

CANADA / JUDGMENT

R. v. Costello

2020 BCSC 1206

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1206 R. v. Costello

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Costello,

2020 BCSC 1206

Date: 20200724

Docket: 92217-2

Registry: Kelowna

Regina

v.

Shaun Earl Martin Costello

Restriction on publication: Pursuant to s. 486.4(2.1) C.C.C.

Before: The Honourable Mr. Justice G.P. Weatherill

Oral Reasons for Sentence

Counsel for the Crown:

P. O'Neil

K. Dodds

Counsel for the Accused:

D. McNamee

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 6 and 24, 2020

Place and Date of Judgment:

Kelowna, B.C.

July 24, 2020

- [1] THE COURT: Mr. Costello is before me for sentencing following a guilty plea entered on July 6, 2020 to the offence of aggravated assault contrary to s. 268 of the Criminal Code, R.S.C. 1985, c. 46. The assault took place on September 3, 2019.
- [2] Firstly, I order a ban pursuant to s. 486.5 of the Criminal Code and direct that any information that could identify the victim in this case, whom I will refer to as K.S., and/or her daughter whom I will refer to as A.B., not be published in any document or broadcast or transmitted in any way.

Circumstances of the Offence

- [3] The circumstances of the offence are not seriously in dispute. They are set out in an agreed statement of facts that was marked as an exhibit on sentencing. I do not propose to review those facts in detail, but if these reasons are ordered, the agreed statement of facts will be added as an appendix.
- [4] Mr. Costello had been in an intimate relationship with K.S. from October 2017 to April 2018. They were living in Edmonton at the time, with K.S.'s daughter from a prior relationship. Their relationship ended in April 2018, with Mr. Costello being arrested and remanded into custody on a charge of assaulting K.S. during an argument. The court ordered that he have no contact with K.S. pending trial. Despite that order, Mr. Costello telephoned and/or attempted to contact K.S. from the remand centre some 450 times.
- [5] As a result, he was charged with attempting to obstruct justice and breaching the probation order.
- [6] In May 2018, Mr. Costello pled guilty to the assault charge and received three months' imprisonment followed by 18 months' probation, one of the terms of which was that he was to have no contact either directly or indirectly with K.S. or her child. That order was in effect until December 2019.
- [7] Mr. Costello finished serving his three-month sentence in June 2019 and was released. He resumed communicating with K.S. over the internet and by telephone, in breach of his probation order. In July 2019 K.S. and Mr. Costello both relocated to the Lower Mainland of British Columbia. They resumed their relationship.

- [8] On August 23, 2019, Mr. Costello, K.S., and her child travelled to Kelowna, B.C., for a vacation. Mr. Costello travelled by car and K.S. and her child went by bus. They travelled separately to avoid Mr. Costello being caught in breach of his probation order. They stayed together in a campground. Discord between them soon developed when Mr. Costello showed interest in another woman staying in the same campground.
- [9] On September 3, 2019, Mr. Costello and K.S. got into an alcohol and cannabis fueled argument that gradually escalated into an altercation over Mr. Costello's cellphone. K.S. began striking Mr. Costello and Mr. Costello responded by striking K.S. once on the right side of her face with force sufficient to cause a three-centimetre laceration to her right cheek requiring stitches to close and undisplaced fractures to the underlying facial bone. K.S. immediately began screaming for help and adjacent campers called 9-1-1. Mr. Costello left the campground on foot before the police arrived. K.S. was taken to hospital for treatment.
- [10] Efforts to locate Mr. Costello in Kelowna were unsuccessful.
- [11] Mr. Costello was arrested on September 4, 2019 near Airdrie, Alberta, taken into custody, and brought back to British Columbia. He was ordered detained in custody at his bail hearing on September 12, 2019, and ordered not to have any contact with K.S. He has been in custody at Okanagan Correctional Centre ("OCC") since that time.
- [12] A few days after he was detained at OCC, and contrary to the no-contact order, he mailed a handwritten letter to K.S. care of her grandmother in Edmonton. Again, on November 17, 2019, Mr. Costello attempted to contact K.S. by calling her grandmother's residence some 27 times.
- [13] On January 24, 2020, Mr. Costello was charged with breaching his probation for his attempts to contact K.S. from OCC. He pled guilty on March 26, 2020, and received a four-month sentence and two years' probation.

