
CANADA / JUDGMENT

R. v. Swaby

2018 BCCA 416

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 416 R. v. Swaby

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Swaby,

2018 BCCA 416

Date: 20181109

Docket: CA44930

Between:

Regina

Appellant

And

Matthew Christopher Swaby

Respondent

Restriction on publication: Section 16(4) of the 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 Madam Justice Bennett

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated November 8, 2017 (R. v. Swaby, 2017 BCSC 2020, Vancouver Docket 27223).

Counsel for the Appellant:

L.A. Vizsolyi

Counsel for the Respondent:

L.J. Helps

Place and Date of Hearing:

Vancouver, British Columbia

June 19, 2018

Place and Date of Judgment:

Vancouver, British Columbia

November 9, 2018

Written Reasons by:

The Honourable Madam Justice Bennett

Concurred in by:

The Honourable Madam Justice Fenlon

The Honourable Madam Justice Griffin

Summary:

Mr. Swaby pleaded guilty to possession of child pornography. Because the Crown proceeded summarily, he faced a 90-day mandatory minimum sentence under s. 163.1(4)(b) of the Criminal Code. The sentencing judge found that the provision violated s. 12 of the Charter and was not saved by s. 1. He imposed a conditional sentence order with strict conditions. On the Crown's summary conviction appeal, the judge dismissed the appeal and declared the mandatory minimum sentence in s. 163.1(4)(b) of no force and effect.

Held: Appeal dismissed. Although the sentencing judge committed errors, those errors did not affect his conclusion. Taking the offender's personal circumstances into account, a 90-day jail term is grossly disproportionate to the conditional sentence order that would otherwise be appropriate, even if served intermittently. The mandatory minimum violates s. 12 both in respect of this offender and in respect of hypothetical offenders. As the Crown did not argue that it could be upheld under s. 1, the provision is of no force and effect.

Reasons for Judgment of the Honourable Madam Justice Bennett:

Overview

- [1] On February 5, 2014, Matthew Swaby was found in possession of a large quantity of exceedingly disturbing child pornography. He pleaded guilty to one count of possession and challenged the mandatory minimum sentence of 90 days' imprisonment provided by s. 163.1(4)(b) of the Criminal Code, R.S.C. 1985, c. C-46 between 2012 and 2015. The sentencing judge, Judge Galati, found that the mandatory minimum sentence was unconstitutional as it applied to Mr. Swaby and instead imposed a conditional sentence order ("CSO") and a term of probation. On the Crown's summary conviction appeal, Justice Marchand affirmed the decision and declared the mandatory minimum sentence of 90 days found in s. 163.1(4)(b) to be of no force and effect.
- [2] The Crown appeal comes to this Court with leave on the sole question of whether the mandatory minimum sentence in s. 163.1(4)(b) infringes s. 12 of the Canadian Charter of Rights of Freedoms.
- [3] The appeal is in fact moot, as Mr. Swaby has completed his CSO and the Crown has indicated that it does not intend to seek further incarceration should this Court conclude that the legislation is constitutional. Leave to appeal was granted by Justice Hunter, whose reasons are indexed at 2018 BCCA 35, and the Court concluded it would be in the interests of justice to consider the appeal.
- [4] For the reasons that follow, I would dismiss the appeal.

Background

- [5] In January 2014, the Integrated Child Exploitation Unit of the RCMP conducted an investigation into the possession of child pornography on file sharing networks. The RCMP found that the user of a particular IP address, later identified as Mr. Swaby, had downloaded a large number of child pornography files.
- [6] The RCMP obtained and executed a search warrant on February 5, 2014, and two computers belonging to Mr. Swaby were seized. Those computers were found to contain 400 video files that the parties agreed met the Code definition of child pornography in s. 163.1. The videos included a range of pornographic content, including videos of children being taped by hidden cameras while changing and videos involving penetrative sexual activity between adults and very young children.
- [7] The computers were also found to contain 480 image files constituting child pornography. The images included a variety of content, including both photos and cartoons of children engaged in sexual acts.

