
CANADA / JUDGMENT

R. v. Allen

2015 BCCA 479

COURT

British Columbia Court of Appeal

DECIDED

10 November 2015

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2015 BCCA 479 R. v. Allen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Allen,

2015 BCCA 479

20151110

Docket: CA43055

Between:

Regina

Respondent

And

Jeremy Robert Allen

Appellant

Correction: The text was corrected in para. 19 on January 26, 2016.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice Garson

On appeal from: an order of the Provincial Court of British Columbia dated
July 30, 2015 (R. v. Allen, Merritt Docket No. 98095)

Oral Reasons for Judgment

Counsel for the Appellant:

M. Stephenson

Counsel for the Respondent:

E. Campbell

Place and Date of Hearing:

Vancouver, British Columbia

November 6, 2015

Place and Date of Judgment:

Vancouver, British Columbia

November 10, 2015

Summary:

The appellant was sentenced on breach of two recognizances which prohibited him from contacting the complainant in any fashion. The judge described the offending behaviour as a barrage of communications. The appellant was sentenced to 140 days incarceration. With credit given for presentence custody, this resulted in an actual sentence of 89 days. He appealed. Held: the sentence of 140 days was entirely fit for the offence, given the numerous breaches encompassed by the charges, and given denunciation and the deterrence are the primary applicable sentencing principles. On the authority of *R. v. Summer*, 2014 SCC 26, credit should be given for presentence custody at 1:1.5. Appeal allowed only to the extent of increasing the credit, reducing the actual sentence to 63 days.

- [1] SAUNDERS J.A.: Mr. Allen applies for leave to appeal sentence and if leave be granted, appeals from his sentence of 89 days, being an effective sentence of 140 days' incarceration less 51 days' credit for pretrial custody calculated on a 1:1 basis. He was found guilty on June 5, 2015, of two counts of breach of recognizance in respect to two recognizances. The counts concerned the same behaviour. The judge entered a conditional judicial stay of proceedings on one count based on *R. v. Kineapple* [1975] 1 S.C.R. 729, and registered one conviction.
- [2] Mr. Allen contends that an effective sentence of 140 days' incarceration for a single count of breach of recognizance is excessive and disproportionate considering the nature of the offence, his circumstances and the principles of sentencing. Further, on the basis of *R. v. Summers*, 2014 SCC 26, he alleges the judge erred in law in denying him enhanced credit of 1:1.5 for pretrial custody.

- [3] The offences arise from a domestic relationship commenced when the complainant was a young teenager and ending about 10 years later when she was 24 years old, after the birth of a child, marriage and the birth of a second child. The judge observed:
- [15] ... The relationship was notable for frequent moves, [the claimant's] social isolation and the presence of family violence
- [4] The ending of the relationship gave rise to the two recognizances breached by Mr. Allen. The first recognizance relates to an event on October 12, 2013, wherein Mr. Allen broke into the West Kelowna home of the complainant's mother where the complainant was staying. Mr. Allen was charged with breaking and entering with intent to commit an indictable offence, was released on bail subject to a recognizance that prohibited contact with the complainant, and was convicted on June 19, 2014, shortly after the offences with which this appeal is concerned. On November 14, 2013, Mr. Allen threatened the life of the complainant. At the time he was still subject to the terms of the bail from the October incident. Mr. Allen was arrested for the November incident, charged with breach of a recognizance and threatening, and then released subject to the second recognizance. On September 24, 2014, Mr. Allen was sentenced for both threatening and breaching his first recognizance. He was sentenced to 14 days incarceration on the breach charge and an effective 60-day sentence on the threatening charge.
- [5] Both recognizances just referred to required a \$1,500 cash bond. Both required Mr. Allen to have no contact, directly or indirectly, with the complainant. The second recognizance relating to the threatening charge expanded on the no contact provision, stating that he was to have no contact directly or indirectly with the complainant "including by social media, twitting, tweeting, texting, email, Facebook or any other means except by legal counsel".
- [6] The charges that lead to the sentence appealed arose from behaviour between May 24 through June 5, 2014. The date for the trial on the charge of breaking and entering the West Kelowna home was looming and the two recognizances were in effect.
- [7] The 12-day time period set out in the count encompassed multiple breaches. Their flavour is caught by the judge's description in his reasons for sentence:
- [10] ...Mr. Allen subjected [the complainant] to a virtual barrage of communications by text, email and telephone. There is no doubt that the communications attributed to Mr. Allen were his.
- [11] Mr. Allen embarked on a campaign to win back [the complainant], in spite of the no contact conditions in both recognizances. This commenced a few weeks prior to his June 19, 2014 trial date. The messages were calculated to persuade [the complainant] to reconcile with Mr. Allen.

