
CANADA / JUDGMENT

R. v. Morin

2019 BCSC 1399

COURT

Supreme Court of British Columbia

DECIDED

2 August 2019

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2019 BCSC 1399 R. v. Morin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Morin,

2019 BCSC 1399

Date: 20190802

Docket: 44614-2; 44614-3-A

Registry: Penticton

Regina

v.

Robert Russel Joseph Morin

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Before: The Honourable Mr. Justice Cullen

Oral Reasons for Sentence

Counsel for the Crown:

K.A. Froehlich

Counsel for the Offender:

J.H. Pennington

Place and Date of Hearing:

Penticton, B.C.

August 2, 2019

Place and Date of Judgment:

Penticton, B.C.

August 2, 2019

[1] THE COURT: Following a trial, at which M.F., a 15-year-old girl, who described her interactions with the offender, testified and at which certain text communications, including digital photographs, were admitted in evidence, I convicted Mr. Morin of three counts as follows:

Count 1

Robert Russel Joseph MORIN, between August 1, 2016 and October 31, 2016, inclusive, at or near Penticton, in the Province of British Columbia, did, for a sexual purpose, touch, directly or indirectly, with a part of his body or with an object, the body of M.F., a person under the age of sixteen years, contrary to Section 151 of the Criminal Code.

Count 2

Robert Russel Joseph MORIN, between August 1, 2016 and October 31, 2016, inclusive, at or near Penticton, in the Province of British Columbia, did sexually assault M.F., contrary to Section 271 of the Criminal Code.

Count 3

Robert Russet Joseph MORIN, between August 1, 2016 and October 31, 2016, inclusive, at or near Penticton, in the Province of British Columbia, did, for a sexual purpose, invite, counsel or incite M.F., a person under the age of sixteen years, to touch, directly or indirectly, the body of Robert Morin, contrary to Section 152 of the Criminal Code.

[2] In the wake of submissions from Crown counsel and counsel for Mr. Morin, I entered a conditional stay on Count 2, following the principles in *R. v. Kienapple*, [1975] 1 S.C.R. 729. I had acquitted the offender of a fourth count of communicating by means of telecommunication for the purpose of facilitating the commission of an offence under ss. 151, 152, or 172.1 of the Criminal Code.

- [3] The circumstances giving rise to the offences occurred in October of 2016, when M.F. was 13 years old. She and a friend, Z.M., had been picked up by the offender and a friend in Kelowna, where M.F. and Z.M. lived. They were taken to Penticton, where the offender and his friend were living in a motel room. M.F. and Z.M. stayed with the offender and his friend for approximately seven days in the motel room.
- [4] During that week, Mr. Morin had vaginal intercourse with M.F. three times and anal intercourse with her one time. There is some evidence that during the anal intercourse M.F. received a tearing type injury. There was no medical evidence of the nature or extent of that injury or whether it had any long-lasting consequences.
- [5] The communications which led to the events between the offender and M.F. occurred via Facebook Messenger and involved some sexting. The messages included Mr. Morin sending M.F. a photograph of his penis and her sending him photographs of herself, on one occasion in lingerie, and she also thought she sent him a picture where she was naked from the waist up but covering her breasts with her hands.
- [6] The interactions between the offender and M.F. concluded when the police arrived and took M.F. and Z.M. away from the motel after approximately, as I have said, seven days.
- [7] M.F. ended up in the Kelowna General Hospital and eventually was sent to the psychiatric ward in that hospital, where she stayed for the next 30 days or so. She had had ongoing difficulties prior to the encounter with the offender and had run away from home some 35 times in total. She did not ultimately return to live with her mother when she was released from the hospital. She did, however, upon her release, resume her communications with the offender via Messenger Facebook, which communications were noticed and captured by her mother.
- [8] In her evidence, M.F. expressed reluctance at having to testify. She did not express what her reaction was to the events which occurred during October 2016 with the offender.
- [9] M.F.'s mother, who testified at trial, provided some information for the pre-sentence report on behalf of her daughter as follows:

She advises her daughter was at a vulnerable time in her life running away from home and using methamphetamine. She reports at the time she lacked maturity and insight into the severity of sexual relations. She states her daughter now realizes why the behaviours of Mr. Morin were wrong.

Prior to testifying, M.F.'s mother reports some psychological impacts on her daughter of having to be in Court sharing her experience and being confronted by other individuals to not "rat" on Mr. Morin. M.F.'s mother reports her daughter is now clean, going to school, in counselling, and seeing medical professionals. She would like the protective condition for her daughter.

