SCC Court File No. 38300

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA)

B E T W E E N:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and –

JUSTYN KYLE NAPOLEON FRIESEN

RESPONDENT
(Appellant)

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INTERVENERS

REPLY OF THE RESPONDENT, JUSTYN KYLE NAPOLEON FRIESEN

(Pursuant to the Order of the Honourable Rosalie Silberman Abella, dated July 2, 2019)

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PART I – REPLY

1. This is the Respondent's reply to the intervenor's factums filed with respect to this matter. More specifically, the respondent is replying to the Attorney General of British Columbia's (hereinafter "AGBC") factum in relation to their argument that the *Agin* approach to appellate intervention in sentencing should be adopted across Canada.

2. The AGBC argues that the approach of the British Columbia Court of Appeal in *Agin* affords higher deference to the sentencing judge and mandates a fitness of sentence analysis prior to sentencing afresh, even where an error of principle is found that has materially impacted the sentence. The Respondent submits that the approach taken by the Manitoba Court of Appeal is not diametrically opposed to the approach taken by the British Columbia Court of Appeal, nor is this case an example of the how the differences between the approaches would result in a different sentence. With respect, the AGBC overstates the British Columbia Court of Appeals conclusions with respect to the level of deference to be accorded to the sentencing judge on appeal. A concise summary of the applicable framework from *Agin* is as follows:

> Where appellate intervention is justified, the role of the court is "to inquire into the fitness of the sentence and replace it with the sentence it considers appropriate": Lacasse, at para. 43. Wagner J. further outlined that meeting the standard allows an appellate court to "intervene without deference to substitute a sentence on appeal": at para 61. The appellate court reviews the fitness of the sentence "without the traditional deference to the sentencing judge's disposition blocking the way" (Joe, at para. 38) or "unshackled by the full force of the deferential standard of review" (J.C.S., at para. 92). However, as conceded by the appellant, this does not imply that deference should not be accorded to findings of fact absent palpable or overriding error, or to determinations with respect to the relative weight to assign the various goals of sentencing that are found to be untainted by the error in issue.[1]

3. The AGBC argues that by adopting this approach a review of fitness must proceed on the basis that all findings and determinations of appropriate sentencing factors that are untainted by the error continue to enjoy appellate deference. They say that the Manitoba Court of Appeal cast aside the sentencing judge's qualitative assessment as to the gravity of the offence and the risk posed by the offender when crafting a new sentence.

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[1] *R. v. Agin*, 2013 BCCA 133 at para 55.

4. These arguments are not borne out in the reasons of the Manitoba Court of Appeal. Each and every finding of the sentencing judge is adopted in the analysis of the Manitoba Court of Appeal as set out in paragraphs 27 – 41 of their decision. The court considered, among other factors, that:

- it must give primary consideration to the principles of denunciation and deterrence when imposing a sentence for an offence that involves the abuse of a child;
- the circumstances of the offence in this case are serious and the degree of responsibility of the accused is high; and
- the accused lacked insight into his behaviour, which impacted on his risk when in the community, particularly in light of his comment to the probation officer that he "enjoys being around children."

5. There is little difference between the approach taken by the Manitoba Court of Appeal and the approach taken by the sentencing judge absent the error. It is important to keep in mind that the error in this case was that the sentencing judge relied on an aggravating factor that was not present by utilizing the 4-5 year starting point. It is both logical and intuitive that correcting for this error, while holding all other factors constant, will result in a downward reduction in sentence, which is exactly what played out.

6. The only statement which is not addressed by the Manitoba Court of Appeal is the sentencing judge's opinion that "clearly this is the worst I have seen." That statement should not be afforded deference on appellate review nor should it be the focal point of appellate analysis. In a previous and unanimous decision of this honourable court, McLachlin C.J. wrote that terms such as "stark horror", "worst offence" and "worst offender" add nothing to the analysis and should be avoided, for good reason.[2] The personal opinion of the sentencing judge that this is the worst case they have seen is not a legal "assessment and assignment of weight to the relevant factors" that can attract appellate deference. The personal experience of the judge, the amount of time a judge has spent on the bench, and the types of cases they have seen is irrelevant to the level of deference to be afforded that judge. Whether it is the judge's first day, or they have been

[22] *R. v. Cheddesingh*, 2004 SCC 16 at para 1.

sitting for 20 years, intervention will be appropriate where the judge has imposed a sentence that is demonstrably unfit or if they have made a material error that impacted the sentence in a significant way.

