
CANADA / JUDGMENT

R. v. R.L.W.

2013 BCCA 50

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 50 R. v. R.L.W.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. R.L.W.,

2013 BCCA 50

Date: 20130206

Docket: CA039542

Between:

Regina

Respondent

And

R.L.W.

Appellant

An order has been made under Sections 486.4(3) and 486.5(1) of the Criminal Code to ban the publication of any information that could identify the Complainant or a witness who is under 18 years of age or the person who is the subject of child pornography.

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Harris

On appeal from: Supreme Court of British Columbia, April 1, 2011

(R. v. R.L.W., 2011 BCSC 1363, Victoria Registry 144444)

Counsel for the Appellant:

J. Blazina

Counsel for the Respondent:

E. Campbell

Place and Date of Hearing:

Vancouver, British Columbia

December 11, 2012

Place and Date of Judgment:

Vancouver, British Columbia

February 6, 2013

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This is an application for leave to appeal, and if leave is granted, to appeal a sentence of five years for sexual assault causing bodily harm and 18 months' consecutive for possession of child pornography. The appellant does not challenge the imposition of a consecutive sentence or other elements of the sentence.
- [2] The appellant alleges the sentencing judge made three errors of principle in imposing sentence. First, he failed properly to consider the appellant's personal circumstances and Aboriginal background in sentencing (particularly on the sexual assault). Second, he erred in considering the appellant's moral culpability in possessing child pornography as an aggravating factor when that culpability is inherent in the offence itself. Third, the sentences are individually and collectively excessive and outside the range for similar offenders in similar circumstances.

- [3] For the reasons that follow I would grant leave, but dismiss the appeal. The appellant has not demonstrated that the sentencing judge erred in principle as alleged.

Background

- [4] Following a trial, the appellant was convicted of three offences: sexual assault causing bodily harm, contrary to s. 272(2)(b) of the Criminal Code; uttering threats, contrary to s. 264.1(1) of the Code; and possession of child pornography contrary to s. 163.1(4). The appellant admitted the possession of child pornography at the beginning of his trial.
- [5] The sexual assault and uttering threats involved Ms. N, his girlfriend, who, at the time, was attempting to end their relationship. The appellant's position at trial was that the sexual activities were consensual or that there was a reasonable doubt about whether Ms. N consented to them.
- [6] The appellant and Ms. N began an intimate relationship in 2007 when the appellant was 27 years old and Ms. N was 21. The relationship began well, but deteriorated because the appellant would become verbally abusive towards Ms. N when he had been drinking.
- [7] On the evening of July 19, 2008, after an argument in downtown Victoria, Ms. N decided to end their relationship. After some discussion, she was persuaded to return with the appellant to his residence. She hoped the appellant's father would be there and that he would persuade the appellant to return the key to Ms. N's apartment. Both the appellant and Ms. N had been drinking; the appellant to a significant degree. The sentencing judge described what happened when they got to the appellant's residence and its consequences for Ms. N:
- [17] R.L.W.'s father was not at home when R.L.W. and Ms. N arrived at the residence. Shortly after entering the premises, R.L.W. became violent with Ms. N. He ordered her to remove her clothes and then threw her onto the bed where he pinned her down, at times holding his hand over her mouth.
- [18] R.L.W. repeatedly asked Ms. N whether she had been unfaithful to him, and threatened that he would hunt her down and kill her if he found out that she had cheated on him.
- [19] R.L.W. insisted on having anal intercourse with Ms. N and threatened to rape her without a condom if she refused.
- [20] R.L.W. forced Ms. N to place a condom on him using her mouth, and over the course of an extended period of time, and from various positions dictated by R.L.W., he penetrated Ms. N's anus.

- [21] During the course of the assault, R.L.W. bit both of Ms. N's breasts a number of times. He also used her hair and a chain necklace she was wearing around her neck as a means of controlling and directing her actions. Ms. N was forced to perform fellatio on R.L.W., and at one point while doing so, she was compelled to view images of child pornography that were stored on his computer.
- [22] R.L.W. had difficulty reaching sexual orgasm and consequently he began masturbating while watching the child pornography that was stored on his computer. Shortly after climaxing, R.L.W. became sad and docile. Crying, he apologized profusely to Ms. N for what he had done to her.
- [23] R.L.W. begged Ms. N not to call the police and threatened to kill himself if she did so. R.L.W. wrote Ms. N a note admitting that he was addicted to crack cocaine and that his alcohol and drug consumption had impacted his thinking and actions. He also admitted that he had "raped" Ms. N and had forced her to watch child pornography. He concluded his note with the following:

Still addicted to crack, struggling alcoholic, going to commit suicide. I love [the name N]. Good bye Grade 8 education. You're smarter than me. Hope you find someone better.

