

CANADA / JUDGMENT

R. v. Swain

2020 BCSC 303

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 303 R. v. Swain

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Swain,

2020 BCSC 303

Date: 20200226

Docket: 101369

Registry: Kamloops

Regina

v.

Cory Richard Swain

Ban on publication pursuant to s. 486.4(2.2) of the Criminal Code,

R.S.C. 1985, c. C-46.

Corrected Judgment: The text of this judgment was corrected at paragraph 1 on April 30, 2020.

Before: The Honourable Mr. Justice Kent

Oral Reasons for Sentencing

Counsel for Crown:

Sarah E. Firestone

Counsel for Accused:

Joseph R.M. Killoran

Place and Date of Hearing:

Kamloops, B.C.

February 26, 2020

Place and Date of Judgment:

Kamloops, B.C.

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I. overview

- [1] Cory Richard Swain stands convicted of the offences of sexual interference with and sexual assault of a person under the age of sixteen years, contrary to sections 151 and 271 respectively of the Criminal Code RSC1985, c-46. The incidents occurred in July 2015 in Kamloops, British Columbia. The female victim was 15 years old at the time of the offences.

- [2] Mr. Swain pleaded not guilty to both charges. The trial took place in Kamloops on June 3-4, 2019. Mr. Swain was represented by legal counsel at the time. The judgment convicting Mr. Swain was delivered on August 7, 2019 and is indexed at 2019 BCSC 1300.
- [3] Mr. Swain's sentencing hearing was put over so that a pre-sentence report could be obtained from the corrections branch of the Ministry of Public Safety and the Solicitor General. A further delay ensued when Mr. Swain failed to appear for the next scheduled sentencing hearing. At today's proceedings, he is represented by different legal counsel.

II. circumstances of the offences

- [4] In July 2015, the victim stayed for four days at the house of one of her girlfriends in the Aberdeen neighbourhood of Kamloops. Mr. Swain, his former wife and their two young children were also visiting the family at the time and staying at the same house.
- [5] On the night the offences occurred, the victim and her friend had decided it would be fun to sleep in a hammock outside in the backyard. They stayed up very late sitting and talking on the backyard patio and at some point, Mr. Swain joined them outside.
- [6] At least two separate interactions of a physical, sexual nature occurred between Mr. Swain and the victim. The first interaction took place after the victim got a drink in the kitchen and was on her way down some outside stairs to the backyard patio. On that occasion, Mr. Swain groped her buttocks.
- [7] The second interaction occurred later when the victim went upstairs to put her glass in the kitchen sink. Mr. Swain came up behind her claiming he was going to bed for the night. He again started to grope the victim which, among other things, included running his hand down her back into her shorts and inserting a finger in her vagina. He tried to remove her shorts and also took her hand, placing it first on the outside of his pants and thereafter, down the inside of his pants so she was touching his penis. He also kissed her in a manner that included the insertion of his tongue in her mouth.
- [8] The victim panicked during both of these interactions but did not physically resist. All of the contact was uninvited and non consensual, although given the victim's age at the time, consent would not have been a defence to the charges in any event.

III. personal circumstances of the offender

- [9] Mr. Swain was born on August 22, 1987. He is currently 32 years of age and was 27 years old at the time of the offences. He was born in Sudbury, Ontario. His parents separated when he was two years old and he lived with his mother until he left as a teenager. His mother was an alcoholic. He dropped out of high school, an event Mr. Swain blames on boredom, not being able to sit still, and needing to pay bills. He managed to complete Grade 9.

- [10] Mr. Swain has three children with two former spouses. Until recently, he was gainfully employed, earning \$60,000 a year. He lived with his employer, who is also a personal friend, and paid rent. He has no significant assets. He claims to be current with his child support obligations. His employment history is mostly in the oil and construction industry.
- [11] Mr. Swain describes himself as having major anger issues while growing up but which have since resolved. He started drinking early as a teenager and blames the drinking for problems with his employment and personal relationships. He claims that drinking is no longer an issue for him. He has smoked marijuana for almost 20 years. However, neither alcohol nor drug abuse appear to have been factors in the offences of which he has been convicted.
- [12] In 2011, Mr. Swain was convicted of assault pursuant to section 266 of the Criminal Code in Calgary, Alberta. He was sentenced to one day in jail and probation for 18 months. He also failed to comply with a recognizance and failed to attend court on two occasions before that conviction.
- [13] Mr. Swain continues to deny the offences of which he has been convicted. Throughout his pre-sentence report interview, he blamed the victim and denied any wrongdoing. He thus takes no responsibility for and expresses no remorse for the events in question.
- [14] Pursuant to s. 726 of the Criminal Code, Mr. Swain was invited to address the court so that his personal statement might be taken into account in determining the sentence to be imposed. He declined to do so.

