

PUBLIC ANNEX B

M18146

COURT OF APPEAL FOR ONTARIO

LABROSSE J.A. (In Chambers)

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B E T W E E N :	)	
	)	
HER MAJESTY THE QUEEN	)	Jeanine E. Leroy,
	)	for the applicant
Respondent	)	
	)	
- and -	)	Karen Manarin and
	)	Howard Leibovich,
FREDERICK DENNIS KEEN	)	for the respondent
	)	
Applicant	)	Heard: May 2, 1996

LABROSSE J.A.:

The applicant is applying for an extension of time to file a notice of appeal against the sentences imposed on him on July 19, 1994. Those sentences total five years in the penitentiary.

The applicant had pleaded guilty to nineteen counts involving a variety of sexual acts committed against young boys. They included three counts of sexual interference (s. 151), one count of gross indecency (s. 157), four counts of anal intercourse (s.159(1)) and 11 counts of procuring sexual services of someone under 18 years of age (s.212 (4)). With respect to the offences under ss. 151, 157, and 159(1), he was sentenced to 5 years

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concurrent. With respect to the offences under s.212 (4), he was sentenced to a two-year term concurrent to each count and concurrent to the five-year term.

It is not argued on behalf of the appellant that the sentence was unfit at the time it was imposed. Rather, the argument is based on the decision of this court in *R. v. C.M.* (1995), 98 C.C.C. (3d) 481, which declared that s. 159 is unconstitutional and of no force and effect. The argument is worded in the following terms:

As part of his sentence appeal, the Applicant also applies for leave to appeal the convictions imposed on him for the 4 counts under s. 159(1) of the Criminal Code to which he pleaded guilty. He is seeking an extension of time to file a Notice of Appeal against conviction only as part of his sentence appeal, for the purpose of having this Honourable Court consider the unconstitutionality of that section as part of his sentence appeal, and not for the purpose of having a new trial on the matters or to have witnesses called, or otherwise to dispute the facts to which he admitted on his sentencing proceedings.

The applicant has three hurdles to surmount in order to succeed on this application: the delay, the status of his case when the change in the law occurred and the merits of his appeal.

The notice of appeal should have been served within 30 days after the date of sentence (Rule 4(2) of Criminal Appeal Rules). His application is almost two years beyond the prescribed time. He admits that he had no intention to appeal during the prescribed time

and he does not know when he formed the intention to appeal. It was clearly formed subsequent to the decision in *R. v. C.M.* which was released on July 21, 1995. He has an obligation to explain the delay and it has not been adequately explained.

In order to claim the benefit of the change in the law brought about by *R. v. C.M.* the applicant's case had to be "in the system". In *Wigman v. The Queen* (1987), 33 C.C.C. 97, the Supreme Court of Canada addressed the issue of when an accused person can invoke a change in the law. At p. 104, the court stated:

The appropriate test is whether or not the accused is still in the judicial system. As expressed in the Crown's factum, this test affords a means of striking a balance between the "wholly impractical dream of providing perfect justice to *all* those convicted under the overruled authority and the practical necessity of having some finality in the criminal process". Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated. Thus a person convicted under *Lajoie* will not be able to reopen his or her case, unless, of course, the conviction is not final. In the *Reference re Language Rights under Manitoba Act, 1870* (1985), 19 D.L.R. (4th) 1 at pp. 28-9, [1985] 1 S.C.R. 721 at p. 757, [1985] 4 W.W.R. 385 at pp. 414-5, the court observed that *res judicata* would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws. The *res judicata* principle would apply with at least as much force to cases decided on the basis of subsequently overruled case-law.

In the present case, the final decision was reached nearly two years ago and the change in the law occurred some nine months ago.

Finally there are the merits of the sentence appeal. As reviewed earlier in *Wigman v. The Queen* the applicant cannot invoke the change in the law with respect to his convictions under s. 151(1). He accepts that he cannot have the convictions set aside. However, he would seek to appeal the convictions as part of his sentence appeal and have the court consider this development in the context of the totality of the sentence imposed upon him. For the purpose of this argument, I am prepared to assume that if the sentences were reviewed, consideration would be given to the fact that on the basis of the law as it stands today, the four counts involving anal intercourse would not form part of the convictions.

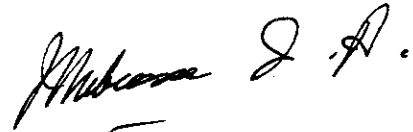
The sheer number of offences and their serious nature required that the applicant receive a significant penitentiary term. At the time of sentencing, both defence and Crown counsel agreed with the trial judge that the sentence was to be a global one and that it was to be concurrent on all charges. It was the totality of the sentences that mattered, not the individual sentences. Excluding the counts for anal intercourse, he pleaded guilty to 15 other counts of sexually-related offences involving 14 victims and approximately 160 sexual acts. On these charges, he was sentenced to four 5-year concurrent terms and eleven 2-year concurrent terms. The total sentence of five years, if anything, was on the light side. Even if the sentences for the counts of anal intercourse are ignored, having regard to the circumstances of the offender and of the offences, it cannot be said that a five-year sentence

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would be "clearly unreasonable": see *R. v. Shropshire* (1995), 43 C.R. (4th) 269 (S.C.C.).

In my view, the appeal is not meritorious and an arguable case has not been made that it would affect the total sentence imposed on the applicant.

The applicant fails all three hurdles. For all of these reasons, I would dismiss the application.

A handwritten signature in black ink, appearing to read "J. A. D." with a stylized flourish.

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B E T W E E N :

HER MAJESTY THE QUEEN

Respondent

- and -

FREDERICK DENNIS KEEN

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J U D G M E N T

RELEASED: May 13, 1996

Melone J.A.

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