September 14, 2018

R v EJB: Reasonable Hypotheticals and Permitted Sentencing Factors

By: Daphne Wang

Case Commented On: *R v EJB*, 2018 ABCA 239 (CanLII)

R v EJB, 2018 ABCA 239 is an important case regarding the sentencing of sexual exploitation offences pursuant to section 153(1.1)(a) of the *Criminal Code*, RSC 1985, c C-46. The decision overturns the trial decision. In doing so, the Court addresses mitigating and aggravating factors judges should and should not consider during sentencing for sexual offences against a minor. The Court also more clearly defines how to assess constitutional challenges to mandatory minimums pursuant to section 12 of the *Charter*. In making these clarifications, the Court of Appeal highlights important considerations that cannot be overlooked when sentencing offenders under section 153(1.1)(a).

Facts and Issues

EJB was 35 years old when he engaged in a three-month sexual relationship with his then 16 year old niece (by marriage). At the time, the complainant had recently moved in with EJB and his family. The trial judge found that the complainant was persistent in pursuing EJB. The complainant was described as a troubled teen and had moved in with other relatives prior to living with EJB and his family (*R v EJB*, 2018 ABCA 239 (CanLII) at paras 3-4). The relationship between the complainant and EJB terminated when EJB's wife caught them in a sexual act. The complainant subsequently went to Calgary and claimed she had been sexually assaulted (at para 5).

EJB was charged with three counts under the *Criminal Code*: section 152 (invitation to sexual touching), section 271 (sexual assault), and section 153(1)(a) (sexual exploitation). The trial judge found EJB not guilty on all of the charges. The Court of Appeal held that EJB was guilty of sexual exploitation and remitted the matter to the trial judge for sentencing (at paras 6-8, see *R v EJB*, 2017 ABCA 176 (CanLII)). The trial judge sentenced EJB to a conditional sentence of two years less one day (at para 17).

In answer to the constitutional challenge of the one year mandatory minimum pursuant to section 153(1.1)(a) of the *Criminal Code*, the trial judge found that although the mandatory minimum was not grossly disproportionate to the appropriate sentence for EJB, it violated section 12 of the *Charter* because it was grossly disproportionate when applied to a hypothetical offender. Since section 153(1.1)(a) could not be saved under section 1 of the *Charter*, it was of no force or effect (at paras 13-14).

The Crown appealed the trial judge's sentencing decision. Here, the Court of Appeal had to decide whether the trial judge erred in: (1) EJB's sentence length, and (2) holding section 153(1.1)(a) to be unconstitutional (at para 18). The Court of Appeal ultimately reversed the trial judge's decision on both issues (at paras 2, 74).

The Court of Appeal's decision regarding EJB's sentence

As opposed to the two year less one day sentence imposed by the trial judge, the Court of Appeal held that the appropriate sentence for EJB is four years less seven months for time already served (at para 2). The trial judge erred because the sentence was not proportional to the gravity of the offence and the degree of responsibility of EJB. In making this determination, the Court of Appeal made several adjustments to the mitigating and aggravating factors the trial judge took into account when sentencing (at paras 41-50).

The Court of Appeal emphasized that the primary objectives of sentencing for sexual abuse of a minor is general deterrence and denunciation (at para 51, citing *R v Hajar*, 2016 ABCA 222 (CanLII) at para 112.). The trial judge erred in treating the complainant's instigation of the sexual contact and the fact that the offender did not engage in pre-planning or coercion as mitigating factors (at para 42). The trial judge also did not consider additional aggravating factors, such as the complainant's vulnerability (at para 45). The court found that the complainant's vulnerability was heightened because she was reliant on EJB and his wife for food, housing, transportation, and financial support. Further, EJB was aware of the issues with the complainant's mental and emotional state, there was a 19 year difference between EJB and the complainant, EJB failed to use a condom, and the sexual acts occurred in the home that EJB and the complainant shared (at paras 45-47).

The Court of Appeal's focus on the dependency and inherent vulnerability of the complainant echoes the Court of Appeal's reasoning in *R v EJB*, 2017 ABCA 176 (CanLII) (the same case as the one discussed here but with a focus on different issues; see "Facts and Issues" above). In *R v EJB*, 2017 ABCA 176, the Court of Appeal said the trial judge erred in finding that EJB was not guilty of sexual exploitation. The trial judge reasoned that EJB was not in a position of authority, he "exercised virtually no control" over the complainant, and the complainant initiated the sexual contact. The Court of Appeal disagreed and held that the complainant was in a position of dependency when living with EJB and his family (at para 7). The complainant's father and stepmother "essentially surrendered their parental responsibility to [EJB] and his wife" (at para 8; *R v EJB*, 2017 ABCA 176 at para 14). When remitted to trial for sentencing, the judge again reasoned the "severity of the offence was reduced" because EJB lacked actual control over the complainant and the complainant instigated sexual contact (*R v EJB*, 2018 ABCA 239 at para 12). Here, the Court of Appeal similarly shifted the focus from the act of the complainant back to the inherent dependency and vulnerability of the relationship between the complainant and EJB (at paras 42-49).

