
CANADA / JUDGMENT

R. v. H.C.T.T.

2020 BCCA 366

COURT

British Columbia Court of Appeal

DECIDED

11 December 2020

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2020 BCCA 366 R. v. H.C.T.T.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. H.C.T.T.,

2020 BCCA 366

Date: 20201211

Docket: CA45886

Between:

Regina

Respondent

And

H.C.T.T.

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

December 17, 2018 (R. v. H.C.T.T., 2018 BCSC 2341,

New Westminster Docket X080224).

Oral Reasons for Judgment

The Appellant, appearing via videoconference:

H.C.T.T.

Counsel for the Respondent:

L.Y. Bantourakis

Place and Date of Hearing:

Vancouver, British Columbia

December 11, 2020

Place and Date of Judgment:

Vancouver, British Columbia

December 11, 2020

Summary:

The appellant seeks leave to appeal his seven and one-half year sentence for incest with his biological daughter over a four-year period starting when his daughter was eleven years old.

Held: Leave to appeal granted; appeal dismissed. The sentencing judge committed no error of principle and the sentence was not demonstrably unfit.

[1] HUNTER J.A.: The appellant seeks leave to appeal, and if leave is granted, to appeal his sentence of seven and one-half years for incest and other offences against his biological daughter.

[2] On June 14, 2018, the appellant was convicted of committing incest contrary to s. 155(2), sexual interference contrary to s. 151, invitation to sexual touching contrary to s. 152, making sexually explicit material available to a person under 16 contrary to s. 171.1(1)(b), and assault contrary to s. 266 of the Criminal Code, R.S.C. 1985, c. C-46. The offences occurred over the course of several years when his daughter was between the ages of 11 and 15.

- [3] The appellant denied the offences at trial, and continues to deny the offences. He was convicted after a trial before judge alone, with reasons for conviction indexed at 2018 BCSC 1218. In convicting the appellant, the judge accepted the testimony of the appellant's daughter that beginning at age 11, her father sexually abused her on a regular basis. The abuse included fondling of his daughter's breasts and genital area, digital penetration, oral sex and many instances of vaginal intercourse. It took place over a four-year period until the appellant's daughter confided in a teacher at her school, and police were called. The evidence of the abuse included DNA evidence matching semen obtained from the daughter's vaginal wall with the appellant's DNA.
- [4] The appellant appealed his conviction, but his conviction appeal was dismissed on May 13, 2020 for want of prosecution: 2020 BCCA 151.
- [5] On December 17, 2018, the appellant was sentenced to seven-and-a-half years' imprisonment on the incest charge, with sentences on the other charges to run concurrently. After credit for time served in detention, the effective sentence was six years and three months. The sentencing judge's reasons for sentencing are indexed at 2018 BCSC 2341.
- [6] In considering the circumstances of the offender, the sentencing judge had the benefit of submissions from the appellant's previous counsel, a psychological assessment prepared by a registered psychologist, and a pre-sentence report prepared by a probation officer with Delta/West Surrey Community Corrections Offices. The judge reviewed the appellant's background and took into consideration the evidence that the appellant suffers from a number of health concerns including a heart condition and neck and cervical spine conditions, both of which may require surgery. He further noted the psychologist's opinion that the appellant fell into the borderline range of intellectual abilities and was a moderate risk to re-offend. The judge also considered a victim impact statement from the appellant's daughter, who spoke of the shame and guilt she felt from the behaviour she endured at the hands of her father.
- [7] In considering the legal parameters for sentencing, the judge considered as aggravating factors the fact that the offence took place with a person under the age of 18 years, that in committing the offence, the appellant abused his position of trust or authority in relation to the victim, and the significant impact the offence has had on the victim. He did not identify any mitigating factors, but noted the submission of the appellant's previous counsel that the appellant had support in the community and would have greater difficulty with incarceration in light of his physical health problems and low cognitive status.
- [8] Incest with a person under the age of 16 carries a minimum sentence of five years: s. 155(2) of the Criminal Code. The judge considered that the appellant bore a "high degree of moral blameworthiness" for this offence. The judge reviewed a number of previous sentencing judgments and concluded that the appropriate range of sentences for incest was between the statutory minimum of five years to a high of nine years. He expressly took into account the appellant's significant health concerns and low cognitive abilities, and concluded that an

appropriate global sentence of seven-and-a-half years was appropriate. With credit for time served in custody, the effective sentence was reduced to six years and three months.

- [9] Appellate review of sentences is subject to a highly deferential standard of review. In *R. v. Lacasse*, 2015 SCC 64, the Supreme Court of Canada repeated the importance of deference to the sentencing judge in these terms:
- [39] This Court has reiterated on many occasions that appellate courts may not intervene lightly, as trial judges have a broad discretion to impose the sentence they consider appropriate within the limits established by law: s. 718.3(1) of the Criminal Code;
- [10] The Court's judgment in *Lacasse* expressed the role of appellate courts in para. 11:

Ultimately, except where a sentencing judge makes an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.

