
CANADA / JUDGMENT

R. v. Barrett

2021 BCSC 288

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 288 R. v. Barrett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Barrett,

2021 BCSC 288

Date: 20210129

Docket: 89993-2

Registry: Kelowna

Regina

v.

Kevin Lee Barrett

Before: The Honourable Mr. Justice S. Wilson

Oral Reasons for Sentence

Counsel for the Crown:

P. O'Neil

Counsel for the Accused:

T. Zanatta

(as Agent for J.D. Watt)

Place and Date of Trial/Hearing:

Kelowna, B.C.

January 26, 2021

Place and Date of Judgment:

Kelowna, B.C.

January 29, 2021

- [1] THE COURT: Kevin Barrett has entered a plea of guilty to a single count of aggravated assault on his mother, Eleanor Holmes, contrary to s. 268(2) of the Criminal Code. The guilty plea was entered on the 7th day of trial just as Ms. Holmes was scheduled to testify. The accused has been detained since the offence date, April 29, 2019.
- [2] The Criminal Code provides that a person convicted of aggravated assault is liable for a term of imprisonment not exceeding 14 years. There is no mandatory minimum sentence.

The Offence

- [3] Mr. Barrett viciously attacked his mother when she refused to let him drive her vehicle on account of the fact that he did not have a driver's licence. He pulled her into the passenger side of the vehicle and pushed her down into the footwell whereupon he struck her both with his fists and with a blunt object. He ripped out handfuls of her hair and threw her dentures out of the vehicle. He bit a chunk from her hand and attempted strangulation with a seatbelt.
- [4] He then drove her in the vehicle into a remote wooded area, removed her shoes, took her cellphone, and rolled her down an embankment into a ravine, and drove away. It was cold and it was getting dark. Somehow, she was able to climb up to the forestry road and was seen covered in blood and sitting on a skid steer by a couple who were driving by on their way to have a bonfire.
- [5] The Crown and Mr. Barrett submitted a very detailed agreed statement of facts at the sentencing hearing. Rather than recite those facts into the record, a copy of the agreed statement of facts is to be attached as an appendix to the written version of these reasons.

The Victim

- [6] The victim, Eleanor Holmes, was 79 years of age at the time of the assault and she is now 80 years old. She provided a very brief victim impact statement that confirms that she remains terrified of Mr. Barrett.
- [7] Having reviewed the photographs of Ms. Holmes that were entered as exhibits at the sentencing hearing together with the descriptions of the assault, it is remarkable that she does not have more significant residual injuries.

- [8] This is a very sad case. It is difficult to appreciate the psychological effects on Ms. Holmes that must have resulted from being the subject of such a brutal attack from her own son whom she had continued to help when no one else would.
- [9] Ms. Holmes, when asked how she feels about Mr. Barrett at the preliminary inquiry, says she loves him and forgave him, but she remains terrified of him at the same time.
- [10] The photographs of the inside of Ms. Holmes' vehicle that were taken on the day following the assault depict clumps of hair and a massive amount of blood throughout the interior of the vehicle.
- [11] While the physical injuries may have largely healed, the psychological consequences will undoubtedly have lingered on.

The Offender

- [12] Kevin Barrett is 61 years of age and was 60 at the time of the assault. He was born and raised in the Kelowna area. He is not married and does not have children.
- [13] His parents separated when he was a child and for a time he lived with his father and stepmother in an environment that included both substance abuse and physical abuse. He reports having been sexually assaulted by a neighbour as a child.
- [14] Mr. Barrett's work history includes mechanical and automotive repair and general labouring work. He has received financial assistance on account of disability more recently.
- [15] Mr. Barrett's background includes alcohol abuse and mental health issues. Although both parties chose to embark on the sentencing hearing immediately following the guilty plea on day 7 of trial, the court has the benefit of a presentence report, if somewhat dated, arising out of a series of convictions from 2009. The presentence report that was entered into evidence is dated April 24, 2009. Those convictions were entered for assault causing bodily harm, impaired driving, and a firearms offence. A psychological presentence report was also prepared at the same time and was also tendered as an exhibit at the sentencing hearing.
- [16] The presentence report from 2009 was prepared with the benefit of Ms. Holmes' input as she was interviewed with regard to Mr. Barrett's circumstances. She described mental health issues on both sides of the family including family members on both sides having committed suicide. Ms. Holmes' own mother was institutionalized on several occasions.
- [17] As for the accused himself, he had an early history of alcohol abuse and has been admitted to the psychiatric unit of the Kelowna General Hospital on several occasions. He has been diagnosed with bipolar disorder and, unfortunately, has a history of not following his medication regime resulting in a deterioration of his mental health from time to time.

