
CANADA / JUDGMENT

R. v. Costello

2003 BCCA 421

COURT

British Columbia Court of Appeal

DECIDED

15 July 2003

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Costello,

2003 BCCA 421

Date: 20030715

Docket: CA030385

Between:

Regina

Respondent

And

Shaun Earl Costello

Appellant

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

J.J. Blazina

Counsel for the Appellant

A. Budlovsky

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

July 15, 2003

- [1] LOWRY, J.A.: Shaun Costello seeks leave to appeal, and if leave is granted, appeals a sentence of four years imprisonment imposed on him September 11, 2002, by a judge of the Supreme Court who, after an eight day trial, convicted him of the aggravated assault of a small child three years of age.
- [2] The grounds of the appeal are set out in the appellant's statement as three:
1. The sentence imposed is outside the range of sentences for similar offences in similar circumstances; 2. The principle of deterrence was overemphasized; and 3. Inadequate weight was given to the prospects for rehabilitation.
- [3] I would grant leave to appeal, but I do not consider there is any sound basis on which the appeal can succeed.
- [4] The assault on the little boy occurred in September 2001 at a time when Costello was on probation after being convicted of having assaulted the child on an earlier occasion.
- [5] Costello was, at the time, living with the child's mother. He was 21 years of age. He was alone with the child who had been left in his care. While he has given different versions of what happened, the learned trial judge concluded that the injuries sustained by the child to his head and abdomen were caused by his having been violently shaken. The injuries were serious. Following the assault, the child was unable to sit up without assistance. He could not walk or perform other basic life skills in the months that followed. With surgical intervention the child recovered from internal injuries to his abdomen which included two perforations of the small intestine but, at the time of sentencing, he continued to suffer from injury to his brain. There was a swelling of the right hemisphere of the brain, which resulted in paralysis to the left side of the child's body, and subdural bleeding. Costello did take the child for medical treatment but not for at least two days after the injuries were inflicted. The trial judge saw Costello's expressions of remorse at the time of sentencing to fall far short of a true recognition of either the gravity of the harm he cause or the extent of his own responsibility for it.

- [6] Costello was, at his counsel's request, subjected to psychological examination prior to his sentencing. The report that was issued contained a diagnosis of drug abuse and an anti-social personality disorder. It concluded that, without treatment, Costello would continue to pose a very high risk of future violence suggesting the need for intensive treatment such as the Intensive Violent Offenders Program that is available through the federal penitentiary system.
- [7] The reasons given by the trial judge for the sentence imposed are comprehensive to say the least. She began by identifying the issue to be where in the range of sentences of offences involving "shaken babies" Costello's case should fall. She then discussed the circumstances of the offence, the affect of the assault on the little boy including difficulties he continued to have with paralysis that required him to wear brace on his left foot and splint on his hand as well as the concern for his cognitive functioning in the future. She then outlined Costello's background, his court history, educational and social background and the efforts he made during the year he was in pre-trial custody toward rehabilitating himself by participating in various drug and alcohol programs that were available to him.
- [8] The trial judge then reviewed the psychological assessment and the submissions made: the Crown seeking six to eight years imprisonment, the defence contending for a conditional sentence followed by probation. She outlined the sentencing principles involved at paras. 36-39 of her reasons as follows:
- [36] The fundamental purpose of sentencing is 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. A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.
- [37] Section 718 of the Criminal Code sets out a number of objectives a sentencing judge should bear in mind when sentencing. The objectives of the sentence in this case include the following: denouncing unlawful conduct; deterring the offender and others from committing offences; because it is necessary to do so, separating the offender from society; assisting in rehabilitating the offender; providing reparations for harm done to victims or to the community; and promoting a sense of responsibility in the offender, and acknowledging the harm done to the victim and to the community.
- [38] As noted in *R. v. McCrindle* [1997] 60 O.T.C. 22 Ont. Gen. Div., the objectives of denouncing unlawful conduct and deterring the offender and other persons from committing offences are especially important in cases involving the abuse of children, in order to express the community's abhorrence of the offence and to deter others from similar violence against young children.
- [39] A sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

- [9] The trial judge weighed what she saw as the aggravating and mitigating factors, considered the authorities cited to her, and imposed a sentence of four years in addition to the year of pre-trial time Costello spent in custody.
- [10] Costello contends now that a fit sentence would be two to two-and-a-half years imprisonment which, given his pre-trial custody would, he says, amount to a sentence of four to four-and-a-half years. The pre-trial time in custody would, on that basis, count double as "dead time" or time when no remission was earned.
- [11] With respect to the first ground of appeal dealing with the range of appropriate sentences in similar cases of similar circumstances, reliance is placed on *R. v. Habib* (2000) 147 C.C.C. (3d) 555 at 561, a decision of the Ontario Court of Appeal which the trial judge considered at para. 67 of her reasons. There, in upholding a sentence of two years less a day to be served conditionally, the court responded to the Crown's submission that the appropriate sentence for an aggravated assault conviction involving a "shaken baby" by saying:

While the typical case may receive such a sentence, the range must extend to accommodate the rare or exceptional case, such as this.

