COURT OF APPEAL OF YUKON

Citation: *R. v. E.O.*,
2019 YKCA 9

Date: 20190418
Docket: 18-YU827

Between:

Regina

Respondent

And

E.O.

Appellant

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

Section 16(4) of the *Sex Offender Information and Registration Act*: 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*.

Corrected Judgment: The summary of the judgment was corrected on April 23, 2019.

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Bennett
The Honourable Mr. Justice Willcock

On appeal from: An order of the Territorial Court of Yukon, dated June 29, 2018 (sentence) (*R. v. E.O.*, 2018 YKTC 28, Whitehorse Docket 15-00357).

Counsel for the Appellant:	M. Dineen J.A. Cunningham
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Vancouver, British Columbia February 5, 2019
Place and Date of Judgment:	Vancouver, British Columbia April 18, 2019

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Willcock

Summary:

E.O. was convicted of sexual exploitation contrary to s. 153(1) of the Criminal Code for sexually touching his 17-year-old niece. The sentencing judge convened a sentencing circle which recommended that E.O. be given a community sentence order and probation. E.O. challenged the mandatory minimum of one year's imprisonment prescribed by s. 153(1.1)(a). The sentencing judge declined to consider the constitutional challenge as, in his view, a 15-month sentence followed by a two-year period of probation was fit and appropriate. Held: Appeal dismissed. The mandatory minimum is grossly disproportionate to a reasonable hypothetical offender and is struck down. However, E.O.'s sentence is upheld. Although it is an error in principle to unreasonably give too little weight to the recommendation of a sentencing circle, no such error was made in this case. The sentencing circle was not sufficiently representative of the interests of the community and the victim, and could be given little weight for that reason.

Reasons for Judgment of the Honourable Madam Justice Bennett:

[1] In 2015, E.O. sexually touched S., his 17-year-old niece, who was in his family's safekeeping because she had been struggling with difficult life challenges. He had sexual intercourse with her a number of times. After a protracted process, including a trial, a constitutional challenge, and a sentencing circle, Mr. O. was sentenced to 15 months' incarceration, along with two years' probation and a number of ancillary orders including a weapons prohibition.

[2] Mr. O. challenges the mandatory minimum sentence contained in s. 153(1.1)(a) of the *Criminal Code*, seeks to have his sentence converted to a conditional sentence order ("CSO"), and seeks to set aside the weapons prohibition.

[3] For the reasons that follow, I would strike down the mandatory minimum sentence, but would uphold the sentence, including the weapons prohibition.

Background

[4] S. was 16 years old when she moved in with Mr. O. and his wife, A., in the spring of 2014. S.'s mother was A.'s sister. S. had been sexually assaulted by her stepfather, who was convicted of the offences. Her father and her grandmother had passed away, and she was having difficulty dealing with life. She was self-harming and drinking to excess.

[5] The two families lived in different villages in Yukon. S. moved to Mr. O.'s village so the O. family could assist her. Both S. and Mr. O. are Indigenous. Mr. O. was well aware of the reasons S. moved into his home. S. obtained a full-time job and paid for some of her board.

[6] The sentencing judge set out the facts clearly in his reasons, indexed as 2018 YKTC 28, and I reproduce them here:

> [17] S.G. came to trust E.O. and later confided in him that she suffered from depression and suicidal ideation. S.G. referred to E.O. as Uncle E. She also testified that she perceived E.O. as a father-like figure due to the activities that they did together, such as snowmobiling and "four-wheeling". Near the end of their relationship, she sent a text message to E.O., in which she referred to him as "dad".
>
> [18] E.O. was clearly in a position of trust with respect to S.G.
>
> [19] E.O. initiated the first sexual contact with S.G. when she was 17 years of age. This occurred on July 2, 2015. The first sexual encounter between them occurred at the O. family cabin where they were alone. E.O. invited S.G. to the upstairs bedroom and E.O. suggested that she wrap her arms around him. This progressed to sexual intercourse.
>
> [20] E.O. admitted to sexual intercourse with S.G. "about five times". He also admitted that he received "a few blow jobs" from S.G.
>
> [21] On one occasion, when E.O. and S.G. were at the family cabin, they consumed hashish together. On another occasion, E.O. gave her a silver chain as a gift.
>
> [22] When S.G.'s aunt discovered that her husband and S.G. were having a sexual relationship, she kicked her out of the house.
>
> [23] S.G. went to the police on August 3, 2015 for assistance in retrieving her personal belongings from the O. household. Based on what S.G. described, the police commenced an investigation which led to the sexual exploitation charge.

