SUPREME COURT OF YUKON

Citation: *R v Sweeney*, 2024 YKSC 10

Date: 20240306
S.C. No. 21-01508
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

AND

KEVIN VICTOR SWEENEY

Publication, broadcast or transmission of any information that could identify the complainant or a witness is prohibited pursuant to s. 486.4 of the *Criminal Code*.

Before Justice K. Wenckebach

Counsel for the Crown — Kathryn Laurie

Appearing on his own behalf — Kevin Sweeney

This decision was delivered in the form of Oral Reasons on March 6, 2024. The Reasons have since been edited for publication without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): Mr. Sweeney has been convicted of nine offences of violence and sexual violence against the complainant, XY.

[2] The offences occurred when XY was living with Mr. Sweeney. XY, who is an Indigenous woman, was 17 years old when she moved in with Mr. Sweeney. She was attending school in Whitehorse, away from her home community, and needed housing. Mr. Sweeney agreed to take her in and care for her.

[3] At the time XY was living with Mr. Sweeney she was experiencing a number of difficulties, including an addiction to crack cocaine. Mr. Sweeney knew this. He used XY's addiction in his offences against her. Thus, he gave her crack in exchange for sex and received crack cocaine in exchange for providing her sexual services to a third party. Mr. Sweeney and XY also regularly used crack while he was having sexual contact with her.

[4] Mr. Sweeney is now before me for sentencing.

[5] The Crown submits that a 13-year sentence is appropriate, with reduction to 11 years taking into account the totality principle. Defence counsel submits that five to seven years is an appropriate sentence in these circumstances.

[6] I begin my analysis by setting out the principles of sentencing.

[7] When crafting a sentence, the Court must keep in mind the purposes of sentencing, which are found at ss. 718(a)-(f) of the *Criminal Code*, RSC 1985, c C-46 ("*Criminal Code*" or "*Code*"). Of the purposes listed in s. 718 denunciation, deterrence, and rehabilitation often guide the Court in sentence determinations.

[8] The objective of denunciation aims at crafting a sentence that communicates society's condemnation of an offence. Deterrence addresses preventing the offender from re-offending and others from committing similar offences. Rehabilitation is aimed at working with the offender through their issues.

[9] Sometimes the Court must balance what can be competing purposes, such as between denunciation and deterrence, and rehabilitation. The *Criminal Code* also provides direction to the Court that, at times, certain purposes are to be prioritized.

[10] The Court must also ensure that the sentence imposed is proportionate. Proportionality is the fundamental principle in sentencing. What that means is that the Court assesses the seriousness of the offence and the degree of responsibility of the offender to determine a fit sentence.

[11] The Court has specific tools it uses to decide what a proportionate sentence is. First, the Court examines the mitigating and aggravating factors. Mitigating factors are the aspects of the crime and the offender that support a less severe sentence. Aggravating factors are aspects of the crime and the offender that support a more severe sentence. The Court looks at the circumstances of the offence itself as well as other evidence, such as pre-sentence reports ("PSRs") which are prepared by bail supervisors, to determine the mitigating and aggravating factors.

[12] The Court will also examine the sentences granted in other cases with similar offences and offenders. Understanding the sentence ordered in those circumstances helps the judge determine what an appropriate sentence may be in the case before them.

[13] Where an accused is sentenced for multiple offences, the principle of totality applies. This means the judge must ensure that the offender's punishment is not more severe than it would have been if the offender had been convicted of one offence. In those cases, the Court may adjust the sentence to meet the principle of totality.

[14] The Court brings together all these steps to come to the sentence for the offender before them.

[15] This is what I will be doing here. First, I will address the most important purposes of sentencing in Mr. Sweeney's case. Second, I will examine the mitigating and

aggravating factors. Third, I will analyse the cases that counsel have submitted. At the end, I will put those factors together to formulate a sentence.

Purposes of Sentencing

[16] Turning to the purposes of sentencing, the *Criminal Code* directs that denunciation and deterrence are to be the primary considerations where an offence involves the abuse of a person under the age of 18 years. Prioritizing denunciation in sexual offences against children is a way of recognizing the wrongfulness of these crimes and the profound harm they cause.

[17] The *Criminal Code* also provides that denunciation and deterrence are the primary considerations where the victim is vulnerable, including where the person is Indigenous and female. This recognizes the particular gravity of committing an offence against someone who, because of racism and the history and present-day realities of colonialism or other prejudices, are at heightened risk of being victimized.

[18] In this case, Mr. Sweeney committed sexual offences against a teenaged Indigenous girl. Denunciation and deterrence therefore are the primary considerations in fashioning an appropriate sentence.

