Court of Queen's Bench of Alberta

Citation: R v Tungul, 2021 ABQB 1004

Date: 20211216
Docket: 200063741Q1
Registry: Edmonton

Between:

Her Majesty the Queen

Crown

- and -

Alyssa Tungul

Accused

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.

By Court Order, information that could identify the Victim must not be published, broadcast, or transmitted in any way.

NOTE: Identifying information has been removed from this judgment to comply with the ban so that it may be published.

Reasons for Decision
of the
Honourable Madam Justice Susan L. Bercov

I. Introduction

[1] This is my sentencing decision following a trial where I convicted Ms. Tungul of one count of sexual assault contrary to section 271 of the *Criminal Code* and one count of sexual interference contrary to section 151 of the *Criminal Code.* The Crown stayed the conviction of sexual assault.

[2] Ms. Tungul was a junior high school teacher who taught the Complainant. Ms. Tungul continued to see the Complainant after he graduated from junior high. I found that on one occasion Ms. Tungul performed oral sex on the Complainant in her car. The Complainant was 15 years old at the time.

[3] The parties disagree on what is a fit sentence is. The Crown argues a fit sentence is 4-5 years. The Defence seeks a conditional sentence of 18-24 months.

[4] Section 742.1(b) of the *Criminal Code* precludes conditional sentences where Parliament has enacted a minimum punishment. However, the minimum sentence for sexual interference has been held to be unconstitutional: ***R v Ford***, 2019 ABCA 87. The Defence sought an adjournment of the sentencing hearing to bring a *Charter* challenge to Section 742.1. The Crown opposed the adjournment. The parties agreed to proceed with the sentencing hearing on the basis that if I conclude that a conditional sentence is a fit sentence, I will adjourn the sentencing hearing to allow the Defence to bring the *Charter* challenge.

[5] I will begin my analysis of a fit sentence with a review of the circumstances of the offence and the circumstances of the offender.

II. Background Facts

[6] The circumstances of the offence are:

- Ms. Tungul was the Complainant's teacher in grade 9.
- Following the Complainant's graduation from grade 9, Ms. Tungul and the Complainant continued to see one another.
- On one occasion, when the Complainant was 15-years old, Ms. Tungul picked the Complainant up in her car to give him a ride. The Complainant asked Ms. Tungul to perform oral sex on him. Ms. Tungul performed oral sex on the Complainant in her car.

[7] The circumstances of Ms. Tungul are:

- Ms. Tungul is 31 years old.
- She has no prior criminal record.
- She has no prior discipline with the Alberta Teachers Association.
- She has a broad support group including support from her immediate and extended family as well as friends and colleagues.
- Ms. Tungul is very involved in her church. She has devoted herself to her faith and volunteering on numerous occasions to assist others.

- She began her teaching career in 2012. I am satisfied from the character letters she provides that teaching was a very important part of her life and her identity. She resigned in 2021. There is little chance she will be allowed to teach again. This is a significant loss for her.

III. Position of the Parties

[8] In seeking a 4-5-year prison term the Crown relies on the 4-year starting point set out by the Court of Appeal for a major sexual assault where the accused is in a position of trust: ***R v Hajar***, 2016 ABCA 222. The Crown notes that the circumstances involve one incident of fellatio that is a major sexual assault. Ms. Tungul was in a position of trust because she was the Complainant's teacher. The Crown also argues that the fact that the Complainant is Indigenous is an aggravating factor. The Crown's position is that there are no mitigating factors.

[9] While the Defence concedes that Ms. Tungul was in a position of trust as the Complainant's teacher and the offence involved a major sexual assault, the Defence argues that I am not bound to follow the 4-year starting point. I have the discretion to depart from the starting point where the circumstances indicate that it is appropriate to do so. The Defence argues in this case an appropriate sentence is a conditional sentence of 18-24 months because of Ms. Tungul's character, remorse, community supports, and the punishment she has already sustained in losing her career and reputation.

IV. Objectives of Sentencing

[10] Section 718 of the *Criminal Code* lists the objectives of sentencing. There is no disagreement that s 718.01 of the *Criminal Code* requires me to give primary consideration to the objectives of denunciation and deterrence when sentencing for offences that involve the abuse of children: ***R v Friesen***, 2020 SCC 9, at paras 101-102.