[7] S. was very clear that she did not want the police involved. She had only called them because her aunt had threatened to burn her possessions and she wanted them back.

[8] Mr. O. was charged with one count of sexual touching of a dependent person by a person in trust or authority—one way of committing the offence of sexual exploitation—contrary to s. 153(1) of the *Code*. The Crown proceeded by indictment. The offence was alleged to have occurred between May 1, 2014, and August 3,

2015. Mr. O. had admitted in his statement that the first time he committed the offence was July 2, 2015. He also said he did not know that what he did was a crime. At the first trial date, neither S. nor her mother, who were subpoenaed, attended the trial. Warrants were issued for their arrest, and both were arrested and returned for trial.

[9] After S. testified, Mr. O. changed his plea to guilty. He also brought a challenge to the mandatory minimum of one year contained in s. 153(1.1)(a). After all of that had transpired, the Crown realized that in charging Mr. O., it had overlooked the fact that the maximum sentence available for the offence had changed on July 15, 2015, from ten to fourteen years' imprisonment. Even if the mandatory minimum was struck down, a CSO was not available for an offence with a maximum sentence over ten years. The Crown moved to have the indictment amended to create two counts, one for acts committed before July 15, 2015, and one for acts committed afterward. The trial judge, in my view, correctly refused the amendment in reasons indexed as 2018 YKTC 9, as Mr. O. had already pleaded guilty. The matter proceeded on the basis that the maximum penalty was ten years' imprisonment.

[10] The defence sought a circle-sentencing process to occur in the village where Mr. O. lives. That request was granted, and someone from the community with experience with circle sentencing arranged the circle.

Circle sentencing

[11] The sentencing circle took place in Mr. O.'s village on April 4, 2018. Along with the judge, counsel and Mr. O., eleven people from the community attended, and all were friends and relatives of Mr. O. A victim service worker attended and read year-old letters from S. and her mother C. Neither S. nor her mother participated in the circle in person. The judge told the participants his findings of fact. The Crown set out that it would be seeking a sentence of two years' imprisonment. After a short break, defence counsel set out her position, which was house arrest. She pointed to the high rates of incarceration of First Nations people in Yukon, and said she was

seeking an alternative. Importantly, the decision on the constitutional challenge had not been made at this point. Those in the circle did not know if a community sentence was even possible.

[12] After defence counsel spoke, the victim service worker expressed her concerns about discussions she had heard during the break which included considerable “victim blaming”, essentially blaming S. for what happened rather than Mr. O. This theme continued throughout the circle.

[13] It was clear that Mr. O. had tremendous support from his family, his employer and the community generally. He is employed in a good job, and has worked most of his life. He was 52 years old at the time of sentencing. He was raised in a family with four sisters. His mother, sister, and aunt attended the circle, along with other family members, his employer, and the Chief (who is also a family member).

[14] Much concern was expressed for Mr. O.’s son, who was in his last year of high school. His mother had passed away suddenly 14 months earlier, and Mr. O. was praised and supported for the good job he did taking care of his son.

[15] A recurring theme, however, was unfair treatment of the victim. Despite the fact that Mr. O. took responsibility for what occurred, many of the attendees did not appreciate the serious nature of the offence. No one saw imprisonment as a fit sentence (other than the Crown), and several viewed the fault as lying with the victim. One person said that what happened was “consensual” and “not abusive”, that Mr. O. was not to blame, and that he should not have to go to jail and be victimized.

[16] The victim service worker said what was happening was not restorative justice without the victim’s participation. While Mr. O. did not blame the victim, the way this circle proceeded, the goal of restorative justice for anyone involved in the process was not achieved. The victim obtained nothing from the process and the community was frustrated because the mandatory minimum sentence precluded the

imposition of a community-based sentence from the outset. It was, in my view, ill conceived to hold a circle in these circumstances.

