SUPREME COURT OF YUKON

Citation: *R. v. Y.H.*, 2019 YKSC 28

Date: 20190528
S.C. No. 18-01517A
Registry: Whitehorse

BETWEEN

HER MAJESTY THE QUEEN

AND

Y.H.

Restriction on publication: A publication ban has been imposed under s. 486.4 of the *Criminal Code* restricting the publication, broadcasting and transmission in any way of any information that could identify the complainant or the offender. This publication ban applies indefinitely unless otherwise ordered.

Before Madam Justice B.M Tulloch

Appearances:
Amy Porteous — Counsel for the Crown
André Roothman — Counsel for Y.H.

REASONS FOR SENTENCING

[1] TULLOCH J. (Oral): On March 8, 2019, Mr. H. was found guilty by a jury of sexually assaulting O.J. pursuant to s. 271 of the *Criminal Code of Canada*. The victim was under the age of 16 at the time of the offence.

[2] Sentencing submissions were heard yesterday and today was set aside for me to complete matters by imposing a fit and fair sentence in all the circumstances of the offence and of the offender.

[3] Section 271 mandates me to impose, upon conviction, a mandatory minimum penalty of one year in custody where the victim is a child under the age of 16.

[4] Mr. H. seeks a declaration that this mandatory minimum penalty violates s. 12 of the *Canadian Charter of Rights and Freedoms* and is therefore not saved by s. 1 of the *Charter*.

[5] I heard submissions from counsel, both with respect to striking down the mandatory minimum penalty as unconstitutional and with respect to what a fair and fit sentence should be in the circumstances of this offence and this offender.

[6] Defence seeks a suspended sentence and probation with conditions while the Crown indicates that a sentence of 15 to 16 months in jail is appropriate.

[7] In coming to my decision today I have carefully considered the able submissions of counsel and the many cases provided to the Court for consideration.

[8] Being mindful of the framework set out in the Supreme Court of Canada decision of *R. v. Nur*, 2015 SCC 15, I must first determine what constitutes a proportionate sentence in this case, having regard to the objectives and principles of sentencing contained in the *Criminal Code of Canada*.

[9] Every sentencing decision is highly unique and dependent on the actual facts found and the circumstances of the particular accused before the court. No two cases are identical.

[10] Given that Mr. H. was convicted by a jury, it is my responsibility pursuant to my authority under s. 724 of the *Criminal Code of Canada* to set out the facts that form the conviction. They are as follows:

[11] Mr. H. and O.J. met on social media. They exchanged a number of communications before they met in person.

[12] It is clear from the evidence that the accused did not take reasonable steps to ascertain O.J.'s age at any time prior to the sexual assault.

[13] In fact, I find that Mr. H. took no steps in spite of the fact that there were a number of things that should have alerted him to the danger that O.J. was likely under the age of 16.

[14] For instance, on the date when the sexual assault took place, the accused knew that O.J. was in school, he may have known that she was in grade nine, he knew her school schedule, he knew she took the bus to and from school, he knew she lived with her grandmother and he knew that an adult controlled her bed time and her internet usage.

[15] When O.J. and Mr. H. met, she did not wear makeup and made no efforts to appear older than she was or to conceal her age in any way.

[16] The evidence shows that O.J. texted the accused before they met in person and before he picked her up for the first time on Jan. 8, 2018.

[17] A joint book of exhibits was introduced at trial. In that book there are a number of text messages which are admitted by both Mr. H. and O.J. They show that prior to their first meeting, O.J. asked "What are were gonna do?" to which the accused replied, "go around first and then decide" O.J. then texted: "Nothing sexual ok?" and the accused replied, "LOL (which means "laughing out loud"), I haven't thought about that part." O.J. then says; "OK I'm just making sure". The accused responds with "Lol right on".

[18] That evening the accused met O.J. at a planned location in his car. They drove around Whitehorse before he delivered her back to where he picked her up. They discussed a number of things during their drive particularly her school in general.

[19] The next day they decided to meet again after O.J. got home from school. The plan was for Mr. H. to pick O.J. up at the same location. O.J. had texted earlier indicating that she had received two face masks for Christmas and she invited the accused to share them with her. The accused agreed to participate.

[20] On January 9, 2018, the accused picked the victim up and drove her to the house where he was renting a room.

[21] After applying and then washing off the face masks, O.J. was encouraged to lay down on Mr. H.'s bed where eventually he joined her. Furniture in the room was very sparse and the bed was the only place other than the floor to sit.

[22] The accused began by touching O.J.'s breasts outside and inside her clothing. O.J. said no a number of times. The accused stopped briefly after he was told no but shortly after, touched her breasts again. This happened a number of times.

