

[2024] N.W.T.J. No. 19 | 2024 NWTTC 2

Between His Majesty the King, and Kyle King

(26 paras.)

Case Summary

Criminal law — Criminal Code offences — Sexual offences, public morals, disorderly conduct and nuisances — Offences tending to corrupt morals — Child pornography — Action by the Crown to review representative sample of child pornography or Child Sex Assault Material ("CSAM"), denied — The Crown argued that in spite of the fact the CSAM was described, the court should still view it — The court did not review the CSAM — The descriptions detailed were more than adequate to describe what the photos and videos depicted.

Action by the Crown to review representative sample of child pornography or Child Sex Assault Material ("CSAM"). King had pleaded guilty to charges of having possessed child pornography. An Agreed Statements of Facts ("ASF") was filed, agreed to by the Crown, defence, and the accused, detailing the acts portrayed in the photos as well as the videos. The Crown argued that in spite of the fact the CSAM was described, the court should still view it. The defence submitted that while the court clearly had the power to do so, viewing the CSAM was unnecessary as it would add nothing in light of the description in the ASF.

HELD: Action denied.

The court analyzed all the possible outcomes and the only possible positive outcome the court saw was that observing the horrible child sexual violence will somehow improve the court's appreciation of the harm. It suggested by implication that the court was incapable of doing so by the understanding of the words used to describe the act. The replaying of CSAM would revictimize their victims. The facts in this case were admitted and the descriptions detailed were more than adequate to describe what the photos and videos depicted. As such, the court did not review the CSAM. However, it allowed the Crown's application to play the representative sample on his laptop faced towards him and describe what was being depicted. The court found the description added no further insight or probative value to the already described photos and videos.

Statutes, Regulations and Rules Cited:

Criminal Code, [R.S.C. 1985, c. C-46, s. 163.1\(3\)](#), s. 163.1(4), s. 163.1(4.1), s. 723(2), s. 726.1

Counsel

Counsel for the Crown: Morgan Fane.

Kira Berkeley

Counsel for the Accused: Evan McIntyre.

[Ss. 163.1(3), 163.1(4.1) and 163.1(4) of the *Criminal Code*]

REASONS FOR JUDGMENT

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I. INTRODUCTION

1 Kyle King has pleaded guilty to charges of having possessed child pornography contrary to section 163.1(4) of the *Criminal Code*.

2 His sentencing hearing was held on November 8th, 2023, in Hay River, Northwest Territories. The sentencing was to be held in Fort Providence, Northwest Territories, but inclement weather forced the hearing to be held in Hay River, with the consent of all parties.

3 Prior to sentencing, the Crown had requested the court to review a representative sample of the child pornography (hereinafter referred to as "CSAM", or Child Sex Assault Material). The court was not inclined to do so without representations by counsel and hearing of those representations at the commencement of proceedings, and after guilty pleas were entered.

4 It should be noted that an Agreed Statements of Facts ("ASF") was filed, agreed to by both the Crown, defence, and the accused, detailing the acts portrayed in the photos as well as the videos. Secondly, there was no joint submission; the Crown sought 2 years custody, the defence 1 year custody. Neither party suggested a conditional sentence order was appropriate.

5 After representations by both counsel (in short, the Crown argued that in spite of the fact the CSAM was described, the court should still view it. The Crown relied on the decision of *R. v. LaPlante*, [2021 NWTSC 29](#), and submitted that *R. v. Sullivan*, [2022 SCC 19](#), supports judicial comity and *stare decisis*, and that this court should follow that decision. The defence submitted that while the court clearly has the power to do so, viewing the CSAM is unnecessary as it would add nothing in light of the description in the ASF.) The court held that it would not view the CSAM and gave verbal reasons. The court further advised that it would be giving written reasons as to why it declined to view the CSAM, which are included herein. It was agreed by all parties that sentencing would proceed, and the accused was sentenced to 20 months incarceration (less any pre-trial custody) along with ancillary orders.