[17] The person who organized the circle also drew up a community plan that was endorsed by a number of the community members. The plan is as follows:

> To help [E.O.] on this path are current services that is provided to the community …
>
> A) Continuing Support Services: [J.] – Alcohol and Drug Services – [J.] provides counselling to [community] residents. She travels to the community twice a month. This is [E.'s] opportunity for sobriety. [E] has agreed to maintain sobriety if sentenced to a community sentence. [E] has agreed to see the Alcohol and Drugs Addiction Counselor every two weeks on the schedule trips.
>
> - Attempts to contact [J.] to provide confirmation were not successful, however her supervisor provided a note to indicate he would follow up with her. …
> - [J.] and [E.] will set their own schedule of appointments.
>
> B) Continuing Counselling support will be provided by [S.]. A letter is attached.
>
> C) Elders' support and guidance – [W.P.], [Mr. P.] and [E.O.] and his son [N.] can travel out to Ethel Lake for traditional and cultural teachings, once a month.
>
> D) Family Circle: This can … be arranged with current resources that [are] available to the community.
>
> E) Community Hours – [E.] has many skills, this was identified from friends and family.
>
> - [E.] will [do] a 30 hour trapping course for Na Cho N'Yak Dun young men.
> - [E.] will also do a 30 hour knife-making for men.

[18] The victim services worker read two letters, one from S. and one from her mother. S.'s letter is short and I reproduce it entirely:

> [S.]
> [Address]
> [Phone number]
>
> August 18, 2017
>
> To Whom It May Concern:
>
> My name is [S.] and I am writing this letter of support for [E.O.]. What happened between us should have never been taken to the police. I never

> wanted anything bad to happen to [E.]and I definitely didn't want him to be charged.
>
> Now that my auntie … is gone, I realize how important it is for [E.] to be there for [N.]. I hope one day we will all be able to sit down and have a family meal together just like we used to.
>
> I regret not making things right with my aunt and wish I could have talked to her fact to face before she passed away. I don't want my family to feel any more pain. I just want us to be able to forgive each other and move on with our lives.
>
> I don't think that will ever happen if [E.] is sent away because of what we did two years ago. In the end [N.] will be the one who suffers more than he already has.
>
> I miss my whole family and just want to be left alone. Please let our family sort this out without the justice system.
>
> Thank you.
>
> [Signature]
> [S.]

[19] I have reproduced below the first and last paragraphs of S.'s mother's letter:

> To Whom It May Concern:
>
> … I am the mother of [S.], as well as the … sister of the late [A.]. I am writing this letter in support of our family's wish to resolve and/or communicate with each other without the aid or involvement of the court system. There has been an accusation of a crime being committed by [E.O.] in regards to his 'relations' with my daughter, [S.]. I just want to state that our family never wished for this private matter to be taken to court at all.
>
> . . .
>
> As for [S.], she is as happy and healthy as any 19 year old girl in her situation could be. She has lost so many people who were close to her now; her grandmother, father and now aunt ([A.]). She will have to live with the fact that they did not have any kind of closure before her passing. I know she needs counselling and support as well but she has to be willing to reach out for it. I also know that [S.] just wants to be loved and accepted by her entire family.
>
> Maybe you will allow us to pick up the broken pieces of our family and allow us to make things right amongst ourselves.

Background of Mr. O

[20] A *Gladue* report and a risk assessment were prepared. Mr. O. was born in the 1960s in the village where the offence occurred. He had a good upbringing, although his parents fought with each other. His father lived in a residence in Dawson City

while attending a public school. It was a version of residential school, as he was taken away from his home and sent to live in Dawson City. His parents drank, especially his father. His father passed away in 2001. He has four sisters, and his mother is still living.

[21] Mr. O. quit school before graduating and lived with his grandfather learning how to live on the land. After some time, he returned to school and graduated with a high school diploma. He then went to trade school and was certified in carpentry.

[22] Mr. O. married in 2004, and he and his wife adopted a son who is now a young adult. His wife died suddenly in February 2017, and left a significant gap in his and his son's lives.

[23] He is at low risk to reoffend. He has no other criminal record.