[23] After continuing to touch O.J. sexually in the manner described, O.J. suggested that he at least put on a condom which he did before having full sexual intercourse with her. Mr. H. than drove her back to the agreed location and dropped her off.

[24] Given the actions of O.J. immediately prior to intercourse, I find there is a reasonable doubt as to whether the sexual intercourse portion was or was not consensual.

[25] That being said, O.J. was only 14 at the time and the law makes it an offence for the accused to proceed. Whether she consented or not, it is aggravating that full sexual intercourse took place.

[26] I start, as I must, by determining what constitutes a proportionate sentence having close regard to the objectives of sentencing contained in s. 718 of the *Criminal Code of Canada*. They are as follows:

[27] The fundamental purpose of sentencing is 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: to denounce unlawful conduct, to deter offenders and other persons from committing offences, to separate offenders from society, where necessary, to assist in rehabilitating offenders, to provide reparation for harm done to victims or to the community, and; to promote a sense of responsibility in offenders, and an acknowledgement of harm done to victims and to the community.

[28] Section 718.1 requires that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[29] In this case, Mr. H.'s actions are very serious as they involve sexual activity with a minor. He had a responsibility to know how old O.J. was before he touched her in the manner he did. His degree of responsibility was very high as his actions significantly violated O.J.'s privacy and her sexual integrity.

[30] Section 718.2(a) indicates that a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing.

[31] It is aggravating in this case that the accused engaged in sexual activity with a young person who was only 14 years old at the time.

[32] This is statutorily aggravating. Section 718.01 instructs the Court as follows:

> When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[33] Further, the very fact that there is a mandatory minimum penalty for this type of offence is indicative of society's condemnation for this type of behaviour.

[34] It is particularly aggravating that Mr. H. did not understand that "no means no". I find that it is aggravating that O.J. had already texted him before they met to say that she was not interested in sexual activity. That should have been his first clue that sex was off the table.

[35] Further, after the first time he touched O.J.'s breasts and she told him no he had a serious obligation to stop. Instead he chose to continue. He says he did so because she smirked indicating consent in his mind. This occurred in spite of the fact that she said no a number of times to the touching of her breasts both outside and inside her clothing. I place no weight whatsoever on his evidence with respect to his misrepresentation of her consent because of the smirk. No reasonable person would suggest that a smirk could mean "yes" while the victim was saying "no".

[36] Even aside from his responsibility to find out if she was old enough to consent, he had an added responsibility to stop what he was doing when she said no. He chose not to stop. He never asked her how old she was and in spite of her telling him no to the touching, he continued his actions which eventually resulted in full sexual intercourse.

[37] It is mitigating that the accused comes before the Court for the first time. He has never been in trouble before and has no criminal record.

[38] At the time of the offence Mr. H. was almost 24 years old making him a youthful first offender.

[39] An extensive presentence report has been submitted for the Court's consideration.

[40] Overall it is a very positive report. The accused is a Chinese citizen, born and raised in the city of Huizhou in the Guangdong Province by both his parents. He describes his childhood as being normal. By all accounts, he had a good childhood and continues to be fully supported by both his parents and his older brother. There was no family violence or substance abuse issues and he was never the victim of any form of abuse.

[41] The accused graduated high school in China and then moved to Vancouver in 2013 to continue his education. He dropped out of college to pursue and complete a two-year degree in Hospitality Management. He was 22 when he moved from Vancouver to Whitehorse.

[42] Mr. H.'s friends and family report being shocked when they heard that he was charged and then convicted of sexual assault.

[43] Throughout the report, Mr. H. expresses what appears to be genuine remorse for his actions. He takes full responsibility and seems to fully understand the consequences of his actions. He states that he would like to apologize to the victim for the damage he has caused.

[44] The accused submits that he now has considerable insight into the seriousness of his actions and advises that he will never do anything like this ever again.

[45] Mr. H. has been reporting to Yukon Community Corrections for over a year, since February 2018. He is described as having excellent reporting habits and he has adhered to all of the conditions placed upon him since his arrest and conviction.

[46] The presentence report also talks about the impact that Mr. H.'s conviction has had on himself and his family.

[47] Page 13 of the report indicates, and I quote: "He reported feelings of shame and self-hatred for his actions, which have resulted in him isolating himself from friends, family and Whitehorse society." This statement is evident from the interviews done with his family, with his landlord's family and with his close friends.

[48] It is also confirmed by the letters of support received and submitted as Exhibit number S1 on sentencing.

[49] Following his conviction, the accused stopped going to work. He was eventually fired from his job as night auditor at a local hotel where he had worked for almost two years.

[50] I am told that, as a result of his actions, Mr. H. will be deported to China where there is a lot of competition for employment, housing and other resources.

