Date: 2022 09 16
Docket: S-1-CR 2021 000012

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HIS MAJESTY THE KING

Appellant

-and-

BENNY GREG GARGAN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a Crown appeal from sentence. The appeal is dismissed for reasons that follow.

BACKGROUND

[2] On November 6, 2019, Benny Gargan pleaded guilty in Territorial Court to a charge of sexual interference under s 151(b) of the *Criminal Code*. That charge carries a mandatory minimum sentence of 90 days imprisonment where the Crown proceeds summarily.

[3] The facts are straightforward. In August of 2018 Mr. Gargan and the victim were attending community celebrations, separately. Mr. Gargan saw the victim and her friends. He joined them. He was very intoxicated. At some point, he touched the victim's buttocks. It was brief. In a statement to police, he said he was trying to hug the victim when he touched her buttocks but he got "carried away". He said while he was doing it he realized it was a "bad idea". Mr. Gargan was 23 at the time. The victim was 13. Both are Indigenous. Mr. Gargan had no criminal record.

[4] A sentencing hearing was held January 6, 2021. Mr. Gargan challenged the mandatory minimum sentence pursuant to s 12 of the *Charter of Rights and Freedoms.* He argued the 90-day mandatory minimum would be a grossly disproportionate sentence based on the facts of his particular case as well as reasonable hypotheticals. The sentencing judge agreed and sentenced Mr. Gargan to serve a period of one day in prison followed by probation for a year.

GROUNDS OF APPEAL

[5] The Crown says the sentencing judge erred in her analysis and conclusion as to the appropriate sentence in the following ways:

a. She gave insufficient weight to the gravity of the offence created by s 151(b) of the *Criminal Code;*

b. She over-emphasized the sentencing objective of rehabilitation at the expense of denunciation and deterrence;

c. She relied on outdated case law to justify the sentence she imposed, giving insufficient weight to *R v Friesen*, 2020 SCC 9 in which the Supreme Court of Canada held, *inter alia*, sentences for sexual crimes against children must increase to recognize and reflect the harm caused by sexual offences against children and the wrongfulness of sexual violence;

d. She turned a lack of evidence about the harm to the victim into a positive finding of "no harm" to the victim.

[6] The Crown says these errors in turn resulted in an erroneous finding that imposing the mandatory minimum sentence would be grossly disproportionate to the appropriate sentence.

STANDARD OF REVIEW

[7] Two standards of review apply. The sentencing judge's decision on the fit and proportionate sentence is reviewable on a deferential standard. This means an appellate court can only intervene where a sentence is demonstrably unfit or where the sentencing judge has committed an error in principle which has had a material effect on the sentence ultimately imposed. Errors in principle include an error of law, failing to consider a relevant factor and over- or under-emphasizing aggravating or mitigating factors. *R v Lacasse*, 2015 SCC 64 at paras 41 and 44.

[8] The sentencing judge's decision on whether the mandatory minimum penalty was grossly disproportionate is reviewable on a correctness standard. *R v Bernarde*, (CA) at para 5.

LEGAL FRAMEWORK

Sentencing

[9] Sentencing is a highly contextual exercise, undertaken within a framework of principles and objectives set out in the *Criminal Code* and informed by jurisprudence.

[10] The overarching principle in sentencing is proportionality: a sentence must be proportionate to the gravity of the offence and the offender's degree of responsibility. This is set out in s 718.1 of the *Criminal Code.*

[11] Additional principles are identified in s 718.2 of the *Criminal Code.* Section 718.2(a) requires sentencing judges to increase or reduce sentences to account for aggravating and mitigating circumstances, including those deemed to be aggravating in ss 718.2(a)(i) through (vii). Section 718.2(a)(ii.1) provides specifically that evidence the offender abused a person under 18, as is the case here, is an aggravating factor.