Sentencing judge's reasons for sentence

[24] The sentencing judge reviewed the facts of the case and the way to approach the constitutionality of the mandatory minimum penalty. The Crown asked that he summarily dismiss the constitutional challenge on the basis that a fit sentence was in excess of the mandatory minimum and therefore there was no need to consider the constitutional question. He concluded that the first step was to ascertain a proportionate sentence for Mr. O.

[25] The judge reviewed a large amount of case law and identified the aggravating and mitigating factors in the case. He identified the aggravating factors as: the significant age difference between E.O. and S.; that E.O. abused his position of trust in relation to the vulnerable victim; and that the abuse continued over a month-long period, and ended only when discovered. He did not place significance on the guilty plea, as it came only after S. had completed her testimony.

[26] Despite the lack of participation and the apparent support of Mr. O. by S., the judge took into account the likelihood of psychological harm to S. as a result of Mr. O.'s offending.

[27] The mitigating factors he found are: E.O. has no prior criminal history; he has the support of his family, members of the community, and his First Nation; and he is a low risk to reoffend.

[28] The sentencing judge specifically referred to the *Gladue* factors, and said that rehabilitation was entitled to substantial weight, as strongly supported by his community members.

[29] He took into account the personal circumstances of Mr. O., including the recent death of his wife and the fact that he was responsible for looking after his son.

[30] He concluded that 15 months' imprisonment followed by two years' probation was a fit and proportionate sentence. The judge also concluded that a conditional sentence would not be an appropriate sentence. He concluded that a CSO would be inconsistent with the fundamental principles of sentencing, in particular, denunciation and deterrence. He concluded that Mr. O.'s moral culpability was high, even when applying the *Gladue* factors. As a result, the judge concluded that he need not analyze the constitutionality of the mandatory minimum sentence.

Positions of the parties

[31] Mr. O. submits that the mandatory minimum should be struck down, and that the 15-month sentence should be converted to a CSO. In addition, he submits that the s. 109 weapons prohibition should be set aside. He submits that the sentencing judge erred in giving the recommendation of the sentencing circle no weight.

[32] The Crown submits that the judge did not err in failing to consider the mandatory minimum, but agrees that if this Court considers it, there is authority supporting striking it down. The Crown supports the 15-month sentence and says that a CSO is not appropriate in this case.

Discussion

[33] There are two main issues in this appeal: first, whether the mandatory minimum contained in s. 153(1.1)(a) is unconstitutional, and second, whether Mr.

O.'s sentence should be varied. For the reasons that follow, I conclude that the mandatory minimum is unconstitutional, but that Mr. O's sentence should not be disturbed by this Court.

Constitutionality of s. 153(1.1)(a)

Legislative history

[34] Prior to 2005, there was no mandatory minimum sentence for sexual exploitation.

[35] In 2005, *An Act to amend the Criminal Code (protection of children and other vulnerable persons) and the Canada Evidence Act*, S.C. 2005, c. 32, introduced a mandatory minimum sentence of 45 days where the Crown proceeded by indictment and 14 days where the Crown proceeded summarily. Because the *Code* precludes the imposition of a CSO for offences with mandatory minimum sentences of imprisonment, this amendment rendered CSOs unavailable for sexual exploitation: *Code*, s. 742.1(b); *R. v. Proulx*, 2000 SCC 5 at para. 48.

[36] In 2012, the *Safe Streets and Communities Act*, S.C. 2012, c. 1, increased the mandatory minimum sentence to one year for an indictable offence and 90 days for a summary conviction offence.

Should this Court consider the constitutional challenge?

[37] In *R. v. Lloyd*, 2016 SCC 13, the Court affirmed that a provincial court does not have the jurisdiction to strike down legislation as unconstitutional, but does have the power to find a law unconstitutional insofar as it affects the case before it (at para. 17). The Court also held that a provincial court does not have to engage in an analysis of the constitutionality of legislation if it would not affect the case, which is what the judge did here (at para. 18). Given the judge's conclusion on sentence, it cannot be said that he erred in concluding that he did not need to consider the issue of the mandatory minimum sentence.