V. Proportionality

[11] Proportionality is the fundamental principle of sentencing: ***R v Hajar***, 2016 ABCA 222 at para 136. A just or fit sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[12] Under s. 718.2(a) of the *Criminal Code*, in assessing the gravity of the offence and the degree of responsibility of the offender I must consider any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[13] In ***Friesen*** the Supreme Court of Canada sought to correct underestimations of the gravity of sexual offences against children, misinterpretations of offenders' degrees of responsibility, and misapplications of aggravating and mitigating factors respecting offenders' responsibility.

[14] The Supreme Court, at para 5, sent the following strong message to judges regarding sentencing for sexual offences against children:

> "Third, we send a strong message that sexual offences against children are violent crimes that wrongfully exploit children's vulnerability and cause profound harm to children, families, and communities. Sentences for these crimes must increase. Courts must impose sentences that are proportional to the gravity of sexual offences against children and the degree of responsibility of the offender, as

> informed by Parliament's sentencing initiatives and by society's deepened understanding of the wrongfulness and harmfulness of sexual violence against children. Sentences must accurately reflect the wrongfulness of sexual violence against children and the far-reaching and ongoing harm that it causes to children, families, and society at large".

A. Gravity of the Offence

[15] In terms of assessing the gravity of the offence, the Supreme Court in ***Friesen*** provides the following guidance:

- In determining the gravity of the offence, courts must recognize and give effect to the inherent wrongfulness of these offences. Sexual offences against children are wrong in themselves, regardless of consequences threatened or actualized.
- Courts must understand the wide scope of harms that sexual offences against children threaten or cause.
- While harm caused can raise the gravity of the offence, harm may not be apparent at the time of sentencing. Courts must consider the reasonably foreseeable potential harm that flows from sexual violence against children when determining the gravity of the offence. These forms of potential harm illustrate the seriousness of the offence even where there is no proof of actual harm.

B. Degree of Responsibility of the Offender

[16] ***Friesen*** provides the following guidance to sentencing judges in assessing the degree of responsibility:

- Applying force of a sexual nature to a child is highly blameworthy because the offender knew or ought to have known the significant harm that can be caused.
- The moral blameworthiness increases where the victim is particularly vulnerable such as children who belong to groups that face discrimination or marginalization in society.
- Victim participation should not distract from adults' responsibility to refrain from sexual violence against children. "Adults, not children, are responsible for preventing sexual activity between children and adults" at para 154.

[17] I will now consider the aggravating and mitigating factors in this case in order to assess the gravity of the offence and the degree of responsibility of Ms. Tungul.

VI. Aggravating Factors

Ms. Tungul was in a Position of Trust

[18] The parties do not dispute that Ms. Tungul was in a position of trust. This is a significant aggravating factor relevant to both the gravity of the offence and offender's degree of responsibility.

[19] A breach of trust increases the gravity of the offence because it is likely to increase the harm to the victim. Where there is a closer relationship and a higher degree of trust, the more likely the breach of trust will cause harm.

[20] A breach of a trust relationship also increases the offender's degree of responsibility because the offender has a duty to protect and care for the child. This breach of the duty of protection enhances moral blameworthiness: ***Friesen***, at para 129.

[21] Ms. Tungul was engaged with the Complainant in a significant relationship of trust. She was his teacher. She was also mentoring him because he was a troubled Indigenous adolescent. He was a particularly vulnerable individual. I conclude that the breach of trust in these circumstances is a significant aggravating factor.

Degree of Harm

[22] The Complainant did not file a victim impact statement. The Complainant's mother did. In her statement she describes numerous ways that Ms. Tungul has significantly harmed the Complainant.

[23] ***Friesen*** directs me to consider the actual harm to the victim where possible. Actual harm is important to the gravity of the offence: ***Friesen***, para 85.

[24] While victim impact statements of parents often provide evidence of the harm actually suffered by the victim, the evidence of actual harm in this case is not clear. Although the Complainant did not provide a victim impact statement, he did testify that he does not believe he was harmed, although others think differently. It was clear in the evidence that there was disagreement between the Complainant and his mother about several issues, including the actual harm to the Complainant. There is no other evidence relating to the actual harm caused.

[25] It is not possible on the evidence in this particular case to determine the actual harm suffered by the Complainant. However, as ***Friesen*** notes, it is not only complainants who are harmed by sexual violence, their families often suffer as well. I am satisfied from the evidence given by the Complainant's mother and step-father at the trial that they suffered psychological and emotional harm.

