Citation: *R.* v. *E.O.*, 2018 YKTC 9

Date: 20180313
Docket: 15-00357
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before His Honour Judge Chisholm

REGINA

v.

E.O.

Publication of information that could identify the complainant or a witness is prohibited pursuant to section 486.4 of the *Criminal Code*.

Appearances:
Noel Sinclair — Counsel for the Crown
Jennifer Cunningham — Counsel for the Defence

RULING ON APPLICATION

[1] E.O. pleaded guilty to having sexually exploited S.G. between May 1, 2014 and August 3, 2015, an offence contrary to s. 153(a) of the *Criminal Code*.

[2] Part way through the sentencing hearing, the Crown raised the issue of a change in sentencing penalty which occurred during the period of the offence charged.

[3] The Crown recently came to the realization that the penalty for this offence was increased from a maximum of 10 years to a maximum of 14 years. Pursuant to the *Tougher Penalties for Child Predators Act*, S.C. 2015, c. 23 the penalty section was amended and came into force and effect on July 17, 2015.

[4] The Crown makes application to amend the Information by requesting that I divide the global count into two counts in order to recognize that the maximum penalty of 14 years is applicable to the part of the offence which occurred on or after July 17, 2015.

[5] The Crown's application is potentially of significance to E.O. as he is challenging the constitutionality of s. 153, specifically the one year mandatory term of imprisonment. If E.O. were successful in his application, and the maximum penalty for the offence is 10 years, he could argue for a conditional sentence. However, if the maximum penalty is found to be 14 years, the argument for a conditional sentence would be unavailable to him.

[6] The Crown makes this application to amend pursuant to s. 603(3)(b)(iii), alleging that the Information is defective in substance. The Crown contends that the division of the defective count into two counts would cure the defect by permitting the imposition of a lawful sentence. The Crown submits that there is no prejudice to E.O., as the proposed amendment does not impact the nature of the case for which he is being sentenced.

[7] E.O., on the other hand, views the proposed amendment as highly prejudicial. He argues that the proposed amendment will negatively impact his jeopardy. The defence submits that, had this issue been raised earlier, E.O. could have, for example, clarified details in his statement to police which touched upon the timing of the sexual exploitation.

[8] The relevant legislation in this regard is found in section 601 of the *Criminal Code*, namely:

> (2) Subject to this section, a court may, on the trial of an indictment, amend the indictment or a count therein or a particular that is furnished under section 587, to make the indictment, count or particular conform to the evidence, where there is a variance between the evidence and
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> (a) a count in the indictment as preferred; or
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> (b) a count in the indictment
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> (i) as amended, or
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> (ii) as it would have been if it had been amended in conformity with any particular that has been furnished pursuant to section 587.
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> (3) Subject to this section, a court shall, at any stage of the proceedings, amend the indictment or a count therein as may be necessary where it appears
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> (a) that the indictment has been preferred under a particular Act of Parliament instead of another Act of Parliament;
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> (b) that the indictment or a count thereof
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> (i) fails to state or states defectively anything that is requisite to constitute the offence,
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> (ii) does not negative an exception that should be negatived,
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> (iii) is in any way defective in substance,
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> and the matters to be alleged in the proposed amendment are disclosed by the evidence taken on the preliminary inquiry or on the trial; or
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> (c) that the indictment or a count thereof is in any way defective in form.
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> (4) The court shall, in considering whether or not an amendment should be made to the indictment or a count in it, consider

(a) the matters disclosed by the evidence taken on the preliminary inquiry;

(b) the evidence taken on the trial, if any;

(c) the circumstances of the case;

(d) whether the accused has been misled or prejudiced in his defence by any variance, error or omission mentioned in subsection (2) or (3); and

(e) whether, having regard to the merits of the case, the proposed amendment can be made without injustice being done.

