
CANADA / JUDGMENT

R. v. Anderson

2014 BCSC 1659

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1659 R. v. Anderson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Anderson,

2014 BCSC 1659

Date: 20140801

Docket: X077684-2

Registry: New Westminster

Regina

v.

David Robert Anderson

and

Chad Keith Gunness

Before: The Honourable Mr. Justice Crawford

Oral Reasons for Sentence

Counsel for the Crown:

C. McPherson

Counsel for the Accused Anderson:

Appearing as Agent for D. Albert, Counsel for the Accused Gunness:

K. Bastow

M. Shames

Place and Date of Hearing:

New Westminster, B.C.

July 18, 2014

Place and Date of Sentence:

New Westminster, B.C.

August 1, 2014

- [1] THE COURT: Mr. Anderson and Mr. Gunness are charged with breaking and entering a dwelling house at 16538 24th Avenue and committing an assault in there, contrary to s. 348(1) (b) of the Criminal Code of Canada, R.S.C. 1985, c. C-46; secondly, an assault in the same circumstances under s. 267(b) of the Criminal Code; and an assault with the use of or threatening the use of a weapon, a baseball bat, contrary to s. 267(a) of the Criminal Code.
- [2] The circumstances on December 18, 2013 were that Mr. Gunness and Mr. McLeod, who appear to have been working together in the drug trade for some three years, were at Mr. McLeod's house on 24th Avenue in the afternoon. They were "cooking" cocaine as I recall.
- [3] In the course of the afternoon, Mr. Gunness's girlfriend asked if she could borrow Mr. McLeod's truck to which he said, "Of course you can". She was going to move some items that needed the use of a truck.
- [4] Not long afterwards, the girlfriend called back to Mr. Gunness, asked him to leave, and then after that told him that she had found a pink baseball bat in Mr. McLeod's truck. The significance of that was Mr. Gunness had been in jail the previous week. Apparently, someone had broken into the Gunness's abode and taken some items which were never specified but included a pink baseball bat.
- [5] The apparent unlawful taking of the pink baseball bat then caused a conference. Mr. Anderson joined in with Mr. Gunness and a couple of other fellows and they all jumped in a truck round about 6 o'clock in the evening of the 18th of December, descended on the dwelling house at 24th Avenue, jumped out of the truck, surrounded the house, and smashed in all the windows which would be a rather frightening experience for most of us.
- [6] At this stage, one has to also see the scene. There is a recreational vehicle of some kind or trailer and Mr. McLeod's dad who is relatively short in stature compared to most of the other players in this sequence of events, walked out of his recreational vehicle apparently with a machete in his hand and said something rather polite -- at least that is the way he gave it in the stand - and said "Gentlemen, can we not have a sensible discussion?" and the rather large four gentlemen turned on him and said presumably in not equally polite language, "Dad, weren't you going to give us the machete and get back inside?" which he did. He then

telephoned the police.

