
CANADA / JUDGMENT

R. v. Abrosimo

2007 BCCA 406

COURT

British Columbia Court of Appeal

DECIDED

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2007 BCCA 406 R. v. Abrosimo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Abrosimo,

2007 BCCA 406

Date: 20070801

Docket: CA034242

Between:

Regina

Respondent

And

Brian Edward Abrosimo

Appellant

BAN ON DISCLOSURE

Pursuant to s. 486(3) (now s. 486.4) C.C.C.

Before:

The Honourable Mr. Justice Hall

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Frankel

H. M. Patey

Counsel for the Appellant

E. A. Campbell

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

June 14, 2007

Place and Date of Judgment:

Vancouver, British Columbia

August 1, 2007

Written Reasons by:

The Honourable Mr. Justice Frankel

Concurred in by:

The Honourable Mr. Justice Hall

The Honourable Madam Justice Saunders

Reasons for Judgment of the Honourable Mr. Justice Frankel:

Introduction

- [1] Brian Edward Abrosimo seeks leave to appeal from an effective sentence of 18 years imprisonment imposed by Judge MacGregor on June 16, 2006, following pleas of guilty to five charges arising out of two separate incidents. At the time of sentencing he was nearly 44 years of age.
- [2] The sentencing judge also declared Mr. Abrosimo to be a long-term offender, and ordered that he be subject to a supervision order for 10 years following the expiration of his custodial sentence. This finding has not been appealed.
- [3] The first incident resulted in the following convictions and concurrent sentences:
- Unlawful confinement of R.M.
- 6 years
- Sexual assault with a weapon on R.M.
- 6 years
- [4] The second resulted in the following convictions and sentences concurrent with each other, but consecutive to the sentences imposed for the first incident:

Kidnapping of S.C.

12 years

Sexual assault of S.C.

8 years

Assault with a weapon (i.e., a vehicle) on S.C. and T.H.

4 years

- [5] The total period of incarceration was reduced by 44 months as credit for the time spent in custody awaiting sentence.
- [6] Mr. Abrosimo raises two grounds. He submits his sentence is unfit because (a) 12 years for kidnapping is outside the range for this offence, and (b) a global sentence of 18 years offends the principle of totality. He seeks to have the kidnapping sentence reduced to less than 10 years, and to have the sentences for the two incidents made concurrent, so that the aggregate sentence is less than 10 years.

Factual Background

- [7] The sentencing judge described the two incidents in some detail:

July 2, 2004

- [4] R.M., age, 25, was working as a prostitute and living on the streets of Surrey. On the morning of July 2, Mr. Abrosimo pulled up in a white sedan and entered into discussions with R.M. regarding sexual services. An agreement was reached regarding price and the sexual services involved, and R.M. got into the vehicle and put on her seat belt. Mr. Abrosimo said that he did not have any cash on him and was driving to a residence to pick up some money. Mr. Abrosimo then pulled into a long driveway to a vacant lot and drove very fast over garbage and debris to an open area surrounded by blackberry bushes. He reached down beside his seat, pulled out a set of handcuffs and managed to get one cuff on the left wrist of R.M. R.M. began screaming and fighting and managed to open her passenger door. She fell out of the vehicle onto her stomach but Mr. Abrosimo landed on top of her back. R.M. continued to struggle and scream, but he managed to handcuff both her hands behind her back.
- [5] R.M. continued to struggle and scream; he flipped her over and hit her about the face and head. Mr. Abrosimo then brought out a handgun, held it to her head and told her to stop screaming or he would kill her. He twisted a black handkerchief and a green plastic garbage bag into and around her mouth, then wrapped and taped the bag around her mouth and head, using black electrical tape. He threw down a blanket, ripped off her pants and sexually assaulted her. When he was finished, he obtained some bolt or metal cutters from the trunk of his car, cut the chain between the middle of the handcuffs, but left them on R.M.'s hands.

He picked up the blanket, got back in his car and drove away.

- [6] R.M. laid there for a few minutes, crying and terrified. She waited until the vehicle was gone, pulled on her pants, and ran down to the street. She eventually flagged down a motorist, who called police and an ambulance for her. She was taken to hospital. A genital swab and pieces from the black electrical tape which was still stuck around R.M.'s head and hair were taken for DNA analysis.
- [7] R.M. had initially consented to perform sexual services for money, but she did not consent to being handcuffed, beaten, threatened, gagged, confined and sexually assaulted.