[9] It is without question that there are broad powers of amendment pursuant to s. 601. However, in my view, the power to amend in s. 601(3)(b)(iii) arises only where the count is clearly defective in substance. For example, in *R. v. Major*, [1977] 1 S.C.R. 826, the Court endorsed the dissenting reasons of Justice Cooper from the Nova Scotia Court of Appeal who had allowed an amendment to the Information which lacked an essential element of the offence (at (1975), 10 N.S.R. (2d) 348). This amendment was made pursuant to the appeal court powers which are now found at s. 683 and which are similar to those found in s. 601.

[10] In the matter before me, the Crown laid a sexual exploitation charge covering a wide timeframe. Nonetheless, pursuant to section 581 of the *Code*, the count applies to a single transaction. As indicated in *R. v. Chamot,* 2012 ONCA 903 at para. 49:

> This court has repeatedly indicated, often in reference to allegations of sexual abuse that span a wide timeframe and several discrete incidents, that a single transaction can encompass several different acts: see e.g., *R. v. Selles* (1997), 34 O.R. (3d) 332 (C.A.), at p. 339. Count 3 alleged a series of acts all of which involved the same complainant and formed part of an ongoing course of conduct within the same family dynamic. Count 3 amounted to an allegation of ongoing, systematic sexual abuse of B.B.

> That conduct, as alleged, described an ongoing "single transaction": see *R. v. Hulan*, [1969] 2 O.R. 283 (C.A.), at p. 290.

[11] Although the count before me covers an extensive timeframe, on its face the count displays no deficiency of substance.

[12] Additionally, at the beginning of the trial of E.O., no application was made to divide the single transaction count. When E.O. pleaded guilty part way through trial, there was no issue raised with respect to the count. As a matter of procedure, it seems incongruous to order a division of one count after the accused has pleaded guilty and the sentencing hearing has commenced. I say this, because if a division of the Information were to occur, presumably E.O. would have the right to plead guilty or not guilty to the newly constituted charges. In my view, we are well past that point in these proceedings.

[13] Also, if I were to grant the Crown's application to split the one count Information into two counts, E.O. could potentially face two consecutive one year terms of imprisonment, although a court would have the power to decide, in these circumstances, to order that the terms run concurrently.

[14] Finally, as mentioned, upon a successful constitutional challenge to the mandatory minimum sentence, E.O. would be unable to seek a conditional sentence if the Crown's s. 603 application were successful.

[15] On balance, I do not see how the amendment can be made without prejudice to E.O.

[16] However, the Crown has referred to the decision in *R. v. Athey,* 2017 BCCA 350, a sexual touching and child pornography case where the defence contested the imposition of a s. 161(1) prohibition order on the basis that the coming into force of the legislative amendments straddled the timeframe covered by the indictment. The Court of Appeal allowed an amendment to the indictment to conform with dates in the agreed statement of facts, in order that "s. 161(1) as amended in 2012 would be properly applicable". The decision noted the absence of prejudice to the appellant occasioned by this amendment, based on the dates set out in the agreed statement of facts.

[17] I find that the situation before me may be distinguished from the *Athey* case. The amended indictment dates proposed by the Crown which would attract the 14-year maximum penalty provisions are between July 17 and 31, 2015. It is true that a careful reading of E.O.'s statement to police and evidence of when S.G. was expelled from the E.O. home suggests that sexual exploitation occurred during this period of time, however, when submissions were made after E.O.'s guilty plea with respect to what my findings of fact should be, the issue of the timing of each of the sexual acts was not argued. In my view, aside from the first sexual act on July 2, 2015, the precise timing of the other incidents has not been proved beyond a reasonable doubt.

[18] I therefore decline to make the amendment sought.

[19] Additionally, I have considered the caselaw regarding s. 11(i) of the *Charter*, which provides:

> Any person charged with an offence has the right
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> …
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> (i) if found guilty of the offence and if the punishment for the offence has been varied between the time of the commission and the time of sentencing, to the benefit of the lesser punishment.

