

CANADA / JUDGMENT

R. v. Alfred

2021 BCCA 71

COURT

British Columbia Court of Appeal

DECIDED

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2021 BCCA 71 R. v. Alfred

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Alfred,

2021 BCCA 71

Date: 20210211

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 publican 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 Mr. Justice Harris

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Abrioux

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

(via videoconference):

I.B. Lawson

Counsel for the Respondent

(via videoconference):

L.A. Vizsolyi

Place and Date of Hearing:

Vancouver, British Columbia

February 11, 2021

Place and Date of Judgment:

Vancouver, British Columbia

February 11, 2021

Summary:

The appellant was convicted of sexual interference and sentenced to nine months' imprisonment to be followed by 24 months of probation. His conviction appeal was dismissed. In his sentence appeal, he argues that the judge failed to give effect to ss. 718.2(d) and (e) of the Criminal Code and a suspended sentence ought to be substituted for his custodial sentence. Held: Appeal dismissed. The judge properly considered the appellant's history as an Indigenous man and exercised restraint in sentencing. The approach urged by the appellant is inconsistent with the Supreme Court of Canada's direction in R. v. Friesen, 2020 SCC 9 that sexual offences against children are inherently exploitative and require higher sentences. The sentence in this case was not demonstrably unfit.

ABRIOUX J.A.:

Introduction

- [1] On February 28, 2019, the appellant was convicted in the Supreme Court of British Columbia of sexual interference of S.V. between August 1, 2017 and December 31, 2017. He was 26 years old at the time of the offence, the complainant 13 years old.
- [2] The appellant's sole defence was that s. 150.1 of the Criminal Code, R.S.C. 1985, c. C-46, which provides that consent is not a defence where a complainant is under the age of 16 years, was unconstitutional. His challenge to that section of the Code was dismissed by the trial judge and the matter moved to sentencing.
- [3] The sentencing proceeded on the basis that a conditional sentence was not available as a matter of law, as the offence the appellant was convicted of was punishable by a maximum sentence of 14 years' imprisonment. Section 742.1(c) of the Code excludes such offences from the range of offences for which a conditional sentence order is available. The applicant did not challenge the constitutionality of s. 742.1(c) at the trial.
- [4] The Crown sought a custodial sentence of between three and four years, the appellant a suspended sentence.
- [5] On May 17, 2019, in reasons for judgment indexed as 2019 BCSC 1452 (the "Reasons"), the judge sentenced the appellant to nine months' imprisonment to be followed by 24 months of probation.
- [6] The appellant filed a notice of appeal against conviction and sentence on May 24, 2019. The conviction appeal was dismissed on September 10, 2020: *R. v. Alfred*, 2020 BCCA 256.
- [7] The sentence appeal was originally scheduled to be heard on November 2, 2020. On October 7, 2020, Mr. Alfred filed a notice of motion and notice of constitutional question seeking leave to raise a new issue on appeal--the constitutionality of s. 742.1(c) of the Criminal Code. On November 6, 2020, he was granted leave to appeal sentence.
- [8] On December 18, 2020, the application to raise the constitutionality of s. 742.1(c) of the Code on appeal was heard by a division of the Court and dismissed: *R. v. Alfred*, 2020 BCCA 384.
- [9] In my view, the reasons for sentence reflect no error in principle nor was the sentence demonstrably unfit. Accordingly, for the reasons that follow, I would dismiss the appeal.

Circumstances of the Offence and the Offender

- [10] The appellant's circumstances were set out in a presentence report (the "PSR") which also commented on Gladue factors. Mr. Alfred, an Indigenous man, was a friend of the victim's older brothers, and to a certain degree, a family friend. He was 26 years of age at the time of the offence and the victim, herself Indigenous, was 13. Mr. Alfred was aware of S.V.'s age. He engaged in sexual intercourse with her on at least two occasions: Reasons at paras. 3-4.