Offender's Background

- [14] Mr. Costello is 41 years of age. He was born in Hamilton, Ontario. He has his grade 12 diploma.
- [15] Shortly after high school, he moved from Ontario to Vancouver where he developed an addiction to crack cocaine and began what has been a longstanding series of convictions for offences, including a 2002 conviction for aggravated assault that landed him in prison for four years.
- [16] He has had some mental health issues throughout his life, including anxiety and depression.
- [17] After serving the sentence for the 2002 aggravated assault, he began a roofing company called Splash Bros Roofing and travelled back and forth to Windsor, Ontario, operating that business.

- [18] In 2006, he injured his knee while working, which appears to have ended his career for the time being.
- [19] He has spent most of his adult life incarcerated, including serving federal prison time in 2012.
- [20] On May 15, 2018, while in custody in Edmonton, he was allegedly sexually assaulted by a corrections officer and suffered from severe anxiety and depression. He says his repeated requests for medical help fell on deaf ears. He has commenced an action out of the Court of Queen's Bench in Calgary, seeking redress for the alleged mistreatment while in custody.
- [21] While being held in custody at OCC on these charges, he has actively been involved with and completed all programs that have been made available to him.

Impact on the Victim

- [22] A victim impact statement dated June 25, 2020 prepared by K.S. was read out by Crown. K.S. states that since the assault she has not been the same and has been left feeling overwhelmed, fearful, and permanently injured. She says she is emotionally drained and is now in the process of rebuilding her life. Since the assault, she has had her child temporarily apprehended by the Ministry of Children and Family Development. She was stranded in Kelowna with no support or money. During her stay at the Kelowna hospital, she says she experienced overwhelming desperation, fear, confusion, and grief, worrying the whole time about her daughter's wellbeing and ability to cope.
- [23] Since the assault, she says she has had constant anxiety and exercises hypervigilance. She has difficulty sleeping and is constantly exhausted. She is socially withdrawn and is constantly in survival mode fearful of what will happen in the future.
- [24] Physically, she says she still has pain and migraines from her eye socket injury and she says she has a permanent scar under her eye with skin discolouration. She has permanent internal and external bruising and she says she does not have full control of her right eye. She says she has numbness in the infraorbital nerve distribution area on the right side of her face including her cheek, the side of her nose, upper lip, and upper teeth. She says she continues to have follow-up treatment and is considering having surgery.
- [25] The assault has also impacted K.S.'s daughter, who witnessed it. She was three years old when it happened. They both relive the event on a daily basis.

Mr. Costello's Criminal Record

- [26] Mr. Costello has an extensive criminal record beginning in August 1998 with a conviction for fraud. In 2002, he was convicted of aggravated assault and received a four-year sentence. He has amassed convictions for assault causing bodily harm in 2009 and 2011; assault with a weapon in 2007; six convictions for common assault (in 2000, 2007, 2008, 2011, 2012, and 2018); a 2012 conviction for abandoning a child; a 2015 conviction for uttering threats; and convictions in 2009 for dangerous driving and leaving the scene of an accident.
- [27] He has been convicted of assaulting previous intimate partners and their children and breaching bail and probation conditions not to have contact with them.
- [28] The victim in this case, K.S., is the latest casualty of his assaulting behaviour.
- [29] Additionally, he has been convicted on 17 separate occasions for breaching court orders including convictions for breaching court orders not to have contact with his victims.
- [30] Further, several of his convictions for violent offences were committed while he was bound by bail or probation conditions not to have contact with his victims.
- [31] His most serious conviction was the 2002 aggravated assault of a three-year-old child who had been left in his care. The child suffered significant injuries as a result of being violently shaken. At the time, he was on probation for an earlier assault of a child. The child involved was the son of his intimate partner at the time. He was sentenced to four years' imprisonment in addition to approximately one year of pre-sentence custody. His sentence appeal was dismissed: *R. v. Costello*, 2003 BCCA 421.

