File Number: 38300

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF MANITOBA)

BETWEEN:

HER MAJESTY THE QUEEN

Appellant
(Respondent)

- and -

JUSTYN KYLE NAPOLEON FRIESEN

Respondent
(Appellant)

- and -

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ATTORNEY GENERAL OF ONTARIO
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Interveners

FACTUM OF THE INTERVENER ATTORNEY GENERAL OF ALBERTA

RULES 37 AND 42 OF THE *RULES OF THE SUPREME COURT OF CANADA*

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FACTUM OF THE INTERVENER

PART I – OVERVIEW AND FACTS

Overview

1. This appeal raises the issue of the disparity between Parliament's expressed intention to treat child sexual abuse more seriously through increasing penalties for offenders, and actual sentences imposed for such offences. While judges continue to affirm the seriousness of child sexual offences, the sentences imposed do not adequately reflect Parliament's intent.

2. Examination of this issue involves the consideration of sentencing guidelines such as starting points and sentencing ranges. The Respondent and some of the interveners challenge the legitimacy of starting point sentencing. In response, the Attorney General of Alberta will discuss reasons for why starting point sentencing guidelines continue to be valid and useful, assist in achieving uniformity of approach in sentencing and are consistent with the fundamental principle of proportionality.

3. The Attorney General of Alberta will also invite this Court to provide much needed direction to judges to increase sentencing ranges for child sexual abuse to take into account the severe psychological and physical harm suffered by children. The Attorney General of Alberta will explain how the current three year starting point for major sexual interference in the Alberta Court of Appeal's decision of *R v Hajar*[1] fails to adequately address the seriousness of sexual offences committed upon children in non-trust relationships. *Hajar* was intended to address *de facto* or ostensible consent to sexual activity where the victim tends to be relatively older, for example, 14 to 15. *Hajar* does not apply to sexual offences involving younger victims such as the four year old victim in this case, where the issue of *de facto* consent does not arise.

Statement of Facts

4. The Attorney General of Alberta accepts the facts as stated by the parties to this appeal and takes no position with respect to any factual disputes between them.

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[1] *R v Hajar*, 2016 ABCA 222

PART II – ISSUES

5. The Attorney General of Alberta's interest in this appeal is confined to the first issue raised by the Appellant:

Question in Issue 1 Are sentencing ranges for sexual offences against children still consistent with Parliamentary and judicial recognition of the severity of these crimes?

6. The Attorney General of Alberta submits that sentencing ranges for sexual offences against children are far below and inconsistent with Parliamentary and judicial recognition of the seriousness of these crimes. Starting point sentencing guidelines are valuable and useful tools that provide consistency and uniformity of approach in sentencing, and can assist in narrowing this gap. Starting points have played an important role in sentencing in Alberta and to some extent in other provinces. The legitimacy of starting points has continued to be affirmed by this Court in a number of cases. That said, the three year starting point for major sexual interference involving child victims in *Hajar*, which is no higher than the three year starting point for major sexual assault on adult victims, is inconsistent with the principle that sexual abuse perpetrated upon children is more egregious than sexual offences committed upon adults. Because *Hajar* was decided in the context of *de facto* consenting older child victims, it does not apply to younger children who did not factually consent to sexual activity with adults.

PART III – STATEMENT OF ARGUMENT

Starting point sentencing guidelines are useful and valid

7. Starting point sentences are a key and central feature of sentencing in Alberta and to a certain extent in other jurisdictions. Their use has led to greater consistency, predictability and transparency in the sentencing process, all of which are necessary to maintain public confidence in the justice system. Starting points are an effective means of achieving uniformity of approach in sentencing while also maintaining flexibility and individualized sentencing. They do not fetter judicial discretion but ensure its exercise is based on proper factors.

8. Starting points are not judicially imposed mandatory minimums.[2] This is because once a starting point is found to be relevant, the judge must apply applicable sentencing principles and objectives to the relevant circumstances of the case to arrive at a fit sentence.[3] The sentence can move up or down depending on aggravating and mitigating factors. Unlike mandatory minimum sentences imposed by Parliament, starting points are flexible and do not deprive courts of the ability to modify proportionate sentences at the lower end of the range of seriousness. They are not "noxious to individualization of sentences".[4]

9. A starting point sentence is just that – a starting point. It is not an end point.[5] As observed by the Alberta Court of Appeal in *R v DSC*, "It primarily provides a place to begin. The alternative is to have no place to begin. All judges have to start their thinking somewhere."[6] Starting points are more flexible than sentencing ranges as they do not have end points or fixed boundaries.