- [24] On 21 July 2008, Ms. N reported the sexual assault and the events of 19 - 20 July 2008 to the police. She also attended at the Victoria General Hospital where she was examined by a sexual assault nurse examiner.
- [25] The nurse who examined Ms. N and observed the following injuries: a reddened area above both tonsil beds with a small amount of petechiae above the right tonsil bed; a small linear abrasion behind each ear; a small reddened area on the back of the scalp; multiple reddened areas around the nipples that looked like bite marks; a reddened area around the posterior fourchette of the vagina; a reddened area around the circumference of the anus; and a small tear to the anus.
- [26] The pain Ms. N suffered to her arms and upper body as a result of the sexual assault persisted for a week or so. Urinating and bowel movements were painful for Ms. N for three weeks, and on some occasions bowel movements were accompanied by bleeding. The fissure in her anal region did not heal for approximately three weeks.
- [8] The appellant was arrested at home on July 25, 2008. The police seized the appellant's computer. The sentencing judge described what was found on it:
- [28] The police seized from R.L.W.'s bedroom a computer and other related media. A forensic analysis of the computer's hard drive disclosed that R.L.W. had downloaded and filed over 200 videos depicting children engaged in all sorts of sexual activities with adults. There were approximately 44 videos located on the computer's desktop, while the remaining videos were filed in three distinct folders. Some of the videos depict children who appear to be between the ages of two and four years old, while others have children who seem to be in their early to mid-teens. Some of the images illustrate forced anal and vaginal penetration of

a child; while others depict a child fellating or masturbating an adult. One video involves an incident of bestiality where the child is bound to a bed frame.

- [9] The appellant was also charged with three breaches of the conditions of his judicial interim release. He pleaded guilty to those breaches.

Reasons for Sentence

- [10] The sentencing judge ordered the preparation of a pre-sentence report, including a psychological assessment of the appellant. He directed also that the pre-sentence report include a "Gladue Report": para. 6.
- [11] After setting out the circumstances of the offences, the judge turned to examine the appellant's personal circumstances. In doing so he relied extensively on the comprehensive history and description of the appellant's upbringing and current circumstances provided by the pre-sentence report and psychological assessment. He noted that the appellant's parents were never married, did not live together, and both suffered from alcoholism. The appellant suffered physical abuse as a young child and was bullied at school. He was sexually molested by an older cousin when he was about nine and again later in his adolescence. The appellant was exposed to a sexualized environment at a young age, which included sexual activity with the seven-year-old daughter of his father's girlfriend, and by the time he was six years old, masturbation and viewing pornography. As a child, the appellant witnessed turbulent domestic relationships and spousal assault on at least one occasion.
- [12] The appellant had difficulty concentrating at school and failed to complete grade 8. Since the age of 14 he worked at various jobs in construction, retail, food services, janitorial, landscaping and clerical work. He left school when he was approximately 16 years old and at about this time began to use the Internet to view pornographic material.
- [13] The sentencing judge analyzed the appellant's history of substance abuse and addictions, including the fact that he had been sober for three years after attending a treatment program in 2000.
- [14] The sentencing judge also analyzed various reports commenting on the appellant's psychological profile. Given the importance the sentencing judge attached to the appellant's psychological profile, it is worthwhile setting out the summary of that report as incorporated in the reasons for sentence:
- [67] Dr. Dugbartey also assessed R.L.W. using the Risk of Sexual Violence Protocol (the "RSVP"). In his report, Dr. Dugbartey described the RSVP as a "structured professional guide designed for appraising sexual violence risk." Having used the RSVP to assess R.L.W.'s circumstances and situation, Dr. Dugbartey summarized his conclusions as follows:

In applying the RSVP, it is my formulation that [R.L.W.] presents with a high risk for sexual re-offending. His pedophilic sexual arousal and sexual interests would not remit spontaneously, and he also appears to derive sexual gratification in sexual violence. His risk for sexual violence

may be expected to escalate and become patently imminent under conditions of intoxication with alcohol or non-prescribed psychoactive substances. Completed treatment of his sexual deviance, mandated abstinence from ingesting alcohol or any illicit substances, as well as very close correctional supervision that involves prohibitions from any contact with the victim or with young children are certainly worth considering. [Emphasis in original.]