Pre-Trial Detention

- [32] The Crown and defence are in agreement with respect of Mr. Costello's pre-trial detention of 325 days as of today. He is entitled to credit at a rate of 1.5 to 1, translating into enhanced credit of 488 days as of today.
- [33] From that, the Crown submits that 120 days ought to be deducted to reflect the sentence he served for breaches at OCC and that he should have enhanced credit of 368 days, which is 488 days minus the 120 days for the breaches.

Crown Position on Sentence

- [34] The Crown asserts that a fit sentence in this case is four years' imprisonment less credit for time served.

Accused's Position on Sentence

- [35] The accused contends that a sentence in the range of time served, which is 368 days to 18 months or, at the most, two years less a day less time served to be followed by a period of probation, would be a fit and proper sentence.

- [36] On Mr. Costello's behalf, Mr. McNamee emphasizes the sentencing principles of proportionality, parity, totality, and restraint and argues that the least restrictive sentence possible in the circumstances should be imposed.
- [37] He also emphasizes that Mr. Costello is only being sentenced for the assault on K.S. on September the 3, 2019, not the fact that he was in breach of the terms of his probation order that he have no contact with K.S.
- [38] He reminds me that the events of September 3, 2019 started with an argument about Mr. Costello talking to another woman, escalating to the point that K.S. repeatedly struck him, and Mr. Costello responding with a blow to the side of K.S.'s face using what he admits was excessive force. In effect, he asserts that Mr. Costello's response, while excessive, was in the nature of defending himself from K.S.'s attacks. The circumstances of the event and Mr. Costello's use of force, he argues, is to some extent a mitigating factor because he was entitled to defend himself.
- [39] Mr. Costello's position is that what occurred was his overreaction to K.S.'s aggression. It was not premeditated. It was the result of a momentary lapse in judgment by using a single blow, excessive force, in a highly charged stressful situation.
- [40] He also asserts that Mr. Costello should be given some credit for the fact that he has been held at OCC during the COVID-19 epidemic and that COVID-19 is a relevant factor for consideration. He relies on *R. v. Lucas*, 2020 BCPC 106, to suggest the credit should be .5 to 2 days for each day in custody. That he says translates into credit of an additional two months. He filed an affidavit explaining how the COVID-19 has affected his living conditions at OCC. Many of the programs have been shut down, public visits have halted, there is limited movement allowed, and the metal shop and woodworking shops are closed. He argues that the restricted movement and program shutdowns amount to a general lockdown of the prison population and he says that the custodial conditions under the COVID-19 pandemic are therefore harsher than conditions that pre-existed COVID-19. The point being that the significant sentences handed out in cases relied upon by the Crown were previous to the pandemic.
- [41] Mr. Costello prepared a handwritten letter to the Court expressing remorse for his behaviour and what he did to K.S. He read that report this morning. He says that he has untreated and improperly assessed medical health issues including anxiety, depression, and PTSD. He relates his mental health issues to growing up in an abusive home and to the violent sexual assault that he says occurred in 2018 while at the Edmonton remand centre. He says that he was punished with 205 days in administrative segregation on 23-hour-per-day lockup for launching a criminal investigation into what had transpired.
- [42] He admits that the force he used on September 3, 2019, was excessive. He recognizes the mistake he made, especially given his claim that he loved K.S. and cared for her. He regrets the incident and apologizes for it. He says he feels horrible.