[38] However, that conclusion does not end the matter in this Court. When a court does have the ability to declare legislation unconstitutional, as long as the

application is properly argued, it will not offend principles of judicial economy to engage in the analysis regardless of the effect on the individual before the court. Unlike a provincial court judge, a superior court of inherent jurisdiction or court with appropriate statutory authority can issue an order that invalidates the legislation. In *R. v. Ferguson*, 2008 SCC 6 at para. 73, and in *R. v. Nur*, 2015 SCC 15 at para. 51, the Court frowned on leaving unconstitutional provisions “on the books”, as it violates the rule of law to allow unconstitutional laws to remain in force indefinitely and deprives the legislature of the important signal that a law does not pass constitutional muster. In short, it is an appropriate use of judicial resources to strike down unconstitutional mandatory minimum sentences even where the offender before the court will be unaffected by that ruling.

[39] I pause to note that in *R. v. Morrison*, 2019 SCC 15, Justice Moldaver for the Court declined to rule on a mandatory minimum because the *mens rea* of the offence had been significantly clarified in that case, and therefore, exceptionally, the Court lacked proper submissions on the kind of conduct that would be caught by the mandatory minimum. In this case, by contrast, there is no significant confusion among the parties about the workings of the offence.

[40] Therefore, in my view, it is appropriate for this Court to consider the constitutionality of the mandatory minimum contained in s. 153(1.1)(a).

Legal framework for the constitutional challenge

[41] At the time of the offence, ss. 153(1) and (1.1)(a) read as follows:

> 153 (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
>
> > (a) for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of the young person; or
> >
> > (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.
>
> (1.1) Every person who commits an offence under subsection (1)

> (a) is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years and to a minimum punishment of imprisonment for a term of one year…

[42] I note that s. 153(1.1)(a) has since been amended to prescribe a maximum sentence of 14 years' imprisonment.

[43] Subsection 153(1) is a hybrid offence, punishable by indictment or by summary conviction at the discretion of the Crown.

[44] Since the introduction of the *Charter*, mandatory minimum sentences imposed by Parliament have been subject to the scrutiny of s. 12, which provides:

> Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

[45] In *R. v. Smith*, [1987] 1 S.C.R. 1045, the Supreme Court of Canada, for the first time, struck down a mandatory minimum sentence on the basis that it violated s. 12. While the majority found that the mandatory sentence of seven years' imprisonment for importing drugs would not be "grossly disproportionate" in all cases, it held that such a sentence could constitute "cruel and unusual punishment" in a reasonable hypothetical factual matrix (at 1077–78).

[46] Proportionality is an essential ingredient of a just sentence: *R. v. Nur*, 2015 SCC 15 at para. 43. In *Smith*, the majority discussed the meaning of gross disproportionality at 1072–73:

> The limitation at issue here is s. 12 of the *Charter.* In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J. in *Miller and Cockriell*, [[1977] 2 S.C.R. 680], where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J. in *Miller and Cockriell*, *supra*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.
>
> … Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

> In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.

[47] The Supreme Court recently examined mandatory minimums in *Nur* and *Lloyd*. In *Nur*, the Court affirmed the *Smith* approach to gross disproportionality and identified the "high bar" for what constitutes "cruel and unusual punishment" under s. 12 of the *Charter*. The Court elaborated at para. 39:

> This Court has set a high bar for what constitutes "cruel and unusual…punishment" under s. 12 of the *Charter*. A sentence attacked on this ground must be grossly disproportionate to the punishment that is appropriate, having regard to the nature of the offence and the circumstances of the offender: *R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1073. Lamer J. (as he then was) explained at p. 1072 that the test of gross disproportionality "is aimed at punishments that are more than merely excessive". He added, "[w]e should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation". A prescribed sentence may be grossly disproportionate as applied to the offender before the court or because it would have a grossly disproportionate impact on others, rendering the law unconstitutional.

[48] In *Nur*, the majority set out the analytical process to be followed when a mandatory minimum sentence is challenged. First, the court must determine what constitutes a proportionate sentence for the offence based on the objectives and principles of sentencing in the *Code* (at para. 46). Second, it must decide, bearing the proportionate sentence in mind, whether applying the mandatory minimum would result in a grossly disproportionate sentence for the offender before the court (at para. 46). Third, if the sentence is not grossly disproportionate for that offender, the

court must then consider whether any "reasonably foreseeable applications" of the provision will result in grossly disproportionate sentences for other offenders (at para. 77). If the answer to either of the latter two questions is yes, then the mandatory minimum sentence is inconsistent with s. 12 and "will fall unless justified under s. 1 of the *Charter"* (at paras. 46, 105–106).

