
CANADA / JUDGMENT

R. v. Power

2010 BCCA 21

COURT

British Columbia Court of Appeal

DECIDED

14 January 2010

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2010 BCCA 21 R. v. Power

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Power,

2010 BCCA 21

Date: 20100114

Docket: CA037574

Between:

Regina

Respondent

And

Harold Garrett Power

Appellant

RESTRICTION ON PUBLICATION: AN ORDER HAS BEEN MADE IN THIS CASE PURSUANT TO SECTION 486.4 OF THE CRIMINAL CODE THAT PROHIBITS ANY INFORMATION THAT COULD IDENTIFY THE COMPLAINANT[S] OR WITNESS[ES] BEING PUBLISHED, BROADCAST OR TRANSMITTED.

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Levine

The Honourable Mr. Justice Lowry

On appeal from: Supreme Court of British Columbia, October 14, 2009

(R. v. Power, 2009 BCSC 1514, Vancouver Docket 24239)

Oral Reasons for Judgment

Appellant appearing In Person (in custody):

Counsel for the (Crown) Respondent:

S.J. Brown

Place and Date of Hearing:

Vancouver, British Columbia

January 14, 2010

Place and Date of Judgment:

Vancouver, British Columbia

January 14, 2010

- [1] LOWRY J.A.: The applicant seeks leave to appeal and, if granted, appeals a sentence of 18 months imprisonment followed by two years probation imposed on him by a Supreme Court judge before whom he was tried and found guilty of one count of sexual exploitation under s. 153(1)(a) as it stood at the time. He contends the sentence is unduly harsh and the judge erred in not giving proper consideration to a conditional sentence order. He also contends two terms of the probation order are unnecessarily restrictive. The reasons given for the sentence imposed are indexed as 2009 BCSC 1514.
- [2] The applicant is a 53-year-old criminal lawyer who represented the complainant in Youth Court proceedings on various occasions during 2004. The complainant was, at the time of the offence, an aboriginal boy of 14 years of age. The applicant encountered the complainant coincidentally one evening in August of that year after the complainant had been thrown out of his house and was in need of a place to stay. The applicant invited him to drive around with him for a time and then he invited him to spend the night at his apartment. The judge described what happened as follows, referring to the complainant as "J.I.":
- [8] Mr. Power took J.I. to his penthouse suite in New Westminster. In the living room of the suite was a pool table and mini-fridge containing beer and other alcoholic drinks. Mr. Power invited J.I. to play pool and offered him a cooler. J.I. accepted. He drank two coolers at Mr. Power's invitation. He had never consumed alcohol before that night. Mr. Power then told J.I. that his brother was visiting so J.I. would have to sleep in Mr. Power's bed. J.I. agreed.

- [9] Mr. Power put on a pornographic video in the bedroom. J.I. remained dressed in his soccer pants and t-shirt. Mr. Power got undressed and into bed. After watching some of the video, Mr. Power invited J.I. to masturbate. J.I. declined. Mr. Power then put his hand down J.I.'s soccer pants, following which he performed oral sex on J.I. J.I. was too shocked and surprised to resist. He recalled ejaculating and then going to sleep.
- [10] The next morning Mr. Power gave J.I. money for breakfast and asked him to leave. No such encounters occurred again. Neither spoke of the incident subsequently. Mr. Power continued to represent J.I. from time to time for approximately 18 months. That representation ended in the spring of 2006, when J.I. went to police at the urging of adults he knew and gave a statement concerning the sexual interaction with Mr. Power in August of 2004.
- [3] The judge then outlined the applicant's background which reveals that he has for many years suffered from alcohol abuse and has long had a sexual attraction to adolescents. The judge reviewed and quoted the more pertinent passages of the psychological assessment outlined in a pre-sentence report furnished to the court. She stated in particular:
- [22] Dr. Hervé noted that despite Mr. Power's assessed risk level, treatment needs, and treatment prognosis, based on his recent community functioning he appeared to be a good candidate for community supervision.
- [4] After reviewing the positions taken by the Crown and the defence, the judge discussed the governing principles and then turned to consider a conditional sentence having regard for the prerequisites established in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61. She considered that, although it was said the applicant may be an appropriate candidate to serve his sentence in the community, he was assessed as a low to moderate risk to re-offend, which gave her concern that he continues to be a risk to the community. But she considered the greatest difficulty in imposing a conditional sentence lay in the requirement that it had to be consistent with the principles and purposes of sentencing. She recognized that, given the nature of the offence, involving as it did the abuse of a young person, primary consideration was to be given to the objectives of denunciation and deterrence. The principle is now codified in s. 718.01 of the Code. The judge expanded on the importance she attached to the unique position of trust and dependency the applicant held as the complainant's lawyer in concluding:
- [52] ... that a fixed term of incarceration is necessary to bring home the significance of the offence and the consequences that will be visited on those who commit such offences.
- [5] The applicant says the judge failed to give adequate reasons for refusing to impose a conditional sentence and failed to give proper effect to the psychological assessment that he appeared to be a good candidate for community supervision. But I see no merit in what the applicant says in this regard. As I have outlined them, the judge's reasons as to why she considered the primary objectives of sentencing would not be adequately addressed by other than a term of incarceration are clear and quite complete. She did not overlook the

psychological assessment but dealt specifically with whether community supervision would be appropriate. As indicated, she had concern the applicant posed a continuing risk to the community. She said that on that aspect of the evidence it was "a very close call" but ultimately rejected a conditional sentence on the basis of the mandated objectives that she considered required incarceration. I see no basis on which this Court should interfere with what was an exercise of the judge's discretion: *R. v. Proulx* at paras. 123-126 and *R. v. Labrash*, 2006 BCCA 357 at paras. 21-22.