- [7] At one minute and 58 seconds into the telephone call, Mr. McLeod, Sr. advised the person that was answering the telephone at the police station that the truck had left with its four occupants.
- [8] So whatever it is that transpired gives rise to the charges because in the next one minute and 58 seconds, the essence of that was that Mr. Gunness gave evidence and said that after having smashed the windows and relieved Mr. McLeod, Sr. of the machete, they turned their attention back to the house and the alleged robber of the pink baseball bat.
- [9] Mr. Gunness said the front door was then open. Mr. McLeod was standing there with what appeared to be a handgun in his right hand. He gave evidence that the other baseball bat holders left the scene and jumped in the truck, but seeing he was close by the right-hand side of the door, he decided to take matters into his own hands, and in his own defence then swung the baseball bat knocking the gun out of Mr. McLeod's hand.
- [10] The evidence of the injuries to Mr. McLeod included that the main injury was a broken right elbow and there were photographs showing evidence of the bruising that occurred after the breaking of the right elbow and showing it on the outside of the right elbow. He also had a broken finger; I do not recall which finger.
- [11] So Mr. Gunness in essence said that having knocked the gun out of Mr. McLeod's hand he then retreated to the truck and left.
- [12] That of course would answer the charges. There had been no break and entry, and secondly the assault was done in self-defence.
- [13] Mr. Gunness was asked to demonstrate how he swung the baseball bat and he demonstrated a right-hand swing and it does not take too much to figure out that it would be very difficult to break the outside of the right elbow when the person facing you is swinging right-handed, so I did not believe Mr. Gunness's story.
- [14] Mr. McLeod's story was that he was trying to hold the door having had all the windows in his house broken and to stop people coming in presumably to do some damage to him, but he was not successful. They broke the door down. There are, of course, four rather large gentlemen outside his front door. There was evidence of a footprint although it was not tied to anybody that was charged, but there was evidence of a footprint in the door and there was some evidence of the breaking of the frame of the door.
- [15] Mr. McLeod says that as the door broke in, he was pushed backwards down onto the ground and then he was hit he said maybe some 15 times by people with baseball bats. He says he put his arms up to protect his head and that is when he sustained the injuries to his right elbow and hand.

- [16] That all makes some sense because the area he was pushed back into was not far from the door and he was pushed into an area with a rectangular couch arrangement in an L-shape and so it would be rather difficult to really get at him with some baseball bats. There was a ladder, and he was lying on the ground with his head away from the door and the couch protecting him on the right and behind him. I was satisfied beyond a reasonable doubt the charges were made out.
- [17] Some of the case citations reference what is called "home invasion" and there is a great variety in the cases that are now enjoying that rather brief if not legal description. It is not one of the worst cases that property is broken into. People are being robbed and perhaps are assaulted with the intention of eliciting from them the whereabouts of their valuables. Great damage can be caused to people let alone the terrorism for old people in their houses and the loss of their assets.
- [18] But rather unfortunately to me this is an example of idiot behaviour that springs and seems to spring from what is happening in the drug trade in this province. People who seem to come from very decent families at some stage totally lose their bearings. The people that have been appearing in this court in the last ten years have good families sitting behind them. They are children that grew up in fairly decent circumstances and who were given a fairly decent set of living rules and morals, perhaps even played sports at a decent level and somehow they get out of school and the fast money, fast cars and fast everything else seems to cause a total loss of moral compass.
- [19] Indeed it is fairly difficult to understand this particular situation. Think about it. Somebody's best friend has got a pink baseball bat in his truck and he lends it to his girlfriend. I view that as an exceedingly low sense of friendship or low sense of what is equal and relevant. If they are friends, why would you not call back and say, "What the hell are you doing with my pink baseball bat," or, "my girlfriend's pink baseball bat?" It is very difficult to understand this behaviour. This I might say is the low end. Unfortunately, I have seen far worse cases of so-called retribution or revenge for off-handed comments.
- [20] What I am calling idiot or stupid behaviour is no less criminal. The Criminal Code is there for a purpose. You do not break into people's houses. You do not whack people with baseball bats. Clearly, there is premeditation fuelled apparently by some heroin and clearly intended to frighten someone and certainly did frighten Mr. McLeod's girlfriend. Mr. McLeod presented as a very distracted person when he was in the stand, perhaps because he did not want to give evidence against his friends. All I can say he is that was lucky to fall into the space he did between the couch and the ladder.
- [21] In my view then when I look at some of the cases I will touch on, this tends to fall to the low end of the sentencing spectrum in the judgments that have been cited by counsel.