- [43] He says that since being incarcerated at OCC he has been well-behaved and has had no institutional charges. He does not feel a long sentence is needed to teach him a lesson. He promises never to be before the court again.

Purpose and Principles of Sentencing

- [44] Section 718 of the Criminal Code states that the fundamental purpose of sentencing is to contribute to respect for the law and the maintenance of a just, peaceful, and safe society by imposing just sanctions that meet one or more of several stated objectives including denunciation of unlawful conduct, general and specific deterrence, separation of offenders from society, where necessary, rehabilitation of the offender, and making of reparations to the victim and to society, and the promotion of a sense of responsibility.
- [45] The Code sets out a further fundamental principle that sentences must be proportionate to the gravity of the offence and offender's degree of responsibility.
- [46] Recognition of aggravating and mitigating factors are also germane to the sentencing process.
- [47] Oftentimes, some of these principles are in conflict. Sentencing is more of an art than a science, and sentencing judges must balance these various sentencing principles and decide which ones best govern a particular case.

Case Law

- [48] I have reviewed the relevant case law relied upon by Crown and Mr. McNamee.
- [49] In *R. v. Raffle*, 2015 BCSC 1895, an offender with an extensive criminal record was sentenced to eight years' imprisonment after being convicted by a jury of an aggravated assault against a domestic partner. At para. 29 of his sentencing reasons, Justice Saunders noted:

The most salient aggravating factors in this case are, first, the fact that these assaults took place in the context of a domestic relationship. The public interest in protecting vulnerable spouses from physical abuse is expressed in specifically recognizing the abuse of spouses or common law partners in the non-exclusive list of aggravating factors set out in s. 718.2 of the Code, but the case law is clear that abuse in the context of any intimate relationship is deserving of the same degree of recognition. See, for example, the majority judgment of Madam Justice McFadyen, in *R. v. Evans*, 1997 ABCA 165, at para. 12.

- [50] Similar to the facts of this case, at the time of the assault, Mr. Raffle was under a no-contact order with respect to the victim he stabbed.
- [51] In *R. v. Gill*, 2014 BCCA 88, there was an appeal by an offender from a sentence of two years less a day after pleading guilty to aggravated assault. He had stabbed his girlfriend several times without warning when he suspected she had been unfaithful. He had no prior criminal record. The court noted that the maximum sentence for aggravated assault is 14 years' imprisonment. It quoted from its earlier decision in *R. v. Craig*, 2005 BCCA 484,

establishing a range of sentences of 16 months to six years and also confirmed its consistent position that crimes of violence against women in domestic relationships required denunciatory sentences: Gill at para. 34.

[52] R. v. Heiney, 2018 BCCA 313, is a more recent Court of Appeal decision dealing with a serious aggravated assault against an intimate partner. The offender was sentenced to six years' imprisonment for a prolonged series of assaults that had lasting physical and psychological effects on the victim. The offender was Indigenous and a Gladue report was before the court at sentence. The Court of Appeal confirmed the importance of denunciation and deterrence and dismissed the appeal.

[53] Respecting the fact that Mr. Costello was violating the terms of his bail conditions not to have contact with K.S., the Crown refers to R. v. Kelly, 1999 BCCA 90, where the court emphasized the importance of such orders despite the fact that the victim of the assault consented to the contact. Justice Lambert for the court stated at para. 9:

I think it is a misunderstanding of the circumstances of this case to regard it as one where the breach is only a technical one, or where the matter should not be categorized as violent, dangerous, or intimidating. Ms. Kaye appears to have consented to the resumption of the cohabitation of Mr. Kelly and herself for a period of two months before this incident; but all these incidents ended in violence, and it was violence that the court was trying to put an end to by imposing this term, and it was violence that occurred and ended up in the injuries to Ms. Kaye.

