
CANADA / JUDGMENT

R. v. S.C.W.

2019 BCCA 405

COURT

British Columbia Court of Appeal

DECIDED

19 November 2019

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2019 BCCA 405 R. v. S.C.W.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. S.C.W.,

2019 BCCA 405

Date: 20191119

Docket: CA44184

Between:

Regina

Respondent

And

S.C.W.

Appellant

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under SOIRA.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Goepel

The Honourable Mr. Justice Butler

On appeal from: An order of the Provincial Court of British Columbia, dated
December 30, 2016 (R. v. S.C.W, Kelowna Registry 77979-4-C & 77979-5).

Counsel for the Appellant:

E. Purtzki

Counsel for the Respondent:

S.E. Elliott

Place and Date of Hearing:

Vancouver, British Columbia

September 10, 2019

Place and Date of Judgment:

Vancouver, British Columbia

November 19, 2019

Written Reasons by:

The Honourable Mr. Justice Goepel

Concurred in by:

The Honourable Mr. Justice Butler

Concurring Reasons by:

The Honourable Madam Justice Newbury (Page 13, para. 39)

Summary:

The offender pleaded guilty to sexual interference with a person under 16 years old and making child pornography, each in relation to his former step-daughter. He was sentenced to seven years' imprisonment. He appeals his sentence on the basis that the judge erred (1) in rejecting a psychological risk assessment which concluded he posed a low risk of re-offending, and (2) in treating as an aggravating factor the age of the victim, an essential element of the offence. Held: Appeal dismissed. The judge was under no obligation to accept or give weight to the expert's

opinion, which he found dissatisfying. While the age of the victim is an element of the offence, it is also a statutory aggravating factor. The judge did not err in taking her age into account in sentencing.

Reasons for Judgment of the Honourable Mr. Justice Goepel:

INTRODUCTION

- [1] The appellant pleaded guilty to sexual interference with a person under 16 years old and the making of child pornography. His victim, A.D., was his former step-daughter. He was sentenced to seven years' imprisonment. He now seeks leave to appeal his sentence. He submits the sentencing judge erred in principle in rejecting a psychological risk assessment tendered by the appellant that concluded that the appellant posed a low risk of re-offending. The appellant further submits the sentencing judge erred in principle in treating the age of the victim, an essential element of the offence of sexual interference, as an aggravating factor.
- [2] For the reasons that follow, I would dismiss the appeal.

BACKGROUND

- [3] The appellant was in a romantic relationship with A.D.'s mother for five years. After the relationship ended, the appellant continued to see A.D. in his role as her stepparent. In November 2012, the appellant who was then 43 years old, took A.D., who was then 12 years old, for an overnight stay at a hotel. A guest at the hotel reported to hotel staff that the appellant was inappropriately touching A.D. in the pool area of the hotel. Police were contacted and entered the appellant's hotel room where he was found to be in the course of sexually abusing A.D.
- [4] Police seized a camera and computer from the hotel room. The camera contained photographs of A.D. lying on the hotel bed with her sweater pulled up and her vagina exposed. There were also photographic close-ups of her vagina. The computer contained 129 images and eight videos taken of A.D. that met the definition of child pornography as well as three stories detailing sexual activity between adults and children.
- [5] The judge in his reasons for sentence described the videos:
- [13] The videos must be experienced to fully understand the full measure of the crushing depravity of the acts. They were witness to the psychological dismemberment and decapitation of the sexual being of a pre-adolescent child.
- [14] Breathless in their brutality, there are no words to describe the despair one felt for the child or the loathing for [the appellant], except a deep and abiding sadness.
- [6] The abuse had been taking place for more than a year. The appellant pleaded guilty to sexual interference on February 16, 2015, and to making child pornography on May 22, 2015.

- [7] The sentencing proceedings were delayed until December of 2016. The appellant then unsuccessfully sought a stay of proceedings pursuant to s. 11(b) of the Charter.
- [8] Some of the history of the proceedings was canvassed by this Court in its decision dismissing his conviction appeal, indexed at 2018 BCCA 346, leave to appeal to the Supreme Court of Canada dismissed on March 28, 2019.