[68] Under the heading "Summary and Opinion", Dr. Dugbartey provided the following diagnostic and prognostic opinion of R.L.W.

[R.L.W.] meets diagnostic criteria for Pedophilia, Nonexclusive Type. He also exhibits Sexual Sadism. There is ample evidence to support the diagnosis of Alcohol Dependence (In a Controlled Environment). There must be no expectation that [R.L.W.'s] deviant sexual interest would spontaneously subside. In fact, we know that if unchecked through sustained and high intensity treatment, the severity of the deviant sexual sadistic acts of individuals with sexual sadism progress over time.

I have carefully considered the defendant's biographic account, his specific First Nations cultural values and mores, the circumstances of the current offences, all within the context of the specialized treatment options for sexual offenders with First Nations ancestry on Vancouver Island. I find no specific treatment programmes designed specifically to meet his risk-needs locally. The prudent course of action would be to consider, at least in the immediate to medium term, treatment options aimed at ameliorating his high risk for sexual reoffending.

[15] While in custody, the appellant completed a "Respectful Relationships" course, and a "Substance Abuse Management" course.

[16] The sentencing judge then analyzed the appellant's First Nation background, noting that he is a member of the Penelakut First Nation and has been involved in various First Nation's activities, although he has never lived on a Reserve. The Gladue Report identified historic circumstances relating to the Penelakut First Nation, including the impact of the loss of culture, identity, language and family through the residential school experience and the physical and sexual assault associated with residential schools.

[17] The report noted the absence of any restorative justice programmes associated with the Penelakut First Nation.

[18] The sentencing judge next turned his attention to the impact of the appellant's conduct on his victims. He accepted that Ms. N had been attacked and physically injured, significantly traumatized, suffered from post-traumatic stress disorder, and had to deal with anxiety, nightmares, fears, and flashbacks. The judge found that she would have to deal with the impact of these events over the long term.

- [19] The sentencing judge also took notice of the harm occasioned by child pornography in degrading, dehumanizing, and objectifying children in ways that play a role in abusing and exploiting their vulnerability, not least through creating a permanent record of abuse and exploitation.
- [20] After recounting the positions of the parties, the sentencing judge set out the legal principles to be applied to the facts. He referred to ss. 718, 718.1, and 718.2 of the Criminal Code, and then specifically identified the Gladue considerations to be applied. He referred specifically to the decision of this Court in *R. v. Ladue*, 2011 BCCA 101, in which Madam Justice Bennett, at paras. 58-59, emphasized the importance of sentencing judges taking the time to apply the Gladue factors to Aboriginal offenders; an obligation the importance of which was confirmed by the Supreme Court of Canada on appeal: see, 2012 SCC 13, [2012] 1 S.C.R. 433.
- [21] After reviewing the cases, the sentencing judge concluded that the range for possession of child pornography is a broad one between four months and two years in prison. He found that the more recent case law "reflects the courts growing concern with this type of crime" at para. 111, observing that:
- [110] In my opinion, the uniform theme that runs throughout all of the case authorities that have been presented to me is that child pornography is a plague on our community that must be addressed firmly by the justice system. I accept that over time the courts have come to a better understanding of the horrific dynamics involved in the production, dissemination, and possession of child pornography. Deterring those who would purchase and possess such dreadful material will go a long way to reducing or perhaps even eliminating the production of this material and the consequential harm that it causes to its child victims.
- [22] After considering the cases on sexual assault, the sentencing judge concluded that the recent case law indicated that the applicable range for an assault of this type was four to six years: para. 113.
- [23] Given the nature of the challenge to the sentence imposed, it is helpful to set out, in full, the critical portions of the judgment applying the legal principles to the circumstances before the Court:

Aggravating Factors

- [119] I find the following to be aggravating factors on sentencing:
- the length, extent, and nature of the sexual assault R.L.W. committed on his girlfriend, Ms. N;
 - R.L.W.'s use of threats of violence during the course of the sexual assault;
 - R.L.W.'s use of child pornography and his forcing Ms. N to view the material; and
 - the significant and long-term impact the offences have had on Ms. N.