- [22] Crown submitted that Mr. Anderson and Mr. Gunness should receive a five-year sentence, that they provide DNA samples under s. 487.051(1)(b), a lifetime firearms prohibition under s. 109, and pay the victim fine surcharge under s. 737 of the Criminal Code.
- [23] Both men are in jail; both are entitled to credit on a one-to-one basis. I see no basis for any enhanced credit under s. 719. Mr. Anderson had contravened his probation conditions; Mr. Gunness contravened the bail order. In fact, Mr. Gunness had been released the day before if I recall rightly.
- [24] I only reference the cases briefly.
- [25] Mr. Justice Joyce in *R. v. Brossault*, 2009 BCSC 464 set out an extensive review of the law on home invasions speaking in particular of the Court of Appeal decision in *R. v. Bernier*, 2003 BCCA 134 where it was suggested that the range in an "average home invasion" is between five and eight years. There have been much more; there have been less.
- [26] What does come out of all of the cases to date is that deterrence and denunciation are primary factors in sentencing for violent crimes, particularly when these crimes violate the safety and security of a person's home.
- [27] The other references were as to time served, that is, *R. v. Mayers*, 2011 BCCA 365; *R. v. Moore*, a decision of Mr. Justice Warren, February 26, 2007, and *R. v. Ross*, a decision of Mr. Justice Schultes 2009 BCSC 1831.
- [28] As Mr. Justice Joyce noted and I have already stated, the emphasis when one looks at the principles of sentencing in the Criminal Code also places a great emphasis on rehabilitation.
- [29] I go back to an emphasis in these cases on denunciation and deterrence because of the higher value we place on the peaceable occupation of our homes. The expectation of society is that if you violate one's peaceful habitation of their home and you cause violence to the occupants then there is going to be a higher price in terms of lost liberty.
- [30] So the crown then, acknowledging that Mr. Gunness has served seven months in pre-trial custody and Mr. Anderson five months, says the sentence should be for five years.
- [31] There was acknowledgement by the crown that Mr. Anderson played a lesser role than Mr. Gunness, but his criminal record is worse. I will come back to that in a moment.
- [32] I do not have a particularly clear picture of either of the accused.
- [33] I am told that Mr. Gunness is 28; he appears to have come from a good family; that he graduated from high school in 2004. I was told he was an elite athlete and that there is family support.

- [34] Counsel for Mr. Gunness submitted that two years less a day plus probation was adequate in the peculiar circumstances of this case, noting also that these gentlemen were not masked and that - and I think this is an appropriate comment - the unmeasured response was due to drugs.
- [35] For Mr. Anderson, counsel noted that he did not appear to have participated in the planning. There was a degree of violence, while ostensibly large in terms of smashed windows, broken doors, and so on, the injuries to Mr. McLeod were not as extensive as they might have been. That perhaps was luck and circumstance.
- [36] Counsel also noted that there were no guns involved on the part of the assailants, there is no history of violence and that Mr. Anderson has already served some recent jail time. Again, it was submitted that a period of provincial time, i.e. less than two years plus three years' probation would be appropriate.
- [37] Reference was made to the conviction list.
- [38] As to Mr. Gunness, the record starts in 2004 which appears to be of course the time of high school graduation. Much of it simply seems to be an inability to accord with the requirements of probation orders, but it starts with driving a motor vehicle without due care and attention, then injury to another person resulting in a recognizance, then in 2012 a theft under \$5,000, in the month of November breaches of probation on several bases, and another theft under \$5,000. In March of 2013, the same sequence with breaches of probation and this time possession for the purposes over \$5,000, and gradually one day jail sentences and then starting to move to 21 days, on March 7, 2013 of 56 days, and July 11, 2013 another breach of probation and was given 30 days less credit for pre-sentence time.
- [39] Mr. Anderson was also born in 1986. His record starts in 2006, again a driving offence, and in 2008 possession for the purpose of trafficking, a series of dispositions in May of 2012 with 60 days' jail plus two years' probation, but on top of that was a six-month jail sentence for possession of stolen property, possession for the purposes over \$5,000 and that was the high end of that grouping in May of 2012 which would have been two years less a day but credit for pre-sentence time in custody 133 days in jail for 595 days. Then we get to December of 2013 where he was out of jail and on probation.
- [40] Defence counsel provided me with cases which one might argue are at the other end of the spectrum.
- [41] R. v. Hockley is a decision of Mr. Justice Bracken at 2013 BCSC 113 and His Lordship started off by saying:
- [1] Mr. Hockley and Mr. Thomas were convicted after a trial of breaking and entering a dwelling and assaulting one of the occupants of the residence in an apparent attempt to collect a business debt owed to Mr. Thomas by the victim, Mr. Kovic.