[54] Lastly, the Crown refers to R. v. Sesay, 2020 BCCA 41, a case involving an offender with a horrendous prior criminal record who pleaded guilty to aggravated assault after he "sucker-punched" his victim in an unprovoked attack in an alley outside a bar and was sentenced to six-and-a-half years' imprisonment. The victim was left with significant life-altering injuries including a brain injury. At para. 33, the court noted:

This Court has upheld sentences in the range of six to eight years for assaults causing life-altering injuries to the victim. As noted in R. v. Payne, 2007 BCCA 541 at para. 44, "sentences in the range of six to eight years for serious aggravated assaults are not uncommon": see also R. v. Heiney, 2018 BCCA 313 at para. 58; R. v. Larose, 2013 BCCA 450 at paras. 17-22; R. v. Woodward, 2011 BCCA 251 at para. 30; R. v. Tschritter, 2006 BCCA 202 at para. 14; R. v. Biln, 1999 BCCA 369 at para. 24; and R. v. Rasanen (1997), 92 B.C.A.C. 74 at paras. 5, 9.

[55] On behalf of Mr. Costello and in support of his position that a fit sentence for Mr. Costello should be time served up to two years less a day, Mr. McNamee referred me to a series of cases as follows:

1. R. v. Stanford, 2017 BCSC 530, where an offender in a manslaughter case, not involving an intimate partner and with an offender with no prior convictions for violent offences, was sentenced to three-and-a-half years' incarceration;

2. R. v. Summerton, 2015 ABQB 326, an aggravated assault case involving an offender with no prior record and did not involve intimate partner violence and an offender who attempted to render assistance to his victim, who did not flee the scene to avoid arrest, and who was given a 60-day intermittent sentence followed by two years' probation;
3. R. v. Jiang, 2011 ABQB 182, an aggravated assault case involving an offender with no prior criminal record and who was considered a good candidate for community supervision who was sentenced to 45 days' intermittent followed by 12 months' probation;
4. R. v. Pulido, 2010 ONSC 3143, an aggravated assault case involving excessive retaliatory force that did not involve intimate partner violence and an offender with a dated and limited criminal record who was sentenced to 90 days' intermittent and received two years' probation;
5. R. v. Hansen, 2014 BCSC 625, an aggravated assault case involving an offender with a dated and unrelated criminal record and had completely turned her life around, did not involve intimate partner violence, and with Gladue factors at play, who was sentenced to 90 days' intermittent to be followed by three years' probation;
6. R. v. Chen, 2017 BCSC 1863, another retaliatory aggravated assault case involving an offender, with no prior criminal record and an offence that was out of character who had overwhelming community support and who had collateral immigration consequences of a lengthy jail sentence, received a 90-day intermittent sentence to be followed by three years' probation;
7. R. v. Peters, 2010 ONCA 30, an aggravated assault case that did not involve intimate partner violence and an offender with a limited and dated record and with significant Gladue factors at play. On appeal, the offender was sentenced to 12 months' incarceration to be followed by three years' probation;
8. R. v. Menard, 2005 ABPC 356, an aggravated assault case that did not involve intimate partner violence, a young offender with limited adult record, who had family support, was sentenced to 12 months' incarceration to be followed by two years' probation;
9. R. v. Bunes, 1999 ABCA 29, which involved a Crown appeal of an 18-month conditional sentence in a case that did not involve intimate partner violence, with no criminal record mentioned; the appeal was allowed and the sentence of 18 months' imprisonment imposed;
10. R. v. Bazinet, 2005 ABCA 388, which was an aggravated assault case involving a young offender with no criminal record who committed an alcohol and cocaine fueled potentially life-threatening knife assault on an unarmed victim that did not involve an intimate partner and an offender with considerable family support; the Court of Appeal sentenced him to 18 months' incarceration; and

