

CANADA / JUDGMENT

R. v. Bullerwell

2016 BCSC 1024

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Supreme Court of British Columbia

DECIDED

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2016 BCSC 1024 R. v. Bullerwell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bullerwell,

2016 BCSC 1024

Date: 20160502

Dockets: X079447-2

Registry: New Westminster

Regina

v.

Joseph David Bullerwell

- and -

Docket: X079448-2

Registry: New Westminster

Regina

v.

Joseph David Bullerwell

Before: The Honourable Madam Justice Fleming

On appeal from: A decision of the Provincial Court of British Columbia,

January 22, 2016 (R. v. Bullerwell, Surrey File Nos. 196041-4-A & 205698-1)

Oral Reasons for Judgment

Counsel for the Crown (Respondent):

N. Reithmeier

Counsel for the Accused (Appellant):

M. Reinhart

Place and Date of Trial/Hearing:

New Westminster, B.C.

April 26 & 29, 2016

Place and Date of Judgment:

Vancouver, B.C.

May 2, 2016

- [1] THE COURT: On November 17, 2015, after a trial, the appellant, Joseph David Bullerwell, was found guilty of the offences of breach of recognizance and uttering a threat to cause death or bodily harm to Wendy Larabie. The breach of recognizance involved failing to comply with a condition that he have no contact with Ms. Larabie because she was a witness in another proceeding involving Mr. Bullerwell. Ms. Larabie is also the mother of Mr. Bullerwell's former common law partner and she has custody and guardianship of their four-year-old son.
- [2] On January 22, 2016, he was sentenced to six months' imprisonment followed by 18 months' probation, which included a term he have no contact, direct or indirect, with his son, save and except through a family court order pronounced after that date.
- [3] Mr. Bullerwell appeals the sentence. His notice of appeal sets out a number of grounds for the appeal. In oral submissions, the alleged errors were framed somewhat differently. He argued the honourable sentencing judge erred by:
- 1) characterizing the offences as occurring in the context of a domestic relationship;
 - 2) likening the offences to a conviction for the obstruction of justice;
 - 3) misapplying the parity principle by failing to correctly distinguish and not distinguish other sentencing decisions resulting in an unfit sentence;
 - 4) failing to properly consider imposing a conditional sentence order; and
 - 5) imposing a no-contact condition in relation to his son as part of probation conditions.

Circumstances of the Offences

- [4] Turning to the circumstances of the offences, the provincial court judge delivered oral reasons which found Mr. Bullerwell guilty of the two offences that give rise to the sentence. In her reasons for sentence, she refers to those oral reasons but does not repeat or summarize them. I have not received a transcript of her trial decision.
- [5] The parties agree the circumstances of the offences can be derived from the testimony of Ms. Larabie because it is clear the court accepted her evidence as establishing Mr. Bullerwell's guilt beyond a reasonable doubt. In brief, Ms. Larabie testified Mr. Bullerwell rode past her on a bicycle while she was at a bus stop by chance. When he was "three bicycle lengths away", he stopped, got off his bicycle, straddled it, and screamed at her repeatedly, "You fucking cunt, I am going to get you. You fucking cunt, I am going to kill you. I am going to kill you".
- [6] Ms. Larabie also testified she took out her cellphone and began pushing on an "SOS" app that would allow the police to locate her. Mr. Bullerwell said to her, "Yeah, you bitch, take out your cellphone, call the police".
- [7] In cross-examination, she described Mr. Bullerwell yelling very aggressively and very violently.

