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Criminal

Quebec court examines impact of lengthy imprisonment on offender's family as mitigating factor

By **Luis Millán**

(March 27, 2023, 9:58 AM EDT) -- In a case that provided the Quebec Court of Appeal with an "opportunity to address the extent to which the detrimental impact of a lengthy term of imprisonment on the offender's family can operate as a mitigating factor in the sentencing process," the appellate court dismissed an appeal by the Crown over a sentence handed to a man found guilty of two counts of sexual interference on his 12-year-old daughter and her friend.

Keen on dispelling the Crown's contention that the sentence of 90 days' imprisonment sentence to be served intermittently was lenient and demonstrably unfit, the Appeal Court reiterated that sentencing ranges are only guidelines; reaffirmed that the objectives of denunciation and deterrence should be given relative precedence; and underlined that the detrimental impact of a lengthy term of imprisonment on the offender's family can be considered as a mitigating factor in exceptional cases, legal experts affirmed.

"It's an excellent decision," remarked Hugues Parent, a criminal law professor at the Université de Montréal and author of *Treatise on Criminal Law,* which is cited in the decision. "Taking into account the impact of a person's incarceration on the family can only be done when the sentence respects the principles of proportionality. It is certainly not a predominant factor in all cases, that's for sure. It is only considered in exceptional cases where the person has a favourable profile."

Hugues Parent, Université de Montréal

According to Jean-Claude Hébert, a prominent Montreal criminal lawyer, the Appeal Court decision illustrates the fluidity of criminal law in sentencing and shows that trial judges have a "great deal of leeway" with respect to frameworks proposed, such as in sentencing ranges, by the higher courts. "The Court of Appeal's judgment reiterates that the ranges are only guidelines that should not take precedence over the individualization of the sentence to be imposed," added Hébert.

Sharon Sandiford, a Montreal criminal lawyer who successfully represented the respondent, said that case stands for three important principles, including the highly deferential position that appellate courts must take in sentencing appeals, the extent to which the negative impact of a lengthy term of imprisonment on an offender's family can be a mitigating factor in sentencing matters, and the importance of respecting all the sentencing principles when tailoring a sentence to the accused. "It is therefore important that the legal system, our legal system, strive to be one of consistency, clarity,

certainty and progress, and this decision stands for these principles," said Sandiford of Silver, Sandiford LLP

The case deals with a 50-year old man, father of five children who immigrated to Canada from Sri Lanka in 1999, who pleaded guilty in April 2021 to two counts of sexual interference on his daughter and her friend. In 2017 and 2018, the man touched his daughter's vagina over her pants in his vehicle on four or five occasions and did the same thing in four or five instances over her clothes while she was in her room asleep. She asked him to stop and pushed his hand away every time. He also abused his daughter's 13-year-old friend in his car, touching her leg close to her vagina and kissed her on top of the head.

A clinical psychologist and sexologist who formally evaluated him concluded that the respondent's behaviour was "situational in nature" and not the result of a maladaptive sexual fixation towards minors. The doctor noted that the respondent felt ashamed, understood his behaviour was wrong and abusive, and requested help. At the time, the man was experiencing "stress and frustrations" with his family situation, the doctor added. His eldest son, seriously ill since birth passed away in December 2021, while his twin sister, also born with a serious illness, has been in foster care since shortly after her birth. Another son, approximately 10 years old at the time of sentencing, is intellectually disabled. His two other daughters, including the one he abused, are in good health. The respondent, a long-distance truck driver, has always been the sole family provider. His wife, who immigrated to Canada in 2002, speaks neither English nor French and does not work.

In a "detailed and carefully written judgment" Court of Quebec Judge Dominique Larochelle sentenced the respondent to 90 days' imprisonment to be served intermittently on a one-day-per-week basis, as well as three years' probation, including 100 hours of community service.

Judge Larochelle, while mindful of the Supreme Court of Canada's "strong statements" regarding sexual offences against children in *R. v. Friesen*, 2020 SCC 9, nevertheless identified a number of mitigating factors, including his guilty plea, the absence of a prior criminal record, his regrets and awareness of the wrongful nature of the acts, his participation in psychosexual and psychosocial assessments, the low risk of reoffending, his employment situation, his role as sole financial supporter for his family, the hardship he suffered as a result of his children's illnesses, and the challenges of social integration.