11. R. v. Dragani, 2018 BCCA 225, a Crown appeal of a 90-day intermittent sentence in a home invasion type case which, again, did not involve intimate partner violence, an offender with no criminal record, and with demonstrably exceptional circumstances; the Crown appeal of the 90-day intermittent sentence was dismissed.
- [56] Additionally, Mr. McNamee argues that because Mr. Costello has been incarcerated during the complete COVID-19 pandemic starting in March 2020, he should be entitled to enhanced credit of .5 to two days for each day. He calls it a "COVID credit", and refers me to R. v. O.K., 2020 ONCJ 189, and Lucas in support.
- [57] In reply, the Crown argues that, except for Dragani, all cases referred to by Mr. McNamee are either from other provinces or are trial-level decisions and the sentences handed out in those cases are below the range established by our Court of Appeal and they simply demonstrate that sentencing is a highly individualized process.
- [58] Additionally, the Crown points out that few of the defence cases involved intimate partner violence which is a particularly aggravating form of violence that requires a primary focus on denunciation and deterrence. Additionally, none of the offenders in the defence cases had a record for violence remotely resembling Mr. Costello's record nor of violence towards the same victim.
- [59] Also, the Crown points out that none of the offenders in the defence cases were on probation at the time of the assault for an earlier assault against the same victim, nor were they in breach of protective court-ordered conditions.
- [60] Neither were any of these offenders assessed as high risk of violent reoffending and therefore concerns about the protection of the public would have played a less significant role in arriving at the fit sentence in those cases.

Aggravating Factors

- [61] Firstly, it is an aggravating factor that the offence involved the abuse of Mr. Costello's intimate partner.
- [62] Secondly, at the time he committed the offence, Mr. Costello was still on probation for an earlier assault against K.S. and he was under an order that prohibited him from contacting K.S.
- [63] Thirdly, the assault of K.S. has had a lasting physical and psychological impact on K.S. and her daughter.
- [64] Lastly, Mr. Costello has an extensive prior record of violence towards previous intimate partners and children of his intimate partners. He has not been deterred by previously lengthy sentences of imprisonment.

Mitigating Factors

- [65] Other than Mr. Costello's guilty plea, there are few mitigating factors. Mr. Costello entered a guilty plea several months before the trial that was scheduled to begin in late October 2020, sparing K.S. the additional trauma of testifying and being cross-examined. His guilty plea in the circumstances of a he said/she said alcohol fueled fight carries more weight than one entered in the face of an inevitable conviction.
- [66] I also consider Mr. Costello's difficult personal circumstances, troubled childhood, difficult upbringing, cocaine addiction, and difficulties he had while incarcerated in Edmonton, including administration segregation, are mitigating in the sense that they help explain his past troubles, mental health issues, and wellbeing.
- [67] Also, I consider it mitigating that Mr. Costello has taken counselling while in custody.
- [68] Additionally, the trial was set to be heard by a judge and jury which, given the COVID-19 issues faced by the court, would have posed difficulties for the court and its administration and would have inconvenienced potential jurors.

Decision

- [69] Mr. Costello, I have considered the submissions of Crown and your counsel and the case law to which I have been referred.
- [70] Of particular guidance as to the appropriate range of sentencing are the comments of Justice Kirkpatrick in *R. v. Craig*, 2005 BCCA 484, an appeal by the Crown of a one-year sentence for aggravated assault where two years' imprisonment was imposed. At para. 10 of that decision, the B.C. Court of Appeal stated:
- [10] It is not disputed, and it appears clear on the cases, that a sentence of two years' imprisonment for the commission of aggravated assault (which is the sentence that was effectively imposed by the judge) is at the low end of the range of sentences imposed on similar offenders in similar circumstances (*R. v. Chana* (1998), 115 B.C.A.C. 159, [1993] B.C.J. No. 2458 (Q.L.) (C.A.) at para. 6). The range of sentence for similar offences was described as being between 16 months and six years in *R. v. Johnson* (1998), 131 C.C.C. (3d) 274 (B.C.C.A.), two years less a day to six years in *R. v. Biln*, 1999 BCCA 369, and, most recently, between 18 months and six years in *R. v. Willier*, 2005 BCCA 404. In determining an appropriate sentence within this broad range, an unprovoked attack with a weapon tends to result in the imposition of a sentence at the higher end while a consensual fight that has escalated with resulting injury tends to result in a sentence at the lower end. See in particular: *R. v. Willier*, at para. 22, and *R. v. Johnson*, at para. 10.

