In the Court of Appeal of the Northwest Territories

Citation: R. v. C. O., 2006 NWTCA 3

Date: 2006 07 14
Docket: A-1-AP-2006000008
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Appellant

- and -

C. O.

Respondent

Restriction on Publication: By Court Order, information that may identify the victim or the person described in this judgment as C.O. may not be published, broadcast, or transmitted in any manner. There is also a ban on publishing the contents of the application for the publication ban or the evidence, information or submissions at the hearing of the application. See the *Criminal Code*, s. 486.4.

The Court:

The Honourable Madam Justice Adelle Fruman
The Honourable Mr. Justice Ronald S. Veale
The Honourable Mr. Justice Keith G. Ritter

Memorandum of Judgment
Delivered from the Bench

Appeal of the Sentence by
The Honourable Mr. Justice J.E. Richard
Dated the 23rd day of March, 2006

Memorandum of Judgment
Delivered from the Bench

Fruman J.A. (for the court):

[1] The respondent pled guilty to sexually assaulting his seven-year-old female relative. The sentencing judge suspended the passing of sentence and placed the respondent on two years' probation. The crown appeals.

[2] The admitted facts were read into the record at sentencing(A.B. 101/22-102/17).The assaults occurred when the respondent was babysitting the young victim. In the particular incident that formed the basis of the charge, the respondent took his clothes off and asked the victim to take hers off. He then attempted to effect penetration, but was unable to. He ignored her pleas to stop. Following the attempts at penetration, he pushed the child's head down towards his penis and instructed her to lick it. He also performed cunnilingus on her. The assaults, all of a similar nature, occurred on six occasions in a three-month period.

[3] At the sentence proceedings, the crown acknowledged the four-year starting point, but requested a gaol term of two years, in light of the many mitigating circumstances (A.B. 128/31-32). Defence counsel advised that the respondent's mother was hoping for a conditional sentence. He indicated that if such a sentence were imposed, significant conditions would be required, including house arrest, compulsory treatment and limited access to the community (A.B. 132/16-24). However, defence counsel acknowledged that a period of incarceration would be appropriate and asked that it be served at the River Ridge facility, which has programs for persons with special needs (A.B. 132/16-35). Both a pre-sentence report and victim impact statement were placed in evidence, but psychological and risk assessments were not provided (A.B. 144-154).

[4] The sentencing judge noted the gravity of the offence of sexual assault and the long-lasting emotional or psychological effects on its victims. He found the tender age of the victim in this case and the trust relationship particularly aggravating. The mitigating factors of an early guilty plea, the respondent's young age (21 at the time) and lack of a criminal record were noted. In addition, the judge was satisfied that the respondent was sincerely and genuinely remorseful and was unlikely to re-offend (A.B. 137/40-43). There was no evidence to support the latter conclusion.

[5] Evidence was also called relating to fetal alcohol spectrum disorder, as the respondent's parents believe he suffers from a mild form of the disorder. The sentencing judge noted that, while there was insufficient evidence to make a finding that the respondent had this disorder, there was a possibility that such a disorder may have contributed to his behavior (A.B. 138/1-15). Although this was not strictly a mitigating factor, the crown concedes that the sentencing judge was entitled to

consider it in light of the evidence concerning the availability of programs in various correctional facilities in this jurisdiction.

[6] The sentencing judge recognized the starting point of four years' imprisonment for sexual assault of a child by an adult in a position of trust. However, he concluded that the circumstances of this case differed from those cases, and a term of incarceration was not necessary to achieve the objectives of sentencing (A.B. 139/20-23). In particular, he decided that the stigma of a sexual assault conviction was punishment in itself, and a form of denunciation and recognition of the gravity of the offence (A.B. 139/39-44).

[7] Our standard of review in sentencing cases is well known. This court can only intervene to overturn a sentence if the judge erred in principle, failed to consider relevant factors, over or under emphasized appropriate factors, or if the sentence imposed is demonstrably unfit: ***R. v. Shropshire***, [1995] 4 S.C.R. 227; ***R. v. M. (C.A.)***, [1996] 1 S.C.R. 500.

