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| **R. c. Yan** | **2022 QCCQ 13083** |

Translated from the original French

C A N A D A

PROVINCE OF QUEBEC COURT OF QUÉBEC

DISTRICT OF CHICOUTIMI

No.: 150-01-062871-208

PRESIDING: THE HONOURABLE SONIA ROULEAU, J.C.Q.

THE QUEEN

v.

JUNJIE YAN

Decision of the Court on September 15, 2022

APPEARING:

Mtre MARIE-ÈVE ST-CYR,

Counsel for the DCPP.

Mtre NICOLAS GAGNON,

Counsel for the Respondent.

DIGITAL RECORDING

THE COURT:

All right, I am ready to render my decision, Sir.

The accused is charged with possession of child pornography because a silicone doll was found in his home by a witness, whose observations and photograph were provided to the officers of the Ville de Saguenay municipal police force. Based on this information, a search warrant was issued and executed, which allowed the doll to be seized. The defence made several admissions, including that the doll belongs to him, belongs to the accused, that he had possession of it when it was seized, and that his DNA was found in the doll’s crotch area, specifying, specifying that no sperm was found on the doll…

INTERPRETER:

Your Honour, excuse me, I, it’s very important, the last sentence, I understood, but they found DNA or they did not find DNA on…

THE COURT:

They found some…

INTERPRETER:

On the doll…

THE COURT:

Found, but they did not find sperm…

INTERPRETER:

Okay.

THE COURT:

Is that ok? He admits…

INTERPRETER:

No sperm…

THE COURT:

Also that this doll has the appearance of a child under the age of eighteen (18) years if analyzed by a reasonable person. At the time of the seizure, the doll was wearing a wig, was dressed in a little white camisole and white panties with a dark border. Dresses, camisoles, panties, including two (2) Tanga and another string, were also seized, all of these items corresponded to the size of the doll, which has proportions comparable to a child’s. The doll is a hundred and twenty-three centimetres (123 cm) long, its waist is fifty-nine centimetres (59 cm), and its chest is sixty-two centimetres (62 cm). It is made from silicone with a metal skeleton, which allows it to bend. It is life-like. Without clothes, the doll does not have breasts, although small nipples are visible. It has a hairless vulva and a clitoris with small lips can be observed. An

orifice of sixteen (16), ah I didn’t take the right measurements, probably, just a moment, please give me a chance to go get them, I know that it was between sixteen (16) and seventeen centimetres (17 cm)…

Mtre NICOLAS GAGNON,

COUNSEL FOR THE RESPONDENT:

It’s fifteen (15) for the vagina…

THE COURT:

Millimetres…

Mtre NICOLAS GAGNON,

COUNSEL FOR THE RESPONDENT:

Fifteen (15)…

THE COURT:

Sorry…

Mtre NICOLAS GAGNON,

COUNSEL FOR THE RESPONDENT:

Fifteen (15) for the vagina and sixteen (16) for the anus…

Mtre MARIE-ÈVE ST-CYR,

COUNSEL FOR THE DCPP:

Ten (10) for the mouth…

THE COURT:

Thank you, so fifteen (15), you say, for …

Mtre NICOLAS GAGNON,

COUNSEL FOR THE RESPONDENT:

The vagina, sixteen (16) for the anus…

THE COURT:

That was where I made an error, thank you. So, an, a, an, an orifice fifteen centimetres (15 cm) deep that represents a vagina and another, and another of sixteen centimetres (16 cm), yes, so, I don’t know where you are now, Madam, I have lost you, so another orifice of sixteen centimetres (16 cm) represents the rectum, its mouth also has an orifice of ten centimetres (10 cm) deep. A container that looks like a pump and a small white stick still in their respective packagings were also seized, a wig with braids and pink Mickey Mouse elastic bands, pink barrettes and some, and some pink elastic bands decorated with what appear to be small flowers. Other items were also seized, so, shipping boxes identified with the name and address of the accused, consistent with the size of the doll and on which it was placed, camouflaged by a blanket. In the box was another, smaller doll, similarly made, with breasts, a vulva, and a vaginal orifice, which aside from the size looks like an adult woman. So the issue in dispute, does the doll seized correspond to the definition of child pornography? Did

the accused have it in his possession? Was he aware of its anatomical features? And, finally, if the defence provided for in section one hundred and sixty-three point one (163.1) subsection six (6) A, whereby he had a legitimate purpose related to art to have the doll. The law. So, the Court adopts the decision of Judge Asselin, Jean Asselin in R. and Gagnon twenty (20), twenty twenty (2020) QCCQ twenty-one seventy (2170)…

INTERPRETER:

Twenty twenty (2020) CCQ twenty-one (21)…

THE COURT:

Seventy (70)…

INTERPRETER

Seventy (70), okay.