August 12, 2004 Incident

- [8] In the afternoon of August 12, 2004, 11-year old S.C. and her 15-year old friend, T.H. were riding their bicycles along 256th Street in Langley. They stopped to pet a cat, stopped briefly for a snack and rest, then got back on their bikes and proceeded south. Mr. Abrosimo had driven by them in his van, noticed the girls and turned around to follow them down 256th Street.
- [9] Mr. Abrosimo then drove his van into the two girls on their bicycles knocking T.H. into the ditch and knocking S.C. to the ground off her bike. He stopped, mumbled that he was sorry, grabbed 11-year old S.C., threw her into the back of the van and drove off. T.H. had suffered a broken wrist and cuts, but climbed out of the ditch to see Mr. Abrosimo grab her little friend, S.C., who was screaming and fighting, then throw S.C. into the back door of his van and drove off. T.H. reported that she screamed and yelled and saw her friend's small white face in the back window of the van as it drove away. A local resident came to assist her and T.H. immediately reported that a man had knocked them off their bikes and had kidnapped her friend.
- [10] S.C. recalls being thrown into the back of the van which had no seats in the rear. The floor was covered by a blanket. She was told by Mr. Abrosimo to get down and to stop screaming. He drove around the South Surrey and Cloverdale area, then eventually drove into the same vacant lot on 64th Avenue where the prior sexual assault on R.M. had taken place.
- [11] Mr. Abrosimo went to the rear of the van, taped S.C.'s mouth and eyes and threw a blanket over her head. He pulled up her top and roughly ripped off her shorts, breaking the zipper. He then performed oral sex on S.C. which she described as "kissing her privates." He was masturbating, and was panting heavily. She said something penetrated her vagina part way, perhaps a finger, but she could not see. When he was finished, he passed her shorts and told her to "Put these on." S.C. said that she "could not see, I can't put them on." Mr. Abrosimo put her out of the van and said, "Do them up." Mr. Abrosimo told S.C. that he would be back in five minutes, to stay there and not to move. He drove off.
- [8] It was admitted that Mr. Abrosimo partially penetrated S.C.'s vagina with his penis.

- [9] Following his arrest Mr. Abrosimo admitted deliberately knocking S.C. and T.H. off their bicycles, kidnapping S.C., and sexually assaulting her. He denied the earlier incident involving R.M.
- [10] A D.N.A. sample obtained from Mr. Abrosimo linked him to both sexual assaults.
- [11] The victim impact statements filed reflect the devastating and profound effects these events had, and will continue to have, on all three victims.
- [12] Mr. Abrosimo's criminal history is lengthy:
- October 10, 1986 - Driving with over 80 mgs of alcohol in his blood - \$300 fine.
 - February 14, 1994 - Breach of a peace bond imposed in 1993 - \$150 fine: He breached the conditions by following his ex-wife.
 - July 27, 1995 - Theft under \$1000 - one day in jail: He was charged with robbery for grabbing a purse from an elderly lady, knocking her to the ground. He pleaded guilty to the included offence of theft, and was sentenced to time served plus one day.
 - August 1, 1995 - Break and enter and committing sexual assault - two years in jail, probation for three years, 10 year firearms prohibition: He broke into his ex-wife's home at 3:30 a.m. She awoke to find him lying naked on top of her attempting to have sexual relations. He applied a gag to her mouth and threatened. She managed to get away from him.
 - January 9, 2000 - Possession of a weapon for a purpose dangerous to the public peace - six month conditional sentence, probation for two years, lifetime firearms prohibition: Two months after being released on parole he became involved in a family dispute and, while under the influence of cocaine and marihuana, fired four shots from a handgun at his sister's ex-boyfriend.
 - March 27, 2003 - Possession of a weapon for a purpose dangerous to the public peace - suspended sentence, probation for two years, 10 year firearms prohibition: While on probation, and living with his parents, he became erratic, and uncontrollable. The police were called. When they attempted to enter his bedroom he told them he had a handgun. As the officers attempted to subdue him, he threatened them with a knife. He fled out a bathroom window, and was apprehended outside hiding in some bushes. He had been holding a staple gun under his jacket, not a handgun.
- [He was bound by the probation order for this offence when he committed the offences against R.M., S.C., and T.H.]
- February 5, 2004 - Assault and failure to comply with an undertaking - six month conditional sentence, probation for two years, 10 year firearms prohibition: This assault was also on his ex-wife. He used duct tape in attempting to restrain and gag her in the course of the assault. He breached the terms of release on the assault charge by using cocaine.