[51] It is not possible for this Court to predict Mr. H.'s future but it is not hard to find that it is likely that his future will be negatively impacted by whatever sentence I impose today. He will have a criminal record and his name will be placed on the National Sex Offender Registry for a period of 20 years.

[52] Mr. H. is described as a very good tenant and his landlord's family is very supportive. They are aware of the conviction and have only good things to say about the accused. He helps with the chores and is kind, respectful and considerate.

[53] Before being charged, the accused had planned to return to college and possibly get a degree in business.

[54] Most of the accused's time since conviction has been spent in his room watching YouTube videos, listening to music and playing video games.

[55] The accused reports having a hard time sleeping due to the stress he is under, waiting for his matter to be completed.

[56] The author of the presentence report used a number of risk assessment tools and although the results were not conclusive, Mr. H. scored in the average risk category for being charged or convicted of another sexual offence. The tests also indicated that a low level of supervision would be appropriate for Mr. H.

[57] This position is supported by the fact that the accused has been on conditions for over one year. He has never breached those conditions and is described as having an excellent reporting record and an overall good attitude.

[58] I conclude from the information provided that the accused is unlikely to reoffend.

[59] There is no information contained in the presentence report about O.J. and the impact this matter has had on her wellbeing. She has chosen not to submit a victim impact statement which, of course, is her right.

[60] That being said research has confirmed that children of sexual abuse are significantly impacted. The court process itself wherein O.J. had to testify twice with

respect to very private events can be, in itself, a traumatic experience for someone of her age.

[61] Parliament made it very clear that the protection of children is a basic value of Canadian society which the courts must defend. The courts have done so by creating a minimum sentence of imprisonment for sexual offences against young persons under the age of 16.

[62] There are a number of other principles of sentencing that must be taken into consideration.

[63] Section 718.2(d) is also an important consideration where the Court is instructed that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.

[64] Rehabilitation is an important consideration in every sentencing but in this case it must take a back seat.

[65] A suspended sentence, even with very strict conditions would, I find, come far short of this Court's primary responsibility, to put deterrence and denunciation at the forefront.

[66] The imposition of a Conditional Sentence Order for a finding of guilt under s. 271 relating to children under 16, is precluded by s. 742.1(c) given the maximum term of imprisonment is 14 years.

[67] The fit and fair sentence I am about to impose takes into account the gravity of the offence, the particulars of the offence and of the offender, the effect of punishment on the accused, the penological goals sought by Parliament when imposing the

mandatory minimum penalty for sexual offences involving children under the age of 16 and the range of sentencing in this jurisdiction.

[68] Accordingly, I find that a proportionate sentence for the accused taking into account the unique circumstances of this case and this particular offender is one year in jail. The one-year jail sentence is to be followed by 12 months probation with the following terms:

1) You must report to the probation officer within three days of your release from custody and thereafter as directed;

2) You must take counselling as directed; and

3) You must have no contact directly or indirectly with O.J.

[69] There are also a number of mandatory orders that I must impose.

[70] Given the nature of the offence Mr. H. is required to give a sample of his DNA for inclusion in the database.

[71] He is prohibited from possessing any firearm or ammunition for a period of ten years pursuant to s. 109 of the *Criminal Code of Canada*.

[72] Pursuant to s. 490.013 Mr. H.'s name will be placed on the Sex Offender Registry for a period of 20 years.

[73] Given the facts in this case and the circumstances of this offender, the proportionate sentence I am imposing does not result in the mandatory minimum penalty being cruel or unusual punishment in breach of s. 12 of the *Charter of Rights and Freedom*.

[74] That being said, I feel required to consider whether it is reasonably foreseeable that the application of the mandatory minimum sentence would result in cruel and unusual punishment for other sex offenders involving children under the age of 16.

[75] Counsel have provided me with a number of cases which I have carefully considered in coming to the sentence I have just imposed with respect to Mr. H.

[76] They have also been provided to assist with whether or not to find that a reasonable hypothetical exists whereby one year in custody could in fact result in a grossly disproportionate sentence.

[77] In other words, as articulated in the case of *R. v. Smith*, [1987] 1 S.C.R. 1045 (referred to in the leading case of *R. v. Nur*): Are there cases where imposing one year of jail would be so excessive as to outrage the public's standards of decency?

[78] The Supreme Court of Canada decision in *R. v. Morrisey*, [2000] S.C.J. No. 39, talks about the factors that must be considered when finding a law to be unconstitutional. They are the same factors that I have used to craft a proportionate sentence for Mr. H. in the case before the Court.

[79] There are two Yukon cases where the mandatory minimum penalty was found to be grossly disproportionate and not saved by s. 1.

[80] In the case of *R. v. Pye*, 2019, YKTC 21, the sentence by the Yukon Territorial Court was a conditional sentence order of 12 months followed by 18 months probation.