[18] Mr. Barrett has a criminal record, albeit it is not a particularly lengthy one at least as it pertains to related offences. He has three prior convictions for crimes of violence which were 3, 11, and 26 years ago. He was subject to a probation order for the most recent of these at the time of this offence.

[19] While he has a number of convictions for various breach offences, the relevant criminal history as it relates to violent offences is limited to those I have already mentioned.

Crown's position

[20] The Crown argues that a fit sentence given the circumstances of this case is one of eight to nine years of imprisonment.

[21] The Crown argues that although the victim, Ms. Holmes, has been left with less residual injuries than are sometimes found in similar cases, this was an assault that involved the striking of an elderly woman and with it came a high degree of risk as to her health and indeed to her life.

Defence position

[22] The defence argues that the appropriate sentence is four-and-a-half years of imprisonment plus a further three years of probation.

[23] Mr. Barrett argues that he is to be sentenced for what did happen to Ms. Holmes and not what might have happened. He does not seek to minimize the assault, but nonetheless points out that she has not been left with the sort of long-term and permanent debilitating injuries that are found in some of the other authorities involving aggravated assault that involved lengthier periods of incarceration.

[24] He also argues that denunciation and deterrence are not the only considerations and that restraint, rehabilitation, and proportionality must also be taken into account.

[25] He submits that his mental health issues can and should be viewed as a mitigating factor in this case.

Pretrial custody

[26] Regardless of the sentence I impose, both parties agree that Mr. Barrett is entitled to credit spent for time awaiting his trial.

[27] Mr. Barrett has been in pretrial custody since April 29, 2019. With enhanced credit, the 639 calendar days equate to 959 days. From that total 60 days is to be deducted on account of two 30-day sentences that pertain to unrelated matters and the accused is therefore entitled to credit of 899 days.

Aggravating factors

[28] The Crown argues the following are aggravating factors in this case:

- a) This was a cowardly unprovoked surprise attack on a frail elderly woman;
- b) The victim is his mother and one of our basic social values is to take care of our elderly parents who cared for us;
- c) This was an extremely vicious attack with blows to the head, body, and limbs and a very nasty bite on the hand and with handfuls of her hair torn off her scalp. This would undoubtedly have been an event of terrifying brutality for the victim;
- d) The victim was confined in her vehicle with no chance to defend herself as the accused drove her some 30 kilometres and dumped her body down an embankment;
- e) He took steps to delay her obtaining help by abandoning her in the wilderness with no phone, no shoes, nor adequate clothing. He lied to a neighbour about where she was and, in the circumstances, it is fortunate that she was found;
- f) The offence has had a significant impact on the victim considering her age and her personal circumstances;
- g) This was not his first offence and he has two prior convictions for assaults causing bodily harm;
- h) Finally, he was on probation having only been released from custody five months earlier for the last of the three prior crimes of violence.

Mitigating factors

[29] The mitigating factors are that:

- a) the accused pleaded guilty. The parties disagree on the value of the guilty plea which was near the end of the trial, but it is nonetheless a mitigating factor;
- b) the accused's mental illness may in certain circumstances be viewed as a mitigating factor.

Principles of sentencing

[30] The principles of deterrence and denunciation are the primary concerns when sentencing an offender for an aggravated assault which is a very serious offence with a maximum term of imprisonment of up to 14 years. Other factors, including the separation of the offender from society, promoting a sense of responsibility in offenders, and rehabilitation are also factors that may be taken into account.

[31] Ultimately, a fit sentence is one that is just and proportional in all of the circumstances.

