

Criminal

Court strikes down mandatory minimum sentences for possession of child porn

By **David Elmaleh**



David Elmaleh

(November 5, 2018, 10:53 AM EST) -- In *R v. John* 2018 ONCA 702 the Ontario Court of Appeal struck down the mandatory minimum sentence for possession of child pornography. The appellant, Nathaniel John, successfully convinced three judges that mandatory minimum sentences of six months imprisonment is grossly disproportionate to the conduct of a reasonably hypothetical offender, using examples of a teenager sexting.

This decision is timely due to the pervasiveness of what is now commonly referred to as sexting. In a recent story, CBC reported at least one in four teens is receiving sexually explicit texts and e-mails, and at least one in seven is sending sexts. With the frequency of sexting and the overlap between definitions, one has to ask, "Is my teenager in possession of child pornography?" and if so, "what are the potential consequences?"

Background

In 2014, the Halton Regional Police Internet Child Exploitation Unit learned an Internet Protocol address in Halton was associated with 174 files believed to contain child pornography. Following the retrieval of the name and address of the subscriber, police obtained a search warrant for the residence and computers in the home. Following the investigation, John was arrested for possession of child pornography and subsequently convicted at trial.

On appeal, John challenged both his conviction and sentence. He argued that the trial judge erred when she admitted the evidence of child pornography found on his computer. Regarding sentence, he submitted that the six-month mandatory minimum in force at the time of the offence violated s. 12 of the Charter.

Reasonable hypotheticals and the Charter

Section 12 of the Charter states, "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment." When interpreting this right, the courts have found that prison sentences which are longer than necessary are grossly disproportionate and can be considered cruel and unusual, making them unconstitutional under s. 12. The mandatory minimum sentence regime removes a judge's discretion in sentencing. This means they can no longer consider all relevant circumstances related to an offence or mitigating factors such as age, good character, family responsibilities and mental health issues.

Several tests determine if a punishment is cruel and unusual. They include analyzing whether the prescribed punishment is so excessive it outrages the standards of decency and whether the punishment is grossly disproportionate to the offence (*R v. Smith* [1987] 1 S.C.R. 1045).

For mandatory minimum sentences the Supreme Court of Canada established a means of addressing a manifestly unjust minimum sentence. If, positing reasonable hypotheticals, an accused can show that a mandatory minimum sentence would result in cruel and unusual punishment, the law creating the minimum sentence is unconstitutional and should be declared of no force or effect pursuant to s. 52(1) of the Constitution.

Teens, sexts and child pornography

Utilizing the reasonable hypothetical mechanism, John did not argue that the mandatory minimum was grossly disproportionate to his circumstances. Instead, he argued the application of mandatory minimums would be grossly disproportionate when applied to reasonable situations like:

- An 18-year-old who receives and keeps a sext from his 17-year-old girlfriend on his phone. The sext is a selfie of the girlfriend.
- An 18-year-old who receives a sext from his 17-year-old boyfriend. The sext is a 30-second video the 17-year-old secretly recorded of the pair engaged in consensual sexual activity.
- An 18-year-old whose friend forwards him a sext from the friend's 17-year-old girlfriend without her knowledge. The 18-year-old doesn't forward the sext but keeps it on his phone.

The Oxford dictionary defines sext as "a sexually explicit photograph or message sent via mobile phone." The *Criminal Code* of Canada defines "child pornography" as a photographic, film, video or other visual representation that shows a person who is under the age of 18, and is engaged in, or is depicted as engaged in, explicit sexual activity.

With the ubiquity of digital communication between youth and the growing popularity of the sext, possession of child pornography is a live issue.

As the law stands, it is permitted for a 17-year-old to have sexual relations with an 18-year-old partner and to record images for personal use. However, until this case, the law also imposed a mandatory six-month jail sentence on the 18-year-old partner for possessing the same images sent to him or her by their 17-year-old partner.

This same mandatory minimum would have been applied to the 18-year-old in the third hypothetical who failed to delete the sext on his phone forwarded to him from a friend.

The Court of Appeal concluded that in consideration of the issue of sexts, application of a mandatory minimum would reasonably hypothetically result in grossly disproportionate punishments. The court found mandatory minimums were unnecessary and that sentencing guidelines already emphasize the importance of denunciation and deterrence for any offence involving the abuse of a child.

Although successful in his constitutional challenge, John's individual circumstances have not changed. The Court of Appeal dismissed his appeals from conviction and sentence, affirming the trial judge and upholding the 10-month sentence.

This case serves as a harsh reminder for teenagers and young adults who may be

romantically involved with individuals under the age of 18.

It also serves as a lesson generally for any friends who may engage in sexting in the so-called selfie era. Teenagers and parents should have frank and open discussions with peers, romantic partners and children about the risk of being charged and convicted of possessing child pornography in situations where sexually explicit photos are being shared among friends, lovers or romantic partners who are under 18 years old.

Many people do not appreciate that mere possession is potentially a crime. The receipt of the text and an immediate failure to delete may lead to criminal convictions that will haunt the young persons for the rest of their lives.

David Elmaleh is a partner at McCague Borlack LLP, in Toronto. He practises civil and criminal litigation, including insurance, renewable energy, Internet libel, commercial and estates matters. You can reach him at delmaleh@mccagueborlack.com.

Photo credit / Morana Bozic ISTOCKPHOTO.COM

Interested in writing for us? To learn more about how you can add your voice to The Lawyer's Daily, contact Analysis Editor Peter Carter at peter.carter@lexisnexis.ca or call 647-776-6740.

© 2018, The Lawyer's Daily. All rights reserved.