- [10] At the time of his offending, the offender had a relatively minor criminal record. He had been convicted in Lloydminster, Saskatchewan of driving while having a blood alcohol reading of over 08, mischief under \$5,000, and taking a motor vehicle without consent. All those convictions occurred on March 7, 2011.
- [11] When these charges were laid in 2017, the offender was admitted to bail. While on bail he committed the offence of assault on February 19, 2018 and offences of escaping lawful custody, breach of an undertaking, and breach of a probation order on October 10, 2018. He also committed the offence of failing to comply with the conditions of his bail by having contact, directly or indirectly, with a person or persons under the age of 16.
- [12] He pleaded guilty to that latter charge before me when I agreed to sit as a judge of the Provincial Court, pursuant to s. 7 of the Provincial Court Act, R.S.B.C. 1996, c. 379. That offence relates to his living at a residence, while on a bail, with a person who had children under the age of 16. There was, apparently, some incidental contact between Mr. Morin and those children, in violation of the terms of his bail.
- [13] The offender was detained in custody on the latter charge following his arrest on January 14, 2019. He has been in custody, therefore, for 201 days and is entitled to credit at a ratio of 1:1.5 days, meaning that he is entitled to credit for 302 days in custody.
- [14] The Crown takes the position that the range of sentence for offences of this nature are from two years to six years and that an appropriate sentence, in the circumstances of this case, is four to five years. The Crown cites the fact that the victim was only 13, she was in a vulnerable position, she was taken away from her community, that there was both anal and vaginal penetration, that she suffered some physical injury, and that she also has been affected both emotionally and psychologically as a result of the offence.
- [15] The Crown acknowledged that, since Mr. Morin is indigenous, the provisions of s. 718.2(e) must be considered, but submitted that s. 718.01, 718.2(a)(ii), and 718.2(a)(iii.1) are applicable and require a sentence that emphasizes denunciation and deterrence over other principles of sentencing. Those sections read as follows:

718.2(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

718.01 When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

718.2(a)(ii) evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner,

718.2(a)(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation,

- [16] Crown counsel noted that both ss. 151 and 152 have maximum penalties of 14 years; and while the mandatory minimum in respect of s. 151 has been declared unconstitutional, the mandatory minimum of one year in respect of s. 152 has not.
- [17] Mr. Froehlich, for the Crown, relied on a number of cases in support of his contention that four to five years is the appropriate range of sentence, in light of the circumstances of this case. In particular, he cited *R. v. Wesley*, 2014 BCCA 321; *R. v. Worthington*, 2012 BCCA 454; *R. v. Yanulik*, 2018 BCSC 1361; *R. v. Drinkwater*, 2015 ONSC 3513; and *R. v. Thomas*, 2017 BCSC 982.
- [18] The Crown acknowledged that this is not a breach of trust situation, as was the case in *Worthington* and *Wesley*, but submits that the age and vulnerability of the victim, M.F.; the fact that she was taken away from her community; and the fact that there was sexual intercourse, as well as anal intercourse, causing some harm to her, are all factors that militate in favour of a sentence near the higher end of the range.
- [19] For his part, the offender seeks a sentence in the range of two years, which is the lower end of the range, less the amount that he is entitled to be credited for, that is 302 days, leaving a sentence of 428 days, which would then enable a probation order to be imposed to facilitate the necessary rehabilitation for the offender to take up a productive life.
- [20] The offender had submitted, through Mr. Pennington, that despite a difficult upbringing (first by alcoholic biological parents and then by alcoholic stepparents, from whom he received physical and emotional abuse) and despite his own struggles with drugs and alcohol, the offender has managed to find and keep employment and to live a reasonably productive life, apart from the offences which he faces currently. Mr. Pennington submitted that the offender was "not lazy" and, thus, able to pursue gainful employment, which, in the long run, would help him to rehabilitate himself.
- [21] Mr. Pennington submitted that the victim in this case clearly had some significant difficult issues that she was struggling with quite apart from her contact with the offender, having run away from home about 35 times. He submitted that her difficulties cannot all be "laid at the feet" of the accused, while granting that the offence is nonetheless a serious one that undoubtedly had some impact on the victim.
- [22] Counsel for the offender relied on Mr. Justice's Romilly's decision in *R. v. B.S.B.*, 2008 BCSC 1526, at para. 36, where he laid out the factors to consider in sentencing in a case such as this. The relevant portions of that paragraph are as follows (I will leave out the citations in support of the factors that Mr. Justice Romilly laid out):
- The nature and intrinsic gravity of the offences which is affected by, in particular, the use of threats, violence, psychological threats and manipulation, etc .

