R v Lafferty, 2020 NWTSC 4.cor 1

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S-1-CR-2018-000-033

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

-and-

DALTON LEE LAFFERTY

RULING ON CHALLENGE TO MANDATORY MINIMUM PUNISHMENT

Corrected judgment: A corrigendum was issued on February 21, 2020; the corrections have been made to the text and the corrigendum is appended to this judgment.

I) INTRODUCTION

[1] Several months ago, Dalton Lafferty pleaded guilty to two counts of sexual assault arising from incidents involving two different victims. The Crown having proceeded by indictment on both charges, Mr. Lafferty faced, on each of them, a mandatory minimum sentence of imprisonment for one year. *Criminal Code*, R.S.C.1985, c. C-46, s. 271(a) (the *Criminal Code*).

[2] At his sentencing hearing Mr. Lafferty challenged this mandatory minimum sentence as contrary to Section 12 of the *Canadian Charter of Rights and Freedoms* (the *Charter*). Counsel made submissions on that issue, as well as general sentencing submissions, on July 8, 2019. On August 20, 2019, I declared

Section 271(a) to be of no force and effect, with written Reasons to follow. I sentenced Mr. Lafferty that same day. *R v Lafferty*, 2019 NWTSC 38.

[3] The following are my Reasons for concluding that Section 271(a) contravenes Section 12 of the *Charter*.

II) ANALYSIS

1. Legal Framework

[4] This Court has had occasion to apply the legal framework that governs Section 12 challenges to mandatory minimum sentences in a number of cases in recent years. *R v Kakfwi*, 2018 NWTSC 13; *R v Cardinal*, 2018 NWTSC 12; *R v Bernarde*, 2018 NWTSC 27 (aff'd 2018 NWTCA 7); *R v Sutherland*, 2019 NWTSC 55. I do not propose to review this legal framework in detail again. For present purposes, I will only summarize it briefly.

[5] A mandatory minimum sentence infringes Section 12 if it results in a grossly disproportionate sentence, namely, one that is "so excessive as to outrage standards of decency" and is "abhorrent or intolerable" to society. To infringe Section 12, it is not sufficient for a mandatory minimum sentence to result in a sentence that is excessive or even demonstrably unfit. The bar to establish gross disproportionality is much higher. *R v Nur*, 2015 SCC 15; *R v Lloyd*, 2016 SCC 13; *R v Morrison*, 2019 SCC 15.

[6] There are two ways in which a mandatory minimum sentence can infringe Section 12. The first is if it would result in a grossly disproportionate sentence for the offender. This was the basis for the challenge in *Bernarde*. The second is if it would result in a grossly disproportionate sentence in reasonably foreseeable situations. *Nur*, para 77. This was the basis for the challenges in *Cardinal* and *Kakfwi*. A mandatory minimum sentence may also be challenged on both bases, as was done in *Sutherland*.

[7] A challenge based on foreseeable applications of a mandatory minimum sentence must be based on situations that may reasonably be expected to arise and are not far-fetched or marginally imaginable. The inquiry must be grounded in judicial experience and common sense. It often includes consideration of cases that have actually arisen. *Nur*, paras 54 to 77.

[8] To decide whether a mandatory minimum sentence would lead to a grossly disproportionate result, the court must first determine, on a rough scale, what

would constitute a proportionate sentence for the offence in question. In doing so it must examine all the relevant contextual factors including the gravity of the offence, the characteristics of the offender, the actual effect the punishment would have on the offender, the penological goals and sentencing principles upon which the mandatory minimum is fashioned, the existence of valid alternatives to the mandatory punishment, and a comparison with punishments imposed for other crimes in the jurisdiction. No one factor is determinative. *R v Goltz*, [1991] 3 S.C.R. 485; *R v Morrisey*, 2000 SCC 39.