10. Starting points are consistent with the fundamental sentencing principle of proportionality.[7] Proportionality requires that a sentence be proportionate to the gravity of the offence and the degree of responsibility of the offender. It is determined both on an individual basis (in relation to the accused himself and to the offence committed) and by comparison with sentences imposed for similar offences committed in similar circumstances (parity principle in s. 718. 2(b)).[8] Because the parity principle impacts directly upon the degree of responsibility of the offender, it is an indispensable component of the proportionality principle. To diminish or ignore the importance of parity in sentencing is to undermine the proportionality principle.[9] It follows that a starting point sentencing guideline, the purpose of which is in part to promote parity in sentencing, is an important factor in achieving a proportionate sentence.[10] The

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[2] *R v Arcand*, 2010 ABCA 363 at para 13
[3] *R v Reddekopp*, 2018 ABCA 399 at para 10
[4] *R v DSC*, 2018 ABCA 335 at para 49; *Arcand, supra*, note 2 at para 66, dissent at para 350
[5] *R v Godfrey*, 2018 ABCA 369 at para 18; *Arcand, supra* note 2 at para 131
[6] *DSC, supra* note 4 at para 49; see also Justice Wakeling in dissent in *R* v *Yellowknee*, 2017 ABCA 60 at para 63
[7] *Arcand, supra*, note 2 at para 108
[8] *R v Lacasse*, 2015 SCC 64 at para 53; *Criminal Code*, RSC 1985, c C-46, s 718. 2(b)
[9] *Arcand, supra*, note 2 at para 61
[10] *Lacasse, supra*, note 8 at paras 57, 67

principles of proportionality and parity contemplate categorization of offences by the courts for sentencing purposes and the setting of starting points.[11]

11. Having said that, the principle of parity is secondary to the fundamental principle of proportionality because other principles set forth in s. 718.2 and sentencing objectives set out in s. 718 are also part of the proportionality analysis.[12] Accordingly, for a sentence to be proportionate, it is necessary to reconcile parity in sentencing with individualization of sentences.[13] As noted by this Court in *R v Lacasse*: "although ensuring parity in sentencing is in itself a desirable objective, the fact that each crime is committed in unique circumstances by an offender with a unique profile cannot be disregarded."[14]

12. Starting points are primarily guidelines, not hard and fast rules.[15] Failure to expressly place an offence within a properly described category, failure to refer to a starting point, or mere departure from a starting point, are not errors of principle so long as the resulting sentence is reasonable in the circumstances, having regard to the relevant starting point as adjusted for that offender and that offence.[16] Deviations from the starting point in service of proportionality are an inseparable aspect of the starting point approach.[17] Not only does starting point sentencing permit deviations, those deviations are instrumental to the process.[18] However, a significant degree of departure may disclose an error in principle where the sentencing judge has failed to

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[11] *Arcand, supra*, note 2 at para 112
[12] *Lacasse supra*, note 8 at para 54; *Arcand, supra*, note 2 at paras 59, 61; *R v LM*, 2008 SCC 31 at para 36
[13] *Lacasse, supra*, note 8 at para 53
[14] *Lacasse, supra*, note 8 at para 58
[15] *Lacasse, supra*, note 8 at para 60. Note: although this Court in *Lacasse* made this comment in respect of sentencing ranges, it held at para 57 that similar principles apply to the starting point approach. See also *Arcand, supra*, note 2 at para 350 (per dissent).
[16] *Lacasse, supra*, note 8 at para 51; *R v M (TE)* (aka *R v McDonnell*), [1997] 1 SCR 948 at paras 32-33, 43; *Arcand, supra*, note 2 at paras 117, also paras 336, 345, 369 as per the dissent; *Godfrey, supra*, note 5 at para 7; *R v Melnyk*, 2014 ABCA 344 at para 5; *R v Nishikawa*, 2011 ABCA 39 at para 4
[17] *Arcand, supra*, note 2 at para 106
[18] *Arcand, supra*, note 2 at para 112

explain why a particular sentence should radically depart from that starting point or where the difference said to justify deviation is not a relevant difference.[19]