Sentencing Hearing

- [8] At the sentencing hearing, the Crown sought concurrent jail sentences of six months and a two-year probation order, along with some ancillary orders. Mr. Bullerwell asked for a conditional sentence order of six to nine months or, in the alternative, a 60 to 90-day jail sentence to be served intermittently.
- [9] The court had the benefit of a presentence report which is not before me. The reasons for sentence describe the report in part as follows:

a Presentence Report has been prepared which provides an extensive background and review. Mr. Bullerwell is 36 years of age He thereafter spent a number of years living with his grandparents. He then moved to Ontario to be with his biological father, who has since died, and he has no relationship with his mother. He self-reports no other family members are in the community. He has lived common-law with Autumn Larabie, who was the daughter of the complainant in this matter

Then further along:

Mr. Bullerwell disclosed that he has a four-year-old son arising from his relationship with Autumn, however, he has not seen his son for three years due to a court order being in place. The complainant in this matter, which is his mother-in-law, has custody or guardianship of his son. Mr. Bullerwell self-reports that he "holds animosity towards the victim and blames her for the no contact condition" Mr. Bullerwell intends to return to his residence if released, that being the

residence that he shared with Autumn. He stated in the report that he does not plan to associate with negative peers, however, page 3 the report notes, and I quote, "His history reveals he tends to socialize with persons who engage in criminal activity and substance misuse." He has expired certificates for forklift operations and first aid and historically his employment has been as a general labourer with temporary work agencies. He self-reported that he was diagnosed with ADHD at a young age and that he is "a resistant person who has issues with authority figures who tell him what to do. However, he does not consider himself an aggressive person. He denies having any anger management issues"

- [10] The sentencing judge then identified it as important that Mr. Bullerwell had advised the report writer he is taking responsibility for the offences and understands his behaviour was wrong. She noted, however, the writer expressed concern that Mr. Bullerwell lacked insight into the offences.
- [11] The reasons for sentence also indicate the complainant was contacted during the preparation of the pre-sentence report. Ms. Larabie described being significantly affected by the offences. She was continuing to meet with the trauma counsellor and expressed concerns for her personal safety.
- [12] The court received Mr. Bullerwell's criminal record as set out in the Ministry of Justice JUSTIN conviction list and a CPIC record. Unfortunately, that same criminal record is not before me. The parties have agreed, however, that I may consider more recent versions of the same documents without taking into account further convictions that post-date the sentencing hearing.
- [13] The sentencing reasons describe the criminal record as follows:
- Mr. Bullerwell has an extensive historical criminal record as noted in the JUSTIN conviction listing dating from 2001 to 2013 inclusive for offences which include, but are not limited to, drug convictions, a number of theft convictions, a number of obstructing a peace officer convictions, breach conviction and fraud conviction. It is important to note that the entries include a breach of a conditional sentence order and that there is an outstanding arrest warrant in the Province of Alberta.
- [14] To be clear, Mr. Bullerwell was convicted three times for breach of recognizance prior to the sentencing hearing, two of which occurred in 2003 and a third in 2012. The entry in relation to the suspension of an 18-month conditional sentence is dated December 23, 2002.
- [15] After summarizing the parties' positions, Mr. Bullerwell's circumstances, and the impact of the offences on Ms. Larabie, the sentencing judge reviewed the authorities provided by both parties, commenting on the ways in which their facts made them helpful or distinguishable from the case before her. She then identified and discussed the principles of sentencing at paras. 17 and 18 of her reasons:

- [17] Section 718 of the Criminal Code of Canada codifies that imposing a sentence that the fundamental purpose of sentencing is to render a fit and proper sentence, and by doing so to consider the denunciation of unlawful conduct; to deter the offender and others from committing offences; to separate offenders from society, where necessary; to assist in rehabilitating offenders; to provide reparations for harm done to victims or to the community; and to promote a sense of reasonability in offenders, and acknowledgment of the harm done to victims and to the community.
- [18] No fact pattern will fit another; each circumstance is unique. However, a sentence to be imposed must be fit, fair, and in proportion to the gravity of the offence and the degree of responsibility of the offender. In considering such sentence the court must consider the fact pattern before the court. In addition, in this instance the Presentence Report is to be considered, the criminal record of Mr. Bullerwell, the principles of sentencing, and the case law provided by both counsel.
- [16] During her analysis, she described Mr. Bullerwell's relationship with the complainant and the fact that she has custody and guardianship of his child as an aggravating factor. She also identified Ms. Larabie's role as a witness in another matter to be aggravating.
- [17] While acknowledging the offences arose out of a chance encounter, the sentencing judge concluded, by his aggressive actions and violently threatening words, Mr. Bullerwell shifted it from a chance encounter to a deliberate encounter that had a traumatic impact on the complainant. She described these circumstances as another aggravating factor.
- [18] At the end of her analysis, the sentencing judge concluded Mr. Bullerwell was not a candidate for a conditional sentence order nor an intermittent sentence. Prior to reaching that conclusion, she again referred to his lack of insight, difficulty obeying community orders and with authority figures, as well as his breach of a conditional sentence order. She went on to note that Mr. Bullerwell's common law spouse had passed away earlier that month, and he had assured the court that, if released, he intended to return to that residence, and then she writes:

However, he has not proposed any meaningful means of ensuring that both the victim and the community are protected.

Position of the Appellant

- [19] Mr. Bullerwell has been in custody since January 22, 2016. He asks the court to reduce the custodial sentence to a period of three months and to remove the term of the probation order that would prohibit him from having contact with his son absent a family court order.

Standard of Review

[20] The standard of review on a sentence appeal is narrow and deferential. This approach was recently affirmed by the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64. The majority confirmed where a sentencing judge makes an error in principle or in considering a mitigating or aggravating factor, or fails to consider a relevant factor, appellate intervention will only be justified where the error has had an impact on the sentence. Even where an error in principle is established, the question still remains whether the error resulted in an unfit sentence.

[21] The rationale for this approach was recently discussed in *R. v. Bosco*, 2016 BCCA 55. Sentencing is a highly individualized, discretionary process that requires the judge to weigh and balance various sentencing principles and goals to determine a fit sentence, given the particulars of the case. The task is delicate, nuanced, and challenging. A sentencing judge is best positioned to determine the sentence, having often heard the evidence that led to conviction, the offender address the court, and the victim speak about the effect of the offence on his or her life (at para. 25).

[22] Turning to the grounds of the appeal.

Ground 1 - Did the Sentencing Judge Err by Characterizing the Relationship between Mr. Bullerwell and the Complainant as "Domestic" or "Familiar"?

[23] Mr. Bullerwell argues the sentencing judge erred by treating his relationship with the complainant as akin to a spousal relationship, suggesting she incorrectly applied s. 718.2 of the Criminal Code, R.S.C. 1985, c. C-46, which deems abusing a spouse or a relationship of trust during the commission of an offence as an aggravating factor.

[24] He points to the comments made by the sentencing judge during an exchange with his counsel that occurred when he sought to distinguish authorities provided by the Crown involving threats against a spouse.

[25] The sentence judge says at one point [as read in]:

With the utmost respect, you place significant emphasis on a sexual or physical relationship. This is a familiar relationship between these parties. She has guardianship or custody. This is more than just a passing relationship. This is a very strong familiar relationship.

[26] Then further on, [as read in]:

But one would think that between you and your mother-in-law, who now is raising your child, that there is a very significant bond of trust.

[27] Ms. Larabie had testified to the effect there had been no relationship of trust since she became a witness, and even prior to that, the relationship was significantly strained.

- [28] Having reviewed the transcript of the hearing and the reasons for sentence, I am not persuaded the sentencing judge erred by imposing a statutory aggravating factor or by overemphasizing the familial relationship between Mr. Bullerwell and the complainant as an aggravating factor.
- [29] Although she referred to this matter as involving "some form of domestic or familial file", the sentencing judge was well aware that the complainant was not a spousal victim. However, she regarded it as important to distinguish the circumstances of this case from those involving threats toward a stranger.
- [30] It is apparent she described the relationship between Mr. Bullerwell and Ms. Larabie as having an aggravating component, based on Ms. Larabie's role in caring for his child and her identity as his mother-in-law. The defence acknowledges it is appropriate for the court to consider Ms. Larabie's caregiving role as an aggravating circumstance.

Ground 2 - Did the Sentencing Judge Err by Characterizing the Offence as Directed at the Administration of Justice?