Discussion

- [32] Notwithstanding the maximum possible sentence of 14 years of imprisonment, the normal range has been described in the authorities as one that would fall between 16 months and six years in jail (*R. v. Nguyen*, 2016 BCCA 408, at para. 47). The range is therefore very broad, and where a particular case fits within the range will depend on all of the circumstances.
- [33] Sentencing is an individualized process that takes into account the circumstances of both the offender and the offence. In some cases, the court imposes a sentence that is above the range that might otherwise apply, especially in particularly egregious circumstances.
- [34] There are numerous examples where courts have imposed sentences in excess of the high end of the range of six years in aggravated assault cases and the Crown has referred to a number of those in its submissions as it seeks a sentence of eight to nine years for Mr. Barrett.
- [35] I will review some of the authorities referred to by the Crown in order to determine whether the circumstances in this case justify a sentence outside of the range.
- [36] I do not intend to review all of the cited authorities in detail. The highest sentence in the cases referred to by the Crown was *R. v. Wallin*, 2003 BCSC 809. In that case, the offender had attacked a female jogger in Stanley Park in Vancouver and strangled her resulting in severe brain injury and leaving the victim in a permanent vegetative state. The accused had pre-existing mental health issues, but no criminal record. Of importance in that case was that the sentencing judge was concerned about protection of the public. The offender was sentenced to nine years' imprisonment.
- [37] There are different aggravating factors in each of the cases cited. In *R. v. Armstrong*, 2003 BCSC 1057; *R. v. Berry*, 2014 BCCA 7; and *R. v. Larose*, 2013 BCCA 450, there were multiple victims. In *Larose*, the offender attacked two strangers with a knife and both suffered life-threatening injuries. There was no guilty plea and the Court of Appeal upheld a sentence of seven years.
- [38] In *R. v. Tschritter*, 2006 BCCA 202, the victim was left with devastating life-altering injuries including a permanent traumatic brain injury which is also what had happened in *Wallin*, although to a lesser degree in *Tschritter*. The Court of Appeal upheld an eight-year sentence.
- [39] The facts in *R. v. Payne*, 2007 BCCA 541, were that the accused was involved in the drug culture and had severed someone's finger and keep it to serve as a warning to others. The accused was also convicted for extortion at the same time. It was an aggravated assault case, but the factual matrix was altogether different.

- [40] Although it is submitted on behalf of the Crown that the physical impact on Ms. Holmes could have been significantly worse, and I agree that the fact that she does not have significant residual injuries is astonishing given what happened to her, she has made a quite remarkable recovery. She continues to have soreness in her nose and a clunking sound in her right ankle and the scar on her hand remains.
- [41] While I am sure that those injuries serve as a constant reminder to her of what she had to endure on that night, she has nonetheless not been left with the sort of permanent injuries that are found in some of the other cases.
- [42] The nature and extent of any injury is material when determining a fit sentence. It is well settled in criminal law that consequences are significant in determining both sentence and indeed charges. For example, an impaired driver who causes an accident that results in a permanent or serious injury will receive a much different sentence than the impaired driver who arrives home safely, if only as a result of good fortune rather than design, even though the moral culpability of each when deciding to get behind the wheel of a car and drive it may be the same.
- [43] From my review of the authorities where sentences above the usual range have been imposed, each contains significant aggravating and distinguishing factors such as permanent serious and debilitating injuries, multiple victims, or are part of a larger pattern of criminal activity including other very serious charges.
- [44] I have concluded that the facts in this case as set out in the agreed statement of facts, while clearly horrific and disturbing, do not include the sort of aggravating factors that were contained in the authorities submitted by the Crown and which factors the cases suggest need to be present to justify imposing a sentence that is above what our Court of Appeal has described as the normal range for this offence.
- [45] I turn now to the question where in the range of 16 months to six years these circumstances should be placed.
- [46] This was a terrifying attack by a larger man on a defenceless and unsuspecting victim, made all the worse by the fact that the victim was his mother, the one person in his family who had continued to support him and maintain a relationship with him when all others refused.
- [47] The attack was unprovoked, and it took place in a confined space where the victim could neither defend herself nor escape. Her decision to play dead was undoubtedly one that contributed to her survival.
- [48] I consider that his decision to abandon her in the wilderness and rolling her down an embankment without proper footwear or clothing and without a phone to be able to call for help is an aggravating consideration in this case because he had ample time to decide what he was going to do after his initial attack when she refused to let him drive her car.

