
CANADA / JUDGMENT

R. v. Cochrane

2013 BCCA 93

COURT

British Columbia Court of Appeal

DECIDED

26 February 2013

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2013 BCCA 93 R. v. Cochrane

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Cochrane,

2013 BCCA 93

Date: 20130226

Docket: CA040554

Between:

Regina

Respondent

And:

Cecil Henry Cochrane

Appellant

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Before:

The Honourable Mr. Justice Low

The Honourable Mr. Justice Chiasson

The Honourable Madam Justice Bennett

On Appeal from: Provincial Court of British Columbia, October 18, 2012

(R. v. Cochrane, Port Hardy Docket No. 15381-2-C)

Oral Reasons for Judgment

Counsel for the Appellant:

C. Darnay

Counsel for the Respondent:

E. Campbell

Place and Date of Hearing:

Victoria, British Columbia

February 26, 2013

Place and Date of Judgment:

Victoria, British Columbia

February 26, 2013

- [1] BENNETT J.A.: On October 18, 2012, Cecil Cochrane pleaded guilty to two counts of assault and one count of resisting a police officer in the execution of his duty. The Crown proceeded by indictment. The sentencing judge imposed a sentence of one year on the count of assault against A.C., six months concurrent on the count of assault against A.W. and three months concurrent on the resisting arrest count. This sentence was reduced by two months to take into account pre-trial custody. Mr. Cochrane also received a probation order for a term of 18 months with a number of restrictive conditions.
- [2] Mr. Cochrane applies for leave to appeal and, if leave is granted, appeals the custodial aspect of his sentences on the basis that his circumstances as an Aboriginal person were not taken into account by the sentencing judge. He has filed an application to adduce fresh evidence with respect to his Aboriginal heritage, as none of this information was before the sentencing judge.
- [3] The Crown fairly concedes this error based on *R. v. Ipeelee*, 2012 SCC 13, [2012] 1 S.C.R. 433, and submits that a fit sentence would be one of seven months on the assault against A.C., four months concurrent on the assault against A.W. and three months concurrent on the resisting arrest count, after assigning two months credit for the pre-trial custody.

Background

- [4] The circumstances of the offences are succinctly set out in the Crown's factum:

4. On December 24, 2011, AW was 18 years old. She was walking to her home in Port Hardy at approximately 8 p.m. when she encountered the Appellant. He stopped her and asked what she was doing. She replied that she was going home. She smelled alcohol around him and thought he was intoxicated. He tried to hug her. She tried to pull away. He pulled her into him. One of his hands brushed over her chest. His other hand moved down her back but not as far as her back side. He let go of her when another girl, AC, walked by.
 5. AC was 14 years old. She was walking to a meeting point where relatives were picking her up when she encountered the Appellant. She saw him talking to another girl. The Appellant then followed her as she walked up a hill. He asked her where she was going. She ignored him. AC also thought the Appellant was intoxicated. She went into the yard of an old foster parent but there was no answer at that home. When she came out of that yard, the Appellant was still there. At that point, the Appellant grabbed her, picked her up and carried her off the street and into a ball field. She was certain he was taking her towards a bush area at the back of the field. He lost his balance and they both fell to the ground. AC was screaming, trying to call out to people she saw on the street. The Appellant grabbed and squeezed her neck, held his hand over her mouth, and told her to be quiet. Something changed then and the Appellant got up, helped AC up and let her go. They walked separate ways out of the ballpark. AC approached a car with a man and his son. She asked them for a cellphone to call the police. AC was sobbing and very upset.
 7. The Appellant was located by police that same evening. The officer told the Appellant he was under arrest for assault. The Appellant ran away. The officer had to chase and tackle the Appellant.
- [5] The Crown at sentencing specifically disavowed any reliance on a sexual aspect to the offences.
- [6] Mr. Cochrane has a lengthy criminal record commencing in 1986. There have been two significant gaps in his record between 2002-2006 and between 2009-2011. Although he has a record of violence, since 2001, almost all of his convictions relate to breaching court orders, possession of drugs, and thefts. His criminal record is consistent with a person who has a drug and alcohol problem.
- [7] At his sentencing hearing, Mr. Cochrane expressed considerable remorse for his conduct, and apologized to the complainants. He said he picked up A.C., thinking she was someone else whom he knew. The sentencing judge did not accept this explanation. Mr. Cochrane said he had moved to Port Hardy to be close to his relatives, but discovered they spent most of their time drinking. It was a bad situation for him, as he fell off the wagon and committed these offences.