[He was under this conditional sentence order at the time of the offences on R.M., and subject to this probation order at the time of the offences on S.C. and T.H.]

[13] The sentencing judge also noted that Mr. Abrosimo had been in the Surrey Pre-Trial Centre since August 14, 2004. Between August 16, 2004 and March 25, 2006, he had been disciplined for a variety of offences: disobedience of orders, fighting (three times), threatening, causing a disturbance, and an inappropriate comment to a guard.

[14] The sentencing judge viewed the offences as extremely serious, stating in part (at para. 86):

Aggravating Circumstances

1. The offences of kidnapping and sexual assault of a child S.C., represent the most heinous and grave of crimes known to our society. The attack and confinement of R.M. and the level of violence used against her, including a threat to kill her if she did not comply, show that Mr. Abrosimo exhibited an escalating level of violence to pursue his sexual needs on random, vulnerable victims. In *R. v. Muhammad* [2004] B.C.J. No. 1561, Vancouver Registry 396, where Mr. Justice Hall said:

I think it is worth observing the individuals who are in the sex trade are in a vulnerable position to a degree. The Courts have to ensure that violence is not employed in transactions of this sort that occur in that occupation.

2. While each of the incidents on July 2, 2004 and August 12, 2004, were crimes of opportunity, they were pre-meditated. Prior to the incident with R.M., he already had in his possession in his vehicle a replica handgun, handcuffs, tape and other items. He picked up a sex trade worker for the purpose of a violent sexual assault. With respect to the incident on August 12th, he had cancelled his scheduled visit to his Probation Officer that day, continued his abuse of "crystal meth", then drove around when he noticed the two young girls who had stopped by the side of the road with their bicycles. He acted in a predatory fashion by turning around, waiting for them, driving up behind them, and slamming his vehicle into their bikes, reckless as to any injury or harm to either of them, for the purpose of kidnapping one of them, throwing her into the van for the purpose of his ultimate sexual gratification.

- [15] At an earlier point in her reasons, while dealing with a long-term offender application and the requirements of s. 753.2 of the Criminal Code, the sentencing judge was satisfied that the current offences formed part of a pattern showing a likelihood of Mr. Abrosimo (a) causing death or injury to other persons, or inflicting psychological damage on them, and (b) causing injury or pain to others in the future through the commission of similar offences. She noted the escalation in the violence associated with his offences, and his inability to control his use of cocaine and methamphetamine.

- [16] With respect to mitigation, the sentencing judge referred to the fact that Mr. Abrosimo made admissions which obviated the need for S.C. and T.H. to testify at a preliminary inquiry, and that he pleaded guilty following his committal for trial. She noted his expression of remorse for S.C. and her family. Although he did not express remorse for R.M., he did admit his actions had caused her severe psychological harm.
- [17] In concluding that the sentences referred to above are appropriate the sentencing judge said:
- [87] I have reviewed with care the many decisions relied on by counsel in the determination of a fit and proper sentence for Mr. Abrosimo. Each of those authorities involve different violent offences, including sexual offences to women and children, and relate to very differing circumstances of each offender, ranging from a young man with no criminal record to an individuals [sic] with lengthy criminal records.
- [88] I have considered the submissions of counsel, the gravity of these offences, the aggravating and mitigating factors, and the circumstances of Mr. Abrosimo's background, his limitations, his escalating criminal record, the primary factors of sentencing being denunciation, condemnation, deterrence and rehabilitation of Mr. Abrosimo. I agree with comments of Mr. Justice Thackray of our Court of Appeal in R. v. P.P.H. 2003 BCCA 591, when he says at para. 11:

It is not necessary to be definitive as to which of those important principles should be regarded as primary. To a significant extent, the priority will be fact driven. Most certainly general deterrence is important but then, to my way of thinking, so is specific deterrence and rehabilitation of the offender. Condemnation, insofar as it reflects society's abhorrence of acts of this nature ... is important, as noted by the sentencing judge in the following paragraph:

The type of offences committed by this offender attack the basic values we hold as a society. We value our children, and have a societal interest in condemning transgressions such as these in harsh terms .

