

CANADA / JUDGMENT

R. v. D.J.

2000 BCCA 656

COURT

British Columbia Court of Appeal

DECIDED

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2000 BCCA 656 Citation: R. v. D.J. Date: 20001128 2000 BCCA 656 Docket: CA026676 Registry: Vancouver COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT Before: The Honourable Mr. Justice Lambert November 28, 2000 The Honourable Madam Justice Rowles The Honourable Mr. Justice Hall Vancouver, B.C. BETWEEN: REGINA RESPONDENT AND: D.J. APPELLANT M. Ritzker appearing for the Appellant K. Ker appearing for the (Crown) Respondent

- [1] HALL, J.A.: This is an appeal in a case involving a person who is now aged 44. The appellant was convicted of a number of offences that occurred when he was a teenager. The conduct involved was sexually assaultive behaviour against his younger and vulnerable female siblings. It is apparent from the material that the home in which the matters occurred was not in many respects ideal and there was a considerable amount of conflict in the house.
- [2] The appellant was found guilty by the trial judge of a number of offences of the nature indicated and these offences were alleged to have occurred with respect to his younger female siblings in the period between September 1968 and September 1973 at a point in time when he was in his early to middle teens.
- [3] The trial judge had before him at the time of sentence a report that certainly was not complimentary of the appellant which indicated that there was a measure of danger in his conduct and his attitude. The judge also had before him a pre-disposition report which referred to victim impact statements from the three siblings involved in the charges. As I read the victim impact statements, the victims all expressed the hope that any sentence or disposition imposed by the Court would hopefully assist in rehabilitating the appellant to change his conduct in order to conduce to the general safety of society.
- [4] The learned trial judge, after hearing submissions on sentence from Crown counsel and counsel for the appellant, imposed a sentence of incarceration plus probation. The case is one in which two years was said to be the maximum sentence because of the provisions of the Young Offenders Act, having regard to the time when the offences occurred and the age of the appellant at the time of the offences.

- [5] The trial judge said this at p. 59 of the transcript of sentence: Considering the principles of sentencing under the Young Offenders Act, in my opinion the appropriate disposition is a custodial sentence of eighteen months, to be served at the Stave Lake Corrections Centre. According to the Probation Officer, a sentence of eighteen months to two years is required to complete the program for sexual offenders there. For the most part, the victims have expressed the view that the accused needs treatment, and they want him to get that so that he does not hurt anyone else. According to the Probation Officer, in light of the accused's denial, counselling options in the community are limited. He said that he wanted to impose a sentence that would give the offender an opportunity to complete a program of 18 months duration and accordingly it was recommended that he be classified to a facility wherein that program was operating.
- [6] The appellant has displayed a measure of intransigence and perhaps a measure of failure to appreciate the findings made by the learned trial judge concerning his conviction. He apparently was unwilling to enter into the program, and in fact, is serving his time at a different custodial institution.
- [7] The judge, as I said in the passage above, indicated that the accused needed treatment and it was hoped that this program would afford that treatment. In the end that hope was not to be realized.
- [8] The case in some respects bears a slight resemblance to a case that was referred to by counsel in argument before us, namely, that is the case of *R. v. D.M.* (1998), 107 B.C.A.C. 318 (B.C.C.A.). Therein a judge had made a disposition with the hope that a certain program could be utilized. In fact it proved to be the case that the program was not available and so this Court made some alteration in a custodial sentence. That essentially is the relief that counsel for the appellant seeks before us here today.
- [9] The judge I think in this case rightly considered that a sentence of incarceration was requisite having regard to the necessity for deterrence and denunciation and was also moved by the consideration that the term he imposed would allow for the treatment that he recommended. It is now apparent that the hope of the learned trial judge with respect to that particular course of treatment has not proved to be possible or achievable. So one comes back to a consideration then of what is appropriate to do in this case.
- [10] It seems to me that the appellant will have, by reason of the fact that he has served approximately a year in custody, be impressed with the inappropriateness of the conduct found by the learned trial judge in convicting the appellant and will realize that this sort of behaviour has serious consequences. I am not of the view that there is much more to be gained from any continuing period of incarceration bearing in mind that the learned trial judge imposed as well a term of probation. The probation was for three years and that will have to be altered from three years to two years in view of the provisions of s. 20(1)(j) of the Young Offenders Act which mandates two years as the maximum probation order available under that legislative regime.

- [11] It seems to me, as I have said, that when one considers this case where we are dealing with a 44 year old person who is subject to provisions of the Young Offenders Act, which are not entirely easy to square with the current position of this appellant so far as many of the provisions of the Act are concerned, that one has to look at each case in light of its own circumstances. Having regard to the circumstances that are extant in this case, I consider that we ought to vary the sentence imposed by the learned trial judge from one of 18 months incarceration or custody as it is referred to under the statute to 12 months. I would alter the probation order term from three years to two years to bring it in line with the provisions of the aforementioned s. 20. The result is that I would allow the appeal to that extent to provide for a sentence of 12 months plus two years probation with the terms ordered in that probation order by the learned trial judge.
- [12] To that extent, I would allow the appeal.
- [13] As Crown counsel has pointed out, there may be an issue as to what was the maximum sentence here having regard to the provisions found in s. 20(k) of the Young Offenders Act. It appears to have been common ground before the sentencing judge in the trial court that two years was the maximum available and I am not disposed to treat the matter on a different basis in this Court.
- [14] LAMBERT, J.A.: I agree with the reasons given by Mr. Justice Hall and I agree with the disposition which he proposes.
- [15] ROWLES, J.A.: I agree.
- [16] LAMBERT, J.A.: The appeal is allowed. The sentence is varied from a sentence of 18 months with 3 years probation to a sentence of 12 months with 2 years probation on the same terms as in the 3 year probation order. "The Honourable Mr. Justice Hall"

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