

CANADA / JUDGMENT

R. v. Roth

2020 BCSC 2200

COURT

Supreme Court of British Columbia

DECIDED

16 October 2020

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2020 BCSC 2200 R. v. Roth

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Roth,

2020 BCSC 2200

Date: 20201016

Docket: 35446-2

Registry: Williams Lake

Regina

v.

Terry Daniel Roth

Restriction on Publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness, referred to in this judgment by the initials T.D. This publication ban applies indefinitely unless otherwise ordered.

Restriction on publication: Pursuant to s. 486.4(2.2) of the C.C.C.

Section 16(4) Sex Offender Information and Registration Act ("SOIRA"):

This section provides that no person shall disclose any information that is collected pursuant to an order under SOIRA or the fact that information relating to a person is collected under SOIRA.

Before: The Honourable Mr. Justice Ball

Oral Reasons for Sentence

Counsel for the Crown

appearing by teleconference:

C. Elden

Counsel for the Accused:

E.C. Rines

Place and Date of Hearing:

Williams Lake, B.C.

October 16, 2020

Place and Date of Judgment:

Williams Lake, B.C.

October 16, 2020

- [1] THE COURT: These are oral reasons for judgment on sentence in the case of R. v. Terry Roth, Williams Lake Registry Court File Number 35446-2. Mr. Roth was convicted by this court on January 20, 2020, with one count of sexual interference contrary to s. 151 of the Criminal Code and one count of invitation to sexual touching contrary to s. 152 of the Criminal Code. Both of the offences occurred between the dates of January 10, 2000, and December 31, 2007.
- [2] As with all oral reasons, the court reserves the right to edit the reasons should the need arise for grammar, correctness, or clarity. The result of the decision will not change, however, if editing is required.

Circumstances of the Offences

- [3] The court reiterates that on January 27, 2020, the court placed a ban on publication pursuant to s. 486.4 of the Criminal Code which prohibits the publication of any information which could identify the victim in these cases. As a result, I have referred to the victim in these reasons as T.D., not out of any aspect of disrespect, but simply to preserve anonymity.
- [4] The parties do not have fundamental disputes over the factual allegations as found by the court after hearing the evidence in this case. Mr. Roth was a family friend and occasional babysitter of T.D. in between the dates noted above. Between those dates, six instances of sexual touching were found to have occurred. I have taken the summary of those occurrences prepared by Crown counsel which was adopted by defence counsel and I repeat those here:

- a. #1: T.D. was about six years old. At the time, she lived with her family in a trailer, which had a number of additions. Mr. Roth came over to the trailer to visit T.D.'s family. It was just prior to T.D.'s bed-time. She was alone, laying on a bunkbed in the bedroom she shared with her siblings. She was wearing "bed clothes." Mr. Roth entered T.D.'s bedroom and the laid down beside T.D. on the bed. While they were laying on the bunkbed, Mr. Roth touched T.D.'s vagina with his hand. At first Mr. Roth touched T.D.'s vagina over top of her underwear; he then progressed and touched her vagina directly. Mr. Roth asked T.D. "does it feel good?"; T.D. does not recall replying. Mr. Roth touched T.D.'s vagina for several minutes. T.D. was not able to give a precise time estimate; she testified "it could have been ten minutes" or "it could have been up to a half an hour."
- b. #2: A few days later, Mr. Roth was over at T.D.'s family home again. T.D. was once again alone in her bedroom and was wearing a nightie. Mr. Roth came into her bedroom and laid underneath the "train bed" with T.D. Mr. Roth and T.D. were laying on their sides, facing one another. Mr. Roth unzipped his pants, exposed his naked penis, and encouraged T.D. to touch his penis. T.D. touched Mr. Roth's penis with her hand for about a minute. Mr. Roth then put his hand under T.D.'s nightie and underneath her underwear. Mr. Roth inserted his finger into T.D.'s vagina and asked, "how does it feel?" T.D. said "it hurts" and Mr. Roth removed his finger from her vagina. T.D. went into the bathroom and noticed that she was bleeding from her vagina. T.D. put some type of paper product, such as a paper towel or toilet paper, in her underwear to collect the blood. The sexual touching lasted "no more than five minutes."
- c. #3: T.D. was about six or seven years old. T.D. was at Mr. Roth's parents' house and was seated on the couch with Mr. Roth, watching a movie. T.D. and Mr. Roth were sitting immediately adjacent to one another and had a blanket over their laps. Mr. Roth put his hand underneath the blanket and touched T.D.'s vagina over her clothing. Mr. Roth's mother was in the kitchen doing chores, about ten feet away from the couch. Mr. Roth's mother appeared to move as if to leave the kitchen, at which point Mr. Roth stopped touching T.D.'s vagina and removed his hand from underneath the blanket.
- d. #4: T.D. was seven or eight years old. Mr. Roth and T.D. both went to a birthday party at the home of a mutual friend. The party was "at a brown home with a pump house nearby." There was a road that led from the home to the pump house. Mr. Roth and T.D. were walking down the road and Mr. Roth decided to give T.D. a piggy-back ride. Mr. Roth picked T.D. up and carried T.D. on his back, with his hands under her buttocks. Mr. Roth began to touch T.D.'s vagina over her underwear. T.D. told him that she was uncomfortable. Mr. Roth stopped, put T.D. down, and went back to the party. The sexual touching "did not last very long - maybe one to two minutes."