IV. impact on the victim

- [15] The Court has been provided with a victim impact statement prepared by the complainant's mother. She says she completed the statement because her daughter "has been through enough and I was her caregiver through this".
- [16] The mother described the victim as a determined and motivated young girl, with lots of friends, who was involved in sports and who did well at school. However, "everything changed" for her daughter in the summer of 2015. All of a sudden, she became moody and unreasonable, had outbursts of anger, barely ate, and refused to come out her room. Her physician diagnosed depression and she was put on anti-depressant medication.
- [17] For the past four years the victim has suffered depression and anxiety. She often would not leave the house for long periods of time and she started missing school. Her grades went downhill and by grade ten (2016) she was failing most of her courses and was transferred to an alternate school with shorter hours and a different pace. She rarely made it to school on a regular basis and has not in fact graduated.

- [18] After a lifetime of Bible camps, she has given up her belief in God and stopped participating in church. She has been unable to keep a job. She started using drugs and alcohol, has attempted suicide several times and has also deliberately hurt herself on several occasions, one such incident resulting in 70 stiches. Her mother says she "will never erase the picture of finding my daughter in her room sitting in a pool of blood with her arms all cut up".
- [19] It is clear from the above that the offences committed by Mr. Swain have severely impacted the victim and her family, perhaps irreparably so.

V. parties' position on sentencing

- [20] When proceeding by way of an indictment, section 151 (a) of the Criminal Code provides that any person who is found guilty of sexual interference with a person under the age of 16 years is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment of 1 year. The mandatory minimum sentence has, however, been struck down by the B.C. Court of Appeal and hence does not apply at this time. Because the maximum sentence is 14 years, a Conditional Sentence of Imprisonment is not available.
- [21] Pursuant to section 271(a) of Criminal Code, any person who is found guilty of committing a sexual assault on a person under the age of 16 years, is liable to imprisonment for a term of not more than 14 years and to a minimum punishment of imprisonment for a term of 1 year. This mandatory minimum sentence has also been struck down on constitutional grounds.
- [22] Based on a 1974 Supreme Court of Canada case of the same name, our criminal law has developed a rule against multiple convictions where the same event gives rise to 2 or more convictions for offences comprising substantially the same elements. Called the "Kienapple Principle", the rule provides that in such circumstances, the accused should be convicted of only 1 offence, usually the more serious offence. The Court then stays the lesser or other charge(s).
- [23] In this case, the Crown asks the Court to apply the Kienapple principle by sentencing Mr. Swain only for the conviction under section 151 of the Criminal Code for the sexual interference offence. In doing so, the Crown expressly concedes that the 2 charges against Mr. Swain involved the same actus reus and mens rea, and that the Kienapple principle does apply. Counsel for Mr. Swain agrees with this approach.
- [24] For the sexual interference conviction, the Crown seeks a sentence of 12 to 18 months, with 2 years probation to follow. It also seeks certain mandatory and ancillary orders including;
- A forensic DNA data bank order under section 487.051 of the Criminal Code;
 - An order pursuant to sections 490.012 and 490.013 (2) (b) of the Criminal Code that Mr. Swain comply with the Sex Offender Information Registration Act for a period of 20 years; and

· An order under section 109 of the Criminal Code prohibiting Mr. Swain for a period of 10 years from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, and explosive substance.

[25] Counsel for Mr. Swain refers to R. v. Rennie, 2013 BCSC 909, R. v. Plehanov, 2017 BCSC 2176 and R. v. J.H., 2014 BCSC 2028 as the most appropriate comparators. He submits that a fit sentencing in this case would be at the low end of a 6-12 months imprisonment range. I have read each of these cases carefully. I note they all precede the Court of Appeal decision in R. v. Williams, 2019 BCCA 295, affirming a range of 1-3 years imprisonment for these types of offences.

