]

- [26] Another case cited by the Crown is *R. v. A.B.* (also referenced by the trial judge). That case involved a 21-year-old accused and 15-year-old complainant. The Court of Appeal for Ontario rejected a constitutional challenge to s. 150.1 that was similar in nature to the one advanced by the appellant in this case. In *A.B.*, the accused complained that s. 150.1 is overly broad because, in its effect, the provision captures non-exploitive sexual activity (at para. 22). In dismissing that contention, the Court held that the purpose of s. 150.1:
- [38] is apparent from the words of the legislation, supported by statements made by the government when the legislation was introduced. Parliament's intention is not simply to prevent sexual exploitation of children or even potential sexual exploitation of children, although those are certainly two of the law's important effects. The purpose of the law, stated succinctly, is to protect children from sexual contact with adults or the invitation to have sexual contact by adults. The close-in-age exceptions reflect Parliament's view that the inherent power imbalance between adults and children vitiates consensual sexual relations between them.
- [Emphasis added.]
- See also *R. v. R.S.M.* (1991), 94 Nfld. & P.E.I.R. 80 (C.A.).
- [27] Finally, in asking that the appeal be dismissed, the Crown relies on the Supreme Court's decision in *R. v. Friesen*, 2020 SCC 9, which post-dates the Constitutional Ruling.
- [28] In *Friesen*, the Court heard a Crown appeal from sentence involving sexual interference and extortion. The trial judge imposed a global sentence of six years' imprisonment. On appeal, the sentence was reduced to four and one-half years. The Supreme Court overturned the appellate decision and restored the original quantum. In doing so, it intentionally sent a "strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities" (at para. 5).
- [29] In the course of its analysis, the Court engages in a comprehensive review and discussion of the purpose of the Code's scheme addressing sexual offences against children, including its legislative and jurisprudential history. This scheme necessarily includes s. 150.1. Although lengthy, the following passages from the decision are particularly salient:
- [51] The prime interests that the legislative scheme of sexual offences against children protect are the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children. This Court recognized the importance of these interests in *Sharpe* in the context of the production of child pornography. As this Court reasoned, the production of child pornography traumatizes children and violates their autonomy and dignity by treating them as sexual objects, causing harm that may stay with them for their entire lifetime (para. 92, per McLachlin C.J., and para. 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.). Sexual violence against children is thus wrongful because it invades their personal autonomy, violates their bodily and sexual integrity, and gravely wounds their dignity (see *Sharpe*, at

paras. 172, 174 and 185, per L'Heureux-Dubé, Gonthier and Bastarache JJ.).

- [52] We would note that the personal autonomy interest carries a somewhat different meaning for children than it does for adults. Children under the age of 16 of course lack the capacity to consent to sexual contact with an adult. As we will explain in detail later in these reasons, a child's participation in such contact is not a mitigating factor and should never be equated to consent. Instead, personal autonomy refers to a child's right to develop to adulthood free from sexual interference and exploitation by adults (see Sharpe, at para. 185).
- [53] In 1987, Parliament created the modern legislative scheme of sexual offences against children by enacting Bill C-15, An Act to amend the Criminal Code and the Canada Evidence Act, R.S.C. 1985, c. 19 (3rd Supp.). In so doing, Parliament replaced the previous offences based on the gender of the victim or the presence of penile penetration with "child-specific gender-neutral offences not dependent upon proof of penile penetration" (A. McGillivray, "Abused Children in the Courts: Adjusting the Scales after Bill C-15" (1990), 19 Man. L.J. 549, at p. 556). As Professor Anne McGillivray wrote, Parliament thus shifted the focus of sexual offences against children from chastity or propriety to a "child-centred" approach that emphasizes the trauma to the child victim from all acts of sexual violence (pp. 558-60). The modern prohibition on sexual interference thereby gives effect to "Parliament's recognition that adult/youth sexual relationships are inherently exploitative" by reason of the lack of maturity, judgment, and experience of children (R. v. George, 2017 SCC 38, [2017] 1 S.C.R. 1021, at para. 26; R. v. Hajar, 2016 ABCA 222, 39 Alta. L.R. (6th) 209, at para. 229).
- [65] The protection of children is one of the most fundamental values of Canadian society. Sexual violence against children is especially wrongful because it turns this value on its head. In reforming the legislative scheme governing sexual offences against children, Parliament recognized that children, like adults, deserve to be treated with equal respect and dignity (Badgley Committee, vol. 1, at p. 292; Fraser Committee, vol. 1, at p. 24, and vol. 2, at p. 563). Yet instead of relating to children as equal persons whose rights and interests must be respected, offenders treat children as sexual objects whose vulnerability can be exploited by more powerful adults. There is an innate power imbalance between children and adults that enables adults to violently victimize them (Sharpe, at para. 170, per L'Heureux-Dubé, Gonthier and Bastarache JJ.; L. (D.O.), at p. 440, per L'Heureux-Dubé J.). Because children are a vulnerable population, they are disproportionately the victims of sexual crimes (George, at para. 2). In 2012, 55% of victims of police-reported sexual offences were children or youth under the age of 18 (Statistics Canada, Police-reported sexual offences against children and youth in Canada, 2012 (2014), at p. 6).
- [152] a victim's participation should not distract the court from the harm that the victim suffers as a result of sexual violence. We would thus strongly warn against characterizing sexual offences against children that involve a participating victim as free of physical or psychological violence, as some courts appear to have done (see Caron Barrette, at para. 46). Instead, as the majority held in Hajar, "Violence is inherent in [such offences] since [they] involv[e] an adult's serious violation of a child's sexual integrity, human dignity and