THE COURT:

On several elements, the facts being largely similar, it refers rightly in particular to the judgment in Sharpe, two thousand and one (2001) 1 S.C.R.

INTERPRETER

One one S.C.R.

THE COURT:

Forty-five (45) because that judgment sheds light on Parliament’s intent to enact the offence of child pornography, the possession of child pornography, and I quote,

Parliament’s main purpose in passing the child pornography law was to prevent harm to children by banning the production, distribution and possession of child pornography, and by sending a message to Canadians “that children need to be protected from the harmful effects of child sexual abuse and exploitation and are not appropriate sexual partners.” However, Parliament did not cast its net over all material that might conceivably pose any risk to children or produce any negative attitudinal changes. Mindful of the importance of freedom of expression in our society and the dangers of vague, overbroad legislation in the criminal sphere, Parliament set its targets principally on clear forms of “child pornography”: depictions of explicit sex with children, depictions of sexual organs and anal areas of children, and I emphasize, and material advocating sexual crimes with children. Through qualifications and defences Parliament indicated that it did not seek to catch all material that might

harm children, but only material that poses a reasoned risk of harm to children and, even then, only where the countervailing right of free expression does not outweigh that risk of, that risk of harm. Judge Serge Champoux in R. and Landry, two thousand seventeen (2017), C, QCCQ seventy-four fifty-five (7455), paragraphs twenty (20) and twenty-one (21) summarizing Parliament’s objective. The, the wrong targeted by this provision, as well as the others concerning child pornography, is known. These, these provisions are a means to eliminate any kind of sexual activity between adults and children, to prevent children from being sexualized and made sexual partners because, in general, society considers it amoral and truly criminal for individuals to direct their sexual desires or fantasies towards children. Any material that seeks to promote, encourage, allow, or be used to achieving their ends is considered criminal. Also, in LSJPA, eighteen eleven (1811), the Court of Appeal interpreted the following terms, including the dominant characteristic for a sexual purpose of sexual organs of a person under, under the age of eighteen (18) years, a, a modern approach to statutory interpretation that requires the provision of an Act to be read in their entire context

and in their grammatical and ordinary sense, harmoniously with the scheme and object of the Act, and the intention of Parliament. The statutory provisions at issue were enacted in nineteen ninety-three (1993) and is the result of a parliamentary committee report. Of these the Badlay, Ba, Badclay report, excuse me, of nineteen eighty-four (1984) outlines in particular the following, child pornography comes into existence through the base and coldly premeditated exploitation of a young person’s sexual vulnerability, we must seriously address any production of this type in Canada. The committee therefore recommended the creation of a new criminal offence of every one who uses, or who induces, incites, coerces or agrees to use a person under eighteen (18) years of age to participate in any explicit sexual conduct for the purpose of producing a visual representation of such conduct. The wording of section one hundred and sixty-three point one (163.1) of the *Criminal Code* is also a, a reflection of the commitment Canada made by ratifying the *Convention on the Rights of the Child* which provides in article thirty-four (34), Sates Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.

For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent the exploitative use of children in pornographic performances and materials. It becomes clear that the notions in subparagraph one hundred sixty-one point one one A double i (161.1(1)(a)(ii)) that must be, yes

INTERPRETER

Yes, go ahead…

THE COURT:

Must be assessed in this context and on the basis of the objective of, of the protection of children as well as sexual organs, must be given a narrow interpretation and analyze the phrases dominant characteristic and sexual purposes with the objective of determining whether a reasonable viewer would see the dominant characteristic of the images as the depiction of a child’s sexual organs for a sexual purpose, I emphasize, in the sense of be reasonably perceived as intended to cause sexual stimulation. Paragraph thirty-five (35) of Sharpe tells us that visual representations include “a photographic film, video or other visual representation, whether or not it was made by electronic or mechanical

means” and I emphasize, this is broad enough to include drawings, paintings, prints, oops, yes, Madam…

INTERPRETER:

You said drawings…

Mtre NICOLAS GAGNON,

COUNSEL FOR THE RESPONDENT:

Right, that’s…

INTERPRETER:

Paintings…

Mtre NICOLAS GAGNON,

COUNSEL FOR THE REPSONDENT:

Really immobile…

THE COURT:

Paintings, prints..

