
CANADA / JUDGMENT

R. v. David & Seitcher

2007 BCSC 756

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 756 R. v. David & Seitcher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. David & Seitcher,

2007 BCSC 756

Date: 20070130

Docket: 25492-2

Registry: Port Alberni

Regina

v.

Reginald Ernest David

Thomas Tyson Seitcher

Before: The Honourable Mr. Justice Shabbits

Oral Reasons for Sentence

(Re Thomas Tyson Seitcher)

January 30, 2007

Counsel for the Crown:

G. Baines

Counsel for the Accused Seitcher:

A. Brown, as agent for H. Braker

Place of Trial/Hearing:

Nanaimo, B.C.

- [1] THE COURT: Mr. Thomas Tyson Seitcher has pled guilty to having committed the manslaughter of John Rufus O'Brien Manson on or about the 12th day of August, 2001, at or near Tofino, in the Province of British Columbia.
- [2] Mr. Seitcher was charged with having committed the second degree murder of Mr. Manson. He was convicted of second degree murder on October the 18th of 2002. The Court of Appeal for British Columbia set aside that conviction on September 21st of 2006, it ordered a new trial.
- [3] The factual background concerning Mr. Manson's death are set out in the oral reasons for judgment of the sentencing judge pronounced November the 4th of 2002, and in the reasons for judgment of the Court of Appeal for British Columbia, set out at R. v. David & Seitcher, 2006 BCCA 412 at paragraphs 4 to 18.
- [4] The deceased, Mr. Manson, was Mr. Seitcher's uncle.
- [5] On August the 11th and August 12th of 2001, there had been a party at Long Beach near Tofino. The party extended into the early morning hours of August the 12th of 2001. There was a good deal of drinking at the party and marihuana was consumed.
- [6] Mr. Seitcher was drinking heavily and smoking marihuana. Mr. Seitcher and a Mr. Reginald David assaulted Mr. Manson during the early morning hours of August the 12th of 2001. Mr. Manson was kicked to death. He suffered horrific injuries.
- [7] Mr. Seitcher has admitted that he kicked Mr. Manson and stomped on Mr. Manson, although he does not say that he was the only person who did that, nor does he say that he was solely responsible for Mr. Manson's death.
- [8] The Crown has accepted Mr. Seitcher's plea of guilty to manslaughter. It accepts that Mr. Seitcher was intoxicated and that he did not have the intent to commit the murder of Mr. Manson.
- [9] The sentencing judge said that the circumstances of the homicide were that it was an extremely brutal, senseless, shameful, and cowardly attack. She described the assault as being violent and vicious. She noted that it had split a very close First Nations community. She said that the loss of Mr. Manson was a loss not only to his family but a loss to the whole of the community.
- [10] I agree with all of those observations of the earlier sentencing judge.
- [11] Mr. Seitcher was born on August the 18th of 1979. He is now 27 years of age.

[12] After the earlier trial, the sentencing judge concluded that Mr. Seitcher's ineligibility for parole would be 10 years. That accorded with the recommendation of the jury at trial, and it was a submission of counsel for each of the Crown and for Mr. Seitcher.

[13] The sentencing judge said this in respect of Mr. Seitcher's personal circumstances -- these comments are at paragraphs 11 to 13 of the transcript of her oral reasons for sentence set out in docket 25492-2, of the Port Alberni Registry:

Thomas Seitcher lost his parents tragically at a very early age and was placed in the care of the Provincial Government for most of his youth, never really gaining Grade 10 and the extent of any disability that Mr. Seitcher might have is not apparent specifically and only suggested.

He has a significant criminal record as a juvenile involving a crime of violence of sexual assault in 1996 and two failures to comply with a recognizance orders of the court. He also has a conviction in 1998 for breaking and entering.

The crimes of violence would be significant, however, I am taking into account that the sexual assault was committed while Mr. Seitcher was a youth. Notwithstanding the unfortunate young childhood, Mr. Seitcher does enjoy the support of an extended family who have also been here throughout the trial. Mr. Seitcher has a significant problem with drugs and alcohol as is very obvious from the circumstances of the offence. He did, however, cooperate with police.

[14] In the proceedings before me, Mr. Seitcher admitted that the criminal record referred to in that excerpt accurately sets out his record.

[15] I have carefully read and considered the victim impact statements that were written in the fall of 2002. There are 10 of them. They were written by one of Mr. Manson's sisters, by one of his sister-in-laws, by five of his first cousins, and by three of his nieces. They are moving accounts as to the extent to which Mr. Manson's death has affected them and their community. Mr. Manson is described as having been a kind and gentle and happy and caring man. They wrote that he always had a smile on his face. They spoke of him maintaining his native language and of involving himself in cultural and educational and community matters.

[16] The pre-sentence report reflects that even up to today, the injuries to the members of Mr. Manson's immediate family and to the community in the Esowista Reserve near Tofino are far from being healed. That pre-sentence report was completed on January the 25th of 2007. The report notes that Mr. Seitcher acknowledges that he cannot yet return to live in the Esowista Reserve and that he will not be able to do that until he has earned the privilege of community acceptance.

