Court of Queen's Bench of Alberta

Citation: R v SH, 2022 ABQB 432

Date: 20220623
Docket: 170051940Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

SH

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the victim or the accused must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Memorandum of Decision
of the
Honourable Madam Justice D.A. Yungwirth

I. INTRODUCTION

[1] The Offender was found guilty after trial of sexual interference, invitation to sexual touching, incest, and sexual assault. The Victim is the biological daughter of the Offender.

[2] Over a period of several years, estimated to be when the Victim was between the ages of six and 10, the Offender touched and licked the Victim's vagina, forced the Victim to touch his penis, invited the Victim to lick his penis and put his penis in her mouth, and pushed his penis into the Victim's anus causing her pain. The Offender is now before the Court to be sentenced.

[3] The Offender has filed an application for a declaration that the five-year mandatory minimum punishment in s 155(2) of the *Criminal Code of Canada*, RSC 1985, c C-46 (*Criminal Code*) violates s 12 of the *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11 (*Charter*) and is therefore unconstitutional.

[4] The Offender concedes that in determining a fit and appropriate sentence or range of sentences for the Offender, a sentence of five years would not be grossly disproportionate for him. Therefore, Counsel did not consider it necessary to provide the Court with the additional information required for consideration of a fit and appropriate sentence for the Offender. Counsel have agreed that the Court's analysis should focus only on the second step of the s 12 *Charter* analysis – consideration of reasonable hypotheticals.

[5] However, given the Offender's concession, the Crown submits that the *Charter* challenge is moot and need not be decided.

[6] If the Court determines that the *Charter* challenge is not moot, the issue becomes whether the five-year minimum sentence in s 155(2) of the *Criminal Code* will impose sentences that are grossly disproportionate in other reasonable hypothetical situations.

[7] If the Court finds that the mandatory minimum sentence in s 155(2) of the *Criminal Code* does infringe s 12 of the *Charter*, the question of whether that infringement can be saved by s 1 of the *Charter* will be argued separately, as Counsel have reserved the opportunity to make additional representations to the Court on this issue if required.

II. ISSUES

[8] Based on submissions by counsel, I have identified the following issues:

1) Is the *Charter* challenge moot?
2) Will the five-year minimum sentence in s 155(2) of the *Criminal Code* impose sentences that are grossly disproportionate in other reasonable hypothetical situations? This involves consideration of the following:

a. Are the Offender's proposed hypotheticals reasonably foreseeable, or are they far-fetched, fanciful, or remote?
b. Is there a reasonable hypothetical circumstance where the mandatory minimum sentence of five years for incest against a person under the age of 16 meets the standard of cruel and unusual punishment?

III. ANALYSIS

A. Applicable Legislation

[9] Section 155 of the *Criminal Code* provides as follows:

> **155 (1)** Everyone commits incest who, knowing that another person is by blood relationship his or her parent, child, brother, sister, grandparent or grandchild, as the case may be, has sexual intercourse with that person.
>
> **(2)** Everyone who commits incest is guilty of an indictable offence and is liable to imprisonment for a term of not more than 14 years and, if the other person is under the age of 16 years, to a minimum punishment of imprisonment for a term of five years.
>
> **(3)** No accused shall be determined by a court to be guilty of an offence under this section if the accused was under restraint, duress or fear of the person with whom the accused had the sexual intercourse at the time the sexual intercourse occurred.
>
> **(4)** In this section, *brother* and *sister*, respectively, include half-brother and half-sister.

[10] Section 12 of the *Charter* guarantees that everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

B. Applications under Section 12 of the *Charter*

[11] The Offender has the onus of establishing, on a balance of probabilities, that the mandatory minimum sentence constitutes cruel and unusual punishment. ***R v Goltz***, [1991] 3 SCR 485 [***Goltz***].

[12] To constitute cruel and unusual punishment, application of the mandatory minimum sentence must be more than merely excessive. It must be so excessive as to outrage the standards of decency and be disproportionate to the extent that Canadians would find the punishment abhorrent or intolerable: ***R v Morrisey***, 2000 SCC 39 [***Morrisey***] at para 26; ***R v Lloyd***, 2016 SCC 13 [***Lloyd***] at para 24.

