Court of Queen's Bench of Alberta

Citation: R v TT, 2019 ABQB 673

Date: 20190829
Docket: 170501829S1
Registry: Edmonton

Between:

Her Majesty the Queen

Appellant

- and -

TT

Respondent

Restriction on Publication

Identification Ban – See the *Criminal Code*, section 486.4.
By Court Order, information that may identify the Accused and the Complainant must not be published, broadcast, or transmitted in any way.
NOTE: This judgment is intended to comply with the identification ban.

By Court Order, there is a ban on publishing information that may identify the accused as having been dealt with under the *Youth Criminal Justice Act*.
No one may publish any information that may identify a child or young person as being a victim or witness in connection with an offence alleged to have been committed by a young person.
NOTE: This judgment is intended to comply with the identification ban.

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

Appeal from the Judgment by
The Honourable Judge S.A. Cleary

Dated the 17th day of November, 2017
(Docket: 170501829Y1)

Introduction

[1] This is a summary conviction appeal against the Respondent, a youth, who pleaded guilty to one count of sexual assault contrary to s 271 of the *Criminal Code*. One month after the sentencing decision the Crown applied before the Youth Court for a post-conviction DNA order. The Court, Crown and Defence mistakenly believed the Court had discretion, which the Court exercised, to refuse an order collecting the Respondent's DNA. The Crown appeals the failure to impose the mandatory DNA order. In response to the appeal, the Respondent seeks a declaration that s 487.051(1) of the *Criminal Code* violates s 7 of the *Charter*.

[2] The Crown's appeal was filed as a sentence appeal. With the Respondent's consent, I granted leave to the Crown to amend its Notice of Appeal to indicate that appeal is under s 497.054 from the refusal to impose a DNA order.

[3] The Government of Canada was provided with proper notice and does not seek to intervene.

[4] The Appellant and Respondent agree:

a) Notwithstanding the *Charter* challenge was not before the trial court due to the history of the matter, I have the jurisdiction to hear and determine the challenge;

b) A DNA sample ordered by a court upon conviction engages the right to security of the person; and

c) If I find that s 487.051(1) of the *Criminal Code* does not violate the *Charter*, the appeal of the refusal to make the DNA order should be allowed. If I find a violation of the *Charter*, the appeal will continue to allow the Crown to adduce evidence under s 1 of the *Charter*.

[5] Section 487.05(2) of the *Criminal Code* provides for an exemption from the mandatory DNA order for certain primary designated offences. Section 271, sexual assault, falls under s 487.051(1), not 487.051(2), with the result that there is no exception for this offence. The Respondent argues that this lack of exception is not in accordance with the principles of fundamental justice in that it is arbitrary, overbroad and grossly disproportionate. In addition, the inclusion of young offenders in the same manner as adult offenders violates the fundamental principle that young persons are to be treated differently because of their lack of maturity and diminished moral blameworthiness. These are the issues for determination.

Statutory Regime

[6] The constitutional challenge deals with three federal statutes: the *Criminal Code* ("*CCC*"), the *DNA Identification Act* ("*DNAIA*"), and the *Youth Criminal Justice Act* ("*YCJA*"). It is useful to outline the statutory regime that governs the collection of DNA samples as well as the safeguards that exist that relate specifically to young persons.

[7] The creation, operation, and continued maintenance of a national DNA data bank is governed by the provisions of the *DNAIA*. Certain *CCC* sections deal with the collection and use of DNA samples.

[8] Prior to amendments to the *DNAIA* in 2005, s 487.051 created two separate categories of offences: primary designated and secondary designated. A court was required to make a DNA order on an adult or young person convicted of a primary designated offence unless satisfied that the offender established the impact of the order on the offender's privacy and security was "grossly disproportionate to the public interest in the protection of society and the proper administration of justice."

[9] In May, 2005, Bill C-13 amended both the categories of offences for which the *DNAIA* orders may be made and the offences included in each category. Primary designated offences were divided into two categories: primary mandatory offences and primary presumptive offences. With respect to primary mandatory offences, the court no longer had discretion as to whether a DNA order should be made and was required to order that a DNA sample be given by any adult or young person convicted of an offence included in this category. With respect to primary presumptive offences, the court could decline to make a DNA order if the offender met the "grossly disproportionate test" referred to above.