INTERPRETER:

Oh, prints…

THE COURT:

Computer graphics, and sculpture: in short, any non-textual representation that can be perceived visually. On this subject, Justice Marc David of the Superior Court, in Renaud two thousand thirteen (2013) QCCS seventy-one sixty-nine (7169), sitting in review of a decision of a justice of the peace who refused a search warrant sought by the police officers,

said when considering Sharpe, the Court is of the opinion that Judge Compagnone erred in law when she decided that [translation] “the item covered by the search warrant was not an image, written material, a video or an audio recording within the meaning of the definition of the definition of ‘child pornography’”.

INTERPRETER:

Could you please repeat, Your Honour, that, that sentence, because it’s important?

THE COURT:

Did not constitute, I don’t know where I, I stopped, “the item covered by the search warrant was not an image, written material, a video or an audio recording within the meaning of the definition of ‘child pornography’”. Merely, merely reading section one hundred and sixty-three point one (163.1) of the Criminal Code could lead to this interpretation. Sharpe, however, specified the definition of “representation”, which clearly includes objects, not just images. By committing this error of law, the justice therefore failed to consider whether this item could constitute child pornography. This error of law therefore prevented her from exercising

her jurisdiction. Had she done so, and I note, presumably she would have found that the item sought, namely the child sex doll observed by Canadian customs officers, constitutes child pornography. The, the dominant characteristic, Sharpe, Sharpe from the Supreme Court comes back. The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its dominant characteristic as the depiction of the child’s sexual organ or anal region. The same applies to the phrase for a sexual purpose which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers. Analysis. The accused’s doll represents a prepubescent child necessarily under the age of eighteen (18) years with a disconcerting realism, in terms of both its proportions and its manufacture. It has three (3) orifices, namely the mouth, the vagina, and the anus. When the police officers arrived, it was hidden under a blanket. To any reasonable objective person, these characteristics are dominant and explicit. There is no ambiguity, and the Court is convinced beyond a reasonable doubt that these orifices are specifically designed for a sexual purpose since its only logical and reasonable

use is to insert objects or a part of the human body into them for the purpose of causing sexual stimulation, given the obvious realism. The other items seized, namely the accessories, dresses, barrettes, elastic bands, intended for the doll are not only clearly feminine but also childish in their colour, style, and size, which is consistent with a child’s size. The Court adds that the documents filed by the, by the accused under re-examination corroborates this conclusion with the images of children they contain and by the accused’s choice to purchase them when they are clearly identified as being for children. Thus, thus, the Court is convinced beyond a reasonable doubt that the doll meets the definition of any other representation the dominant characteristic of which is the depiction of a child’s sexual organs and anal region for a sexual purpose, excuse me. While, while the accused admits possession, the evidence leaves no room for doubt. His argument states instead that this item was not intended for a sexual purpose, but that it had an artistic purpose that he defined as taking photos of the doll dressed to promote his culture, in particular, the Han dynasty. On this subject, however, the accused admits that he has several objects

related, related to the doll that is not related in any way to his artistic purpose. Notwithstanding the fact that the accused stated that he did not have any intentions, sexual intentions in possessing the doll, he saw its specific characteristics and could not have been unaware of the explicit purpose of this object. The possession of this item is possession of child pornography and under no circumstances, despite his culture, will the, the courts tolerate the use of ignorance of the law as a defence. That said, that said, that said, notwithstanding what was said earlier, for this defence to even find support, the accused must be believed or at least his version must raise a reasonable doubt as to the defence he presents. Here are the reasons the Court does not believe him, first, he speaks of adult women when he refers to his desire to make, to share his culture. By, by publishing the photos of the doll wearing dresses corresponding to the Yan dynasty, Han, excuse me, not only does this doll have no characteristics of an adult woman, but the dresses and accessories leave no, no doubt as to the childishness of their style. Moreover, if the accused’s purpose was solely artistic, why purchase underwear, in particular the two (2) Taïga panties to hide the doll’s private parts?