[12] The principles of parity and restraint are included in the *Criminal Code* in ss 718.2(b), (c) and (d). Parity means the same or similar crimes committed under similar circumstances will attract similar, although not necessarily identical, sentences. Restraint requires the sentencing judge to impose the least restrictive sanction necessary in the circumstances.

[13] Closely related to restraint is s 718.2(e), under which sentencing judges are required to consider ". . .all available sanctions other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims . . . with particular attention to the circumstances of [Indigenous] offenders". In applying this principle, sentencing judges must consider systemic factors, commonly referred to as *Gladue* factors, such as poverty, housing insecurity, addiction, unemployment, and the intergenerational effects of colonial policies and practices such as residential schools, which may have played a role in bringing the offender into the justice system. *R v Gladue*, [1999] 1 SCR 688. 1999 CanLii 679; *R v Ipeelee*, 2012 SCC 13 (CanLii), [2012] 1 SCR 433.

[14] Sentencing *objectives* are found at 718. They are: denunciation and deterrence, rehabilitation, separating offenders from society (where necessary), reparation, promoting a sense of responsibility in offenders, and acknowledging the harm done to victims and the community. The emphasis to be placed on any of these objectives will vary with the particular circumstances and nature of the offence as well as statutory direction. The *Criminal Code*, at ss 718.01 and 718.04 requires sentencing judges give primary consideration to denunciation and deterrence in cases where, as in this case, the victim is a child and/or a vulnerable person, including someone who is Indigenous and female.

[15] In *Friesen*, at paras 102-104, the Supreme Court of Canada confirmed denunciation and deterrence are the primary sentencing objectives in sexual offences against children. *Friesen* does not prohibit sentencing judges from considering and factoring in other objectives where they are relevant; however, other objectives, including rehabilitation, cannot be elevated to status equal to or above those of denunciation and deterrence. Moreover, it does not relieve sentencing judges of their duty to consider and apply *Gladue* in sentencing Indigenous offenders.

[16] *Friesen* provides guidance to courts for sentencing offenders convicted of sexual interference under ss 151(a) and (b). Those sentences must recognize the profound harm caused to child victims of sexual offences and reflect Parliament's legislative initiatives. To achieve this, direction is provided on three specific points. First, there should be an "upward departure" from prior sentencing precedents which may not reflect society's modern understanding of the gravity of these offences and the harm caused by them. Second, sexual offences against children should attract more severe sentences than those perpetrated against adults. Third, it is an error of law to treat sexual interference less seriously than sexual assault: the elements of both offences are similar and the maximum sentence for each is now the same. *Friesen*, paras 107-120.

[17] Finally, *Friesen* offers guidance on the specific factors sentencing courts should consider in determining an appropriate sentence for an offender convicted of sexual interference. This is neither a checklist, nor an exhaustive set of considerations. The factors include: the likelihood of re-offending; whether the offender was in a position of trust; the duration and frequency; the victim's age; and the degree of physical interference. *Friesen*, at paras 121 to 154.

Constitutional Challenge to Mandatory Minimum Sentences

[18] The legal framework governing challenges to mandatory minimum sentences under s 12 of the *Charter* has been articulated and applied by this Court and the

Territorial Court on a number of occasions, including *R v Lafferty*, 2020 NWTSC 4; *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 RA*, 2019 NWTTC 10; and *R v Kapolak*, 2020 NWTTC 12. The key principles are summarized below.

[19] It is not enough for a mandatory minimum sentence to result in an excessive or demonstrably unfit sentence. To infringe s 12, a mandatory minimum sentence must be one which results in a "grossly disproportionate" sentence. Such a sentence is one that is ". . .so excessive as to outrage standards of decency" and is "abhorrent or intolerable" to society. *R v Nur*, 2015 SCC 15 at para 170.

[20] Mandatory minimum sentences may be challenged on two bases. An applicant may show imposing the mandatory minimum would result in a grossly disproportionate sentence for the applicant or that imposing the mandatory minimum sentence would result in grossly disproportionate sentences in reasonably foreseeable situations. These must be "grounded in judicial experience and common sense". *Nur*, at para 62.