- [120] The contents of the pre-sentence report and the psychological assessment also cause me grave concern with respect to R.L.W.. In my opinion, those reports indicate that R.L.W. poses a safety risk to the community and I find that to be an aggravating circumstance as well.
- [121] The prognosis is not a positive one for R.L.W., and based upon all the evidence before me, I have no doubt that he needs a significant amount of intensive treatment and counselling to address all of his psycho-sexual problems in addition to his substance abuse issues.

Sentence

- [122] At paragraphs 80 and 81 of Gladue, [R. v. Gladue, [1999] 1 S.C.R. 688] the Supreme Court of Canada provided the following guidance for sentencing judges who are faced with crafting an appropriate sentence for an aboriginal offender:
80. As with all sentencing decisions, the sentencing of aboriginal offenders must proceed on an individual (or a case-by-case) basis: For this offence, committed by this offender, harming this victim, in this community, what is the appropriate sanction under the Criminal Code? What understanding of criminal sanctions is held by the community? What is the nature of the relationship between the offender and his or her community? What combination of systemic or background factors contributed to this particular offender coming before the courts for this particular offence? How has the offender who is being sentenced been affected by, for example, substance abuse in the community, or poverty, or overt racism, or family or community breakdown? Would imprisonment effectively serve to deter or denounce crime in a sense that would be significant to the offender and community, or are crime prevention and other goals better achieved through healing? What sentencing options present themselves in these circumstances?
81. The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large.
- [123] R.L.W. is 30 years old. He was one month shy of his 28th birthday when he committed the principal offences that are before me. He is a man of First Nations heritage whose parents are survivors of the forced assimilation and physical and sexual abuse of the residential school era. Both R.L.W.'s parents have substance abuse problems, and this serious addiction has been passed onto their son. R.L.W. was exposed to a violent home life and witnessed first-hand the problems and harm that can result from substance abuse.

[124] R.L.W. was introduced to a sexualized environment at a very early age and was sexually victimized when he was young.

[125] The Supreme Court of Canada in Gladue clearly articulated that the length of any custodial sentence for an aboriginal offender must be assessed carefully and there may be circumstances that warrant imposing a different or shorter term of imprisonment than one which would be imposed on a non-aboriginal offender for the same offence. The evidence before me indicates there are few, if any, alternative sentencing programs offered by the Penelakut First Nation. Notwithstanding that fact, I must still take into account the principles of restorative justice when crafting a sentence for R.L.W. (see: Gladue, paragraph 93).

[126] I have applied the Gladue framework to the consideration of an appropriate sentence for R.L.W. In particular, I have considered his aboriginal ancestry and ethno-cultural affiliation, the social and familial factors that have influenced his growth and upbringing, as well as the systemic factors within society that may have played a role in his criminal behaviour.

[127] Having done so, I have also kept in mind that the conventional goals of sentencing, such as deterrence, denunciation and protection of the community are as important for First Nations communities as they are for their non-First Nations counterparts. As the Supreme Court of Canada observed at paragraph 93 in Gladue:

It is unreasonable to assume that aboriginal people do not believe in the importance of traditional sentencing goals such as deterrence, denunciation and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

[128] In my opinion, any reasonable member of the community would find child pornography repugnant and would expect the courts to deal with those found in possession of such material in a fair but firm manner. When I say "community", I mean the community as a whole and that includes First Nations as well as non-First Nations members. Children are amongst the most vulnerable in our society. To purchase images of them being sexually violated is an offence that touches the soul of the community and calls for a strong deterrent and denunciatory sentence.

[129] I find the sexual assault, including the threats uttered to Ms. N, to be a very serious and aggravated offence as well. It was a prolonged attack by R.L.W. on someone who was trying to end a relationship with him in a civil and respectful manner. The assault was fuelled by alcohol, but triggered by anger and jealousy. Forcing Ms. N to watch child pornography while she was being assaulted was a degrading and dehumanizing act on the part of R.L.W., disclosing personality traits that are gravely concerning to the court.

