

CANADA / JUDGMENT

R. v. Cole

2021 BCSC 293

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 293 R. v. Cole

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cole,

2021 BCSC 293

Date: 20210226

Docket: 69057

Registry: Chilliwack

Regina

v.

Vincent Douglas Cole

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Before: The Honourable Mr. Justice Williams

On appeal from: A decision of the Provincial Court of British Columbia, dated September 25, 2019 (R. v. Cole, Abbotsford Docket No. 86758-1).

Reasons for Judgment

Counsel for the Crown

(C. Bright appeared in person and

R. Carot appeared via teleconference):

C. Bright

R. Carot

Counsel for the Accused:

D. Petri

Place and Date of Trial/Hearing:

Chilliwack, B.C.

October 7, 2020

Place and Date of Judgment:

Chilliwack, B.C.

February 26, 2021

- [1] Vincent Douglas Cole appeals to this Court from a sentence imposed on him by a judge of the Provincial Court of British Columbia (the "Judge"), following entry of a guilty plea to a charge of possession of child pornography, contrary to s. 163.1(4)(b) of the Criminal Code [Code]. The offence occurred between September 20, 2016 and June 8, 2017.
- [2] Before the Provincial Court, the Crown sought an eight-month conditional sentence order ("CSO"), coupled with a two-year probation order and a number of other ancillary orders. The appellant urged the imposition of a 24 month suspended sentence, again coupled with a probation order and the ancillary orders.
- [3] In reasons for sentence pronounced on September 25, 2019 (the "Reasons"), the Judge imposed a six month CSO, as well as a two-year probation order and ancillary orders.
- [4] It is that sentence from which Mr. Cole brings his appeal.
- [5] There is another aspect of the matter for which the parties seek a ruling of this Court, and that is with respect to a Code provision.
- [6] At the time of the proceedings below, the Code provided a mandatory minimum sentence:

Possession of child pornography

163.1(4) Every person who possesses any child pornography is guilty of
 - (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year; or

- (b) an offence punishable on summary conviction and is liable to imprisonment for a term of not more than two years less a day and to a minimum punishment of imprisonment for a term of six months.
- [7] In the matter at bar, because the Crown had proceeded summarily, that provision thereby prescribed a minimum sentence of six months imprisonment. As well, the effect of the provision would preclude the imposition of a CSO.
- [8] In light of other case authority applicable at that time, specifically, *R v. Swaby*, 2018 BCCA 416 [Swaby] and *R v. Alexander*, 2019 BCCA 100 [Alexander] both Crown counsel and counsel for Mr. Cole urged upon the Judge that he should not consider himself bound by the mandatory minimum provision of the Code. They were in agreement that in the particular circumstances of the case it was appropriate for the Judge to decline to impose a sentence in accordance with the mandatory minimum, on the basis that to impose the mandatory minimum would violate s. 12 of the Charter. The Judge accordingly declined to apply the mandatory minimum and instead imposed the six month CSO.
- [9] In the present proceeding, the parties acknowledge that the circumstances warrant a declaration that the mandatory minimum provision is of no force and effect. Because a judge of the Provincial Court of British Columbia does not have jurisdiction to make such a declaration, it must be made by a Justice of the Superior Court: *R v. Lloyd*, 2016 SCC 13, at para. 19. Thus, counsel invite this Court to make that declaration.
- [10] I intend to act in accordance with that submission, but first I will deal with the substantive sentence appeal.

Background

- [11] At the time of sentencing, the appellant was 33 years of age. He was 30 and 31 years old during the span of the offence. The Crown alleged no criminal record.
- [12] The circumstances of the appellant are unusual. He was born with cerebral palsy and experienced frontal lobe seizures. This is a form of epilepsy and the appellant is considered to fall within the autism spectrum. He takes medication for seizures and mood stabilizers for depression.
- [13] The sentencing judge had before him a presentence report as well as a psychological assessment that had been prepared through the Forensic Psychiatric Services Branch.
- [14] The material disclosed that Mr. Cole's intellectual functioning is at the level of a 10 to 14-year-old. He does not have the skills or the cognitive ability to reside on his own in the community because of his intellectual impairments. He was raised by his grandmother but she died in 2005. He has subsequently been in the care of Community Living BC and at the time of the offence was residing in the care of a family in the community. The psychological report opined that Mr. Cole should remain in a supervised structure with supportive care living arrangement to address his developmental disability and related needs.