- [11] The appellant was 27 years of age at the time of sentencing. He was himself a victim of sexual abuse as a child, suffered some dislocation from his family, and was exposed to alcohol abuse: Reasons at paras. 7-8. He has no criminal record: Ibid at para. 11.
- [12] The PSR indicated that Mr. Alfred had been steadily employed for most of his years as an adult, and had recently had a child with his partner of five years. He endured physical assaults by his father and stepfather between the ages of 9 and 18. He has had minimal relationships with most of his family members. He suffered from depression at the time of the offence, which resulted from his partner's substance abuse issues and a threat which had been made against his life. He described himself to the author of the PSR as having felt "numb" and having "stopped caring".
- [13] After he was charged with the offence in question he lost most of his friends and associates and his infant daughter was removed from his and his partner's care by child protection authorities. At the time of sentencing Mr. Alfred and his partner were both engaged in counselling with the objective of regaining custody of their daughter. Mr. Alfred was suicidal for a period after his daughter was removed.

Reasons for Sentence

- [14] Having reviewed the background circumstances, the judge considered the following to be aggravating factors:
- the appellant was 13 years older than the victim and knew her age;
 - there were acts of sexual intercourse on multiple occasions; and
 - the statutory aggravating factor pursuant to s. 718.2(ii.1) that the offence involved the abuse of a child.

Reasons at para. 20.

- [15] The judge also noted, but did not consider as an aggravating factor, the appellant's "disconcerting lack of understanding of responsibility" and "degree of blaming the victim", that is, his "view that the complainant, although he knew she was underage, was substantially a willing participant and that nothing was forced upon her": Reasons at paras. 12 and 21.
- [16] The judge also found a number of mitigating factors, in particular that the appellant:
- had no criminal record and a prosocial lifestyle;
 - had long-term employment;
 - had a largely positive relationship status;
 - was cooperative with police; and
 - was willing to engage with rehabilitation.

Reasons at para. 19.

- [17] The judge specifically referred to the principles of restraint and the need to consider the least restrictive sentence, particularly in the case of an Aboriginal offender as codified in ss. 718.2(d) and (e) of the Code, concluding:
- [25] In the determination of an appropriate sentence, I must take account of this man's background and circumstances as they reflect quite regrettable experiences growing up as an Aboriginal person. Specifically, a broken family, including some time in care; a history of having been abused; a history of substance abuse, that is both exposed to it and having engaged in it himself; and a sense of conflict with respect to his own Aboriginal heritage.
- [26] I am also concerned that the sentence this Court imposes does not have a destructive effect upon him. There are positive things in his life that are fragile and society is best served by Mr. Alfred surviving and thriving, being able to hold his family together, to be a father to his daughter, holding a job and continuing to take a contributing role in his community. Those considerations call for restraint in the sentencing process.
- [27] In my view, there must be a jail sentence, but it must be tempered and restrained to address the concerns I have articulated. To my mind, the sentence sought by the Crown would be excessive and harmful to any rehabilitation of the offender. My conclusion is that a nine-month sentence is fit and appropriate in the circumstances. I would urge the correctional authorities to make their best efforts to ensure that this man is availed of the Forensic Sex Offenders Program and whatever other programs are available to promote his rehabilitation.

Standard of Review

- [18] The applicable principles were summarized by Justice Fitch in *R. v. L.S.N.*, 2020 BCCA 109 [L.S.N.]:
- [49] It is well established that a deferential standard of review applies on appeals from sentence. Appellate intervention is only justified when a sentencing judge has committed an error in principle that had an impact on the sentence or imposed a demonstrably unfit sentence: *R. v. M.* (C.A.), [1996] 1 S.C.R. 500 at para. 90; [*R. v.*] *Lacasse* [, 2015 SCC 64] at paras. 41, 44.

See also *R. v. Friesen*, 2020 SCC 9 [Friesen] at paras. 25-29.

