

CANADA / JUDGMENT

R. v. Conway

2020 BCSC 2154

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2154 R. v. Conway

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Conway,

2020 BCSC 2154

Date: 20201030

Docket: 171279-2

Registry: Victoria

Regina

v.

Joel James Conway

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Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Sentence

Counsel for the Crown:

D.J. Sissons

Counsel for the Accused:

T.J. Russell

Place and Date of Trial/Hearing:

Victoria, B.C.

October 30, 2020

Place and Date of Judgment:

Victoria, B.C.

October 30, 2020

[1] THE COURT:

[2] These are reasons for sentence for two offences committed by Mr. Conway on March 31, 2017, at Saanich:

1. sexual assault of A.B., contrary to s. 271 of the Criminal Code;
2. breaking and entering a dwelling house and committing an indictable offence therein, namely sexual assault of A.B., contrary to s. 348(1)(b) of the Criminal Code.

[3] I delivered reasons for conviction on March 26, 2019. The reasons are indexed and published at 2019 BCSC 489.

Circumstances of the Offences

[4] As the reasons for conviction set out the facts in detail, it is unnecessary for me to review the circumstances of the offences in much substantial detail here. These reasons should be understood in conjunction with the previous reasons.

[5] The basic facts are set out in paragraphs 6 through 24 of the previous reasons.

[6] In summary, the offender Mr. Conway and a friend Mr. S. met up with A.B., at a downtown Victoria nightclub late in the evening. She had been drinking heavily, according to her own account. They met just outside the hotel where the nightclub is located. They agreed to split the fare for a taxi to go to her home in Saanich, 10-15 minutes away. On the way, they picked up some blueberry vodka that Mr. Conway had purchased earlier in the evening.

[7] They went to A.B.'s home, which is a townhouse type residence, where they consumed some of the blueberry vodka, that is the three of them, and used some cocaine. The three persons remained in the home socializing until early in the morning. Mr. Conway and his friend Mr. S. departed by taxi at about 4:20 a.m. At that point A.B. went to bed. As she put it, she passed out. She said she had had a lot to drink. As I noted in paragraph 15, she did not distinguish between what she called "passing out" and falling asleep.

- [8] Mr. Conway and Mr. S. returned to downtown Victoria by taxi to retrieve Mr. Conway's car. Mr. Conway then drove his friend home. On the drive, Mr. Conway told his friend that he wanted to go back to A.B.'s residence. He said that he thought he had a chance or a shot with A.B. He was discouraged by Mr. S. In one manner or another, as I explained, Mr. S. reminded Mr. Conway that he was married and had a family. In other words, he was encouraged to go home to his family instead.
- [9] He did not do that. He returned to A.B.'s townhouse. The dispute in the evidence was whether he was invited back or not, and whether he was willingly invited into the home by A.B., who said otherwise. I accepted her evidence in finding Mr. Conway guilty of the offences.
- [10] So Mr. Conway re-entered the home by one means or another without permission, without consent, and without A.B.'s participation, who was sleeping heavily in an upstairs bedroom. The evidence did not allow me to determine whether he entered the home through the front door, which may have been openable, despite what A.B. thought, or perhaps through the rear of the home by climbing up onto a balcony.
- [11] I described the circumstances of the sexual assault at paragraph 16 of the reasons. That was where I set out the evidence of A.B., which I accepted in general terms. I quote:
- [16] A.B. states that she awoke when she felt something touching her. She opened her eyes and saw Mr. Conway standing next to the bed, naked. It took her a few moments to recognize him. She says she asked him what he was doing in her house, and how he had gotten into her house. She says he said, "You left your front door open [or "unlocked"]". She says that she was frozen with fear. He pulled her leggings down and put his mouth on her genitals. He put his penis in her mouth. He turned her over and had vaginal intercourse. She says that he raped her. . . .
- [12] That is the essence of it. She says she was heavily intoxicated, as I mentioned.
- [13] I also accepted the evidence of A.B. that prior to the departure of Mr. Conway and his friend, there had been nothing at all to indicate to her that Mr. Conway wanted to have sex with her that night. I accepted that when she closed the door and watched them leave in the taxi and waved goodbye, she was exhausted, and went to bed alone, with no expectation or any reason whatsoever to expect that Mr. Conway would return.
- [14] As I noted at paragraph 73, A.B. was not physically injured in the assault. She did not resist, or cry out. As I said there, the fact that she did not resist is no indication of consent, nor is there, on that basis, a reason why I should have had a reasonable doubt about that. I explained that the circumstances were shocking and frightening to her, and her behaviour in not resisting is very consistent with her fear, and the fact that the offender was in her bedroom and in her home uninvited.