- [31] Mr. Bullerwell argues the sentencing judge erred in considering *R. v. C.E.B.*, [1995] B.C.J. No. 659 (B.C.C.A.), which involved an appeal from a sentence for the offence of obstructing justice. The transcript shows, however, the Crown relied upon the decision not for the sentence imposed, but to establish that threatening a witness is an aggravating factor.
- [32] In her reasons for sentence, the judge expressly acknowledges Mr. Bullerwell was not convicted of obstruction of justice. She does describe his threats as "to the administration of justice in breach of the no contact order". I do not disagree that Mr. Bullerwell's conduct was, as the Crown suggests, an affront to the administration of justice, given the complainant was a witness against him in another matter at the time and he was bound by a court order to have no contact with her. I conclude, therefore, this ground of appeal has not been established.

Ground 3 - Did the Sentencing Judge Err by Imposing an Unfit Sentence, Bearing in Mind the Parity Principle?

- [33] The sentencing judge was referred to a series of sentencing decisions, each of which she discussed in her reasons. None involved circumstances that I would describe as compellingly similar. Most of them relate to convictions for uttering threats, along with other convictions for violent offences and a multitude of aggravating and mitigating factors, as well as pre-custody time that make it difficult to discern the sentencing range for the offence of uttering threats to cause death or bodily harm. I note the maximum sentence for the offence of uttering threats by way of summary conviction is 18 months' imprisonment.
- [34] Mr. Bullerwell argues the sentencing judge erred by failing to consider similar sentences imposed on similar offenders by distinguishing his authorities and failing to distinguish those provided by the Crown.

- [35] Indeed, she did distinguish the defence authorities. Among them was *R. v. Olson*, 2011 BCCA 8, where the Provincial Court imposed an eight-month conditional sentence order for several convictions, including two counts of assault and uttering threats, as well as breach of recognizance involving two successive common law partners, which the Court of Appeal upheld. The convictions arose from a guilty plea and the accused had been in custody for ten months prior to being sentenced. In addition to the guilty plea and pre-custody time, the sentencing judge in this case noted the accused, unlike Mr. Bullerwell, had no previous conviction for breach of a conditional sentence order.
- [36] Another was *R. v. Goyan*, 2003 ABQB 489 [Goyan], the accused was convicted of threatening to cause death or bodily harm to his estranged spouse and sentenced to a conditional sentence of twelve months, followed by one year of probation. The offence occurred during a telephone conversation. Prior to sentencing, he had attended a substance abuse program. The accused suffered from significant mental and physical health issues. He had an extensive criminal record for break and enter and theft, and one conviction for assault regarding his spouse many years earlier. Mr. Goyan had been compliant with fairly strict bail terms that included abstaining from the use of drugs and alcohol, despite a lifetime of substance abuse. He had spent 22 days in predisposition custody. Here the sentencing judge distinguished Goyan on the basis of the circumstances of the offence, the time he spent in custody, and the absence of any prior breach convictions.
- [37] She also distinguished two other decisions of the B.C. Provincial Court, including *R. v. Ekland*, 2007 BCPC 29 [Ekland], based on the time spent in remand, and *R. v. L.R.K.*, [2011] B.C.J. No. 2122 [L.R.K.], because the accused had no criminal record, pled guilty, and had sought out counselling.
- [38] In *Ekland*, the accused pled guilty to uttering threats towards his sexual partner. He was on parole at the time and he wanted her to lie to his parole officer, telling her she would end up dead if she did not get it right. Mr. Ekland had a criminal record for violent offences, including uttering threats. The sentencing judge imposed a sentence of four months, reduced from six, because of the time spent in remand.
- [39] In *L.R.K.*, the accused was convicted of assaulting his wife during three incidents and uttering threats to her that he would kill her parents. He pled guilty shortly after being arrested for breaching his bail order by having contact with his wife, but during the trial, where she had recanted her allegations of assault. The accused spent some time in custody, before being released on bail pending preparation of the presentence report. The court noted he had established a successful business in the community and was providing financial support to his ex-wife and his children, and was by all accounts a good parent. The Provincial Court sentenced him to 45 days in custody followed by three years' probation.
- [40] Mr. Bullerwell also argues the sentencing judge failed to properly distinguish the Crown's authorities, namely *R. v. Ram*, [1991] B.C.J. No. 3865 (B.C.C.A.) [Ram] and *R. v. H.J.H.*, [2002] B.C.J. No. 2658 [H.J.H.].