- e. #5: T.D. was about eight years old. She went to Mr. Roth's parents' home for a visit. Mr. Roth was in the woodshed, preparing wood to be brought into the house for heating. T.D. went into the woodshed to "hang out" with Mr. Roth. At some point, Mr. Roth touched T.D.'s vagina over her clothing. He also encouraged T.D. to touch his penis over his clothing. The sexual touching lasted "less than a minute."
 - f. #6: T.D. was about eight or nine years old. She went to Mr. Roth's apartment, which was located above a community hall. At the time, Mr. Roth shared the apartment with his then spouse and their children. Mr. Roth's children were not present at the time as they were in the care of his parents. Mr. Roth and T.D. went into the master bedroom. Mr. Roth grabbed T.D.'s hand and placed it on his penis, at first over his jeans, and then underneath his clothing. The sexual touching lasted "at least 10 minutes."
- [5] Evidence was given of other instances of sexual touching, but I found those to be too vague to support any positive finding.

Circumstances of the Offender

- [6] The presentence report dated and filed October 8, 2020, was placed before the court which report set forth in significant detail the life and upbringing of the accused. Mr. Roth was born in 1982, and is now 38 years old. His parents separated when he was two years old and domestic violence by his father may have been the reason for that separation. He continued living with his father until he was age 13 when he ran away from home. After a year in foster care, he began to live again with his mother. His mother then remarried and he had a positive relationship with his stepfather.
- [7] In 2001, a one-year-old child, who was the son of Mr. Roth, was killed in a motor vehicle accident. Mr. Roth and that son did not have a regular relationship, but, nonetheless, Mr. Roth was upset and continues to feel guilty as a result of the death of that child.
- [8] Terry Roth was himself the victim of an incident of sexual assault by a high school counsellor in 2001.
- [9] Mr. Roth and another woman had a relationship which lasted approximately six years, during which three children were born. The relationship came to an end in part because of domestic violence of the woman against Mr. Roth. Mr. Roth has maintained a positive relationship with his youngest son, now aged 15, with whom he resides. Arrangements have been made for the care of that child pending the jail sentence, which was acknowledged to be forthcoming.
- [10] Mr. Roth presently receives income from a "Persons with Disabilities" social assistance pension due to a bad back, a learning disability, and poor depth perception in one eye. He is a chronic user of marihuana and is also on prescription methadone which he has used for at least 10 years after becoming addicted to painkillers which he was using to manage chronic back pain.

