

In the Court of Appeal of Alberta

Citation: R. v. C.H.L., 2008 ABCA 366

Date: 20081104
Docket: 0801-0164-A
Registry: Calgary

Between:

Her Majesty the Queen

Appellant

- and -

C.H.L.

Respondent

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The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Madam Justice Colleen Kenny
The Honourable Madam Justice Elizabeth Hughes**

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Judge D. Brand
Dated the 12th day of June, 2008
(Docket: 080039290P1)

Memorandum of Judgment

The Court:

A. Facts

[1] The respondent was accused by his daughter of performing various types of sexual activity upon her about 30 years before, when she was 6-9 years old. Asked by the police, he stated that he did not really recall it, but it must be true if she said so. When charged, he pled guilty to three crimes:

1. Sexual intercourse without consent (rape)
2. Sexual intercourse with his daughter (incest)
3. Gross indecency (oral sex)

[2] Five separate occasions were charged and admitted. They included vaginal penetration and oral intercourse. One of the five occasions involved both. Some years after these assaults, his daughter twice attempted suicide after these assaults became known.

[3] When sentenced, the respondent was 64 years old. He was not then working. At one time, he had been off work for a time because of depression, but had gone back to work after treatment. He had maintained steady employment virtually all his adult life, and had no criminal record. His psychiatrist reported on his mental state, diagnosing little besides depression. The psychiatrist suspected one or two other physical conditions, but said little more. The respondent was reported as taking medication for depression, and a few physical ailments (presumably prescribed by another physician), but no other medical report or diagnosis was provided. Nor did anyone suggest that the respondent's prescriptions could not continue to be provided while he was in jail. The psychiatrist said that jail would be very bad for the respondent and his wife, but gave no details.

[4] The pre-sentence report said that "the Subject is not a suitable candidate for community supervision . . . the writer is very concerned about his attitude towards the offence . . .".

[5] The defence sought and got in Provincial Court a conditional sentence of two years less a day. It included house arrest, but subject to a large number of exceptions, including going to work.

[6] The Crown appeals.

B. Reasons for Sentencing

[7] The sentencing judge gave brief oral reasons. They covered less than we would have hoped. They said little about statute law and nothing at all about case law. This is not a case where oral argument to the sentencing judge narrowed down the topics, nor precluded the matters raised later on appeal, nor made the conditional sentence order inevitable, nor supplied obvious reasons for the sentence given. What seem to be the key phrases in the reasons are brief, vague, and ambiguous. Some of the matters mentioned just before the conclusion, in law are neither mitigation, nor any basis for a conditional sentence order. For example, the desire to maintain a salary stream for the benefit of the respondent's wife. (That is also factually a little surprising, as the respondent was not then working.) Nor does appellate defence counsel suggest that a salary to support his wife was a mitigating circumstance, or other valid legal argument against jail.

[8] If the sentencing judge found that the respondent was in bad or dangerous health, there was neither evidence nor concession to support that finding.

C. The Court of Appeal's Basic Approach in this Appeal

[9] Oral argument on appeal ranged over a number of disputed topics, including starting points in Court of Appeal decisions, which Court of Appeal decisions have precedential value, and supposed modifications to starting points by more recent law.

[10] We do not find it necessary to rely upon or decide any of those principles or disputes here. They do not affect the result. Nor will we try to compare the facts here to those in each case cited to us, still less a case decided on equal division (4:4), such as *R. v. L.F.W.* [2000] 1 S.C.R. 132. It is sufficient to invoke a few well-known and much more basic principles, and then to look at the facts here, to decide what range of sentences the crime and the personal circumstances of the respondent would permit.

D. Seriousness of the Offence

[11] The respondent committed assaults on his daughter on five separate occasions, involving about seven sexual acts, most violating two sections of the *Criminal Code*. He did this at significant intervals, with ample opportunity in between to reflect. So there is no question of a momentary impulse with no time to reflect or desist.

[12] The girl was young, and forced sexual activity of varied kinds would be expected by any mature person (as this man then was) to have serious effects on her. Her two suicide attempts confirm that result in fact.

[13] That this was done by her own father, living in the same household daily, represented about as bad a breach of trust as could occur, and one which must have seemed impossible for her to flee or avoid.

[14] One important element in sentencing is the gravity and repetition of the crimes, and the degree of moral blameworthiness involved. Proportionality is the first principle of sentencing. The crimes are extremely bad here, in all respects, for reasons largely discussed above.

[15] The maximum sentence for one of the types of crime concerned was 14 years. For another, it was life. This case involves multiple occurrences, none of them trivial, technical, fleeting, nor coerced by others.

[16] If there were no mitigating circumstances, all the circumstances of these crimes could not possibly attract a sentence of less than four years. More could be justified, but four is the lowest one could legitimately go on these particular facts. That is true even without looking at any mandated starting points from Court of Appeal precedents.

E. Mitigating and Personal Circumstances

[17] The respondent never denied the allegations and pled guilty at once, sparing all concerned all the agonies of litigation. He was of previous good character, and has not offended since either. Nor is there any chance that the respondent will commit another sexual offence. His health has removed his mental inclinations, and quite possibly his physical ability.

[18] The respondent's age and the long gap since the crime may not be irrelevant, but we view their mitigating effect as modest at best.

[19] Aside from making individual (personal) deterrence unnecessary, we also view this respondent's present health as having little weight. He has several health conditions which a lay person would suppose could become serious if untreated. But there is no evidence at all that they cannot be treated. On the contrary, the indications are that they are being successfully treated (mostly by medication), and do not interfere much with ordinary life. More to the point, there is no indication that such treatment could not continue in prison.

[20] The respondent said that he was abused as a child, but his counsel did not suggest to us that should mitigate his sentence. Argument confirmed that no one suggests that it should aggravate it either. So that factor need not be weighed in this case.

[21] Totalling all the circumstances helpful to the respondent on the facts of this case, one could not properly give them more weight than 25%, which would leave a sentence of at least three years in jail.

F. Conclusion

[22] In our view, two years' jail, or two years less a day, here would be an unfit sentence outside the proper range. All the case law says that in cases such as the present, general deterrence (of others) and denunciation are very weighty, indeed the main object of sentencing. It is obvious, with or without the sentencing judge's reasons, that general deterrence and denunciation here got seriously inadequate weight, if any. In our view, the two-year figure alone would justify appellate intervention.

[23] Even if we were in error there, the sentence was not jail. It was a conditional sentence in the community (including community service). A conditional sentence order sometimes suffices to deter and denounce in certain types of crime, and with certain offenders. But that is not the same thing as saying that it deters and denounces as much. In most cases, it plainly does not. That a conditional sentence is not barred by a specific statutory provision does not mean that it is fit. That depends upon proportionality and other individual circumstances. A conditional sentence order here was plainly unfit. We say that quite apart from the flaws in the reasons for sentencing. Counsel have shown us no route which would begin to justify that light a sentence on this record. It errs seriously in principle and in weight. And, of course, a sentence of two years or over bars a conditional sentence order.

[24] Therefore, after oral argument, we pronounced a judgment allowing the appeal, and quashing the conditional sentence order. In principle, the sentence should be three years' actual jail, but we gave credit (at par) for the 131 days actually served under the conditional sentence order, and imposed a sentence of two years plus 234 days. The prohibition, registration and weapons orders stand. This Memorandum sets out our reasons, as promised.

Appeal heard on October 21, 2008

Memorandum filed at Calgary, Alberta
this 4th day of November, 2008

Côté J.A.

Kenny J.

Appearances:

J.B. Hawkes, Q.C.
for the Appellant

A.A. Sanders
for the Respondent