[10] On January 1, 2008, s 487.051(1) of the *CCC* was amended to its current version as follows:

> **Order - Primary Designated Offences**
>
> **487.051(1)** The court shall make an order in Form 5.03 authorizing the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis from a person who is convicted, discharged under section 730 or found guilty under the *Youth Criminal Justice Act* or the *Young Offenders Act*, of an offence committed at any time, including before June 30, 2000, if that offence is a primary designated offence within the meaning of paragraph (a) of the definition ***primary designated offence*** in section 487.04 when the person is sentenced or discharged.
>
> [emphasis added]

[11] Pursuant to s 487.04, a "primary designated offence" is an offence set out in paragraphs (a) to (d). Only the offences set out in paragraph (a) are primary mandatory offences. Paragraph (a) includes sexual assault contrary to s 271 of the *CCC*.

[12] Other offences in paragraphs (a.1) to (d) of s 487.04 require the young person to satisfy the onus set out in s 487.051(2) which is that the impact of such an order on the privacy and security of the person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

[13] Other *CCC* provisions deal with the manner in which DNA samples may be taken, as well as their use and destruction. Section 487.06(1) sets out the three ways in which a DNA sample may be taken, namely: the plucking of individual hairs, buccal swabbing and taking blood by pricking the skin surface. Section 487.06(2) authorizes the court to include terms and conditions in the order that it considers advisable "to ensure that the taking of the samples ... is reasonable in the circumstances". Section 487.08(1.1) prohibits the use of DNA samples obtained pursuant to a collection order except to transmit them to the Commissioner of the RCMP "for the purpose of forensic DNA analysis in accordance with the DNA Identification

Act". Anyone who breaches that provision is guilty of a hybrid offence under s 487.08(4) and liable to imprisonment for two years if the Crown proceeds by way of indictment.

[14] Most of the provisions of the *DNAIA* relate to a series of rules and procedures that govern the day-to-day operation of the NDDB. They include prohibitions on the use of samples and profiles, and provide for criminal sanctions for those who fail to comply with those prohibitions.

[15] For present purposes, ss 9.1 and 10.1 of the *DNAIA* are of particular importance. They focus on access to youth records and the removal and destruction of bodily substances that have been collected from young persons for purposes of inclusion in the NDDB. Both sections provide that in the case of young persons, the information in the NDDB shall be permanently removed and the bodily substances destroyed "when the record relating to the same offence is required to be destroyed, sealed or transmitted to the National Archivist of Canada under Part 6 of the Youth Criminal Justice Act".

Retention Periods for DNA Profiles and Samples of Young Offenders

[16] Part 6 of the *YCJA* contains an elaborate set of rules designed to protect the identity of young persons and any records that may have been generated as a result of their involvement in the Youth Criminal Justice System. It addresses the manner in which youth court records are to be kept and by whom; the people who can access them and under what circumstances; how long the records are to be kept; and when and by whom they are to be removed and destroyed.

[17] The *YCJA* and the *DNAIA* establish retention periods for DNA profiles and samples in various situations involving young offenders. The length of the retention period varies depending on whether an offence is prosecuted by way of indictment or by summary conviction, and depending on the nature of the offence and whether the offender commits a further offence.

[18] While acknowledging the complexity of the record retention periods created by the interaction of the *DNAIA* and the *YCJA*, what is relevant for present purposes is that DNA samples and profiles are removed and destroyed in similar fashion as fingerprints and photographs taken routinely in respect of young persons under s 113 of the *YCJA*.

Evidence

[19] The Crown tendered, with consent of the Respondent, an Affidavit of Jeffrey Gordon Modler who is the officer in charge of the National DNA Data Bank of Canada ("NDDB"). Mr. Modler also gave *viva voce* evidence by video link and was cross-examined on his Affidavit and *viva voce* testimony.

[20] Mr. Modler gave evidence regarding how DNA samples are collected, the steps that are taken to protect the individual's personal information, and the procedures used to ensure that information collected is only used for identification purposes.

[21] Where an event, including Part 6 of the *YCJA*, triggers the destruction of an offender's biological sample and removal of the DNA profile from the NDDB, Mr. Modler outlined the procedures involved in destroying biological samples and removing the DNA profile from the NDDB. Mr. Modler acknowledged that the NDDB relies on law enforcement to notify the NDDB that a triggering event has occurred. Accordingly, the NDDB's compliance with legislation requiring the destruction of biological samples and removal of the DNA profile

depends on whether law enforcement provides the NDDB with accurate and timely notification of a triggering event.