[21] The starting point in the analysis is to decide what a proportionate sentence would be for the offender. In *R v Morrisey*, 2000 SCC 39 at paras 27 and 28, Gonthier, J summarized the relevant contextual factors the Court must consider in this exercise, specifically:

- the gravity of the offence;
- the circumstances of the particular offence;
- the personal characteristics of the offender;
- the actual effect the punishment would have on the offender;
- the goals and sentencing principles upon which the sentence is fashioned;
- the existence of valid alternatives to the punishment imposed; and
- a comparison of punishments imposed for other crimes in the same jurisdiction.

[22] Justice Gonthier also stated that no single one of these factors is determinative as to whether a mandatory minimum sentence contravenes s 12 of the *Charter*.

[23] Finally, where an offence can be committed by a broad range of both offenders and conduct, a mandatory minimum sentence will be more vulnerable to a s 12 challenge. This is because it will necessarily include offenders of different levels of moral blameworthiness, thereby increasing the number of offenders and/or reasonably foreseeable situations in which imposing the mandatory minimum will result in a grossly disproportionate sentence.

ANALYSIS

Did the sentencing judge give appropriate weight to the gravity of the offence?

[24] The sentencing judge considered the "gravity of the offence" in determining both the appropriate sentence and in analyzing whether imposing the mandatory minimum sentence would be grossly disproportionate. With respect to the latter, she stated:

> [30] The offence is at the low end of the spectrum of sexual violence. It does not appear to have had an impact on the victim. She was bothered, very briefly, but was otherwise unharmed physically.
>
> *R v Gargan*, 2021 NWTTC 09

This statement is found under the heading "Gravity of the Offence". At first glance, and in its immediate context, it appears to conflate the objective assessment of gravity of the *offence* itself with the subjective assessment of the seriousness of the circumstances in this *particular* case. At other places in her judgment, however, the sentencing judge demonstrated an appreciation for the gravity of the offence itself.

[25] Reasons must be read as a whole. In this case, the reasons as a whole demonstrate the sentencing judge appreciated the gravity of the offence of sexual interference when she considered what the appropriate sentence would be. She was also cognizant of the direction in *Friesen* about the seriousness and gravity of the offence and its effects on victims. Under the heading "Aggravating Circumstances" she referred expressly to Rowe, J's comments in *Friesen* on the disproportionate impact indigenous children and children in care experience from sexual violence and she took judicial notice of the "serious emotional and physical harm" which can result from this offence. *Gargan,* at para 19.

[26] The sentencing judge did not err in this aspect of her analysis.

Did the sentencing judge over-emphasize rehabilitation and under-emphasize denunciation and deterrence?

[27] The fact that denunciation and deterrence are the primary objectives in sentencing for sexual interference does not mean rehabilitation and other sentencing objectives cannot be factored into the sentence. They remain relevant, even though they cannot be given primacy or be considered equally important.

[28] The sentencing judge did not over-emphasize rehabilitation, nor did she elevate it to the same level as denunciation and deterrence. She recognized expressly ss 718.01 and 718.04 of the *Criminal Code* which, as stated, require sentencing judges give primary consideration to denunciation and deterrence where the victim is a child and/or a vulnerable person, including someone who is Indigenous and female. Further, as noted, she referred to *Friesen* and its directions and guidance at several points throughout her judgment.

[29] The reasons contain only one express reference to rehabilitation, at paragraph 28. There, the sentencing judge states "For a first offender, sentencing usually focuses on rehabilitation*".* The comment is made in the context of assessing the constitutional validity of the mandatory minimum sentence and the application of the framework in *Morrisey*, particularly, whether there would be reasonable alternatives to incarceration. Read with the reasons as a whole, it cannot reasonably be interpreted as representing undue emphasis on rehabilitation, nor does it signal an intention to place it above or on equal footing with denunciation and deterrence.

