

In the Court of Appeal for the Northwest Territories

Citation: *R v Gargan*, 2023 NWTCA 5

Date: 2023 08 02

Docket: A1-AP-2022-0006

Registry: Yellowknife, N.W.T.

Between:

His Majesty the King

Appellant

- and -

Benny Greg Gargan

Respondent

**Reasons for Decision of
The Honourable Chief Justice Ritu Khullar**

Application for Leave to Appeal

**Reasons for Decision of
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[1] The Crown applies for leave to appeal a summary conviction appeal decision upholding a sentencing judge's finding that the 90 day mandatory minimum sentence for sexual interference is unconstitutional. For the reasons below, leave to appeal is denied.

[2] The respondent was convicted of one count of unlawful touching of a person under the age of 16 (sexual interference) contrary to s 151(b) of the *Criminal Code*. The Crown proceeded summarily, and the respondent pled guilty in the Territorial Court of the Northwest Territories.

[3] The offence occurred on August 3, 2018. In December 2018, while investigating another matter, the police learned about this incident, then interviewed the complainant and arrested the respondent who admitted the conduct while detained. The undisputed facts were that the 13 year-old complainant attended a community event where the 23 year-old respondent was present. The respondent had been consuming alcohol. He approached the complainant, reached out to hug her and touched her on her buttocks. The sentencing judge described it as "brief and isolated". Both respondent and the complainant are Indigenous. There was no information about the effect of the touching on the complainant.

[4] In fixing a fit sentence for the respondent, the sentencing judge found the age and vulnerability of the complainant to be statutorily aggravating and which elevated deterrence and denunciation as the primary goals in sentencing. She referred to *R v Friesen*, 2020 SCC 9 and the shift in paradigm in sentencing articulated by the Supreme Court of Canada for offences against children. In mitigation, the sentencing judge noted that the respondent pled guilty, did not have a criminal record, had suffered life disadvantages associated with the systemic disadvantage of Indigenous people, was remorseful, and, by the time of sentencing, had taken steps to get treatment for his alcohol addiction and had reintegrated into the community. Having noted the primacy of proportionality and surveyed previous sentencing decisions that involved "a single, brief, act of violence, perpetrated on an indigenous teenager in circumstances that do not involve a breach of trust", the sentencing judge concluded that one day of imprisonment and 12 months probation would be fit. She deemed the one day of imprisonment to be served by the respondent's attendance at court for sentencing: *R v Gargan*, 2021 NWTTC 9 (*Sentencing Decision*). In addition to providing a DNA sample, the respondent was also ordered to register under the *Sex Offender Information Registration Act* (SOIRA) for the mandatory period of ten years.

[5] Although s 151(b) of the *Criminal Code* prescribes a mandatory minimum sentence of 90 days' imprisonment for sexual interference when the Crown proceeds summarily, the sentencing judge found the mandatory minimum grossly disproportionate to the fit sentence for the respondent. Accordingly, the mandatory minimum violated the respondent's 12 *Charter* right not

to be subjected to cruel and unusual punishment, and the sentencing judge declined to apply it to the respondent.

[6] The Crown appealed the sentence to a judge of the Supreme Court of the Northwest Territories. It alleged various errors in the sentencing judge's conclusion that a one day sentence of imprisonment was a fit sentence for the applicant: (1) underemphasis of the seriousness of the offence, (2) underemphasis of the primary objectives of denunciation and deterrence, (3) fixing the sentence by comparison with previous sentence decisions which pre-dated the Supreme Court's directions in *R v Friesen* about sentencing for sexual crimes against children, and (4) drawing erroneous inferences about the harm to the complainant. It is fair to say the Crown sought to attack the finding about s 12 of the *Charter* by attacking the fitness of the sentence imposed.

[7] The summary conviction appeal judge concluded that none of the errors was made out and affirmed the one day imprisonment plus 12 months probation as a fit sentence: *R v Gargan*, 2022 NWTSC 21 (*Summary Conviction Appeal Decision*). She also affirmed the ruling that the 90 day mandatory minimum sentence was grossly disproportionate when applied to the applicant, so violated s 12 of the *Charter*.

[8] The Crown now seeks leave to appeal the *Summary Conviction Appeal Decision* under s 839 of the *Criminal Code*. The requirements for leave to appeal are that:

- 1) the proposed grounds of appeal involve questions of law alone,
- 2) the matter raises a reasonably arguable case of substance, and
- 3) the matter is of sufficient importance to warrant a second level of appeal.