- [11] Mr. Roth reached grade eight in school and then left school. He worked in the oil and gas industry servicing pumpjacks, moving oilrigs, drilling water wells, and other short-term jobs. During his relationship with the woman mentioned above, he worked in the fabrication industry for several years. He apparently suffers now from emotional, psychological, and cognitive shortcomings which will be discussed further below. He also is in significant debt.
- [12] Both the presentence report, which has now been marked as Exhibit 1 in the sentencing hearing, and the psychological report prepared by Dr. Joneja, a doctor of clinical psychology, dated October 7, 2020, marked Exhibit 2 in this sentencing hearing, noted that because the offender is not acknowledging his criminality and has little insight into the situation, there is a concern about the potential usefulness of future counselling. Dr. Joneja at para. 48 of her report opines that Mr. Roth has "an average risk of sexual violence recidivism which is currently limited by access to potential victims". She notes that Mr. Roth continues to deny the sexual violence which may reflect a history of entrenched antisocial attitudes and beliefs that condone the use of antisocial behaviour, para. 39, and this insight also contributes to a lack of insight also contributes to the risk of sexual reoffending.
- [13] Defence counsel indicated that his client is prepared to be involved in whatever counselling is recommended or directed by the court while he is in custody or by his probation officer thereafter. It is hoped that this offender will take serious advantage of the opportunities for new understandings which may be offered in the course of a period in custody, as well as a period of probation to follow.
- [14] I wish to make it clear, however, there is no requirement for this offender to acknowledge guilt in this case. He is entitled as a matter of law to maintain his innocence throughout the proceedings, regardless of the findings of this court.

Victim Impact Statement

- [15] T.D. attended the sentencing hearing in Williams Lake today and read her victim impact statement in open court. She read clearly in an emotional manner describing the difficulties which the offences against her have caused. The victim impact statement has been, as I said earlier, marked Exhibit 3 in this sentencing.

Positions of the parties

- [16] It is the position of the Crown on sentencing that this offender should be sentenced to 18 months in jail on each of the two counts, which sentences are to be served concurrently one with the other, followed by three years of probation on terms which will be discussed below.

- [17] It is the position of the defence on this sentencing hearing that the custodial sentence should be 12 to 15 months, again, concurrently one with the other, also followed by three years of probation on the same terms. Defence counsel relied for his submissions on two cases. Those cases are *R. v. Williams*, 2019 BCCA 295, and *R. v. A.L.*, 2019 BCSC 2118, in support of this submission that a 12-month jail sentence is appropriate.
- [18] The issue raised by this reliance is the more recent decision of the Supreme Court of Canada in *R. v. Friesen*, 2020 SCC 9, where the Supreme Court of Canada stated it wished to send a strong message that sexual offences against children are violent crimes that wrongly exploit children's vulnerability and cause profound harm to children, families, and communities, para. 5. The court specifically stated that going forward sentences for these crimes must increase. The court specifically stated that:
1. there should be an upward departure from prior precedents and sentencing, and ranges may well be required to impose a proportionate sentence;
 2. sexual offences against children should generally be punished more severely than sexual offences against adults; and
 3. sexual interference with a child should not be treated in a less serious manner than sexual assault against a child.
- [19] In *Friesen*, the Supreme Court of Canada expressed concern about the range of sentence set out in the *Williams* case and directed that all provincial courts "to revise and rationalize sentencing ranges" for sexual offences against children. In light of this comment, one must be concerned that the sentencing range in *Williams* and *A.L.* is no longer good law.
- [20] As discussed above, there are a number of aggravating factors in this case including the young age of T.D., the fact that Mr. Roth was in a position of trust in relation to her as a babysitter and caregiver, and the significant emotional, physical, and psychological impact on her person articulated in her victim impact statement read in court today. The offences took place over a period of time. The sexual touching was inherently violent and invasive which caused physical injury, as noted above, with vaginal bleeding. T.D. was told she would get into trouble if she told anyone.
- [21] The chief mitigating factor in this case is that Mr. Roth has no criminal record. He has maintained himself on bail without a breach or other violation for a period of more than two years. Often an expression of remorse is considered a mitigating factor, but that is not present in the case at bar. The presence or absence of remorse would not affect the sentence in this case.