[20] The Crown relies on two older appellate decisions. In *R. v. C. (V.I.)*, 2005 SKCA 95, the accused pleaded guilty to a single count of sexual assault encompassing a timeframe of 14 months. The allegation was that he had repeatedly sexually assaulted his cousin during this period of time. The accused was liable to a more serious penalty due to a change in legislation during the timeframe of the offence. The Court of Appeal found that as the sexual assaults occurred both before and after the increase to the maximum penalty, the increased penalty applied due to the fact that the offence was not complete at the time of the change in penalty.

[21] A similar decision was reached in *R. c. Pouliot*, 2006 QCCA 643, where the Court found that since the offence of keeping a bawdy house continued well after the penalty increased, the offender was not entitled to the benefit of the earlier, lesser penalty.

[22] I, however, prefer the reasoning of Doherty, J. in *Attorney General of Canada v. Lalonde*, 2016 ONCA 923. The issue in question was whether Mr. Lalonde met the statutory eligibility criteria for accelerated parole pursuant to the *Corrections and Conditional Release Act,* S.C. 1992, c. 20. He had been convicted of a count of conspiracy to traffic in cocaine and a count of conspiracy to traffic in marijuana. Based on Ontario caselaw which found that the abolition of eligibility for accelerated parole

amounted to an increase in punishment, correctional authorities had to make decisions on early parole eligibility based on the date of the offence. The dates of Mr. Lalonde's criminal conspiracy straddled the dates on which the accelerated parole provisions were repealed.

[23] In finding that a crime is committed at the time that culpability attaches, the Court of Appeal stated:

> [11] Section 11*(i)* of the *Charter*, like s. 11*(g)* and s. 11*(h),* reflects a constitutional aversion to retrospective criminal legislation. Retrospective criminal laws are viewed as unfair and undermining the rule of law because they effectively change the rules in the middle of the "game" to the detriment of the individual affected by those rules. Fairness and respect for the rule of law require that a person's maximum exposure to punishment for a criminal act be fixed as of "the time of commission" of the criminal act for which he or she is to be punished: see *R. v. J. (K.R.),* [2016] S.C.J. No. 31, 2016 SCC 31, 337 C.C.C. (3d) 285, at paras. 20-27.

[24] Contrary to the decisions from Quebec and Saskatchewan, noted above, Doherty, J. wrote:

> [23] With respect, I cannot agree with *Pouliot* and *C. (V.I.).* While I accept that the offences in both cases continued beyond the enactment of the relevant legislation, I do not agree that the continuation of the offences meant that they were not committed before the enactment of the relevant legislation. The accused in *Pouliot* was liable for the offence of keeping a common bawdy house as of the date on which the increased exposure to forfeiture came into effect. Had he been charged on that date, he would have been convicted.
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> [24] Similarly, the accused in *C. (V.I.)* committed acts of sexual assault before the enactment of the increased penalty. He was culpable on the single count indictment preferred by the Crown from the moment he committed the earliest of the sexual assaults capable of supporting the charge as framed in the indictment. Had the Crown proved only that one assault, the accused would have been convicted on the indictment as charged. I do not agree that because the Crown chose to lay a single charge encompassing several discrete acts of sexual assault that occurred

> over several months, the offence for which the accused was convicted should be viewed as "not complete", or as if it "did not occur" until the last of the sexual acts occurred. The number of discrete acts capable of supporting liability for the offence as charged does not alter the fact that the *actus reus* and *mens rea* required to support a conviction coexisted as of the first act of sexual assault.

[25] E.O. initiated sexual contact with S.G. on July 2, 2015, before the enactment of the *Tougher Penalties for Child Predators Act*. E.O.'s culpability for this crime commenced on that date.

[26] The Crown made a decision to lay a one count sexual exploitation charge covering this and other sexual acts. This is legally considered to be a single transaction encompassing several different acts.

[27] As such, I conclude it would be inappropriate to find that the sexual exploitation was not made out until late July 2015. It was made out at the time of the first sexual act on July 2, 2015.

[28] Therefore the penalty that was applicable on that date is the penalty that governs this sentencing hearing.

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CHISHOLM T.C.J.