- [71] Accordingly, the range of sentencing for aggravated assault in a domestic context is 16 to 18 months' incarceration at the low range and six years' incarceration at the high range with an unprovoked attack with a weapon tending towards the higher end of the range. Sentences may go higher depending on the nature of the offence and the circumstances of the offender: *R. v. Larose*, 2013 BCCA 450, at paras. 17-19. The maximum sentence for aggravated assault is 14 years.
- [72] I am mindful that these sentencing ranges are useful guidelines only. They do not displace the requirement that sentencing is an individualized process: *Sesay* at para. 32.
- [73] Sentences in the range of six to eight years for serious aggravated assaults are not uncommon: *Sesay*, para. 33.
- [74] For example, in *Heiney*, the Court of Appeal was asked to review a sentence of six years' incarceration handed out to an offender who pleaded guilty to a vicious, brutal, and prolonged aggravated assault of an intimate partner leaving her with lasting physical and psychological effects. At paras. 57 and 58, the court stated:
- [57] Mr. Heiney agrees that the range of sentence for aggravated assault is between 16 months and six years. While acknowledging this was a very serious assault, he submits his moral blameworthiness is lessened by the application of the applicable Gladue principles and the fact that alcohol was involved. Mr. Heiney submits these factors, coupled with his young age, his eagerness to pursue treatment and family support, should bring the sentence down from the high end of the range to a fit sentence of four years.
- [58] I cannot agree. The applicable range and the sentencing judge's conclusions that denunciation and deterrence are the primary objectives of sentencing are not challenged on the appeal. While the range for sentences for aggravated assault is 16 months to six years, sentences may go higher depending on the nature of the offence and the circumstances of the offender: *R. v. Larose*, 2013 BCCA 450 at paras. 17-19.
- [75] Denunciation, general and specific deterrence, and protection of the public are principal aspects in this case. I am mindful, as well, of the principles of rehabilitation, proportionality, totality, parity, and restraint. I do recognize the desirability of rehabilitation, but at this stage, Mr. Costello, based on your record and past behaviour, rehabilitation is not a primary factor. If you were to make an effort to get some appropriate help and treatment for your addiction issues, perhaps rehabilitation down the road is a possibility. That will be your decision to make.
- [76] Respecting the COVID-19 pandemic and how it plays a role in determining a fit sentence, I agree with and adopt the comments of Justice Pomerance in *R. v. Hearn*, 2020 ONSC 2365 at para. 23:

the court must fully recognize the potential harmful health impact on detained persons in the various institutions, while at the same [time] exercising the balancing required to sustain its fundamental role in the administration of justice and protection of the public.

[77] I also agree with the Crown's submission that while the court can consider the impact of the COVID-19 pandemic in determining a fit sentence, those considerations do not justify a disproportionately lenient sentence or one that would put the public at risk.

[78] Crimes of violence against intimate partners require denunciatory sentences.

[79] Your behaviour, Mr. Costello, on September 3, 2019 was not situational or due to a momentary lapse in judgment. Your history of violence, despite repeated interventions by provincial and federal correctional authorities, speaks volumes. It is apparent that you cannot control yourself during stressful situations and you become explosive. You violently assaulted a woman that you say you loved. It was excessive and unreasonable. That, Mr. Costello, is not love at all, but is the product of what I infer to be your controlling and domineering personality.