- The frequency of the offences and the time period over which they were committed.
 - The abuse of trust and the abuse of authority which are involved in the relationship between the offender and the victim.
 - The disorders underlying the commission of the offences: the offender's psychological difficulties, disorders and deviancy, intoxication, etc.
 - The offender's previous convictions: proximity in time to the offence charged and the nature of the previous offences.
 - The offender's behaviour after the commission of the offences: confessions, collaboration in the investigation, immediate involvement in a treatment programme, potential for rehabilitation, financial assistance if necessary, compassion and empathy for the victims (remorse, regret, etc.).
 - The time between the commission of the offences and the guilty verdict as a mitigating factor depending upon the offender's behaviour (the offender's age, social integration and employment, commission of other offences etc.).
 - The victim: gravity of the attack on his or her physical or psychological integrity reflected by, in particular, age, the nature and extent of the assault, the frequency and duration of the assault, the character of the victim, his or her vulnerability (mental or physical handicap), abuse of trust or authority, lingering effects, etc.
- [23] The offender submitted, through counsel, that, in light of those factors, a sentence near the low end of the range is appropriate. In particular, counsel for the offender submitted that there was, in this case, no coercive violence. That is, no violence beyond that which was intrinsic to the acts themselves.
- [24] He submitted that the duration and number of incidents comprising the offending (that is four times over seven days) is, by contrast with other cases, which span months or even years, relatively short.
- [25] He submits that there was no abuse of authority or breach of trust in the context of this case.
- [26] He acknowledges that there are no significant disorders underlying the accused's offending that can be discerned.
- [27] He submits that the prior convictions of the accused are not germane and not close in time to the offences before me.
- [28] He submitted that the offender's behaviour after the attack was not a positive sign, in the sense that he attempted to carry on his relationship with the victim after it was ended by the intervention of the police. He submitted, however, that the lapse of time between the verdict and the offence is not a factor one way or the other.

- [29] He submitted that the gravity of the attack on the victim's psychological and physical integrity is a factor to consider, but submits that much of what had an impact on the victim pre-existed the accused's involvement with her.
- [30] Mr. Pennington submits that these factors, coupled with the need to consider the offender's aboriginal status and the points of distinction between this case and the cases cited by the Crown, all militate in favour of a sentence at the low end of the range, and, in his submission, a sentence of two years, before taking account of the credit due to the offender for the time that he has spent in custody since January of this year, are appropriate.

CONCLUSION

- [31] This is a case where the offender has been convicted of two counts of sexual interference and invitation to sexual touching, contrary to ss. 151 and 152 respectively. Those are serious offences, providing for a maximum penalty of 14 years in each case. The particular offences in this case are at the most serious end of the spectrum, involving sexual intercourse three times and one occasion where the offender penetrated the complainant anally, causing her an injury in the process. At the time of the offence, the victim was only 13 years old, while the offender was 23.
- [32] This is not a case involving coercion by violence, threats of violence, or weapons. It did not involve undue manipulation or grooming. It did not involve a breach of trust or an abuse of authority. The extent of the harm to the victim is difficult to gauge, but she clearly was, at the time of the offending, young, vulnerable, and susceptible to being damaged by the offender's actions.
- [33] The offender does not have a significant or relevant prior record. He has apparently had a difficult childhood of his own and no appreciable advantages to enable him to rise above the issues he faced during his formative years. I accept that his aboriginal heritage is a significant factor to be taken into account. I also accept that, in cases of significant violence or seriousness, that factor recedes in importance to the need for denunciation and deterrence. I accept that denunciation and deterrence are paramount considerations in a case of this sort.
- [34] In my view, this case is distinguishable in some ways from the cases relied on by the Crown. In Wesley, for example, the victim was seven or eight years old and Wesley was in a position of authority or trust in relation to that victim. In Yanulik, the offender groomed and manipulated a very troubled 13-year-old girl. He also showed her a knife at one stage in the course of their relationship. In Thomas, there was similar manipulation and grooming.

- [35] In this case, by contrast, the offender acted opportunistically and without regard to the victim's age or vulnerability. He took full advantage of her for his own gratification, but it could not be said that he was sophisticated or premeditated in his actions or engaged in what has been described in other cases as manipulation and grooming. I have already noted that he did not, in this case, threaten or display any coercive violence towards the victim.
- [36] I cannot make specific findings as to the consequences to the victim in this case, but it seems highly likely that the offender's activities will have, in the longer term, a serious effect on her psychic well-being and her sense of integrity.
- [37] In my view, a sentence of two years does not fully take account of the seriousness of this case, while a sentence in the range of four to five years places it in the company of cases involving a greater degree of moral complicity.
- [38] In my view, a sentence of three years is an appropriate sentence. I accept that the accused is entitled to be granted credit of 302 days, due to the time he has spent in custody since the beginning of this year. That leaves a sentence of 793 days or two years and 63 days.
- [39] I will make the ancillary orders sought by counsel for the Crown.
- [40] Is there anything further, counsel?
- [41] MR. FROEHLICH: No, My Lord.
- [42] MR. PENNINGTON: No.
- [43] THE COURT: All right. Thank you.
- [44] THE CLERK: Order in court. All rise.
- [PROCEEDINGS ADJOURNED]
- [PROCEEDINGS RECONVENED]
- [45] THE COURT: I realize that I had not specifically addressed the issue of what sentence was going to be imposed with respect to the breach count. I accept that a month is appropriate. However, the month will be served concurrently with the sentence which I have imposed with respect to Counts 1 and 3 and those counts are to be concurrent one with the other. All right?
- [46] MR. FROEHLICH: Thank you, My Lord.
- [47] THE COURT: Thank you.
- [48] THE CLERK: Order in court. All rise.

The Honourable Mr. Justice A.F. Cullen

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