
CANADA / JUDGMENT

R. v. Birchall

2001 BCCA 356

COURT

British Columbia Court of Appeal

DECIDED

1 June 2001

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Citation:

R. v. Birchall

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Docket:

CA026919

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

ROBERT DARRELL BIRCHALL

RESPONDENT

Before:

The Honourable Chief Justice McEachern

The Honourable Mr. Justice Lambert

The Honourable Mr. Justice Finch

G. Gaul

Counsel for the Appellant

G. McKinnon, Q.C.

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

March 6, 2001

Place and Date of Judgment:

Vancouver, British Columbia

June 1, 2001

Dissenting Reasons by:

The Honourable Chief Justice McEachern

Majority Reasons by:

The Honourable Mr. Justice Lambert (p.13, para.23)

Concurred in by:

The Honourable Mr. Justice Finch

Reasons for Judgment of the Honourable Chief Justice McEachern:

The Facts

- [1] The respondent and two others were drinking beer and watching a hockey game on television. They were so displeased with the performance of a player sometimes known as "Moose" that they decided, after the game late in the evening, to go into the countryside in the respondent's truck and shoot a moose. The respondent had a .303 rifle in his truck. When they got out of their truck one of these young men, the deceased, became separated from the others. Two theories have emerged as to what happened next. The third member of the party alleged that the respondent had a grievance against the deceased and shot him. The other view, as described by the respondent, was that he heard noises in the bush and, thinking it was a moose, fired two shots in the direction of these sounds. In this way he shot and killed the deceased. After the shooting the two survivors buried the deceased in a shallow grave but as often happens the truth came out and the respondent was charged with first degree murder.
- [2] Before trial the Crown filed a fresh Indictment charging the respondent with second degree murder and a jury found him guilty of manslaughter.

- [3] At the sentencing hearing the trial judge concluded that the jury disbelieved the evidence of the third member and found the death was caused as described by the respondent. This makes good sense because the jury would otherwise have found the respondent guilty of at least second degree murder. The respondent's counsel argued that the mandatory four-year sentence for manslaughter where a weapon is used was unconstitutional.
- [4] The trial judge in this case, following *R. v. Bill* (1997), 13 C.R. (5th) 103 (B.C.S.C.), which applied the trial judgment in *R. v. Morrissey* (1997), 161 N.S.R. (2d) 161 (N.S.S.C.), concluded that the mandatory four-year sentence for this offence was unconstitutional. On 16 February 2000, he imposed a sentence of one year to be served in the community. That sentence has now been fully served. The Crown has appealed against that sentence and is seeking to have the mandatory sentence of four years, less credit for time served, imposed. This would mean that the respondent would now be imprisoned for a period of years.
- [5] Subsequently, on 9 December 2000, the Supreme Court of Canada delivered judgment on an appeal from the decision of the Nova Scotia Court of Appeal, which had reversed the decision of the Trial Division in *Morrissey*. The Supreme Court of Canada agreed with the Nova Scotia Court of Appeal that the mandatory four-year sentence for criminal negligence causing death and for unlawfully pointing a firearm was constitutional. The Crown argues this decision precludes the dismissal of this appeal.
- [6] In *Morrissey* the 35 year-old accused did not have previous convictions and had been drinking heavily. He had a sawed-off rifle and, intending to enter a lower bunk, he stumbled and the gun went off killing a person in the upper bunk. The accused then took the body some distance away and covered it with a blanket and threw the rifle in a river. The next day he tried to commit suicide and then committed himself to a hospital. He pleaded guilty to the two offences mentioned above.
- [7] In giving the majority judgment of the Supreme Court of Canada in *Morrissey*, which it must be remembered was a case of criminal negligence causing death - a less serious offence than manslaughter - Gonthier J. made several statements that bear directly upon this appeal. He said at paragraphs 54-55:
- [54] The four-year minimum sentence equally sends a message to people who are in a position to harm people to take care when handling their weapon. Hunting accidents occur all too easily. When individuals with weapons are hunting in such a degree of proximity, extra steps are necessary to ensure that other hunters are not harmed. Therefore, when hunting, before hunters pull the trigger on their guns, they must form a reasonable belief that the object they are shooting at is not another human. Extra vigilance is necessary with guns, and while society would expect people to take precautions on their own, unfortunately people do not always do so. Consequently, Parliament has sent an extra message to such people: failure to be careful will attract severe criminal penalties. The sentence represents society's denunciation, having regard to the gravity of the crime; it provides retributive justice to the family of the victim and the community in general; and it serves a general deterrent

function to prevent others from acting so recklessly in the future.