- [8] When interviewed at the RCMP detachment, Mr. Swaby explained that he found child pornography by typing "PTHC" into the search bar on his computer. He understood the acronym to stand for "preteen hardcore," having researched the term on Urban Dictionary sometime after first encountering it. He told the officer that he understood child pornography to involve someone under the age of consent.
- [9] Mr. Swaby explained in the interview that he downloaded child pornography "kind of because [he was] bored." He acknowledged having masturbated while watching it. He downloaded different kinds of pornography (including adult pornography) and would compile those videos into playlists.
- [10] On January 6, 2016, Mr. Swaby pleaded guilty to possession of child pornography before Galati P.C.J. The Crown had elected to proceed by way of summary conviction. This meant that Mr. Swaby faced a mandatory minimum sentence of 90 days' jail.
- [11] Judge Galati did not view the videos because in his view the Agreed Statement of Facts contained sufficient description, plus his lengthy experience as a trial judge allowed him to appreciate the "sickening horror" of child pornography. He described some of the videos as depicting "sadistic behaviour" and the videos generally as "disgusting examples of the sexual victimization of children."
- [12] Judge Galati found that "it was necessary to speak to [Mr. Swaby] as one would speak to a child" in the interview and that his cognitive abilities during the interview were "questionable".
- [13] In relation to the offence itself, Galati P.C.J. found that Mr. Swaby "knew what he was looking for" when he downloaded the videos and images, and that he knew that downloading and viewing child pornography was wrong. Mr. Swaby likened the experience of watching the videos to "watching a video of someone breaking their leg". He was drawn to the videos because of what Galati P.C.J. termed their "shock value" and because he thought some of them were "funny."
- [14] Mr. Swaby was 23 years old at the time of the offence. His parents were not married, and although he visited from time to time, his father did not have an active role in parenting. His mother was a loving parent, but her work schedule did not allow her to be around a great deal. Mr. Swaby spent much of his time alone and unsupervised in his room. He had a computer in his room and began accessing pornography at an early age.
- [15] He had no criminal record. He had lived in Burnaby with his mother and sister for his entire life until his arrest. After his arrest and release on bail, his bail conditions required that he move out of his mother's apartment.

- [16] While in school, Mr. Swaby was behind his peers in academic functioning and was placed in specialized learning classes. Nevertheless, he worked part time while in high school and eventually graduated. After graduating, he worked at a department store for four years and then in a warehouse, but was unemployed at the time of the offence. After his arrest, he began to work in a kitchen as a dishwasher and cook. He was still employed in those capacities at the time of sentencing.
- [17] Mr. Swaby had very few friends upon leaving high school. Approximately two years before the offence, his functioning deteriorated. He began to spend much of his time alone in his room playing video games. He began accumulating food and bottles of urine in his room. His mother often heard him speaking to himself and crying. She observed that his crying became particularly noticeable when he was laid off from the department store.
- [18] Mr. Swaby was assessed by two psychologists, Dr. Patrick Bartel and Dr. Sarah Mordell. Judge Galati ordered a forensic psychiatric assessment of Mr. Swaby to address what he considered gaps in the two psychologists' reports. He listed five questions that he wanted the assessment to address. No such assessment was undertaken. Instead, Dr. Mordell provided an additional follow-up letter addressing Galati P.C.J.'s questions.
- [19] Although Dr. Bartel and Dr. Mordell differed in their description of the extremity of Mr. Swaby's cognitive and intellectual impairment, they agreed that Mr. Swaby lived with a significant level of impairment.
- [20] Both psychologists wrote in their reports that Mr. Swaby had difficulty finding their offices. Dr. Mordell wrote that she eventually had to leave her office to meet Mr. Swaby on the street and escort him into her clinic. He explained to her that he had been confused because "he did not expect the building to look the way it had."
- [21] Mr. Swaby told Dr. Bartel that he knew he "was not smart" from an early age. Dr. Bartel concluded that Mr. Swaby's intellectual functioning was in the "extremely low" range in nearly all respects. His IQ test was in the 0.01 percentile, in the range of 49-59. He concluded that Mr. Swaby had an intellectual disability.
- [22] Dr. Mordell, by contrast, observed that Mr. Swaby's verbal comprehension was significantly higher than his processing speed and that there were some discrepancies between different perceptual reasoning scores in the tests she carried out. She did not think that Mr. Swaby met the criteria of an intellectual disability at the time of her assessment.
- [23] Both psychologists found that Mr. Swaby had "paedophilic interests" but concluded that he did not have a paedophilic disorder and had a relatively low risk of reoffending.