Did the trial judge rely on outdated case law in determining an appropriate sentence?

[30] The sentencing judge considered, at para 40 of her decision, a number of cases from Alberta, Ontario and Québec which involved " . . . a single, brief, act of violence, perpetrated on an indigenous teenager in circumstance that do not involve a breach of trust". All of those cases pre-date *Friesen* which, as noted, directs there be a departure from prior precedents in sentencing offenders for sexual interference and other sexual crimes against children. Notably, however, the sentencing judge also considered the factors set out in *Friesen* for determining an appropriate sentence. *Gargan,* at para 20.

[31] Even though the sentencing judge relied, to a certain extent, on older precedents, it did not lead her to err in her conclusion.

[32] Sexual crimes are pervasive in the Northwest Territories and must be treated seriously. That is particularly so when they are perpetrated against children. As noted however, sexual assault and sexual interference capture a broad range of offenders and conduct, some of which can be fairly characterized as less serious than in other cases. In this case, Mr. Gargan briefly touched the victim in a sexual manner over her clothing. He committed a crime; however, it falls on the low end of the spectrum of sexual interference. *Friesen* does not change these facts. These facts, combined with the mitigating circumstances, including Mr. Gargan's young age, remorse and guilty plea, and the application of the principles of proportionality and *Gladue,* led the sentencing judge to conclude the appropriate sentence was one-day in prison followed by a year of probation. That is a reasonable conclusion, based in evidence and law. It should not be disturbed.

Did the sentencing judge err in her conclusions about harm to the victim?

[33] In describing the effect on the victim, the sentencing judge noted she had declined to provide a victim impact statement. She also noted the author of the pre-sentence report contacted the victim and she declined to participate. From this, the sentencing judge drew the conclusion the victim had "moved on". *Gargan,* at para 27. Later, she stated the victim "was bothered, very briefly, but was otherwise unharmed *physically."* (Emphasis added) *Gargan,* at para 30.

[34] This assessment represents reasonable conclusions and inferences drawn from what was before the sentencing judge. Further, and as noted earlier, the sentencing judge recognized and took judicial notice of the emotional and psychological harm suffered by child victims of sexual crimes. The sentencing judge did not err in assessing the harm to the victim in this case.

Did the sentencing judge err in determining the mandatory minimum sentence violates s 12 of the Charter?

[35] Having determined an appropriate sentence would be one day in prison followed by a year of probation, the sentencing judge turned to whether imposing the 90-day mandatory minimum would result in a grossly disproportionate sentence. The manner in which she applied the legal framework does not appear to be in issue and in my view, she applied it thoroughly and correctly. Rather, it is her conclusion on the appropriate length of sentence. Given my conclusion that her decision on the appropriate sentence should remain undisturbed, there is no question that imposing

the mandatory minimum sentence would result in a "grossly disproportionate" punishment, thereby satisfying the test in *Nur*.

CONCLUSION

[36] The sentencing judge properly considered and applied the principles and objectives of sentencing. She considered the gravity of the offence, the aggravating and mitigating circumstances, and the offender's circumstances including *Gladue* factors. Read as whole, her reasons reveal she appreciated and applied the sentencing principles and objectives set out in the *Criminal Code* and the direction of the Supreme Court of Canada in *Friesen.* Although she referred to case law which pre-dates *Friesen* in applying the principle of parity, the facts are such that the result would not have been affected in any substantive way. Accordingly, the sentencing judge's conclusion respecting the appropriate sentence did not lead to an incorrect conclusion on the constitutional validity of the mandatory minimum sentence for sexual interference.

Appeal dismissed

K. M. Shaner
J.S.C.

Dated at Yellowknife, NT, this
16th day of September, 2022

Counsel for the Appellant: Trevor Johnson
Counsel for the Respondent: Ryan Clements

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