E. Conclusion on Cruel and Unusual Punishment

- [55] The four-year term of imprisonment that the appellant must serve does not constitute cruel and unusual punishment. In the circumstances of this case, it is clear that the appellant's criminal conduct was particularly grave. The punishment imposed on the appellant serves legitimate penological goals and is founded on recognized sentencing principles. The effect of the punishment on the appellant is mitigated by the availability of parole and the deductibility of pre-trial custody. Further, the sentence does not violate the Charter in any reasonable hypothetical scenario provided to this Court.
- [8] In view of the foregoing, I do not think it is necessary to undertake a detailed analysis of the factors to be taken into account in determining whether there should be a constitutional remedy. I will, however, mention them briefly.
- [9] The first factor is "The Gravity of the Offence". At para. 35 Gonthier J. said that there is no more serious consequence than causing a death. At para. 37 he said that anyone who causes death using a firearm in culpable circumstances is guilty of a very serious crime.
- [10] The second factor is "The Particular Circumstances of the Offender". In Morrissey, Gonthier J. mentioned that the accused was very intoxicated, he was reckless, and he failed to call for medical assistance. He said the circumstances indicate the seriousness of the crime. Notwithstanding the presence of some mitigating factors, such as having no criminal record and genuine remorse, those factors did not displace the gravity of the offence.
- [11] The third factor is "The Actual Effect of the Punishment on the Offender". Gonthier J. notes that a four-year sentence is unquestionably a serious sentence, but this does not, by itself, constitute cruel and unusual punishment. He also notes the availability of day and other parole and the right to credit for time served. In this case, the respondent served a year under the sentence imposed by the trial judge. In the respondent's favour is the fact that he has served his sentence and special hardship will be experienced in going into the penitentiary at this late date. I shall say more about that matter later in these Reasons.
- [12] The fourth factor is "Penological Goals and Sentencing Principles". At paras. 43-48, Gonthier J. upheld the constitutionality of the minimum sentence for offences committed with a firearm in a case that was less serious than this one, both with respect to the offence to which the accused pleaded guilty and the culpability of the offender.
- [13] At para. 49, Gonthier J. stated that there were no other factors that would lead to a finding of cruel and unusual punishment in the case he was deciding. As a result, he concluded that the four-year sentence, less time served, was not cruel and unusual punishment.
- [14] There are two other factors that must be mentioned as being relevant to this case. First, the respondent is an aboriginal, and counsel referred to Criminal Code s. 718.2(e) which requires particular attention to the circumstances of aboriginal offenders. This question was

not pressed by counsel, possibly because the respondent had never lived on a reserve, he graduated from High School in Kamloops, and he has attended as a student at the University College of the Cariboo where he is currently working toward completion of a Bachelor of Arts with a major in psychology and sociology. Moreover, aboriginal status was not a factor contributing in any way to the commission of this offence. What we have here, as the trial judge said, was not a hunting accident, but rather:

...a careless act after a thoughtless decision to go out in the dark with a loaded rifle. Good judgment was put aside with tragic results.

- [15] The fact that the respondent is an aboriginal person, however, cannot be overlooked. It remains a factor to be considered as the Criminal Code requires.
- [16] Second, we have the fact that Code s. 718.2(d) requires that there be as little interference with liberty as possible if other sanctions are available. In this case, the respondent was in custody for about two weeks before he was released on bail. He has now served 12 months and two weeks and he is entitled to some extra credit for pre-sentence time under the usual sentencing principles.
- [17] Notwithstanding the foregoing, I have no doubt on the authority of Morrissey that a constitutional exemption was not a suitable disposition in this case at the time of sentence and that the learned trial judge could have imposed a sentence of four years. I suspect he may have done so if he had the benefit of the decision of the Supreme Court of Canada in that case.
- [18] There are, however, other problems in the case. First, I begin by instructing myself about the authorities cautioning us against imposing a custodial sentence after a sentence has been fully served: *R. v. Bartkow* (1978), 24 N.S.R. (2d) 518 (C.A.); *R. v. Warr* (1987), 62 Nfld. & P.E.I.R. 158 (Nfld. C.A.); *R. v. Karalash* (1990), 66 Man. R. (2d) 159 (C.A.); *R. v. Russo et al.*, [1998] 42 O.R. (3d) 120 (C.A.). Keeping this principle in mind we must be very slow to impose a custodial sentence several months after complete service of a rehabilitative sentence.
- [19] Next, on the question of jurisdiction, our authority is only to interfere in a sentence imposed at trial if we conclude that the sentence under appeal was "unfit". A sentence that is illegal could hardly be a fit sentence. However, a constitutional exemption is not an illegal sentence since the reasons for judgment in *Morrissey* make it clear that constitutional exemptions may be given in proper cases. If a trial judge in his or her wisdom decides upon a rehabilitative sentence, and if such sentence is not illegal in the sense described above and it is fit in the circumstances, then we should not interfere. In considering whether this sentence was fit, we must have regard to all the principles of sentencing including, of course, the various sub-sections of Criminal Code ss. 718, 718.1 and 718.2 and the post-conviction history because we often take such matters into account in sentencing. The Criminal Code provisions contain numerous mitigating principles aimed at rehabilitation that must be taken into account. In addition, even if a constitutional exemption should not have been granted in this case, I am not persuaded that the sentence, viewed in the light of the actual facts in this case