- [24] In respect of Mr. Swaby's mental health, both psychologists described a history of suicidal behaviour and ideation, chronic sleep disturbance, and depressed mood. Mr. Swaby explained to both psychologists that he regularly spoke to a voice inside his head, who he called "Chris". He told Dr. Bartel that "Chris" was his best friend and that he did not want to lose him.
- [25] Dr. Bartel referred to Mr. Swaby's auditory hallucinations and depressed mood. He reported that Mr. Swaby likely had some form of schizoaffective disorder, such as combined schizophrenia and major depressive disorder.
- [26] Dr. Mordell reported that Mr. Swaby appeared to meet the criteria for persistent depressive disorder. She noted that he also displayed symptoms of mania and that further monitoring would be required to assess whether he lived with bipolar disorder or a primary psychotic disorder.
- [27] Both psychologists were concerned that Mr. Swaby would not be able to tolerate incarceration.
- [28] Dr. Bartel opined that from a mental health perspective, incarceration would be very detrimental to "this young and vulnerable man". In Dr. Mordell's opinion, Mr. Swaby's depressive symptoms had been partially alleviated by his new employment and increased social engagement. She thought this progress would be endangered by a period of incarceration.

Decision of the Sentencing Judge (2016 BCPC 478)

- [29] Judge Galati found that the mandatory minimum sentence in s. 163.1(4) of the Code infringed Mr. Swaby's s. 12 right to be free from cruel and unusual punishment and that it was not shown to be justified pursuant to s. 1 of the Charter. He therefore declined to apply the mandatory minimum sentence to Mr. Swaby.
- [30] Judge Galati recognized that s. 718.01 of the Code requires that denunciation and deterrence be prioritized where an offence involves children. He recognized that the number of videos, the period over which they were collected, and the serious sexual offending depicted in some of them were aggravating factors.
- [31] He also recognized numerous mitigating factors: Mr. Swaby's youth and relative isolation at the time of the offence, his mental health and cognitive issues, his lack of criminal record, his co-operation with authorities, his expression of remorse and early guilty plea, his willingness to be assessed and treated, the fact that he is not a paedophile, and his compliance with bail conditions.

- [32] In assessing the gravity of the offence, Galati P.C.J. explained that the very existence of child pornography is harmful to children and society. He wrote that the gravity of the offence was somewhat attenuated by its indirect nature. He reasoned that although possession of child pornography contributes to the abuse of children, it does not do so directly.
- [33] Ultimately, Galati P.C.J. concluded that Mr. Swaby's moral culpability was low. He found that Mr. Swaby's cognitive and mental health issues likely contributed to his commission of the offence. He further found that Mr. Swaby did not realize the gravity of his actions. He found that a CSO followed by probation would be a proportionate sentence.
- [34] He then concluded that a 90-day sentence would be grossly disproportionate to the CSO that would otherwise be appropriate. He reiterated that the gravity of the offence was reduced because it does not involve direct harm. He found that the gravity of the offence stemmed primarily from the nature of the material that Mr. Swaby possessed. Judge Galati held that the full context, including both the gravity of the offence and Mr. Swaby's personal characteristics, satisfied him on a balance of probabilities that a 90-day sentence would be grossly disproportionate.
- [35] He rejected the Crown's submission that serving the sentence intermittently would render it constitutional. He found that it was "just as likely" that having to repeatedly report to a correctional facility would exacerbate rather than alleviate the effect of the sentence.
- [36] Although Mr. Swaby made submissions on reasonable hypothetical offenders, Galati P.C.J. did not consider them. He concluded that s. 163.1(4) prescribed a grossly disproportionate punishment as it applied to Mr. Swaby himself.
- [37] Judge Galati invited submissions on whether the provision constituted a reasonable limit on Mr. Swaby's s. 12 right. The Crown took no position on whether the provision could be "saved" by s. 1 of the Charter. Judge Galati nevertheless considered the issue in separate reasons and found that the provision was not a reasonable limit on the right.
- [38] No longer constrained by the mandatory minimum sentence, Galati P.C.J. imposed a four-month CSO to be followed by two years' probation.

Decision of the Summary Conviction Appeal Judge (2017 BCSC 2020)

- [39] The summary conviction appeal was heard moot. Mr. Swaby had already served his CSO and the Crown did not take the position that he should be incarcerated if Marchand J. upheld the mandatory minimum sentence.
- [40] Justice Marchand upheld Galati P.C.J.'s decision and declared s. 163.1(4) of the Code to be of no force and effect pursuant to s. 52 of the Constitution Act, 1982.

