
CANADA / JUDGMENT

R. v. Dankewich

2005 BCCA 629

COURT

British Columbia Court of Appeal

DECIDED

14 December 2005

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COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Dankewich,

2005 BCCA 629

Date: 20051214

Docket: CA033324

Between:

Regina

Respondent

And

Rickie Alexander Dankewich

Appellant

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

The Honourable Madam Justice Levine

Oral Reasons for Judgment

G.J. Barriere

Counsel for the Appellant

M.J. Brundrett

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

14 December 2005

- [1] DONALD, J.A.: This is an appeal from a sentence of two years' less a day imprisonment and two years' probation on a plea of guilty to the offence of robbery imposed by a judge of the Provincial Court at Vernon. The appellant requires an order extending time to file the application for leave to appeal. The application is not opposed and I would grant an extension.
- [2] At issue are the quantum of the sentence and some of the terms of the probation order, in particular, conditions relating to contact with individual persons and an area restriction.
- [3] The appellant was charged, along with Steven Gabriel Pevach, on a two-count Information, which reads as follows:

Count 1

Rickie Alexander DANKEWICH and Steven Gabriel PEVACH, on or about the 14th day of December, 2004, at or near Lumby, in the Province of British Columbia, did commit aggravated assault of Luc Daniel MONAST, contrary to Section 268(2) of the Criminal Code.

Count 2

Rickie Alexander DANKEWICH and Steven Gabriel PEVACH, on or about the 14th day of December, 2004, at or near Lumby, in the Province of British Columbia, did commit robbery of Luc Daniel MONAST, contrary to Section 344(b) of the Criminal Code.

- [4] The appellant pleaded guilty to robbery, Pevach to aggravated assault and Pevach was sentenced to four years' imprisonment as the Crown proposed.
- [5] This was a robbery of a taxi driver in alarming circumstances. They were described by the judge in this way:
- [2] The facts, put briefly, are that Mr. Monast was a taxi driver in Kelowna. In the middle of the night on the date in question, he was driving in Kelowna when approached by the two accused. They wanted to go to Mr. Pevach's girlfriend's house at Edgewood, which is at least a two hour drive from Kelowna. The accused were highly intoxicated on alcohol and were using some form of drugs on the ride out. Mr. Monast got his directions wrong, and they ended up driving north of Vernon towards Enderby. There was a gas station convenience store stop. They then got back on the road, returned to Vernon, turned east and headed towards Edgewood.

- [3] In an isolated area out near Lumby, Mr. Monast decided that the vehicle was going to run short of propane and he would have to turn back to get more fuel. When he did so, for reasons that are hotly debated but really remain unknown, Mr. Pevach attacked Mr. Monast with a knife, inside and outside the cab. Mr. Dankewich joined in menacing Mr. Monast outside the cab, with an object that could have possibly been an axe.
- [4] Mr. Pevach stabbed Mr. Monast between six and ten times, as disclosed by the number of the victim's wounds. Mr. Pevach stabbed the victim with such force that when the victim was fleeing on foot down that winter's road that night, he discovered that the knife was still embedded in his skull. Mr. Dankewich took control of the cab, and while the victim hid in snow banks in the bush, Mr. Dankewich and Mr. Pevach drove up and down the road, continuing in this manner to heighten the fear of the victim. Both accused were subsequently caught on foot by the R.C.M.P. after they abandoned the vehicle.
- [6] The circumstances of the offender were related by the judge in this way:
- [6] As to the accused, Mr. Dankewich is nineteen years old. He is of Ojibway descent. He has not expressed any interest in or had any contact with his aboriginal roots. His family was troubled by substance abuse, even while he was in the womb. His father died at age four. Between age four and eight, he had a brief period of calm in his life, which quickly disappeared. By the time he was eleven, his mother was using cocaine. Numerous foster placements followed. Mr. Dankewich got involved in the Kelowna street scene, doing drugs. He got into the street culture. He survived mainly by selling drugs. He finished formal school in Grade 8, although he managed to get a couple of courses in Grade 9 and Grade 10 while he was in youth detention. He has never had employment.
- [7] He has been addicted to crystal meth for the past two years prior to these events and was on an extended alcohol and drug binge involving many days, when these events occurred. Although traditionally resistant to community help, he has now said that he would commit himself to substance abuse treatment. His mother, who is now stable, has indicated she is prepared to offer her home on the west side near Kelowna, to help him with some structure. His youth record is for trafficking, possession of drugs, as well as for failing to comply with undertakings.
- [7] The appellant spent approximately seven and a half months in pre-sentence custody. His counsel sought a "two-for-one" credit for time served and a conditional sentence with the express consent to engage in residential treatment for substance abuse. Counsel for the Crown below acknowledged the appellant's lesser role in the overall circumstances of the offence and his disadvantaged background and proposed a range of 18 to 24 months, which after giving a "two-for-one" credit for time served would amount to, in the Crown's submission, four months actual custody, more if the sentence were to be served in the community, plus probation.