THE SENTENCING HEARING

- [9] At the sentencing hearing the appellant called Dr. Anton Schweighofer, a clinical and forensic psychologist, who had prepared a psychological assessment of the appellant. Dr. Schweighofer testified that the appellant posed a low risk for re-offending. He found that it was most likely the appellant was not a paedophile and concluded that the appellant's offending was most likely the product of emotional factors, in particular, his feeling of estrangement, loneliness and inadequacy which led to a "distorted view that a young female has adult like qualities [that] can contribute to sexual abuse." Dr. Schweighofer opined that the appellant's offending was driven by his "increasing estrangement from [the victim's mother] and his increasing work problems and associated feelings of loneliness and inadequacy." Crown counsel submitted that Dr. Schweighofer's opinion should be given little weight because he relied heavily on representations made by the appellant who was not credible.
- [10] The judge also had before him victim impact statements that outlined the devastating impact of the offences on A.D. and her mother.
- [11] The Crown sought a sentence of five to six years on the sexual interference charge and three years consecutive for the pornography offence. The defence position was a global sentence of three-and-a-half to four years.

THE SENTENCING REASONS

- [12] In his sentencing reasons, the judge noted as mitigating factors that the appellant has no criminal record and had pleaded guilty to the offences. He gave no weight to Dr. Schweighofer's opinion. He noted that the report did not explain how the appellant could have repeatedly committed the horrendous offences against a child without realising it was wrong and doing great harm to the child. He noted that the appellant remains untreated and unchanged. He found Dr. Schweighofer's opinion that there is a low risk that this might happen again defied belief.
- [13] The judge reviewed numerous authorities concerning similar circumstances of child sexual abuse. He made specific reference to s. 718.2(a)(ii.1) of the Criminal Code which sets out that abuse of a person under the age of 18 years shall be deemed to be an aggravating circumstance and then noted that A.D. was under 18 years old at the time of the offence. The judge also referenced the deemed aggravating factors concerning a breach of a position of trust (s. 718.2(a)(iii)) and that the offence had a significant impact on the victim (s. 718.2(a)

(iii.1)).

- [14] The judge held that the appropriate sentence for sexual interference was five years and the appropriate sentence for the making of child pornography would be four years consecutive. Taking into account the totality principle, he reduced the sentence on the pornography count to two years consecutive, for a total sentence of seven years.

ON APPEAL

- [15] The appellant concedes that the sentence is within the range of sentences for similar offences, but raises two grounds of appeal. First, while acknowledging that the judge was not bound to accept the opinion of an expert, he submits that the sentencing judge erred in rejecting Dr. Schweighofer's psychological assessment by failing to judicially consider and weigh the expert's opinion before rejecting it. He submits that the rejection of Dr. Schweighofer's opinion had an impact on the sentence imposed. He says the judge's rejection of the opinion caused him to consider that, in effect, the appellant was not at a low risk of re-offending and he could well be a pedophile. He submits that whether an offender poses a low risk of re-offending is a relevant consideration at sentencing because the risk of re-offending is relevant to the protection of the public.
- [16] Second, the appellant submits the judge erred in principle in treating an essential element of the offence of sexual interference as an aggravating factor. An essential element of sexual interference under s. 151 of the Criminal Code is that the victim is under the age of 16. He submits that using an essential element of the offence, which is a prerequisite to the conviction itself, as a specific aggravating factor to increase the length of sentence amounts to an impermissible form of double counting. In support, he cites comments in *R. v. Lacasse*, 2015 SCC 64, for the proposition that it is an error in principle to treat an essential element of an offence as an aggravating circumstance in sentencing.
- [17] In light of these errors in principle and the impact of those errors on the sentence imposed, the appellant submits that it is open to this Court to adjust the sentence.
- [18] The appellant submits that the sentence on the sexual interference charge should be reduced by one to two years, for a total sentence of five to six years of imprisonment.
- [19] The Crown submits that the judge properly rejected the psychological report. It submits that even if it was held that the judge erred in the manner he dealt with the report it would not have impacted the sentence. The Crown further submits that the judge did not err in taking into account the deemed aggravating factor concerning A.D.'s age. It submits that the judge was mandated by Parliament to do so.

STANDARD OF REVIEW

- [20] The fitness of a sentence is subject to appellate deference. An appellate court may only impose a different sentence where: (a) the sentencing judge erred in principle, failed to consider a relevant factor, or erroneously considered an aggravating or mitigating factor, and the error appears to have impacted the sentence; or (b) the sentence is "demonstrably unfit" in that it represents a marked and substantial departure from sentences customarily imposed for similar offenders committing similar offences, and therefore amounts to an unreasonable departure from the principles of proportionality: *Lacasse* at paras. 11, 39-44, 51-53.
- [21] In *R. v. Agin*, 2018 BCCA 133, this Court summarized the circumstances in which appellate intervention is justified:
- [56] Appellate intervention is justified when an appellate court identifies a material error that has impacted the sentence, in that the sentence would have been different absent the error. The court will then assess the fitness of the sentence by conducting its own sentencing analysis. If the sentence is unfit, the court may vary the sentence and impose a fit sentence.
- [57] Where there is no error, or the error had no impact on the sentence, appellate intervention can still be justified if the sentence is demonstrably unfit.