- [49] As he drove northbound on Highway 97 with his victim in the passenger-side footwell of the vehicle, Mr. Barrett could have driven her the short distance to the hospital to get assistance, but instead he drove her 15 kilometres up a forest service road and dumped her there. After doing so, he proceeded to go to the liquor store and buy himself an ice cream. He later told a concerned neighbour that she had gone out with her friends.
- [50] He did nothing to help Ms. Holmes and carried on with the routine aspects of daily life while she was, at least from his understanding, lying bleeding and unconscious in a ravine out in the bush. It was therefore only as a result of her resilience and strength, and perhaps some good fortune to the extent that two people happened to be on the remote forest service road that evening, that Ms. Holmes was able to obtain assistance, and not as a result of any actions on the part of Mr. Barrett.
- [51] The case that is closest to the facts in this case is *R. v. Wilson*, a decision of Mr. Justice Baird, reported at 2020 BCSC 918, a case that was referred to by both parties in their sentencing submissions. The facts in *Wilson* are not dissimilar from those here. Mr. Wilson attacked his mother with a hammer, and essentially confined her for a period of time, not unlike what happened here. The victim was eventually able to escape but suffered significant injuries and was hospitalized for five weeks. The offender pleaded guilty after the preliminary inquiry but before the victim testified at trial.
- [52] The offender pleaded guilty to a single count of aggravated assault on his mother. He had twice been convicted of assaulting his mother previously and reported a troubled upbringing. He had been involved in organized crime for a time, albeit he had no criminal record from that behaviour and suffered a traumatic brain injury when he was attacked by associates of similar background.
- [53] The offender, Mr. Wilson, suffered cognitive defects and was prone to violent outbursts which left him dependent. He was unable to manage his affairs and he had a committee. He was found not criminally responsible by reason of mental disorder for the first of the two prior assaults on his mother, but was found guilty and sentenced following the second.
- [54] Justice Baird considered the offender's brain injury to be a mitigating factor and concluded that six years would be an acceptable sentence, but ultimately imposed a sentence of five-and-a-half years.
- [55] A guilty plea is generally considered to be a mitigating factor at the determination of sentence. Mr. Barrett's guilty plea in this case was entered on the morning that his mother was scheduled to give her evidence at the trial. His guilty plea was not an early one and the considerations of avoiding the cost of a trial and the inconvenience to witnesses who were required to testify at the trial do not apply in this case.

- [56] That said, his plea had the effect of sparing his mother from having to testify and be cross-examined at trial which would undoubtedly have been an unpleasant experience for her as she would have had to relive all of the details of the attack while giving evidence against her own son.
- [57] The accused argues that his mental illness should be seen as a mitigating factor and there is authority from our Court of Appeal to support that general proposition. In *R. v. Badhesa*, 2019 BCCA 70, the Court of Appeal held that mental illness can be a mitigating factor because the offender's moral culpability is reduced. At paragraph 42, the Court said the following:
- [42] When mental illness causes or contributes to the commission of an offence, it is a mitigating factor and a sentence may be reduced because the offender's moral culpability is attenuated. In these circumstances, general deterrence is a less weighty consideration because a mentally ill offender is not an appropriate medium for making an example to others: *R. v. Belecourt*, 2010 ABCA 319 at para. 8. Nor does specific deterrence or severe punishment play a significant role in the determination of a fit sentence. The former is meaningless when an offender is out of touch with reality and the latter may be disproportionate to the offender's degree of responsibility: *R. v. Batisse*, 2009 ONCA 114 at para. 38.
- [58] When the police arrived at Ms. Holmes' residence, Mr. Barrett was seen rolling around on the living room floor. When he was being driven to the RCMP detachment, he was rambling about unrelated topics and claimed to have been home all day, but asked if they had found his mother "on the mountain".
- [59] That Mr. Barrett has suffered mental illness throughout his life, something that to which he may have a genetic predisposition, is not in issue. A Bipolar 1 diagnosis was addressed in the psychological presentence report from April 2009, as was his mental health generally, together with his history of mental health issues. He has been admitted to the psychiatric ward of the Kelowna General Hospital on many occasions.
- [60] However, problematic in affording too much weight to his bipolar diagnosis and mental illness as a mitigating factor is that he has at various times through his life made the decision to stop taking the medications that he has been prescribed that help to prevent a deterioration of his mental health to the point where he becomes a risk to others.
- [61] His criminal record, while not insignificant, nonetheless shows that Mr. Barrett is capable of living in the community. His unwillingness to take his medication was specifically addressed by the victim, Ms. Holmes, when she was interviewed for the presentence report in 2009, which report followed from a conviction for a violent crime.