- [15] The charge arose from an investigation conducted by the Abbotsford Police Department. Acting on a report from the National Child Exploitation Coordination Centre, to the effect that an internet address in the vicinity was involved in an upload of child pornography, the police attended at Mr. Cole's home to conduct a search. Specifically, they searched his basement residence where they found and seized his computer. A search of the device disclosed child pornography video and images. There were a total of 64 images, some of which were duplicates. In total, there were 19 unique images.
- [16] Mr. Cole was cooperative with the investigation. He was bound by conditions of judicial interim release pending trial, which conditions included limitations on his access to internet.
- [17] The Judge heard submissions in early September 2019. Decision was reserved until September 25, 2019. The Reasons which were pronounced on that date are extensive and thorough.

Standard of Review and Relevant Legal Principles

- [18] In April 2020, the Supreme Court of Canada released new direction on "how to impose sentences that fully reflect and give effect to the profound wrongfulness and harmfulness of sexual offences against children": *R v. Friesen*, 2020 SCC 9. In that decision, the Court provided a comprehensive articulation of the standard of review for appeals of sentence:
- [25] Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person (*Lacasse*, at para. 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91). Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).
- [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

- [27] If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (Lacasse, at para. 43). It will apply the principles of sentencing afresh to the facts, without deference to the existing sentence, even if that sentence falls within the applicable range. Thus, where an appellate court has found that an error in principle had an impact on the sentence, that is a sufficient basis for it to intervene and determine a fit sentence. It is not a further precondition to appellate intervention that the existing sentence is demonstrably unfit or falls outside the range of sentences imposed in the past.
- [28] However, in sentencing afresh, the appellate court will defer to the sentencing judge's findings of fact or identification of aggravating and mitigating factors, to the extent that they are not affected by an error in principle. This deference limits the number, length, and cost of appeals; promotes the autonomy and integrity of sentencing proceedings; and recognizes the sentencing judge's expertise and advantageous position (Housen v. Nikolaisen, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 15-18).
- [29] Often the sentence that the appellate court determines to be fit will be different from that imposed by the sentencing judge, and the appellate court will vary the sentence. If the sentence chosen by the appellate court is the same as that imposed by the sentencing judge, the appellate court may also affirm the sentence despite the error.
- [19] Since the hearing in Mr. Cole's appeal, our Court of Appeal has released its decision in R v. Williams, 2020 BCCA 286. Williams affirms the analysis that Friesen applies in a sentence appeal for sexual offences against children. Justice Abrioux, for a unanimous Court, wrote, "[i]t is clear from Friesen that a new analytical framework is to be applied by courts in Canada to the sentencing of sexual offences against children" (at para. 51).
- [20] It is clear that the principle of proportionality is at the heart of the sentencing process. In relation to the proportionality principle for sexual offences against children, Williams says this:
- [13] The court [in Friesen] emphasized that an accurate understanding of the harmfulness and wrongfulness of sexual offences against children is "key to imposing a proportionate sentence" (para. 75). In this regard, Friesen directs courts:

To give effect to the inherent wrongfulness, potential harm and actual harm of the offence when considering its gravity; and

To consider "the harm the offender intended or was reckless or wilfully blind to "when considering the offender's responsibility, while recognizing that absent exceptional circumstances offenders "will usually have at least some awareness of the profound physical, psychological, and emotional harm that their actions may cause the child" (para. 88).