7. The AGBC further argues that after finding an error of principal that has impacted the sentence in a material way, the appellate court should engage in a fitness of sentence analysis before resentencing the offender. Presumably, this fitness analysis is separate and distinct from the "demonstrably unfit" analysis which forms its own basis of appeal, otherwise the only basis of appeal in a sentencing case would be a demonstrably unfit sentence.

8. The AGBC's approach unduly complicates the matter. It is implicit in the analysis that if an error has had a meaningful and significant impact on the final sentence, the resulting sentence is no longer fit and appropriate for that offender in those circumstances. It is difficult to imagine a circumstance where an error of principle will be significant and meaningful, but will result in a fit sentence on a standard that requires less unfitness than "demonstrably unfit."

9. The example provided by the AGBC is a situation where there are so many errors going both ways they effectively cancel one another out. In this situation, they say, it is best to leave the sentence undisturbed. This argument does not provide a convincing rationale for a secondary fitness analysis after a significant error is identified. Such an analysis would only serve to prevent a fresh look. With respect, the integrity of the justice system warrants a fresh sentencing analysis if the sentencing judge's decision is replete with errors going both ways. If the final sentence arrived at by the appellate court is the same or close to the original sentence, they may always decline to intervene.

10. To further their argument, the AGBC states that the sentence is this case should not have been disturbed because the sentencing judge committed an error that benefited the Respondent. They say the wording of s.718.2(a)(iii) of the *Criminal Code* makes it a statutorily aggravating factor to abuse a position of trust, whether the offender occupies the position of trust or not. By failing to consider that s.718.2(a)(iii) applied to the Respondent, the sentencing judge made an error.

11. Section 718.2(a)(iii) does not create a moral equivalency between offenders involved in a case that includes a position of trust and those who actually occupy such a position. This approach ignores the longstanding common-law recognition that occupying a position of trust is a category of its own for sentencing purposes. The 4-5 year starting point that forms the backdrop for this appeal is a creation of the common-law and applies to caregivers, family members, and community members who are entrusted with the care and protection of children and exploit that position for their own sexual gratification. The crime of sexual interference is made even more reprehensible when the adult is in a position of trust vis-a-vis the child.[3] This could not be clearer than in the comments of the Manitoba Court of Appeal in *D.C.*:

> The gross abuse of parental trust, and the fact that the offence often commences when the victim is a child of tender years and continues over a lengthy period, are the usual hallmarks of a sexual assault involving members of a family unit. Clearer guidance to the courts will result from the recognition that the repeated sexual abuse of a child by a parent is a crime like no other and should be placed for sentencing purposes in a category of its own. [4]

12. This distinct category of offender has survived in the modern formulation of the four to five year starting point as follows:

> This court has repeatedly affirmed the principle that where major sexual assaults are committed on a young person within a trust relationship by means of violence, threats of violence or by means of grooming, the starting point for sentence consideration is four to five years' incarceration.[5]

13. Regardless of the correct interpretation of section 718.2(a)(iii), the common-law starting point only applies to those within a trust relationship and does not have a liberal interpretation. The 4-5 year starting point does not apply to the Respondent; applying it to his case along with the aggravating factor of a position of trust was an error. If section 718.2(a)(iii) applies to the Respondent it does not place him into the same category of blameworthiness or culpability established at common-law for those who occupy a position of trust.

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[3] *R. v. D. A. M.*, [1999] N.S.J. No. 46 at para 83.
[4] *R. v. D.C.*, [1991] M.J. no. 480 at para 10.
[5] *R. v. Sidwell*, 2015 MBCA 56 at para 38.

14. The Manitoba Court of Appeal considered the circumstances involving the offender's behavior in relation to the mother to be aggravating, as did the sentencing judge, contrary to the assertion of the AGBC. While they did not find that the Respondent occupied a position of trust, they recognized the seriousness of the situation. Noting a distinction between this offender and those occupying a position of trust was not an error, and section 718.2(a)(iii) does not eliminate any potential difference in the sentence that should result. These are highly unique circumstances and it was open to the sentencing judge to determine whether the level of moral blameworthiness in this case equated to occupying a position of trust in relation to the child or not. That determination was also open to the Manitoba Court of Appeal when they were re-sentencing the Respondent. It cannot be said the sentencing judge made an error in applying section s.718.2(a)(iii) simply because he found the offender was not in a position of trust.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 27th day of August 2019

Gerri Wiebe

Ryan McElhoes

TABLE OF AUTHORITIES