- [8] The fresh evidence sets out in considerable detail the circumstances of his Aboriginal heritage. Mr. Cochrane deposes that he is a status Indian and a member of the Quatsino First Nation. He is of mixed heritage: black and Aboriginal. His mother and his aunt were survivors of a residential school located in Alert Bay. They were both victims of physical and sexual abuse.
- [9] Mr. Cochrane was born on December 5, 1967, and is now 45 years old. His mother and her husband separated shortly after his birth, as it was apparent that his mother's husband was not his father. He has never met his biological father. His mother began a common law relationship with Mr. Schirmer, whom Mr. Cochrane considered his father. Both were alcoholics and his mother was addicted to heroin. His two older siblings were apprehended by child welfare and adopted by different families. His step-father committed suicide when Mr. Cochrane was six years old. Mr. Cochrane found his body. His mother died of a drug overdose when he was eight years old. Mr. Cochrane and his brother found her body when they came home from school. He was apprehended by child welfare and sent to live with his aunt. He suffered physical and sexual abuse at the hands of relatives when he visited them on the reserve. He began drinking at age 14. He began using drugs in his early twenties and was drug addicted for long periods of time. He was diagnosed with AIDS in 1997, and is on a strict drug regimen.
- [10] He stopped drinking and using drugs in 1999 after a 16-month residential treatment program. He regularly attends Alcoholics Anonymous and Narcotics Anonymous. He relapsed for short periods in 2006 and 2007. He moved to his reserve in 2010 to reconnect with his family, but there was a great deal of drug and alcohol use in the community and he succumbed to alcohol abuse once again.

Discussion

- [11] The Crown does not object to the admission of this evidence. Indeed, in *R. v. Gladue*, [1999] 1 S.C.R. 688, the Supreme Court made clear the importance of this evidence, even when tendered for the first time on appeal. Justices Cory and Iacobucci, writing for the Court, said the following at para. 85:

Similarly, where a sentencing judge at the trial level has not engaged in the duty imposed by s. 718.2(e) as fully as required, it is incumbent upon a court of appeal in considering an appeal against sentence on this basis to consider any fresh evidence which is relevant and admissible on sentencing. In the same vein, it should be noted that, although s. 718.2(e) does not impose a statutory duty upon the sentencing judge to provide reasons, it will be much easier for a reviewing court to determine whether and how attention was paid to the circumstances of the offender as an aboriginal person if at least brief reasons are given.

- [12] I would admit the evidence.

[13] In Gladue, the Court made it clear that sentencing judges must take into account the systemic and background factors featured as part of the experience of the Aboriginal person in Canada. These factors were reviewed in the decision at paras. 67-69:

67 The background factors which figure prominently in the causation of crime by aboriginal offenders are by now well known. Years of dislocation and economic development have translated, for many aboriginal peoples, into low incomes, high unemployment, lack of opportunities and options, lack or irrelevance of education, substance abuse, loneliness, and community fragmentation. These and other factors contribute to a higher incidence of crime and incarceration. A disturbing account of these factors is set out by Professor Tim Quigley, "Some Issues in Sentencing of Aboriginal Offenders", in *Continuing Poundmaker and Riel's Quest* (1994), at pp. 269-300. Quigley ably describes the process whereby these various factors produce an overincarceration of aboriginal offenders, noting (at pp. 275-76) that "[t]he unemployed, transients, the poorly educated are all better candidates for imprisonment. When the social, political and economic aspects of our society place Aboriginal people disproportionately within the ranks of the latter, our society literally sentences more of them to jail."

