
CANADA / JUDGMENT

R. v. Brassington

2019 BCSC 265

COURT

Supreme Court of British Columbia

DECIDED

18 January 2019

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2019 BCSC 265 R. v. Brassington

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Brassington,

2019 BCSC 265

Date: 20190118

Docket: 25813

Registry: Vancouver

Regina

v.

Derek Brassington

David Attew

Paul Johnston

Danny Michaud

Publication ban made pursuant to s. 486.5(1) of the Criminal Code of Canada and the inherent jurisdiction of the Court by Associate Chief Justice Holmes

on January 30, 2019.

Before: The Honourable Mr. Justice Silverman

Oral Reasons for Sentence

Re: Derek Brassington

Counsel for the Crown:

C. Considine, Q.C.

C. Massey

Counsel for the Accused, Derek Brassington:

I. Donaldson, Q.C.

M. Begalka, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

January 18, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 18, 2019

[1] THE COURT: These are oral reasons. If a transcript is ordered, I reserve the right to edit, although that will not involve a change in the decision or in the reasoning.

[2] Mr. Brassington is before me for sentencing on two counts of a lengthier indictment. Those two counts are, I will quote the operative words:

Count 1:

... commit a breach of trust, by breaching the standard of responsibility and conduct demanded of him by the nature of his office during the management of Jane Doe, a witness in a criminal investigation, contrary to Section 122 of the Criminal Code.

Count 3:

... did wilfully attempt to obstruct, pervert or defeat the course of justice by compromising the integrity and safety of a witness ... in relation to a criminal investigation, contrary to Section 139(2) of the Criminal Code.

[3] He pleaded guilty to both of those counts earlier today.

[4] The Crown and the defence have provided me with a joint submission on sentencing. Mr. Brassington has acknowledged his understanding that I am not required to follow that joint submission if I am satisfied it is not appropriate.

[5] Mr. Brassington was, at the time of the offences, an RCMP sergeant. The crimes were committed in that capacity. Even then, it would be a rather typical case of its kind were it not for one notorious fact: it arises out of what is referred to colloquially in this province as the Surrey Six investigation. Then Sergeant Brassington was a senior officer in that

investigation, indeed a team leader. Among his many duties was that of witness management. He was responsible for the protection and keeping happy of a number of witnesses, so that they could continue to assist the investigation. One of those potential witnesses was a young woman who had what the investigation considered important information about one, perhaps more than one, of the accused in the Surrey Six murders.

- [6] In the course of his proper duties as manager of this witness, he became involved in a relationship with her, which eventually became a sexual relationship. She was 22, he was 39. Therein the offences were committed.
- [7] During the relationship, they shared hotel rooms in various parts of Canada which were paid for by the government, took trips to various places in Canada which were paid for by the government, and engaged in sexual relations. Those hotel rooms and trips may have been and perhaps were always necessary, partly for the investigation, but they became places and forums for the sexual relationship to occur, as well.
- [8] All of the foregoing occurred from June 1, to December 31, 2009. There is no suggestion of any offences of a sexual nature having been committed. Although the young woman was clearly in a vulnerable position and in a position where she could have been taken advantage of because of their relative positions, the Crown advises that at the charge approval stage, it considered and assessed whether the young woman's consent had been vitiated in all the circumstances. The Crown decided it had not been so vitiated to the extent that charges of that nature could meet the Crown charge approval standard. No such charges were ever laid nor were any such allegations made, so far as I have been told. To the contrary, it appears, from a variety of mutual texts and emails, that Mr. Brassington had fallen in love with the young woman and that she had a genuine fondness for him.
- [9] The breach of trust charge involves the use of the airplanes, hotels, and indirectly funds that I have previously referred to from the government, and in addition, involves a breach of the following standard requirements that witness managers and police officers generally are supposed to refrain from being involved in:
1. spending time alone with witnesses, particularly those of the opposite sex;
 2. engaging in intimate or sexual relationships with witnesses;
 3. consuming alcohol to the point of intoxication with witnesses;
 4. inducing witnesses to become intoxicated;
 5. disclosing to third parties the locations of relocated witnesses;
 6. lying to fellow officers about their activities with a witness; and
 7. violating the safety protocols of the Witness Protection Program.

