

CANADA / JUDGMENT

R. v. Swaby

2018 BCCA 35

COURT

British Columbia Court of Appeal

DECIDED

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2018 BCCA 35 R. v. Swaby COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Swaby, 2018 BCCA 35 Date: 20180125 Docket: CA44930 Between: Regina Applicant Appellant And Matthew Christopher Swaby Respondent 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 Hunter (In Chambers) On appeal from: an order of the Supreme Court of British Columbia, dated November 8, 2017 (R. v. Swaby, 2017 BCSC 2020, Vancouver Registry No. 27223) Oral Reasons for Judgment Counsel for the Applicant: L.A. Vizsolyi Counsel for the Respondent: L.J. Helps Place and Date of Hearing: Vancouver, British Columbia January 23, 2018 Place and Date of Judgment: Vancouver, British Columbia January 28, 2018 Summary: The Crown applies for leave to appeal the decision of a summary conviction appeal court that upheld a Provincial Court of British Columbia judge's decision that the mandatory minimum sentence of 90 days' imprisonment then prescribed by s. 163.1(4)(b) of the Criminal Code infringes s. 12 of the Charter of Rights and Freedoms. The respondent opposed leave on the basis that the question does not raise an issue of law alone and that the appeal lacks merit. Held: Application granted. The constitutional question is a question of law and the matter is one of considerable significance beyond the immediate case.

[1] HUNTER J.A.: The Crown seeks leave to appeal a judgment of a judge of the Supreme Court of British Columbia, sitting as an appeal judge on a summary conviction sentence appeal. The sole issue in the appeal is whether the mandatory minimum sentence provided by s. 163.1(4) of the Criminal Code, R.S.C. 1985, c. C-46, which was in force at the time of the offence, infringes s. 12 of the Charter of Rights and Freedoms.

[2] Mr. Swaby was charged with and pleaded guilty to a single count of possession of child pornography contrary to s. 163.1(4) of the Criminal Code. The Crown proceeded by way of summary conviction. At the relevant time, the minimum sentence for such an offence was imprisonment for 90 days.

- [3] Mr. Swaby sought a declaration before the sentencing judge that s. 163.1(4) prescribed a minimum sentence which is grossly disproportionate to the offence alleged and thereby amounted to cruel and unusual punishment, contrary to s. 12 of the Charter. The sentencing judge agreed and held that s. 163.1(4) was unconstitutional.
- [4] The Crown appealed this decision to the Supreme Court of British Columbia, but the appeal was dismissed and the constitutional remedy confirmed. The Crown seeks leave to appeal this decision to this Court. Test for leave
- [5] This leave application is brought pursuant to s. 839(1) of the Criminal Code, which restricts appeals to this Court from summary conviction sentence appeals to grounds that involve a question of law alone for which leave to appeal has been granted by this Court or a judge of this Court.
- [6] The test for granting leave to appeal under s. 839 was summarized by Justice Frankel in *R. v. Winfield*, 2009 YKCA 9 as follows:
- [13] To obtain leave to appeal from the decision of a summary conviction appeal court, the applicant must establish that (a) the ground of appeal involves a question of law alone, (b) the issue is one of importance, and (c) there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The overriding consideration in the exercise of the discretion to grant or refuse leave is the interests of justice: *R. v. Cai*, 2008 BCCA 332, 258 B.C.A.C. 235 at para. 26 (Chambers); *R. v. Gill*, 2008 BCCA 259 at para. 3 (Chambers).
- [14] In *R.(R.)*, Mr. Justice Doherty discussed the approach to be taken in deciding whether to grant leave to appeal the decision of a summary conviction appeal court. In this connection, he stated:
- [27] The requirement that the applicant obtain leave to appeal in s. 839 provides the mechanism whereby this court can control its summary conviction appeal docket. Access to this court for a second appeal should be limited to those cases in which the applicant can demonstrate some exceptional circumstance justifying a further appeal. ...
- [37] In summary, leave to appeal pursuant to s. 839 should be granted sparingly. There is no single litmus test that can identify all cases in which leave should be granted. There are, however, two key variables -- the significance of the legal issues raised to the general administration of criminal justice, and the merits of the proposed grounds of appeal. On the one hand, if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong, though the grounds must at least be arguable. On the other hand, where the merits appear very strong, leave to appeal may be granted even if the issues have no general importance, especially if the convictions in issue are serious and the applicant is facing a significant deprivation of his or her liberty.