[22] Mr. Modler explained the various audits that are performed to ensure the NDDB complies with the legislation. The audits confirm that the procedures of the NDDB are compliant with the legislation. The findings of the audits are rated on a scale of severity as minor or serious. Minor errors include matters such as errors involving paper work. Serious errors include a laboratory using an unqualified individual or procedure, a data breach or including identification information that should not be included. No audit has found a serious error.

[23] Mr. Modler also included in his Affidavit statistics for the past five years indicating the number of samples of young persons that have been destroyed in accordance with the triggering events.

[24] The Respondents entered two exhibits with consent of the Crown. Exhibit 3 is a CIPIC printout for the Respondent and Exhibit 4 is a case tracking sheet for the Respondent. Both were printed on the same date, September 18, 2018. The last entry on Exhibit 3 is January 19, 2017. The last entry on Exhibit 4 is September 18, 2018. There are entries on Exhibit 4 after January 19, 2017 that do not appear on Exhibit 3. The purpose of this evidence is to demonstrate that some law enforcement databases are not up to date.

Section 7 of the *Charter*

[25] Section 7 of the *Charter* provides that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice"

[26] The analysis under s 7 involves two steps: the first is whether any of the enumerated rights are engaged; and the second is whether the deprivation is not in accordance with the principles of fundamental justice: ***Carter v Canada***, 2015 SCC 5 at para 55 ("***Carter***").

[27] Laws that infringe life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object: ***Carter*** at para 72.

[28] The principle of diminished moral blameworthiness of young persons under s 3(1)(b) of the *YCJA* is a principle of fundamental justice under s 7: ***R v DB***, 2008 SCC 25 at paras 47, 59, 61, 68, and 69.

[29] The onus is on the Respondent to prove on a balance of probabilities that the legislation is contrary to s 7 of the *Charter*: ***R v Ndhlovu***, 2016 ABQB 595 at para 77 ("***Ndhlovu***").

[30] The Respondent argues that this case involves a young offender where the facts of the sexual assault are minor. The legislation mandating a DNA sample from young offenders in all cases of sexual assault, regardless of the degree of seriousness of the sexual assault, renders the legislation arbitrary, overbroad, and disproportionate, and violates the principle of diminished moral blameworthiness of young persons. In the alternative, the Respondent argues that removing judicial discretion for primary mandatory offences is contrary to s 7 regardless of the seriousness of the offence or the nature of the offender.

[31] The Crown concedes that the physical and psychological security of the person is engaged. The Crown disputes that the legislation is arbitrary, overbroad or grossly

disproportionate. The Crown also disputes that the legislation violates the principle of diminished moral blameworthiness of young persons.

Principles and Objectives of the *DNAIA*

[32] Section 3 provides that "the purpose of this *Act* is to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences."

[33] The principles are set out in s 4:

> It is recognized and declared that
>
> (a) the protection of society and the administration of justice are well served by the early detection, arrest and conviction of offenders, which can be facilitated by the use of DNA profiles;
>
> (b) the DNA profiles, as well as samples of bodily substances from which the profiles are derived, may be used only for law enforcement purposes in accordance with this Act, and not for any unauthorized purpose; and
>
> (c) to protect the privacy of individuals with respect to personal information about themselves, safeguards must be placed on
>
> (i) the use and communication of, and access to, DNA profiles and other information contained in the national DNA data bank, and
>
> (ii) the use of, and access to, bodily substances that are transmitted to the Commissioner for the purposes of this Act.

[34] The objectives and importance of the *DNAIA* is well recognized in the caselaw. In ***R v Briggs*** (2001) 55 O.R. (3d) 417 (C.A.) the Ontario Court of Appeal recognized the broader purpose of the legislation stating at para 22:

> In this case, the state's interest is not simply one of law enforcement vis-à-vis an individual -- it has a much broader purpose. The DNA data bank will: (1) deter potential repeat offenders; (2) promote the safety of the community; (3) detect when a serial offender is at work; (4) assist in solving cold crimes; (5) streamline investigations; and most importantly, (6) assist the innocent by early exclusion from investigative suspicion (or in exonerating those who have been wrongfully convicted).