- [130] I am satisfied the circumstances of the sexual assault, threatening, and possession of child pornography place these offences at the higher end of the sentencing scale. In my opinion, notwithstanding his state of intoxication, R.L.W. knew what he was doing and went ahead and did it without any consideration of the lasting impact it would have on the woman who had once loved him or upon the children who had been used and abused during the course of the production of child pornography. For all of these reasons, I find R.L.W.'s moral culpability to be high.
- [131] I also find R.L.W. poses a present risk of re-offending and is therefore a risk to the community. In reaching this conclusion, I have placed great weight on the contents of the pre-sentence report and the psychological assessment of R.L.W., and particularly the observations and conclusions of Dr. Dugbartey with respect to R.L.W.'s prognosis and risk to re-offend.
- [132] In my opinion, the principles of denunciation, deterrence, and protection of the community are paramount considerations in this case.
- [24] In the result, the appellant was sentenced to five years for the sexual assault, 18 months' consecutive for possession of child pornography, and three months' concurrent for uttering threats. He was also sentenced to a total of 31 days in jail for the two breaches of the undertakings and one breach of recognizance to be served consecutively to the sentences for the sexual assaults, threats, and possession of child pornography.

On Appeal

- [25] The issues on appeal relate to the sentence for sexual assault and possession of child pornography. No appeal is taken from the sentences for uttering threats or breaching bail conditions or the imposition of consecutive sentences.
- [26] The decision of the sentencing judge is entitled to deference unless the judge made an error of principle, or an error in the application of relevant factors by failing to consider a factor or over-emphasizing a factor. Even where there is such an error, however, the ultimate question for this Court is whether the sentence imposed is unfit in the sense that it is a substantial and marked departure from the range of sentences imposed for similar offences and similar offenders: *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at 564-5, 105 C.C.C. (3d) 327; *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 at para. 37, 84 B.C.A.C. 261.

Whether the sentencing judge erred in his application of the Gladue factors?

- [27] Two points are advanced in respect of this aspect of the appeal. First, that there were circumstances in the appellant's Aboriginal background that are relevant to his moral culpability, but which were overlooked, misapprehended, or not given due weight by the sentencing judge in his application of the Gladue considerations in determining a fit sentence. Second, that the sentencing judge did not, in fact, properly apply the Gladue considerations to his assessment of a fit sentence.

- [28] In support of his first argument, the appellant points to two different facts in the Gladue Report he argues were overlooked by the sentencing judge, which, when taken into account, offer insight into how it is that he had come before the court on these charges and, consequently, affect a proper assessment of his moral culpability. The appellant argues that the sentencing judge misapprehended the evidence about the degree to which he had been sexually victimized as a child. The sentencing judge proceeded on the basis that the appellant had been the victim of occasional and intermittent sexual abuse at the hands of an older cousin, whereas he had in fact been the subject of a more continuous pattern of abuse. Further, the sentencing judge overlooked the fact that the appellant's father had witnessed his own father shoot his spouse. Had the sentencing judge properly appreciated this evidence, the appellant contends, he would have concluded that the appellant was somewhat less morally culpable for the offence than he did and adjusted the sentence accordingly.
- [29] I am unable to accede to this argument. Although the report does support the conclusion that the appellant was abused at the hands of his male older cousin on about half a dozen occasions, it is not apparent to me that taken as a whole the judge materially misapprehended the role the appellant's history of sexual abuse may have played in bringing him before the court. His account of the appellant's early experiences of sexualization and sexual abuse, and increasing involvement in watching pornography is balanced and fair. The judge made a minor error in referring to the number of occasions on which the appellant was sexually abused, but recognized and emphasized the fact that he had been abused. There is nothing in the record that would support the inference that the appellant was less morally culpable for his conduct in assaulting Ms. N because of the frequency of the sexual abuse. I am not persuaded that the error had, or reasonably would have had, any effect on the judge's conclusion about the appellant's moral culpability.
- [30] Much the same may be said about the sentencing judge's failure to refer to the fact that the appellant was aware that his father had seen his own father kill his mother. The judge is not required to review every piece of evidence or every fact contained in the report. Indeed, the judge also did not refer to facts suggesting the extent to which the appellant felt happy and safe growing up with his father, who although an alcoholic, has been sober for the past 17 years. I am satisfied that the judge properly appreciated the contents of the pre-sentence and Gladue reports taken as a whole and did not misapprehend what they disclosed about the impact of the appellant's Aboriginal ancestry in explaining how he came to be before the court.
- [31] I would not accede to this ground of appeal.
- [32] The second argument contends that the sentencing judge did not in fact apply the Gladue considerations as he is required to do. This argument takes its bearings from the reference made by the sentencing judge to the Gladue decision itself, *R. v. Gladue*, [1999] 1 S.C.R. 688, in the Supreme Court of Canada where the Court said this at para. 93:

It is unreasonable to assume that aboriginal people do not believe in the importance of traditional sentencing goals such as deterrence, denunciation and separation, where warranted. In this context, generally, the more serious and violent the crime, the more likely it will be as a practical matter that the terms of imprisonment will be the same for similar offences and offenders, whether the offender is aboriginal or non-aboriginal.

