NOVA SCOTIA COURT OF APPEAL
Citation: *R. v. DeYoung*, 2017 NSCA 13

Date: 20170130
Docket: CAC 457345
Registry: Halifax

Between:

Nickolis William DeYoung

Appellant

v.

Her Majesty the Queen

Respondent

Restriction on Publication: pursuant to s. 486 of the Criminal Code of Canada

Judge:	Farrar, J.A.
Motion Heard:	January 19, 2017, in Halifax, Nova Scotia in Chambers
Held:	Motion for amendment of the Notice of Appeal dismissed; motions for leave to appeal and interim release dismissed.
Counsel:	Brian F. Bailey for the appellant Mark Scott, Q.C., for the respondent

Order restricting publication – sexual offences

486.4 (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of

(a) any of the following offences:

(i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 172.2, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 346 or 347,

(ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or

(iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with stepdaughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).

Decision:

Overview

[1] Nickolis William DeYoung made a number of motions before the Court. He sought to amend his Notice of Appeal; leave to appeal, and; if leave to appeal was granted, interim release pending appeal. The matter came before me in Chambers on January 19, 2017. At that time, I denied the motion to amend the Notice of Appeal, denied leave and interim release with detailed reasons to follow. These are those reasons.

Background

[2] Mr. DeYoung has some learning difficulties. He was 21 years old when he had sexual intercourse and oral sex with the 14-year-old victim. They had chatted and flirted on-line for approximately four days before they met at Mr. DeYoung's apartment on January 5, 2015 – after the victim finished school for the day.

[3] Mr. DeYoung sent a cab to the victim's school to bring her to his apartment. They began watching a movie. They progressed to the bedroom where their activities led to consensual sex. Afterwards, Mr. DeYoung gave the victim money to take a cab home. Once home the victim informed her parents that she had had sex with Mr. DeYoung. An investigation eventually led to charges under s. 271 (sexual assault) and s. 151 (sexual interference) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46.

[4] Mr. DeYoung co-operated with police and pled guilty to the charge under s. 271 of the *Criminal Code*. The Crown did not proceed with the s. 151 offence.

[5] At sentencing, counsel for Mr. DeYoung challenged the mandatory minimum punishment (MMP) for the indictable offence under s. 271. Judge Del Atwood concluded that, notwithstanding Mr. DeYoung's intellectual challenges, he was not satisfied on the evidence that a 12 month period of incarceration would constitute a grossly disproportionate sentence for him. The sentencing judge did, however, conclude that the MMP was unconstitutional based on a reasonable hypothetical.

[6] In the sentencing submissions, the Crown sought a period of incarceration of two to three years and provided a number of cases to set the range between 18 and 36 months.

[7] Counsel for Mr. DeYoung agreed with the normal range as set out by the Crown. He argued, however, that the individualized process and mitigating factors militated in favour of the non-custodial sentence with numerous rehabilitation components.

[8] The sentencing judge concluded that the encounter which culminated in sexual assault involved planning and pre-meditation. Mr. DeYoung had the victim come to his apartment in a taxi. Once there, he showed that he had the capacity and capability to exercise a degree of control over the victim.

[9] The sentencing judge took into account the evidence regarding the applicant's low to average intellectual functioning, and concluded that these cognitive and social deficits did not inhibit Mr. DeYoung from initiating contact, continuing contact and arranging the encounter. The sentencing judge concluded that a purely community-based sentence should be rejected since there was no authority provided to support it and it would require disregard for the imperative emphasis on denunciation and deterrence.

[10] The sentencing judge agreed with Mr. DeYoung's counsel that Mr. DeYoung was very remorseful, and was likely to respond well to treatment. These factors, the sentencing judge found, warranted a shorter sentence than those outlined in the cases provided by the Crown.

[11] He sentenced Mr. DeYoung to a period of 12 months' incarceration followed by 24 months' probation, ancillary firearms prohibition, DNA, SOIRA and s. 161 *Criminal Code* orders were also made.