[35] More recently, the Ontario Court of Appeal in ***R v CS***, 2011 ONCA 252 at paras 81 - 82 ("***CS***") describes the objectives and importance of the legislation:

> Weiler J.A.'s description of the many benefits that society derives from the collection of DNA samples has received universal approval and was described at para 32 of *Rodgers* as a correct articulation of the broader "purpose of the legislative scheme".
>
> In light of *Briggs* and *Rodgers*, the importance of the state objective in enacting the DNA data bank legislative scheme, both as it relates to adults and young

> offenders, can scarcely be doubted. Indeed, I would describe its worth as inestimable in cases such as where the NDDB facilitates the apprehension of a serial sexual predator, or the exoneration of a person who has been wrongfully convicted.

The Legislation is not Arbitrary

[36] A law is arbitrary if there is no rational connection between the purpose of the law and the deprivation of life, liberty or security of the person: ***Canada (Attorney General) v Bedford***, 2013 SCC 72 at para 96 (***Bedford***).

[37] The Respondent argues that the purpose of the legislation is to assist law enforcement. This purpose assumes and relies on recidivist behaviour of all offenders in the designated offences category, including young offenders and even for the lowest-level of conduct contrary to s 271. For this reason, the legislation is arbitrary.

[38] Considering the broad purpose of the legislation I do not accept this argument. The fact that the legislation is used to exonerate individuals from suspicion and conviction indicates that the purpose of the legislation does not assume and rely on recidivist behaviour of all offenders.

[39] The Respondent also argues that including all young offenders on even the lowest-level of conduct that leads to a s 271 conviction bears no connection to the purpose of the legislation. The lack of judicial discretion arbitrarily places each and every offender in the same category regardless of the varying circumstances of the offender and the degree of severity of the offence.

[40] In my view this confuses the purpose of the legislation. The case law is clear that the legislation is an investigative tool, not a form of punishment or sanction: ***R v Rodgers,*** [2006] 1 S.C.R. 554 at para 5 ("***Rodgers***"); ***R v North***, 2002 ABCA 143 at para 33; and ***CS*** at para 141.

[41] The Respondent's argument erroneously assumes that young offenders convicted of sexual assault where the circumstances are at the lower end of severity will not commit further offences or benefit from early exclusion from investigative suspicion or wrongful conviction. Bearing in mind that the purpose of the legislation is an investigative tool, not punishment, the DNA of young offenders convicted of sexual assault involving less serious conduct assists with the investigative purposes of the legislation. I find that there is a clear rational connection between the broad purpose of the legislation and the deprivation.

The Legislation is not Overbroad

[42] Overbreadth is where the law is so broad in scope that it includes conduct that bears no relation to its purpose. There is no rational connection between the purposes of the law and some, but not all, of its impacts. The law may be rational in some cases, but it overreaches in its effect in others. The focus remains on the individual and whether the effect on the individual is rationally connected to the law's purpose: ***Bedford*** at paras 112 - 113.

[43] The Respondent's argument under this principle is similar to the argument as to why the legislation is arbitrary. This case involves a 17-year-old aboriginal male where the sentencing judge characterized the sexual assault as minor. The Respondent argues that this is a clear example of how including all offenders is overbroad as it goes beyond what is necessary to meet the objectives of the legislative scheme.

[44] Considering that the legislation is an investigative tool, not a punishment, DNA from all offenders, both young offenders and adults, regardless of the severity of the sexual assault, will assist with the broader purposes of the legislation Accordingly, I find that the legislation is not over broad.

The Legislation is not Grossly Disproportionate

[45] The question to ask under this principle is different than the question for arbitrariness and overbreadth. The question here is whether the law's effects on life, liberty or security of the person are so grossly disproportionate to its purposes that they cannot rationally be supported. This rule against disproportionality applies only in extreme cases where the seriousness of the deprivation is totally out of sync with the purpose of the legislation: ***Bedford*** at para 120.

[46] Gross proportionality does not consider the beneficial effects of the legislation for society. It balances the negative effects on the individual against the purpose of the law, not any benefits to society: ***Bedford*** at paras 121 - 122.

[47] The physical and psychological impact of the legislation has been considered in the case law. The physical intrusion caused by the taking of a DNA sample is minimal: ***R v RC***, 2005 SCC 61 at para 26. In ***CS*** at para 138 the Ontario Court of Appeal found that the legislative safeguards considerably reduce if not remove any psychological impact DNA sampling may cause.