- [89] I have considered the principle of totality and the issue of a range of sentencing. In this case, the offences of kidnapping and sexual assault, sexual assault with a weapon, are among the gravest offences of violence and warrant an exemplary sentence.
- [18] With respect to the combined sentence of 18 years she said:
- [91] In sentencing Mr. Abrosimo for a total period of imprisonment of 18 years, less time served for his pretrial custody, I realize that I am exceeding the total sentence requested by Crown Counsel [i.e., 15 to 17 years]. However, in my view, such sentence is necessary as these were two very distinct, serious, and separate incidents and that, in all the circumstances, the sentence are [sic] necessary to denounce Mr. Abrosimo's actions in the commission of these offences, and to protect the public.

[19] Even though 12 years was imposed only on the kidnapping charge, it is clear the sentencing judge intended this to be the appropriate global punishment for all of the crimes committed on August 12, 2004. This can be seen in the discussions following the initial pronouncement of sentence. In paragraph 90 of the reasons 12 years is imposed on both the kidnapping and sexual assault charges. However, the transcript shows that once the sentencing judge had concluded delivering her judgment Crown counsel drew to her attention that the maximum for sexual assault is 10 years. In response the sentencing judge stated :

I was doing that globally, as a global sentence. I appreciate that the maximum under - for sexual assault is ten years, so I should probably break that down.

This resulted in the sentence for the sexual assault of S.C. being adjusted to eight years.

Analysis

Kidnapping Sentence

- [20] Mr. Abrosimo says 12 years for kidnapping S.C. is outside the acceptable range for this offence. His position is that this was a "spontaneous" act, and that the sentencing judge was wrong to treat it as "premeditated." He relies on a number of authorities as supporting the proposition that sentences of 10 years or more are reserved for those cases involving carefully planned schemes of kidnapping for ransom: e.g., *R. v. Mills* (1998), 129 C.C.C. (3d) 313, 112 B.C.A.C. 283; *R. v. Chong*, 2000 BCCA 359, 142 B.C.A.C. 7.
- [21] While this Court has held that sentences of 10 years or more are appropriate in ransom cases, it does not follow that such a sentence will be inappropriate in other circumstances. Regard must be had to the nature of the crime, and the offender.
- [22] Although the crimes were ones of opportunity, they were nonetheless premeditated. While the victims were chosen at random in each case Mr. Abrosimo set about to commit acts of violence on vulnerable people for the purposes of sexual gratification. With respect to S.C. his actions were properly described as "predatory." That he was highly sexually aroused that day due to his use of methamphetamine does not detract from this.
- [23] The sentencing judge properly took a global approach in sentencing for the events of August 12, 2004, and asked herself what punishment was appropriate for the offences committed that day: *R. v. Jones*, 2000 BCCA 379, 140 B.C.A.C. 30 at para. 21. The question for this Court is whether, in this context, 12 years is unfit.
- [24] The sentencing judge considered all the appropriate and relevant factors. The circumstances here are of the outmost gravity, and warrant significant disapprobation. Mr. Abrosimo showed callous and wanton disregard for the lives of two young children. Although not expressly referred to, her approach is consistent with s. 718.01 of the Code:

When a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence of such conduct.

[25] It has not been shown that the sentencing judge's decision is based on any error of principle, or an improper consideration of relevant factors. Further, having regard to the circumstances, I cannot say that in exercising her discretion she imposed a sentence which is demonstrably unfit. There is, accordingly, no basis upon which to interfere: *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at paras. 89-91.

Totality Principle

[26] In support of this ground Mr. Abrosimo refers to several decisions in which lower aggregate sentences were imposed on offenders who committed more sexual offences on more victims. However, in some of these cases the offender's criminal record was not as serious, or there was no record at all. In this case, of course, there is the additional aggravating factor of the offences having been committed while Mr. Abrosimo was subject to earlier sentencing orders. As his counsel, Mr. Patey, stated in advancing this argument, "all cases differ on their facts." Accordingly, a detailed examination of each of the decisions cited would serve no useful purpose in determining the fitness of the sentence imposed in this case.

[27] The main thrust of Mr. Abrosimo's argument is that the sentences for the two separate incidents should be concurrent. His position is that as kidnapping is the offence for which the highest sentence is available, the totality principle requires that the aggregate sentence for both incidents not be substantially above what is a fit sentence for it.