- [41] Justice Marchand upheld Galati P.C.J.'s finding that Mr. Swaby's mental health and impaired cognition were causally related to his offending and were therefore mitigating factors. In his view, Galati P.C.J. properly drew this inference from the evidence provided by Dr. Bartel and Dr. Mordell.
- [42] Justice Marchand also upheld Galati P.C.J.'s finding that even an intermittent sentence would have a negative effect on Mr. Swaby. He concluded that Galati P.C.J. did not engage in speculation to find that having to report to a correctional facility would exacerbate the effect of incarceration.
- [43] Justice Marchand deferred to Galati P.C.J.'s assessment of Mr. Swaby's moral blameworthiness. He found that it was reasonable for Galati P.C.J. to conclude that Mr. Swaby did not fully appreciate the gravity of his conduct "[g]iven the time it has taken Parliament and the courts" to understand the serious harm that results from the possession of child pornography.
- [44] Finally, Marchand J. also considered a reasonable hypothetical offender with the mental function of a teenager who briefly and inadvertently possessed one item of the least depraved child pornography. He found that even if he erred in finding the mandatory minimum sentence to be grossly disproportionate in its application to Mr. Swaby, that the provision violates s. 12 of the Charter on the basis of this hypothetical offender.
- [45] Although he dismissed the appeal, Marchand J. disagreed with Galati P.C.J. on four points.
- [46] First, he found that Galati P.C.J. mischaracterized the harm arising from possession of child pornography. The summary conviction judge characterized the harm as stemming from the act of possessing the material rather than from the grievous nature of the material.
- [47] Second, he found that Galati P.C.J. mistakenly found that the possession of child pornography was a less serious offence because it only indirectly causes harm to children.
- [48] Third, he found that Galati P.C.J. erred in considering Mr. Swaby's cognitive and mental health issues in characterizing the seriousness of the offence. Justice Marchand held that Mr. Swaby's personal circumstances should have been considered separately during his weighing of Mr. Swaby's moral culpability.
- [49] Fourth, and finally, he found that Galati P.C.J. incorrectly considered two factors as mitigating when they were more accurately characterized as neutral: that Mr. Swaby was not a paedophile and that he complied with his bail conditions.
- [50] Despite identifying these errors, Marchand J. found that Galati P.C.J.'s reasons, read as a whole, made clear that he understood the gravity of child pornography offences and the nature of the harm that they cause. Justice Marchand reasoned that Mr. Swaby's personal circumstances were unavoidably central to determining whether the mandatory minimum sentence was grossly disproportionate and Galati P.C.J.'s errors therefore had little effect.

Legal Analysis

History of Mandatory Minimum Sentences for Child Pornography Offences

- [51] The mandatory minimum sentence for possession of child pornography has changed three times. Prior to 2005, there was no mandatory minimum sentence. The imposition of a mandatory minimum sentence meant that a CSO could no longer be imposed: Code, s. 742.1(b); R. v. Proulx, 2000 SCC 5 at para. 48.
- [52] In 2005, Bill C-2, An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act, S.C. 2005, c. 32, introduced a mandatory minimum sentence of 14 days when the Crown proceeded summarily and 45 days when the Crown proceeded by indictment.
- [53] In 2012, the Safe Streets and Communities Act, S.C. 2012, c. 1, increased the mandatory minimum sentence to 90 days when the Crown proceeded summarily and six months when it proceeded by indictment. The former mandatory minimum sentence is impugned in these proceedings. When in force between 2012 and 2015, it read:
- 163.1 (4) Every person who possesses any child pornography is guilty of
- (b) an offence punishable on summary conviction and is liable to imprisonment for a term not more than 18 months and to a minimum punishment of imprisonment for a term of 90 days.
- [54] In 2015, the Tougher Penalties for Child Predators Act, S.C. 2015, c. 23, further increased the mandatory minimum sentence to six months when the Crown proceeds summarily and one year when it proceeds by indictment.

Legal Framework for the Constitutional Challenge

- [55] Since the introduction of the Charter, mandatory minimum sentences imposed by Parliament have been subject to the scrutiny of s. 12, which provides:

Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

- [56] In R. v. Smith, [1987] 1 S.C.R. 1045, the Supreme Court of Canada, for the first time, struck down a mandatory minimum sentence on the basis that it violated s. 12. While the majority found that the mandatory sentence of seven years' imprisonment for importing drugs would not be "grossly disproportionate" in all cases, it held that such a sentence could constitute "cruel and unusual punishment" in a reasonable hypothetical factual matrix (at 1077-78).
- [57] Proportionality is an essential ingredient of a just sentence (R. v. Nur, 2015 SCC 15 at para. 43). In Smith, the majority discussed the meaning of gross disproportionality at 1072-73:

The limitation at issue here is s. 12 of the Charter. In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J. in Miller and Cockriell, [[1977] 2 S.C.R. 680], where he defined the phrase "cruel and unusual" as a "compendious

expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the Charter is, to use the words of Laskin C.J. in *Miller and Cockriell*, supra, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.