- [11] The effect of this principle is that in order to successfully appeal a sentence, an appellant must show either that the sentencing judge committed an error of law or principle that had an impact on the sentence or that even in the absence of error by the sentencing judge, the sentence is demonstrably unfit.
- [12] The appellant, who is self-represented in this Court, has argued that the sentence is illegal and that there was an error in principle, but his submissions do not provide any support for these assertions. These submissions focus on alleged errors in his conviction, and a recitation of the health problems he suffers that were considered by the sentencing judge. The appellant has filed an additional statement updating his health challenges, but, in my view, these health issues do not support a conclusion that the judge failed to take into account all relevant factors when imposing sentence. I can see no error of law or principle that would warrant appellate intervention.
- [13] I do not consider the sentence to be demonstrably unfit, or unfit at all. The sentencing judge took guidance from this Court's judgment in *R. v. R.A.J.*, 2010 BCCA 304, which also involved multiple offences by an offender against his daughter. *R.A.J.* argued unsuccessfully before this Court that a global sentence of eight years was demonstrably unfit. In addressing an earlier decision, *R. v. O.M.*, 2009 BCCA 287, where a five-year sentence was imposed, this Court said the following:
- [26] In my respectful view, *O.M.* does not set the high end of the range for cases of this nature. This is borne out in the case law. For example, in *R. v. D.E.H.*, 1999 BCCA 526, this court refused leave to appeal a sentence of six years for a conviction of incest which occurred over seven years. Similarly, in *R. v. G.E.B.*, 2001 BCCA 236, this court refused leave to appeal a sentence of seven years in addition to 7.5 months of pre-trial custody for one count of incest involving multiple sexual offences against the accused's daughter. In *R. v. T.A.D.* (1995), 68 B.C.A.C. 236, a case involving repeated sexual offences against a young child, this court said at para. 9:

Sentences for such a series of offences of up to 12 years or more have been approved by this court but usual range is more like five to eight or nine years.

- [14] In coming to this conclusion, Bennett J.A. made comments that I would respectfully adopt for the case at bar:
- [30] The primary principle of sentencing is proportionality: a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender: s. 718.1. A sentence must not exceed what is just and appropriate given the moral blameworthiness of the offender and the gravity of the offence: *Nasogaluak* [R. v. *Nasogaluak*, 2010 SCC 6] at paras. 40-42. I cannot conceive of a more morally blameworthy act than a parent sexually offending against his or her child, particularly, as here, commencing at a young age and being repeated many times over a course of years.
- [31] In my view, the global sentence imposed by the trial judge was fit.
- [15] After the sentence in the case at bar was pronounced, the Supreme Court of Canada reinforced the seriousness with which sentencing judges should approach sentencing for sexual offences against children. In *R. v. Friesen*, 2020 SCC 9, the Court noted that when applying the proportionality principle, courts must recognize that the wrongfulness and harmfulness of sexual offences against children "impact both the gravity of the offence and the degree of responsibility of the offender": at para. 75. The Court explained the manner in which sentencing principles should be applied to these cases:
- [76] Courts must impose sentences that are commensurate with the gravity of sexual offences against children. It is not sufficient for courts to simply state that sexual offences against children are serious. The sentence imposed must reflect the normative character of the offender's actions and the consequential harm to children and their families, caregivers, and communities (see *M. (C.A.)*, at para. 80; *R. v. Morrissey*, 2000 SCC 39, [2000] 2 S.C.R. 90, at para. 35). We thus offer some guidance on how courts should give effect to the gravity of sexual offences against children. Specifically, courts must recognize and give effect to (1) the inherent wrongfulness of these offences; (2) the potential harm to children that flows from these offences; and, (3) the actual harm that children suffer as a result of these offences. We emphasize that sexual offences against children are inherently wrongful and always put children at risk of serious harm, even as the degree of wrongfulness, the extent to which potential harm materializes, and actual harm vary from case to case.
- [16] The Court went on to explain 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": at para. 114.
- [17] The Court also emphasized that "all other things being equal, an offender who abuses a position of trust to commit a sexual offence against a child should receive a lengthier sentence than an offender who is a stranger to the child": at para. 130.

[18] With this guidance in hand, I cannot say that a global sentence of seven-and-a-half years for this serious offence by a father against his own daughter is unfit. It falls well within the principles expressed by the Supreme Court of Canada for sexual offences against children and, in my opinion, is entirely fit.

[19] For these reasons, I would grant leave to appeal, but dismiss the appeal.

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

[21] DICKSON J.A.: I agree.

[22] BAUMAN C.J.B.C.: The appeal is dismissed.

The Honourable Mr. Justice Hunter

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