Mitigating and aggravating factors

[19] I will now consider the mitigating and aggravating factors. The mitigating factors, that is, those aspects of the crime and the offender that support a less severe sentence, are few.

[20] Mr. Sweeney reported, for the PSR, that he went through a difficult childhood. Defence counsel submits that this is a mitigating factor. Crown submits that I should

give the evidence little weight because in my decision on conviction I found that Mr. Sweeney is often not credible.

[21] I do not find Crown's submissions on this issue persuasive and accept that Mr. Sweeney had a traumatic childhood. The bail supervisor who completed the PSR interviewed Mr. Sweeney's mother. While she did not specifically corroborate all of Mr. Sweeney's statements about what occurred in his childhood home, it was clear from what she said that there was alcohol abuse in Mr. Sweeney's household. Her general demeanour towards Mr. Sweeney also supports his reports of a difficult childhood.

[22] The other mitigating factor here are Mr. Sweeney's health problems. It is uncontroverted that Mr. Sweeney has health issues, including mental health issues. There is no evidence that he cannot be treated in prison. However, I accept that prison will be harder on him than it would be on a healthy person. Mr. Sweeney's health, therefore, provides some mitigation.

[23] Mr. Sweeney's counsel also indicated that Mr. Sweeney wanted me to know that he has lost everything because of the conviction. The Court can take into account negative impacts on an accused that occur because of the commission of an offence. They must, however, relate to the offence and the circumstances of the offender.

[24] I recognize that Mr. Sweeney believes that he has lost a great deal because of the convictions. Based on what I have seen and read, however, including in the PSR and Dr. Lohrasbe's report, I do not conclude that Mr. Sweeney's losses are because of the convictions. Mr. Sweeney puts the responsibility for his ills on many sources outside of himself. He may want to look at himself and what he has done to find himself where he is now.

[25] With regard to the circumstances of the offender, Mr. Sweeney continues to deny the offences. This is his right and it is not an aggravating factor.

[26] It also means, however, that he cannot benefit from the mitigation which comes with taking responsibility for an offence. Furthermore, it makes it difficult to assess prospects for rehabilitation.

[27] While the mitigating factors are few, the aggravating factors are numerous. The *Criminal Code* provides that certain factors which are present here must be considered aggravating. These are: Mr. Sweeney abused a victim who was under 18 years of age; Mr. Sweeney abused a position of trust or authority in relation to XY; and the offence had a significant impact on XY.

[28] In this case, Mr. Sweeney began abusing XY when she was 17 years old. The Supreme Court of Canada has noted that disproportionately low sentences have historically been ordered in cases where the victim was a teenager. It has reminded lower courts not to minimize the seriousness of sexual offences against a child because they are adolescents (*R v Friesen*, 2020 SCC 9 ("*Friesen*")).

[29] Mr. Sweeney was also in a position of trust and authority in relation to XY. Mr. Sweeney offered her a place to live so she could attend school. As noted by the Crown, Mr. Sweeney was in a position of trust because he took XY in and made her part of the family. He was entrusted to provide XY with food and shelter. Mr. Sweeney knew that XY had few adults she could rely on in Whitehorse. She was largely on her own.

[30] He was also in a position of authority. It was Mr. Sweeney that ran the house. He was the disciplinarian not only of his children but of XY as well.

[31] Mr. Sweeney additionally took advantage of the systemic vulnerabilities XY faced. Indigenous children often have fewer educational opportunities than non-Indigenous children. This happened to XY as well. She believed that her home community did not provide her with good educational opportunities, whereas Whitehorse did. She moved away from her parents in order to get a better education and because of that found herself living at Mr. Sweeney's home.

[32] Further, XY was living in a chaotic environment. She was in an unhealthy relationship and was abusing crack cocaine. Mr. Sweeney knew this.

[33] XY was vulnerable in multiple ways. As a person in a position of trust and authority, Mr. Sweeney was supposed to help her. Instead, he exploited her.

[34] While arguing about Mr. Sweeney's likelihood of recidivism, Mr. Sweeney's counsel suggested that Mr. Sweeney's crime was a crime of opportunity. My finding, however, is that this was not a crime of opportunity. Mr. Sweeney knew that XY was abusing crack cocaine when he offered her a place to live. He knew that she was living in an unstable environment with few supports. He knew she was a teenager, the same as his own children. I have found that Mr. Sweeney asked XY to move into his home because he wanted to have sexual activity with her. I agree with the Crown that there were elements of grooming in Mr. Sweeney's approach to XY. Mr. Sweeney's actions were predatory.

[35] Moreover, Mr. Sweeney was 49 when the abuse began. This large age difference is also an aggravating factor.