Positions of the Parties

- [19] The appellant's position is that the judge failed to give effect to ss. 718.2 (d) and (e); accordingly, he made a material error that impacted the sentence. He also submits that the nine-month custodial sentence was demonstrably unfit in that the circumstances of this case should have resulted in a sentence at "the low end of the range of such offences".
- [20] He says that the evidence was to the effect that the 13-year old complainant had "a crush on the accused and testified she 'wanted' her relationship with him to happen, and she was not pressured by him". In this respect, the appellant submits that the shift in focus stressed in

Friesen, namely from a focus on "sexual propriety" to the "wrongful interference with sexual integrity" (at para. 55), is highly relevant to proportionality in this case since none of the indicia of sexual violence--such as violation of trust, predatory behaviour, grooming or the application of force--were present. While recognizing that a victim's willing participation is not a mitigating factor, he submits it is "clearly a factor differentiating this case from cases of predatory sexual violence against children". He cites various cases in support of a reduced sentence.

- [21] The Crown's position is that the sentencing judge clearly considered a number of mitigating factors, including the appellant's history as an Indigenous person, and arrived at a sentence that reflected significant restraint. It notes that a victim's willing participation is neither a mitigating factor, nor an indication that sexual violence has not occurred, stressing the Court's recognition in Friesen that sexual offences against children are inherently exploitative. It argues that the sentence in this case was "well below the applicable range" established in both the pre- and post-Friesen jurisprudence.

Discussion

- [22] The principles of sentencing applicable to this appeal were outlined in L.S.N:
- [50] Proportionality is the cardinal principle of sentencing: Lacasse at para. 12. All sentences must be proportionate to the gravity of the offence and the degree of responsibility of the offender: R. v. Proulx, 2000 SCC 5 at para. 54; Friesen at para. 30.
- [51] Sentencing judges exercise a broad, case-specific discretion in determining the weight to be accorded to the sentencing principles set out in s. 718 and 718.2 of the Code. Sentencing judges also exercise a broad discretion in determining how those principles are best achieved in a particular case. But the resulting sentence must respect the fundamental principle of proportionality: R. v. Nasogaluak, 2010 SCC 6 at para. 40; R. v. Ipeelee, 2012 SCC 13 at para. 37.
- [52] Sentencing is, of course, an individualized process. Exceptional circumstances--often rooted in an offender's disadvantaged background--may inform the assessment of an offender's moral culpability. The moral culpability of a significantly disadvantaged offender may be attenuated in the face of circumstances a sentencing judge considers to be exceptional.
- [53] Of particular note in this case are the systemic and background factors that have played a role in bringing Indigenous persons like the respondent before criminal courts. These background circumstances may be found to attenuate an Indigenous offender's moral culpability, including in very serious cases like the one at bar. In addition, the applicable sentencing objectives may be achieved in different ways and through the adoption of different methods in the case of a disadvantaged Indigenous offender: R. v. Gladue, [1999] 1 S.C.R. 688; Ipeelee at paras. 59, 84-86.