Circumstances of the Offender

- [15] A presentence report that sets out Mr. Conway's basic life facts. He was born in 1986 in Halifax. He is currently 34 years of age. The family moved to Victoria when he was 13 years of age. He graduated from high school. In general respects, he had what would be called a normal or conventional or not unusual upbringing. He has no criminal record. He has a family. He has been married for a significant period of time. He has three young children, all boys; they are 12, seven, and four years of age.
- [16] He works steadily in the home theatre entertainment business, working with his father-in-law, in their family business.
- [17] The presentence report indicates that Mr. Conway does not accept the verdict. He continues to deny that he committed the offences. Therefore, the PSR writer was unable to address issues such as remorse or, in broad terms, rehabilitation. The PSR also notes that Mr. Conway has had problems in the past with alcohol and illicit drug use, and there was some of that on the night in question, as I mentioned.
- [18] There are numerous letters of support and character references from members of the community, friends, and family members. All are very, very positive.
- [19] Mr. Conway continues to have the support of his spouse, who speaks very highly of him as a breadwinner and as a father and husband. She is of the view that he is not guilty. He also has a positive letter of reference from his mother, which sets out similar themes in terms of Mr. Conway being a good person, with good character and, in her view, denying that he could have committed these crimes.
- [20] There are letters of support, as well, from his father-in-law, and mother-in-law, who refer to his value as a worker and as an important participant in the business, and his qualities as a father and a husband. Numerous other letters indicate that he is active in the community with volunteer organizations, and in general has many supporters.

Impact on the Victim

- [21] I have a victim impact statement from the victim. The victim impact statement was read out in court and has been marked as an exhibit. I will not refer specifically to any part of the victim impact statement. In summary, the victim states that the episode has had profound, enduring, damaging effects. The damage is emotional and psychological. She has had a very difficult time dealing with this, and struggles to overcome the consequences daily.

Legal Parameters

[22] As the Crown notes in its submissions, the maximum sentence for Count 1, sexual assault under s. 271, is 10 years' imprisonment; the maximum punishment for breaking and entering, Count 2, is imprisonment for life. There are no minimum sentences for these offences.

The Positions of the Crown and Defence

- [23] The Crown's position is that given the aggravating factors and Mr. Conway's high moral culpability, there should be a sentence of four years imprisonment for the sexual assault, and also four years on Count 2, the breaking and entering with committing sexual assault in the residence, and the two sentences should be served concurrently. The Crown also proposes a number of ancillary orders. The defence indicates that none of those are in issue.
- [24] The Crown primarily emphasized two aggravating factors. One is that A.B. was in her own home, in her own bed, when she was assaulted, and in that regard the Crown emphasizes her vulnerability. The second factor is that A.B. was asleep when she was assaulted, and again, was vulnerable. The Crown emphasizes that Mr. Conway was aware that the victim had consumed significant quantities of alcohol and some drugs that evening, and that he was aware that she was expecting to be left alone, with no expectation that anybody would be returning.
- [25] The Crown also mentions that Mr. Conway had been warned not to return by his friend. I do not see that as an aggravating factor. I look at that as merely part of the context, as I mentioned during the course of submissions.
- [26] The Crown's position then is that, based upon the moral blameworthiness of Mr. Conway and the key objectives of general deterrence and denunciation, four years is an appropriate and fit sentence. The Crown also mentioned specific deterrence. I would place less weight on that factor in this particular case, given the lack of any record on the part of Mr. Conway, or any other indication of reoffending behaviour.
- [27] In my view this case is not about specifically deterring Mr. Conway from reoffending. The case is about general deterrence and, even more, denunciation.
- [28] In its submissions the defence emphasizes the lack of a criminal record, and a number of factors some of which I have already mentioned. Namely, the family support, and specifically the harm that would be caused to his family as, in effect, collateral damage, upon a term of imprisonment, including in particular a lengthier term of imprisonment in a federal institution. In general terms, the defence emphasizes the out-of-character nature of the offences. The defence does not disagree that four years is within the general range on the authorities. I do not think there could be any disagreement about that.