Is the mandatory minimum in s. 153(1.1)(a) unconstitutional?

[49] The sentencing judge in this case first considered the question of a proportionate sentence for Mr. O. He concluded that a sentence of 15 months' incarceration was a fit and proportionate sentence. As I explain in more detail below, this Court owes deference to the sentencing judge and I would not differ from his conclusion: *R. v. Lacasse*, 2015 SCC 64.

[50] Next is the issue of a reasonable hypothetical. In *R. v. Hood*, 2018 NSCA 18 at paras. 150–54, the Court, in striking down the mandatory minimum of one year for s. 153(1), posed the hypothetical of a new teacher in her 20s with bipolar disorder (as did Ms. Hood) 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 in prison, and that a one-year sentence would be grossly disproportionate, amounting to cruel and unusual punishment.

[51] In *R. v. E.J.B.*, 2018 ABCA 239, the Court upheld the legislation on the basis that the reasonable hypotheticals used by the sentencing judge in that case were too far-fetched. The Court found that the facts, though drawn from real cases, had been changed so much that they were no longer reasonably foreseeable. The Court said, at para. 73, "The aspiration of the provision, and Parliament's will, is that people in this position will regulate their behaviour and do their duty respecting a young person."

[52] Courts of appeal across the country have recently struck down mandatory minimum sentences for numerous offences, including:

- 90 days for summary possession of child pornography in s. 163.1(4)(b) (*R. v. Swaby*, 2018 BCCA 416, leave to appeal to SCC requested);
- six months for indictable possession of child pornography in s. 163.1(4)(a) (*R. v. Alexander*, 2019 BCCA 100; *R. v. John*, 2018 ONCA 702);
- six months for communicating with a person under the age of 18 for a sexual purpose in s. 286.1(2) (*R. v. J.L.M.*, 2017 BCCA 258, leave to appeal to SCC refused, [2018] 1 S.C.R. ix);
- one year for touching a person under the age of 16 for a sexual purpose in s. 151(a) (*R. v. Scofield*, 2019 BCCA 3; *R. v. Ford*, 2019 ABCA 87; *R. v. J.E.D.*, 2018 MBCA 123; *Caron Barrette c. R.*, 2018 QCCA 516).

[53] In my view, the hypothetical used in *Hood* is reasonable and not far-fetched. It demonstrates that the offence is drafted broadly enough to capture offenders for whom a one-year sentence would be grossly disproportionate. I agree with the Nova Scotia Court of Appeal that in such circumstances, the one-year mandatory minimum sentence is grossly disproportionate and a violation of s. 12 of the *Charter*. Although the offence exists to regulate the behaviour of responsible adults, the mandatory minimum sentence does not sufficiently account for the variety of ways in which an adult may fail to meet their duty to young people. For that reason, it is unconstitutional.

[54] Given that the Crown does not argue that it is saved by s. 1, in my view, the one-year mandatory minimum sentence should be struck down as unconstitutional.

Mr. O's sentence

Standard of review

[55] Courts of appeal derive their jurisdiction to review sentences imposed by sentencing judges from s. 687 of the *Code*. That section precludes an appellate court from intervening in an appeal from sentence except where the sentence is demonstrably unfit or where the sentencing judge made a material error that impacted the result: *Lacasse* at paras. 44, 52; *R. v. Agin*, 2018 BCCA 133. Errors in

principle, failure to consider a relevant factor, erroneous consideration of aggravating or mitigating factors, and unreasonably according or failing to accord weight to particular factors are material errors: *Lacasse* at para. 44; *R. v. Suter*, 2018 SCC 34 at paras. 88–89.

Circle sentencing

[56] On appeal, Mr. O. focuses on the judge's treatment of the sentencing circle's recommendation. As such, it is necessary to explain how an appellate court should review a sentencing judge's decision where a sentencing circle was held.

[57] As set out above, the sentencing circle in this case was attended almost entirely by friends and relatives of Mr. O., and there was considerable victim blaming among the participants. S. participated solely through the submission of a short letter written a year earlier.