[81] The Crown in that case proceeded summarily and Mr. Pye, a member of the First Nations, pled guilty to sexual interference pursuant to s.151 of the Criminal Code. The accused was 21 and the victim was 14. They had sexual intercourse. The accused argued that the 90-day minimum sentence infringed s. 12 of the *Charter*. The accused

had no prior criminal record and there were significant *Gladue* factors that needed to be taken into consideration. He had a low risk of reoffending, the offence was out of character, he was very remorseful and focussed on seeking treatment.

[82] The Court found that while s. 151 was a specific intent offence, it could be committed in a variety of ways, capturing a broad range of both activities and offenders. This wide net made it constitutionally vulnerable. There were reasonably foreseeable hypotheticals captured by s. 151 for which a sentence of imprisonment would be grossly disproportionate.

[83] Section 151 and s. 271 where the victim is under the age of 16 carries the same mandatory minimum sentences. Both sections capture a very broad range of activities and offenders.

[84] The second case is that of *R. v. E.O*., 2019 YKCA 9, decided this year. E.O. pled guilty part way through his trial to sexual exploitation pursuant s. 153 of the *Criminal Code of Canada*. The accused and the victim were both aboriginal, there was a Gladue Report filed and a sentencing circle held. Taking into account a number of aggravating factors the sentence imposed was 15 months jail. The trial judge declined to consider the constitutional challenge which had been made by counsel to the mandatory minimum penalty.

[85] The Yukon Court of Appeal found the jail sentence to be fit and proper in all of the circumstances of the case and then went on to find that the mandatory minimum penalty of one-year was unconstitutional as it breached s. 12 of the *Charter* and was not saved by s. 1.

[86] The court set out the legislative history and noted that prior to 2005, there was no mandatory minimum sentence for sexual exploitation. This would also be true of offences under ss. 271 and 151 of the *Criminal Code of Canada*.

[87] In considering a reasonable hypothetical, the Yukon Court of Appeal struck down the mandatory minimum as unconstitutional. In doing so, the court was mindful of the case of *R. v. Hood*, 2016 NSPC 78, aff'd 2018 NSCA 18, from the Nova Scotia Court of Appeal.

[88] In *Hood* the following hypothetical was posed: A new teacher in her 20s with bipolar disorder who texts a 17-year old student about a school assignment. They meet and she touches the student sexually during a manic episode. That is their only sexual encounter. The Court concluded that such an act would seldom draw a term of imprisonment and a one-year sentence would be grossly disproportionate, amounting to cruel and unusual punishment.

[89] One of those factors is the range of sentencing within the jurisdiction.

[90] To this end, I have broadened my research to look specifically at Yukon cases involving convictions with respect to both s. 271 where the victim is under the age of 16 and s. 151. I have come to the conclusion that the range is as broad as the actions captured by sexual offences involving children. After reviewing 25 cases, I find that the appropriate range in the Yukon is six months to 27 months in jail.

[91] Appendix A of the Crown's materials sets the range from 9 months to three years for this type of offence. The cases provided are not just from the Yukon.

[92] In *R. v. Scholfield*, 2019, BCCA 3, the Court upheld the striking down of the one year mandatory minimum. The Court relied on both the facts before it and a possible reasonable hypothetical to strike down the mandatory minimum.

[93] Mr. Scholfield was 22 at the time of the offences and the victims were both 15. There was vaginal intercourse and acts of fellatio with each victim. The offender had significant cognitive impairments. The Court of Appeal changed the sentence given by the trial judge by extending the Conditional Sentence Order from six months to 12 months. The offences were acknowledged as being serious and the circumstances of the offences were also serious but the impact of the sentence on the offender himself is what tipped the court in the direction of determining the appropriate sentence is a CSO and thus grossly disproportionate in comparison with the mandatory minimum.

[94] I am persuaded by these cases that there are reasonable foreseeable hypotheticals which could exist to find the mandatory minimum sentence of one year in jail unconstitutional.

[95] Section 271 of the *Criminal Code of Canada* captures a very broad and very diverse set of circumstances whereby a conviction could be entered.

[96] Those who commit offences under s. 271 in relation to children under the age of 16 also have a very broad and very diverse background. An offender's moral culpability is just one factor that could significantly impact the constitutionality of the mandatory minimum penalty of one year in jail.

[97] Offenders suffering from extreme fetal alcohol spectrum disorder is just one type of person whereby mandatory minimum penalty may or may not be appropriate, given the specific circumstances of the offence and of the offender.

[98] In conclusion, I declare that the mandatory minimum of one year's imprisonment is of no force and effect based on a reasonable foreseeable hypothetical.

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TULLOCH J.