including the fact that he has served his sentence, was not a fit sentence. Those factors make it impossible, in my view, to justify incarceration for up to nearly three further years of imprisonment. Such a sentence will benefit no one and will do unnecessary harm to the respondent who has already served a sentence that cannot be said to be unfit. I say this because in *R. v. Hundal*, [1993] S.C.R. 867, the accused was sentenced to one year for negligently driving an overloaded truck against a red light into a busy downtown intersection at rush hour killing another motorist. He was sentenced to one year in prison.

[20] Thus, while the learned trial judge could have imposed the so-called mandatory sentence of four years (less the usual discount for time served of about a month), and may have erred by reason of subsequent authority by not doing so, I cannot conclude, having regard to the principles of sentencing, that the sentence actually imposed in this case was unfit in the circumstances. In fact, I doubt Parliament ever intended to apply this unfortunate regime of mandatory imprisonment for negligent offences. When a statutory provision is sought to be applied in a way that was never intended, then we should be both careful and astute in avoiding such a result.

[21] There is another problem in this case. Even if the so-called mandatory sentence of four years is the starting point, the respondent is entitled to credit for double time served before sentencing (a total of one month), and also for the one year he served on conditional sentence. I understand my colleagues agree with that. I have in mind that if we should give credit for time served on his conditional sentence, he would be eligible for day parole now, and to full parole sometime in June. He might even be entitled to some further credit for having his life on "hold" once the Crown's Notice of Appeal was filed on 8 March 2000, shortly after his sentence. I say this because that is one of the bases for giving credit for pre-sentencing time served. But apart from that, the present circumstances of the respondent raise the question again of whether a sentence of three years and eleven months at this time, even if dated back to the date of sentencing, is so grossly excessive that it shocks the conscience of right-thinking persons. In my judgment, such a sentence is so wholly disproportionate that it would constitute cruel and unusual punishment at this time. The respondent is entitled to a constitutional exemption now even if he was not, on the authorities such as *Morrissey*, entitled to it at the time of his original sentencing.

[22] While I would grant leave to appeal, I would dismiss this appeal on the basis, first, that the sentence has not been shown to be unfit and alternatively, that the respondent is entitled to a constitutional exemption from the so-called mandatory sentence. On that basis I would impose a sentence of time served.

"The Honourable Chief Justice McEachern"

Reasons for Judgment of the Honourable Mr. Justice Lambert:

I

- [23] Chief Justice McEachern has stated the facts in summary form, but in sufficient detail for the purposes of these reasons.
- [24] I have come to a number of conclusions different from conclusions stated by Chief Justice McEachern and, with respect, I have reached a different opinion about the outcome of this appeal.
- [25] Having regard to the reasons and the decision of the Supreme Court of Canada in *R. v. Morrisey*, [2000] 2 S.C.R. 90, and having regard to a comparison between the circumstances of this case and the circumstances in *Morrisey*, it is my opinion that the sentencing judge was wrong in law in granting a constitutional exemption from the mandatory minimum punishment of imprisonment for a term of four years for manslaughter, where a firearm was used in the commission of the offence; and it is my opinion that the sentencing judge imposed an unfit sentence. In reaching this conclusion I have noted that Birchall is an aboriginal offender.
- [26] The mandatory sentence of four years, in the circumstances of this case, is not so grossly excessive that it shocks the conscience of right-thinking persons and is not so wholly disproportionate that it constitutes cruel and unusual punishment.
- [27] Birchall has completed serving the conditional sentence of twelve months imposed by the sentencing judge, which was to be served in the community. In addition, he has fathered a child in that period. Neither of those factors persuades me that a sentence which was unlawful and unfit when it was imposed can now be regarded as lawful and fit. The sentence did not constitute cruel and unusual punishment when it ought to have been imposed. Having regard to the purposes of Parliament in enacting the mandatory minimum four year sentence for manslaughter committed with a firearm, neither the completion of an unfit conditional sentence served in the community, nor the birth of a child, can turn the unfit and unlawful sentence into a fit and lawful one.
- [28] The fact that Birchall had completed his sentence before this Crown appeal came on for hearing does not deprive this Court of the power to hear the appeal and to impose a fit and lawful sentence. See *Re Brown*, [1947] S.C.R. 83 (S.C.C.); *R. v. Mitchell* (1981), 29 Nfld. & P.E.I.R. 125 at 131 (P.E.I. C.A.); and *R. v. Warr* (1987), 62 Nfld. & P.E.I.R. 158 at 161 (Nfld.C.A.).