[13] Offences that are broadly defined will be particularly vulnerable to a s 12 *Charter* challenge. While mandatory minimum sentences may be constitutional in many circumstances, when the offence is broadly defined, it may capture conduct not deserving of the mandatory minimum sentence. A narrowly defined offence will be less vulnerable to a s 12 *Charter* challenge: ***Lloyd*** at para 3. An appropriately narrow offence is one that "only captures conduct that in all circumstances will be highly blameworthy and antithetical to the peace of the community:" ***R v Oud***, 2016 BCCA 332 at para 44.

[14] When a s 12 *Charter* challenge to a mandatory minimum sentence is brought, there are two stages to the analysis: ***R v Nur,*** 2015 SCC 15 [***Nur***] at para 46; ***Lloyd*** at para 23; ***Morrisey*** at

paras 26 – 29. First, the Court must determine a fit and appropriate sentence or range of sentences that focuses on the individual circumstances of the offender without regard to the mandatory minimum sentence. This process must be consistent with the purposes and principles of sentencing set out in Part XXIII of the *Criminal Code* (ss 718, 718.1, 718.2). The Court must determine whether the mandatory minimum sentence is so excessive as to outrage the standards of decency in light of that fit and appropriate sentence. If the answer is yes, the mandatory minimum sentence is inconsistent with s 12 of the *Charter* and will fall unless it can be justified under s 1 of the *Charter*: ***Lloyd*** at para 23. If the answer is no, the Court may still proceed to the second stage of the analysis: ***Morrisey*** at para 29.

[15] At the second stage, the Court must consider whether a breach of s 12 of the *Charter* arises from applying the mandatory minimum sentence to other offenders in reasonably foreseeable circumstances. Excluding consideration of reasonably foreseeable applications of a mandatory minimum sentencing law would run counter to the settled authority of the Supreme Court and artificially constrain the inquiry into the law's constitutionality: ***Nur*** at para 49.

[16] The question at this stage is whether the mandatory minimum sentence will impose sentences that are grossly disproportionate to the circumstances of other offenders that would result in a violation of s 12 of the *Charter*. The sentencing judge may consider reported cases and make reasonable inferences from those cases to deduce what other circumstances are reasonably foreseeable and what the impact of the law may reasonably be. The circumstances being considered must be grounded in a reasonable hypothetical that may reasonably be expected to arise. They must not be far-fetched, fanciful, or remote: ***Goltz*** at p 506; ***Nur*** at para 62. In constructing reasonable hypotheticals for consideration, employing personal characteristics that create the "most innocent and sympathetic case imaginable" should be avoided. "[T]he exercise must be grounded in experience and common sense:" ***Nur*** at paras 74 – 75.

[17] In ***R v EJB***, 2018 ABCA 289 [***EJB***] (leave to appeal to the Supreme Court dismissed) and ***R v Ford***, 2019 ABCA 87 [***Ford***], the Court has outlined factors to be considered when constructing reasonable hypotheticals. The hypotheticals should deal with the same offence as the one charged, should consider the degree of intent required for the offence, should not consider a scenario where the accused might be acquitted of the offence charged, and should not consider factors that "do not or should not diminish the culpability of the offender for the crime charged" (***EJB*** at paras 59 – 66). In ***Ford*** at para 12, the Court summarized the guidance offered by ***Nur*** and ***Lloyd*** in considering reasonable hypotheticals:

- The hypothetical situation must be reasonably foreseeable, on the basis of judicial experience and common sense (***Nur*** at para 62).
- Judges may wish to start with cases that have actually arisen and make inferences from those to other cases that are reasonably foreseeable, while excluding situations that are fanciful or remote (***Nur*** **a**t para 62).
- A situation from a reported case should not be excluded from consideration even if it asks what situations may foreseeably arise that will be captured by the mandatory minimum. Fanciful, remote, far-fetched, or speculative situations are excluded, but there is a difference between a situation that is remote and one that is merely unlikely (***Nur*** at para 68).