[29] The defence position is that, nonetheless, it is open to me to impose a sentence of two years less a day, which would therefore translate into a provincial custodial sentence, with a substantial term of probation attached which, as the defence notes, could be up to three years.

The Principles of Sentencing

[30] I will turn briefly to the principles of sentencing as reviewed by the Crown in its submissions. These are set out for the most part in the Criminal Code.

[31] Under s. 718.1, the fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[32] Section 718 states:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives . . .

[33] The objective most applicable here is:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;

[34] Subparagraph (b) is also highly relevant:

(b) to deter the offender and other persons from committing offences.

[35] Other sentencing principles are set out in s. 718.2. Section 718.2(a) says:

(a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender;

and sets out, without limitation, a number of specific circumstances. Subsection (iii.1) is relevant. It states:

(iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation . . .

[36] This is a deemed aggravating circumstance. I consider it applicable, based upon the victim impact statement of A.B.

[37] Other relevant principles set out in s. 718.2 include:

(b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

. . .

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.

[38] And in a similar vein:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

[39] The last few words are not applicable in this case.

Aggravating and Mitigating Circumstances

[40] I accept the aggravating circumstances the Crown argues, namely that the victim was in her own home in her own bed when she was assaulted and was vulnerable, and that she was asleep, and that Mr. Conway was aware that she had consumed alcohol and drugs and was vulnerable.

[41] I have also found, as another aggravating circumstance, the harm to the victim, as I just mentioned.

[42] The mitigating circumstances applicable include that Mr. Conway has no criminal record, firstly. Secondly, in other respects, he is an upstanding member of the community; a contributing, law-abiding member of the community who works, supports his family, and is by all accounts a good husband and father. So in general, these offences seem to be out of character. Also there has been a long period of time since the charges were brought, and Mr. Conway has done well, in terms of compliance with bail conditions. Finally there is, as noted, strong support from his family and the community.

Applicable Case Law

[43] I accept that, as the Crown argues, based on the authorities, the general range for sexual assault involving intercourse is from two years to six years. The defence cites an example of a case referring to that, *R. v. Cartwright*, a recent decision of Justice Jenkins, 2019 BCSC 820, where the court so finds at paragraphs 49 and 50. Justice Jenkins states:

[49] On a number of occasions, the Court of Appeal has stated that sentences for sexual assault involving intercourse range from two to six years of incarceration: see *R. v. Pouce Coupe*, 2014 BCCA 255 at para. 31; and *R. v. B.S.B.*, 2010 BCCA 40 at para. 6.

[44] At paragraph 50, Justice Jenkins added as follows:

[50] It is clear that a fit sentence for sexual assault including intercourse in British Columbia is between two and six years incarceration. There may be circumstances which would justify a sentence out of that range after considering circumstances of the offence and offender, and the needs of the community in which the offence occurred: *G.M.* at para. 23. It is important to remember that a range for a sentence is a guideline rather than a rule.

[45] Pouce Coupe was referred to by the Crown in its submissions.

[46] However, in my view a case that also involves a break and enter, calls for a sentence that is not at the bottom end of range of two to six years that I just referred to.

[47] I refer to some of the authorities referred to by the Crown and the defence.