- [41] In *Ram*, the Court of Appeal upheld a sentence of nine months' imprisonment for the accused threatening to kill his wife. The accused pled guilty to assault and breach of undertaking, as well as uttering threats. He was sentenced to 30 days consecutive for the assault and breach of undertaking convictions. The sentencing judge had described the threat as a matter of serious concern and the accused as posing a real and present danger to his wife and children. I note the sentencing judge referred to *Ram* as within a reasonable range for consideration, but also "somewhat distinguishable", referring to the threat as premeditated and the circumstances involving an actual assault.
- [42] In *H.J.H.*, a group of young people led by the accused and another accused viciously taunting and threatening three adults. *H.J.H.* had a short record for property offences, a supportive family, and was employed. At the time of sentencing, he had spent eight and a half months in custody. Citing principles of deterrence and denunciation, and noting this was a group offence, the trial judge imposed an additional six months' imprisonment and 18 months' probation. The Court of Appeal dismissed the appeal.
- [43] Mr. Bullerwell argues the sentencing judge erred by applying what she described as the key finding in *H.J.H.*:

With respect to denunciation, I believe the sentencing judge was right to take into account the perceptions of the local community, which has clearly been victimized by young criminals in the last few years. The circumstances of the offences in question were serious even though the charges themselves are not particularly so.

She then stated:

Mr. Bullerwell must be aware that the perceptions of the community, the standards of his community, and the safety and protection of the community as a whole do not tolerate stopping and deliberately yelling and threatening the complainant, and a complainant who is his mother-in-law, the person who has custody or guardianship of his child, and for whom he knew was bound by a no contact order himself.

- [44] It was at this point the sentencing judge summarized the principles of sentencing noted above and observed the facts of each case are unique. She then, in my view, correctly described her role in determining a fit sentence.
- [45] Although I may well have approached the analysis of the cases somewhat differently, I cannot say that during her review she committed what could be characterized as an error.
- [46] Nor do I accept the appellant's other submission that the sentencing judge imposed an unfit sentence by overemphasizing Mr. Bullerwell's criminal record and failing to place sufficient weight on the gap between his breach convictions. In suggesting there is a meaningful gap since his last conviction for breach of recognizance in 2012, he has not accounted for a period of imprisonment that followed that last conviction.

- [47] Of course, a sentence may be demonstrably unfit where it is clearly unreasonable or involves a marked departure from the range of sentences normally imposed, in the absence of an error of principle. Although, I have commented the appropriate range is difficult to determine from the cases that were before the sentencing judge and are before me, bearing in mind those decisions, the maximum sentence of 18 months imprisonment for the offence of utter threats, I am not able to conclude a six-month jail sentence involved a marked departure from that range.
- [48] Ultimately, the reasons for decision satisfy me the sentencing judge was alive to the fundamental principle that guides and dominates the sentencing process, which is to impose a sentence that is proportionate to the gravity of the offences and the degree of responsibility of the offender when she imposed a six-month custody term.
- [49] I therefore am not able to conclude the sentence was unfit.

Ground 4 - Did the Sentencing Judge Fail to Adequately Consider Imposing a Conditional Sentence?