- [21] Williams also discussed how judges should consider exceptional circumstances involving mental illness. At para. 28, the Court cited with approval the following from *R v. Badhesa*, 2019 BCCA 70:
- [42] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated. In these circumstances, general deterrence is a less weighty consideration because a mentally ill offender is not an appropriate medium for making an example to others. Nor does specific deterrence or severe punishment play a significant role in the determination of a fit sentence. The former is meaningless when an offender is out of touch with reality and the latter may be disproportionate to the offender's degree of responsibility: [Citations omitted.]
- [22] Expanding on this framework the court in Williams wrote at para. 33:
- [33] First, as noted in *Badhesa*, mental health issues may reduce a sentence because the offender's moral culpability is attenuated. But this factor must be considered in light of Friesen, in particular the comments of the Court at para. 75
- [Emphasis added.]
- [23] The proposition that possession and viewing of child pornography is a serious sexual offence against children is affirmed in *R v. Alexander*, 2019 BCCA 100 at paras. 41 and 42:
- [41] *R. v. Inksetter*, 2018 ONCA 474 held a custodial sentence was necessary to emphasize denunciation and deterrence in cases of child pornography:
- [22] Child pornography is a pervasive social problem that affects the global community and its children. In *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, the Supreme Court described how possession of child pornography harms children. As Fraser C.J.A. wrote in *R. v. Andrukonis*, 2012 ABCA 148, at para. 29, "possession of child pornography is itself child sexual abuse." The children depicted in pornographic images are re-victimized each time the images are viewed. In amassing, viewing, and making available his vast and terrible collection to others, the respondent participated in the abuse of thousands of children.
- [23] Over the past decade, Parliament has increased the legislated range of sentence for child pornography related offences. Most recently, in 2015, it amended the Criminal Code to increase the minimum sentence for possession of child pornography to 1 year and the maximum sentence to 10 years, in all cases where the Crown proceeds by indictment. At the same time, the maximum sentence for [making] child pornography available was increased to 14 years. (The minimum sentence remains at one year.)

...

[25] As Feldman J.A. wrote in [R. v. D.G.F., 2010 ONCA 27], at para. 21, "[o]ver the last two decades, courts have been on a learning curve to understand both the extent and the effects of the creation and dissemination of child pornography over the internet and to address the problem appropriately". Even before these amendments, this court signalled that more significant sentences for child pornography-related offences were appropriate: R. v. H.(R.), 2012 ONCA 593, [2012] O.J. No. 4230; R. v. Saliba, 2013 ONCA 660, [2013] O.J. No. 6002.

[42] Swaby expressed the same principles, stating, "[e]xcept in exceptional cases, those who possess child pornography will be incarcerated", even in cases where the Crown proceeds summarily: at paras. 66-67.

[24] With this legal framework in mind, I turn to the issues on this appeal.

Grounds of Appeal

[25] Because I found some duplication and lack of clarity in the manner in which the grounds were set out in the appellant's factum, in an effort to focus the analysis on what I understand the issues to be in this appeal, I have taken the liberty to reframe the grounds as follows:

The sentencing judge erred in principle by violating the principle of proportionality, as set out s. 718.1 of the Code and the principle of restraint, s. 718.2(d) which had an impact on sentencing by:

- i. Failing to consider Mr. Cole's exceptional circumstances, particularly in light of the sentence in Swaby;
- ii. Failing to adequately consider the principle of rehabilitation and placing undue weight on specific deterrence; and
- iii. Misapprehending the principles governing suspended sentences by concluding a suspended sentence would not satisfy the requirement for denunciation and deterrence.

In addition, the parties seek a declaration striking down the mandatory minimum sentence under section 163.1(4) of the Code when the Crown proceeds summarily.

Analysis

[26] For clarity, the standard of review that will be applied is this: an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit, or (2) the sentencing judge made an error in principle that had an impact on the sentence. If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