Interim Judicial Release

[12] An appellant may only challenge sentence with leave of the Court of Appeal or a judge thereof. The *Criminal Code* requires that in a sentence appeal, like this one, interim judicial release may only be granted if a judge of the Court of Appeal has granted leave to appeal:

> 679(1) A judge of the court of appeal may, in accordance with this section, release an appellant from custody pending the determination of his appeal if:

…

(b) in the case of an appeal to the Court of Appeal against sentence only, the appellant has been granted leave to appeal).

[13] Section 679(4) of the *Criminal Code* sets out the criteria for interim judicial release pending appeal:

> (4) In the case of an appeal referred to in paragraph (1)(b), the judge of the court of appeal may order that the appellant be released pending the determination of his appeal or until otherwise ordered by a judge of the court of appeal if the appellant establishes that
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> (a) the appeal has sufficient merit that, in the circumstances, it would cause unnecessary hardship if he were detained in custody;
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> (b) he will surrender himself into custody in accordance with the terms of the order; and
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> (c) his detention is not necessary in the public interest.

[14] With these provisions in mind I will now turn to the appellant's motions.

Application for Leave to Appeal and Grounds of Appeal

[15] The appellant originally sought leave to appeal on the basis that the sentencing judge erred in:

(a) placing undue emphasis on deterrence, general and specific and in these circumstances;

(b) failing to give adequate emphasis on reformation and rehabilitation;

(c) failing to give adequate weight to the appellant's personal circumstances of intellectual difficulties;

(d) failing to properly take into account the principles of sentencing as set out in the *Criminal Code*.

[16] On December 22, 2016, he sought an adjournment to make an application to amend the Notice of Appeal to argue that s. 742.1 of the *Criminal Code* which precludes a conditional sentence for a s. 271 offence was contrary to ss. 7 and 12 of the *Charter*.

[17] The actual wording of the amendments sought are contained in the pre-hearing submissions of the appellant dated January 16, 2017, and are as follows:

1. Section 742.1 *CC* in respect of awarding Conditional Sentence Orders fetters the discretion of sentencing judges contrary to s. 7 of the *Charter*;
2. The availability of Conditional Sentence Orders with respect to sexual assaults under s. 742.1*C.C.* results in an arbitrary distinction in conjunction with Section 7 of the *Charter* contrary to Section 12 of the *Charter*.

Leave to Amend the Notice of Appeal

[18] Rule 90.39(2) allows a judge of this Court to permit a party to amend a Notice of Appeal. In considering such requests, the Chambers judge is primarily guided by two considerations as set out by MacDonald, C.J.N.S. in *Nyiti v. Cape Breton University*, 2009 NSCA 54:

> [5] When considering such requests, I am guided primarily by two considerations – (a) whether the amendments are reasonably necessary, and (b) the extent of any resulting prejudice. For example, in **Lane v. Carsen Group**, 2003 NSCA 42, Saunders, J.A. permitted an amendment to a notice of appeal holding:
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> > [12] In conclusion, I am persuaded that the inclusion of this additional ground is reasonably necessary for the proper presentation of the appeal, that it will enable justice to be done between the parties and that the amendment will not cause any prejudice to the respondent.
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> [6] In **2301072 Nova Scotia Ltd. v. Lienaux**, 2007 NSCA 4, Cromwell, J.A. (as he then was) similarly permitted the appellant to amend their notice of appeal stating:
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> > [10] In my view, the amendment is reasonably necessary for the presentation of the appeal and will not occasion prejudice in the sense which is relevant to this application.

[19] I am left to determine whether the amendments are reasonably necessary and the extent of any resulting prejudice.

[20] After considering the materials filed in this case, I am of the view that I should deny the appellant's request. Although I recognize that in certain circumstances a *Charter* argument can be raised for the first time on appeal, I agree with Mr. Scott, for the Crown, that the failure to raise the issue before the

sentencing judge, the absence of any record relating to the alleged infringement and the inability of the Crown to call evidence to satisfy a s. 1 justification is prejudicial to the Crown and it would be inappropriate to address it for the first time on appeal.