- [12] Reliance is also placed on *R. v. Ewen* (2000), 144 C.C.C. (3d) 277 which the trial judge also considered. There, similarly, in upholding a conditional sentence, the Saskatchewan Court of Appeal was responding to the Crown's submission that the usual range of sentence for an aggravated assault in a case of this kind was two to four years.
- [13] But, in my view, what was said in those cases does not establish a range of sentences that could be said to be sufficiently clear that the trial judge erred in principle by not adhering to it. Both courts were considering the appropriateness of conditional sentences in exceptional cases, where, unlike the circumstances here, the accused did not have a propensity for violence and re-offending. Both courts were responding to Crown submissions about the appropriateness of conditional sentences, not undertaking assessments of the range of custodial sentences.
- [14] The sentence imposed on Costello has not been shown to be outside a range of sentences in cases of similar circumstances. To the extent that it is said to entail a longer period of incarceration than the trial judge might have imposed, it is justified, in my view, by the aggravating factors. I refer in particular to the seriousness of the assault as evident in the amount of force that was said would have been required to cause the extent of the serious long term injury the little boy sustained. It was said that a person would have had to have shaken him "for all they were worth". I refer, as well, to the fact that Costello had pleaded guilty and was sentenced to a period of probation for assaulting the same child on an earlier occasion. I refer further to the propensity for violence that he has because of his drug abuse and anti-social personality disorder that is in need of intense treatment. Finally, I refer to Costello's expressions of remorse falling far short of recognizing the harm he has done and his responsibility for it.

- [15] With respect to the second ground of appeal having to do with the emphasis placed on specific and general deterrence, reliance is placed on the decisions of the Court of Appeal in *R. v. Gregory*, [1985] B.C.J. No. 1860 and *R. v. Smith*, [1986] B.C.J. No. 460. Both were decisions of this Court where the sentences imposed were for manslaughter in the death of a child. In the first, a sentence of two years less a day was increased to four years and, in the second, a sentence of 10 years was reduced to six years. I see little in either case that assists Costello in contending that the trial judge overemphasized specific and general deterrence.
- [16] Specific and general deterrence are unquestionably important considerations in passing sentence in cases of this kind. The trial judge recognized deterrence as one of the objectives of the sentence she imposed as she was required to do.
- [17] With respect to the third ground of appeal that insufficient weight was given to Costello's efforts to rehabilitate himself, reliance is placed on *R. v. Carle* 2001 BCCA 492 and *R. v. Marks* 1994 Carswell Nfld. 129 (C.A.) for the proposition that a continuing course of child abuse is to be distinguished from a single criminal act in imposing sentence for that act. It is contended that, without having due regard for Costello's rehabilitative efforts, the trial judge sentenced him as if there had been a pattern of abusing the little boy.
- [18] I do not understand how it could be said that the trial judge wrongly sentenced Costello based on a pattern of abuse. The only other incident she mentioned was the assault of the little boy for which Costello was on probation when he committed the offence for which he was being sentenced. That was a perfectly appropriate consideration in imposing the sentence. As for Costello's efforts to rehabilitate himself, the trial judge stated such to be one of the mitigating factors she was taking into account, and she quoted the psychologist's report with respect to the rehabilitative treatment Costello requires. Considering the extensive reasons given for the sentence imposed as a whole, I can see no basis on which it can be said the trial judge failed to give adequate weight to Costello's prospects of rehabilitation.
- [19] This Court should not intervene with respect to the sentence imposed by a trial judge unless the judge has committed an error of principle, failed to consider a relevant factor, overemphasized a relevant factor, or, the sentence is demonstrably unfit: *R. v. Shropshire*, [1995] 4 S.C.R. 227, *R. v. M.* (C.A.), [1996] 1 S.C.R. 500, and *R. v. McDonnell*, [1997] 1 S.C.R. 948.
- [20] In my view, none of those reasons have been established on this appeal on any of the three grounds advanced.
- [21] I would dismiss the appeal.
- [22] RYAN, J.A.: I agree.
- [23] SAUNDERS, J.A.: I agree.

[24] RYAN, J.A.: The application for an extension of time to apply for leave to appeal is granted.
Leave is granted but the appeal is dismissed.

"The Honourable Mr. Justice Lowry"

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