COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Veinotte,*
2016 BCCA 21

Date: 20160114
Docket: CA43126

Between:

Regina

Appellant

And

Aaron Gerald Veinotte

Respondent

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Section 16(4) *Sex Offender Information and Registration Act ("SOIRA")*: 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.

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman
The Honourable Madam Justice Fenlon

On appeal from: an order of the Provincial Court of British Columbia, dated September 2, 2015 (*R. v. Veinotte*, Cranbrook Docket No. 31360)

Oral Reasons for Judgment

Counsel for the Appellant: M.A. Mereigh and M. Scott

Counsel for the Respondent: G. Kosakoski

Place and Date of Hearing: Vancouver, British Columbia
January 14, 2016

Place and Date of Judgment: Vancouver, British Columbia
January 14, 2016

Summary:

The Crown seeks leave to appeal the one-year mandatory minimum sentence imposed on the respondent who pleaded guilty to one count of sexual assault contrary to s. 271 of the Criminal Code, R.S.C. 1985, c. C-46. The offence involved an intrusive but non-violent sexual assault of a 13-year-old girl. Held: leave is granted; the appeal is dismissed. The sentencing judge did not err in law or in principle, nor can it be said that the sentence imposed is demonstrably unfit. A mandatory minimum sentence is not invariably reserved for the least serious offence and the least culpable offender.

[1] **KIRKPATRICK J.A.**: On September 2, 2015, a judge of the Provincial Court imposed a one-year mandatory minimum sentence on the respondent, Aaron Gerald Veinotte, who pleaded guilty to one count of sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46. The Crown seeks leave to appeal the sentence and, if leave is granted, asks that this Court substitute a sentence of two years' imprisonment and a two-year period of probation.

CIRCUMSTANCES OF THE OFFENCE

[2] On September 6, 2014, the complainant, A.L., a 13-year-old Métis girl with a troubled background, took her dog for a walk and went to Mr. Veinotte's home. Mr. Veinotte was 29 years of age and had known A.L. and her parents for many years. They talked outside and when it became dark and cold, went inside. They sat on the floor, smoked a marihuana joint and cigarettes, and listened to music.

[3] They moved to the bed to watch television. Mr. Veinotte eventually had sexual intercourse with A.L. In his sentencing submission, Crown counsel described A.L.'s reaction:

> She did note that she ignored the part about how he was older than me. She didn't say that it bothered her. She didn't tell him to stop. He was 29 and she was 13. She described that he did have intercourse with her, that she wasn't sure if he ejaculated or not.
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> She noted that afterwards they watched some more TV, listened to some music, that she felt all right. She noted that she had a lot to smoke, that she was really baked, and after they had intercourse he performed oral sex, as well, and then they had intercourse again. She noted that she was feeling really good, and she -- that no one had treated her in that way. She did note that she had sex previously, and that they did cuddle in the bed after intercourse again.

[4] A.L. later told the police that she was not frightened of Mr. Veinotte, but was scared of losing him as a friend and family member. She did not feel angry, but was disappointed.

[5] Mr. Veinotte expressed remorse to A.L.'s family shortly after the incident and made a statement to the police in which he admitted the circumstances of the offence.

CIRCUMSTANCES OF THE OFFENDER

[6] Both a psychiatric assessment and a pre-sentence report were available to the sentencing judge. These reports established that Mr. Veinotte's parents are both of Mi'kmaq First Nations descent. His mother had a significant alcohol problem. The psychiatrist speculated that Mr. Veinotte might have fetal alcohol deficits although Mr. Veinotte has no awareness of those factors and has managed to obtain his Grade 12 equivalency.

[7] Mr. Veinotte has no knowledge of his father who was described as a very violent man who broke Mr. Veinotte's arm when he was two years of age.

[8] Mr. Veinotte was molested by another male when he was 11 years of age.

[9] Mr. Veinotte became involved in theft and mischief at age nine as a result of lack of supervision at home. He first tried alcohol and marihuana at age 10, and regularly consumed alcohol from age 13 and was described as an alcoholic. He has in the past been addicted to methamphetamine and cocaine. Mr. Veinotte has an admittedly thin employment history. It appears that Mr. Veinotte's substance abuse is the primary contributing factor in his unemployment. Remarkably, Mr. Veinotte ceased consuming drugs or alcohol shortly after the offence in about September 2014 after he began living at a religious-based recovery centre. At the time of sentencing he had been "substance free" for almost a year.

[10] Mr. Veinotte has a substantial criminal record primarily for property offences dating back to 1997, but no previous convictions for sexual offences.