[48] I begin with the 1984 decision of the British Columbia Court of Appeal in *R. v. Hollingworth*, [1984] B.C.J. No. 1701. There was a guilty plea in that case. The Court of Appeal overturned the sentence imposed by the trial judge, which was two years less a day plus a small fine, and two years in default of payment of the fine. The circumstances were similar, in some respects. Justice Seaton said:

2 The appellant entered a house. He knew no one [was] there. He went in through the basement and went upstairs and he raped the woman who was there. It has been said that there was no violence. That this victim apparently wisely realized that there was nothing to be gained by fighting does not lead to the conclusion that there was no violence. Every rape is a terribly violent act. Indeed, it is hard to think of something more violent than rape.

3 This victim was in her own home, at night, when this happened. It is unexplained. It is the sort of offence that demands, absolutely demands, a long sentence.

[49] Justice Seaton added:

8 This was a terrible offence. It will not permit of a light sentence, and in my view the sentence imposed was light, too light. I would allow the appeal. I would delete the fine. I would impose a sentence of 4 years' imprisonment. That sentence is the least that can be given for the offence that was committed here. I would allow the appeal accordingly.

[50] Justice Macfarlane concurring in the result added as follows:

11 The term of imprisonment must be long enough in a case of this type to recognize the severity of the crime which the offender has committed. His personal background and previous unblemished record, of course, stand him in good stead. If it were not for that then the sentence to be imposed for such a terrible crime as this would be much greater. Here, the circumstances are aggravated. This is no ordinary case. This is the case of an offender entering the house of a stranger, at night, and raping a defenceless woman in her bed. . . .

[51] *R. v. Munt* 2012 BCCA 228 is another relevant decision. The circumstances were reviewed by Madam Justice Kirkpatrick at paragraph 3, where she adopted the circumstances as summarized by the trial judge. I refer to paragraph 6 of the trial decision as quoted in the Court of Appeal:

[6] The circumstances of the offence are that after the complainant passed out and did not come back out of the house, Mr. Munt tried various means to get into the house. This included walking into the bedroom of another resident of the home, a woman who lived on the bottom floor of the house who had a separate entrance and suite. Mr. Munt ended up

putting the ladder up against the house and broke into the complainant's bedroom through the window. There he sexually assaulted her and had intercourse with her. The complainant was essentially frozen; she could not talk or move. When Mr. Munt was finished, he left.

- [52] In terms of personal circumstances, the offender was 30 years of age and it was his first offence. His family remained very supportive. He was in a long-term relationship and had a young daughter. He was working as a tile setter for a company owned and operated by his father.
- [53] The circumstances that could be seen as making that case somewhat worse was that there was some suggestion that Mr. Munt was involved with a group that utilized date-rape drugs. There was no finding that he had administered the drug, but he would have been aware that it had been utilized.
- [54] However, in my view, in the case at bar there is some similarity, in that Mr. Conway knew that the victim was heavily intoxicated and had also used drugs, was vulnerable, and was essentially unconscious.
- [55] In paragraph 15, the court stated:
- [15] In my opinion, general deterrence and denunciation were appropriately considered to be paramount considerations in this case. The community is entitled to be protected from such vile conduct and others who may be so inclined must be firmly discouraged. In my view, the 30 month sentence imposed can be said to be at the low end for this offence. I do not consider that a conditional sentence was ever a reasonable prospect in the circumstances of this case.
- [56] The court went on to note at paragraph 16 that it was not overlooking the emphatic letters of support that were filed on behalf of Mr. Munt at the sentencing.
- [57] The defence relies on a number of other authorities. One is the decision of the British Columbia Court of Appeal in *R. v. Morrison*, [1989] B.C.J. No. 821. The decision is quite brief. The circumstances have some similarity. The offender had been drinking at a party with a friend. The friend departed with two female companions who had been at the party. A little later the offender followed them out and went to the friend's home. Finding the door unlocked, he entered, went into the bedroom, and got into bed with the victim without waking her. He sexually assaulted her by sexual intercourse involving some penetration or attempted penetration. The woman woke up and was at first confused as to who was in bed with her. She thought it was the man she lived with. When she realized that it was the offender, an acquaintance, but someone who she had not in any way had any form of previous sexual relationship with, she protested vigorously. The offender stopped the sexual assault and departed shortly afterwards.
- [58] The offender was 33 years of age and had no criminal record of any significance. He was contributing member of society with a good employment record and sense of responsibility.