13. Starting points do not offend the restraint principle, including considerations for *Gladue*/*Ipeelee* factors.[20] With starting point sentencing, relevant facts related to the individual offender and specific offence are taken into account and the starting point is adjusted accordingly. In this way, restraint is served because the final sentence will be the least that is appropriate in the circumstances for that offence and that offender.[21]

14. The starting point sentencing guideline approach has been endorsed by this Court on a number of occasions. The following cases have affirmed the legitimacy of this approach as well as other sentencing tools such as sentencing ranges and categories: *R v M (TE)* (aka *R v McDonnell)*;[22] *R v Stone;*[23] *R v Proulx*;[24] *R v Nasogaluak,*[25] *R v Lacasse*;[26] *R v Suter*.[27]

15. Critics of starting points argue that because starting points are considered "binding", they have been "elevated to the rule of law" as opposed to serving as a guideline only.[28] For example,

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[19] *Arcand*, *supra*, note 2 at paras 106, 117; *M (TE)*, *supra*, note 16 at para 43; *R v Marchesi*, 2009 ABCA 304 at para 8; *R v Tran*, 2010 ABCA 317 at para 16; *Godfrey*, *supra*, note 5 at para 7; *Nishikawa*, *supra*, note 16 at para 4

[20] *R v Gladue*, [1999] 1 SCR 688; *R v Ipeelee*, 2012 SCC 13

[21] *Arcand*, *supra*, note 2 at para 142

[22] *M (TE)*, *supra*, note 16 at para 43

[23] *R v Stone*, [1999] 2 SCR 290 at paras 244-245

[24] *R v Proulx*, [2000] 1 SCR 61 at para 87

[25] *R v Nasogaluak*, [2010] 1 SCR 206 at para 44

[26] *Lacasse*, *supra*, note 8 at paras 57-58

[27] *R v Suter*, 2018 SCC 34 at para 25. Note: In *R v Wells*, 2000 SCC 10 at paras 45-47, this Court cited with approval a statement made by the majority in *McDonnell* criticizing categorization. However, the comment in *Wells* was *obiter* and is inconsistent with this Court's ratio in *Stone* that categorization is valid as long as there is clarity in the categories described.

[28] *Godfrey*, *supra*, note 5 at paras 40-41 per O'Ferrall JA in dissent; *Arcand*, *supra*, note 2 at para 352 (dissent); *R v Gashikanyi*, 2017 ABCA 194 at paras 2, 21, 34-35 per Berger JA, see however, paras 103-104 per Rowbotham JA in dissent. Also, in *R v Lee*, 2012 ABCA 17, Berger JA at paras 74-76 held that *Arcand* was not binding. See however, contrary comments

Justice O'Ferrall in dissent in the Alberta Court of Appeal decision of *R v Godfrey* commented that a starting point would be "open to attack" if treated as a mandatory minimum.[29] That may be so, but the Alberta Court of Appeal has made it clear on numerous occasions that the "binding" nature of a starting point does not make it equivalent to a minimum sentence.[30] The fact the Alberta Court of Appeal has in many cases imposed or upheld sentences much lower than the starting point illustrates that starting points, for the most part, have not been relied upon as mandatory minimum sentences.[31]

16. The Alberta Court of Appeal clarified that "binding" means a sentencing judge cannot ignore it.[32] It also means a sentencing judge cannot fail to consider the starting point on the basis that "his conscience" did not allow him to consider the starting point in sentencing.[33] On the other hand, "binding" does not mean a sentencing judge errs in failing to advert to the relevant starting point. This is because such a failure, by itself, does not constitute a reviewable error, provided the resulting sentence is reasonable in the circumstances.[34]

17. Yet for starting points to have actual value, judges cannot be free to disregard them. The majority of the Alberta Court of Appeal in *Arcand* made this point clear in stating that "[t]his would be akin to saying: starting points are permissible; appellate courts can set them provided they are clear; and sentencing judges are free to disregard them with impunity. What then would be the purpose of starting points? If a sentencing judge need only pay lip service to a starting point, and not even that, then a starting point would provide a guide to no one and nowhere."[35]

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of Conrad JA at para 105, and Watson JA at para 142; and also, *R v Zentner*, 2012 ABCA 332 at paras 23-24.