[28] *M.(C.A.)* is cited as authority for this proposition. Reliance is placed on the following statement from *Ruby on Sentencing*, 4th ed., (Toronto: Butterworths, 1994), quoted in paragraph 42 of Chief Justice Lamer's reasons: "A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, ." However, when these words are read in context, it is apparent that they do not support what Mr. Abrosimo seeks to draw from them.

[29] Paragraph 42 of *M.(C.A.)* reads in its entirety:

In the context of consecutive sentences, this general principle of proportionality expresses itself through the more particular form of the "totality principle". The totality principle, in short, requires a sentencing judge who orders an offender to serve consecutive sentences for multiple offences to ensure that the cumulative sentence rendered does not exceed the overall culpability of the offender. As D. A. Thomas describes the principle in *Principles of Sentencing* (2nd ed. 1979), at p. 56:

The effect of the totality principle is to require a sentencer who has passed a series of sentences, each properly calculated in relation to the offence for which it is imposed and each properly made consecutive in accordance with the principles governing consecutive sentences, to review the aggregate sentence and consider whether the aggregate sentence is "just and appropriate".

Clayton Ruby articulates the principle in the following terms in his treatise, *Sentencing*, *supra*, at pp. 44-45:

The purpose is to ensure that a series of sentences, each properly imposed in relation to the offence to which it relates, is in aggregate "just and appropriate". A cumulative sentence may offend the totality principle if the aggregate sentence is substantially above the normal level of a sentence for the most serious of the individual offences involved, or if its effect is to impose on the offender "a crushing sentence" not in keeping with his record and prospects.

[Emphasis added.]

[30] In my view, the principle articulated by the Chief Justice is set out in the portion underlined above. It is the same as that now found in s. 718.2(c) of the Criminal Code:

Where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh.

[31] Mr. Ruby's statement does no more than provide an example of when the totality principle "may" be violated. While consecutive sentences can run afoul of this principle, it is not simply because the aggregate is above the normal range for the most serious offence, but because it exceeds what is appropriate given the offender's overall culpability. When an offender's overall culpability warrants more severe punishment nothing precludes the imposition of such a sentence.

[32] Here consecutive sentences were appropriate as the two incidents are wholly unconnected. The sentencing judge, accordingly, did not err in the approach she took. To have made the sentences concurrent would have been, in effect, to impose no sentence at all for the offences against R.M.: *R. v. Stanley*, [1986] B.C.J. No. 695 (QL) (C.A.) at para. 8 ; *R. v. Moore*, 2006 BCCA 44, 221 B.C.A.C. 251 at para. 8. The real question is whether 18 years is unduly long or harsh given Mr. Abrosimo's overall culpability.

[33] As previously mentioned, these offences were committed against vulnerable victims at a time when Mr. Abrosimo was bound by previous sentencing orders. The circumstances of both incidents can be described as horrendous. Mr. Abrosimo has a history of violent criminal activity and, as evinced by these incidents, the level of violence he is prepared to use continues to escalate. He has clearly demonstrated an inability to control his use of illicit substances and the dangerous conduct their use precipitates.

- [34] This Court's decision in *R. v. Henry*, 2002 BCCA 575, 174 B.C.A.C. 238, is instructive. An offender sentenced to 18 years for aggravated sexual assault to be followed by a 10 year long-term supervision order sought to have the period of incarceration reduced to 12 years. In dismissing his appeal Finch C.J.B.C. said:
- [29] The learned sentencing judge, however, properly directed his attention to the present and future for the appellant, and not his past. It was entirely appropriate for the judge to emphasize protection of the public and deterrence as paramount considerations. The high risk of his re-offending calls for a long period of incarceration. Given the appellant's constellation of serious problems, he will not be rehabilitated without extensive treatment. None of the experts was prepared to say when the appellant might likely be free of his alcohol and drug dependency, and so long as he remains dependent, none can predict when the risk of re-offending might be lowered.

These words apply equally to the case at bar.

- [35] The sentencing judge was alive to the principle of totality. She grounded her decision on a careful assessment of the facts, and a consideration of the applicable principles, including deterrence, denunciation, rehabilitation and, most importantly, protection of the public. Although 18 years is a harsh sentence it is not unduly so or clearly excessive in the circumstances. Again, I can find no basis on which to interfere.

Conclusion

- [36] I would grant leave to appeal and dismiss the appeal.

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Madam Justice Saunders"

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