[58] The Supreme Court recently examined mandatory minimums in *Nur and R. v. Lloyd*, 2016 SCC 13 [Lloyd SCC]. In *Nur*, the Court affirmed the Smith approach to gross disproportionality and identified the "high bar" for what constitutes "cruel and unusual punishment" under s. 12 of the Charter. The Court elaborated at para. 39:

[39] This Court has set a high bar for what constitutes "cruel and unusual punishment" under s. 12 of the Charter. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. Lamer J. (as he then was) explained at p. 1072 that the test of gross disproportionality "is aimed at punishments that are more than merely excessive". He added, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation". A prescribed sentence may be grossly disproportionate as applied to the offender before the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional.

- [59] At first instance in *Lloyd* (reasons indexed at 2014 BCPC 8), the sentencing judge "declared" that the mandatory minimum sentence of one year of imprisonment, found in s. 5(3)(a)(i) (D) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19, was unconstitutional. He nonetheless sentenced Mr. Lloyd to one year in prison.
- [60] On appeal, this Court set aside the finding of unconstitutionality on the basis that the Provincial Court did not have jurisdiction to make the declaration (*R. v. Lloyd*, 2014 BCCA 224 at para. 38 [*Lloyd BCCA*]). Additionally, this Court concluded that since the mandatory minimum did not impact the sentence, it would not address the issue (para. 44). It also found that the one-year sentence was unfit and increased it to 18 months' imprisonment (paras. 65-70).
- [61] The Supreme Court overturned this Court's decision (*Lloyd SCC* at para. 56). The Court unanimously found that although provincial court judges do not have jurisdiction to declare a law of no force and effect, the sentencing judge did not make a formal declaration (paras. 17 and 61). Instead, it found that the sentencing judge properly considered the constitutional validity of the provision in the course of determining whether the provision applied in the case before him (paras. 20 and 61). The majority agreed with the sentencing judge that s. 5(3)(a)(i)(D) was unconstitutional (paras. 37 and 50). Because the Supreme Court, unlike the Provincial Court, had the jurisdiction to do so, it declared that the provision was of no force and effect (para. 56). It also restored the one-year sentence imposed by the trial judge (paras. 52-55 and 61).
- [62] In *Nur*, the majority set out the analytical process to be followed when a mandatory minimum sentence is challenged. First, the court must determine what constitutes a proportionate sentence for the offence based on the objectives and principles of sentencing in the Code (para. 46). Second, it must decide, bearing the proportionate sentence in mind, whether applying the mandatory minimum would result in a grossly disproportionate sentence for the offender before the court (para. 46). Third, if the sentence is not grossly disproportionate for that offender, the court must then consider whether any "reasonably foreseeable applications" of the provision will result in grossly disproportionate sentences for other offenders (para. 77). If the answer to either of the latter two questions is yes, then the mandatory minimum sentence is inconsistent with s. 12 and "will fall unless justified under s. 1 of the Charter" (paras. 46, 105-106).

Application

Sentencing Principles for Child Pornography Possession Offences

- [63] The first task, according to *Nur*, is to determine a proportionate sentence for the offence, which requires consideration of the guiding statutory principles. The majority in *Nur* reminded us that the fundamental principle in sentencing is to achieve a proportionate sentence: a sentence that balances the gravity of the offence and the moral blameworthiness, or degree of responsibility, of the offender (para. 42). In reaching a

proportionate sentence, the sentencing judge must take into account the sentencing objectives found in s. 718 of the Code, aggravating and mitigating factors including those in s. 718.2(a)(i)-(iv), the similarity principle (s. 718.2(b)), the totality principle (s. 718.2(c)), and the need for restraint in imposing imprisonment (s. 718.2 (d)-(e)) (paras. 39-42).