VII. Mitigating Factors

Good Character

[26] The Defence marked as Exhibit 2 several letters of character from family, friends, colleagues, Ms. Tungul's employer and a priest. These letters acknowledge that the authors are aware of her conviction for sexual interference with a student and acknowledge the wrongfulness of her conduct. Notwithstanding, the letters describe a caring, hard working individual. She is passionate about teaching and helping students, committed to social justice, equality, and community. The authors describe, with examples, her concern for others. Some of the authors indicate that her conduct was "out of character".

[27] The Defence argues that Ms. Tungul's good conduct, as evidenced by these letters, is a significant mitigating factor.

[28] While I agree with the Defence that the reference letters do speak very positively to Ms. Tungul's character, evidence of good character has low probative value in sexual assault cases because previous good character is common in child sexual assault cases: ***R v Misay,*** 2021 ABQB 485, at paras 126-131.

[29] Evidence of good character does tend to support a rehabilitative sentencing objective: ***Misay***, at para 131.

Collateral Consequences

[30] Ms. Tungul was placed on suspension from her teaching job. She has now resigned. I agree with the Defence that there is no prospect of her being able to resume her teaching career in the future. The Defence argues that given her passion for teaching, this is a significant consequence to her that I should consider as a mitigating factor. In addition, Defence exhibited several media articles arguing that the damage to her reputation is a mitigating factor.

[31] Collateral consequences are relevant factors in sentencing: ***Misay***, para 169. The Defence relies on several cases where the sentencing judge considered the loss of a teaching career as a mitigating factor: ***R v A(D.B.)***, 2006 ABPC 63; ***R v Penner***, 2001 ABQB 1133; ***R v McNally***, [2008] A.J. No. 586; ***R v Leong***, 2011 ABPC 151.

[32] Several of the letters attached as Exhibit 2 describe Ms. Tungul's passion for teaching and dedication to her students. I accept that the loss of this career is a significant consequence for her. I find that it should be considered in determining what is a fit sentence.

[33] The Defence provided no authorities that damage to an offender's reputation from media publicity is a relevant sentencing factor. I decline to treat it so.

Remorse

[34] Remorse is a relevant mitigating factor that gains added significance when paired with insight that significantly reduces the likelihood of reoffending: ***Friesen***, para 165.

[35] The Crown argues that the Defence's suggestion that Ms. Tungul is remorseful is disingenuous because in her evidence during the trial Ms. Tungul attempted to shift the blame to the Complainant by suggesting that she felt forced to perform oral sex.

[36] The Defence strongly disagrees arguing that Ms. Tungul had the right to defend herself at the trial with all available defences and should not be punished for exercising that right.

[37] I disagree with the Crown that Ms. Tungul cannot defend herself at the trial with evidence, some of which I accepted and some I did not, and, at the same time, be remorseful. I note one letter in particular, from a lawyer who has known Ms. Tungul for many years, indicating that:

> "Alyssa is conscientious and remorseful. She knows she made a mistake in failing to maintain appropriate boundaries with her student. In my conversations with her, she has shown the strength of character that I always knew about her, by acknowledging where her responsibilities lie. She understands the wrong committed. I respect her for that.
>
> ... I also know that she is someone who is committed to learning from her mistakes, that these are actions that she cannot and will not repeat".

[38] I accept that these comments are accurate. In my view, Ms. Tungul's remorse coupled with her insight is a mitigating factor.

VIII. Community Support

[39] The letters of "good character" demonstrate that Ms. Tungul has considerable community support from her church, her family, and her friends.

[40] Community support does not lower the gravity of an offence or the degree of responsibility of an offender. It does aid the rehabilitative objective of punishment: ***Misay,*** at para 153.

Parity

[41] In determining a proportionate sentence, I must also consider the principle of parity: similar offenders who commit similar offences in similar circumstances should receive similar sentences: ***Friesen,*** at para 31**.**

[42] The Crown submitted few cases. The Crown relies on ***Friesen*** and ***Hajar***.

[43] In ***Hajar*** the Alberta Court of Appeal established a starting point of 4 years for a major sexual assault where the accused is in a position of trust. There is no dispute that the conduct in this case is a major sexual assault.

[44] In ***Friesen*** the Supreme Court sent a strong message that sentences for sexual offences against children must increase to reflect the current understanding of the wrongfulness and harmfulness that these offences cause to children, their families, and society at large. The Supreme Court, at para 114, commented that "mid-single digit penitentiary terms of sexual offences against children are normal...".

[45] The Defence provided several cases, both pre and post ***Friesen*** supporting the Defence argument that a sentence of 18 – 24 months is a fit sentence.