- [50] There is no dispute a conditional sentence was available in this case. Mr. Bullerwell argues the court failed to adequately consider imposing such a sentence on a number of other errors.
- [51] He suggests the sentencing judge erred by imposing a burden upon him when she observed that he had not proposed any meaningful means of ensuring both the victim and the community would be protected should a conditional sentence be ordered. I agree Mr. Bullerwell was not obligated to do so, but his criminal record, including his convictions for breaches of recognizance and those in relation to obstructing peace officers, as well as other circumstances, support the sentencing judge's conclusion that he was not a suitable candidate for a conditional sentence order.
- [52] The appellant also argues the sentencing judge erred when she considered the essential facts of the offence to be aggravating; namely, Mr. Bullerwell's deliberate decision to continue his encounter with the complainant, and to utter the threats he did in the manner he did. I agree with Mr. Bullerwell that, given he was convicted of both a breach of recognizance and uttering threats, these circumstances are not properly characterized as aggravating circumstances. It is difficult to determine, however, whether it was these circumstances alone that formed the basis for the court's conclusion, because the reasons refer to the nature of the deliberate encounter and its traumatic impact on the complainant together as an aggravating factor. Those same circumstances also speak to the gravity of the offences.
- [53] In any event, I am unable to conclude any error in principle impacted on the sentence so as to render it unfit. It is clear from her reasons as a whole that the sentencing judge was not confident Mr. Bullerwell would abide by the terms of a conditional sentence or that it would protect the complainant and the community.

[54] No error has been established on this ground.

Ground 5 - Did the Sentencing Judge Err by Imposing a No-contact Condition with Mr. Bullerwell's Son, Subject to a Future Family Court Order, as Part of the Probation Order?

[55] Section 732.1(3)(h) of the Criminal Code authorizes imposing conditions to protect society and for facilitate the offender's successful reintegration into the community. Before a condition may be imposed, it must be reasonable. To be reasonable, a probation condition must be linked to the circumstances of offence and or the offender. What is required is an adequate nexus between the offender, the protection of the community, and his reintegration into the community (R. v. Badyal, 2011 BCCA 211 at para. 5).

[56] Mr. Bullerwell submits there is no nexus between a condition of no contact with his son and his circumstances. Apart from his conviction for uttering threats, he has no convictions for violent offences. He also suggests it was unreasonable for the court to restrict his contact with his son absent a family court order, as part of the probation order, because the requirement to obtain such an order necessarily imposes on him cost, uncertainty, and delay.

[57] The Crown argues there is a clear nexus between the offences and the condition of no contact at issue. Mr. Bullerwell threatened the family member with guardianship and custody of the child at issue. The sentencing judge concluded it was appropriate to restrict his contact with the complainant and those in her care that were related to Mr. Bullerwell. In doing so, she refused the Crown's request that a no-contact term also be imposed in relation to another child in Ms. Larabie's care who was unrelated to Mr. Bullerwell.

[58] Her reasons do not explain why she imposed the term with respect to Mr. Bullerwell's son or the discrepancy in approach between the two children.

[59] An exchange between the sentencing judge and the Crown suggests she imposed the term in relation to Mr. Bullerwell's child because he was at liberty to make an application to family court.

[60] There is no dispute the term was imposed as a means of protection. Implicit in the exchange is the sentencing judge's view the other child did not require additional protection, but Mr. Bullerwell's child did. It is difficult to imagine, however, why Mr. Bullerwell's child was at some greater risk when both were in the care of the complainant who was protected by a no-contact condition.

[61] The condition itself indicates the sentencing judge saw it as appropriate that a family court assess Mr. Bullerwell's child's safety before allowing any contact however I can find no indication he had an existing right of access.

[62] On this point, I agree with Mr. Bullerwell. The sentencing judge was made aware the complainant had custody and guardianship of the child pursuant to a court order, and that Mr. Bullerwell had not seen the child for three years. Bearing in mind the circumstances of

the offence and Mr. Bullerwell, in my view, the condition of no contact regarding is child was entirely unnecessary, given the condition of no contact protecting the complainant, and it was inconsistent with her decision to refuse the condition regarding the other child in her care.

[63] In my view, it does not have an adequate nexus to the circumstances of the offence and the offender and is unreasonable.

Conclusion

[64] Accordingly, I will allow the appeal only to the extent that the condition of no contact with Mr. Bullerwell's son be removed from the probation order.

"Fleming J."

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