[59] On the appeal, counsel for the Crown relied on *R. v. Hollingworth*, which is the decision I referred to previously. The court stated:

In my opinion, this Court, in the *Hollingworth* case, indicated the appropriate range of sentences where the violent crime of sexual assault has taken place in what should be the safe confines of the complainant's home. The intoxication of the applicant in this case and in *Hollingworth* is a common factor of the two cases.

[60] The sentencing judge imposed a sentence of three years imprisonment on a charge of sexual assault. The Court of Appeal declined to interfere with the decision.

[61] [On the sentencing hearing before me, it was erroneously submitted that the Court of Appeal affirmed a sentence of two years less a day in *Morrison*. On that basis I declined to follow the decision. I have edited these reasons in order to remove the erroneous references to *Morrison*.]

[62] In *R. v. Engerdahl*, [1993] B.C.J. No. 1921, (B.C.C.A.) the circumstances again were roughly similar. paragraph 3, Justice Hinds said:

3 The appellant broke and entered the residence of the complainant on Dewdney Trunk Road in the Maple Ridge area of British Columbia. The 48 year old complainant was at that time asleep on a couch in her townhouse and it was a deep sleep which had been induced by her having taken a sleeping pill and by her having consumed two drinks of double strength vodka. While the complainant was asleep the appellant removed her underclothing and sexually assaulted her by having sexual intercourse. In the course of the act of sexual intercourse the appellant awoke. She screamed very loudly at the appellant, the screams being heard by neighbours and she realized that the appellant was a person completely unknown to her. She was apparently an aggressive woman and she grabbed his hair and dragged him down the hallway. She awakened her daughter and caused her to get a shot gun. The police were called. The complainant covered the appellant with a shot gun until the arrival of the police.

4 The appellant was approximately 36 years of age at the time of the sentencing. He had a short record of offences unrelated to the offence in this case.

[63] The court referred to *Hollingworth* and also *Morrison*, the decisions I have just referred to, and said this in paragraph 7, at the end of the paragraph:

. . . I am satisfied that in circumstances of this case the imposition of the sentence of three years was not an unfit sentence.

[64] The Chief Justice of B.C. McEachern added as follows. He said:

I would have decided that three years in prison and two years probation was a lenient but fit sentence for an offence which involves the invasion of a woman's home, bed, and person even for a person such as the appellant without any relevant record.

- [65] The defence also relied on a number of other authorities. One is a decision of Justice Joyce, *R. v. V. (R.W.)*, 2003 BCSC 1806. I agree with the submissions of the Crown about that case. That case really dealt with the question of whether a conditional sentence order was applicable. That type of sentence is no longer available in cases of this sort. Justice Joyce went through a number of decisions in deciding to make the conditional sentence order, which the court determined was fit. The nominal sentence had to be less than two years, and for that reason two years less a day was imposed, and a conditional sentence ordered. In my view, the decision is not useful guidance to me.
- [66] Similarly, the defence relied upon *R. v. B.S.B.*, 2010 BCCA 40. The sentencing judge imposed a sentence of two years less a day and three years' probation. The offender appealed; the appeal was denied. However, the Crown did not cross appeal, therefore the issue was not whether the sentence was too lenient, but whether the sentence was unfit for being too harsh, and whether a conditional sentence order would be appropriate. The Court of Appeal said it was not appropriate.
- [67] The defence relied on *R. v. Lindstrom*, 2012 BCPC 354. Without getting into detail, in my view that case is distinguishable, as is the decision in *R. v. Cartwright*, also relied on. I referred to that decision earlier, but on the facts of the case it is distinguishable.