- There remains some uncertainty as to what personal characteristics can be considered in relation to hypothetical offenders – if courts should consider the impact on, for example, mentally ill offenders when considering the reasonably foreseeable scope of the law.

    1) ***Nur*** suggested at paras 73 – 76 that courts may consider "personal characteristics relevant to people who may be caught by the mandatory minimum" but must exclude those that would produce "remote or far-fetched" examples.

    2) The majority in ***Lloyd*** did not directly address the question of what personal characteristics are properly considered. However, at paras 32–33 it considered the effect of the minimum sentence on hypothetical drug addicts.

[18] Three cases from Alberta where the reasonable hypothetical analysis was applied were heard by the Supreme Court on March 22, 2022, with judgments reserved: ***R v Hilbach,*** 2020 ABCA 332 [***Hilbach***]; ***R v Hills,*** 2020 ABCA 263; and ***R v Zwozdesky,*** 2019 ABQB 322. No decision has been rendered at the date of this decision.

C. Is the Charter challenge moot?

[19] As indicated above, the Offender concedes that in determining a fit and appropriate sentence or range of sentences for this offence and this Offender, a sentence of five years would not be grossly disproportionate for him.

[20] Accordingly, the Crown argues that the gross disproportionality of the mandatory minimum sentence for incest is not a live issue in the current proceedings and, as such, this Court should not exercise its discretion to hear this case. The Crown relies on ***R v Stephenson***, 2019 ABCA 453 and ***Hilbach*** as support for the proposition that if the Court determines that a mandatory minimum sentence is not grossly disproportionate to a fit and proper sentence for the individual offender before it, the Court may, but need not, go further where it can have no impact on the sentence in the case at issue.

[21] In this case, so as not to constrain the inquiry into the constitutionality of ss. 155(2), I choose to move on to the second stage of the analysis. This is consistent with the approach set out by the Supreme Court of Canada in ***Nur***.

D. Are the Offender's proposed hypotheticals far-fetched, fanciful, or remote?

Position of the Offender

[22] The Offender has proposed three hypotheticals, which draw on the facts from the cases of ***R v CMSM***, 2019 NBPC 14 [***CMSM***]; ***R v MLC***, 2020 ABQB 293; ***R v KDH***, 2012 ABQB 471; and ***R v Melrose***, 2021 ABQB 73 [***Melrose***].

[23] The first scenario involves an Indigenous man with intellectual challenges who has a brief sexual relationship with his half-sister. The offender has numerous *Gladue* factors and suffers from intellectual challenges. When he turns 18, he is introduced to his half-sister by blood. She is not yet 16 years of age. They develop a mutual romantic relationship and engage in a single incident of consensual sexual intercourse. Penetration is brief. The offender wore a condom and did not ejaculate. After learning his acts are illegal, he confesses his conduct to the police and pleads guilty on his first court appearance. He has no criminal record.

[24] The second scenario involves a sexually abused man who has sexual intercourse with his sister. He and his sister had been repeatedly sexually abused by members of their family. They had become desensitised to sexual conduct between family members. When he turns 18, he has sexual intercourse with his sister, who is 15, with her ostensible consent. He does not ejaculate, and no pregnancy occurs. He confesses and pleads guilty in docket. He has no criminal record.

[25] The third scenario involves a man with intellectual challenges who has a brief relationship with his blood sister. Personal characteristics are identical to those in ***Melrose***. He does not function as an adult and has difficulty foreseeing the consequences of his actions. He has sexual intercourse with his sister when he is 18 and she is 15 with her ostensible consent. He confesses and pleads guilty.

[26] For all three scenarios, the Offender argues that a five-year sentence is grossly disproportionate, not only on account of the mitigating factors, but also because the offence of incest is not an offence of sexual violence. For this, he relies on paragraph 16 from ***R v GR***, 2005 SCC 45: "it is well established that an allegation of incest is not directed to assaultive behaviour."

[27] Essentially, the Offender argues that the offence and minimum sentence cast too wide a net. The Offender submits that reasonably foreseeable applications of s 155(2) of the *Criminal Code* would clearly result in sentences much lower than the five-year mandatory minimum.

