
CANADA / JUDGMENT

R. v. Alderman

2017 BCCA 26

COURT

British Columbia Court of Appeal

DECIDED

13 January 2017

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2017 BCCA 26 R. v. Alderman

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Alderman,

2017 BCCA 26

Date: 20170113

Docket: CA43555

Between:

Regina

Respondent

And

Matthew David Alderman

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Dickson

On appeal from: Orders of the Provincial Court of British Columbia, dated

October 9, 2014 and May 28, 2015 (R. v. Alderman (October 9, 2014),

Chilliwack Docket 61049-2C and 2015 BCPC 221).

Oral Reasons for Judgment

Counsel for the Appellant:

J.J. Blazina

Counsel for the Respondent:

M.A. Street

Place and Date of Hearing:

Vancouver, British Columbia

January 13, 2017

Place and Date of Judgment:

Vancouver, British Columbia

January 13, 2017

Summary:

Appeals by A. from: (a) his conviction on a charge of aggravated assault; and (b) an effective sentence of eight years' imprisonment imposed on a related charge of attempted murder. Both charges arose out of an incident in which A. tried to break the victim's neck. The victim had rented A. a room in her house. A. attacked her when she asked him to leave. Held: Conviction appeal allowed; sentence appeal dismissed. The aggravated assault conviction is set aside on the basis of the Kienapple principle and a stay entered. The sentence was not demonstrably unfit. The sentencing judge properly had regard to A.'s lack of remorse in considering the degree to which A. posed a risk to the public. The judge did not punish A. for an absence of a spousal relationship with the victim.

- [1] FRANKEL J.A.: Matthew David Alderman was convicted by Judge Point of the Provincial Court of British Columbia on charges of attempted murder and aggravated assault. Mr. Alderman received an effective sentence of eight years' imprisonment on the attempted murder charge and three years concurrent on the aggravated assault charge.
- [2] Mr. Alderman appeals his conviction on the aggravated assault charge and seeks leave to appeal the sentence imposed on the attempted murder charge. If leave is granted, then he seeks a variation of that sentence to between five and six years' imprisonment.
- [3] Although this Court's practice is to dispose of a conviction appeal before hearing a related sentence appeal, in this case both appeals were scheduled together due to the fact that the Crown concedes that the conviction on the aggravated assault charge should be set aside on the basis of the rule against multiple convictions set out in *Kienapple v. The Queen*, [1975] 1 S.C.R. 729. In my view, the factual and legal nexus between the two offences is such that the Kienapple principle applies. As the conviction on the attempted murder charge has not been

appealed, and is therefore final, the aggravated assault charge should be permanently stayed: *R. v. Provo*, [1989] 2 S.C.R. 3 at 16. It should be noted that at the trial, Crown and defence counsel (who are not counsel on this appeal), did not make submissions with respect to the application of Kienapple.

- [4] The victim, Deborah Halladay, offered to rent Mr. Alderman a room in her house when he and her nephew were evicted from the place where they lived. After hearing stories about Mr. Alderman's past, Ms. Halladay became concerned about his continued presence in her home. On January 14, 2013, approximately three months after Mr. Alderman moved into Ms. Halladay's home, she told him he was no longer welcome. Mr. Alderman became angry and began to shake. She told him that if he did not leave, then she would call the police. When Mr. Alderman came closer, Ms. Halladay moved into the corner of the kitchen and tried to call 9-1-1 on her cellular telephone. Mr. Alderman put his hands around Ms. Halladay's neck and squeezed. He lifted her up by her neck, stating, "Why won't your neck break? I just want to kill you. I just want to snap your neck." Ms. Halladay begged Mr. Alderman to stop.
- [5] When Ms. Halladay opened her eyes, she was lying on the floor. Mr. Alderman was punching the television. She asked him to call 9-1-1 because she could not move. Mr. Alderman took a knife out of a kitchen drawer and began to stab himself. Ms. Halladay asked him to come and hold her hand because she did not want him to hurt himself. Mr. Alderman said, "Why? I'm a monster", but finally came over and held her hand. He then telephoned Ms. Halladay's daughter and told her, "I hurt your mom." He also called 9-1-1.
- [6] In his statement to the police, Mr. Alderman said the only thought going through his mind at the time he grabbed Ms. Halladay by the neck was "hearing the satisfying crunch of bones snapping". He equated what he did to "removing a bottle cap from a bottle."
- [7] Mr. Alderman was nearly 25 years old at the time of the offence and 27 at the time of sentencing. He had one prior adult conviction in 2009 for mischief.
- [8] The sentencing judge had before him a pre-sentence report prepared by a probation officer, a psychiatric assessment prepared by a psychiatrist, and a psychological/psychiatric assessment prepared by another psychiatrist. Those reports described Mr. Alderman as lacking remorse and lacking insight as to the consequences of his actions.
- [9] At the sentencing hearing, the parties agreed Mr. Alderman was entitled to three years and seven months' credit for pre-sentence custody. The Crown submitted the sentencing range for the attempted murder was seven to twelve years' imprisonment and sought an effective sentence of ten years on that charge and four years concurrent on the aggravated assault charge. Mr. Alderman's counsel submitted the sentencing range for the attempted murder was six to eight years' imprisonment and sought an effective sentence of six years on that charge.

- [10] The sentencing judge's reasons are indexed as 2015 BCPC 221. Mr. Alderman contends those reasons contain three errors. The first is that the judge considered Mr. Alderman's lack of remorse as an aggravating factor. The second is that the judge treating the lack of a spousal relationship between Mr. Alderman and Ms. Halladay as an aggravating factor. Last, Mr. Alderman says that even if the sentencing judge did not commit those two errors, the sentence imposed is nevertheless unfit. I would not accede to any of those arguments.
- [11] Mr. Alderman's first argument focuses on the following paragraph of the sentencing judge's reasons:
- [13] This is for me the most aggravating factor in this case, that Mr. Alderman appears cold and without remorse for his actions.