II. ANALYSIS

a. Whether the court should view a representative sample of the material found in Mr. King's possession

6 Paragraphs 13 to 20 of the ASF describe both the numbers and content of Mr. King's CSAM collection. The court includes them verbatim.

Forensic Analysis of Devices Seized - CSAM

13. Forensic analysis of Mr. King's devices revealed 1,731 unique images and 140 unique videos of accessible CSAM. An additional 512 unique images and two videos of CSAM were inaccessible on the device.
14. An 'accessible' file is one that is 'visible' to an ordinary user accessing the computer. It can be played, shared, and ultimately deleted.

15. An 'inaccessible' file is one that has its data still stored on the media used by the computer but is not 'visible' as a file to an ordinary user. Inaccessible files are almost exclusively the result of an accessible file being deleted, either automatically or at the command of the computer user.
16. Of the accessible unique images of CSAM, 58 depicted human children and 1,673 were computer-or hand-animated.
17. Of the accessible unique video, which in total comprises two hours and 26 minutes of video, 62 videos depict human children and 80 videos depict computer- or hand-animated video.
18. The human children in the images and video are females between the approximate ages of infancy to 8 years old.
19. The animated children are depicted as being between the approximate ages of infancy to 12 years old. They are depicted as being in stages of pre-pubescent to early puberty.
20. Both the human and animated CSAM depict the following:
 - * Erotic poses with genitalia exposed;
 - * Children posing in lingerie;
 - * Children engaged in vaginal and anal intercourse;
 - * Children masturbating;
 - * Children performing fellatio and cunnilingus;
 - * Children with what appears to be semen on their faces and bodies;
 - * Children naked, gagged, and bound;
 - * Children naked, bound, gagged, and engaged in sexual activities;
 - * Children using sex toys on their own and with adults;
 - * Children engaged in sexual activities with other children;
 - * Children engaged in sexual activities with animals;
 - * Children engaged in sexual activities with adults; and
 - * Children engaged in sexual activities with multiple adults at the same time.

7 The *Criminal Code* requires a sentencing court to hear any relevant evidence presented by the prosecutor or the offender, and to consider any relevant information placed before it in determining the sentence. *Criminal Code*, [R.S.C. 1985, c. C-46, ss 723\(2\)](#) and 726.1.

8 While the material is unquestionably relevant (its possession is the offence), the admissibility of such relevant evidence is not absolute in Canadian criminal law. The court has an overriding discretion to exclude relevant evidence on grounds including that its prejudicial effect would outweigh its probative value. *R. v. P.M.* [2012 ONCA 162](#), paras 31-33.

b. Reasons for not viewing the representative sample of CSAM

9 When balancing "relevance" against "prejudicial value outweighing probative value" the court must analyze the possible outcomes. Number 1, after viewing the CSAM, the court becomes so enraged at the horrible content that the court is at risk of imposing an unduly harsh sentence. This is not in the interests of justice. Number 2, after viewing the CSAM, the court will become so enraged that it will attempt to overcome its revulsion by attempting to mitigate the sentence and potentially give a lower than appropriate sentence. This again, is not in the interests of justice. Number 3, after viewing the CSAM, the court becomes so enraged and repulsed and is overwhelmed by the sights, it simply declares a mistrial, and sets it upon another justice to review. Again, not in the interests of justice. The only possible positive outcome this court can see is after running the gauntlet of all those risks, that observing the horrible child sexual violence will somehow improve the court's appreciation of the harm, which by implication

suggests the court is incapable of doing so by the understanding of the words being used to describe the act. Certainly, the risk of prejudice in this scenario, clearly outweighs the benefit.

10 Following up on the last point, this judge is the recipient of an excellent Grade 12 education from Alberta, as well as university degrees, and this judge understands words and can picture in this judge's mind's eye what those words mean and depict. Can it reasonably be argued that the descriptions contained in the ASF are insufficient to allow the court to comprehend the horror of child sexual violence? What is it in paragraph 20 of the ASF that needs clarification or expansion? This court would suggest nothing.