The reasoning in *R v EJB*, 2018 ABCA 239 should be followed for many reasons. First, a minor's instigation of sexual contact is not taken into consideration when assessing the accused's guilt under section 153(1) because a minor cannot consent to sexual exploitation. By extension, a minor's actions expressing consent should not be relevant when courts determine the appropriate

sentence for the offender under section 153(1.1) (see *R v Hajar*, 2016 ABCA 222 (CanLII). For further analysis see here). Second, as seen from this decision, considering a minor's instigation of sexual contact as a mitigating factor is problematic because this ignores the inherent vulnerability and harm the sexual relationship imposes on the minor, reduces the severity of the offence, and wrongly shifts the blame from the offender to the complainant. Instead, one should follow the Court of Appeal's citation of *R v Hann (No 2)* (1990), 1990 CanLII 2629 (NLSC): "[t]he implication from the wording of s. 153 is that notwithstanding the consent, desire or wishes of the young person, *it is the adult in the position of trust who has the responsibility to decline having any sexual contact whatsoever with that young person.* [Emphasis added by LaForest J. [in *R v Audet*, [1996] 2 SCR 171, 1996 CanLII 198 (CanLII))]]" (at para 42).

The Court of Appeal's decision regarding the constitutionality of the one year mandatory minimum pursuant to section 153(1.1)(a)

The trial judge held that the one year mandatory minimum in section 153(1.1)(a) of the *Criminal Code* violates section 12 of the *Charter* and cannot be saved under section 1 of the *Charter* (at paras 13-14). The Court of Appeal disagreed, holding that section 153(1.1)(a) does not violate section 12 of the *Charter*. Specifically, the Court could not "envision a set of circumstances constituting a reasonable hypothetical based on reason and common sense where the exploiting offender could claim that a 12 month sentence would shock anyone, let alone the enlightened public" (at para 73).

In assessing whether there was a violation of section 12 of the *Charter*, the Court of Appeal applied the same two-part test that the trial judge cited:

> First, the court must determine what constitutes a proportionate sentence for the offence having regard to the objectives and principles of sentencing in the *Criminal Code*. Then, the court must ask whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the fit and proportionate sentence. If the answer is yes, the mandatory minimum provision is inconsistent with s. 12 and will fall under justified under s. 1 of the *Charter* (at para 56, citing *R v Nur*, 2015 SCC 15 (CanLII) at para 46).

The second step of the test has two parts. The court must first determine whether the mandatory minimum requires the judge to impose a sentence that is grossly disproportionate to the accused. If the answer is no, the court must then ask whether the provision is grossly disproportionate to a hypothetical offender (at para 57).

In this second step of the test, the Court of Appeal said the trial judge was correct in holding that the one year mandatory minimum was not disproportionate for EJB (at para 8). However, the trial judge erred in holding that section 153(1.1)(a) was grossly disproportionate to a hypothetical offender. This is because: (1) the trial judge failed to consider that the offence of sexual exploitation requires specific intent and consequently, a high degree of moral blameworthiness; and (2) more importantly, although the trial judge relied on hypotheticals that were based on actual cases, the facts

were changed in a way that created examples that were "too remote or far-fetched" (at paras 59-61). In the hypotheticals the trial judge used, the scenario either wrongly described the conviction or "changed the facts to the point where they were no longer reasonably foreseeable cases" (at paras 63-64).

The Court of Appeal set out certain boundaries for assessing whether a mandatory minimum is grossly disproportionate to a hypothetical offender. For a provision to be grossly disproportionate, courts must only consider reasonable hypotheticals. Courts must "be careful not to stigmatize every disproportionate or excessive sentence as a constitutional violation" (at para 65). Therefore, reasonable hypotheticals should not set out facts for a crime other than the one charged, the facts of hypotheticals must not suggest the offender might be acquitted, and courts must not consider factors that do not diminish the culpability of the offender (at para 66). In addition, the Court of Appeal commented that it would be incorrect to compare sexual exploitation with similar offences that fall under the same category, and offences with similar mandatory minimums (at para 67).

The Court of Appeal's decision demonstrates that proving a section 12 *Charter* violation is a high bar. It will "only be on rare and unique occasions" that a provision will be so grossly disproportionate to violate section 12 of the *Charter* (at para 65, citing *R v Goltz*, [1991] 3 SCR 485 (CanLII)). The Court of Appeal also indicated that a sentence will only be grossly disproportionate where it is "abhorrent or intolerable to society" and it will "shock the conscience of Canadians." Judges should avoid constructing "the most innocent and sympathetic case imaginable" (at paras 60, 69).

It is interesting that the trial judge used similar language to the Court of Appeal when setting out and applying the test for section 12 of the *Charter*. For example, the trial judge recognized that hypotheticals must be reasonable and cannot be extreme or far-fetched, and a grossly disproportionate sentence must be "abhorrent or intolerable to society" and "shock the conscience of Canadians" (*R v EJB*, 2017 ABQB 726 (CanLII) at paras 58, 75). Perhaps the trial judge and the Court of Appeal reached different conclusions because it is difficult to create a consistent standard of "reasonable hypotheticals." However, moving forward, *R v EJB*, 2018 ABCA 239 tells us that judges should exercise caution when creating hypotheticals that alter the facts of actual cases.

This post may be cited as: Daphne Wang, "R v EJB: Reasonable Hypotheticals and Permitted Sentencing Factors" (September 14, 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/09/Blog_DW_EJB_Court_of_Appeal_Sentencing_Sept2018.pdf

To subscribe to ABlawg by email or RSS feed, please go to http://ablawg.ca

Follow us on Twitter @ABlawg

THE UNIVERSITY OF CALGARY FACULTY OF LAW BLOG