WARNING

The President of the panel hearing this appeal directs that the following should be attached to the file:

An order restricting publication in this proceeding under ss. 486.4(1), (2), (3) or (4) or 486.6(1) or (2) of the *Criminal Code* shall continue. These sections of *the Criminal Code* provide:

> 486.4(1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the complainant or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> (a) any of the following offences;
>
> (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 172, 172.1, 173, 210, 211, 212, 213, 271, 272, 273, 279.01, 279.02, 279.03, 346 or 347,
>
> (ii) an offence under section 144 (rape), 145 (attempt to commit rape), 149 (indecent assault on female), 156 (indecent assault on male) or 245 (common assault) or subsection 246(1) (assault with intent) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 4, 1983, or
>
> (iii) an offence under subsection 146(1) (sexual intercourse with a female under 14) or (2) (sexual intercourse with a female between 14 and 16) or section 151 (seduction of a female between 16 and 18), 153 (sexual intercourse with step-daughter), 155 (buggery or bestiality), 157 (gross indecency), 166 (parent or guardian procuring defilement) or 167 (householder permitting defilement) of the *Criminal Code*, chapter C-34 of the Revised Statutes of Canada, 1970, as it read immediately before January 1, 1988; or
>
> (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in any of subparagraphs (a)(i) to (iii).
>
> (2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and

(b) on application made by the complainant, the prosecutor or any such witness, make the order.

(3) In proceedings in respect of an offence under section 163.1, a judge or justice shall make an order directing that any information that could identify a witness who is under the age of eighteen years, or any person who is the subject of a representation, written material or a recording that constitutes child pornography within the meaning of that section, shall not be published in any document or broadcast or transmitted in any way.

(4) An order made under this section does not apply in respect of the disclosure of information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community. 2005, c. 32, s. 15; 2005, c. 43, s. 8(3)(b).

486.6(1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

(2) For greater certainty, an order referred to in subsection (1) applies to prohibit, in relation to proceedings taken against any person who fails to comply with the order, the publication in any document or the broadcasting or transmission in any way of information that could identify a victim, witness or justice system participant whose identity is protected by the order. 2005, c. 32, s. 15.

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bauer, 2013 ONCA 691
DATE: 20131114
DOCKET: C57295

Weiler, Watt and Pepall JJ.A.

BETWEEN

Her Majesty the Queen

Applicant/Appellant

and

Dennis Bauer

Respondent

Michelle Campbell, for the appellant

Robert C. Sheppard, for the respondent

Heard: November 5, 2013

On appeal from the sentence imposed on June 6, 2013 by Justice J. C. George of the Ontario Court of Justice.

ENDORSEMENT

[1] The Crown seeks leave to appeal the respondent's eight month sentence for sexual interference.

[2] The appellant submits that the sentencing judge erred:

(a) by overemphasizing the *Gladue* principles; and

(b) by failing to give proper effect to the principles of denunciation and deterrence resulting in a sentence that is manifestly unfit and outside the appropriate range.

[3] At trial, the appellant requested a sentence in the range of two to three years. While the appellant now submits that the appropriate sentence is in the range of five to six years, in light of its position at trial, the appellant seeks a sentence of three years.

Facts

[4] At the time of the offence, the victim was 14 years of age. She was a close friend of the respondent's daughter whom she had known since grade four. The victim was being bullied at school. She began to attend at the respondent's home on a daily basis. The respondent, who was 40 years old at the time, told her that he too had been bullied and could help her deal with it. The two began to exchange text messages. After a few months, the respondent began telling the victim that his sex life with his wife was unsatisfactory. He invited the victim to engage in his sexual fantasies. When the victim was unresponsive, he threatened to kill himself.

[5] While the victim initially resisted the appellant's advances, he persisted and the victim began to feel that she was in a relationship with him. She would regularly meet him in his truck before and after school. He digitally penetrated the victim without her consent and, after this the respondent routinely digitally penetrated the victim. On one occasion, he had sexual intercourse with her without using a condom. He also penetrated her with a vibrator and placed a ball gag in her mouth.

[6] The police were contacted when the victim's father discovered some of the text messages on the victim's cell phone. By this time, the respondent and the victim would communicate upwards of 600 times per day.

[7] The respondent pled guilty to the offence of sexual interference.

[8] The respondent obtained a secondary school diploma. He has worked as a fabricator for the past 12 years. He has no prior criminal record. He has been married for many years and has three children.

[9] The respondent and his mother are members of the Kettle and Stony Point First Nation. She attended a public off-reserve school where she was subject to racism. The respondent's father is of German descent. The respondent's parents have been married for over 45 years and continue to live in London where they raised the respondent and his sister. They owned and successfully operated a variety store and a Dairy Queen there. They worked hard and with substantial savings, were able to retire when the respondent was 14 years

old. The respondent was disciplined by his father through corporal punishment. The respondent felt that his parents doted on his sister and that he was unloved.