- [42] His Lordship noted the debt arose when Mr. Thomas hired Mr. Kovic as a subcontractor on a renovation contract. Mr. Kovic asked for and received a deposit of approximately \$3,000 to obtain materials but evidently did not perform his part of the contract and did not return the deposit. After the excuses ran out, Mr. Hockley and Mr. Thomas went to Mr. Kovic's residence, each carrying a handle, one a shaft to a hockey stick, and the other a shovel handle, both wearing gloves. They found Mr. Kovic in his bedroom and when he did not say he would pay or he refused to pay, they hit him with the sticks which resulted in some bruises and cuts to Mr. Kovic's head which were promptly treated at hospital. The judge said the injuries were not serious. The residual effects, physically and psychological, were substantial and Mr. Kovic moved to Calgary. The police arrived on the scene in very short time because Mr. Kovic's son was in the next bedroom and both the gentlemen gave themselves up to the police officers.
- [43] What was of concern to the court in that case was that they had led law-abiding and productive lives up to the particular incident, they had no criminal records, there was no need to separate the men from society and in the finish His Lordship imposed a sentence of 90 days in custody served intermittently on weekends, plus probation orders.
- [44] In *R. v. Luttman and Oakland*, Mr. Justice Wong in a decision cited at 2005 BCSC 405, spoke to both young men. That incident appears to have occurred because the victim, Mr. Hussey, apparently did something on the roadway which leads to the description of people with "road rage" and thus Mr. Luttman and Mr. Oakland found Mr. Hussey's car and smashed the windows. Hussey was visiting another man's residence. They kicked the door in and found Mr. Hussey. Oakland "manhandled" Mr. Hussey. Hussey apparently was able to fend off some of the attack and even managed to throw a beer bottle at Luttman's head. The police were called. Again, no masks, no bats, more of a fight.
- [45] His Lordship pointed out that these gentlemen will carry convictions for breaking and entry and assault which may or may not affect the rest of their lives if they ever wanted to do security work, if they wanted to even do care work. Something like that stands out as a huge block. He gave them both suspended sentences.
- [46] I have touched on the principles of sentencing and I repeat what is said in the Criminal Code at s. 718 that:

The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;

- (e) to provide reparations for harm done to victims or to the community; and
 - (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.
- [47] Section 718.1 says, "A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender".
- [48] I have spoken on the range of sentences that are often made but it seems to me it is somewhere between the Hockley, case and the bottom end of the range.
- [49] These offenders are not like Mr. Hockley; men of blameless character. But I want to say this to you, Mr. Anderson and Mr. Gunness, from where I sit you are on course to meet a violent end. The drug trade in this province has become a very dangerous occupation. You see enough in the newspapers. Sadly enough, I and the other judges in this province get to see the replays that come before the court on an all too regular basis at trial. Your rehabilitation is going to be in your hands. You are at the tipping point of 28-30 years old. You can clean yourselves up and use your remarkable bodies - you are big strong men - to make an honest living and you might look forward to the lives that your parents live. I do not need to point out where I think the other road goes.
- [50] Gentlemen, will you stand please.
- [51] The circumstances still require jail time and I will take into account the time served. So taking into account the seven months and the five months that are mentioned earlier, Mr. Gunness I sentence you to one year, 11 months jail time, that you provide a DNA sample pursuant to the Criminal Code, there is a lifetime firearms prohibition, and there will be a two-year probation order which we can speak to terms if they are not standard. Mr. Anderson, I sentence you to one year, 10 months jail, you too are to provide a DNA sample if it has not already been given, and there will be a lifetime firearm prohibition. Thank you. You may sit down.
- [52] MS. SHAMESS: My Lord, I have a question. Is that taking into account time served?
- [53] THE COURT: Yes.
- [54] MS. SHAMESS: All right. So it's really one year, 10 months plus the five months that he has been in custody?
- [55] THE COURT: Yes.
- [56] MS. SHAMESS: So it is in fact a federal sentence, is that correct?
- [57] THE COURT: Well, how that plays I am not too clear, but --
- [58] MS. SHAMESS: You're giving him two years plus -- two years plus --