11 Following the logic of being forced to view the pictures and videos, and not relying on detailed descriptions, it is sad how miserably this court will fail when the court has to actually write a decision and use words, for the court cannot draw diagrams, stick men, paint a Monet or even attach the criminal images to the decision. The court will have to write and use words. Words are the paintbrush of the judicial craft. And those words will be the words of the defence and Crown, contained in the agreed-upon facts, words written by officers of the court that the court is entitled to rely on. The court is entitled to rely on their judgment much like the court can rely on joint submissions.

12 Parliament, the courts, Crown and victim advocates all allude to the fact, which this court accepts, that the replaying of CSAM revictimizes their victims. This court does not accept the proposition that their revictimizations will be any less painful when it is revisited by one of "the good guys". Where a description is contained in the ASF, as was done in this case, there is nothing left to imagine. The victims deserve better.

13 Further, if at any point this court believed it was appropriate to view this CSAM, the court would be compelled to seek the victims' views on the issue of the court viewing their sexual degradation as per the Victims Bill of Rights. Secondly, where a detailed description has been provided to the courts, the court would require that the victims be made aware of that fact prior to providing their views.

14 With respect to harm in general, Parliament has criminalized this conduct not only because of the harm to victims, but because of harm to offenders. We know it harms judicial participants, including investigators, victims' service workers, and judges. We have branches of medical science devoted to the assessment and treatment of pedophilia. We have the same branches of medical science devoted to the assessment and treatment of vicarious trauma for police, childcare workers and judicial participants who have to deal with this trauma. We know what viewing these stark criminally obscene photos and videos, depicting child violence, can cause. Again, when adequate descriptions exist, why would we put participants involved in the judicial system at risk?

15 With respect to the proposition that the court must view the CSAM because of the fact it is "the offence of possessing it" seems to disregard other rules of evidence. If, for instance, the facts were in dispute, such as the Crown averring the material is CSAM and the defence saying it is not CSAM, the court must review it because it is a fact in issue. However, the facts are admitted. Further, while this court has seen descriptions in previous cases that are reported in greater detail, the descriptions detailed are more than adequate to describe what the photos and videos depict. The court is loathe to go behind those admissions.

16 But just as importantly, the rules of evidence in Canadian criminal law allow for a fact to be proven in multiple ways. For instance, proof of death; the court does not have to view photos of a dead body with bullet holes in the head to prove the deceased is deceased, no more so than they would have to exhume the body or head down to the morgue. A properly admitted autopsy report is another way for the court to say, "I have proof that there is a death"; even admission of death between the Crown and defence is a way to prove death. An admission of child pornography along with the description by both parties is surely another.

17 The courts in the past have prevented juries' from viewing graphic death scenes on the principle of the prejudicial value outweighing the probative value. While the distinction may be made that judges are capable of disabusing their minds of photos of grotesque child violence, the principle is the same. The facts are proven by different means before the trier of facts. It is not a novel concept.

18 Words can describe photos and videos. It is more difficult to describe feelings with words, as feelings are more subjective than pictures. This court agrees with previous judicial sentiments that have described CSAM as "child torture". It is vile and viewing it is an assault on the senses. Yet words can describe it. It is far more difficult to describe the pain of being bear sprayed or tasered, yet no one in their right mind would ask the court to undergo that experience to appreciate it, even though this court is convinced words don't adequately describe it.

19 Another factor that concerns this court is the fact that the *actus reus* and *mens rea* of the offence are knowing that the material is CSAM and possessing it is the crime. Crown, the defence and the court cannot possess these materials in their homes or in their offices even for laudable purposes, such as it is a remembrance of how evil this material is. It is a crime to possess it and view it. The only defence we would have to the possession and to the viewing of it, is that it is necessary or essential to the administration of justice to view it. But where this court has concluded for the many reasons stated that the court does not believe it is necessary to view it, does the court not have the same *mens rea* as the offender? Quite frankly, this court feels morally compromised in viewing this criminal material, in light of the fact the court has a complete understanding, by its description, of its contents.