R v Bhalla, 2021 ABCA 126 at para 8; *R v Aheer*, 2018 ABCA 395 at para 7; *R v Tibu*, 2016 ABCA 97 at paras 5-7.

Applications for leave should be granted sparingly. There has already been one appeal, thus granting leave would bring a second level of appeal which is to be discouraged in the absence of some compelling reason to conclude otherwise: *Tibu* at para 9.

[9] On this application, the Crown does not challenge the conclusion that the sentence imposed (one day custody plus 12 months probation) is fit. Rather, the appeal would be confined to the question of whether the 90 day mandatory minimum is grossly disproportionate to the fit sentence. The Crown argues that this Court should consider the gross disproportionality analysis in light of the recent Supreme Court of Canada decisions in *Friesen* and *R v Hills*, 2023 SCC 2.

[10] The question is one of law. Constitutional questions, properly framed, will almost always be sufficiently important to warrant a second level appeal. This application turns on whether the issue raises a reasonably arguable case of substance. In my view, given the well developed case law in this area, it does not meet this threshold.

[11] First, with respect to *Friesen*, both the sentencing judge and the summary conviction appeal judge considered it and, in my view, does not affect their conclusion that the mandatory minimum is grossly disproportionate to the fit sentence. *Friesen* stated at para 107 that sentencing ranges for sexual crimes against children may need to increase in some provinces. At the sentencing hearing and the summary conviction appeal, the Crown argued that *Friesen* implies that a one day custodial sentence for this offence was demonstrably unfit. Those arguments were rejected: *Sentencing Decision* at paras 19-20; *Summary Conviction Appeal Decision* at paras 30-32. If given leave for a further appeal, the Crown does not intend to repeat those arguments. Rather, it will argue that *Friesen* somehow suggests that 90 day custodial sentence is not grossly disproportionate to a one day custodial sentence. However, *Friesen* did not address gross disproportionality under s 12 of the *Charter*, nor how to determine whether a mandatory minimum is grossly disproportionate, and it provides no support for the Crown's argument.

[12] The Crown also argues that the recent decision in *Hills* changes the analysis, and it is arguable that after *Hills*, a court might not find the mandatory minimum to be grossly disproportionate. It does not appear that the issue of gross disproportionality was argued fully in the court below, and the decision in *Hills* would not have been available.

[13] *Hills* does not change the law in this area; it reaffirms the Supreme Court's analytical approach to s 12: *Hills* para 3. It does offer some nuance in assessing whether a mandatory minimum is grossly disproportionate to a fit sentence in a reasonably foreseeable scenario. But those nuances are not material to the proposed appeal since the courts below held the mandatory minimum breached s 12 because it was grossly disproportionate for the *actual* respondent, not a hypothetical one. On gross disproportionality, which is the only issue for which leave is sought, *Hills* reemphasizes that courts must consider the *effects* of the mandatory minimum sentence on the offender compared with the *effects* of the fit sentence. In assessing gross disproportionality, three questions should be addressed: the scope and reach of the offence, the effects of the mandatory penalty on the offender, and the objectives of the penalty.

[14] First is consideration of the scope and reach of the offence. Any offences that can be committed in many ways and under many different circumstances by a wide range of people are constitutionally vulnerable: *Hills* at para 125. It has been repeatedly recognized that sexual interference is the kind of offence that casts a wide net over offenders, victims and circumstances which makes the mandatory minimum sentence constitutionally vulnerable: *R v Ford*, 2019 ABCA 87 at para 10; *R v Drumonde*, 2019 ONSC 1005 at para 46; *R v Pye*, 2019 YKTC 21 at para 74; *R v CBA*, 2021 BCSC 2107 at paras 23-24, 34; *Sentencing Decision* at para 41. The circumstances of this case are a perfect illustration of why. The conduct, a brief hug and touch of the complainant's buttocks, is among the least serious instances of sexual interference, which can cover very grave violations of sexual integrity of victims and devastating exploitations of their vulnerability. The 90 day minimum sentence would apply nevertheless.