II

- [29] I would grant leave to appeal and I would allow the Crown appeal. I would substitute the mandatory minimum sentence in place of the sentence of one year imposed by the sentencing judge. I would make an allowance of one month for the two weeks spent in pre-trial custody, as permitted by s-s.719(3) of the Code, (see *R. v. Wust*, [2000] 1 S.C.R. 455), leaving a sentence of three years and eleven months as the substituted sentence.

III

[30] That brings me to the treatment to be given to the twelve months that elapsed after Birchall was sentenced on 16 February, 2000. During that period, Birchall served his sentence. But he served it as a custodial sentence in the community under the terms of a conditional sentence order. In my opinion, the usual practice that applies when there is a variation of sentence by the Court of Appeal must apply in this case. The twelve months already served constitute part of the sentence of three years and eleven months that I would substitute. In other words, the substituted sentence takes effect from the day the original sentence was imposed, with a gap for the period after the twelve month conditional sentence was completed and before the order I would make would take effect.

[31] In reaching that conclusion I have referred to s-s.687(2) of the Code:

687. (2) A judgment of a court of appeal that varies the sentence of an accused who was convicted has the same force and effect as if it were a sentence passed by the trial court. (my emphasis)

[32] I have also referred to s-s. 719(1):

719. (1) A sentence commences when it is imposed, except where a relevant enactment otherwise provides. (my emphasis)

And I have referred to s.742.1, which authorizes the imposition of a conditional sentence:

742.1 Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

(a) imposes a sentence of imprisonment of less than two years, and (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2,

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

(my emphasis)

[33] From the wording of s.742.1(a) it is clear that a conditional sentence is a sentence of imprisonment. Like all other sentences, it begins to run when it is imposed. If it is varied by this Court, the variation takes effect from the date of the original sentence in accordance with the provisions of the Code to which I have referred and to the invariable practice of the Court. In accordance with s-s.719(1) there would have to be an enactment permitting a different starting date before such a date could be imposed.

- [34] So what must happen is that Birchall must surrender himself into custody and begin serving the remainder of his sentence in the appropriate prison facilities. But when he does so, he will receive credit for the time served on his conditional custodial sentence in the community for the twelve months actually served.
- [35] The conclusion I have reached is consistent with the principles governing conditional sentences, including s.742.6(9)(d) which explicitly provides that where the court terminates a conditional sentence order, because of a breach of that order, the time already served on the conditional sentence continues to count as part of the sentence. Section 742.6(9)(d) reads in this way:
- (9) Where the court is satisfied, on a balance of probabilities, that the offender has without reasonable excuse, the proof of which lies on the offender, breached a condition of the conditional sentence order, the court may . . .
- (d) terminate the conditional sentence order and direct that the offender be committed to custody until the expiration of the sentence. (my emphasis)
- [36] The conclusion I have reached is also consistent with the observations of Madam Justice Arbour, for the Supreme Court of Canada, in *R. v. Wust*, where, at para. 22, she said:
- [I]t is important to interpret legislation which deals, directly and indirectly, with mandatory minimum sentences, in a manner that is consistent with general principles of sentencing, and that does not offend the integrity of the criminal justice system. (my emphasis)
- [37] The time served under the conditional community custodial sentence, prior to the sentence being varied by this Court, is the precise amount of time that may be deducted from the balance of the sentence to be served in prison. There is no statutory authority for allowing additional time to be deducted. The conditional custodial sentence that was served in the community is part of the sentence, and time runs in its remorseless way at its constant speed for conditional and non-conditional sentences alike.
- [38] In the result, if Birchall's sentence were to be varied so that it was changed from one year imprisonment in the community under a conditional sentence to three years and eleven months, the balance of which is to be spent in prison, then Birchall will have spent twelve of those months already as the time served as his conditional sentence, more than is required to be eligible for day parole, and only four months short of the sixteen months required in order to be eligible for full parole.

IV

- [39] In summary, I would grant the Crown's application for leave to appeal, I would allow the Crown appeal, and I would substitute a sentence of three years and eleven months for the sentence of one year imposed by the sentencing judge.

"The Honourable Mr. Justice Lambert"

I AGREE:

"The Honourable Mr. Justice Finch"

June 1, 2001 - Date corrected to read June 1, 2001 not June 1, 2006.

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