[8] The judge noted the principal aggravated feature, that this was a robbery of a tax driver, and stressed the vulnerability of a person in that position. He used three years as a starting point and gave straight time credit for time served on the reasoning that because there were programs available in the jail to which the appellant was remanded and he did not avail himself of those programs, he should not be given the usual "two-for-one" factor. The judge interpreted *R. v. Shoker* (2004), 192 C.C.C. (3d) 176, 2004 BCCA 643, as making it impossible for him to impose a term of the probation order that the appellant take residential treatment for his addiction problems. He said that the only feasible alternative was for him to take such treatment in jail. In the result, he gave the sentence that I have indicated, two years' less a day, plus probation with seven conditions.

[9] Those conditions are as follows:

CONDITION 1: Keep the peace and be of good behaviour.

CONDITION 2: Appear before the Court when required to do so by the Court.

CONDITION 3: Notify the Court or the Probation Officer in advance of any change of name or address, and promptly notify the Court or the Probation Officer of any change of employment or occupation.

CONDITION 4: This order comes into force on the expiration of your jail sentence. You must then report forthwith to a probation officer at 3101 29th Avenue, Vernon, B.C. and report thereafter when required by a probation officer and in the manner directed by your probation officer.

CONDITION 5: You must reside in a residence approved of by your probation officer and not change that place of residence without the prior written approval of your probation officer.

CONDITION 6: Have no contact directly or indirectly with Luc Daniel Monast and Steven Gabriel Pevach or any other person named in writing by your probation officer.

CONDITION 7: You must not be found at any place that you have been prohibited from attending by your probation officer in writing.

[10] Only Conditions 6 and 7 are in contention. The appellant says that they amount to an improper delegation to the probation officer as to the restriction on contacts and places. This is perhaps the least contentious aspect of the appeal. The Crown does not object to a variation of the probation order, so long as the no contact order includes the name of Michael Anthony Howell, a person identified in the pre-sentence report as being a person that the appellant should avoid. The appellant does not object to the variation of that term.

[11] The Crown also, at least implicitly, acknowledges that the judge improperly delegated a judicial function to the probation officer in the seventh term in the order, the area restriction. The Crown proposes a more specific term, as follows:

You are not to be found within the area bound by Doyle St. on the north, Richter St. on the east, Lake St., Marshall St., and Buckland St. on the south, and the lakeshore to the west except with the written permission of your probation officer or unless accompanied by your mother.