If, if it is true that he takes photos without sexual connotations, why does he need to cover the doll’s genitals when the dresses seized completely cover this part of the body because of their length and design. It is also contradictory to state that he brought a dress to the station to try to explain to the police his purpose in possessing the doll, when he never took it out of the bag from the time of his arrest until his incarceration. Rather, it was the police officer who discovered it when searching the bag, and at that moment in fact the accused tried two (2) times to recover it to put it back in his backpack, the Court easily finds that his version is inconsistent with his spontaneous reaction at the time of the seizure. I have already said it, but on cross-examination, he admitted that several of the items seized, including, including certain dresses, Mickey Mouse hair decorations, with the artistic purpose he claims he had…

INTERPRETER:

With what, pardon me, Your Honour?

THE COURT:

With the artistic purpose he claims…

INTERPRETER:

Ah…

THE COURT

He had..

INTERPRETER:

Okay.

THE COURT:

And despite the insistence of counsel for the, for the prosecution to discover the reason or the, the origin, the accused remained vague. This is why the Court also notes that the accused evaded several questions, provided absurd explanations, and contradicted himself, to name only those examples, he refused to answer the question when he was asked whether the doll represents a child, and after a long hesitation he stated that the women of his country, and from Japan more specifically, are small in stature, as a way of justifying the possession of the doll. His explanations are completely inconsistent, however, with the anatomy of the, of the doll, which does not have breasts, which does not have breasts, a hairless vulva and small, small lips and that is clearly the anatomy of a child and not an adult. He also states that he had this doll to take photos, but he did not do so, on the pretext that he still had not received the Han dynasty dresses, yet, is everything all right, Madam?

INTERPRETER:

Yes, fine.

THE COURT:

Yet, when he was arrested, he brought one to show the police officers to explain his purpose in possessing the doll. Finally, questioned about the doll, the smallest doll that has an adult appearance, although he admitted that it belongs to him, he, he was unable to determine where it came from, first saying that it was in the box and, at another moment, saying that he had found it while putting things away when he moved. He also maintained that he does not intend to use it to take photos and we will therefore never know why it was in his possession. He also claims that this small doll, I’ll start over, Madam, I made a mistake, I’ll start over, I’ll start over, he also claims that the doll in question, the doll that is the subject of the trial today is small to reduce shipping costs, which is, which is inconsistent with its weight, which the police officer estimates to be about fifty pounds (50 lbs) which also..

INTERPRETER:

About fifty, about fifty pounds (50 lbs), that’s…

THE COURT:

Yes...

INTERPRETER:

You said, Your Honour…

THE COURT:

Which alone generates significant costs. If, if we accept his rationale, his rationale of saving money, a much lighter, simple mannequin without a frame would have done the job and would have cost much less, this, this explanation is therefore absolutely ridiculous. Finally, finally, the defence also argues that the neighbour witness corroborates him on the dresses and their use. Not only is this self-corroboration, it has low probative value because he was told of the charges against him, and the lack of sperm is also not likely to raise a reasonable doubt as to the sexual purpose, since the doll was washed at least once, according to the admissions of the accused, while it is equally possible and highly probable that he did not have the time to use it. Therefore, therefore the Court does not believe the accused, his version raises no reasonable doubt as to the explicitly sexual purpose that he, that he had in possessing this doll, since its dominant characteristic is the

depiction of the sexual organs of a child under the age of eighteen (18) years, his intentions therefore, because of the evidence described, could not have been innocent. The Court concludes by quoting paragraphs eighty-six (86) and ninety-four (94) of Sharpe, where the Supreme Court affirms the importance of protecting children from all forms of child pornography to shield them from all forms of sexual exploitation that fuels the sexual deviance of such offenders and feeds their fantasies related, related to the use of such an item. What is happening? Is everything okay? And I quote, I conclude that the social science evidence adduced in this case, buttressed by experience and common sense, meets the existence, the requirement of the existence of a rational connection between the purpose of the law and the means adopted to effect this purpose…

INTERPRETER:

Could you repeat the last two (2) sentences…

THE COURT:

And the means adopted…

INTERPRETER:

Your Honour?

THE COURT:

To effect this purpose…

INTERPRETER:

Okay.

THE COURT:

Possession of child pornography increases the risk of child exploitation and now we are talking about, and now we are talking about the law before Sharpe, the law prohibiting publication and distribution did not apply to the private viewing of child pornography, whereas such viewing can provoke conduct and stimulation that increases the risk of offence. Therefore, for these reasons, the Court is convinced beyond a reasonable doubt of the, of the commission of the offence alleged against the accused and finds him guilty.

I, the undersigned, Official Court Reporter, hereby certify that the foregoing constitutes an accurate and faithful transcript of the digital recording, to the best of my knowledge.

[signed]

NICOLE BERGERON, O.C.R.