[46] For the pre-***Friesen*** cases, some of the cases are distinguishable because they did not involve breaches of trust: ***R v Springchief,*** 2017 ABPC 134; ***R v Johnson***, 2010 ABCA 287; ***R v Hajar***, 2016 ABCA 222. The breach of trust that occurred in this case is a significant aggravating factor.

[47] The Defence relies on several cases pre-***Friesen*** involving sexual assaults by teachers against students where sentences of less than 24 months were imposed: ***R v McLachlan***, 2014 SKCA 68; ***R v Pontbriand***, 2014 QCCQ 7928; ***R v Ralph***, 2014 BCSC 467; ***R v RFG***, 2006 NBCA 104. In my view, given the clear directions of the Supreme Court in ***Friesen***, sentencing decisions prior to ***Friesen*** are of limited value in applying the principle of parity and determining the gravity of the offence and the responsibility of the offender.

[48] The Defence relies on a few cases post-***Friesen*** where sentences less than 24 months were imposed. Some of the cases are distinguishable because they did not involve breaches of trust and there was a guilty plea that is a significant mitigating factor: ***R v Melrose***, 2021 ABQB 73; ***R v Bernardon***, 2021 ONCJ 438.

[49] The other cases post-***Friesen*** involving breaches of trust where sentences less than 24 months were imposed, are distinguishable because they involve conduct on the lower end of the spectrum of intrusiveness: ***R v R.A.M.***, 2021 ONCJ 319; ***R v D.B***., [2021] O.J. No. 4381.

[50] There are cases involving breaches of trust post-Friesen where sentences in the range of 24 – 40 months were imposed: ***R v T.J***., 2021 ONCA 392; ***R v E.F***., 2021 ABQB 639; ***R v DHW***, 2021 ABPC 123. There is also a case imposing a 40-month sentence where there was no breach of trust and there was a guilty plea: ***R v Vandekerckhove***, 2021 MBQB 61.

[51] The Defence argues that I cannot blindly apply the 4-year starting point in ***Hajar*** for a major sexual offence involving a breach of trust. I agree.

[52] In ***Friesen***, the Supreme Court of Canada confirmed that sentencing ranges and starting points are appropriate tools for appellate courts to use in assisting a trial judge's analysis of the parity principle. The Supreme Court repeated the direction that ranges and starting points are guidelines, not hard and fast rules. Sentencing judges must consider the individual circumstances of each case in determining whether to depart from a sentencing starting point.

[53] In ***R v Parranto***, 2021 SCC 46, the Supreme Court reiterated that starting points do not relieve the sentencing judge from considering all relevant sentencing principles and conducting an individualized analysis by considering all relevant factors.

IX. The Fit Sentence for Ms. Tungul

[54] I disagree with the Defence that an appropriate sentence in this case is 18 – 24 months. A sentence of 24 months or less is not a fit sentence. It does not properly reflect the gravity of the offence where a teacher who is mentoring a troubled Indigenous youth commits a sexual offence. A sentence in this range fails to recognize the harm to victims, family members and society of sexual assaults involving a breach of trust against vulnerable youths.

[55] I disagree with the Crown that an appropriate sentence in this case is 4-5 years. I disagree with the Crown that there are no mitigating factors. In my view, remorse and the loss of a teaching career are mitigating factors.

[56] A sentence of 4 years fails to consider all the individual circumstances of this case including: mitigating factors, the number of acts, the age of the youth, the degree of force involved, and other sentencing objectives, including rehabilitation.

[57] Considering all relevant circumstances, I conclude that a fit sentence in this case is 32 months.

[58] Having concluded that a conditional sentence is not a fit sentence in the circumstances of this case, it is not necessary for me to hear the constitutional challenge to s. 742.1. It is not an efficient use of judicial and court time to hear a constitutional challenge that is academic to the sentence to be imposed in this case: ***R v Baltazar***, 2021 ABQB 879.

[59] I understand from counsel that there is no credit for pre-trial custody to offset against the period of imprisonment.

[60] I also grant the following ancillary Orders:

- An Order requiring Ms. Tungul to comply with SOIRA for 20 years pursuant to s. 490.012 of the *Criminal Code.*
- An Order requiring Ms. Tungul to provide a sample of her DNA for inclusion in the DNA data bank pursuant to s. 487.051 of the *Criminal Code.*

Heard on the 12th day of November, 2021.
Dated at the City of Edmonton, Alberta this 16th day of December, 2021.

Susan L. Bercov
J.C.Q.B.A.

Appearances:

Damon Macleod
for the Crown

Brian Vail
for the Accused