[29] *Godfrey, supra*, note 5 at paras 40-41
[30] *Reddekopp, supra*, note 3 at para 10; *DSC, supra* note 4 at para 45
[31] *R v Ford*, 2019 ABCA 87; *R v SLW*, 2018 ABCA 235; *R v Bunbury*, 2018 ABCA 346; *R v Giroux*, 2018 ABCA 56; *R v L'Hirondelle*, 2018 ABCA 33; *R v Corbiere*, 2017 ABCA 164; *R v Legerton*, 2015 ABCA 79; *R v EHM*, 2015 ABCA 131
[32] *Reddekopp, supra*, note 3 at paras 3, 5; *Nishikawa, supra*, note 16 at para 4; *R v Trinh*, 2012 ABCA 383 at para 7; *Marchesi, supra*, note 19 at para 8
[33] *Melnyk, supra*, note 16 at para 5
[34] *Arcand, supra*, note 2 at paras 104-117; *Nishikawa, supra*, note 19 at para 4
[35] *Arcand, supra*, note 2 at para 118

18. To conclude, starting points are helpful tools that give guidance to sentencing judges in the exercise of their discretion. Unlike mandatory minimum sentences imposed by Parliament, starting points are flexible and do not deprive courts of the ability to modify proportionate sentences at the lower end of the range of seriousness. Applied properly, starting points are consistent with the fundamental sentencing principle of proportionality and are critical to ensuring uniformity and consistency in sentencing while at the same time maintaining the individualization of sentences.

Sentences for child sexual abuse need to be increased

19. Sentences for child sexual abuse involving both positions of trust and non-trust must be increased from the current sentencing ranges to reflect the serious short and long-term physical and psychological harm caused to children. The Attorney General of Alberta urges this Court to caution judges against equating child sexual assaults with adult sexual assaults in respect of the gravity of the offence and the resulting harm to the victim. While sentencing courts continue to characterize child sexual offences as serious, present sentencing ranges do not adequately reflect this sentiment.

20. The Attorney General of Alberta suggests that this Honourable Court provide firm direction to sentencing judges to impose significantly sterner sentences for child sexual abuse involving both trust and non-trust relationships.

The three year starting point for major sexual interference in *Hajar* is inconsistent with the principle that sexual offences on children is more serious than sexual offences upon adults.

21. The Alberta Court of Appeal's decision of *Hajar* is problematic when compared with starting point sentences for adult victims. Despite the majority's statement that sexual offences committed upon child victims are more egregious than those committed upon adult victims,[36] the three year starting point guideline for child victims established is no higher than the three year starting point for adult victims. To explain how this inconsistency arose, it will be helpful to discuss how the majority arrived at a three year starting point in *Hajar*.

[36] *Hajar*, *supra*, note 1 at para 12

22. Prior to *Hajar*, judges were routinely imposing low sentences ranging from 5 to 17 months imprisonment in cases where 13, 14 or 15 year old victims, through their willing participation, were said to have *de facto* consented to serious sexual activity with adults. Most of these sentences were upheld by the Alberta Court of Appeal.[37] Such cases involving *de facto* consenting underage victims had become increasingly more common as a result of the increased age of consent from 14 to 16 in 2008. Though the law prior to *Hajar* was clear that a young person's factual consent was irrelevant to conviction, there was uncertainty about whether *de facto* consent was relevant to sentencing, especially where the victim was 14 or 15. This created inconsistency in sentencing in this area.

23. Lenient sentences were imposed because of a general (unfounded) belief by sentencing judges that adolescent victims suffer no harm where they factually consented to sexual activity with adults, as compared with adult victims who did not consent to engage in sexual activity with their offenders. This mindset was accurately described by the majority of the Alberta Court of Appeal in *Hajar*: "Despite Parliament's decision to raise the age of consent, the attitude that the *de facto* consent of a 14- or 15-year-old child diminishes the overall degree of moral blameworthiness, that is the seriousness, of the criminal conduct seems to persist in some quarters. Judges are not immune from this attitude. It can be summed up in four words: 's/he asked for it'".[38] Sentencing judges often considered the three year major sexual assault starting point unwarranted in cases where the young victim gave ostensible consent to sexual activity with an adult.