Range of Sentence

- [22] Given the nature of the offence in this case, in particular, the period of time over which the offences were committed, the trust relationship that was breached as a result of the commission of these offences, and the effect on T.D., and taking into account the comments

in Friesen, I am satisfied that a sentence of one year would be insufficient and not within the range of sentencing for this particular offence. The minimum sentence which will serve the interests of denunciation and deterrence, the primary sentencing principles in this case and allow an opportunity for rehabilitation of this offender to begin, is a sentence of one year and four months which is to begin today. That is a total of 16 months.

[23] There will follow a period of three years of probation for the accused on the following terms:

1. You must keep the peace and be of good behaviour.
2. You must appear before the court when required to do so by the court.
3. You must notify the court or the probation officer in advance of any change of name or address, and promptly notify the court or probation officer of any change of employment or occupation.
4. You must have no contact or communication directly or indirectly with T.D.
5. You must not go to any residence, school, or workplace of T.D. If you see T.D., you must leave her presence immediately without any words or gestures.
6. You must report in person to a probation officer at the Williams Lake Community Corrections Office located at 100, 640 Borland Street within 24 hours of your release from custody.
7. When first reporting to your probation officer, you must inform him or her of your residential address and phone number, and you must not change your residence or phone number without written permission of your probation officer.
8. You must not go to any public park, public swimming area, or community centre where persons under the age of 16 years are present or can reasonably be expected to be present, or a daycare centre, school ground, or playground. The exceptions are if you have the written permission of your probation officer and, in that event, you must carry the written permission when you are in the prohibited area.
9. You must not have no contact directly or indirectly with, or be alone in the presence of, any person under the age of 16 years. The exception to that requirement is in respect to your son, J.R.
10. You must not engage in any activities, volunteer work, or employment that could bring you into contact with persons under the age of 16 years without the written permission of your probation officer and, when so engaged, you must carry this permission on your person.

11. You must attend, participate in, and successfully complete any intake, assessment, counselling, or program as directed by your probation officer. Without limiting the general nature of this condition, the intakes, assessments, counselling, or programs may relate to sexual offence prevention and substance abuse.
- [24] There will also be an order pursuant to s. 490.012 of the Criminal Code that Mr. Roth will comply with the Sex Offender Information Registration Act for a period of 20 years. Both of the offences with which Mr. Roth has been convicted are designated offences under s. 490.11(1) of the Code and that order is therefore mandatory under s. 490.012 of the Code. For the same reason given, s. 490.013(2)(b), the duration of the order must be 20 years.
- [25] There will also be an order that within 14 days of his entry into custody that Mr. Roth will provide a sample of his DNA for analysis. That is pursuant to s. 487.051 of the Code. Both of the offences for which he has been convicted are primary designated offences and therefore that order is mandatory.
- [26] There will be an order under s. 109 of the Criminal Code that Mr. Roth be prohibited for a period of 10 years from possessing firearms, weapons, and other items listed in s. 109 of the Criminal Code; and in that regard, relying on R. v. Ralph, 2014 BCSC 467, and the decision of Mr. Justice Romilly therein, there will also be an order that, pursuant to s. 743.21 of the Code, Mr. Roth is prohibited from communicating directly or indirectly with T.D. or any of her children or her spouse while he is in custody.
- [27] Counsel, I did not address the issue of whether or not there is any credit for time spent in custody.
- [28] MR. RINES: I do not believe so, My Lord.
- [29] THE COURT: All right. So there will be no such order, then.
- [30] THE COURT: I would like to thank both counsel for hard work on this case. You have both been very professional and it showed in your efforts on this file. Thank you.

"Ball J."

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