

CANADA / JUDGMENT

R. v. R.J.E.

1999 BCCA 258

COURT

British Columbia Court of Appeal

DECIDED

15 April 1999

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT:

Before:

THE HONOURABLE MR. JUSTICE MACFARLANE April 15, 1999 THE HONOURABLE MR. JUSTICE DONALD THE HONOURABLE MADAM JUSTICE HUDDART Vancouver, B.C.

BETWEEN:

R E G I N A

RESPONDENT

AND:

R.J.E.

APPELLANT

**T. Johnston appearing for the Appellant U. Botz appearing for the (Crown)
Respondent**

AN ORDER HAS BEEN MADE IN THIS CASE PROHIBITING PUBLICATION OF ANY INFORMATION THAT COULD DISCLOSE THE IDENTITY OF THE COMPLAINANTS PURSUANT TO SECTION 486(3) OF THE CRIMINAL CODE.

[1] DONALD, J.A.: This is an application for leave to appeal, and if leave is granted, an appeal from a sentence of 18 months imposed for sexual assault after a trial before a Supreme Court judge in New Westminster. The conviction was recorded on count one of the indictment which reads:

Count 1

He, between the 1st day of February, 1983 and the 31st day of August, 1986, at or near Aldergrove, in the Province of British Columbia, did sexually assault L.G., contrary to Section 246.1 of the Criminal Code.

- [2] Counts 2 and 3 of the indictment charged two different offences of sexual touching of the same person over the same period of time. The trial judge found the applicant guilty of those offences, but entered judicial stays on the Kienapple principle.
- [3] The circumstances were briefly summarized in the judge's Reasons for Sentence.
- [2] The accused was in loco parentis with the complainant, L.G., who was also only thirteen at the time of the alleged offences. From the evidence, the accused fondled the complainant and performed oral sex on her on numerous occasions. In addition, on one occasion he tried to have sexual intercourse with her but he was unsuccessful. At the time of the offences the accused was the boyfriend of L.G.'s mother and was looked upon by the young complainant as her dad. At the time of the trial the complainant was an adult and the mother of four children.
- [4] At time of sentence, the applicant was a 63 year old retired factory worker with no other criminal record. He has two adult children from a prior marriage and a ten year old daughter by a common law relationship which ended some years ago. The child remained with her mother after the break up but the applicant maintains an active relationship with his daughter. He appears to lead a normal, stable life in his community.
- [5] In sentencing the applicant, the trial judge noted three aggravating factors: the age of the victim, breach of trust and the attitude of the offender towards the offence.
- [6] Counsel for the applicant argues that the trial judge mis- apprehended the pre-sentence report in respect of the applicant's attitude. I agree with that argument. It appears that the trial judge mistook a description of the applicant's state of mind at the time of the offence for his current state of mind. With respect, this was a crucial mistake because the trial judge gave great emphasis to the factor relating to present attitude. I think it influenced his determination that a conditional sentence sought by the applicant was inappropriate. When that element is removed, as I think it should be, then the way is clear to impose a conditional sentence, and in my judgment, that is the fit sentence in this case.
- [7] The trial judge listed the mitigating and aggravating factors in this way.
- [9] In the case at bar the mitigating factors include the fact that the accused has no previous criminal record, that he has received various letters of support from members of his community, that he has expressed some remorse for the offence, that he is involved in the raising of his ten year old daughter. There are, however, several aggravating factors here as well. To begin with, the accused was in a position of trust towards the complainant at the time the offences were committed. In addition to that the complainant was only 13 years old

at the time these offences were committed. Perhaps the most aggravating factor, however, is his attitude towards this offence. The probation officer who prepared the pre sentence report in this matter states at p. 6:

He (the accused) described the victim as a "cute, well developed little girl", for whom he developed an independent relationship, and on whom he later admits to developing a "crush". He admits to feeling that he was doing the victim a favour when he touched her; that he was sexually satisfying her. He states he felt that since she was black, she may not have had the same opportunity to have boyfriends as her peers, and feels this also may have been a motivation for the sexual activity to continue. He states each time the activity occurred, he felt very guilty, and vowed to himself it would not happen again. [Emphasis added by trial judge]

[10] It would also appear from the pre-sentence report that the accused rationalizes and tries to minimize his behaviour. At p. 11 of the pre-sentence report, the probation officer states:

Bob presents as a friendly, personable individual, who appears to be forthright in speaking about his offence. He appears to be anxious, somewhat ashamed and embarrassed about his involvement in these acts, and also appears to have acknowledged exhibiting some minimizing and rationalizing cognitive styles with respect to his sexual behaviour toward his victim. i.e. "She wanted to be sexually satisfied"; "She was on me all the time"; "She always started with the massages."