20 The case the court wishes to discuss is *R. v. Hunt*, [2002 ABCA 155](#), as both *R. v. LaPlante*, [2021 NWTSC 29](#) as well as *R. v. GKS*, [2019 ABPC 75](#) refer to it. While *R. v. GKS* held that *Hunt* was binding on the Provincial Court (now the Alberta Court of Justice) the court in *GKS* did not view the CSAM. In *R. v. LaPlante*, while the court did not comment on the binding nature of *Hunt*, the court referenced it, cited *GKS* as stating *Hunt* was binding, and viewed the CSAM. With the greatest of respect, and using the Alberta Court of Appeal's own words, *Hunt* is not binding authority, as I will describe below.

21 *Hunt* was a 2002 decision of the Alberta Court of Appeal which was a sentence appeal. And it struck me when the Ontario Court of Appeal in *R. v. P.M.*, [2012 ONCA 162](#), a 2012 decision which runs counter to it, highlights that the Alberta Court of Appeal decision in *Hunt* was in "a memorandum of judgment", which I will return to in a moment. As the Ontario Court of Appeal carefully points out in *R. v. P.M.*, the offender in *Hunt* had argued that the images should not be viewed because the parties had entered in to an agreed statement of facts, and the Crown was then barred from going beyond that statement of facts. That respectfully was the issue before the court in *Hunt*. The court considered that and found there was no such agreement that prevented the Crown from entering the images into evidence at the sentencing hearing.

22 The court in *Hunt* then noted defence did not suggest the prejudicial value outweighed the probative value, which is exactly what the court is suggesting here today. While the court in *Hunt* "doubted" the argument could be made, they did not entertain it, nor did they hear any submissions respecting it or any of the other issues it raised. And that may well have been as a result of the fact the issue was whether or not there was an agreement made between the Crown and defence not to enter them. Secondly, and as I said I would get back to, the Alberta Court of Appeal in *Hunt* was a memorandum of judgment, not reasons for judgment or reasons for a judge-reserved decision. And I point that out because a memorandum of judgment has "little weight as precedent". And I say that not from my perspective; those are the very words of the Alberta Court of Appeal. In *R. v. Arcand*, [2010 ABCA 363](#), the Alberta Court of Appeal took great pains to describe why sentencing memoranda have little weight as precedent. For completeness, I enclose their detailed analysis.

2. Why Do Sentencing Memoranda Have Little Weight as Precedent?

[215] What weight to give to sentencing Memoranda of Judgment of this Court is not a theoretical issue. The Reconsideration Cases cannot be squared with otherwise binding Court precedent, and yet some counsel wish to rely on them. Hence the desire to jump the hurdle that sentencing Memoranda of Judgment have little weight as precedent. There are good reasons why sentencing Memoranda of Judgment are generally accorded less weight as precedent. We set out below ten reasons.

(a) Factual Decisions

[216] Most sentencing decisions are heavily fact driven. Specific sentencing outcomes are not themselves precedents because each case is a unique mixture of aggravating and mitigating factors. Further, oral decisions rendered from the bench are seldom helpful because all the facts are typically

not set out in the short reasons given. Thus, accurate comparisons of one case to another will frequently suffer from this shortcoming.

(b) Drafting Precedent

[217] Courts of appeal do more error correcting than law making, yet give reasons in almost all cases. It takes much more time and work to write a precedential decision accurately enough worded to be cited, than to write a few paragraphs telling the unsuccessful party why he or she lost.

(c) Volume of Work

[218] Typically, each single sentence appeal involves a myriad of facts, yet turns on only one or two of those. The sentencing judge's reasons may be comprehensive and largely unchallenged. If the only aim of the appeal is quickly to correct a single point, then the resulting memorandum will likely focus on that point and only the facts related to it. It would not be practical to embroider all judgments with topics not in dispute. It is clearly more practical to recognize the aim generally of memorandum sentencing judgments: it is focussed, modest, and thus limited.

(d) Urgency

[219] A draft judgment which will make a new general law must be circulated to the whole Court. That is this Court's rule. But often a sentence appeal would become moot or unjust after two or three months, so reserving decision is impossible. A solution to the dilemma is a quick Memorandum of Judgment not making any new general law.