- [59] THE COURT: Well, if it's one year, 10 months, plus the seven -- he had the seven months? No, he had the five months. I'm getting mixed up.
- [60] MS. BASTOW: He had the five months. And what is -- are you giving time and a half credit for that? We didn't (indiscernible) that issue.
- [61] THE COURT: No, I touched on it very briefly and I said I wasn't giving enhanced credit.
- [62] MS. BASTOW: Okay. Thank you.
- [63] MR. MCPHERSON: In terms of the term for probation, obviously the standard keep the peace and be of good behaviour and the like, I think there should be a no weapons term. That firearms prohibition is there of course but I think there should be a no weapons term and I am going to suggest there be no contact with the names I have and of course I have very little knowledge of this file (indiscernible) so Spencer McLeod and Brittany Schotropa.
- [64] THE COURT: That's correct.
- [65] MR. MCPHERSON: I think that's all the Crown asks for -- oh, and the victim fine surcharge. It's not one that can be waived.
- [66] THE COURT: Yes, the victim fine surcharge is to be paid.
- [67] MR. MCPHERSON: My Lord, was there probation on Mr. Anderson or just Mc. Gunness?
- [68] THE COURT: Both.
- [69] MR. MCPHERSON: Two years.
- [70] MS. SHAMESS: My Lord, if I may. Mr. Albert didn't provide me with any instructions on submissions for a probation order or any non-standard terms. I'm not sure if My Lord would -- would agree to perhaps return at a later date when Mr. Albert could provide some guidance on that matter or I don't know what Your Lordship's schedule is --
- [71] THE COURT: No, I will leave that for you and Mr. McPherson's office to settle but there will be standard terms and Mr. McPherson has indicated a few others that if they are not already in there would be there.
- [72] MS. SHAMESS: -- or stand it down, I might be able to contact him (speaking simultaneously with the Court)
- [73] THE COURT: The (indiscernible) is keeping away from the young lady and Mr. McLeod and no weapons that probably goes with the lifetime -- well, with --
- [74] MR. MCPHERSON: (speaking simultaneously with the Court) No it doesn't --
- [75] THE COURT: -- weapons and firearms is different.
- [76] MS. SHAMESS: The terms are -- is there a no contact with the complainants?
- [77] THE COURT: Yes.

[78] MR. MCPHERSON: Yes.

[79] MS. SHAMESS: Perhaps we should speak to our clients about that. They have known each other -- Mr. Gunness at least has known the complainants for a very long time, I don't know what my client (indiscernible)

[80] THE COURT: Well, Mr. McLeod would probably have something to say about it too, I suspect.

[81] MS. BASTOW: On behalf of Mr. Anderson I can tell Your Lordship that he doesn't have a relationship with him so it's not a problem having that condition.

[82] MR. SHAMESS: Mr. Gunness informs me that he -- he doesn't have a continuing relationship with either Mr. McLeod or Brittany and I'm sorry I'm not sure what her last name is --

[83] THE COURT: That's all right.

[84] MS. SHAMESS: -- and that he doesn't anticipate it being a problem with no contact in particular.

[85] THE COURT: Thank you. Thank you, Madam Registrar.

"Crawford J."

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