[80] So, taking all of these factors I have mentioned into consideration, and using every ounce of restraint I can muster, I have determined that a fit, just, and a proportionate sentence would be one of three-and-a-half years' incarceration and I impose that penalty as your sentence.

[81] I also agree with Crown's submissions that your entitlement to pre-trial detention credit shall not take into account the four-month sentence you received after pleading to breach of probation: *R. v. Sidhu*, 2005 BCCA 308.

[82] I also agree with Crown that it is not the law in this province that there is such a thing as a "COVID-19 credit" that entitles you to credit for time served in excess of what is prescribed by the Criminal Code. I have come to my decision that a sentence of three-and-a-half years' incarceration is the proper sentence for this offence and, in doing so, have taken the COVID-19 crisis into account.

[83] Your pre-sentence custody credit, therefore, shall be 368 days as of today, namely, 325 calendar days plus enhanced credit of 1.5 which equals 488 days less 120 days equals 368 days.

Ancillary Orders

[84] In addition to that sentence, I make the following ancillary orders:

1. There will be an order pursuant to s. 743.21 of the Code prohibiting Mr. Costello from communicating either directly or indirectly with K.S. or A.B. during his prison sentence.

2. This is Mr. Costello's second conviction for aggravated assault and eleventh conviction for any assault. A person with a criminal record such as that of Mr. Costello and with a tendency towards violence should never been permitted to possess firearms. Accordingly, there will be a lifetime ban on the possession of weapons and other enumerated items following his release from prison pursuant to s. 109(3) of the Code.
 3. Aggravated assault is a primary designated offence. Accordingly, Mr. Costello will provide DNA samples in accordance with s. 487.051(1) of the Code for inclusion in the national DNA databank.
- [85] There will also be an order that these reasons for sentence and any exhibits filed on the sentencing hearing shall be forwarded to the Correctional Services of Canada for sentencing management purposes.
- [86] This concludes my reasons. Ms. Dodds?
- [87] MS. DODDS: Yes, My Lord, first, I just want to clarify with Madam Clerk for the purposes of the no-contact whether she needs the full name and spelling of K.S. and A.B. or whether I can provide that in written form?

[DISCUSSIONS]

- [88] MS. DODDS: Yes, thank you, and then, My Lord, in terms of just tidying up, the Crown will direct a stay of proceedings on Count 2 and Count 3 on the indictment, and then we would also ask that there are a number of outstanding dates and we would ask that they be cancelled. So there was a pre-trial conference scheduled for August 5, 2020; there were voir dres scheduled for the week of October 5, 2020; and then there was jury selection on October 26; and judge and jury trial week set for October 26 and November 6. So we are asking that all of those outstanding dates be cancelled.
- [89] THE COURT: All right. They are cancelled and Counts 2 and 3 are stayed.
- [90] Mr. McNamee, anything?
- [91] MR. McNAMEE: Nothing further, My Lord, thank you.
- [92] THE COURT: All right, thank you.
- [93] Good luck to you, Mr. Costello.
- [94] THE CLERK: Just need one further thing, My Lord. I need an actual new-time calculation for the jail.
- [95] THE COURT: Yes, okay, hang on.

[DISCUSSION RE NEW-TIME CALCULATION]

[96] THE COURT: We are just trying to determine the correct number of new-time days. I have it at 909 days which is three-and-a-half years times 306 -- three-and-a-half years times 365 days is 1,277 rounded, less credit of 368, is 909.

[97] MR. McNAMEE: 909, My Lord?

[98] THE COURT: Yes, what I have.

[99] MR. McNAMEE: That was what I had, as well.

[100] MS. DODDS: Yes.

[101] THE COURT: We are all agreed, okay, and just for the record, I did not see it happen, but I see Mr. Costello has left us. I am not sure when.

[102] THE CLERK: A few minutes, My Lord, I apologize.

[103] THE COURT: Okay, all right, thank you all.

"G.P. Weatherill J."

Appendix "A"

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