[6] After deciding a term of incarceration was warranted, the judge turned to consider the range of sentences for offences of this nature and commented on the governing authority. She noted the applicant had no criminal record but said there was no guilty plea or expression of remorse to mitigate the sentence. She concluded:

[57] I have already outlined the factors which, in my view, require a definite prison term. The sexual assault took place on one occasion only, but that cannot surely be viewed as a mitigating factor. There was nothing impulsive about the assault. There was guile and manipulation involved. It was a very serious and highly intrusive assault. Mr. Power committed fellatio on J.I. Before that, he plied him with alcohol and showed him pornographic videos. J.I. was sexually inexperienced before that time and, most importantly, of course, Mr. Power had acted as J.I.'s lawyer.

[58] In this case, as noted, the sentencing principles require the greatest emphasis on denunciation and deterrence. I have considered the other principles, but these must receive the greatest attention. As noted by Bennett J. in [*R. v. Lennax*, 2008 BCSC 1761] at para. 45:

Children are entitled to be protected in society and by our courts. The only way the courts can denounce such crimes [as this] is by the imposition of a sentence.

[59] As observed by Newbury J.A. in *R. v. Ashley-Pryce*, 2004 BCCA 531, the case law reflects the very serious view taken by the courts of offences involving the sexual exploitation of persons under the age of 18 by persons in positions of authority or trust. In that case, the Court of Appeal upheld a sentence of 18 months incarceration for a healthcare worker who masturbated himself by holding the hand of an elderly female Alzheimer's patient. He was convicted of one count of sexual exploitation under s. 153. He had pled guilty to the offence and, due to the conviction, had to move his family from the small community.

[60] While I am not persuaded that a penitentiary term is appropriate in this case, I am persuaded that a significant reformatory term is required. I will, therefore, be imposing a sentence of 18 months followed by two years of probation.

[7] The applicant says the judge overemphasized denunciation and deterrence and made no mention of the prospects of rehabilitation. This, he says, led her to impose a sentence that was unduly harsh and unfit. He maintains the judge wrongly treated the absence of a guilty plea as an aggravating factor and thus erred in principle.

- [8] Again, I see no merit in what the applicant contends. I do not consider the judge to have treated the absence of a guilty plea as an aggravating factor, but merely to have pointed out there was no mitigating factor that could be attributed to an expression of remorse. Further, in my view, there is no sound basis on which it can be said the sentence was unfit. As the Crown points out, the applicant was in a unique position of trust and the complainant was particularly dependent upon him at a very troubled time in his young life. The applicant invited the complainant to his apartment for the night even though he was sexually attracted to adolescent males. Given the complainant's age and circumstances, the applicant knew he was particularly vulnerable and took advantage of him.
- [9] A couple of times in her reasons, the judge referred to the offence the applicant committed as a sexual assault when she ought to have said sexual exploitation, but her having done so is of no particular consequence now. She was not confused about the charge. The sentence imposed cannot be said to be inconsistent with what has been imposed for the offence of sexual exploitation: *R. v Ashley-Pryce*, 2004 BCCA 531.
- [10] The applicant says that two provisions of the probation order are unnecessarily restrictive. The first, Condition 9, prohibits his having contact with children under the age of 16 years unless accompanied by an informed adult approved by his Probation Officer. He says the provision need do no more than prohibit his being alone in the company of a person under the age of 16 years. The provision is unduly broad and would be adequate, and consistent with the offence of which the applicant was convicted, if the worded as by this Court in *R. v. R.R.M.*, 2009 BCCA 578 consistent with what the applicant seeks.
- [11] The second provision, Condition 11, prohibits the applicant from attending playgrounds, school grounds, public parks, community centres or other sites where children may congregate unless accompanied by an informed and approved adult. The Crown acknowledges that the words "or other sites where children may congregate" constitute a vague phrase that is unnecessary, particularly given Condition 9.
- [12] I would grant leave to appeal but would dismiss the appeal save that I would amend Conditions 9 and 11 of the Probation Order so they provide:
- Condition 9: You shall not be in the company of any person under the age of 16 years, unless in the company of an informed adult approved in advance by your Probation Officer.
- Condition 11: You are not to attend at playgrounds, school grounds, public parks, or community centers unless accompanied by an informed adult approved of in advance by your Probation Officer.
- [13] DONALD J.A.: I agree.
- [14] LEVINE J.A.: I agree.

[15] DONALD J.A.: Leave to appeal is granted. The appeal is allowed to the extent of amending the probation order as indicated in the reasons of Mr. Justice Lowry. The appeal is otherwise dismissed.

"The Honourable Mr. Justice Lowry"

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