However, what the judge said has to be read in the context of the reasons as a whole.

- [12] Immediately before the impugned paragraph, the sentencing judge referred to previous incidents in which Mr. Alderman acted out violently toward his brother (by stabbing him) and his sister (by trashing her property). The judge then set out portions of the psychological/psychiatric assessment in which Mr. Alderman is reported as saying that Ms. Halladay was the "aggressor and the intimidator in the argument." In the assessment, Mr. Alderman is described as having no sense of genuine guilt, shame, or remorse, as well as no empathy, and no appreciation of the psychological and physical harm he caused Ms. Halladay.
- [13] Immediately after para. 13 the sentencing judge set out what he describes as "contradictory" behaviour by Mr. Alderman, namely, that after trying to take Ms. Halladay's head off, he called 9-1-1. The judge then referred to Mr. Alderman having stabbed himself as an apparent act of remorse and notes that Mr. Alderman did not flee the scene and co-operated with the police. As well, the judge noted Mr. Alderman made a statement to the probation officer consistent with someone who believes they have done something wrong and wants to face the consequences out of a sense of remorse: para. 17.
- [14] On the basis of all the information before him, the sentencing judge found that Mr. Alderman's lack of remorse and empathy were products of a mental illness and he posed a high risk for future violence of some form. Having done so, the judge said the following in concluding that eight years' imprisonment - rather than the six years proposed by Mr. Alderman's counsel - was a fit sentence:
- [22] I have concluded that the principles of specific deterrence and the need for protection of the public are primary in this case. I agree with defence that because this case can be viewed as less violent than those cases presented by the Crown that a less serious sentence ought to be imposed.

- [23] Nevertheless, the seriousness of what has happened and because of what I deem to be Mr. Alderman's cold and callous nature, he poses a high risk to commit other violent offences unless treated in a high intensity treatment program. It is my determination that a fit sentence in this case is eight years. Given that he has already served three years and seven months, that would leave a remainder of four years, five months to serve.
- [15] Mr. Alderman correctly cites *R. v. Zeek*, 2004 BCCA 42 at para. 24, 193 B.C.A.C. 104, for the proposition that it is generally an error in principle to consider lack of remorse as an aggravating factor on sentencing. However, when the sentencing judge's reasons are considered as a whole, it is clear that he did not treat Mr. Alderman's lack of remorse as a basis for increasing the sentence. Rather, the judge, as he was entitled to do, considered Mr. Alderman's lack of remorse in assessing the degree to which Mr. Alderman poses a continuing risk to the public: *R. v. Allard*, 1999 BCCA 481 at para. 4-5, 130 B.C.A.C. 6; *R. v. Taylor*, 2014 BCCA 304 at paras. 19-20, 359 B.C.A.C. 49.
- [16] Mr. Alderman's second argument focuses on the following paragraphs in the sentencing judge's reasons, in particular the first sentence of para. 10:
- [9] In a family dispute case where anger and conflict are often present with high emotional contact or broken promises, cheating spouses, or long unpaid child support payments, this is the background of often violent altercations between family members. In this case, the victim had no history of family events. She was merely providing a room to someone who was temporarily without a home.
- [10] In this circumstance, Mr. Alderman's response is in my view even more frightening and callous. This is not the first time he has responded in a violent way to what he perceived as a slight on his sensibilities.
- Mr. Alderman contends that, in essence, the sentence judge punished him for not having a spousal relationship with Ms. Halladay.
- [17] There is no merit in that submission. In the paragraphs I have just mentioned the sentencing judge did no more than refer to the fact that acts of unprovoked violence often occur in family relationships in which there is a history of reoccurring conflict between the parties but that this was not such a case. Accordingly, the judge properly considered Mr. Alderman's extremely violent reaction to a request to leave, made by a person who had been kind to him, as an aggravating factor.
- [18] What remains to be determined is Mr. Alderman's third argument, namely, whether an eight year sentence - which is within the range suggested by counsel who acted for Mr. Alderman's at the sentencing hearing - is fit having regard to all the circumstances. As is well-known, a sentencing judge's decision is entitled to deference and should not be varied on appeal unless demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11, [2015] 3 S.C.R. 1089; *R. v. Lloyd*, [2016] 1 S.C.R. 130 at para. 52, 334 C.C.C. (3d) 327.

- [19] Having regard to the fact that this Court has upheld sentences in the range of eight years for offenders convicted of attempted murder who posed a high risk to the public, the present sentence cannot be said to be demonstrably unfit: *R. v. Fitzpatrick* (1991), 5 B.C.A.C. 82; *R. v. Burton* (1994), 51 B.C.A.C. 180; *R. v. Fitzmaurice*, 2001 BCCA 655, 160 B.C.A.C. 79.
- [20] In the result, I would allow the appeal on the aggravated assault charge, set aside that conviction, and enter a permanent stay of proceedings. I would grant leave to appeal the sentence on the attempted murder charge, but dismiss that appeal.
- [21] BAUMAN C.J.B.C.: I agree.
- [22] DICKSON J.A.: I agree.
- [23] BAUMAN J.A.: The aggravated assault charge is set aside, the conviction thereon that is, and a permanent stay of proceedings in respect of that charge is entered. Leave to appeal the sentence is granted but the appeal from sentence is dismissed.

"The Honourable Mr. Justice Frankel"

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