[21] In *R. v. Reid*, 2016 ONCA 524, the Ontario Court of Appeal set out the governing principles that determine whether an appellate court will entertain an appeal on an argument not raised at trial. Watt, J.A., writing for the Court, held that the general rule is that courts of appeal will not permit an issue to be raised for the first time on appeal (¶39). The general rule also applies to constitutional issues (¶41). He detailed what must be shown by a party who seeks to raise issues, including constitutional issues, for the first time on appeal:

> 43 A party who seeks to escape the grip of the general prohibition against raising issues for the first time on appeal must meet or satisfy three preconditions:
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> > i. the evidentiary record must be sufficient to permit the appellate court to fully, effectively and fairly determine the issue raised on appeal;
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> > ii. the failure to raise the issue at trial must not be due to tactical reasons; and
> >
> > iii. the court must be satisfied that no miscarriage of justice will result from the refusal to raise the new issue on appeal.
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> See *Brown*, at p. 927, per L'Heureux-Dubé J. (dissenting).
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> 44 A final point. The decision whether to grant or refuse leave to permit a new argument is a discretionary decision informed by a balancing of the interests of justice as they affect all parties: *Kaiman*, at para. 18.

[22] The appellant has not satisfied me that the evidentiary record is sufficient to permit this Court to fully, effectively and fairly determine this issue raised for the first time on appeal.

[23] Perhaps more importantly, the proposed grounds of appeal do not raise an arguable issue. They are not necessary for the reasonable presentation of the appeal. They also do not assist Mr. DeYoung in arguing the appeal has sufficient merit to justify his interim release. I will explain why I am of this view.

[24] Parliament has the power to make policy decisions with respect to sentencing. This was recognized in *R. v. Lloyd*, 2016 SCC 13:

> 45 Parliament has the power to make policy choices with respect to the imposition of punishment for criminal activities and the crafting of sentences that it deems appropriate to balance the objectives of deterrence, denunciation, rehabilitation and protection of society. Courts owe Parliament deference in a s. 12 analysis. As Borins Dist. Ct. J. stated in an oft-approved passage:
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> > It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function, the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.
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> *(R. v. Guiller* (1985), 48 C.R. (3d) 226 (Ont.), at p. 238)

[25] As Mr. Scott points out in the Crown's brief, in the few cases where the constitutionality of s. 742.1 has been challenged, the courts have uniformly rejected the assertion. It has been recognized that Parliament never intended for conditional sentences to be an option for violent or serious offences. In *R. v. Perry*, 2013 QCCA 212 (leave to appeal ref'd [2013] SCCA No. 126), the Quebec Court of Appeal affirmed that s. 742.1 simply removes the discretion to order but one of many available options for a sentencing judge:

> [152] …section 742.1 *Cr. C.* constitutes merely one more limitation on the judge's sentencing power. One may lament this choice and feel that Parliament is misguided. But that is not sufficient. The choice was a political one, and its appropriateness may not be questioned by judges so long as it does not violate the offender's constitutional rights, as is the case here.

[26] More recently, in *R. v. Sawh*, 2016 ONSC 7797 (Ontario Superior Court of Justice), the defendant sought an order declaring that s. 742.1(c) was inconsistent with both ss. 7 and 12 of the *Charter* and that it was of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*. The trial judge did an extensive review of the law including the various amendments to s. 742.1 over the years and reached a similar conclusion as the Quebec Court of Appeal in *Perry* and found that s. 742.1 simply excluded specific offences from the conditional sentence regime:

> 95 As earlier reviewed in these reasons, Parliament's ability to limit a judge's sentencing discretion is well-established in the case law: See *Nasogaluak*, at para.

> 45 and quoted in these reasons at para. 21. In *Proulx*, the court recognized that Parliament "could easily have excluded specific offences" from the conditional sentencing regime. That is all that Parliament has done here.

(See also *R. v. Neary*, 2016 SKQB 218, ¶19, 22 and 26).

[27] In conclusion, I am not satisfied that the proposed amendments raise an arguable issue that s. 742.1 of the *Criminal Code*, which excludes s. 271 offences from a conditional sentence, is contrary to either ss. 7 or 12 of the *Charter*.