Position of the Crown

[28] The Crown argues that the hypothetical scenarios put forth by the Offender are not reasonable hypothetical scenarios but represent the most innocent and sympathetic cases imaginable. The Offender's analysis places too much emphasis on the personal characteristics of the offender. The Crown argues there is too much variation between the Offender's scenarios and the reported cases from which he derived his scenarios.

[29] The Crown argues that all three scenarios involve a single incident of sexual intercourse between siblings, siblings who are not more than two years apart, an offender who is a recent adult, a complainant who is approaching age 16, a confession, and remorse. Further, the offenders all have significant mitigating factors which make the proposed hypotheticals unreasonable.

[30] The Crown also argues that, in light of ***Friesen***, there are no reasonable hypotheticals that would render the five-year minimum sentence grossly disproportionate.

[31] The Crown submits that Parliament has confirmed its intent to maintain heavy mandatory minimum sentences for sexual offences by declining to repeal these provisions of the *Criminal Code* even though it has recently put forward bills to remove such sentences for drug and firearm offences (see Bill C-22, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 2nd Sess, 43rd Parl, 2020 [Bill C-22] and Bill C-5, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*, 1st Sess, 44th Parl, 2021 [Bill C-5])

Applicable Legal Principles

[32] In considering the reasonable hypotheticals offered by the Offender in support of his application, the Court considers the following principles taken from the cases outlined above:

- What is the reach of the law? What kind of conduct may the law reasonably be expected to catch? What is the law's reasonably foreseeable impact? (***Nur***).

- Section 12 requires courts to consider the scope of the offence, the types of activities it penalizes and the reasonably foreseeable circumstances in which it may arise. (Karakatsanis J in ***Morrisey***).
- Is the impugned provision sufficiently specific in its application, or does it cast an overly broad net? (***Nur, Lloyd***).
- Does the hypothetical involve the same crime with the same degree of moral blameworthiness? (***EJB***).
- Consider the circumstances of the offence without considering the personal characteristics of the accused in the hypothetical and then proceed to consider personal characteristics only if necessary (***Ford***).
- If considering "personal characteristics relevant to people who may be caught by the mandatory minimum," do not construct the most remote, far-fetched, and sympathetic case imaginable (***Nur***, ***Ford***).
- The exercise must be grounded in judicial experience and common sense (***Nur, Ford***).

Questions of the scope of the offence, the degree of moral blameworthiness, and concerns about crafting the most sympathetic hypothetical imaginable are particularly relevant to the s 12 *Charter* analysis in this case.

Application of Legal Principles in this Case

[33] The Offender, in offering the three hypotheticals, argues that s 155 of the *Criminal Code* imposes a five-year mandatory minimum sentence for an offence that is not by necessity 'violent.' In an attempt to show that the offence of incest casts too wide a net by not being "directed to assaultive behaviour," the hypotheticals advanced by the Offender involve sexual intercourse described as consensual. The Offender submits that incest may have a lesser degree of moral blameworthiness because consensual activity is captured in the offence. I reject this reasoning. While collateral violence is not a necessary element of the offence, the minimum penalty under s 155(2) of the *Criminal Code* only applies when the victim is under the age of 16, is legally unable to consent, and is therefore the victim of a sexual assault.

[34] Further, the moral blameworthiness of any kind of sexual assault against a child is high – "the use of a vulnerable child for the sexual gratification of an adult cannot be viewed as anything but a crime demonstrating the worst of intentions" (***Friesen***, quoting ***R v LFW***, 2000 SCC 6 at para 31). The Court in ***Friesen*** also held that, except in certain rare cases, an offender will be aware of the "profound physical, psychological and emotional harm that their actions may cause the child" (para 88).