privacy even in cases of ostensible consent" (para. 115 (emphasis in original)). The fact that additional forms of violence such as weapons, intimidation, and additional physical assault may not be present does not provide a basis to ignore the inherent violence of sexual offences against children (see Marshall, at p. 220).

[154] Finally, a victim's participation should never distract the court from the fact that adults always have a responsibility to refrain from engaging in sexual violence towards children. Adults, not children, are responsible for preventing sexual activity between children and adults .

[Emphasis added.]

[30] Friesen makes it clear, in fact and law, that children under the age of 16 do not have the capacity to consent to sexual activity with adults (see also para. 148). Moreover, the Supreme Court has accepted that any such activity is inherently exploitive.

Fatal Flaw in Appellant's Position

[31] As acknowledged by the appellant, correctly identifying the legislative purpose of an impugned provision is critically important to the overbreadth analysis: Moriarity at para. 24.

[32] I agree with the trial judge that the appellant describes the purpose of s. 150.1 too narrowly. Doing so constitutes a fatal flaw in his position and undermines the entirety of his constitutional challenge. Misidentifying the purpose of the legislation led the appellant to an erroneous supposition that there is no rational connection between the objective of denying the defence of consent and some of its effects: Moriarity at para. 20.

[33] The Supreme Court has ruled unequivocally that children under the age of 16 do not have the capacity to consent to sexual activity with adults. Furthermore, sexual activity between adults and children is inherently exploitive because of children's lack of maturity, judgment, and experience. The Court has identified the purpose of s. 150.1 in a manner much broader than that advanced by the appellant, and it has emphasized that protecting children is one of the most fundamental values of Canadian society. The Code provisions addressing sexual offences against children, including s. 150.1, prohibit all sexual activity with adults in order to protect "the personal autonomy, bodily integrity, sexual integrity, dignity, and equality of children": Friesen at para. 51.

[34] Parliament has carved out close-in-age exceptions, but, even then, those exceptions do not apply where the accused is in a position of trust or authority towards the complainant, is a person with whom the complainant is in a relationship of dependency, or the relationship is exploitive of the complainant (for example, ss. 150.1(2) and (2.1)).

[35] Contrary to the appellant's suggestion, the close-in-age exceptions are not indicative of an intention by Parliament to criminalize only conduct that is manifestly and purposefully exploitive or abusive. Instead, as explained by professors Isabel Grant and Janine Benedet in "Confronting the Sexual Assault of Teenage Girls: The Mistake of Age Defence in Canadian Sexual Assault Law" (2019) 97:1 Can Bar Rev 1, the close-in-age exceptions:

reflect a recognition that younger teenagers do engage in sexual experimentation with each other and that the criminal law is not the appropriate tool for protecting teenagers from the consequences of all such activity. However, where [adults] are outside of the close in age exceptions, there should be a significant responsibility on them to make sure that the [persons] with whom they are engaging in sexual activity are 16 years of age or older.

See also A.B. at para. 37.

[36] In my view, Friesen's pronouncement on legislative purpose is binding on this Court, even though it was not stated in the context of a constitutional application. At trial, the appellant failed to show there is no connection between the effects of s. 150.1 and the purpose adopted in Friesen. To the contrary, there is a logical and compelling nexus between denying the defence of consent to accused who do not meet the criteria for a close-in-age exception and the objective of the legislation. Sexual activity between those accused and complainants under the age of 16 is, by its very nature, exploitive. This is so even in cases where the complainant is alleged to have willingly participated in the activity. It bears repeating: sexual offences committed by adults against a participating child victim are not free of physical or psychological violence: Friesen at paras. 77-79, 152.

[37] In my view, the appellant's constitutional claim was bound to fail. The trial judge correctly found that the appellant did not establish a violation of s. 7 of the Charter. Even without Friesen, I would have come to that same conclusion, substantially for the reasons provided in A.B. Like the trial judge, I do not consider it necessary for this Court to address s. 1.

Disposition

[38] For the reasons provided, I would dismiss the appeal from conviction.

[39] WILLCOCK J.A.: I agree.

[40] ABRIOUX J.A.: I agree.

[41] WILLCOCK J.A.: The appeal is dismissed.

"The Honourable Madam Justice DeWitt-Van Oosten"

[1] The appellant was also convicted of sexual assault contrary to s. 271 of the Code. However, that conviction was conditionally stayed pursuant to R. v. Kienapple, [1975] 1 S.C.R. 729.

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