[8] The crown contends that the two-year suspended sentence imposed in this case is demonstrably unfit. For the following reasons we agree with this submission.

[9] As noted by the sentencing judge, the starting point for serious sexual assaults involving children in trust situations is four years in gaol: ***R. v. S. (W.B.)***; ***R. v. P. (M.)*** (1992), 127 A.R. 65; ***R. v. B.K.K.***, [1995] N.W.T.J. No. 122 (S.C.). The offence committed by the respondent falls squarely within this description. The assault was serious because it involved attempted intercourse, fellatio and cunnilingus. In addition, the respondent was in a clear position of trust; not only was he the victim's babysitter, he was her relation. The tender age of the victim, seven years, and the fact that the conduct occurred on repeated occasions, were aggravating circumstances.

[10] In finding that the circumstances in this case did not warrant a term of incarceration, the judge failed to recognize that the paramount objectives in cases involving abuse of children are general deterrence and denunciation: ***S. (W.B.)***, *supra* at paras. 33, 41; ***R. v. J.J.W.*** (2004), 348 A.R. 395, 2004 ABCA 50 at para. 14. In the result, he over-emphasized mitigating factors and the respondent's personal circumstances. While the judge considered rehabilitation to be important, the suspended sentence was not rehabilitative. The judge noted that with this sentence, he could not order the respondent to take treatment, and merely asked that the respondent or his parents consider that (A.B. 142/25-28).

[11] Although the judge noted the specific denunciatory effect the stigma of a sexual assault conviction would have on the respondent, he failed to address the general need to deter other persons from engaging in such acts and society's condemnation of such conduct. Sexual abuse of a child may have long-lasting devastating effects, which may be heightened when the perpetrator is someone in whom the child places her trust: ***S. (W.B.)*** at para. 35. In our view, in this case the principles of general deterrence and denunciation can only be addressed by a significant term of incarceration.

[12] The four-year starting point is based on a single serious sexual assault on a child by a person in a position of trust: ***S. (W.B.)*** at para. 42. In this case, the repeated assaults and the very young age of the victim are aggravating factors to be considered. There are, however, many mitigating factors present, as identified by the sentencing judge.

[13] At sentencing, defence counsel suggested that if incarcerationwere warranted, it should be at the River Ridge facility, based on evidence adduced about the programs available there for persons with special needs. River Ridge is a territorial, as opposed to a federal facility. In this appeal, the crown submits that a gaol sentence at the very high end of the territorial range would be fit. In its view, such a sentence would take into consideration the mitigatingfactors, the respondent's personal circumstances and his need for rehabilitation, while still giving effect to the overarching principlesof general deterrence and denunciation.

[14] In light of these submissions, we allow the appeal and substitute a term of imprisonment of two years less a day for the suspended sentence previously imposed. We request that the sentencebe served in the River Ridge correctional facility and that appropriate treatment programs be made available to and be completed by the respondent.

[15] The gaol term will be followed by a term of two years' probation. In addition to the compulsory conditions, the following terms and conditions shall apply:

1. The respondent shall not be in the presence of any person under the age of 16 years unless that person is accompanied by a parent or guardian; and

2. The respondent shall take whatever assessment, treatment or counseling the probation officer directs and provide proof of completion of the assessment, treatment or counseling to the satisfaction of the probation officer.

We note that, as required, the respondent has agreed to the second condition.

Appeal heard on June 28, 2006

Memorandum filed at Yellowknife, N.W.T.
this 14th day of July, 2006

Fruman, J.A.

Appearances:

Loretta Colton
for the Appellant

Dan Rideout
for the Respondent

A-1-AP 2006000008

IN THE COURT OF APPEAL
OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

C.O.

MEMORANDUM OF JUDGMENT