Second, a court must consider the effects of the mandatory penalty, 90 days imprisonment, on the offender as compared with the effects of the fit sentence: *Hills* at paras 35, 38. It has been repeatedly recognized that imprisonment is the harshest form of punishment, whose ripple effects

on the offender and his community cannot be underestimated: *Hills* at para 101. It is the penal sanction of last resort: *Hills* at para 31. Given those truths about incarceration, it is very difficult to understand how a mandatory minimum custodial sentence that is 90 times higher than a fit (one-day) custodial sentence is not grossly disproportionate. The Crown provided no argument about this. Of course, numbers alone aren't determinative – effects matter. The respondent would spend up to 90 days imprisoned, with the loss of liberty that involves. He is a young Indigenous man with a substance abuse problem but no criminal record at the time of sentencing. The criminal charge and conviction were a wake up call: the respondent attended residential treatment successfully and was continuing with counselling. He had taken steps to re-establish himself in the community and with his family. To incarcerate the respondent for up to 90 days would risk undoing the successful steps he has taken towards re-integrating himself with his family and his community and would be potentially devastating. While not directly applicable to this stage of the analysis, it is also not clear to me how the Crown's position addresses the over incarceration of Indigenous people in Canada.

[15] Third, it is necessary to consider the primary objectives of the mandatory sentence, which in this case are denunciation and deterrence. A mandatory minimum sentence can be grossly disproportionate if it gives no recognition to other objectives such as rehabilitation: *Hills* at paras 140-144. The courts below considered rehabilitation based on the fact that the respondent addressed the underlying addiction and found that the 90 day minimum risked undermining his successful steps toward rehabilitation. Denunciation and deterrence could be achieved through the conviction and the period of probation.

[16] This case illustrates one of the problems with mandatory minimum sentences - they shift the focus from the offender during sentencing in a way that can show “complete disregard” for the principle of proportionality: *Hills* at para 38.

[17] Several courts that have considered the mandatory minimum sentence in s 151(b) for sexual interference have found it to be unconstitutional: see for instance, *Drumonde*, *Pye* and *CBA*. Interestingly, in the context of finding the minimum one year sentence for sexual assault under s 271(a) of the *Criminal Code* unconstitutional, where the Crown proceeds by indictment, Justice Charbonneau relied on a reasonable hypothetical that was eerily similar to the actual facts of this case: *R v Lafferty*, 2020 NWTSC 4 at para 18.

[18] The only case that the Crown can point to in support of its position that the 90 day minimum sentence is not grossly disproportionate to a one day custodial sentence is *R v M-M*, 2022 ABQB 197. The respondent submits it is distinguishable and, in any event, wrongly decided. I agree that *M-M* does not assist the Crown in this application.

[19] First, an “important” factor in *M-M* for upholding the constitutionality of the 90 day mandatory minimum sentence was that it could be served intermittently. Without commenting on the correctness of this position, it is not a factor here. The respondent submits, and the Crown concedes, that in most cases, including this one, serving a sentence on an intermittent basis is not a realistic option in the Northwest Territories, and the Crown does not rely on this point. Second,

M-M relies heavily on *Friesen* to support its conclusion. I agree that pre-*Friesen* case law on sentencing for sexual interference has to be considered in light of *Friesen*, but that does not automatically mean it is wrong or irrelevant. Further, while clearly sending a strong message that sexual offences against children are serious crimes and sentences in some provinces may need to increase, the Supreme Court of Canada did not do away with the primary principle of proportionality in crimes against children: *Friesen* at paras 5, 91. In addition, as already noted, *Friesen* impacts the analysis of what is a “fit” sentence, not gross disproportionality.

[20] Third, the fit sentence for the actual offender in *M-M* was 15 months imprisonment. The Court in *M-M* did not consider whether the 90 day minimum would be grossly disproportionate to a fit sentence of one day in custody, which is what the Crown proposes to argue if given leave in this case. And lastly, *M-M* relies on the Alberta Court of Appeal decision in *Hills*, which was clearly repudiated by the Supreme Court of Canada.

[21] In conclusion, the Crown raises a question of law that is sufficiently important to warrant a further appeal but I find that it is not reasonably arguable on this record. The courts below found that the mandatory 90 day custodial sentence is grossly disproportionate to the one day custodial sentence fit for this offender in the circumstances. The Crown has not outlined any reasonable argument that their conclusion is in error. Therefore, the Crown’s application for leave to appeal is denied.

Application heard on June 28, 2023

Reasons filed at Yellowknife, NWT
this 2nd day of August, 2023

Khullar C.J.A.

Appearances:

T. Johnson
for the Appellant

R. Clements
for the Respondent

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REASONS FOR DECISION