[11] I must say that I find the attitude of the accused towards the commission of this offence reprehensible in the extreme. [My underlining]

[8] The last quotation is taken from that part of the pre- sentence report headed "Writer's Impression". For context and a complete understanding of the probation officer's meaning, it is necessary to consider the remaining paragraph under that heading:

At the same time, he appears to be able to accept responsibility for the offence, and acknowledges that he should not have behaved sexually toward the victim regardless of her behaviour, since he was the adult.

[9] The trial judge concluded his reasons for sentence in this way:

In my view, the accused's attitude towards this offence, the fact that he was in a position of trust at time this offence was committed, the fact that the complainant was only 13 years old at the time of the offence and the other circumstances of this case, make this a case where the sentence imposed on the accused should not be a conditional sentence but a sentence served in an institution.

[10] I read the pre-sentence report as describing the applicant's past attitude which he now acknowledges was wrong. With that element removed, the only aggravating factors are those present in every case of historical sexual assault of a child by an adult in a position of trust. The case law is clear that this is not an exempt category for a conditional sentence.

- [11] In two instances where this court considered a conditional sentence - in the first instance as it were because the Code was amended to provide for this form of a sentence while the appeals were pending - the divisions granted such a sentence. In *R. v. S. (R.N.)* (1997), 121 C.C.C. (3d) 426 (B.C.C.A.), this court substituted a conditional sentence for a custodial sentence in a case said by Mr. Justice Lambert, who gave the reasons for the court, to involve a breach of trust by a step- grandfather who sexually assaulted a child over 4 to 5 years.
- [12] Similarly, in *R. v. R.J.S.* [1998] B.C.J. 59, 16 January 1998, this court granted a conditional sentence to a 63 year old man with no prior record. The victim in that case was seven years old at the time of the offence and was the grand- niece of the offender.

[13] The Criminal Code provides in Section 742.1:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court (a) imposes a sentence of imprisonment of less than two years, and (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3. 1995, c. 22, s. 6; 1997, c. 18, s. 107.1.

- [14] The quantum of the sentence in this case, 18 months, is not challenged and it of course is below the period specified in subsection (a) of Section 742.1.
- [15] Turning to subsection (b), given that the applicant now acknowledges the wrongness of his conduct and his attitude at the time that he committed these acts, it cannot be said that he poses any danger to the community.
- [16] I think that another provision of the sentencing sections should be noted. Section 718.2(d) reads:

718.2(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

- [17] In my respectful view, there is no purpose to be served by requiring the applicant to serve his sentence in custody. Neither is there any need for that mode of sentence to be imposed for his rehabilitation. His present attitude does not require denunciation, and as I have indicated, he seems to be leading a normal, proper life in all respects.
- [18] He will, however, be subject to conditions for 18 months which will impede his liberty to some extent.
- [19] For all of these reasons, I would grant leave to appeal and I would allow the appeal by substituting a conditional sentence for a custodial sentence.

[20] MACFARLANE, J.A. I agree.

[21] HUDDART, J.A. I agree.

[22] MACFARLANE, J.A.: The appeal is allowed. The custodial sentence of 18 months is satisfied and a conditional sentence of 18 months is imposed. The conditions will be as prescribed by Section 742.3(1)(a) to (e) inclusive and that reads:

742.3(1) The court shall prescribe, as conditions of a conditional sentence order, that the offender do all of the following: (a) keep the peace and be of good behaviour; (b) appear before the court when required to do so by the court; (c) report to a supervisor (i) within two working days, or such longer period as the court directs, after the making of the conditional sentence order, and (ii) thereafter, when required by the supervisor and in the manner directed by the supervisor; (d) remain within the jurisdiction of the court unless written permission to go outside that jurisdiction is obtained from the court or the supervisor; and (e) notify the court or the supervisor in advance of any change of name or address, and promptly notify the court or the supervisor of any change of employment or occupation.

[23] In addition to those conditions, the following shall apply as well. The accused shall: - Report as directed by the conditional sentence supervisor;

- Remain within the jurisdiction of the court;
- Advise the conditional sentence supervisor in advance of any potential changes in telephone number, address, employment, or relationships; - Maintain a primary residence approved of by the conditional sentence supervisor and provide proof of that residence in writing and admit the conditional sentence supervisor to the residence to ensure compliance with this condition;
- Refrain from being in the company of anyone under the age of 16, unless there is permission from the court, or written permission by the conditional sentence supervisor;
- Attend for such assessment and/or counselling as directed by the conditional sentence supervisor;
- Attend for and accept, and complete such sex offender treatment as directed by the conditional sentence supervisor, and participate in any intensive supervision programs;
- Advise the conditional sentence supervisor of the names, genders and ages of all parties resident at or visiting at your place of residence and facilitate contact of such parties by the conditional sentence supervisor;
- Refrain from any direct or indirect contact with L.G., or her children.

"The Honourable Mr. Justice Macfarlane"

"The Honourable Mr. Justice Donald"

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