[58] The Crown has asked us to reiterate the admonishment made by Chief Justice McEachern in *R. v. Johnson* (1994), 91 C.C.C. (3d) 21 (Y.T.C.A.) at 24:

> Sentencing circles are not prescribed by the *Criminal Code* of Canada. If the judges of a court propose to use sentencing circles to assist them in some kinds of sentencing (and I do not suggest they should not), they should establish and publish rules under *Code*, s. 482(2) and *Interpretation Act*, R.S.C. 1985, c. I-21, s. 35 (which defines "province" to include the Yukon Territory), so that both the Crown and the accused, and their counsel, will know the kinds of cases to be tried in this way, and precisely what they and their client may expect. It would be wrong, in my view, if the judges of a court should follow different procedures on such a common question as sentencing which is an important component of every case where a conviction is entered.
>
> Also, if rules are established, any aggrieved party will have a certain basis for attacking such procedure either before or after the commencement of the sentencing process.

This Court made the same request of the Territorial Court judges in *R. v. Johns* (1996), 66 B.C.A.C. 97 (Y.T.C.A.). In *Johns* at para. 24, Justice Prowse noted that this Court should not "impose its own structure on such proceedings", because it is one step removed from those proceedings and would not be able to rely on the expertise of community members. I agree that the Territorial Court judges are in a better position to determine what rules—if any—to impose on sentencing circles.

[59] Although I agree that circle sentencing processes are more useful to sentencing judges when they have certain characteristics, I would not go as far as saying that they must conform to the same procedural rules every time they are employed. The idea of imposing guidelines has not always been welcomed: *R. v. C.P.*, [1995] Y.J. No. 186 (Terr. Ct.). Judges who actually hold sentencing circles in Yukon have made clear that, in their eyes, flexibility is necessary: Barry Stuart, *Building Community Justice Partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice Canada, 1997) at 114. In my view, a degree of flexibility should be preserved in order to ensure that sentencing circles can be employed in the varied circumstances of particular cases, which will always involve offenders, victims, and communities with their own needs and experiences. For example, although in some circumstances the victim's voice will be crucial, the victim may not always need to be present: Stuart at 11. I note that sentencing circles held in the Territorial Court can use procedures that have been partially developed by a particular Indigenous community: *R. v. Gingell* (1996), 50 C.R. (4th) 326 (Y.T. Terr. Ct.). A less flexible framework may pose difficulties for proceeding in this way. Ultimately, judges of the Territorial Court can decide whether to enact guidelines that allow for this flexibility if they so choose.

[60] Even so, sentencing circles should be planned and carried out with the sentencing judge's task in mind—a circle should be planned and run such that it gives the judge confidence in its recommendations. While sentencing circles have the potential to perform multiple functions, the primary function they serve in the criminal justice system is to allow members of Indigenous communities to share information with the sentencing judge. As Jonathan Rudin explains in *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Toronto: Emond, 2019) at 208:

> … it is important to emphasize that sentencing circles are not an Indigenous practice; rather, they are a way the court system has chosen to obtain information from members of the Indigenous community. If an Indigenous community or nation were given the ability to design their own justice system very few would likely say, "What we would like is for the judge to sit with us and listen to what we have to say and then go away and tell us what the sentence will be."

[61] When an offender has taken part in a sentencing circle, an appellate court may intervene where the sentencing judge has given the sentencing circle's recommendation unreasonable weight—whether too much weight or too little—and where that error impacted the sentence: *R. v. Jacko*, 2010 ONCA 452 at para. 81.

[62] It is clear that in this case the judge gave the sentencing circle's recommendation little to no weight. The only thing he drew from the circle was that Mr. O had the support of his community. Although the circle agreed on a recommendation that Mr. O. take part in a community plan that did not involve jail, the judge instead sentenced Mr. O. to 15 months in jail without adverting to the recommendation. I note parenthetically that it will generally be helpful for reviewing courts if sentencing judges explain, even if only briefly, why they have decided to give sentencing circles' recommendations the weight they have given them.

[63] Nevertheless, in the circumstances, it was not an error for the judge to give the sentencing circle's recommendation the minimal weight he did.