- [64] In this case, s. 718.01 provides that in cases involving child abuse, primary consideration is given to the objectives of denunciation and deterrence.
- [65] Prior to the establishment of the mandatory minimum sentence, non-carceral sentences were imposed for possession of child pornography. In *R. v. Pommer*, 2008 BCSC 737 at paras. 50-57, Smith J. (as she then was) canvassed a number of decisions pre-2005 where discharges, suspended sentences and conditional sentences were imposed. Judge Galati concluded that a suspended sentence was in the range of sentences appropriate for Mr. Swaby absent the mandatory minimum sentence.
- [66] In *R. v. R.L.W.*, 2013 BCCA 50, in a case that proceeded by indictment, this Court upheld a general range of between four months and two years for possession of child pornography offences. In *R. v. Watson*, 2018 BCCA 329, this Court said, at para. 25:
- [25] Sentences imposed in cases of child pornography will vary significantly depending on the nature of the offence and the offender's personal circumstances. In *R. v. Inksetter*, 2018 ONCA 474, the Ontario Court of Appeal imposed a sentence of three years in prison on a count of possession of child pornography. That case involved significantly more egregious circumstances: more than 1.2 million images and more than 40,000 videos depicting child pornography at the extreme end of the spectrum. However, like Mr. Watson, the offender in that case was older (age 51), had no prior criminal record, and did not pose a significant risk of reoffending.

Thus, in my view, even absent a mandatory minimum sentence, a period of incarceration will usually be required, even when proceeding summarily. However, prior to the introduction of the mandatory minimum, non-carceral sentences were in the appropriate range in some cases. Given the deference an appellate court is mandated to show to sentencing judges, I cannot disagree that absent a mandatory minimum sentence, a suspended sentence would have been in the range of sentences available.

Particularized Inquiry

What is a proportionate sentence for Mr. Swaby?

- [67] As set out above, the possession of child pornography is a very serious crime. Except in exceptional cases, those who possess child pornography will be incarcerated. Mr. Swaby, however, as found by the sentencing judge, is the exceptional case. Judge Galati described him as "child-like" due to his impairments. Both psychologists who interviewed Mr. Swaby agreed on the deleterious effect that incarceration would have on him.

- [68] There is no dispute that the gravity of Mr. Swaby's offence is high. I agree with Marchand J. that Galati P.C.J. erred when he concluded that possession of child pornography did not involve the "direct infliction" of harm on others, and that this should be taken into account in considering Mr. Swaby's moral culpability (paras. 60 and 73). It is well established that the offence of possession inflicts serious harm on children by providing a market for the material (Watson at para. 23).
- [69] I also agree with Marchand J. that the gravity of the offence is not considered when assessing moral culpability; it is weighed as a factor when considering a proportional sentence. The sentence should be proportionate to the circumstances of the offence, including its gravity, and the circumstances of the offender.
- [70] I also agree with Marchand J. that Galati P.C.J.'s error in respect of the harm of child pornography did not actually affect his assessment of the gravity of the offence. Judge Galati was clearly alive to the grave nature of the circumstances of Mr. Swaby's offence. He described the child pornography in terms of "sickening horror" in the course of deciding not to view the pornography. He said, at para. 14:
- [14] Recognizing that some types of child pornography are more egregious than others, many of the videos on Mr. Swaby's computer fall at the more serious end of the spectrum as they involve penetrative sexual activity between adults and very young children, including in a few cases, sadistic behaviour. The Agreed Statement of Facts provides descriptions of the various sex acts being performed. They are disgusting examples of the sexual victimization of children.
- [71] The Crown argues that Marchand J. erred in upholding Galati P.C.J.'s conclusion on Mr. Swaby's moral blameworthiness despite his error in terms of the gravity of the offence.
- [72] Assessing Mr. Swaby's moral culpability is complicated as he is not a "typical" offender. Mr. Swaby was 23 years old at the time of the offence. He is now 28 years old. His background is discussed above. At the time of the offence, Mr. Swaby lived with significant cognitive and intellectual impairment, as well as other mental health problems, including auditory hallucinations.
- [73] The circumstances of his offence were undeniably serious. His collection was extensive, and portrayed children, including very young children, in violent and horrific circumstances.
- [74] Mr. Swaby understood that what he was doing was wrong. But, as Galati P.C.J. found, he did not know "how wrong it was". Mr. Swaby likened the experience of watching the videos to watching a video of a person breaking their leg. That is obviously not an accurate reflection of the blameworthiness or harm of the offence.
- [75] Both Galati P.C.J. and Marchand J. concluded that Mr. Swaby had a highly reduced level of moral culpability based on his personal circumstances. That reduced level of culpability supported their findings that a fit and proportionate sentence would be a CSO.

