

CANADA / JUDGMENT

R. v. Heward

2001 BCCA 365

COURT

British Columbia Court of Appeal

DECIDED

16 May 2001

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2001BCCA0365 Citation: R. v. Heward Date: 20010516 2001 BCCA 365 Docket: CA27981 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT Before: The Honourable Chief Justice McEachern May 16, 2001 The Honourable Madam Justice Ryan The Honourable Mr. Justice Hall Vancouver, B.C. BETWEEN: REGINA RESPONDENT AND: DANNY WAYNE HEWARD APPELLANT P. Pearson appearing for the Appellant B. Johnstone appearing for the Respondent [1] RYAN, J.A.: On September 13, 2000 the appellant pleaded guilty to one count of breach of a recognizance, contrary to s. 145(3) of the Criminal Code, and to one count of sexual assault contrary to s. 271 of the Criminal Code. The appellant was sentenced by a Provincial Court judge to six months imprisonment for the first offence and eighteen months imprisonment for the second offence to be served concurrently. In addition, the Provincial Court judge imposed a three year probation order with terms, and, a s. 161 order for a period of 20 years. The appellant seeks leave to appeal the sentence, and if leave is granted asks this court to reduce the sentence of incarceration and to remove the order that was made pursuant to s. 161 of the Criminal Code.

- [2] The appellant was 38 years old when he entered into an apparently consensual relationship with the 13 year old complainant. The relationship lasted approximately six weeks. The appellant and the complainant had sexual contact including intercourse on approximately 25 occasions during this period.
- [3] The appellant met the complainant when he was living in an apartment in Campbell River. He was employed with a concrete company in Campbell River. His apartment was in close proximity to a school and it was frequented by several youths "as a place to party". Those who came to house included the appellant's niece, and it was through this niece that he met the complainant.
- [4] The relationship with the complainant came to an end only when the young girl was prohibited from seeing Mr. Heward by her parents. As a result of their relationship the appellant was arrested and charged with sexual assault. He was released on a recognizance which included as a condition that he not have any contact directly with the complainant. The appellant was later charged with breach of recognizance after he and the complainant continued to communicate with each other through a series of letters and telephone calls.

- [5] The appellant has an unrelated youth and adult criminal record. The adult record consists of a conviction for two counts of breaking and entering and theft over in 1981 for which he received a sentence of 90 days in custody with 12 months probation, and a second conviction on January 16, 1985 for forgery and uttering false documents. For the last offences he was placed on probation for a period of two years that that he received a period of two years probation.
- [6] The Provincial Court judge rejected the submission made by counsel for the appellant that a conditional sentence should be imposed in this case. The sentencing judge was of the view that the overwhelming weight of the evidence before the court established the appellant posed a risk to the community and that this sentence must, therefore, begin in jail.
- [7] The conclusion of the trial judge that the weight of the evidence before the court established that the appellant posed a risk to the community was based in part on the following paragraph from the forensic report was prepared for sentencing purposes: In terms of treatment considerations, his responses suggest that he is satisfied with himself, as he is, that he is not experiencing marked distress and that as a result he sees little need for changes in his behaviour. [8] The appellant submits that the sentencing judge erred. He says that the sentence is outside the range for a similar offence and, therefore, demonstrably unfit. Having heard the able submissions of Mr. Pearson I am not persuaded that a term of imprisonment for 18 months is unfit. The appellant encouraged and took sexual advantage of a 13 year old girl. The activity lasted over six weeks, and only ended when the child's parents discovered the relationship and in some way we were not informed of. Although the appellant has taken steps to rehabilitate himself while incarcerated, this is something the parole authorities will no doubt take into account when he becomes eligible for release on parole.
- [9] Counsel for the appellant submitted, as well, that the trial judge erred in making an order under s. 161. He says that the term of 20 years was excessive. The counsel says that the order is inappropriate with respect to the situation in the case at bar. I agree with that submission. In my view the concerns of the court with respect to the appellant's attraction to young girls may be adequately addressed by adding a provision to the probation order, in this case, for the length of the order that the appellant have no contact, directly or indirectly with any female under the age of 16 years with the exception of members of his own family.
- [10] I would, therefore, set aside the s. 161 order and modify the probation order to the extent that I have just described. I would grant leave, and allow the appeal to the extent that s. 161 order be set aside in the manner that I have described.
- [11] McEACHERN, C.J.B.C.: I agree
- [12] HALL, J.A.: I agree.
- [13] McEACHERN: C.J.B.C.: Thank you, counsel. Leave is granted and the appeal is allowed only to the extent described by Madam Justice Ryan. "The Honourable Madam Justice Ryan"

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