- [12] The appellant's counsel, without strenuously objecting to that variation, notes that area restrictions can often lead to awkwardness and difficulty. I am satisfied that the area restriction is appropriate and has a saving aspect to it so that it is not absolute. The evidence is that the appellant was a denizen of the streets of Kelowna as a youth and for his rehabilitation he should be ordered to avoid the troubled area as specified.
- [13] The next point in issue is the question of enforced residential treatment for substance abuse. With respect, the judge seems to have misapprehended the appellant's position. Through his counsel, the appellant did consent to an order that he attend a residential treatment facility for treatment of his addictions and that position is maintained today in this Court. Therefore, this was not a situation to which the decision of this Court in Shoker applied.
- [14] The appellant argues that this error on the part of the judge has implications for the length of the sentence. The contention is that the judge may have chosen a lengthier term in custody to ensure treatment than he would otherwise have done had he realized that it was open to him to include residential treatment as a term in the probation order. The relevant passage in the reasons is at para. 12:
- [12] His overriding need for successful substance abuse treatment cannot be directed in British Columbia by the use of a probation order, *R. v. Shoker* (phonetic). Therefore, in order to place him in treatment, for his benefit and for the protection of the community, I have to acknowledge that treatment can only occur within the context of a provincial institution. He is an untreated and predatory offender. This sentence is not one in its totality which would call for a conditional sentence, nor would he be eligible for a conditional sentence as long as he remains a violent and untreated substance abuser.
- [15] I do not think this manifests an error in principle. Giving the reasons a sympathetic reading, I take the remarks in para. 12 to go to his reason for denying a conditional sentence and not to justify the quantum of the penalty. It is obvious that the judge did not think that a conditional sentence was appropriate, given the circumstances of the offence, and since he was going to be in custody the residential treatment could take place there.
- [16] As an alternative position, counsel for the appellant encourages this Court to impose a term for residential treatment in the probation order I would accede to that alternative position.
- [17] Turning to the issue relating to pre-sentence custody, the judge declined to apply a "two-for-one" factor. The Crown concedes that the judge, I quote counsel's written submission, "may have engaged in an injudicious analysis of pre-sentence custody". I think that, with respect, the judge erred in two ways: (1) in overlooking that there are no remission mechanisms available; see *R. v. Wust*, [2000] 1 S.C.R. 455, 143 C.C.C. (3d) 129 at para. 45; and (2) in

speculating that programs in the remand centre were actually available to the appellant while awaiting disposition of the charges. This was speculation because there was no information given to the judge at the sentence hearing as to the availability of the programs and the appellant's willingness to take them. Subsequent enquiries revealed that while there were programs available, priority is given to inmates actually serving a sentence and as the appellant was on remand, he was assigned low priority and although he did in fact apply for participation in the programs, he was refused. So not only did the judge speculate, but also the conclusion that he arrived at was, as became evident, erroneous.

- [18] I would, therefore, accept the Crown's concession that a "two-for-one" factor is appropriate in the circumstances of this case. This would result in, assuming that the effective sentence is thought to be somewhere in the area of 31 to 32 months, a remainder of 16 months.
- [19] That leads then to a consideration of the last issue, which is the fitness of the sentence. The facts surrounding this robbery are egregious, involving a frightening degree of violence. In my respectful view, the judge was not wrong in looking at a range around three years for this kind of offence. In doing so, he remained consistent with decisions of this Court, in particular, *R. v. Crane*, [1986] B.C.J. No. 904 (C.A.) (QL), where a 42-month sentence was upheld in the robbery of a taxi driver with a knife. There, Mr. Justice Hinkson said:
- [11] It is a very serious offence to rob a taxi driver. Taxi drivers are susceptible to threats of assault and robbery during the course of their daily employment and this court in the past has indicated that robbery of a taxi driver will be treated as a serious offence. This is a particularly serious matter because a knife was used in the course of the robbery, threats to kill the driver were made, and the evidence before the sentencing judge was that this has had a serious effect on this driver; he has changed from driving at night (this robbery took place at night); he now is on a day shift because he can no longer face the prospect of this kind of incident occurring to him in the future.
- [12] The principal consideration in imposing this type of sentence is general deterrence.
- [20] The judge's approach was also consistent with the more recent decision of *R. v. Edstrom* (2005), 209 B.C.A.C. 129, 2005 BCCA 105, which involved a sentence of 40 months for the robbery of a taxi driver. The violence there included wrapping a seatbelt around the taxi driver's neck. The passage in *Crane* to which I have referred was recited by Mr. Justice Braidwood, who gave the decision for the Court in *Edstrom*.
- [21] In my respectful view, there has been no demonstration that an effective sentence of 31 months was unfit.
- [22] In the result, I would grant leave to appeal. I would reduce the custodial aspect of the sentence to one of 16 months. I would vary the probation order in this way: (1) by adding in Condition 6 the name of Michael Anthony Howell, as earlier indicated; (2) Condition 7 would contain the area restriction that I have described in substitution for the wording that appears in the probation order; and (3) I would add as a further condition that, "You are to

attend at a residential treatment facility for substance addiction as directed by your probation officer."

[23] NEWBURY, J.A.: I agree.

[24] LEVINE, J.A.: I agree.

[25] DONALD, J.A: The appeal is allowed on the terms indicated. Thank you, counsel.

"The Honourable Mr. Justice Donald"

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