- [54] Exceptional circumstances do not, however, oust the proportionality principle. They simply permit the taking into account of case-specific considerations that could conceivably justify departure from a conventional sentencing range in order to craft a proportionate sentence. As this Court noted in *R. v. Padda*, 2019 BCCA 351 at para. 36, characterizing an offender's circumstances as exceptional "is simply a shorthand means of identifying the kind of personal circumstances which justify going outside a conventional range in order to craft an appropriate individualised proportionate sentence."
- [23] In my view, the judge did not make a material error that impacted sentence, nor was the custodial sentence demonstrably unfit.
- [24] First, the judge did not make a material error in failing to properly consider ss. 718.2(d) and (e) of the Code.
- [25] A review of the reasons for sentence indicates that the judge considered the appellant's history as an Indigenous person, as well as numerous other mitigating factors. It is clear that he not only expressed that he was exercising restraint, but in fact did so.
- [26] In my view, the appellant on this sentence appeal repeats the same fundamental error he made on his conviction appeal, that is arguing that the victim's "willingness" reduced his moral blameworthiness. In effect, he submits that this "willingness" constitutes an exceptional circumstance which justifies a departure from the proportionality principle.
- [27] But as was noted in *L.S.N.*, exceptional circumstances do not oust the proportionality principle: at para. 54, cited at para. 22 above.
- [28] The appellant highlights Justice Fitch's comments in *L.S.N.* in which he differentiated that case from *R. v. Chen*, 2019 BCSC 1290 [Chen]--where a suspended sentence was imposed--on the basis that the accused and victim in *Chen* were "willing participants". In my view, these comments, read in context, do not assist the appellant. Justice Fitch was clear that the willing participation of the victim in *Chen* was not a mitigating circumstance, and that the comparison was merely intended to show that *Chen* lacked certain aggravating factors that were present in the case before him: at para. 70.
- [29] And yet the appellant's argument on this point is wholly at odds with the comments and reasoning in *Friesen*, with the following extracts being germane for the purposes of this appeal:
- [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. 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 [*R. v. Sharpe*, 2001 SCC 2], 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] 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. 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.; [R. v. L. (D.O.), [1993] 4 S.C.R. 419], at p. 440, per L'Heureux-Dubé J.).
- [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 (George, at para. 2; R. v. Audet, [1996] 2 S.C.R. 171, at para. 23).
- [Emphasis added.]
- [30] Simply put, in Friesen, the Court has accepted that sexual offences against children are inherently exploitive and constitute sexual violence. Viewed in this context, it cannot be said that a material error that impacted the sentence was made by the judge.
- [31] I would also find that the sentence was not demonstrably unfit.
- [32] In L.S.N., the Court allowed a Crown appeal and imposed a term of imprisonment of two years less one day in place of a suspended sentence, finding that a suspended sentence failed to reflect the "gravity of the offence or the respondent's moral culpability" and was demonstrably unfit: at paras. 66 and 80. The offender was an Indigenous man in his 30s who had suffered from depression and substance abuse. The victim was his 14 year old step-niece. The offences took place on more than one occasion, were not the accused's first sexual offences against a child and were committed while the accused was on probation for a prior sexual interference conviction. The Court reiterated Friesen's "strong message that sentences for sexual offences against children must increase", and added that even on a pre-Friesen analysis the initial sentence in the case could have been "much higher": at paras. 7 and 96.

- [33] The appellant cites several authorities which pre-date Friesen, including Chen. But as this Court noted in *R. v. Williams*, 2020 BCCA 286, "reliance on precedents that predate [Friesen] may well be inappropriate or of limited assistance" in sentencing for sexual offences: at para. 73.
- [34] Among the authorities relied upon by the appellant in support of a reduced sentence, only *L.S.N.* and *R. v. Parsons*, 2020 ONSC 5412 [Parsons] were rendered after Friesen. In *Parsons*, the accused, who was 80 years old and in frail health, was given a conditional sentence. This was possible in light of the Ontario Court of Appeal's decision in *R. v. Sharma*, 2020 ONCA 478, leave to appeal granted, [2020] S.C.C.A. No. 311, which struck down s. 742.1(c) of the Code. As the Court noted, given "the COVID-19 virus, his age and underlying health conditions he likely would not survive [a custodial] sentence": at para. 25. The case is therefore readily distinguishable from the circumstances here.
- [35] The sentence in this case balanced Mr. Alfred's mitigating circumstances, including Gladue factors, with the other applicable sentencing objectives and principles, not the least of which is that the appellant sexually abused a 13-year-old adolescent who was half his age. Although the circumstances were somewhat different, the imposition of a custodial sentence in this case was, in my view, consistent with *L.S.N.* given that the sentence in that case might have been "much higher".
- [36] In fact, when one considers the Court's comments in Friesen that:
- [114] it is incumbent on us to provide an overall message that is clear [citation omitted]. That message is that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. ...

it is my view that the sentence was clearly not demonstrably unfit.

Disposition

- [37] I would dismiss the appeal.
- [38] HARRIS J.A.: I agree.
- [39] FITCH J.A.: I agree.
- [40] HARRIS J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Abrioux"

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