

CANADA / JUDGMENT

R. v. Hurley

2024 BCCA 259

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 259 R. v. Hurley

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Hurley,

2024 BCCA 259

Date: 20240712

Docket: CA49912

Between:

Rex

Respondent

And

Nicholas Nolan Roche Hurley

Appellant

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Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

The Honourable Justice Skolrood

On appeal from: An order of the Provincial Court of British Columbia, dated
May 22, 2024 (sentence) (R. v. Hurley, North Vancouver Docket 68824).

Counsel for the Appellant:

B.R. Anderson

Counsel for the Respondent:

S.E. Elliott, K.C.

Place and Date of Hearing:

Vancouver, British Columbia

June 20, 2024

Place and Date of Judgment:

Vancouver, British Columbia

July 12, 2024

Written Reasons by:

The Honourable Justice Skolrood

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

Summary:

The appellant appeals a sentence of two years' imprisonment for sexual assault on the grounds that the sentencing judge failed to appreciate how his mental health disorders and childhood trauma lessened his moral culpability for the offence. The appellant argues that a conditional sentence is the more proportionate and reasonable sentence and the sentencing judge erred by imposing a custodial sentence.

Held: Leave to appeal granted and appeal dismissed. The judge committed no reviewable error in concluding that the appellant's mental health condition and childhood trauma had no impact on his moral culpability for the offence. The appellant has not demonstrated that the sentence imposed, which falls at the lower end of the applicable range, is unfit.

Reasons for Judgment of the Honourable Justice Skolrood:

- [1] On December 19, 2022, Mr. Hurley was convicted of one count of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46 in connection with an incident that occurred on December 15, 2020. The reasons for conviction of Judge Challenger are indexed at 2022 BCPC 346.
- [2] On May 22, 2024, Mr. Hurley was sentenced to two years' imprisonment, with reasons for sentence indexed as R. v. Hurley (22 May 2024), North Vancouver 68824-1 (B.C.P.C.).
- [3] The appellant now seeks to appeal that sentence. He asks this Court to substitute a conditional sentence order ("CSO") of two years less one day, followed by probation.

Factual Background

- [4] The background facts are canvased in the reasons for conviction as well as the reasons for sentence and, as such, I will not repeat them in detail.
- [5] The complainant and the appellant worked together at a hotel in Whistler, B.C. The appellant's living situation was not working out and the complainant invited him to move into the house that she shared with other employees. The complainant testified that after the appellant moved in, some of his behaviour made her uncomfortable. It appeared that he had developed a romantic interest in her, which was not reciprocated.
- [6] On the evening of December 14, 2020, there was a party at the house in which the complainant and the appellant lived. In the reasons for sentence, Challenger P.C.J. described the relevant events of that night:
- [9] At the end of the evening, the victim placed her sobriety at a level of 7 out of 10 with 0 being sober and 10 being "passed out drunk". [The appellant] was not consuming alcohol.
- [10] Around 1:00 a.m., the victim went upstairs to her room. [The appellant] texted her asking if he could talk to her. She told him to meet her in her room. Her room was very small with a sloped roof. They sat on the bed chatting. They spoke about his intention to attend an alcohol rehabilitative program. He also told her he was having trouble sleeping.
- [11] The victim was very tired and intoxicated and wanted to sleep. Because she felt sorry for him, she told [the appellant] he could sleep in her room for the night.
- [12] She lay down closest to the wall with her back to [the appellant]. She fell asleep and woke up as he was rolling her over to face him. He was kissing her. She pulled her head back and said "No - we are just friends" and he responded "Don't you think I know you don't want anything more than friendship?" She rolled back over and went to sleep.
- [13] She woke up on her back with the feeling of his weight against her side and his hand in her pants around her genital area. He then began removing her sweat pants and she said "No. Stop. Please." He responded saying "Look at you. How can I stop?" She repeated saying no, stop and please.

- [14] He pulled her underwear and sweatpants down to her knees and put his fingers in her vagina. She could feel his knuckles against the opening to her vagina causing her pain. He then put his mouth on her genitals as she continued to say no and asked him to stop. He asked if he could get a condom. She said no.
- [15] Her next recollection was feeling his body weight on top of her as he attempted intercourse. He was not able to penetrate her vagina because she was not lubricated. She recalled thinking her body was protecting itself.
- [16] Her next memory was waking up alone the next morning.
- [7] In her reasons for conviction, the judge described the central issue as one of credibility, specifically whether the complainant consented to the sexual activity as described by the appellant, or whether she did not consent as she testified (at para. 99). The judge concluded:
- [111] I find on all the evidence that I do accept the Crown has proved beyond a reasonable doubt that the accused engaged in sexual activity with the complainant contrary to her clear and verbally communicated lack of consent. I find the accused guilty.