- [62] It is apparent that, absent his medication, Mr. Barrett becomes aggressive, violent, unpredictable, and detached. His mental health issues have been a feature of his entire adult life. It should be and should always have been apparent to him that when he was functioning well, it was a product of the prescribed medication, not confirmation that he no longer required it.
- [63] He has mental illness, but his illness is one where the effects can be and previously have been attenuated with medication. The decision of whether to take medication is his and his alone, and by deciding not to take it when he was recommended to do so, he contributed to the risk that manifested itself in this brutal and unprovoked attack.
- [64] It follows that mental illness is much less of a mitigating factor than was so in the Wilson decision.
- [65] Rehabilitation is an objective to be taken into account on sentencing. However, there is little here that would suggest that it should play much, if any, role in determining the fit sentence for Mr. Barrett. His mental illness, as I said, has unfortunately been a significant part of his life. Rehabilitation in this case, as I understand it, would essentially be limited to taking his medication as prescribed.
- [66] Whether he takes his medication or not is something that is within his control. Mr. Barrett has been unable to ensure that he remains in a state such that he is not a threat to members of the public and, therefore, I do not consider rehabilitation to be a significant factor in sentencing Mr. Barrett.
- [67] I do not accede to the argument that the COVID-19 pandemic plays any role in determining a fit sentence for Mr. Barrett. The authorities referred to by Mr. Watt on behalf of Mr. Barrett were all from the early stages of the pandemic when less was known about it and all those authorities are from Ontario. However, the courts of this province, for the most part, have paid less heed to arguments about the risk of COVID-19 in our prisons, in part because our institutions have done an excellent job of managing the risk.
- [68] The possibility of an increase in the risk of contracting COVID-19 and the stricter limitations placed on inmates in the institutions is more of a factor in determining whether to release a person on bail as opposed to determining the duration of a term of imprisonment.
- [69] Mr. Barrett's submission that he should receive a sentence of four-and-a-half years plus three years of probation would see him remain in a provincial institution and would allow the court to make an order for probation to take effect upon his release.

- [70] In *R. v. Wilson*, the sentencing judge noted at para. 47 of his decision that the offender had performed well in the past under probation orders under the supervision of Community Corrections. I infer that the sentencing judge's wish to impose an order for probation was a factor in imposing a sentence of five-and-a-half years as it would permit the offender to remain in a provincial institution and allow for probation thereafter, notwithstanding the earlier comment in his decision that a sentence of six years would be acceptable.
- [71] Mr. Barrett argues that there is only one conviction for breach of probation on his criminal record and that the court should therefore follow what was done in *Wilson*. I do not agree.
- [72] First, although Mr. Barrett has only one conviction for breach of probation, he has multiple relatively recent convictions for breaches of undertakings. The fact that the court orders he breached were related to the terms of release as opposed to a part of probation orders imposed by a sentencing judge is a distinction without a difference, and I conclude that Mr. Barrett cannot be said to have a track record of performing well under court supervision.
- [73] Second, even though I have already said that a just and proper sentence for Mr. Barrett is within the established range for a conviction of aggravated assault, which is a term of imprisonment of 16 months to six years, I conclude that a custodial sentence of four-and-a-half years is inadequate in these circumstances. Protection of the public, including Ms. Holmes, must be taken into account. I find that a fit sentence for Mr. Barrett must be at the upper end of the range.
- [74] Mr. Barrett, I sentence you to a term of imprisonment of six years.
- [75] After giving credit for pretrial custody, by my calculations, that would leave a further 1,291 days remaining, but counsel can confirm those calculations.
- [76] In addition, I make the following ancillary orders: first, in addition, in accordance with s. 743.21(1) of the Criminal Code, I prohibit Mr. Barrett from communicating directly or indirectly with Eleanor Holmes during the remaining period of his custodial sentence.
- [77] Next, Mr. Barrett will provide a sample of his DNA forthwith pursuant to s. 487.051 of the Criminal Code.
- [78] Next, Mr. Barrett is prohibited for the rest of his life from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance pursuant to s. 109.
- [79] Finally, I will make the order pursuant to s. 743.2 of the Criminal Code that any reports or exhibits from the sentencing hearing will be provided to Correctional Services of Canada.
- [80] That concludes my decision. Anything arising?
- [81] MS. O'NEIL: My Lord, I agree with Your Lordship's calculation of the remaining sentence to be served. With respect to any other outstanding matters, I direct a stay of proceedings on Count 1 of the indictment.

[82] THE COURT: Yes.

[83] MS. ZANATTA: And, yes, My Lord, I can confirm that I also agree with the calculation.

[84] THE COURT: All right. Then we are concluded. Thank you.

"Wilson J."

Appendix "A"

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