VI. principles of sentencing

[26] Section 718 of the Criminal Code provides:

[718] The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community. [Emphasis added.]

[27] Section 718.1 of the Criminal Code underlines as a "fundamental principle" that "a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".

[28] Section 718.2 also makes it mandatory for the court to consider certain other sentencing principles, including:

- a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;
- a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances (the "parity principle");
- an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and

· all available sanctions, other than imprisonment, that are reasonable in the circumstances should be considered.

[29] In *R. v. Lacasse*, 2015 SCC 64, the Supreme Court of Canada observed:

- [1] Sentencing remains one of the most delicate stages of the criminal justice process in Canada ... it ... involves ... the exercise of a broad discretion by the courts in balancing all the relevant factors in order to meet the objectives being pursued in sentencing.
- [2] For this purpose, the courts have developed tools over the years to ensure that similar sentences are imposed on similar offenders for similar offences committed in similar circumstances -- the principle of parity of sentences -- and that sentences are proportionate by guiding the exercise of that discretion, and to prevent any substantial and marked disparities in the sentences imposed on offenders for similar crimes committed in similar circumstances. [In that regard], the courts have adopted a system of sentencing ranges and categories designed to achieve these objectives.
- [3] The credibility of the criminal justice system in the eyes of the public depends on the fitness of sentences imposed on offenders. A sentence that is unfit, whether because it is too harsh or too lenient, could cause the public to question the credibility of the system in light of its objectives.
- [4] One of the main objectives of Canadian criminal law is the rehabilitation of offenders. Rehabilitation is one of the fundamental moral values that distinguish Canadian society from the societies of many other nations in the world, and it helps the courts impose sentences that are just and appropriate.

...

- [6] While it is normal for trial judges to consider sentences other than imprisonment in appropriate cases ... in all cases in which general or specific deterrence and denunciation must be emphasized, the courts have very few options other than imprisonment for meeting these objectives, which are essential to the maintenance of a just, peaceful and law-abiding society.
- [30] In determining where to appropriately place a particular offender in the sentencing range applicable to any particular crime, the court will consider the specific aggravating and mitigating factors in the case. The court also recognizes that in exceptional circumstances, a sentence below the range may be appropriate. In *R. v. Voong*, 2015 BCCA 285, the Court noted that such exceptional circumstances might include the absence of a criminal record, significant and objectively identifiable steps towards rehabilitation from drug addiction, gainful employment, genuine remorse and acknowledgement of the harm done to society as a result of the offences (as opposed to harm done to the offender as a result of being caught). In short, the Court stated, "There must be something that would lead a sentencing judge to conclude that the offender has truly turned his or her life around ..." In this case, there are no "Voong" factors favoring a sentence below the "usual" sentencing range.

[31] In *R. v. Williams*, 2019 BCCA 295, our Court of Appeal recently affirmed that sentences for sexual interference in this province will generally fall within a range of 1 to 3 years' imprisonment. In confirming this range, the Court expressly noted,

- Section 718.2 of the Criminal Code deems as an aggravating circumstance, abuse of a person under the age of 18 years (para 63);
- "Section 718.01 of the Criminal Code requires a Court in imposing a sentence for an offence involving abuse of a person under 18 years of age, including sexual interference, to give primary consideration to the objectives of denunciation and deterrence" (para 64);
- "It is well-documented in the literature and well-established in the jurisprudence that sexual activity with a child is likely to cause significant emotional, psychological, and often physical harm that can last a lifetime" (para 66); and
- "The more invasive the sexual activity and more significant the aggravating factors, the higher the sentence. However a proportionate sentence must also give way to attenuating personal circumstances and mitigating factors that may reduce the offender's moral blameworthiness." (para 71).

VII. conclusion and ancillary orders

[32] In this particular case, there are few mitigating factors in Mr. Swain's favor. He is 32 years old, has a full time job, and is paying child support for his 3 children. He remains in contact with his former spouses both of whom are supportive of him. He provides care for his second spouse who suffers from epilepsy and multiple sclerosis. His criminal record is dated, unrelated, and was influenced by alcohol abuse which Mr. Swain says he has since overcome.

[33] Mr. Swain does not have the mitigating benefit of a guilty plea. During his pre-sentence report interview, he expressed no remorse, but rather blamed the victim. He has not acknowledged any harm either to the victim or to the community. As noted above, there are no "Voong" considerations in play.