[10] The respondent did not grow up in an Aboriginal community. His father was a disciplinarian who disapproved of any Aboriginal cultural involvement or practices within their home. Accordingly, the respondent's knowledge of, and participation in, Aboriginal culture is limited. The respondent asserted that his only connection to Aboriginal culture was through regular visits with his maternal grandparents who resided on the reserve. His grandfather died when he was 13 and his grandmother died when he was 30.

[11] The impact of the offence on the victim and her family has been enormous. She had previously been an A student. Her marks fell. She switched schools and lost most of her friends. She commenced self-cutting and was on suicide watch. She suffers frequent panic attacks and has been put on anti-depressants. She has been accused of lying about the offence. Her father admonishes himself for having failed to protect her.

Grounds of Appeal

(1) Did the sentencing judge err in the *Gladue* analysis by overemphasizing factors that had limited application to this particular accused?

[12] The respondent accepts that the sentencing judge imposed a lesser sentence than he would have if not for the *Gladue* principles. He submits that there is no way of quantifying the differential and submits that the overall sentence was nonetheless fit.

[13] While the sentencing judge did correctly state the *Gladue* principles, he failed to "tie them in some way" to the offender and the offence and in so doing, underemphasized the respondent's moral culpability for this offence. While an Aboriginal offender need not establish a direct causal link between his circumstances and the offence, the *Gladue* factors need to be tied in some way to the offender and the offence (*R. v. Ipeelee*, 2012 SCC 13 (CanLII), [2012] 1 S.C.R. 433 at para. 83. See also *R. v. Gladue*, 1999 CanLII 679 (SCC), [1999] 1 S.C.R. 688). The rationale for *Gladue* is that many Aboriginal offenders come from situations of social and economic deprivation with few opportunities for positive development and these circumstances may diminish their moral culpability (*R. v. Ipeelee*, at para. 73).

[14] In this case the respondent's circumstances did not diminish his moral culpability. As the *Gladue* report indicated, the respondent's knowledge of, and participation in, his Aboriginal culture was limited. He grew up off-reserve and was raised by parents who have been married for over 45 years and who ran a

successful business. There was no suggestion of any residential school history within his mother's family of origin. The respondent never attended a residential school and there is no evidence he experienced any sexual abuse, discrimination, or forced displacement.

[15] In the circumstances, the judge's emphasis on addressing the impact of residential schools, displacement from communities, and higher incidents of suicide, substance abuse and incarceration among Aboriginal people was misplaced in this case. There was nothing in the *Gladue* report that would warrant a sentence outside the normal range.

(2) Does the sentence imposed fail to give proper effect to denunciation and deterrence and result in a sentence outside the range and that is manifestly unfit?

[16] Quite apart from the foregoing, the sentencing judge failed to appreciate the gravity of the offence and the culpability of the offender. This was an exploitative, repeated and demeaning series of sexual assaults against a vulnerable 14 year-old by a person in a position of trust. An eight month sentence cannot adequately reflect the principles of denunciation and deterrence. The judge appears to have treated the child's acquiescence as a mitigating factor; he said that she had not been raped. However, a child's willing participation is not a mitigating factor in circumstances where the respondent made the victim feel that she was in a relationship with him (*R. v. P.M.* (2002), 2002 CanLII 15982 (ON CA), 155 O.A.C. 242 (C.A.)).

[17] Mid-to-upper single digit penitentiary sentences are appropriate where an adult in a position of trust sexually abuses a young child on a regular basis over a substantial period of time (*R. v. D.D.* (2002), 2002 CanLII 44915 (ON CA), 58 O.R. (3d) 788 (C.A.), at para. 44). This range may apply even to a single instance of sexual abuse (*R. v. Woodward*, 2011 ONCA 610 (CanLII), 284 O.A.C. 151 (C.A.)).

[18] The respondent groomed the victim and used emotional blackmail. Not realizing that she was being manipulated by the offender, the complainant was seduced into thinking that she was in a relationship with him. This was not an isolated incident of sexual interference. The first instances were forced. The respondent used a vibrator and a ball gag without the victim's consent. The abuse escalated over time to include one incident of full unprotected intercourse thereby exposing the victim to the possibility of an unwanted pregnancy and the risk of sexually transmitted disease.

[19] It is of paramount importance that children be protected from seducers and predators through sentences that emphasize the principles of denunciation

and deterrence. The sentence is manifestly unfit and an unjustifiable departure from the range.

[20] Under the circumstances, a three year sentence of incarceration less time spent in post-conviction custody is fit and appropriate. We calculate time spent as amounting to 162 days (June 6, 2013 – November 14, 2013). In giving this sentence, we are not departing from the *R. v. D.D.* range but are giving effect to the range of sentence sought by the appellant. The ancillary orders remain in place.

[21] Leave to appeal sentence is granted, the appeal allowed, and the sentence imposed at trial varied in accordance with these reasons.

"K.M. Weiler J.A."
"David Watt J.A."
"S.E. Pepall J.A."