[9] If the range of conduct and offenders that can be captured by an offence is very broad, the constitutional vulnerability of a mandatory minimum sentence triggered by that offence is increased. This is because if the offence "casts the net wide", there is a greater risk that there will be circumstances where the mandatory minimum sentence will lead to a grossly disproportionate result: an offence that catches a broad range of conduct inevitably catches offenders with varying degrees of moral blameworthiness. *Nur*, para 82; *Lloyd*, para 27. As was explained by the majority of the Supreme Court of Canada in *Lloyd*:

> (...) the reality is this: mandatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.
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> *Lloyd*, para 35.

2. Application

[10] Mr. Lafferty's position on this Application is not that Section 271(a) would lead to a grossly disproportionate result in his own situation. Rather, his challenge is based on what he argues are reasonably foreseeable situations where a sentence of one year imprisonment would be grossly disproportionate. The scenarios he relies on are derived from cases from other jurisdictions where Section 271(a) was successfully challenged. *R v MacLean*, 2018 NLSC 209; *R v Deyoung*, 2016 NSPC 67; *R v E.R.D.R.*, 2016 BCSC 684. Mr. Lafferty acknowledges that these decisions are not binding but he urges this Court to follow them.

[11] The Crown says that these decisions should not be followed. It argues that these cases and the hypotheticals considered minimize the gravity of sexual

misconduct against children and the harm it causes, overlook the inherent power differential between adults and children, and over fixate on "close-in-age" scenarios.

[12] I share the Crown's concern that the language used in some of these cases could be seen as trivializing the seriousness of sexual abuse of children. Any sexual assault on a child, no matter how brief or fleeting, is a serious offence. As Mr. Lafferty concedes, it can be assumed that such an offence causes harm to the victim. I also agree that hypotheticals that involve "ostensible" consent by a victim who does not have the legal capacity to consent to sexual activity, or hypotheticals that are close to making the "close-in-age" exceptions applicable on the issue of consent, must be approached with great caution.

[13] "Ostensible consent", as I pointed out when I sentenced Mr. Lafferty, is generally not a mitigating factor on sentencing. *Lafferty*, pp. 12-13 and 16-23. See also *R v Hajar*, 2016 ABCA 222. As for attributing a mitigating effect to closeness in age, I find it problematic as well. The line has to be drawn somewhere as to when a person has the legal capacity to consent to sexual activity. Outside the close-in-age exceptions specifically set out in the *Criminal Code*, placing significant mitigating weight on the age difference between the parties, or on how close the situation was from being captured by those exceptions, could considerably dilute Parliament's decision as to where the line should be drawn in the first place.

[14] Recognizing, as I do, that any sexual misconduct against a child must be treated as being serious, the question remains whether it is, in *all* cases, so serious that a sentence of one year imprisonment is not grossly disproportionate.

[15] Sexual Assault is an offence that captures an extremely broad range of conduct, ranging from kissing, or brief touching over the victim's clothes, to far more intrusive behaviour, such as forced intercourse. While not determinative, as noted above at Paragraph 9, this renders the impugned mandatory minimum sentence constitutionally vulnerable.

[16] In addition, Sexual Assault is a hybrid offence. The 1-year mandatory minimum applies only if the charge is proceeded with by indictment. If the charge proceeds summarily, the mandatory minimum sentence is only 6 months. *Criminal Code*, s. 271(b). In structuring this provision the way it has, Parliament has recognized that a 1-year mandatory minimum jail term is not warranted in all sexual assault cases, even when the victim is a child. And while the Crown has the discretion to proceed summarily for less serious offences, which avoids engaging

the higher mandatory minimum sentence, the Supreme Court of Canada has made it clear that this discretion is of no assistance in defending the constitutionality of a mandatory minimum sentence. *Nur*, paras 85-86 and 92; *Morrison*, paras 149-151.

[17] In light of this, and leaving aside the close-in-age and "ostensible consent" situations, in my view, there are reasonably foreseeable situations where a 1-year jail term would be grossly disproportionate.