- [33] The appellant argues that the judge fell into the error of discounting the Gladue considerations when the time came to apply them to the determination of a fit sentence. In doing so, he fell into the mistake made by other courts in treating Aboriginal and non-Aboriginal offenders on the same basis when the offence in issue is one which can be categorized as being "serious". This error has recently been canvassed by the Supreme Court of Canada in *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433.
- [34] In *Ipeelee*, the Court reiterated the importance of taking into account the Gladue considerations in all offences, regardless of their seriousness. In particular, the Supreme Court criticized the post-Gladue jurisprudence for the irregular and uncertain application of the Gladue principles to sentencing decisions for serious or violent offences. The Court said this at para. 84 and following:
- [84] The second and perhaps most significant issue in the post-Gladue jurisprudence is the irregular and uncertain application of the Gladue principles to sentencing decisions for serious or violent offences. As Professor Roach has indicated, "appellate courts have attended disproportionately to just a few paragraphs in these two Supreme Court judgments -- paragraphs that discuss the relevance of Gladue in serious cases and compare the sentencing of Aboriginal and non-Aboriginal offenders" (K. Roach, "One Step Forward, Two Steps Back: Gladue at Ten and in the Courts of Appeal" (2009), 54 *Crim. L.Q.* 470, at p. 472). The passage in Gladue that has received this unwarranted emphasis is the observation that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for Aboriginals and non-Aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing" (para. 79; see also [*R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207] at paras. 42-44). Numerous courts have erroneously interpreted this generalization as an indication that the Gladue principles do not apply to serious offences (see, e.g., *R. v. Carrière* (2002), 164 C.C.C. (3d) 569 (Ont. C.A.)).
- [85] Whatever criticisms may be directed at the decision of this Court for any ambiguity in this respect, the judgment ultimately makes it clear that sentencing judges have a duty to apply s. 718.2(e): "There is no discretion as to whether to consider the unique situation of the Aboriginal offender; the only discretion concerns the determination of a just and appropriate sentence" (*Gladue*, at para. 82). Similarly, in *Wells*, Iacobucci J. reiterated, at para. 50, that

[t]he generalization drawn in Gladue to the effect that the more violent and serious the offence, the more likely as a practical matter for similar terms of imprisonment to be imposed on aboriginal and non-aboriginal offenders, was not meant to be a principle of universal application. In each case, the sentencing judge must look to the circumstances of the aboriginal offender.

This element of duty has not completely escaped the attention of Canadian appellate courts (see, e.g., *R. v. Kakekagamick* (2006), 214 O.A.C. 127; *R. v. Jensen* (2005), 196 O.A.C. 119; *R. v. Abraham*, 2000 ABCA 159, 261 A.R. 192).

- [86] In addition to being contrary to this Court's direction in Gladue, a sentencing judge's failure to apply s. 718.2(e) in the context of serious offences raises several questions. First, what offences are to be considered "serious" for this purpose? As Ms. Pelletier points out: "Statutorily speaking, there is no such thing as a 'serious' offence. The Code does not make a distinction between serious and non-serious crimes. There is also no legal test for determining what should be considered 'serious'" (*R. Pelletier, "The Nullification of Section 718.2(e): Aggravating Aboriginal Over-representation in Canadian Prisons"* (2001), 39 *Osgoode Hall L.J.* 469, at p. 479). Trying to carve out an exception from Gladue for serious offences would inevitably lead to inconsistency in the jurisprudence due to "the relative ease with which a sentencing judge could deem any number of offences to be 'serious'" (Pelletier, at p. 479). It would also deprive s. 718.2(e) of much of its remedial power, given its focus on reducing overreliance on incarceration. A second question arises: Who are courts sentencing if not the offender standing in front of them? If the offender is Aboriginal, then courts must consider all of the circumstances of that offender, including the unique circumstances described in Gladue. There is no sense comparing the sentence that a particular Aboriginal offender would receive to the sentence that some hypothetical non-Aboriginal offender would receive, because there is only one offender standing before the court.
- [87] The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the Criminal Code, to consider the unique circumstances of Aboriginal offenders. Failure to apply Gladue in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the Gladue principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.
- [35] The issue is whether the sentencing judge fell into the errors identified by the Supreme Court in the passages set out above. In my opinion, he did not. To the contrary, I am satisfied that the sentencing judge recognized and discharged his duty to consider the unique circumstances of the appellant in assessing how the systemic and background factors associated with his ancestry bear on his culpability for the offence.

