TOP FIVE 2016

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

R v LLOYD, 2016 SCC 13, [2016] 1 SCR 130

Date Released: April 15, 2016

Full decision: https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/15859/index.do

Facts

Joseph Ryan Lloyd was a drug addict and dealer in Vancouver's downtown east side. He was addicted to cocaine, methamphetamine, and heroin, and sold drugs to support his habit. In February 2013, he was convicted of possession of methamphetamine for the purpose of trafficking. One month after his release, he was charged with and convicted of three additional counts of possession for the purpose of trafficking.

Section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act (CDSA)* required a one year minimum sentence for any person that traffics or possesses a substance if that person was convicted of a substance offence in the previous 10 years. Since Mr. Lloyd had been convicted of an earlier drug offence, the judge was required to give him a jail sentence of at least 12 months. His lawyers tried to argue that he only had small amount of drugs when he was charged and the sentence therefore amounted to cruel and unusual punishment in violation of s. 12 of *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

Procedural History

Galati J. of the British Columbia Provincial Court of Justice found Mr. Lloyd guilty. Justice Galati acknowledged that lower sentences have occasionally been imposed on repeat offender, drug-addicted traffickers; however, based on the particular facts of Mr. Lloyd's case, he found that the appropriate sentence for Mr. Lloyd was 12 months.
On the constitutional issue, Justice Galati concluded that s. 5(3)(a)(i)(D) of the *CDSA* violated s. 12 of the *Charter* because the one-year mandatory minimum sentence would amount to cruel and unusual punishment in some circumstances (although not in Mr. Lloyd's particular case) – for example, where an addict possesses a small amount of drugs to share with a spouse or a friend. A one-year sentence for such an offender, the Court

held, would be grossly disproportionate to what is justified by sentencing principles. Justice Galati found that the violation of s. 12 could not be justified under s. 1 of the *Charter*, and sentenced Mr. Lloyd to one year of imprisonment.[1]

The British Columbia Court of Appeal held that provincial court judges do not have the power to declare laws constitutionally invalid; only superior courts have such a power. The Court of Appeal therefore set aside the provincial court judge's declaration of unconstitutionality and declined to consider the constitutional challenge to the mandatory minimum provision itself. The Court of Appeal also allowed the Crown's sentence appeal and increased Mr. Lloyd's sentence to 18 months imprisonment concurrent for the three offences. The Court held that a higher sentence was justified because (1) Mr. Lloyd possessed three different substances for street-level distribution; (2) the substances are dangerous, highly addictive, and socially destructive; (3) he committed the offences while on probation; (4) he was carrying a knife in a sheath, contrary to the terms of his probation; (5) he had a lengthy criminal record, with 21 prior convictions; and (6) his attempts at rehabilitation were minimal, and he showed little insight into the harm caused to others.[2]

Mr. Lloyd appealed to the Supreme Court of Canada (SCC).

Issues

1. Did the provincial court judge have the power to decide the constitutionality of the mandatory minimum sentence?
2. Is the mandatory minimum sentence law at issue unconstitutional?
3. Did the Court of Appeal make an error in increasing Mr. Lloyd's sentence to 18 months?

Decision

The appeal was allowed. Section 5(3)(a)(i)(D) of the *CDSA* was declared to be inconsistent with s. 12 of the *Charter* and the violation was not justified under s. 1. The SCC therefore declared it of no force or effect. It also set aside the sentence of the Court of Appeal and restored the sentence of one year imprisonment that was imposed by the provincial court judge.

Ratio

The minimum mandatory sentence imposed by s. 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* violates s. 12 of the *Charter* because it imposes a penalty that is grossly disproportionate to the offence and the broad array of potential circumstances under which it may arise.

[1] See *R. v. Lloyd, 2014 BCPC 8* and *R. v. Lloyd*, 2014 BCPC 11
[2] See *R. v. Lloyd*, 2014 BCCA 224

Reasons

A. Did the provincial court judge have the power to decide the constitutionality of the mandatory minimum sentence?

Writing for the majority, McLachlin C.J. held that existing law is clear that provincial court judges are not empowered to make formal declarations that a law is of no force or effect under the Constitution; only superior court judges of inherent jurisdiction and courts with statutory authority have such power. However, provincial court judges do have the power to determine the constitutionality of a law where "it is properly before them". That is, when the issue arises in a case the judge is hearing, they have the power to determine its constitutional validity. Since Mr. Lloyd had challenged the mandatory minimum that formed part of the sentencing regime that applied to him, the provincial court judge was entitled to determine the constitutionality of the provision put before him. Justice Galati ultimately concluded that the mandatory minimum sentence was not grossly disproportionate.