[18] I would offer the following as an example of such a situation. An 18-year-old man is at a social gathering where persons of a wide age range are present, including teenagers who are younger than 16 years old. He becomes intoxicated. He asks a 15-year old girl to dance. She accepts. While they are dancing, he kisses her on the lips and touches her breast area over her clothes. She pulls back and tells him to stop. He immediately does. She is upset. He apologizes. He is charged with sexual assault. He pleads guilty at his first appearance. He does not have a criminal record, has family support and good prospects for rehabilitation. The victim also has family support. She has taken counselling. In her Victim Impact Statement presented at the sentencing, she describes how upsetting these events were for her and the negative impact they have had. She also says that she believes the young man is sincerely sorry and that she accepts his apology.

[19] Applying, in accordance with *Morrissey*, the factors outlined at Paragraph 8 to this situation, it seems to me a proportionate sentence, on a rough scale, may not include incarceration at all, and if it did, it would be for a very short period of time. A sentence of 1-year imprisonment would not only be harsh and demonstrably unfit in this situation, it would be grossly disproportionate. In the language of *Nur* and *Lloyd*, it would be so excessive as to outrage standards of decency and would be intolerable to society.

[20] This is one example. Given the breadth of the conduct that is captured by this offence, one can think of many other situations where a 1-year term of imprisonment would be grossly disproportionate, even looking strictly at the circumstances of the offence. Aside from those, the offender's circumstances must also be considered and may reduce that offender's moral blameworthiness. In some situations, mental health issues may have that effect. *R v Ramsay*, 2012 ABCA 257. It may also be the case if the offender is indigenous, in application of the principles articulated in *R v Gladue*, [1999] 1 S.C.R. 688 and *R v Ipeelee*, 2012 SCC 13. In my view, there are numerous reasonably foreseeable circumstances where Section 271(a) would lead to the imposition of a grossly disproportionate sentence.

[21] My conclusion in this regard is in line with the jurisprudence dealing with other challenges to mandatory minimum sentences for offences involving sexual misconduct towards children. As noted by the Crown, Section 271(a) is part of a broader sentencing regime which includes a number of mandatory minimum penalties for sexual offences committed against children. One of these is the 1-year mandatory minimum sentence for the offence of Sexual Interference when the Crown proceeds by indictment. *Criminal Code*, s. 151(a). That mandatory minimum sentence has been successfully challenged at the appellate level in a number of jurisdictions. *R v Caron Barrette*, 2018 QCCA 516; *R v Hood*, 2018 NSCA 18; *R v J.E.D.*, 2018 MBCA 123; *R v Scofield*, 2019 BCCA 3; *R v Ford*, 2019 ABCA 87.

[22] Of course, Sexual Interference and Sexual Assault are distinct offences. They do not have the same essential elements. Still, there is considerable overlap between them. There are many factual scenarios that would constitute an offence under both provisions, including the one I outlined above at Paragraph 18. In fact, it is not uncommon for both charges to be laid arising from the same alleged event. That being so, a significant disparity in the sentencing consequences stemming from these two offences would be difficult to justify.

[23] All the appellate courts that have entertained challenges to Section 151(a) have concluded that it contravenes Section 12 of the *Charter*, although the analysis in the different cases have focused on different factors. In *Hood*, the court examined a hypothetical where the offender suffers from a mental illness. In *Scofield*, the court considered a scenario where the parties were just a few months away from falling within the close-in-age exception and where the victim ostensibly consented to the sexual contact.

[24] As I already alluded to, I find that situations involving ostensible consent, close-in-age situations and cases close to the line where consent would be a defence to the charge, raise difficult issues. I also find it unnecessary to address those here because this Application can be disposed of simply on the basis of the breadth of the circumstances that can trigger the mandatory minimum sentence. That was a significant concern in *J.E.D.*:

> The problem with the (mandatory minimum sentence) provision for the offence of sexual interference is that it is a sweeping law that casts its net over a wide range of potential conduct. Given the elements that constitute the offence, it would cover situations ranging from a single touch by a 20-year old of a 15-year old to much more serious, numerous and long-term sexual violations of a toddler.
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> *J.E.D.*, para 107.