[36] The duration, frequency, and extent of physical interference in the sexual abuse are all aggravating factors. Mr. Sweeney had sexual contact with XY frequently over

nine or 10 months. The sexual contact included kissing, touching, oral and vaginal penetration, and attempted anal penetration.

[37] The physical violence was not frequent but was not negligible. Mr. Sweeney whipped XY with a belt causing her skin to split, strangled her, and kicked her with steel toe boots.

[38] Undoubtedly, Mr. Sweeney's abuse has caused grave harm to XY. Both XY and her mother provided victim impact statements that described some of the effects XY and her family have experienced. I will not refer to these effects in detail, but I recognize the pain and anguish Mr. Sweeney has caused and continues to cause five and a half years after the offences were committed.

[39] The Crown submitted that although Mr. Sweeney has a dated and largely unrelated record, he does have a conviction for assault. It is not to me, however, a strong aggravating factor.

[40] Sexual offences against children are inherently wrongful. Here, in addition, Mr. Sweeney abused his position of trust and authority and profoundly exploited XY's vulnerabilities. The abuse was extensive. Mr. Sweeney is highly morally blameworthy because he knew or ought to have known the profound impact his abuse would have on XY. There are few mitigating factors to detract from his moral blameworthiness. The result is that a substantial penalty should be imposed. The next question is what that penalty should be.

[41] To address this issue, I will analyse the case law counsel have filed.

[42] As Crown counsel has done, I will concentrate on the offences of receiving a material benefit knowing that it was obtained for the commission of an offence in

combination with sexual assault with a weapon, as they are interrelated, and the offence of sexual exploitation.

[43] Counsel filed five cases which deal with receiving money or drugs in exchange for sexual services. In legal terms, this is called “providing consideration for sexual services.” For ease, I will refer to it as “paying for sexual services.”

[44] The cases bare many similarities to the facts in this proceeding, as well as differences. The similarities include that in most of the cases counsel filed, the victims were vulnerable teenagers and in several they were identified as Indigenous. In many of the cases, the victims were supplied with alcohol or drugs in exchange for sex. The perpetrators knew the victims’ ages and were generally aware of other vulnerabilities.

[45] In one case, *R v Alcorn*, 2021 MBCA 101, the offender was convicted of one charge arising from one incident. In the rest of the cases, the conviction related to providing sexual services for pay was one amongst others. In *Alcorn*, the sentence imposed by the Court of Appeal was five years. In other cases, the sentences imposed for the charges related to paying for sexual services ranged from six months to six years. Total sentences on all counts, including paying for sexual services, ranged from 37 months to 10 years.

[46] Although there are similarities between the cases filed in the case at bar, there are challenges that make it difficult to apply the case law here. First is that only two of the cases are from British Columbia and the Yukon. This is important because local circumstances can affect the sentences imposed.

[47] Unfortunately, the decisions from British Columbia and Yukon provide limited assistance because the sentencing decisions are not available. Sentencing decisions,

unlike the appeal and conviction decisions filed, would provide a better understanding of the aggravating and mitigating circumstances.

[48] The other cases are sentencing decisions. However, they are from Alberta and Manitoba. Moreover, in some of them, there were different convictions, such as possession of child pornography, that are not present here.

[49] Nevertheless, I can discern certain principles from those cases. The first is that *Friesen* applies equally to these offences as it does to offences of sexual assault, sexual exploitation, and other related offences. *Friesen* discusses the importance of applying appropriate sentences to offenders who are convicted of sexual violence against children. In particular, it is important to underline that children, including teens under the age of 18, who provide sexual services for payment do not do so voluntarily. They deserve to be protected, as they are victims as well.

[50] Thus, the statement in *Friesen* that “mid-single digit penitentiary terms for sexual offences against children are normal” (at para. 114) is equally applicable in offences involving children providing sexual services for pay as it is in other offences of violence against children.

[51] In this case, Mr. Sweeney took XY to Mr. Anshoor’s house with the plan to trade XY’s body for cocaine. He provided XY to Mr. Anshoor, who performed oral sex on Mr. Anshoor, and got crack in return. The gravity of these actions was compounded when immediately after, in front of Mr. Anshoor, Mr. Sweeney had vaginal intercourse with XY and whipped her with a belt.

[52] In light of what occurred simply on that night, defence counsel’s recommendation of a global sentence of five to seven years would not be a proportionate sentence.

[53] A six-year sentence for the s. 286.2(2) and s. 272 offences is not outside of the range: those are providing XY to Mr. Anshoor for sexual services and the sexual assault with the weapon. However, given that Mr. Sweeney's experience in prison will be more difficult than it would for others and given the other mitigating factors, I will impose a five-year sentence for these two offences.