Reasons for Sentence

- [8] In her reasons for sentence, Challenger P.C.J. made the following findings:
- a) The absence of penile penetration did not reduce the need to denounce the appellant's conduct or deter others who might violate the bodily integrity of another person. Nor did it constitute exceptional or unique circumstances supporting the granting of a CSO (at paras. 92-93);
 - b) The appellant's ADHD and related social and learning issues helped to explain to a limited extent how he failed to appreciate that his romantic feelings for the complainant were not reciprocated. However, his ongoing attempt to cultivate a romantic relationship was not a manifestation of those conditions, rather he was attracted to her in a typical romantic and sexual way (at para. 94);
 - c) The appellant did not fail to understand the complainant's clearly communicated lack of consent; he intentionally chose to disregard it in order to satisfy his own sexual and romantic desires (at para. 95);
 - d) While there was some concern, particularly expressed by his family, that the appellant would not cope well in a custodial institution due to psychological and emotional issues, the evidence did not establish that he would suffer any excessive hardship exceeding the normal consequences of a conviction which results in a term of imprisonment (at paras. 101, 105); and
 - e) The appellant had experienced significant "collateral consequences" as a result of his conviction for a sexual offence, including social stigmatization, the loss of his ability to coach soccer as a career and ongoing anxiety and depression (at para. 109).

[9] In the light of all of the evidence and surrounding circumstances, the judge concluded that a CSO "would not be proportionate to the gravity of the offence and the [appellant's] degree of responsibility". In the judge's view, a custodial sentence was required "as there is a need to instill our basic communal values and to demonstrate that our society views the nature of such crimes as abhorrent" (at para. 111).

[10] The judge therefore imposed the sentence of two years' imprisonment.

On Appeal

[11] On appeal, the appellant submits that the judge erred in:

- a) failing to consider how Mr. Hurley's mental health disorders diminished his moral blameworthiness; and
- b) failing to give weight to Mr. Hurley's own childhood abuse as a mitigating circumstance.

The appellant submits that on the basis of these errors, the judge further erred in failing to impose a CSO.

Standard of Review

[12] The standard of review on sentence appeals is well established. It is a highly deferential standard. An appellate court will interfere only where it is established that there was an error in principle that materially affected the sentence, or the sentence is shown to be demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Friesen*, 2020 SCC 9 at para. 26; *R. v. Maslehati*, 2024 BCCA 207 at para. 46.

Discussion

[13] Before turning to the specific grounds of appeal raised by the appellant, it is useful to address the principles governing sentencing for sexual assault offences and the availability and appropriateness of conditional sentences. Conditional sentences have been available in respect of convictions for sexual assault since an amendment to the Criminal Code was brought into force on November 17, 2022 (see *An Act to Amend the Criminal Code and the Controlled Drugs and Substances Act*, S.C. 2022, c. 15).

[14] Since that time, this Court has considered CSOs in the context of adult sexual assault convictions prosecuted by way of indictment:

- a) In *R. v. T.H.*, 2024 BCCA 123, the Court dismissed a Crown appeal from a conditional sentence of two years less a day with punitive conditions, three years' probation and a restitution order;
- b) In *R. v. Henry*, 2024 BCCA 132, the Court dismissed a defence appeal from an order of imprisonment of two years less a day and declined to substitute a conditional sentence; and