68 It is true that systemic and background factors explain in part the incidence of crime and recidivism for non-aboriginal offenders as well. However, it must be recognized that the circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systemic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions. Moreover, as has been emphasized repeatedly in studies and commission reports, aboriginal offenders are, as a result of these unique systemic and background factors, more adversely affected by incarceration and less likely to be "rehabilitated" thereby, because the internment milieu is often culturally inappropriate and regrettably discrimination towards them is so often rampant in penal institutions.

69 In this case, of course, we are dealing with factors that must be considered by a judge sentencing an aboriginal offender. While background and systemic factors will also be of importance for a judge in sentencing a non-aboriginal offender, the judge who is called upon to sentence an aboriginal offender must give attention to the unique background and systemic factors which may have played a part in bringing the particular offender before the courts. In cases where such factors have played a significant role, it is incumbent upon the sentencing judge to consider these factors in evaluating whether imprisonment would actually serve to deter, or to denounce crime in a sense that would be meaningful to the community of which the offender is a member. In many instances, more restorative sentencing principles will gain primary relevance precisely because the prevention of crime as well as individual and social healing cannot occur through other means.

[14] The fact that a sentencing judge must consider these factors when determining a proportionate sentence was recently reinforced in *Ipeelee* at para. 87:

The sentencing judge has a statutory duty, imposed by s. 718.2(e) of the Criminal Code, to consider the unique circumstances of Aboriginal offenders. Failure to apply Gladue in any case involving an Aboriginal offender runs afoul of this statutory obligation. As these reasons have explained, such a failure would also result in a sentence that was not fit and was not consistent with the fundamental principle of proportionality. Therefore, application of the Gladue principles is required in every case involving an Aboriginal offender, including breach of an LTSO, and a failure to do so constitutes an error justifying appellate intervention.

- [15] Mr. Cochrane is an Aboriginal person who has clearly suffered from the negative systemic factors that have plagued Aboriginal people for many decades. His mother was in a residential school where she suffered abuse. That abuse was passed onto Mr. Cochrane and his siblings, by both his mother and his relatives. His mother was an alcoholic and drug user, who died of an overdose when he was a mere child. Despite horrific abuse, and his own descent into alcohol and drug use, Mr. Cochrane has made a number of successful efforts to be drug and alcohol free.
- [16] The failure of the sentencing judge to consider Mr. Cochrane's Aboriginal heritage requires this Court to consider whether, despite this error, the sentence was fit.
- [17] These incidents, although very frightening for the complainants, are mitigated by Mr. Cochrane's deep regret for his conduct, as well as his recognizing that he needs to leave the reserve if he is going to be able to return to sobriety. His degree of moral blameworthiness, based on his background, remorse and rehabilitative efforts, weighed against his conduct and his criminal record, leads me to the conclusion that the sentencing judge erred in imposing a sentence of one year.
- [18] I would accede to the Crown's submission and impose a sentence of seven months with respect to the assault against A.C., which takes into account the two months pre-trial custody. I would not interfere with the other sentences, nor will I comment on their fitness. They are to be served concurrently and will not affect the global effect of the seven-month sentence. I would not disturb the probation order or any of the ancillary orders.

Conclusion

- [19] Therefore, I would grant leave to appeal, allow the appeal and reduce the sentence of ten months to seven months.
- [20] LOW J.A.: I agree.
- [21] CHIASSON J.A.: I agree.
- [22] LOW J.A.: Leave to appeal sentence is granted. The appeal is allowed to the extent of reducing the sentence for the assault on AC to seven months.

"The Honourable Madam Justice Bennett"

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