[54] The Crown also seeks a six-year sentence for the convictions of sexual exploitation.

[55] Counsel also filed case law of sentences involving ongoing sexual violence against children. Global sentences range from two to 10 years. The sentences imposed on the individual counts of sexual exploitation range from two to eight years' imprisonment. However, I agree with the Crown that none of the cases captures the constellation of facts present here.

[56] Thus, I again take into account what *Friesen* says and that mid-single digit penitentiary sentences for sexual violence offences against children is normal. Taking into consideration that Mr. Sweeney was in a relationship of trust and authority, XY's numerous vulnerabilities, the repeated and physically intrusive nature of the assaults, the other aggravating factors and the few mitigating factors, a six-year sentence is appropriate.

[57] The Crown is also seeking a one-year consecutive sentence for the conviction of assault causing bodily harm. XY's evidence was that, during the assault, Mr. Sweeney choked her and kicked her in the temple and ribs with steel toe boots on. The nature of the assault warrants a one-year sentence.

[58] I am in agreement with the Crown on the sentences for the other convictions as well.

[59] The sentence, without taking into account totality, is, therefore, 12 years.

[60] Taking a hard look at the sentence, I will reduce it to 10 years to conform with the principles of totality. This means that the s. 272 offence will be reduced by one year, as will the exploitation offence.

[61] There are also ancillary orders, including DNA collection, firearms prohibition, and *Sex Offender Information Registration Act* orders, which are called "*SOIRA*" orders. Most orders are mandatory, but there is one issue upon which I can decide, and that is whether to make the *SOIRA* order for 20 years or for life.

[62] Under the new *SOIRA* regime, a lifetime order can be made where the accused has been convicted in the same proceeding of two offences, such as Mr. Sweeney committed, and where the Court is satisfied that those offences demonstrate or form part of a pattern of behaviour showing that the offender presents an increased risk of reoffending by committing a crime of a sexual nature.

[63] What this really means is that the question before me is whether Mr. Sweeney is at an increased risk of reoffending by committing a crime of sexual violence or a sexual nature.

[64] Here, Mr. Sweeney has no other offences of sexual violence on his record. However, he sexually abused XY over an extensive period of time. I have found that his actions were predatory. I therefore conclude that there is an increased risk of Mr. Sweeney reoffending by committing a crime of a sexual nature. I order that the *SOIRA* order be in place for life.

[65] In conclusion, the sentence will be as follows.

- I will deal with Count 1 and Count 12 together because they occurred together. I determined that four years would be an appropriate sentence for the two offences, given the principle of totality. Somewhat artificially, the sentence on both counts shall be two years to be served consecutively to each other;
- For Count 2, sexual exploitation, contrary to s. 153(1)(a): I order a sentence of five years to be served consecutive to counts 1 and 12;
- For Count 5, assault causing bodily harm, contrary to s. 267(b): I order a one year sentence consecutive to counts 1, 12, and 2;
- Count 3, s. 153(1)(b): I order a sentence of three years to be served concurrently to all the other counts;
- Count 6, assault with a weapon, contrary to s. 267(1): 3 months concurrent;
- Count 7, assault, contrary to s. 266: 3 months concurrent;
- Count 8, uttering a threat to cause death, contrary to s. 264.1(1)(a) — this took place at the same time as the assault causing bodily harm: 90 days concurrent;
- Count 11, obtaining for consideration sexual services of XY, who was under the age of 18 years old, contrary to s. 286.1(2): I agree with the Crown that this is part and parcel of the sexual abuse that forms part of Count 2. This will be recorded as three years to be served concurrently.

[66] The total, again, will be a 10-year prison sentence.

[DISCUSSIONS]

[67] There will be a mandatory DNA order; the firearms prohibition order under s. 109 of the *Criminal Code*; and the *SOIRA* order, which will remain in place for life.

[68] I waive the requirement that Mr. Sweeney pay the victim fine surcharge.

[69] There is a no contact order in place. Does that remain in place and what is the Crown seeking in terms of that?

[70] MS. LAURIE: Yes, that had not been addressed on the last occasion so thank you for raising that. If there could be an order pursuant to s. 743.21(1), a no contact order respecting XY.

[71] THE COURT: I will make that order.

[DISCUSSIONS]

[72] MS. LAURIE: In total, there were four short periods of time in which Mr. Sweeney has been in custody on these matters and, in total, his time in custody, including today's date, is 47 actual days. That would be 71 days with enhanced credit.

[DISCUSSIONS]

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WENCKEBACH J.