- [10] Then Sergeant Brassington breached each of those standards, some of them on a number of occasions.
- [11] The attempted obstruction of justice charge involves the potential harm and the harm that was caused to the investigation. The witness was potentially a useful and important witness in the investigation. The circumstances that were created by Mr. Brassington ruined her for those purposes. Her credibility would have been, as a witness, completely undermined.
- [12] Second, he himself was ruined as a reliable witness. As a senior investigator, he would have been one. He had done work in the investigation to prepare himself to be one, and much of that work had to be redone by other officers.
- [13] Although it is clear that he did not set out to commit these crimes for the aforementioned purposes, that is to undermine the investigation or the witness, or indeed he did not set out to commit the crimes at all, he nevertheless knew that once he fell onto that path, the foregoing consequences of fatal damage as useful witnesses would flow from his actions.
- [14] Ultimately he succumbed to the pressure that he was feeling more and more, arising from what he knew from the beginning was wrongdoing. He confessed all to senior officers and assisted the police fully in understanding what he had done and in attempting to remedy and rectify it.
- [15] The defence argues, indeed concedes, that his understanding as a superior officer was something which should have surfaced much earlier. As it turns out, I am told and I accept, that his superior officers and his fellow officers had high praise for his abilities as an investigator. He was a star and I accept that as so.
- [16] The pressure on him, however, was great and defence counsel suggests that was a contributing factor to the ill-fated decision-making process which he underwent. The Surrey Six investigation was a major situation which came on the heels, literally within a week, of the well-known Dziekański investigation involving the death of a young man who was tasered at the Vancouver Airport. Mr. Brassington was also a senior officer, including witness management, involved in that investigation. There was tremendous pressure on all officers involved.
- [17] He did not set out, the defence argues, to do what he ended up doing in this case. It happened and then ultimately he fell in love.
- [18] There are aggravating and mitigating factors that I am required to set out. Amongst the aggravating factors are the following:
1. He is a police officer, and as such, the public places him in high regard and he has a special duty to not do the kinds of things that he did do in this case. He is required to resist that temptation.
 2. The consequences to the investigation previously referred to.

3. I am entitled to conclude that he would necessarily have been, and I do conclude it, aware of the consequences to the investigation of what he did.
4. The position of trust itself, although an essential ingredient of one of these two charges, is also deemed to be an aggravating factor in s. 718.2(a)(iii).

[19] Mitigating factors must also be considered:

1. He has pleaded guilty. Yes, it is late, but I am satisfied that there have been potential defences available to him up until recently, and consequently the guilty plea is not something that I ignore as a mitigating factor.
2. He ultimately confessed all to the RCMP and assisted in remedying that problem.
3. There is no doubt in my mind that he did not plan this, although of course his judgment does not speak well for him in allowing himself to fall into it.
4. There is no doubt that he has suffered a great deal from this. He has lost his family in the sense of a divorce and no longer living in the same home as his, from that relationship, four children, which I am told and I accept are the most important relationships in his life. When I say he has lost them, I mean obviously that relationship has changed and not for the better. I understand he is working on it.
5. He has suffered considerable stigma, shame, and embarrassment in the community. There has been reporting for a number of years about various aspects of this case. Worse still, and I accept it is worse, his family has suffered. They will continue to suffer.
6. He provides the Court with a variety of letters of reference which are extremely helpful, but on the other side of that positive factor is the accepted notion that police officers would be expected to be able to provide an abundance of good character evidence, and therefore the use of it as mitigation is somewhat muted.

[20] I have been provided with a number of cases from a variety of courts from both counsel. There are cases involving police officers which state that jail sentences are more likely to be appropriate than in breach of trust cases where there are non-police officers involved. On the other hand, there are also cases from similar courts which say that there is no reason why, in appropriate cases, a conditional sentence or a non-custodial sentence should not be imposed in a situation of this kind.