The SCC confirmed that the effect of such a finding by a provincial court judge is that it permits the judge to refuse to apply the mandatory in the specific case before it. The law itself remains in full force or effect, unless a formal declaration of invalidity is made by a court with the power to do so. The SCC concluded that the provincial court judge was within his power to consider the constitutional validity of the sentencing provision in the course of making his decision in Mr. Lloyd's case.

B. Is the mandatory minimum sentence law at issue unconstitutional?

The SCC outlined the legal test that needs to be met in order to find a violation of s. 12 of the *Charter*. A sentence will infringe s. 12 if it is "grossly disproportionate" to the punishment that is appropriate, considering the nature of the offence and the specific circumstances of the offender.[3] To be "grossly disproportionate", a sentence must be so excessive that it is an outrage to society's standards of decency and would be considered abhorrent or intolerable to most people.

The SCC held that mandatory minimum provisions that cast a net over a wide range of potential conduct are more "constitutionally vulnerable". For instance, in the case of s. 5(3)(a)(i)(D) of the *CDSA*, at one end of the range of conduct caught by the provision is a professional drug deal dealer selling dangerous drugs for profit. At the other end of the range stands a drug addict who is charged for sharing a small amount of drugs with a friend of spouse. Under the mandatory minimum provision, a judge would be required to sentence both individuals to one year in prison.

The SCC concluded that such a sentence would be grossly disproportionate to what would be fit in certain circumstances and therefore held that the provision violated s. 12 of the *Charter*. The Court found that

[3] The analytical framework to determine whether a sentence constitutes a cruel and unusual punishment under s. 12 of the *Charter* was clarified in *R. v. Nur*, 2015 SCC 15, [2015] 1 S.C.R. 773. For a case summary of *R. v. Nur*, see OJEN's resource *Top Five 2015*, available online at: http://ojen.ca/en/resource/top-five-2015.

the infringement was not justified under s. 1. Although parliament's objective of combatting the distribution of illicit drugs is important and the objective is rationally connected to imposing a one-year mandatory minimum sentence, the provision did not minimally impair the s. 12 right.[4]

C. Did the Court of Appeal make an error in increasing Mr. Lloyd's sentence to 18 months?

The SCC held that a trial judge's determination about what is an appropriate sentence is entitled to deference from higher courts. Appellate courts cannot alter a trial judge's sentence unless there is evidence that the trial judge made a legal error or imposed a sentence that was clearly unfit. The SCC held that this was not the case with respect to Mr. Lloyd. It held that the Court of Appeal could not intervene and alter the sentence imposed by the provincial court judge just because it would have weighed the relevant factors differently and come up with a different sentence. Accordingly, the SCC restored the one-year sentence imposed by the provincial court judge on Mr. Lloyd.

DISCUSSION

1. What do you think are the benefits and disadvantages of mandatory minimum sentences?

2. Do you think that 12 months was an appropriate sentence for Mr. Lloyd in the circumstances? Why or why not?

[4] For a more detailed explanation of s. 1 of the *Charter*, see the OJEN resource *In Brief: Section 1 of the Charter & the Oakes Test*, available online at: http://ojen.ca/en/resource/in-brief-section-1-of-the-charter-the-oakes-test.

3. Chief Justice McLachlin stated:

[M]andatory minimum sentences that, as here, apply to offences that can be committed in various ways, under a broad array of circumstances and by a wide range of people are vulnerable to constitutional challenge. This is because such laws will almost inevitably include an acceptable reasonable hypothetical for which the mandatory minimum will be found unconstitutional. If Parliament hopes to sustain mandatory minimum penalties for offences that cast a wide net, it should consider narrowing their reach so that they only catch offenders that merit the mandatory minimum sentences.[5]

Do you think it is possible for parliament to design mandatory minimum sentences that catch only the intended offenders? Why or why not?

4. Chief Justice McLachlin stated:

Another solution would be for Parliament to build a safety valve that would allow judges to exempt outliers for whom the mandatory minimum will constitute cruel and unusual punishment. Residual judicial discretion for exceptional cases is a technique widely used to avoid injustice and constitutional infirmity in other countries. It allows the legislature to impose severe sentences for offences deemed abhorrent, while avoiding unconstitutionally disproportionate sentences in exceptional cases. The residual judicial discretion is usually confined to exceptional cases and may require the judge to give reasons justifying departing from the mandatory minimum sentence prescribed by the law.[6]

Do you think it is a good idea to all judges to have "residual judicial discretion" to decide whether or not to impose mandatory minimum sentences in exceptional circumstances? Why or why not? What are the advantages and disadvantages of this approach?

[5] *R. v. Lloyd*, 2016 SCC 13, [2016] 1 SCR 130 at para. 35.
[6] *Ibid* at para. 36.

5. Do you think we should ever have minimum mandatory sentences or do away with them completely? Why or why not? If so, when would they be appropriate?