[25] I completely agree with these comments, and find that the same can be said about Section 271(a). The mandatory minimum sentence for Sexual Assault is also a sweeping law that casts its net over a very broad range of conduct. This, in my view, is fatal to its constitutionality.

[26] As a final observation, I would add that this does not mean that all mandatory minimum sentences triggered by sexual offences committed against children are similarly vulnerable.

[27] In *Ford*, the court appeared concerned that its decision to strike down Section 151(a) as unconstitutional was at odds with *R v E.J.B.*, 2018 ABCA 239, which upheld the mandatory minimum sentence that applies to the offence of Sexual Exploitation:

> I am aware that this decision is at odds with *R v E.J.B.* 2018 ABCA 239, which considered the constitutionality of the mandatory minimum sentence prescribed by s. 153 of the *Criminal Code*. This creates an unusual situation but the decisions address different provisions of the *Criminal Code* such that the parties were not obliged to request reconsideration of *E.J.B.*
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> *Ford*, para 19.

Leave to appeal to the Supreme Court of Canada has since been denied in *E.J.B. E.J.B. v Her Majesty the Queen,* [2018] S.C.C.A. No. 441.

[28] With respect for the contrary view, I do not find that there necessarily is any contradiction between the conclusions reached in *Ford* and *E.J.B.* To secure a conviction on a charge of Sexual Exploitation, the Crown has to prove that the offender was in a position of trust or authority towards the young person, that the young person was in a position of dependency towards the offender, or that the relationship between the accused and the young person was exploitative of the young person. These elements of the offence considerably elevate its inherent moral blameworthiness, irrespective of the extent and level of intrusiveness of the sexual contact that ultimately takes place.

[29] This, to me, is analogous to the elevated moral blameworthiness that I concluded necessarily attaches to the offence of Child Luring and renders the mandatory minimum sentence for that offence *Charter* compliant. *Sutherland*, paras 47-55. A majority of the Ontario Court of Appeal has since reached the same conclusion about the constitutionality of the mandatory minimum sentence for Child Luring. *R v Cowell*, 2019 ONCA 972.

[30] In my view, Sexual Exploitation and Child Luring both imply an elevated moral blameworthiness that places these offences in an entirely different category than broadly defined offences such as Sexual Assault and Sexual Interference. This has a significant bearing on the constitutionality of the mandatory minimum sentences that these offenses trigger.

III) CONCLUSION

[31] These were the reasons why I concluded that Section 271(a) of the *Criminal Code* contravenes Section 12 of the *Charter*. The Crown did not attempt to argue that the breach could be justified under section 1 of the *Charter*. Accordingly I declared the words "and to a minimum punishment of imprisonment for a term of one year" in Section 271(a) to be of no force and effect pursuant to Section 52(1) of the *Constitution Act, 1982*.

[32] Mr. Lafferty also challenged the constitutionality of Section 490.013(2.1) of the *Criminal Code*, which mandates an order requiring that he comply with the requirements of the *Sex Offender Information Registry Act* for life. I will deal with that issue in a separate Ruling.

"L.A. Charbonneau"

L.A. Charbonneau
J.S.C.

Dated in Yellowknife, NT this
13th day of February 2020

Counsel for the Crown: Martha Chertkow and Alexander Godfrey
Counsel for the Accused: Charles Davison

Corrigendum of the Memorandum of Judgment

Of

The Honourable Justice L.A. Charbonneau

1. Paragraphs 1,2,3,10,20,21,25, and 31 make reference to Section **271(1)(a)** of the *Criminal Code.* They have been corrected to read Sec **271(a)** of the *Criminal Code.*

2. Paragraph 16 makes reference to Section **271(1)(b)** of the *Criminal Code*. It has been corrected to read Section **271(b)** of the *Criminal Code*.

3. The last sentence of paragraph 31 has been corrected to read

   [31] (…)**Accordingly, I declared the words "and to a minimum punishment of imprisonment for a term of one year" in Section 271(a)** to be of no force and effect pursuant to Section 52(1) of the *Constitution Act, 1982*.

4. The citation has been amended to read:

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