[64] There is no doubt that the participants of the circle were well meaning, and did their best in the circumstances. It was, however, an unsatisfactory process. The victim did not participate, nor did anyone truly support the victim other than a victim service worker who clearly felt challenged by the process. There was no participation from the probation services, the alcohol and drug services who would be engaged with a community sentence with Mr. O., the police community, or others who might be interested. Not all of these groups need be represented at every circle, but there were very few at this circle who represented voices other than those supporting Mr. O.

[65] In addition, many of the participants in the circle had a fundamental misunderstanding with respect to the fact that by virtue of her age, S. was indeed a victim, and not at fault for what had occurred. That misunderstanding tainted the recommendations and support shown for Mr. O.

[66] In my view, the sentencing judge's consideration of the sentencing circle's recommendation and his failure to give it much weight was not an error.

Should a CSO be imposed?

[67] The next question is whether Mr. O should be sentenced to a CSO now that the impediment of a mandatory minimum sentence is removed from the sentencing process.

[68] In facts not dissimilar to those before the Court, the Alberta Court of Appeal in *E.J.B.* overturned a CSO and imposed a four-year sentence. In *Hood*, the Nova Scotia Court of Appeal upheld the 15-month CSO imposed by the sentencing judge for offences with two former students when Ms. Hood was in a pathologically elevated mood.

[69] The sentencing judge carefully considered whether there should be a CSO. He sat in the community at the sentencing circle, listened to the community members, and was well aware of the extent to which that community was prepared to support Mr. O. He was alive to Mr. O.'s excellent work record, the fact he had no criminal record, that he was raising his son as a single parent, and how the *Gladue* factors affected Mr. O. He was provided with reports from Yukon Corrections outlining the unsatisfactory state of the facilities for Indigenous offenders, recommendations from the Truth and Reconciliation Report, and the disproportionate incarceration rate of Indigenous people in Yukon corrections. All of these factors were in favour of a CSO.

[70] However, the sentencing judge was also aware of the seriousness of this offence. Mr. O. took advantage of a young, vulnerable woman who was in his care precisely because she was vulnerable and needed adult support and supervision. He had sexual relations with her a number of times over the course of a month. The judge weighed the applicable principles of sentencing and concluded that denunciation and deterrence could not be properly met with a CSO.

[71] A sentencing judge has the difficult but important task of ensuring that while *Gladue* principles are properly considered and incarceration of Indigenous offenders is avoided whenever possible, violence against Indigenous women is not trivialized: *R. v. Morris*, 2004 BCCA 305 at paras. 68–69.

[72] As noted above, considerable deference applies to sentences imposed by trial judges. The judge in this case did not find it necessary to strike down the mandatory minimum as, in his view, it would not have made a difference to the sentence he considered fit and proportionate. He considered all options on the basis that the mandatory minimum did not exist.

[73] The role of this Court is not to second-guess a sentencing judge who has examined the facts carefully, in this case heard the evidence at trial, participated in a circle sentencing, carefully considered the case law, the circumstances of the offence and the offender, the *Gladue* factors, and the principles of sentencing set out in the *Code*.

[74] In my view, there is no basis upon which to substitute another view for that of the sentencing judge. He committed no material errors, nor is the sentence he imposed demonstrably unfit.

Weapons prohibition

[75] Mr. O. seeks an order setting aside the s. 109 weapons prohibition. The judge imposed an exemption on the order such that it did not apply when the firearm was used for sustenance hunting and trapping.

[76] Section 109 reads:

> 109 (1) Where a person is convicted, or discharged under section 730, of
>
> (a) an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for ten years or more,

[77] Mr. O. argued that the factual matrix should guide whether the order should be made. I do not disagree; however, in my view, when the sexual integrity of a child is violated, as it was here, that is sufficient violence to attract the prohibition order.

[78] The sentencing judge added an exemption for sustenance hunting and trapping purposes which we are not asked to interfere with. We are told that usually the Chief Firearms Officer makes the exemption, but the jurisdiction of the judge to also make that order was not challenged.

[79] In my view, the weapons prohibition was properly made, including the fact of an exemption. It may be that the Chief Firearms Officer will need to craft the exemption more clearly.

Conclusion

[80] In conclusion, I would declare the mandatory minimum of one year's imprisonment to be of no force and effect. I would otherwise dismiss the appeal.

"The Honourable Madam Justice Bennett"

I agree:

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Willcock"