[48] The Respondent argues that although the psychological security of young offenders in providing DNA samples is an issue, the main concern is that DNA is very different from a person's fingerprint in that it contains powerful information about an individual, far beyond a means of identification. It contains every detail of a person's biological make-up. While the legislation contains safeguards on the use of this information, nothing prevents Parliament from altering these safeguards in the future. Further, no system is perfect. Courts routinely deal with cases where privacy legislation is breached. While the legislation contains specific provisions for destruction of samples and DNA profiles for young offenders, the NDDB relies on information from law enforcement agencies as to when a young offender's sample and profile should be destroyed. Exhibit 3 and 4 demonstrate that the databases of law enforcement agencies are not always up to date. For these reasons, the effects of the legislation are grossly disproportionate.

[49] While future Parliaments can always amend legislation, this is not a proper consideration in determining whether the legislation as it exists today complies with the *Charter*.

[50] The Ontario Court of Appeal in ***CS*** at para 138 and the Provincial Court of Alberta in ***R v SQ***, 2010 ABPC 370 at para 120 found that the legislative safeguards against improper use of DNA samples and the legislation for destruction of DNA samples for young offenders are sufficient to address concerns about disproportionality.

[51] I find that the Respondent has not met the onus of proving on a balance of probabilities that safeguards in the legislation do not adequately protect against improper use of DNA samples or retention of DNA samples for young offenders indefinitely. The evidence of Mr. Modler persuades me that there are sufficient safeguards in the legislation that are being followed by the NDDB to protect an offender's privacy and to protect against the use of DNA samples for purposes other than identification. While Exhibits 3 and 4 indicate that law enforcement databases are not always up to date, this evidence is insufficient to prove that DNA samples are

not being destroyed in accordance with the legislation. The evidence of Mr. Modler is that in the last five years, DNA samples of young offenders are being destroyed.

The Legislation does not Violate the Principle of Diminished Moral Blameworthiness

[52] The Respondent argues that by including young offenders, the legislation does not account for the principle of diminished moral responsibility of young persons under the *YCJA*.

[53] I accept that the principle of diminished moral responsibility is a principle of fundamental justice. I find that the legislation does not violate this principle because diminished moral blameworthiness relates to questions of punishment and DNA orders are not a form of punishment: ***CS*** at para 141; ***Rodgers*** at paras 63-64. In addition, as previously outlined, the legislation provides for retention and destruction periods for the DNA profiles and samples of young offenders.

The Lack of Judicial Discretion Does Not Violate s 7

[54] The Respondent argues in the alternative that by removing judicial discretion for mandatory designated offences, the legislation violates s 7. The deprivation of a hearing and an opportunity to be heard violates s 7 for all offenders, not just young offenders and for all offences, regardless of the factual seriousness of the offence.

[55] As the requirement to provide a DNA sample is not a punishment, but an investigative tool, I find that the deprivation of a hearing and an opportunity to be heard does not violate s 7 of the *Charter*.

[56] The Respondent relies on the decision in ***Ndhlovu***, to support several of the arguments. ***Ndhlovu*** considered whether the requirements of the *Sex Offender Information Registration Act* ("*SOIRA*") is unconstitutional. ***Ndhlovu*** is distinguishable from this case for many reasons including: in ***Ndhlovu*** the Crown conceded that the registry is established on the assumption of recidivism. This concession is not made in this case; the deprivation of liberty in the *SOIRA* is more serious than the DNA legislation; and the limited retention periods for DNA samples taken from young persons is absent in the *SOIRA*.

Conclusion

I conclude that the legislation requiring a court to impose a mandatory DNA order for young offenders convicted of a primary mandatory offence does not violate any principle of fundamental justice. The Respondent's application for a declaration that s 487.05(1) of the *CCC* violates s 7 of the *Charter* is dismissed.

[57] The Crown's appeal of the trial judge's refusal to grant the DNA order is allowed. I grant an order that the Respondent provide a DNA sample by September 20, 2019.

Heard on the 23rd day of August, 2019.
Dated at the City of Edmonton, Alberta this 29th day of August, 2019.

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

Appearances:

Deborah J. Alford
Justice and Solicitor General
Appeals, Education & Prosecution Policy Branch
for the Appellant

Graham Johnson
Dawson Duckett Garcia & Johnson
for the Respondent