- [27] A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1 of the Code. That is the principle of proportionality; the Judge made specific reference to that principle at para. 63 of the Reasons. Similarly, at para. 64, the Judge referenced other principles, among which he included that "all available sanctions other than imprisonment that are reasonable in the circumstances and consistent with the harm done to victims or the community shall be considered for all offenders".
- [28] Accordingly, it is fair to say that the Judge was alive to those principles. Whether he violated them in crafting his sentence must be decided by examining the Reasons.
- [29] Mr. Cole argues that his exceptional circumstances were not adequately considered in reducing his degree of responsibility and moral blameworthiness, with the result that the sentence imposed was harsh and excessive.
- [30] I am unable to accede to this submission. The Reasons make clear that the Judge was quite cognizant of Mr. Cole's exceptional circumstances and gave them meaningful consideration. In his Reasons, he provided a thorough review of Dr. Todd's psychological assessment from the Forensic Psychiatric Clinic as well as a Pre-Sentence Report (at paras. 15 - 39). The reports provided specific insights into Mr. Cole that, in my view, informed the sentence imposed.
- [31] The judge referenced Mr. Cole's exceptional circumstances throughout his Reasons. For example:
- [97] As described, the moral culpability of Mr. Cole here is significantly reduced. He has several deficits and appears to operate at the level of a young teenager, or perhaps younger. He cannot live in the community on his own. The collection he possessed is relatively small, but the video contains images of penetrative activity between a[n] adult and children. The only higher level is sadism or bestiality.
- [32] The issue of exceptional circumstances is sometimes a factor taken into account in the imposition of sentence, particularly where the court is giving consideration to imposing a sentence which is simply at odds with what would otherwise be the prevailing sentencing authority. This has been recently noted by our Court of Appeal in *Alexander and Badhesa*, cited above.
- [33] The Judge reviewed several prior decisions noting that the broad range of sentences for possession of child pornography is four months to two years jail. (Each decision pre-dates *Friesen and Williams*). The Judge also examined decisions where first time offenders with exceptional circumstances, comparable to Mr. Cole, were sentenced for a sexual offence: *Swaby*; *Alexander*; *R v. Walker*, 2017 BCSC 1301; *R v. Schofield*, 2019 BCCA 3. Each resulted in a CSO of various durations.

- [34] The Judge wrote that absent Mr. Cole's exceptional circumstances, a four month jail sentence would be appropriate - the lowest end of the noted range. Instead, and taking into account the cases cited above, he sentenced Mr. Cole to a six month CSO. He wrote:
- [94] In my view, taking into account all of the relevant principles of sentencing and the aggravating and mitigating circumstances, especially considering the reduced morale blameworthiness of Mr. Cole, given his cognitive impairments, a six-month jail sentence would not be proportionate. As Judge Galati said in Swaby, separating him from society is not necessary to protect the public, and in the circumstances, would be contrary to the restraint principle, particularly as he is a first offender.
- [35] In my view, it cannot be fairly said that the Judge failed to give sufficient recognition to the appellant's special circumstances. I find no error in the Judge's application of the principles of proportionality or restraint. On balance, and having in mind the attenuated moral blameworthiness to be attributed, given Mr. Cole's cognitive impairments, and with proper recognition of the principle of restraint, the Judge's imposition of a six month CSO seems to my mind unassailably sound.
- [36] Counsel for the appellant takes issue with the sentence imposed on Mr. Cole when compared to the circumstances of Mr. Swaby. He contends that Mr. Swaby had a larger and more abhorrent collection of child pornography and lived in the community on his own. Yet, Mr. Swaby was only sentenced to a four month CSO.
- [37] I note that the Judge considered several other cases in addition to Swaby. However, specific to this point, he wrote this:
- [105] In my view, based on the descriptions, Mr. Swaby also seemed to be suffering more profound cognitive deficiencies, with auditory hallucinations, isolation and urinating in bottles in his room. He had severe mental health concerns, and further, the psychological information provided in court was more detailed than was provided here for Mr. Cole.

In other words, the Judge was of the view that there were meaningful differences between Mr. Swaby and the appellant.

- [38] In any event, comparing the individual circumstances in any case to those of some other is not a mathematically or scientifically precise calculation. It is often observed that sentencing is a highly individualistic exercise, as the Judge noted at para. 93 of his Reasons. There are a myriad of factors to be considered, and all of those go into informing the ultimate decision that a sentencing judge makes.
- [39] I am not persuaded the Judge made an error in principle relating to Mr. Cole's exceptional circumstances or analysis of other comparable sentences that materially affected Mr. Cole's sentence.