Decision

- [68] As the Crown has argued, the moral blameworthiness of the offender is very high in this case. In my view, Mr. Conway knew what he was doing. He knew that he was not invited back to A.B.'s home. He knew that he was breaking in, by one means or another, and he knew that he was sexually assaulting the helpless victim who was sleeping in her own bed.
- [69] In my view, having regard to the authorities, and the references to two and a half years being the low end of the range, and three years as lenient, the sentence range applicable in this case does not fall to the two years less a day suggested by the defence. In my view, that sentence, in the circumstances of this case, is just not open to me.
- [70] I agree with the submission of the Crown that four years is well within the overall range of two to six years, especially when considering the aggravating factor of the sexual assault taking place in the victim's own home following a break and enter.
- [71] I have the added aggravating factor, as I mentioned, of the severe consequences to the victim.
- [72] However, there are some strong mitigating factors in this case, as well. There is the fact that Mr. Conway has no criminal record and is otherwise a law-abiding member of the community. Most powerfully, the detrimental effects of any sentence, particularly a federal sentence, on Mr. Conway's family and children. There is no getting around that. There is no question but that the consequences would be, in all likelihood, very severe, and potentially harmful. The children are undoubtedly severe collateral damage in cases like this, as they

are in any case, practically speaking, where parents are sent to prison. That, in my view, is an unfortunate consequence of our correctional system.

- [73] However, in my view, in this case the principles of denunciation and general deterrence require a strong message to be sent, and therefore a penitentiary term of significant length is required. Given the mitigating factors I have referred to, I think a four-year sentence is not required to send the appropriate message in this case, and a three-year sentence would be sufficient to respond to the sentencing requirements.
- [74] I wish to add a comment about the suggestion that a sentence of two years less a day together with a term of probation of up to 36 months would also be appropriate, because it keeps the offender under the supervision of the court system for up to five years. That might be a factor in some cases, but in my view is not a factor in this case where specific deterrence is really not an important factor.
- [75] Therefore, the sentence to be imposed will be three years, concurrently on each count.
- [76] Mr. Conway, would you please stand. For the reasons indicated, Mr. Conway, I am imposing a sentence of three years' penitentiary service, and I am also imposing the ancillary terms that you heard about during the course of the submissions earlier, which I will review right now. You may be seated.
- [77] All right, so the ancillary orders are those that the Crown put forward during the course of submissions and, as I mentioned, there was no argument about this from the defence.
- [78] First, an order for DNA pursuant to s. 487.051(3). Secondly, a firearms prohibition for 10 years, including the other weapons referred to in s. 109. Thirdly, the SOIRA order, lifetime under s. 490.012 and 490.013, and I believe that is it. Mr. Sissons?
- [79] MR. SISSONS: There is a victim fine surcharge that is applicable, then I will leave that. My friend may want to address that. The firearms prohibition under 109, was that 10 years?
- [80] THE COURT: Ten years.
- [81] MR. SISSONS: Yes.
- [82] THE COURT: Right, and what I mentioned is that the section refers to other forms of weapons beyond firearms.
- [83] MR. SISSONS: Yes.
- [84] THE COURT: So of course the order encompasses the other weapons referred to in s. 109.
- [Submissions regarding victim fine surcharge]

[85] THE COURT: It is a relatively small amount of money, but I appreciate that, given the circumstances and Mr. Conway being the sole breadwinner, money is very tight and I see no purpose in it, so I am willing to make an order waiving the surcharge on the grounds of hardship.

[86] You had another submission?

[Submissions regarding Kienapple] at 3:50:09 TO 3:52:09 P.M.]

[87] THE COURT: Yes, all right. Your position -- the position of the defence, as I understand it, is there should be a conditional stay on Count 1, correct?

[88] MR. RUSSELL: Yes.

[89] THE COURT: All right.

[90] MR. RUSSELL: The sexual assault.

[91] THE COURT: Right, and Mr. Sissons, you have no position opposing that, correct, on the authorities?

[92] MR. SISSONS: No, there is a background in law for it.

[93] THE COURT: All right. In that case, I will make that order on the basis of the principles in Kienapple, so there will be a conditional stay on Count 1.

[Submissions re allocution]

"Verhoeven J."

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