[34] Any mitigating factors in the case are far outweighed by aggravating factors. Mr. Swain's conduct was opportunistic and predatory. His victim was a 15 year old girl. His conduct has caused her severe emotional and psychological harm of a sort that may last her lifetime. His moral blameworthiness is very high. In such circumstances, the principles of denunciation and deterrence must be the primary considerations in sentencing Mr. Swain and they strongly militate in favor of imprisonment in the mid range of sentences for sexual interference endorsed by our Court of Appeal.

[35] In *R. v. Rosenthal*, 2015 YKCA 1, the Court replaced a 2 years suspended sentence with a 14 month custodial sentence holding "there was no logical reason to exclude cases of digital penetration from the range of sentence with sexual assault involving intercourse because it is a serious and invasive form of sexual assault" (para 8). In that case a woman was

socializing with the accused and consuming alcohol. She asked to stay over and sleep in his bed rather than going home. She awoke to his finger in her vagina, which he removed when she moved over. She then left.

- [36] The Court in *R. v. P.D.W.*, 2015 BCSC 660, imposed a 15 month sentence for a 49 year old man who digitally penetrated and performed oral sex on a 13 year old girl. He also asked her to perform oral sex on him, which she did not do. They had exchanged text messages for more than a month. There, the offender was sentenced for 2 offences, sexual interference and an invitation to sexual touching, stemming from one incident where the victim was visiting the offender's step-daughter for a sleepover.
- [37] In light of all the above, for his conviction for the offence of sexual interference under s.151 of the Criminal Code, Mr. Swain is sentenced to 15 months imprisonment with 2 years probation following his release from custody.
- [38] Section 719 (3) and (3.1) of the Criminal Code permits the Court to give sentencing credit for each day an accused spends in custody in respect of the offences with which he has been charged. The maximum credit is 1.5 days for each day spent in pre-sentence custody. While a day in jail might ordinarily count as a day in jail, the Supreme Court has noted that enhanced credit for custody in a remand center is warranted because of the often harsh conditions in such centers and also because time spent in a remand center does not count for the purposes of eligibility for parole, or earned remission for statutory release.
- [39] In this case, Mr. Swain has served 61 days in custody to date and the Crown expressly concedes he should be granted enhanced credit at a ratio of 1.5 to 1 for a total credit of 92 days. Mr. Swain's 15 month sentence is thus reduced by 92 days.
- [40] The terms of the probation order will be as follows:
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 report in person to a probation officer at Kamloops, BC within 2 business days after your release from custody, unless you have obtained, prior to your release, written permission from the probation officer to report elsewhere or within a different timeframe. After that, you must report as directed by the probation officer;
 4. When first reporting to the probation officer, you must inform him or her of your residential address and phone number. You must not change your residence or phone number without written permission from your probation officer;
 5. You must immediately notify the Court or the probation officer of any change in employment or occupation;

6. You must attend, participate in and complete intake assessment, counselling, or any other program as directed by the probation officer including any such program related to sexual offence prevention;
 7. You must have no contact or communication directly or indirectly with [the victim];
 8. You must not go to or be within 100 meters of any residence, school or workplace of [the victim], except while in a moving motor vehicle on your way to some other place;
 9. You must have no contact or communication directly or indirectly with, nor be alone in the presence of, any person you know to be or who reasonably appears to be under the age of 16 years. The exceptions are:
 - a) if they are your own children;
 - b) if you have the written permission of your probation officer in which case you must carry the permission;
 - c) with the consent of the child's parent or guardian, but only after the parent or the guardian has reviewed this order;
 - d) in the course of legitimate employment, but only in the immediate presence of an adult who has knowledge of this order, or when contact is necessary or incidental to the employment;
 - e) through or in the immediate presence of a lawyer who has reviewed this order; or,
 - f) during scheduled court appearances but only with a sheriff present.
- [41] I also grant the 3 mandatory ancillary orders sought by the Crown pursuant to sections 109 (weapons prohibition), 487.05 (DNA) and 490.012 (Sex Offender Information Registration) of the Criminal Code.
- [42] Lastly, a Kienapple stay is to be entered with respect to the conviction under s. 271 of the Criminal Code.

"Kent J"

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