- [40] Mr. Cole says that it is telling that the Reasons make no specific reference to rehabilitation. He notes that s. 718(d) provides that one of the objectives of sentencing is "to assist in rehabilitating offenders". He argues the Judge instead improperly focused on specific deterrence.
- [41] Additionally, he submits that in light of Mr. Cole's exceptional circumstances the Judge should have considered the principles and objectives of sentencing set out in the Youth Criminal Justice Act, S.C. 2002, c. 1, [YCJA] namely, s. 38(1) which provides that the purpose of sentencing is to hold the young person accountable for an offence through the imposition of just sanctions that have meaningful consequences, and promote his or her rehabilitation and reintegration into society, thereby contributing to the long term protection of society.
- [42] In my view, there was no requirement or obligation to specifically apply the YCJA. This was not a proceeding under that statute. Nevertheless, the sentence imposed by the Judge accords with the YCJA purpose and objectives: recognizing Mr. Cole's exceptional circumstances, he was not sanctioned with jail, but instead received a sentence that was crafted for his personal circumstances, including conditions and a probation order that provide for rehabilitation.
- [43] I turn now to the appellant's concerns about specific deterrence and rehabilitation.
- [44] In this Court, Mr. Cole contends that the Judge erred in the emphasis he assigned to deterrence. In support of this submission, the appellant says that the Judge found that he (Mr. Cole) did not need to be specifically deterred.
- [45] In my view, that submission reflects a misunderstanding of the Reasons of the Judge. I note particularly paras. 98 and 99:
- [98] It is also quite concerning that Mr. Cole indicated that he was viewing the material about 30 times in a month. This is effectively daily use. A child pornography story was also open on his computer when the police attended to search, even when Mr. Cole was not at home. His use of this material was not isolated, but habitual. In my view, this calls for personal deterrence of Mr. Cole.
- [99] Also, Mr. Cole said he was accessing this material to cope with the aftermath of being sexually abused by a relatives a few years prior, suggesting, as Crown argued, that he may turn to such outlets when he encounters difficulties. This also calls for personal deterrence, in my view.

Accordingly, it is clear that the Judge did consider that specific deterrence was a necessary element in the sentence. He also identified and expressed concern over Mr. Cole's habitual use of the material as a coping mechanism and that absent intervention there is a concern he may re-offend.

- [46] In my view, the Judge was quite properly entitled to consider deterrence as a factor in fashioning his sentence.

- [47] That said, the Judge crafted the sentence in light of these concerns by specifically ordering conditions to limit Mr. Cole's use of the internet and potential access to child pornography while also ordering counselling to presumably learn healthier coping mechanisms. These conditions are consistent with the objective of rehabilitation and are not an errant over-emphasis on specific deterrence.
- [48] The above conditions were also incorporated into the two year probation order, as an integral component of the sentence imposed. It is trite that the purpose of a term of probation is to assist in the rehabilitation of the offender: *R v. Goddard*, 2019 BCCA 164, at paras. 20-23.
- [49] The fact that the word rehabilitation does not appear in the Reasons does not constitute an error in principle. It is apparent that the objective of rehabilitation was not only considered, but applied to Mr. Cole's sentence.
- [50] Finally, the appellant argues that the Judge misapprehended the principles of suspended sentences. I disagree.
- [51] The appellant notes that in *Swaby*, the sentencing judge indicated that he would consider an appropriate sentence to be either a conditional sentence of imprisonment followed by probation, or a suspended sentence with probation for three years. As mentioned, Mr. *Swaby* was sentenced to a four month CSO.
- [52] In relation to a suspended sentence in this case, the Judge wrote:
- [100] Defence says that on the principles enunciated in *R. v Voong*, a suspended sentence can provide the appropriate deterrence and denunciation. I note that the circumstances in *Voong* are not analogous to the offender here, or the type of circumstances. A CSO was also not available in the circumstances of Mr. *Voong*.
- [101] In my view, a suspended sentence is not appropriate, taking into account the developments in sentencing for these type of offences, recognizing the harm done and the need for deterrence and denunciation. In my view, the offender here does need to be specifically deterred and I do not believe a suspended sentence provides enough deterrence.
- [53] I am satisfied that the Judge understood that a suspended sentence is capable of providing some level of deterrence and denunciation. However, he concluded that, in the facts of Mr. Cole's case, a suspended sentence would not provide sufficient deterrence and denunciation. As noted, he reviewed several cases provided by counsel as part of his analysis (all released prior to *Friesen* and *Williams*) and none of the cases ordered a suspended sentence.
- [54] I am unable to say that was an error.