The trial judge also took into consideration and gave significant weight to the collateral consequences that the respondent's incarceration would have on his family. In her findings of fact, which was not disputed by the Crown, Judge Larochelle noted that a prolonged detention would have "dramatic consequences" on the victim and her family's short- and long-term financial autonomy and on its ability to find housing. The wife of the accused would have to assume parental responsibilities on her own but evidence revealed that she is not "self-sufficient" and has a "lack of understanding" of basic legal, financial and educational rules. She is also vexed by "emotional difficulties" and expressed suicidal intentions, according to a report by youth protection authorities.

The Crown, which sought a sentence of two years' imprisonment and three years' probation along with a number of incidental orders, appealed. The Crown asserted that the trial judge erred in considering as mitigating factors the respondent's psychosexual and psychosocial assessments, the distress he suffered due to his children's infirmities, the challenges of social integration and the hardship the family would suffer if a lengthy sentence was imposed.

The Appeal Court dismissed the appeal. "While such elements may not correspond to the strict definition of a mitigating factor, they can nonetheless be relevant in crafting a fit sentence," said Appeal Court Justice Frédéric Bachand in *R. v. G.G.*, 2023 QCCA 305, issued on March 6. Both Justices Stephen Hamilton and Stéphane Sansfaçon concurred.

The Appeal Court pointed out that the respondent's participation in psychosocial and psychosexual assessments, which he paid for himself in spite of his precarious financial situation, reflects a desire for rehabilitation, and the judge was "entitled" to take that into consideration. It is also well established that an offender's socioeconomic vulnerability and social marginalization are elements that can be taken into account at the sentencing stage, added the Appeal Court. In "exceptional and specific circumstances," a judge may also bear in mind the consequences of a lengthy imprisonment sentence, said Justice Bachand. But he warned that these circumstances cannot be "relied" on to

reduce a sentence to the point where the sentence becomes disproportionate to the gravity of the offence or the moral blameworthiness of the offender.

The impact incarceration may have on the family is a factor that remains relevant and can be taken into account in certain specific situations, particularly when the individual has a favourable profile, is undergoing rehabilitation or the family has special needs, noted Parent. But it is not per se an aggravating or mitigating factor, he added. "The problem with the question of the impact of incarceration on the family is that this factor, as such, does not relate to the seriousness of the crime as such," explained Parent. "Nor does it tell us anything about the responsibility of the individual. Nor does it have any impact on the degree of responsibility of the individual. So, in other words, it is not a factor that, in itself, should be qualified as aggravating or mitigating. Because to be qualified as an aggravating or mitigating factor, the factor must absolutely relate either to the seriousness of the crime or to the personality or degree of responsibility of the individual."

In its appeal, the Crown also argued that the sentence was demonstrably unfit, and disproportionately lenient because it ignores the underpinning of section 718.01 of the *Criminal Code*. The primary consideration in cases involving the abuse of children should be given to the objectives of denunciation and deterrence, maintained the Crown. But the Appeal Court dismissed those arguments as well, heeding in part to guidance issued by the Supreme Court in *R. v. Lacasse*, 2015 SCC 64, which held that appellate courts face a very high threshold to intervene in sentencing. *Lacasse* also held that while the sentencing objectives set out in s. 718 must be taken into account, it is up to the trial judge to properly weigh these principles and objectives. Further, s.718.01 does not require sentencing judges to prioritize the objectives of denunciation and deterrence "in an absolute manner or at all costs," said Justice Bachand.

"It's certain that in a context like this, a sexual offence against a child, that first of all the Court must prioritize the objectives of denunciation and deterrence — that is automatic and it is the court's main objective," explained Parent. But "prioritising the objectives of denunciation and deterrence does not mean that other objectives should be discarded. That is, if the individual, for example, has begun a rehabilitation process, if the individual presents a profile like the accused here, from that moment on, this must also be taken into account in the sentence that will be imposed."

According to Sandiford, the judge's discretion on sentencing allows them to depart from the range, even significantly, if the sentence "remains sufficiently proportionate to the gravity of the crime" and the degree of the accused's responsibility.

The Appeal Court held that a sentence of a sentence of 90 days' imprisonment to be served intermittently is a "significant restriction" on an offender's freedom that may allow the objectives of deterrence and denunciation to be met. In this case, the respondent, who works six days a week, will spend his day off over the next two years incarcerated, spend the following three years under probation and be required to perform 100 hours of community service, "which also constitutes a significant restriction on his freedom," said Justice Bachand.

"From a human perspective, one can never predict the randomness of the appointment of judges, the tendencies of which experienced lawyers usually know," remarked Hébert. "To get around this reality, a lawyer can judge-shop and plead guilty to a judge who is likely to give the proposed sentence. Clearly, some judges are more difficult to persuade in child sexual abuse cases."