[11] The psychiatrist noted that Mr. Veinotte had "some insight" into the offence and that substance abuse was a notable factor in the offence. The pre-sentence report confirmed that Mr. Veinotte acknowledged the charges and "demonstrated sadness and remorse when discussing the charges, in particular on how this may have impacted the victim". He also expressed a "heightened level of regret" at losing his good friend, A.L.'s father, and "accepts responsibility and acknowledges the emotional and mental damage it has caused the victim and her family".

SUBMISSIONS ON SENTENCE

[12] At the sentencing hearing, the Crown advocated a sentence of between two and four years in accordance with the range of sentence expressed in *R. v. G.M.,* 2015 BCCA 165, of two to six years. *G.M.* concerned a violent sexual assault involving anal intercourse.

[13] During the course of those submissions, the judge observed:

> THE COURT: I was going to say there – there's lots of sexual assault convictions in this area where people have received sentences of significantly less than two years. …

[14] In light of the mandatory minimum sentence, the defence advocated for a sentence of one year.

SENTENCING REASONS

[15] The judge commenced his reasons by expressing his frustration with the Crown's decision to proceed by indictment, thereby effectively precluding the exercise of discretion in the fashioning of what the judge considered to be an appropriate sentence. By proceeding by indictment, s. 271(a) provides that, if the complainant is under the age of 16 years, the offender is liable to a minimum punishment of imprisonment for a term of one year.

[16] The judge acknowledged the seriousness of the offence. He was specifically referred to s. 718.01 by Crown counsel in submissions. He accepted that denunciation and deterrence were the primary sentencing factors. He acknowledged

that Mr. Veinotte had accepted responsibility, entered a guilty plea, and that the offence constituted a breach of trust between him and A.L. and her family. It is clear the judge was aware of the local community's expectations of an appropriate sentence.

[17] The judge ultimately imposed the mandatory minimum one-year sentence together with a one-year probation order, including a term that Mr. Veinotte abstain from the consumption of alcohol, a term which Mr. Veinotte said would help him and which had been identified as a risk factor.

ON APPEAL

[18] The Crown on appeal contends that the judge failed to give effect to "the new sentencing framework" represented by Parliament's enactment of mandatory minimum sentences for sexual offences against children. The Crown contends that the judge failed to have regard to s. 718.01 of the *Code* which requires that when a court imposes a sentence for an offence that involves abuse of a person under the age of 16 years, it must give primary consideration to the objectives of denunciation and deterrence. The Crown maintains that the judge did not appreciate that "minimum sentences have the effect of raising sentences across the board for such offences [the making of pornography offence] to maintain proportionality": *R. v. Worthington,* 2012 BCCA 454.

[19] The Crown further contends that the judge did not impose a proportionate sentence. The Crown submits that the circumstances of the offence – two incidents of unprotected sexual intercourse and one incident of oral sex, on a 13-year-old child whose acquiescence was induced by the provision of marihuana – called for a sentence greater than one year which the Crown submits is reserved for the least culpable offender in the least serious circumstances.

[20] Lastly, the Crown contends that the sentence imposed was not fit. The Crown submits that the range of sentences for crimes against children has been altered in recent years by reason of the mandatory minimum sentences such that sentences

imposed in the past no longer reflect the appropriate sentence to be imposed in the present.

DISCUSSION

[21] On December 17, 2015, the Supreme Court of Canada handed down reasons in *R. v. Lacasse,* 2015 SCC 64, which reinstated a sentence imposed at trial for impaired driving causing death that had been reduced on appeal. The majority reiterated what has been said on many occasions:

> [11] This Court has on many occasions noted the importance of giving wide latitude to sentencing judges. Since they have, *inter alia,* the advantage of having heard and seen the witnesses, sentencing judges are in the best position to determine, having regard to the circumstances, a just and appropriate sentence that is consistent with the objectives and principles set out in the *Criminal Code* in this regard. The fact that a judge deviates from the proper sentencing range does not in itself justify appellate intervention. Ultimately, except where a sentencing judge make an error of law or an error in principle that has an impact on the sentence, an appellate court may not vary the sentence unless it is demonstrably unfit.
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> [12] In such cases, proportionality is the cardinal principle that must guide appellate courts in considering the fitness of a sentence imposed on an offender. The more serious the crime and its consequences, or the greater the offender's degree of responsibility, the heavier the sentence will be. In other words, the severity of a sentence depends not only on the seriousness of the crime's consequences, but also on the moral blameworthiness of the offender. Determining a proportionate sentence is a delicate task. As I mentioned above, both sentences that are too lenient and sentences that are too harsh can undermine public confidence in the administration of justice. Moreover, if appellate courts intervene without deference to vary sentences that they consider too lenient or too harsh, their interventions could undermine the credibility of the system and the authority of trial courts. With respect, I am of the opinion that the Court of Appeal was wrong in this case to reduce the sentence imposed by the trial judge by basing its intervention on the fact that he had departed from the established sentencing range.