- [36] I have reached this conclusion for a number of reasons. First, the sentencing judge explicitly states at para. 126 of his reasons for sentence that he has applied "the Gladue framework and taken into account the appellant's aboriginal ancestry, ethno-cultural affiliation, the social and familial factors that influenced his growth and upbringing, as well as the systemic factors within society that may have played a role in his criminal behaviour".
- [37] While the appellant asserts that the sentencing judge was not explicit as to how he applied the Gladue framework, I can see nothing in the reasons to cast doubt on that statement. On the contrary, the sentencing judge recounted in considerable detail the relevant Gladue factors, drawing particular attention to his parents' residential school experience and their substance abuse problems which had been passed onto their son, as well as the appellant's history of substance abuse, his exposure to a violent home life, and his introduction to a sexualized environment at a very early age, including sexual victimization.
- [38] Second, the position of the Crown at the sentencing hearing was that the Gladue factors should not play a significant role in his sentencing on the principal offences because they were serious offences and consequently no distinction should be made between an Aboriginal and a non-Aboriginal offender. It is evident from the reasons that the sentencing judge rejected that position. He did, in fact, consider the appellant's ancestry. He referred expressly to paras. 80 and 81 of the decision of the Supreme Court of Canada in Gladue wherein guidance is provided to sentencing judges in assessing the impact of systemic and background factors contributing to the offender coming before the court. He recognized his duty to take the Gladue principles into account at para. 125 of the Reasons:
- [125] The Supreme Court of Canada in Gladue clearly articulated that the length of any custodial sentence for an aboriginal offender must be assessed carefully and there may be circumstances that warrant imposing a different or shorter term of imprisonment than one which would be imposed on a non-aboriginal offender for the same offence. The evidence before me indicates there are few, if any, alternative sentencing programs offered by the Penelakut First Nation. Notwithstanding that fact, I must still take into account the principles of restorative justice when crafting a sentence for R.L.W. (see: Gladue, paragraph 93).
- [39] The sentencing judge referred to the passage at para. 93 in Gladue that suggested that for more serious offences, as a practical matter, there may be no difference in the sentences imposed on Aboriginal and non-Aboriginal offenders. But I do not think that the sentencing judge fell into the errors identified by the Supreme Court of Canada in Ipeelee. The reference to para. 93 in Gladue was in reference to the fact that other principles of sentencing, deterrence, denunciation and separation are important to both First Nations and non-First Nations communities for some violent offences. The judge, while referencing para. 93 of Gladue, continued to recognize his duty to apply the Gladue factors on an individualized basis. He did not treat that statement as a universally applicable proposition, and did not proceed on the basis of carving out an exception to the application of the Gladue principles because this was a serious offence.

[40] In summary, the sentencing judge identified the relevant Gladue factors, recognized his obligation to take them into account, and said that he had taken them into account in reaching his conclusion about the appellant's moral culpability for the offence. In the absence of alternative sentencing programmes available to the appellant, the judge focused his analysis on the systemic and background factors that contributed to the appellant being before the court. It has not been demonstrated that the judge failed to take these factors properly into account. The fact that the sentence imposed may be similar to one that would have been imposed on a non-Aboriginal offender does not, standing alone, indicate any failure to take into account Aboriginal background. As the Supreme Court of Canada has recently reconfirmed in *Ipeelee*, there is no automatic reduction of sentences simply because the offender is Aboriginal: see para. 71.

[41] I would not accede to this ground of appeal.

Whether the sentence imposed is demonstrably unfit and did the judge err in treating the possession of child pornography as an aggravating factor?

[42] The appellant submits that the sentences on both the sexual assault and the possession of child pornography are demonstrably unfit. He suggests an appropriate sentence would be three to four years for sexual assault causing bodily harm and six to 12 months' consecutive for possession of child pornography, for a global sentence, including the threats and breach offences, of three years and seven months to five years.

[43] The sentencing judge had concluded, on his examination of the relevant cases, that the appropriate range for the sexual assault was four to six years, while for the possession of child pornography the range was four months to two years. The judge sentenced the appellant to a term of imprisonment in the middle of the range he found applicable for the sexual assault and towards the high-end of the range for the possession of child pornography. The sentences are towards the high-end of whatever is the applicable range.