- [12] [The complainant] was ... an important witness in the forthcoming case against him. The benefits to Mr. Allen of having [the complainant] "on side" at his trial were obvious and potentially significant.
- [13] Mr. Allen's communications to [the complainant] over this period were unrelenting. The exhibited print-outs of his text and email communications run to many pages. His words were in turns flattering, apologetic, pleading or ingratiating and at other times coarse and insulting. He conveyed the truth, as he put it, that no one loved her as he did. Her silence was torturing him. He couldn't eat or sleep. He was shattered. He asked why she was, destroying him, killing him. He told her at one point he had nearly committed suicide the previous night. He repeatedly pleaded with her to come home, to help him mend his broken heart. He asked her again and again to stop ignoring him.
- [14] In some messages his words and tone were bullying and abusive. He told [the complainant] she was vindictive. He cursed and accused her of cheating on him, though he said he still loved her. On May 24, 2014, while [the complainant] was preparing to attend her father's funeral, Mr. Allen called and told her that her father had thought she was a whore and said that he, her father, never loved her.
- [8] In passing sentence the sentencing judge first settled on denunciation and deterrence as the predominant sentencing considerations. He referred to the principles of sentencing codified in the Criminal Code, R.S.C. 1985, c.-C-46, in ss. 718-718.2, and he referred to *R. v. Bates* (2000), 146 C.C.C. (3d) 321 (O.N.C.A.). He recognized in particular the vulnerable position of a person seeking to end a domestic relationship and the need to protect people who are also witnesses.
- [9] The judge then canvassed the positive potential for Mr. Allen's rehabilitation and referred as mitigating factors to the fact Mr. Allen did not contest the charges of which he was convicted and to his lack of a criminal record at the time the offences were committed. The judge found the mitigating factors did not predominate over the need for a sentence emphasizing denunciation and deterrence.
- [10] The judge determined that a sentence of 140 days was appropriate. He gave credit on a one to one basis for 51 days served in pre-trial custody, resulting in the 89 day sentence imposed. He declined to give any greater credit for pre-trial custody on the basis that Mr. Allen's conduct in breaching his bail militated against enhanced credit.
- [11] As this is a sentence appeal, it is to be remembered that we may not lightly interfere with the sentence imposed, and may do so only if it is demonstrated the sentencing judge has committed an error in principle resulting in a sentence that is unfit, or where there is no error in principle shown, that the sentence is demonstrably unfit in the sense it is a substantial and marked departure from the range of sentences typically imposed on like offenders in like circumstances: *R. v. M.*(C.A.), [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327 at para. 90; *R. v. Johnson* (1996), 112 C.C.C. (3d) 225 (B.C.C.A.). In *R. v. Allen*, 2012 BCCA 377, Madam Justice Ryan for the Court comprehensively addressed the correct approach at paras. 28-35,

referring in particular to *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, a discussion I adopt.