- [55] While the principle of restraint is undoubtedly a factor in the determination of a fit sentence, it is one of a number of principles that are engaged. Other considerations, sometimes competing, are in play as well. Those have to be given their proper effect, and the sentencing judge has the task of balancing those elements. To say that simply because a lesser sentence is theoretically available, the court is obliged to impose that sentence, is not a valid axiom of the sentencing process.
- [56] The key to imposing a proportionate sentence is considering the harmfulness and wrongfulness of sexual offences against children. In summary, I have found no error in principle that materially affected Mr. Cole's sentence, nor do I find it demonstrably unfit, harsh or excessive.
- [57] The appeal from sentence is dismissed.

Declaration

- [58] The sentence imposed on Mr. Cole and upheld on appeal is below the mandatory minimum sentence ("MMS") under s. 163.1 (4)(b) of the Code. When the Crown proceeds summarily, the Provincial Court has exclusive jurisdiction to hear the matter, but lack the jurisdiction to make a general declaration that a law is of no force or effect: *R v. Lloyd*, 2016 SCC 13, at para. 19. Before this Court, the Crown submits that it would be an appropriate use of judicial resources to strike down the MMS under section 163.1(4) of the Code when Crown proceeds summarily.
- [59] The Crown submits that, based on the binding British Columbia Court of Appeal authorities in *Swaby* and *Alexander*, the current six month MMS for possession of child pornography where the prosecution proceeds summarily cannot be constitutionally defended.
- [60] In *Swaby*, the Court of Appeal declared the former three month MMS under s. 163.1(4) of the Code to be of no force and effect. This is the same offence to which Mr. Cole pled guilty in the case at bar. However, by that time, the Code had been amended to increase the MMS to six months. It is the submission of the Crown that a six month MMS cannot be constitutionally defended when a MMS of three months, half the amount, for the same offence has been declared unconstitutional by the Court of Appeal: the s. 12 analysis and reasonable hypothetical adopted by the Court of Appeal are equally applicable to the case at bar.
- [61] Shortly following the decision in *Swaby*, the Court of Appeal in *Alexander* declared the former six month MMS, where the Crown proceeds by indictment, to be of no force and effect. In *Alexander* the Court found that the reasonable hypothetical adopted in *Swaby* inevitably leads to the conclusion that the six month MMS violates s. 12 of the Charter.

- [62] The constitutionality of the increased MMS from six months to one year when proceeding by indictment was subject to s. 12 analysis in *R v. Hamlin*, 2019 BCSC 2266. Citing both *Swaby* and *Alexander*, Justice Winteringham declared the one year MMS to be of no force and effect.
- [63] Consistent with the analytical approach in *Hamlin*, I, too, am guided by the reasoning of Justice MacKenzie in *Alexander* at paras. 51 - 55:
- [51] In declaring that s. 163.1(4)(b) of the Criminal Code violates s. 12 of the Charter and is of no force and effect, the Court in *Swaby* upheld the conclusions of the sentencing judge and the summary conviction appeal judge that a 90-day sentence of incarceration was grossly disproportionate to a CSO, which would otherwise be appropriate for the offender. In its analysis, the Court relied on a reasonable hypothetical derived from *R. v. John*, 2018 ONCA 702, concluding there are reasonable hypotheticals in which a mandatory term of imprisonment would result in a grossly disproportionate sentence (*Swaby* at paras. 91, 96).
- [52] In my view, the reasonable hypothetical (or "reasonably foreseeable application": per Nur at para. 57) adopted in *Swaby* inevitably leads to the conclusion that the six-month mandatory minimum punishment then in effect under s. 163.1(4)(a) also violates s. 12 of the Charter. The reasonably foreseeable situation in *John* was as follows:
- [29] An 18-year-old whose friend forwards him a "sext" from the friend's 17-year-old girlfriend without her knowledge. The 18-year-old doesn't forward the "sext" but keeps it on his phone.
- If *Swaby* concluded this hypothetical rendered the 90-day mandatory minimum unconstitutional, then consideration of the same hypothetical would also render the six-month mandatory minimum punishment in this case unconstitutional. The essential elements are identical for both offences. The only difference lies in how Crown exercises its very broad discretion as to whether to proceed by indictment or summarily.
- [53] To conclude that where the Crown proceeds summarily, the 90-day mandatory minimum punishment is unconstitutional, but where the Crown proceeds by indictment instead, the six-month mandatory minimum withstands Charter scrutiny could give rise to unfairness. The Crown could simply avoid the effect of *Swaby* by electing to proceed by indictment in every case.
- [54] Furthermore, the Crown properly acknowledges that this Court "may consider itself bound to follow the legal conclusion that *Swaby* provides a hypothetical [scenario] that infringes s. 12 of the Charter". The Crown did not argue that the legislation was saved under s. 1 of the Charter.
- [55] As the Ontario Court of Appeal in *John* said recently with respect to the mandatory minimum punishment at issue in the present case:

[41] The mandatory minimum is entirely unnecessary. This court has recently emphasized the importance of denunciation and deterrence for any offence involving abuse of a child, and that those principles are the primary principles of sentencing applicable for such offences involving child pornography: *R. v. Inksetter*, 2018 ONCA 474, at para. 16. In another recent decision, *R. v. J.S.*, 2018 ONCA 675, this court upheld a sentence of 18 years for sexual abuse of young children, making child pornography depicting that abuse, and distribution of that material.

[64] The Crown submits that the s. 12 analysis and reasonable hypothetical adopted by the Court of Appeal also apply to the case at bar. In submissions, the Crown noted:

Since *Swaby*, there has existed in this Province a curious and less than ideal state of affairs from an administration of justice point of view. Between June 20, 2019 and October 4, 2019, both the six month MMS when the Crown proceeds summarily and the one year MMS when the Crown proceeds by indictment were "still on the books" despite both these MMS's being constitutionally indefensible. Then, on October 4, 2019, the one year MMS was declared to be of no force and effect [in *Hamlin*]. Since that date there has been an MMS when the Crown proceeds summarily but no longer an MMS when the Crown proceeds by indictment.

[65] Additionally, the Crown submits that leaving the MMS "on the books" leads to uncertainty and is an inefficient use of judicial resources since the Provincial Court has no jurisdiction to make the declaration but maintains exclusive jurisdiction to hear the matter. The Provincial Court is then left to follow the same procedure as was conducted in *Cole*.

[66] With respect to making a declaration of unconstitutionality of legislation, I am guided by the following statement of Justice Bennett in *R. v. E.O.*, 2019 YKCA 9:

[38] When a court does have the ability to declare legislation unconstitutional, as long as the application is properly argued, it will not offend principles of judicial economy to engage in the analysis regardless of the effect on the individual before the court. Unlike a provincial court judge, a superior court of inherent jurisdiction or court with appropriate statutory authority can issue an order that invalidates the legislation. In *R. v. Ferguson*, 2008 SCC 6 at para. 73, and in *R. v. Nur*, 2015 SCC 15 at para. 51, the Court frowned on leaving unconstitutional provisions "on the books", as it violates the rule of law to allow unconstitutional laws to remain in force indefinitely and deprives the legislature of the important signal that a law does not pass constitutional muster. In short, it is an appropriate use of judicial resources to strike down unconstitutional mandatory minimum sentences even where the offender before the court will be unaffected by that ruling.

[67] To summarize, *Swaby* struck down a three month MMS when proceeding summarily; *Alexander* struck down a six month MMS when proceeding by indictment; *Hamlin* subsequently ruled the increase to a one year MMS was unconstitutional. I agree with the submissions of both Crown and Mr. Cole that the current six month MMS for possession of child pornography when proceeding summarily cannot be constitutionally defended.

[68] I declare the mandatory minimum sentence of six months imprisonment under s. 163.1(4) (b) of the Code to be of no force and effect.

Conclusion

[69] In the result, this Court makes the following orders:

1. Mr. Cole's appeal from sentence is dismissed.
2. There will be a declaration that the mandatory minimum sentence of six months imprisonment under s. 163.1(4) (b) of the Code is of no force and effect.

"Williams J."

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