- c) In Maslehati, the Court allowed a Crown appeal and set aside a conditional sentence, substituting a sentence of 28 months' imprisonment.
- [15] In all three cases, the Court stated that a conditional sentence will "rarely" be appropriate for sexual assaults with aggravating circumstances, such as penile penetration: T.H. at paras. 6, 60; Henry at para. 32; Maslehati at para. 11.
- [16] This Court has also confirmed that the generally applicable range of sentences for "serious sexual assaults" is two to six years: R. v. G.M., 2015 BCCA 165 at para. 22; Henry at para. 35; Maslehati at para. 58.
- [17] While the court in G.M. did not define the term "serious sexual assault", Justice Dewitt-Van Oosten in Maslehati had this to say:
- [72] It is now generally recognized that all sexual assaults are "serious", irrespective of the nature of the physical acts involved. As aptly noted in R. v. Merasty, 2023 SKCA 33 at para. 23: "[n]o matter what form it takes, a sexual assault is a forceful subjection of the victim to their assailant's sexual desires" (emphasis added). Writing for the Court in R. v. A.J.K., 2022 ONCA 487 [A.J.K.], Associate Chief Justice Fairburn described all forms of sexual assault as "serious acts of violence" because: "They reflect the wrongful exploitation of the victim whose personal autonomy, sexual integrity, and dignity is harmfully impacted while being treated as nothing more than an object": at para. 74. These comments are consistent with the Supreme Court of Canada's more recent jurisprudence on sexual assault, including Kirkpatrick at para. 51 (set out above).
- [73] Accordingly, rather than describe some sexual assaults as "serious" and other sexual assaults as something other than that, I consider it constructive when distinguishing between cases for purposes of sentencing to focus on the circumstances surrounding the offence at issue, including the nature of the sexual contact, its duration, the context in which it occurred, and the actual and reasonably foreseeable harms that flowed from it. The more aggravating the circumstances, the objectively graver the offence.

[Emphasis in original.]

- [18] Justice Dewitt-Van Oosten went on (at para. 74) to identify a number of circumstances that may be found to elevate the already inherent seriousness of a sexual assault. Of particular relevance to this case are:

- highly invasive sexual conduct;
- taking advantage of incapacity;
- persistence in the face of communicated non-consent; and
- the violation occurred in the complainant's home.

- [19] Justice Dewitt-Van Oosten also observed:

- [83] the penalties imposed for sexual assault against adults must reflect society's contemporary understanding of the harmfulness and the wrongfulness of sexual violence, generally. It is not enough to simply acknowledge these harms. The sentences must actually take them into account, recognizing that the harmfulness and the wrongfulness of sexual assault impact both the gravity of the offence and the offender's personal responsibility: Friesen at para. 75. See also, *R. v. Kolola*, 2021 NUCA 11 at paras. 28, 36, and the comments of Justice Trotter in *R. v. Brown*, 2020 ONCA 657 at para. 59.
- [84] I appreciate that sentencing ranges represent guidelines only. It is trite law that they are "not hard and fast rules". Consequently, a judge's decision to depart from a range will not, standing alone, constitute an error in principle: Friesen at para. 37; Parranto at para. 36.
- [85] Because of the individualized nature of sentencing, there will be cases in which a non-penitentiary term for an adult sexual assault with one or more aggravating circumstances is nonetheless found to be justified. A factual finding of diminished moral blameworthiness or compelling mitigation may provide a sound basis to depart from the G.M. range in prosecutions by indictment.
- [86] Sentencing ranges convey an appreciation of the gravity of the offence. With the applicable range in mind, the judge must then "individualize the sentence in a way that accounts for both aspects of proportionality: the gravity of the offence and the offender's individual circumstances and moral culpability": Parranto at para. 44, emphasis added.
- [87] An offender's "individual circumstances" may render a custodial disposition significantly harder for them to bear than for someone else: *R. v. Hills*, 2023 SCC 2 at paras. 135, 165. This can have a mitigating effect at sentencing.
- [88] An offender's "individual circumstances" might also reduce their moral culpability. For example, the evidence at sentencing may establish "mental disabilities that impose serious cognitive limitations" and "manifestly [interfere] with the offenders' ability to reason and [compromise] their volitional and decision-making capacity": G.J.M. at paras. 53-58. See also Ellis at para. 81.

[Emphasis in original.]

Issue 1: Did the sentencing judge err in failing to consider how the appellant's mental health diminished his moral blameworthiness?

- [20] The appellant submits that the judge failed to grapple with the impact that his mental disorders had on his moral culpability. He argues that the judge diminished the impact of these disorders by finding that while they may assist to a limited degree in explaining how he failed to recognize that his romantic feelings were not reciprocated, his continued attempts to cultivate a romantic relationship with the complainant was not a manifestation of those disorders (at para. 94).