[21] The test is clear that joint submissions will not be appropriate where reasonable persons would view it as a breakdown in the proper functioning of the criminal justice system, bring the administration of justice into disrepute, or be contrary to the public interest.

- [22] My view is that if this were not an offshoot of the Surrey Six murders, it would be a much easier decision for me, and it would be a reasonably benign decision on my part to accept the joint submission without a second thought. Having said that, it is of no small moment that counsel making the joint submission are two of the most senior and experienced criminal lawyers in the province.
- [23] In all the circumstances, I am satisfied that it is appropriate that I accept the joint submission that is before me for a conditional sentence, and consequently, sir, I sentence you to imprisonment for two years less one day, that sentence to be served in the community as a conditional sentence.
- [24] I have in writing, the agreed terms and I know you and your counsel have read these. I am going to briefly indicate what they are in short form. The Justice of the Peace will have the written form that you have already seen, and those will be the formal conditions:
1. You must keep the peace and be of good behaviour.
 2. You must appear before the court when required to do so by the court.
 3. You must keep the conditional sentence supervisor aware of any changes in your name or address.
 4. You have to stay in BC unless you have written permission from the court or your conditional sentence supervisor.
 5. You must have no contact or communication, directly or indirectly, with Jane Doe 1 (aka Jane Doe). You know who that is, right? All right. Except, and there are two exceptions to that, through legal counsel who has reviewed this order. And second, during a scheduled court appearance or other court process, but only if her counsel is present.
 6. You have to report in person to the conditional sentence supervisor at the Surrey South Community Corrections Office by 3:00 p.m. on January 23.
 7. When first reporting to the supervisor, you will have to provide your address and phone number. You will not be able to change it without written permission.
 8. This is what is called house arrest. For the two years less a day, you will remain inside or on the lot of your residence between 7:00 p.m. and 6:00 a.m. each day. This may be at your primary residence or such other residence as permitted in writing by your conditional sentence supervisor.
 9. You must present yourself immediately at the door to your residence or answer the phone when any peace officer or conditional sentence supervisor attends to check on your compliance, unless you have a reasonable excuse.
 10. You may be away from your residence during the house arrest hours, that means at night, with the written permission of your supervisor. Such permission may include reasonably necessary parenting responsibilities (including picking up your wife's children after work

from their home). The onus will be on you, sir, to prove that that has occurred if a policeman picks you up after hours. You must carry the written permission when you are outside your residence during the house arrest hours. You may also be away from your residence during the house arrest hours, and there are two exceptions:

- a) while in the course of your employment or when travelling directly to or returning from your place of employment, and if requested you have to provide the details of that and of your employment generally to your conditional sentence supervisor, including location and hours of work; and
 - b) In the event of a medical emergency, and then only while at a health care facility or when travelling directly to or returning directly from the facility. If requested, you must provide your CSS with written confirmation that you went to the facility, signed by a representative of the health care facility to which you went.
- 11. You must not possess or consume alcohol, drugs, or any other intoxicating substance, except in accordance with a medical prescription.
 - 12. You must not enter any liquor store, beer and wine store, bar, sports bar, pub, night club, beer garden, or any other place where the primary commodity sold is liquor.
 - 13. You must attend, participate in, and successfully complete any intake, assessment, counselling, or program as directed by the supervisor if such program is provided with no expense to you.
 - 14. You must complete 100 hours of community work under the direction of your CSS, and you must complete it by July 31, 2020.
- [25] When you receive a copy of these conditions before leaving here today, you are going to take that with you to the conditional sentence supervisor.
- [26] In addition to the conditional sentence order with those terms, I am going to make an order for restitution pursuant to s. 738 of the Criminal Code in the amount of \$10,000 payable to the Receiver General of Canada before your conditional sentence has expired.
- [27] THE COURT: You will attend at the RCMP station in White Rock on January 25, 2019, for the purposes of the Identification of Criminals Act.

"Silverman J."

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