- [12] Where, as here, the principle of parity is invoked by the appellant, the correct approach is conveniently expressed by Madam Justice Neilson in *R. v. Peynado* 2011 BCCA 524 at par. 27:
- [27] Section 718.2(b) of the Criminal Code requires a sentencing judge to consider parity in sentences for similar offenders and similar offences. Thus, when considering the fitness of a sentence, one function of appellate review is to ensure it does not represent a "substantial and marked departure" from sentences imposed in similar cases: *M. (C.A.)* at para. 92. An examination of sentencing authorities with similar features is a necessary part of that analysis. Nevertheless, the principle of parity will not over-ride the principle of deference unless the sentencing judge has made an error in principle or failed to give proper consideration to relevant factors or evidence: *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163 at para. 35. Moreover, as the sentencing judge observed, while the range of sentences emerging from earlier cases provides guidance, it is not conclusive of an appropriate sentence in a given case: *R. v. Bernier*, 2003 BCCA 134, at paras. 40-42, 63- 75, and 105-106, 177 C.C.C. (3d) 137.
- [13] The first ground of appeal challenges the fitness of the sentence. Mr. Allen says the sentence is too long. He contrasts this sentence, on one count, to the 14 day sentence imposed on September 24, 2014, for one count of breaching a recognizance. Mr. Allen invokes the principle of parity and also says the sentence on this one count is outside the appropriate range in any event and thus is demonstrably unfit.
- [14] I would not accede to this ground of appeal.
- [15] In my view, the comparison between this offence and the single incident offence on which the 14-day sentence was imposed is not sound, and thus the submission that this sentence lacked parity considering the lesser sentence cannot succeed. The earlier sentence was imposed in response to a single incident. In contrast, the sentence with which we are concerned was imposed for a series of breaches that amounted to, as the judge said in the passages to which I have referred, as a barrage of communications. The judge referred not only to the number of incidents over this period and the volume of print-outs of text and email communications, but also to their content which varied from apologetic and pleading to coarse and insulting, and included offensive comments to her about her father's view of her communicated to her on the day of her father's funeral. Further, this barrage occurred under the shadow of the approaching trial in June for the October 2013 incident, at which the complainant was scheduled to testify.
- [16] I see no error in principle, no misapplication of the notions of parity or proportionality. As to the fitness of the sentence, Mr. Allen refers to *R. v. Bilotta*, 2015 BCSC 181, in which six sentences totalling 155 days were imposed on six counts of breach of recognizance, most of them involving simple contact with the complainant. Mr. Allen says the individual sentences in that case establish a range of sentence for one count that stops far short of 140 days.

Again I do not agree, for the reason just explained that the count in this case represents many incidents that must be reflected in the sentence imposed.

- [17] It is well established that a domestic context to the offence, and the fact that the prohibited contact was with a witness on the eve of trial, are both aggravating factors: *R. v. Rush*, BCCA 2010 293, *R. v. T.E.C.*, 2015 BCCA 43; *R. v. Gill*, 2014 BCCA 88; *R. v. Cooper*, 2009 BCCA 208; and *R. v. Dwyer* (1996), 81 B.C.A.C. 129. I also refer to *R. v. MacDonald*, 2012 BCCA 155, although the sentence in that case was imposed in the context of sentencing for multiple offences.
- [18] In the aggravated circumstances before the judge, it seems to me the sentence imposed was entirely fit. I would not interfere with the sentence on the basis of fitness.
- [19] The second issue is the question of credit for pre-sentence custody. On this issue the Crown acknowledges that enhanced credit should have been given, and that the sentence should be adjusted.
- [20] I will explain. The judge declined to give more than one for one credit, saying that Mr. Allen demonstrated bad conduct disentitling him to enhanced credit by breaching the terms of his recognizance. Here, in my respectful view, the judge erred because the bad conduct referred to by the judge was the very conduct that made up the offence requiring the sentence. To both sentence Mr. Allen for the offence of breaching his recognizance and consider his actions to be bad conduct disentitling him from enhanced credit, is to double count: because the sentence is for that the breach of the recognizance, that conduct cannot be then used in this calculation: *R. v. Kazakoff*, 2014 BCCA 422; *R. v. Vinepal*, 2015 BCCA 349.
- [21] I consider that the basis expressed for denying enhanced credit cannot be sustained , and there being no other basis to deny enhanced credit, on the authority of *Summers* Mr. Allen must be credited with a further 26 days, thereby giving him credit for 77 days for pre-sentence custody.
- [22] Accordingly, I would grant leave to appeal sentence and reduce the sentence from 89 days to 63 days.
- [23] KIRKPATRICK J.A.: I agree.
- [24] GARSON J.A.: I agree.
- [25] SAUNDERS J.A.: Leave to appeal is granted and the sentence is reduced from 89 days to 63 days.

"The Honourable Madam Justice Saunders"

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