- [76] In order to justify a non-custodial sentence, it is necessary to appreciate the seriousness and significance of Mr. Swaby's impairments--particularly given that the difference is between a 90-day sentence, which could cause significant harm to Mr. Swaby, and a CSO, which is a sentence of imprisonment served in the community rather than the harmful prison setting.
- [77] In *R. v. Proulx*, 2000 SCC 5 at para. 22, the Court concluded that a CSO is "also a punitive sanction capable of achieving the objectives of denunciation and deterrence". [Emphasis in original.]
- [78] I agree with Galati P.C.J. and Marchand J. that absent a mandatory minimum sentence, a sentence to be served in the community under strict conditions would satisfy all of the objectives and principles of sentencing, and would be a proportionate sentence.

Is the mandatory minimum grossly disproportionate for Mr. Swaby?

- [79] The final question that Nur directs us to ask is whether the mandatory minimum sentence is grossly disproportionate to a sentence served in the community in these circumstances. In my view, the answer is clear from the summary of Mr. Swaby's circumstances.
- [80] Judge Galati and Marchand J. both found that a sentence of 90-days' incarceration was grossly disproportionate to the CSO that would otherwise be appropriate. The Crown submits that both judges erred in two ways in coming to that conclusion. First, in failing to find that a 90-day sentence would not have been grossly disproportionate if served intermittently. Second, in finding that the unavailability of a CSO could render a mandatory minimum sentence cruel and unusual.
- [81] The Crown submits that a 90-day sentence can be served intermittently (Code, s. 732(1)), and therefore would not be grossly disproportionate for Mr. Swaby. I disagree. Galati P.C.J. correctly identified that attending at a prison to serve the sentence intermittently for many weeks would have a deleterious effect on Mr. Swaby. This conclusion was not based on speculation, as the Crown submits, but on his consideration of all of the evidence, including his assessment of Mr. Swaby, who appeared before him.
- [82] I do agree that in some circumstances, an intermittent sentence will be proportionate where a "straight time" sentence would not be. Ordering a sentence to be served intermittently can alleviate deleterious effects for certain offenders (*R. v. Goltz*, [1991] 3 S.C.R. 485 at 514). However, Galati P.C.J. found that these were not those circumstances and Mr. Swaby was not that offender. I see no reason to interfere with his finding.
- [83] Finally, the Crown submits that the unavailability of a CSO cannot render a mandatory minimum sentence unconstitutional. The Crown submits that a CSO can never be proportionate when a prison term is not, because a CSO can only be imposed when imprisonment is warranted. The Crown says that if Mr. Swaby's four-month CSO was proportionate, then a shorter, 90-day term of incarceration could not have been grossly disproportionate.

- [84] Where a CSO is the fit and proportionate sentence, a period of incarceration can, in the right circumstances, be grossly disproportionate to that sentence, because a CSO is a sentence of a different kind. Although a CSO is a sentence of imprisonment (Proulx at para. 29), it is not a period of incarceration (R. v. Wu, 2003 SCC 73 at para. 25). As the Supreme Court recognized in Proulx, there "is a very significant difference between being behind bars and functioning within society" under a CSO (para. 40, quoting R. v. Shropshire, [1995] 4 S.C.R. 227 at para. 21).
- [85] Although recent s. 12 cases have focused on durations of mandatory minimum sentences, s. 12 of the Charter has its origins in protection against punishments of a particular nature or kind: Smith at 1109, per Wilson J. As Lamer J. (as he then was) wrote in Smith, the gross disproportionality of a sentence is ultimately a multi-factored question (at 1073):

The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied. Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. Sometimes it will be the result of the combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality. For example, twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement.

- [86] It is precisely because a CSO and a jail term are sentences with different natures that their durations cannot be directly compared. The Court explained clearly in Proulx that a conditional sentence "will usually be a more lenient sentence than a jail term of equivalent duration" (para. 44).
- [87] Judge Galati properly concluded that a carceral sentence would be grossly disproportionate to the CSO that he ultimately imposed on Mr. Swaby. Although Mr. Swaby's offending was extremely serious, it was ameliorated by his personal circumstances. In his unusual circumstances, I agree with Galati P.C.J. and Marchand J. that the mandatory minimum sentence is grossly disproportionate, and that sending Mr. Swaby to prison, even to serve an intermittent sentence, would outrage the standards of decency of most informed Canadians.
- [88] Although this is sufficient to find that s. 163.1(4)(b) violates s. 12, I do not wish to leave the discussion here. In my view, the mandatory minimum is also grossly disproportionate to reasonable hypothetical offenders.