[35] In all reasonably foreseeable circumstances where the mandatory minimum sentence applies, the offender is in a position of trust to the child. The nature of the familial relationship creates a reasonable expectation of trust. This breach of trust is "especially morally blameworthy" (***Friesen*** at para 129, citing ***R v D(D)***, 163 CCC (3d) 471 at paras 24 and 35, 58 OR (3d) 788; ***R v Rayo***, 2018 QCCA 824 at paras 121-22). The offence does not cast too wide a net. Section 155(2) of the *Criminal Code* can reasonably be expected to catch sexual assault of a child by a person in a position of trust with whom the child shares a biologically close connection.

[36] The question to be answered is whether a breach of s. 12 of the Charter arises from applying the mandatory minimum sentence to other offenders in reasonably foreseeable circumstances.

[37] The Offender's hypotheticals rely on a small age gap between victim and offender, a victim approaching the age of 16 and ostensible consent to suggest that incest that attracts the mandatory minimum sentence may be less morally blameworthy. I have carefully considered these hypotheticals against the types of reasonably foreseeable circumstances to which the mandatory minimum in ss. 155(2) is intended to apply.

[38] I conclude that the types of hypotheticals offered by the Offender are not the kind of hypotheticals that may reasonably be expected to arise. They are remote and involve the most sympathetic cases imaginable. Relying on these types of hypotheticals in stage 2 of the analysis set out in ***Nur*** should be avoided.

[39] I move now to a consideration of whether there is a reasonable hypothetical circumstance where the mandatory minimum sentence of five years for incest on a person under the age of 16 would meet the standard of cruel and unusual punishment.

[40] The sentencing guidance offered in ***Friesen*** is an answer to this question without needing to resort to crafting a hypothetical. The Court was unequivocal:

> that mid-single digit penitentiary terms for sexual offences against children are normal and that upper-single digit and double-digit penitentiary terms should be neither unusual nor reserved for rare or exceptional circumstances. We would add that substantial sentences can be imposed where there was only a single instance of sexual violence and/or a single victim…maximum sentences should not be reserved for the "abstract case of the worst crime committed in the worst circumstances". Instead, a maximum sentence should be imposed whenever the circumstances warrant it." (para 114, references omitted)

[41] In ***R v Gerbrandt***, 2021 ABCA 346, the Court relied on ***Friesen*** to overturn and increase a sentencing judge's decision in a child pornography case. The judge had found the mandatory minimum sentence of one year was grossly disproportionate to the Offender on account of her significant cognitive deficits. On appeal, the Court held that ***Friesen*** set "a normative benchmark" for sentencing for sexual offences involving children (para 97). The Court accepted the Crown's proposed sentence of two years less a day but noted that the sentence should not be taken as "a cap, a floor or a starting point" (para 98).

[42] Parliament has prioritized denunciation and deterrence for sexual offences that victimize children, has identified abuse of a person under the age of 18 as an aggravating factor and has indicated that the abuse of a position of trust further aggravates these offences (ss 718.01, 718.2(a)(ii.1) and 718.2 (a)(iii) of the *Criminal Code*). By imposing mandatory minimum sentences, Parliament has signaled that sexual violence against persons under the age of 16 should be punished more severely (***Friesen*** at para 116).

[43] While mandatory minimum sentences for a variety of sexual offences involving children have been struck down by trial and appellate courts, none have been declared unconstitutional since ***Friesen*** was decided in April 2020: Hamish C. Stewart, *Sexual Offences in Canadian Law*, ch 9, (Toronto, Ont: Thompson Reuters, 2022).

[44] I find that the five-year minimum sentence in s 155(2) of the Criminal Code does not impose sentences that are grossly disproportionate in other reasonable hypothetical situations.

IV. Conclusion

[45] For all the above reasons, I conclude that the mandatory minimum sentence in s 155(2) of the Criminal Code does not infringe s 12 of the Charter.

[46] The Offender's application for a declaration that the five-year mandatory minimum punishment in s 155(2) of the *Criminal Code* violates s 12 of the *Charter* is therefore dismissed.

Heard on the 27th day of April, 2022.
Dated at the City of Edmonton, Alberta this 23rd day of June, 2022.

D.A. Yungwirth
J.C.Q.B.A.

Appearances:

Lori Dunford and Lilit Tokmajyan
for the Crown

Curtis Steeves
for the Accused