DISCUSSION

- [22] Before turning to the individual grounds of appeal, it is important to emphasize that this case involves offences against a vulnerable child. In such cases, denunciation and deterrence are always the main considerations. The appellant did not suggest otherwise. As this Court noted in *R. v. D.G.*, 2014 BCCA 84:
- [37] children are "priceless assets", and it is extremely important to denounce conduct that takes advantage of their vulnerability

A. The Expert Opinion

- [23] The judge was under no obligation to accept the opinion of Dr. Schweighofer. In preparing his report, Dr. Schweighofer did not contact any collateral sources, nor did he review the images or the videos of the sexual abuse. His low risk assessment was based extensively on the appellant's own representations. Dr. Schweighofer himself noted that the appellant appeared to avoid discussing some aspects of the sexual offending, minimized some aspects of the sexual offending, and outright denied some issues noted in his file when there was persuasive collateral information.

- [24] In rejecting Dr. Schweighofer's opinion the judge stated he was dissatisfied with the report because "it does not explain how [the appellant] could have committed the horrendous offences against the child over and over without realizing it was wrong, that it was doing great harm to the child, and not being able to stop himself from doing it". He noted that the appellant remains untreated and unchanged and that in the assessment the appellant minimized his behaviour, deflected blame, and portrayed the child as the instigator.
- [25] In these circumstances it was open to the court to give little to no weight to Dr. Schweighofer's opinion. I would not accede to this ground of appeal.
- [26] I should further note that even if it could be said that the judge erred in not giving weight to the opinion, it would likely have had no impact on the sentence. The fact that an accused is unlikely to re-offend is not a significant consideration in a case concerning sexual abuse against children when the emphasis is properly based on matters of general deterrence and denunciation: *R. v. T.A.D.* (1995), 68 B.C.A.C. 236, Criminal Code s. 718.01.

B. The Aggravating Factor

- [27] This ground of appeal is premised on the submission that it was an error in principle for the judge to take into account as an aggravating factor the age of the victim, when that is also an essential element of the offence of sexual interference. In support of this proposition, the appellant relies on certain comments in *Lacasse*.
- [28] In *Lacasse*, the accused was convicted of impaired driving causing death. The trial judge on sentencing held his intoxication was an aggravating factor. The Québec Court of Appeal held that the trial judge had made an error in principle by considering an element of the offence (intoxication) as an aggravating factor. The Supreme Court of Canada agreed.
- [29] In his dissenting reasons, Gascon J. said as follows:
- [146] An element of the offence cannot in itself constitute such a factor. A judge who characterizes an element of the offence as an aggravating factor thus makes an error of law that opens the door to appellate intervention: [citations omitted].

At para. 83, Wagner J. writing for the majority, agreed with Gascon J. that the fact that the accused was intoxicated should not have been mentioned as an aggravating factor, since being intoxicated is one of the elements of the offence.

- [30] Of note, however, is that *Lacasse* did not concern a statutory aggravating factor. While in *Lacasse* intoxication was an element of the impaired driving offence, intoxication was not a statutory aggravating factor under the Criminal Code. *Lacasse* makes no mention of the treatment of statutory aggravating factors that are themselves elements of the offence. In my view, *Lacasse* is distinguishable and stands only for the proposition that elements of an offence should not be used as common-law aggravating factors.