Reasonable Hypothetical

- [89] The Crown cites six cases that upheld mandatory minimum sentences for child pornography offences contained in s. 163.1, as well as three cases that upheld 90-day mandatory minimum sentences for other sexual offences committed against children. All nine decisions were made by trial courts.

- [90] Since the hearing occurred in this case, one of those decisions has been successfully appealed. In that case, *R. v. John*, 2018 ONCA 702, rev'g in part 2017 ONSC 810, the Court of Appeal for Ontario found that the six-month mandatory minimum (in place between 2012 and 2015) that applied when the Crown proceeded by way of indictment on a possession of child pornography charge violated s. 12 on the basis of a reasonable hypothetical. I note, parenthetically, that the most recent amendment increased the mandatory minimum for summary offences to six months' imprisonment. The parties were given an opportunity to make further submissions in light of that decision.
- [91] The Court in *John* considered the following reasonable hypothetical (para. 29):
- [29] An 18-year-old whose friend forwards him a "sext" from the friend's 17-year-old girlfriend without her knowledge. The 18-year-old doesn't forward the "sext" but keeps it on his phone.
- [92] The Court concluded that the reasonable hypothetical would give rise to a grossly disproportionate sentence if the mandatory minimum sentence were imposed. In doing so, it emphasized that a six-month jail sentence was a substantial interference with liberty, that the offence included only one image, that the image was "lawfully self-created", that the hypothetical offender was a passive recipient, and that the offender was a young adult (para. 39).
- [93] The Court in *John* commented on the necessity of mandatory minimum sentences for child pornography offences at para. 41:
- [41] The mandatory minimum is entirely unnecessary. This court has recently emphasized the importance of denunciation and deterrence for any offence involving abuse of a child, and that those principles are the primary principles of sentencing applicable for such offences involving child pornography: *R. v. Inksetter*, 2018 ONCA 474, at para. 16. In another recent decision, *R. v. J.S.*, 2018 ONCA 675, this court upheld a sentence of 18 years for sexual abuse of young children, making child pornography depicting that abuse, and distribution of that material.
- [94] This Court has similarly and repeatedly stated the same principles in the context of child pornography offences: see *R. v. Allen*, 2012 BCCA 377 at para. 60; *Watson* at para. 23. As noted above, the range of sentence is generally incarceration beyond the 90-day mandatory minimum at issue here.
- [95] In its supplemental submissions, the Crown submits that the 90-day mandatory minimum sentence would not constitute cruel and unusual punishment for the hypothetical offender considered in *John*. The Crown emphasizes, as in its original submissions that a 90-day sentence can be served intermittently.
- [96] I would adopt the analysis by Pardu J.A. in *John*, and apply it to the 90-day mandatory minimum sentence in this case. While incarceration is almost always the inevitable sentence for such offences, there exist reasonable hypotheticals in which a mandatory term of incarceration--even if served intermittently--would result in a grossly disproportionate

sentence, rendering such a sentence cruel and unusual. Indeed, as noted above, prior to the mandatory minimum sentences, suspended sentences, conditional discharges and CSO's were, on occasion, deemed to be fit sentences for possession of child pornography.

[97] The offence of possession of child pornography is extremely broad. It captures not only actual photos and videos, but also drawings and cartoons. It is broad enough to capture conduct that, while morally blameworthy, does not justify a prison term. As with other broadly framed offences (e.g., Lloyd SCC at paras. 30 and 35), a mandatory minimum sentence of incarceration will be susceptible to challenge. In Lloyd, at paras. 35-36, the Court found that where offences may be committed in a broad array of circumstances, and by a wide range of people, they "will almost inevitably include an acceptable reasonable hypothetical", and be found unconstitutional. The Court once again recommended that the law be amended to permit a residual judicial discretion to exempt the outliers from a mandatory minimum sentence.

[98] The Crown did not seek to justify the mandatory minimum sentence as a reasonable limit under s. 1.

[99] Therefore, I would uphold the conclusion of Marchand J. that the mandatory minimum sentence of 90-days' imprisonment is unconstitutional, and is of no force and effect.

[100] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Griffin"

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