- [7] In *R. v. Klos*, 2015 BCCA 360 (in Chambers), Justice Frankel summarized the considerations for a leave judge in this way:
- [33] The overriding consideration in determining whether to grant or refuse leave is the interests of justice: *R. v. Alpha Manufacturing Inc.*, 2009 BCCA 443 at para. 13, 277 B.C.A.C. 17. That leave will be granted sparingly is evinced by the following from *R. v. Bresnark*, 2013 ONCA 110:
- [5] A second appeal in summary conviction proceedings is the exception, not the rule. *R. v. R. (R.)*, 2008 ONCA 497, 90 O.R. (3d) 641. First, the matter in issue must raise a question of law alone. Even if the proposed appeal involves a question of law alone, there are only two types of cases in which leave to appeal may be granted. One is when the matter raised has significance to the administration of justice beyond the particular case and the grounds of appeal are at least arguable. The other is where the merits appear to be very strong - particularly if the conviction is serious and the appellant is facing a significant deprivation of his or her liberty. Do the grounds involve a question of law alone?
- [8] The first requirement is that the ground of appeal involves a question of law alone. The question for appeal proposed by the Crown is as follows: Does the mandatory minimum sentence of 90 days' jail as provided by s. 163.1(4)(b) of the Criminal Code infringe s. 12 of the Charter of Rights and Freedoms?
- [9] In my view, the question whether a mandatory minimum sentence required by the Criminal Code offends s. 12 of the Charter is a question of law.
- [10] Mr. Swaby has argued that in this case, the conclusions of the sentencing judge were inextricably bound to the factual context before the Court. The fact that the sentencing judge made certain factual findings in order to reach a decision on this point does not detract from the nature of the issue. The New Brunswick Court of Appeal considered a similar argument in *R. v. Dunnett* (1990), 62 CCC (3d) 14 at 18-19 (N.B.C.A.) and made the following comments in relation to a leave application under s. 839 of the Criminal Code: The legal rights protected by the Charter must always be considered in a factual context. They cannot arise in the abstract. The facts must be found by the trial Judge. Once the facts have been established by the trial Judge, an appellate court must consider the application of the Charter to those facts. The application of the facts as found by the trial Judge to the legal rights protected by the Charter involves, in my opinion, questions of law. As such, subject to leave being given, these questions are reviewable by this Court.
- [11] I conclude that I have the jurisdiction to grant leave to appeal on the ground advanced by the Crown. Is the issue one of importance?
- [12] Striking down a provision of the Criminal Code is a matter of considerable importance. The respondent does not suggest otherwise. Does the application meet the merits test?

- [13] The traditional merits test requires the leave judge to determine whether there is sufficient merit in the proposed appeal that it has a reasonable possibility of success. The respondent argues strongly that the summary conviction appeal judge considered the appropriate tests and that there is no merit to the proposed appeal.
- [14] I agree with the respondent that the judgment of the summary conviction appeal judge is thoughtful and well reasoned. However, in my view this application engages the principle set out by Justice Doherty in *R. v. R.(R.)*, 2008 ONCA 497 adopted by Frankel J.A. in the passage from Winfield to which I have referred: if the issues have significance to the administration of justice beyond the particular case, then leave to appeal may be granted even if the merits are not particularly strong, though the grounds must at least be arguable.
- [15] In relying on this passage, I do not mean to suggest that the merits of this appeal are not particularly strong. I take this as an indication that if the issues are of significance to the administration of justice beyond the specific case at bar, then as long as the issue is arguable it is not necessary to assess the merits of the appeal as closely as would be necessary if the legal issue was not likely to affect other parties not before the Court.
- [16] Here, the question whether a provision of the Criminal Code should be struck down as contrary to the Charter is a matter of considerable significance beyond the immediate case. If leave is denied, the decision of the summary conviction appeal judge will be binding in the Provincial Court and in the Supreme Court of British Columbia. While the section under consideration in this appeal has been amended to increase the mandatory minimum sentence, if the judgment sought to be appealed is correct, it will of necessity apply to the current provision in the Criminal Code. It may as well have application to other analogous offences with mandatory minimum sentences. I agree with the Crown that given the importance of the issue and the impact beyond the immediate parties, it should be a division of this Court that decides whether the mandatory minimum sentence in s. 163.1(4)(b) contravenes s. 12 of the Charter.
- [17] I am satisfied that it is at least arguable that a jail sentence of 90 days is not a grossly disproportionate penalty for the serious offence of possession of child pornography. As I am granting leave and the appeal will be heard by a division of this Court, I do not propose to say anything further about the merits of the appeal.
- [18] Accordingly, leave to appeal is granted on the following ground: Does the mandatory minimum sentence of 90 days' jail as provided by s. 163.1(4)(b) of the Criminal Code infringe s. 12 of the Charter of Rights and Freedoms? "The Honourable Mr. Justice Hunter"

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