24. Before *Hajar*, the majority of the Alberta Court of Appeal in *R v Bjornson* held it was unable to decide whether serious sexual assaults involving *de facto* consenting victims under the age of 16 constitute major sexual assaults to which the three year starting point applies, in the absence of legislative records, social science and expert evidence that address the issue of whether harm is actually caused to victims in these cases.[39]

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[37] See *R v Bjornson*, 2012 ABCA 230; *R v Pritchard*, 2005 ABCA 240; *R v Feng*, 2011 ABCA 172; *R v Sam*, 2013 ABCA 174; *R v Pudwell*, 2013 ABCA 88

[38] *Hajar*, *supra*, note 1 at para 7

[39] *Bjornson*, *supra*, note 37 at para 8

25. *Hajar* was the first case to reach the Alberta Court of Appeal where such expert evidence, social science literature and legislative records had been presented and accepted at sentencing. This evidence demonstrated the significant harm, both short and long-term, caused to children who engaged in sexual activity with adults, even where the child had given *de facto* consent to the sexual acts.

26. The majority of the Alberta Court of Appeal in *Hajar* concluded there was a strong analogy between major sexual assaults and major sexual interference, and that a similar starting point was therefore justified. They confirmed a starting point of three years imprisonment for all cases of major sexual interference including those involving the child's *de facto* consent.

27. Although *Hajar* advanced the law as it stood at the time, it created an anomaly when viewed alongside the three year starting point for adult victims established in *Sandercock*[40] and affirmed in *Arcand*.[41] What must be remembered however, is that *Hajar* was intended to address major sexual offences involving victims under the age of 16 who *de facto* consented to sexual acts with adults in non-trust positions. Because *Hajar* was decided in this context, its scope should be limited accordingly. Thus, where no *de facto* consent exists and victims are much younger, more severe sentences are warranted.

28. Moreover, a four year starting point could well have been justified in the circumstances of *Hajar* on the basis of the Alberta Court of Appeal's finding that relationships between adolescents and adults not within the close-in-age exception are inherently exploitative.[42] This inherent exploitation is caused by the inability of children to provide informed consent, the age discrepancy between the adult and the child, and the resulting power imbalance between them.

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[40] *R v Sandercock*, 1985 ABCA 218

[41] *Arcand*, *supra*, note 2

[42] See *R v S (WB)*, 1992 CanLII 2761 (ABCA) at p 20. Pursuant to s. 150.1 of the *Criminal Code*, the close-in-age exception is less than five years older for 14 and 15 year old complainants, and less than two years or older for 12 and 13 year old complainants.

There is no reason why child victims involved in inherently exploitative relationships are any less vulnerable than those involved in trust relationships.[43]

PART IV – SUBMISSIONS ON COSTS

29. The Attorney General of Alberta does not seek costs and submits that the ordinary rule that costs are not awarded against interveners should apply.

PART V – ORDER SOUGHT

30. The Attorney General of Alberta takes no position on the disposition of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Edmonton, Alberta, this 6th day of August, 2019.

JOANNE B. DARTANA
COUNSEL FOR THE INTERVENER,
THE ATTORNEY GENERAL OF ALBERTA

[43] Note: the precedential value of *Hajar*, *supra*, note 1 was not diminished by the subsequent Alberta Court of Appeal decision in *Gashikanyi*, *supra*, note 28. *Hajar* was a reserved decision decided by a specially convened panel of five justices of the Court of Appeal. The majority of the Court in *Gashikanyi* held that *Hajar* was wrongly decided and need not be followed. However, as there was no motion to reconsider *Hajar* as required by the Alberta Court of Appeal's *Criminal Appeal Rules* (Court of Appeal of Alberta, *Criminal Appeal Rules*, r 16.27) the majority's statement in *Gashikanyi* that *Hajar* was wrongly decided and need not be followed, is of no legal import. Accordingly, *Hajar* remains binding on all levels of court in Alberta, including the Court of Appeal. This was confirmed by the Alberta Court of Appeal in the decisions of *DSC*, *supra*, note 4 at paras 39-45 and *Reddekopp*, *supra*, note 3 at para 10, decided subsequent to *Gashikanyi*.

PART VII – TABLE OF AUTHORITIES, RULES AND LEGISLATION

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