[22] In order for the Crown to succeed in this appeal, it must establish that the sentencing judge made an error of law or an error of principle that had an impact on the sentence and that the sentence was demonstrably unfit.

[23] In my opinion, the Crown's appeal cannot succeed because it is, in essence, a request that we second-guess the sentencing judge. The Crown asks us to find

that it was an error in principle for the judge to impose the mandatory minimum sentence because it failed to have regard to the so-called "inflationary floor" that such sentences represent.

[24] The Crown's submission rests on the minority views of Madam Justice Arbour in *R. v. Morrisey,* 2000 SCC 39, and this Court's decision in *R. v. B.C.M.,* 2008 BCCA 365, in which the Court explained the effect of mandatory minimum sentences:

> [31] While the views of Arbour J. are not precedentially authoritative, the sentencing judge was entitled to adopt them as a logical and appropriate statement of the interaction between minimum sentences and the traditional sentencing principles, notably proportionality, which requires that similar offenders receive similar sentences. A minimum sentence does not oust that fundamental principle. The search for a fit sentence is still guided by similar sentences imposed in the past on similarly situated offenders. Nevertheless, a mandatory minimum sentence introduces a higher starting point and therefore a narrower range within which that principle will operate. The notion of a fit sentence must be adjusted accordingly if the principle of proportionality is to remain operative.
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> [32] For example, in this case, the introduction of the mandatory minimum sentence of one year for making child pornography significantly shrinks the range of sentencing options. It excludes consideration of a suspended sentence and probation under s. 731, or a conditional sentence under s. 742.1 of the *Code.* The only remaining sentencing options are terms of imprisonment between the statutory minimum of one year and the statutory maximum of ten years. Thus, the least culpable offender in the least serious circumstances, who might have received a more lenient sentence prior to Bill C-2, will now be sentenced to one year in prison. It would be inconsistent with proportionality if worse offenders in more serious circumstances, who might have received a one year sentence prior to Bill C-2, continue to be sentenced to one year under the new regime. The principle that similar offenders should receive similar sentences requires acknowledgement that a minimum sentence has a proportionate inflationary effect on the balance of the sentencing range.

[25] However, this Court in *R. v. Lloyd,* 2014 BCCA 224, expressed reservation as to the rigid application of an "inflationary floor":

> [53] There is, I think, a need for some caution in accepting the "inflationary floor" principle as an invariable rule of interpretation. In light of the Supreme Court of Canada's view in *R. v. L.M.,* 2008 SCC 31 that the maximum sentence is not reserved for "the worst offender and the worst offence", it may be doubted that the minimum sentence should be reserved for the "'best' offender", as Arbour J. suggested.

[26] The fallacy inherent in the Crown's argument is that there is an invariable rule that a mandatory minimum sentence is reserved for the least serious offence and the least culpable offender. That submission cannot be logically sustained. It would mean, by comparison, that the maximum sentence is reserved only for the worst offenders and the worst offences. To accede to this would eviscerate the fine balancing that sentencing judges are charged with performing.

[27] Even if we were to accede to that submission, I cannot say that, in the circumstances of this offence and this offender, the sentence imposed is demonstrably unfit.

[28] The Crown tendered many cases which it suggested demonstrate the appropriate "range" of sentences. With respect, few of the cases are of assistance and many simply bear no comparison at all to the circumstances at bar.

[29] As the majority in *Lacasse* stated, the cardinal principle is proportionality. It is self-evident from the review of the record in this case that this offence is very serious in that it involved an intrusive but non-violent sexual assault of a 13-year-old girl. No one would suggest that it is not serious or that Parliament's intention in mandating a minimum sentence in a crime against a child should be minimized.

[30] However, it is also self-evident that Mr. Veinotte had an exceedingly deprived childhood marred by his own alcohol addiction and drug use. He expressed his remorse at an early opportunity and pleaded guilty before the trial. He has embarked on rehabilitation with remarkable success given a history of addiction that appears to have spanned more than half his life.

[31] In my opinion, this is not an appeal in which this Court should intervene. I would grant leave to appeal but dismiss the appeal.

[32] **GROBERMAN J.A.**: I agree.

[33] **FENLON J.A.**: I agree.

[34] **KIRKPATRICK J.A.**: Leave to appeal is granted but the appeal is dismissed.

"The Honourable Madam Justice Kirkpatrick"