[44] Essentially, the appellant argues that the facts of the offences are not sufficiently egregious to justify a sentence at the high-end of the applicable range. In respect of the sexual assault, he submits that cases imposing sentences as long as five years typically involve greater violence and a more sustained assault. On the possession of child pornography, the appellant contends that the amount and nature of the pornography are in a range that typically has attracted sentences of six months to 12 months.

[45] The appellant relies on cases such as *R. v. Kerr* (1992), 13 B.C.A.C. 165 (B.C.C.A.), *R. v. Khan* (1994), 23 W.C.B. (2d) 292, 41 B.C.A.C. 70, and *R. v. G.E.W.* (1993), 20 W.C.B. (2d) 88, 28 B.C.A.C. 189 (B.C.C.A.), to illustrate his argument that sentences of five years involve greater physical violence accompanying the sexual assault than was involved in this case. I accept that these cases did involve more extreme violence, but as Chief Justice Finch said in response to a similar argument in *R. v. Morgan*, 2004 BCCA 628 (at para. 5), "the fact that the appellant did not have to resort to greater physical violence in order to achieve his sexual goals, did not render him less culpable ... this complainant experienced terror and feared

for [her] life". In Morgan, an appeal of a five-year sentence was dismissed. The victim was confined in Mr. Morgan's apartment for several hours during which he threatened her with serious physical violence and death.

- [46] In my opinion, the sentencing judge did not err in his identification of the applicable range for a sexual assault of this gravity. The judge identified the aggravating factors set out above at para. 23 of these reasons. While the assault did not involve the same degree of physical violence as other cases, it was nonetheless a vicious and violent assault. To the extent that it was less physically violent, the appellant deployed psychological terror to force Ms. N's compliance. I utterly fail to see how securing compliance by uttering threats, rather than inflicting force, renders this sexual assault less egregious as a result. The assault was psychologically humiliating and has had serious long-term consequences for the victim. It was, moreover, degrading and dehumanizing to force Ms. N to watch child pornography. I can see no error in the judge's conclusion that the appellant's moral culpability was high.
- [47] The judge was also entitled to take into account the psychological report which concluded that the appellant was at a high risk of re-offending and exhibited sexual sadism. It was entirely proper for the judge to place greater weight on the need to protect society and to emphasize deterrence, denunciation and the protection of society as opposed to rehabilitation in these circumstances.
- [48] For these reasons I do not think that the sentence imposed was demonstrably unfit.
- [49] Similarly, in my opinion, the sentencing judge correctly identified the appropriate range of sentences for possession of child pornography. I accept that based on the cases the range of sentences for possession of child pornography is broad, but, as the judge recognized, courts have over the years developed a greater appreciation of the harm caused to children by its manufacture, distribution and possession. More recent cases place greater emphasis on denunciation and deterrence and sentences have tended to increase.
- [50] The appellant contends that the judge erroneously considered the appellant's moral culpability in possessing child pornography as an aggravating factor when such culpability is inherent in the offence itself. I do not see the merit in that submission on the facts of this case. Child pornography may take many different forms, all dreadful, but some worse than others. In my view, it was open to the sentencing judge to take account of the nature and quantity of the pornography as well as how it was used in assessing the appellant's moral culpability.
- [51] As the Crown points out, the appellant actively shopped for, selected, filed and stored images and videos which he watched repeatedly. His collection included over 200 videos. The sentencing judge undertook the distressing duty of viewing some of the material in order to assess its nature. It is clear that he found it repellent and repugnant. The videos included violent or sexual offences being committed by adults on children. Some of the children appeared to be between two and four years old. One video involved bestiality. I accept that the pornography in the appellant's possession fell towards the extreme end of the range.

[52] The sentencing judge carefully described the impact of child pornography on the abuse and exploitation of vulnerable children. He recognized the more recent case law which reflects society's growing concern with this type of crime. As the judge said at para. 128:

Children are among the most vulnerable in our society. To purchase images of them being sexually violated is an offence that touches the soul of the community and calls for a strong deterrent and denunciatory sentence.

[53] Although the sentence may be towards the high end of the range for the possession of child pornography, it is not demonstrably unfit.

[54] In sum, in my opinion the sentences for the sexual assault and the possession of child pornography are not unfit when viewed individually or in the aggregate. No error of principle in their imposition has been demonstrated. I would grant leave, but dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice Neilson"

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