[28] It follows that the amendments are not reasonably necessary for the presentation of this appeal.

The Other Grounds of Appeal

[29] For ease of reference, I will repeat the other grounds of appeal raised by the appellant:

(a) placing undue emphasis on deterrence, general and specific and in these circumstances;

(b) in failing to give adequate emphasis on reformation and rehabilitation;

(c) in failing to give adequate weight to the appellant's personal circumstances of intellectual difficulties;

(d) in failing to properly take into account the principles of sentencing as set out in the *Criminal Code*.

[30] Rule 91.24(1) addresses leave to appeal in interim release:

> **Release pending appeal**
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> 91.24 (1) An appellant who appeals against sentence only, is in custody, and wishes to be released pending appeal must make a motion to a judge of the Court of Appeal for leave to appeal, which motion may be heard together with a motion for an order for release under section 679 of the Code and be determined before or at the same time as the motion for release is determined.

[31] In Nova Scotia the test for leave requires that the grounds of appeal raise "arguable issues" or are "not frivolous" (See *R. v. Johnston*, 2014 NSCA 78 and authorities cited therein).

[32] With respect to the appellant's argument, it is nothing more than a recitation of the grounds of appeal and expressing disagreement with the sentencing judge's conclusion. The appellant points to nothing in the record which supports the argument that the sentencing judge erred in the manner asserted.

[33] Instead, he relies on a factual determination made by the sentencing judge as a springboard for his argument on the enumerated grounds of appeal. He says that the sentencing judge's finding that there was a significant degree of planning and premeditation in this case is not supported by the evidence. The sentencing judge said: "With respect to Mr. DeYoung's moral culpability, I find that there was a significant degree of planning and premeditation in this case. …".

[34] Mr. DeYoung's counsel argues that the record does not support this finding and it led the sentencing judge to err in imposing an excessive sentence on Mr. DeYoung.

[35] With respect, the argument has no merit. The sentencing judge sets out in his decision the facts he relies upon in making this determination. He said:

> …Mr. DeYoung persuaded the victim to visit him at his apartment and even arranged to send a taxi to drive her there. It was Mr. DeYoung who led the victim into escalating levels of sexual activity. Accordingly, I find Mr. DeYoung was the one solely responsible for this crime.

[36] Later he continues:

> I consider this evidence in conjunction with the actual facts of this case. Mr. DeYoung was the prime mover in this crime and no fault is to be attributed to the victim in any way. Mr. DeYoung's cognitive and social deficits did not inhibit him from contacting … from initiating contact with the victim by means of a social networking site and continuing that contact up to the point in time he invited her for a visit, nor did it inhibit him from arranging to have a taxi pick her up and bring her to his apartment where he certainly would have the capacity and capability to exercise a degree of control over her.
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> Although Mr. DeYoung's level of planning and calculation might not have reached the high level of grooming and predation as in say *The Queen v. Stewart*, I consider Mr. DeYoung's moral culpability to be in the mid-range on the scale of gravity.

[37] Taking into account the deference that is owed in reviewing the sentencing judge's findings, I see no error – let alone a reviewable error. To the contrary. In

the circumstances of this case, his finding that there was a significant degree of planning and premeditation is amply supported by the record.

[38] With respect to the alleged errors on the part of the sentencing judge, other than the argument which I have outlined above, no detailed arguments were made with respect to how the trial judge erred in the manner suggested in the Notice of Appeal. A review of the record belies any such assertion. The sentencing judge properly cited the provisions of the *Criminal Code*, considered the relevant case law, and considered Mr. DeYoung's individual circumstances in detail. There was no foundation laid to suggest an error by the sentencing judge. Simply saying so does not raise the grounds to arguable issues on appeal.

Conclusion

[39] In light of my determination of the issues on the request to amend the Notice of Appeal and with respect to "arguable issues", it is not necessary for me to address the other criteria for interim release.

[40] The motion to amend is dismissed. Leave to appeal and interim release is denied.

Farrar, J.A.