- [31] The question raised by the appellant has been the subject of decisions of the Ontario Court of Appeal. In *R. v. Gaukrodger*, [2006] O.J. No. 3614 (C.A.), the offender, a school teacher, was convicted of sexual exploitation of the fourteen-year-old victim, a former student. The court found that she used her position of trust as his teacher and a close friend of the victim's family to commit the offence. The trial judge referred to the "relationships involving trusts that the offender breached in committing the offence" as an aggravating factor. The offender argued that because breach of trust is an element of the offence for which she was convicted, it was an error in principle to treat it as an aggravating factor in sentencing. The Ontario Court of Appeal rejected this approach, and stated:
- [4] The facts which constitute essential elements of an offence do not thereby lose their relevance on sentencing. The facts which the Crown is required to prove to establish the offence do not somehow become "used up". Those facts will always be part of the consideration on sentencing. The extent to which the facts that establish the essential elements of the offence can increase or decrease the sentence imposed will depend on the specifics of those facts considered in the context of the entire circumstances.
- [32] In *R. v. Tejada-Rosario*, 2010 ONCA 367, the complainant in a sexual assault was the patient of the accused, a psychiatrist. A short time into the professional relationship they began to see each other socially and over 9-10 years they had numerous sexual encounters. The Ontario Court of Appeal found the trial judge made an error in holding that
- [12] since it was breach of trust that made the otherwise consensual sexual activities crimes, it was "debatable whether in such a case it is also proper to consider breach of trust as an aggravating circumstance". Parliament has expressly legislated that abuse of a position of trust is an aggravating factor on sentencing, pursuant to s. 718.2(a)(iii) of the Criminal Code
- [33] The court continued at para. 13, citing *Gaukrodger* for the notion that the Ontario Court of Appeal
- has expressly rejected the theory that the facts that constitute the essential elements of an offence are somehow exhausted and are not available for consideration at the time of sentencing. In this case, the nature of the abuse of trust was the defining aggravating factor and should have been given substantial weight by the trial judge in imposing sentence.
- [34] In *R. v. B.S.*, 2019 ONCA 72, the appellant was convicted of a series of sexual and violent offences against the complainant, who was 12-14 years at the time of the offences and therefore legally incapable of consenting to the sexual relations. The court specifically rejected the submission that the trial judge erred in considering the complainant's age as an aggravating factor under s. 718.2(a)(ii.1) with respect to the sexual interference conviction, stating as follows:

[12] We do not agree that the trial judge inappropriately considered the complainant's age as an aggravating factor under s. 718.2(a)(ii.1) with respect to the sexual interference conviction, which necessarily involves the abuse of a person under the age of 16. The complainant's age was relevant to assessing her degree of vulnerability, and the age difference was relevant to assessing the appellant's degree of culpability.

[35] While this Court does not appear to have specifically considered the issue, it has considered deemed statutory aggravating factors notwithstanding they contained elements of the offence. In *R. v. K.V.E.*, 2013 BCCA 521, the accused pleaded guilty to three counts of incest committed against his three daughters contrary to s. 155 of the Criminal Code, and one count of sexual touching committed against his granddaughter contrary to s. 151 of the Criminal Code. Stromberg-Stein J.A. noted as follows:

[34] It is an aggravating factor to offend against children, particular[ly] where the offender is a parent who is in a position of trust: s. 718.2(a)(ii.1) and 718.2(a)(iii) of the Criminal Code

Thus, while the age of the victim was an element of the s. 151 offence, and the position of trust as a parent was an element of the s. 155 offence, they were nonetheless considered as aggravating factors.

[36] I agree with the approach of the Ontario Court of Appeal. Parliament has expressly legislated that the age of the victim is an aggravating factor on sentencing. A.D.'s age was relevant to assessing her degree of vulnerability and the age difference between A.D. and the appellant is relevant to assessing his degree of culpability. Considering the age of the victim at the sentencing stage, despite it being an element of the offence, aligns with the purposes and principles of sentencing. If sentencing is to be an individualised process and sentences are to be proportionate to the gravity to the offence, the specific circumstances of each offence must be taken into account at sentencing, even where those circumstances overlap with the elements of the offence. The egregiousness of the sexual offence against a child increases as the age of the child decreases. Taking into account the age of the victim is an appropriate consideration of the specific facts of the individual offence.

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

[38] In the result I find that the judge did not make a material error that impacted the sentence. The sentence is not demonstrably unfit. I would grant leave to appeal the sentence but dismiss the appeal.

"The Honourable Mr. Justice Goepel"

I AGREE:

"The Honourable Mr. Justice Butler"

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [39] I agree with my colleagues that the sentence in this case was a fit one and that any error of law concerning the question of "aggravation" did not materially affect the sentence.
- [40] I would leave open for another day the question of whether the effect of a statutory aggravating factor is different in principle from a common law one; and whether the Ontario authorities referred to in Mr. Justice Goepel's reasons adequately address the question of aggravation, as opposed to mere relevance to the determination of a fit sentence.
- [41] I see the significance of the victim's age in cases such as this (i.e., where one element of the offence depends on the victim's age) as one of degree. All other things being equal, greater moral blameworthiness obviously attaches where the victim is age 5 or 6, or 11 or 12, in comparison to age 15. It may be that s. 718.2(ii.1) should be seen merely as a codification of that principle. Whether on the other hand it should be regarded as an additional factor that may increase the sentence that would otherwise be imposed in the circumstances of the offence (including the victim's age) before the court in any given case is a highly theoretical issue that in my opinion need not be decided in the case at bar.
- [42] I would join with my colleagues in dismissing the appeal.

"The Honourable Madam Justice Newbury"

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