- [21] Further, the appellant submits that the judge erred when she stated that he "does not suggest that his moral culpability should be found to be reduced due to his ADHD or learning challenges" (at para. 67). The appellant says that no such concession was made and that this error tainted the judge's assessment of his mental condition.
- [22] I am unable to accede to this ground of appeal. Contrary to the appellant's submission, even though she misstated his position, it is apparent that the judge did engage with the issue of the appellant's mental disorders and moral culpability. As stated above, she rejected the argument that the appellant's ongoing attempts to cultivate a relationship with the complainant were a manifestation of his mental disorders. With respect to the offending conduct itself, the judge concluded that the appellant had not failed to understand the complainant's clearly communicated lack of consent; rather, he intentionally chose to disregard it (at para. 95). It is clear the judge found that the appellant's decision to disregard the complainant's communicated lack of consent was driven by his desire to satisfy his own sexual and romantic desires. The appellant's ADHD and related learning and social issues thus had little or no bearing on the appellant's moral culpability for the specific conduct that grounded his conviction.
- [23] That conclusion was open to the judge on the evidence. She considered the psychological evidence presented by the appellant in the form of a (dated) psychoeducational report prepared by Dr. Goodall; a psychological assessment undertaken by a psychologist, Dr. Thomas; a risk assessment by a forensic psychiatrist, Dr. Scott; and a letter from a counsellor, Mr. Power (at paras. 75-88). The judge attached minimal weight to some of the evidence, for example that of Dr. Goodall and Mr. Power, because the opinions offered lacked a proper evidentiary foundation (at paras. 84, 87). The judge further found that the opinions of Dr. Scott and Dr. Thomas did not establish that the appellant was likely to experience heightened risks or excessive hardship if he was subject to a term of imprisonment (at paras. 100, 105).
- [24] The appellant also argues that the judge's findings in the reasons for sentence with respect to the impact of his mental disorders are inconsistent with the findings in the reasons for conviction that he was "infatuated" with the complainant and that he "interpreted her behaviour to accord with his feelings and beliefs rather than in an objectively reasonable manner" (reasons for conviction at para. 105). I do not agree that these findings are inconsistent. Rather, they support the judge's conclusion that while the appellant may have misinterpreted the fact that his romantic feelings were not reciprocated, he did not misunderstand the complainant's clearly communicated lack of consent and instead chose to ignore it.
- [25] In my respectful view, the appellant has not demonstrated any reviewable error on the part of the judge in coming to this conclusion.

Issue 2: Did the judge err in ignoring the appellant's own sexual victimization?

- [26] There was evidence before the judge that following the appellant's parents' separation when he was very young, his father's new partner sexually abused him. He was also subject to physical and verbal abuse by his father and the partner. Both Dr. Scott and Mr. Power identified that childhood abuse as a possible contributing factor to the appellant's offending conduct.
- [27] The judge found that it was unclear from the evidence what, if any impact, the consequences of the childhood abuse may have had on the degree of responsibility for the offence (at para. 68). The appellant submits that the judge erred in failing to recognize that this "compelling personal circumstance", when combined with other mitigating circumstances, diminished his moral culpability.
- [28] As with the evidence concerning the appellant's mental health, the judge was clearly aware of the childhood trauma experienced by the appellant. She engaged with the issue and found that the evidence did not establish that the trauma played a role in the offending conduct. The judge cited this Court's decision in *R. v. G.J.M.*, 2024 BCCA 82 where Justice Dickson underscored the necessity of specific evidence explaining the relationship between an offender's personal circumstances, including mental disorders, and the offending conduct: at paras. 57-58, citing *R. v. Badhesa*, 2019 BCCA 70 at para. 43 and *R. v. Nystrom*, 2023 BCCA 232 at para. 22.
- [29] The appellant has not demonstrated any reviewable error in the judge's finding and I would therefore not accede to this ground of appeal.

Fitness of the sentence

- [30] While the appellant does not directly challenge the fitness of the sentence imposed, he argues that a CSO is a more proportionate and reasonable sentence taking account of his diminished moral culpability given his mental health condition and traumatic childhood, factors that again he says the judge failed to consider adequately.
- [31] As I have found, the judge did not err in her consideration and treatment of the appellant's personal circumstances. Rather, she engaged in an individualized sentencing analysis based on her assessment of the evidence as a whole, including the appellant's circumstances and the governing principles of sentencing. Ultimately, she imposed a sentence of two years' imprisonment, which is at the very lowest end of the range established by this Court for sexual assault against an adult that was prosecuted by indictment and for which there were aggravating circumstances. The judge's analysis accorded with the analysis required by s. 742.1 of the Criminal Code as explained by this Court in *Maslehati* at para. 57, citing *R. v. Fice*, 2005 SCC 32.
- [32] In my respectful view, the appellant has not demonstrated that the sentence imposed is unfit.

Conclusion

[33] I would grant the appellant leave to appeal sentence but, for the reasons given, I would dismiss the appeal.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Abrioux"

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