[. . .]

(g) Different Audiences

[222] There are many possible audiences for whom a judgment might be written or spoken: whether they are reserved reasons or memoranda usually suggests who is the intended audience. For example, if judges write a judgment for the parties alone, the judgment will generally advert briefly (if at all) to legal principles and not define such principles exactly, still less explain them. The dangers of relying exclusively on a brief recital of some law which contains no statement of its context are illustrated in English authority.

(h) Economy and Fairness

[223] Counsel who see and hear no suggestion of novel or contested law are entitled to prepare economically, and not research all the law and policy on each possible topic in each case.

(i) Dismissal Does not Mean Agreement with Sentence

[224] Given the deferential standard of review on appeal, dismissing a sentence appeal does not indicate agreement with the sentence, and still less does denying leave to appeal. Most sentence appeals are dismissed. All sentence appeals to the Court of Appeal need leave to appeal. If the law dictated equal precedential weight for all sentencing Memoranda of Judgment, then panels would often deny leave instead of dismissing appeals. There is clearly no duty routinely to give reasons for denying leave to appeal sentence.

(j) Retroactivity

[225] It would be unfair to change the weight of precedent retroactively. Were the rule of precedent different, most Memoranda would have been written with different explanations, or with many more facts and recitals.

3. Conclusions on Sentencing Memoranda of Judgment

[226] Neither precedent, nor the Court's Practice Directions, nor this judgment says that sentencing Memoranda never have any use as precedent. Nor does Alberta authority or any Practice Direction forbid counsel from citing sentencing Memoranda of Judgment. But counsel must not think that all

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authorities will have heavy weight and sway courts. Some authority either has little weight, or is overborne by other authority.

[227] The precedential value of a sentencing Memorandum of Judgment will be a function of the reasoning contained therein. There may also be situations where a *collection* or *series* of sentencing memos could have use as precedent. Additionally, a Memorandum of Judgment, because of the detailed reasoning it contains, may come to be adopted by one or more reserved judgment of this Court or by the Supreme Court.

23 This principle was recently reiterated by the Court of Appeal in *R. v. Oka*, [2022 ABCA 265](#), where Justice Wakeling advised at para 21:

This Court has warned counsel and sentencers of the little precedential value of appellate sentencing opinions:44

Great care must be exercised when assessing the precedential value of appeal court sentencing judgments. Some appellate opinions reveal the range of sentences that the appeal court believes is fit. *Most do not* [emphasis in original].

24 In the footnote to this statement, Justice Wakeling set out at length the Court of Appeal's ongoing exhortations to approach sentencing memorandum of judgments with caution, citing the Court's decisions in *R. v. Martial*, [2018 ABCA 201](#), *R. v. Ryan*, [2015 ABCA 286](#), *R. v. Cabrera*, [2021 ABCA 291](#), *Arcand*, *R. v. Tran*, [2010 ABCA 317](#) and *R. v. Kollie*, [2021 ABCA 389](#), all making the point sentencing decisions are to be approached with caution.

III. CONCLUSION

25 For all of the above reasons, the court did not review the CSAM. Upon my conclusion to this end, the Crown, unaware of the Courts decision, sought leave to play the representative sample on his laptop faced towards him and describe, in his own words, what was being depicted. Defence took no position, although opined that in light of the agreed upon description in the ASF, it would offer little of probative value. As a result of the fact the Crown could not have foreseen the courts decision, the court allowed the Crown's application and the representative sample was described. In conclusion on this point, the court found the description added no further insight or probative value to the already described photos and videos.

26 While I do not wish to imply that the following is any scientific or statistically accurate survey, I can advise that all of the judges I have ever discussed this matter with, whether in private or at conferences dealing with judicial wellness, have talked about the trauma and revulsion they have experienced by viewing same. Not one has ever expressed that their appreciation or understanding was enhanced by the experience of viewing CSAM. In short, all have expressed they wished they had never viewed it.

V. MYERS DEPUTY J. TERR. CT.

Dated at Yellowknife, Northwest Territories this day of March, 2024.