[17] Mr. Seitcher was taken into custody on August the 12th of 2001 and held until he was released on interim judicial release on March the 19th of 2002. That is a period of 7 months and 7 days.

- [18] For reasons I will refer to in a moment, Mr. Seitcher is entitled to double credit for that pre-trial custody time served. Mr. Seitcher's pre-trial custody is equivalent to 14 months and 14 days of time served.
- [19] Mr. Seitcher was taken into custody again upon the jury's verdict being rendered on October the 18th of 2002. He was held in Federal institutions until October the 4th of 2006, which was after the Court of Appeal allowed his appeal against conviction and ordered a new trial. That is a period of 3 years and 337 days.
- [20] There is an issue on these proceedings as to the credit to which Mr. Seitcher is entitled to for that time served.
- [21] Section 719(3) of the Criminal Code provides that the court has the discretion to reduce a sentence for time served. The case law relevant to the amount of credit that should be allowed was recently reviewed by Mr. Justice Romilly in *R. v. Whitman*, 2006 BCSC 865. That review is contained within paragraphs 47 to 55 of that case report. Paragraphs 49 to 55 of that case report include these excerpts.
- [22] In *R. v. Rezaie* (1996), 112 C.C.C. (3d) 97, Associate Justice Laskin of the Ontario Court of Appeal wrote this:

Although this section [s. 721(3)] is discretionary, not mandatory, in my view a sentencing judge should ordinarily give credit for pre-trial custody. At least a judge should not deny credit without good reason. To do so offends one's sense of fairness. Incarceration at any stage of the criminal process is a denial of an accused's liberty. Moreover, in two respects, pre-trial custody is even more onerous than post-sentencing custody. First, other than for a sentence of life imprisonment, legislative provisions for parole eligibility and statutory release do not take into account time spent in custody before trial (or before sentencing). Second, local detention centres ordinarily do not provide educational, retraining or rehabilitation programs to an accused in custody waiting trial. For these reasons, pre-trial custody is commonly referred to as "dead time", and trial judges, in deciding on an appropriate sentence, frequently give credit for double the time an accused has served.

- [23] In *R. v. Wust*, [2000] 1 SCR 455, Madam Justice Arbour, writing for the Supreme Court of Canada, said this:

In the past, many judges have given more or less two months credit for each month spent in pre-sentencing detention. This is entirely appropriate even though a different ratio could also be applied, for example if the accused has been detained prior to trial in an institution where he or she has had full access to educational, vocational and rehabilitation programs. The often applied ratio of 2:1 reflects not only the harshness of the detention due to the absence of programs, which may be more severe in some cases than in others, but reflects also the fact that none of the remission mechanisms contained in the Conditional and Conditional Release Act apply to that period of detention. "Dead time" is "real" time. The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge . . .

[24] Mr. Justice Romilly refers to R. v. Neudorf, 2004 BCCA 374 in which the British Columbia Court of Appeal:

... held that where there was evidence that the accused was able to take rehabilitative programs while in pre-trial custody double credit does not have to be given.

[25] And finally, Mr. Justice Romilly referred to the point:

... that where the accused, because of his previous incarceration history, would be unlikely to obtain early release or the accused was in custody because he repeatedly breached the conditions of his release or the accused is seen as a serious danger to society, courts have either departed from the 2:1 ratio or denied credit for pre-sentencing custody altogether:

Mr. Justice Romilly referred to a number of authorities relating to that issue.

[26] During Mr. Seitcher's incarceration after his 2002 conviction, there was a concern by the custodial authorities that Mr. Seitcher remained a danger to society. This factor suggests that Mr. Seitcher may not have been likely able to obtain the full benefit of statutory remissions that would have been available to others without being burdened by such a concern.

[27] There is also the consideration that Mr. Seitcher did have access to educational and rehabilitative programs after his conviction. In fact, Mr. Seitcher successfully obtained his G.E.D., or Grade 12 equivalency, while incarcerated. That, of course, does stand to his credit. But the fact that he had programs available to him also dictates against double credit being allowed for the 3 year, 337 day period of incarceration following the 2002 conviction and before he was again remanded to remand centres.

[28] Nevertheless, none of the remission mechanisms, including statutory remission, can now allow to that period of incarceration.

[29] The evidence before me is that Mr. Seitcher has not consumed alcohol during his lengthy period of incarceration, nor has he used non-prescriptive drugs. In fact, it appears to me that Mr. Seitcher is determined to avoid any future consumption of alcohol or non-prescriptive drugs.

[30] For those reasons, Mr. Seitcher may well have obtained remission for part of his time served, had he been incarcerated in 2002 for manslaughter and not incarcerated for second degree murder. I have concluded that the appropriate credit for the time served after conviction for murder and before he again was placed in remand centres, is at the rate of 1.5 to 1. The credit for that period of time is therefore 3 years and 337 days times 1.5, for a total of 6 years and 126 days.

[31] Mr. Seitcher was again largely incarcerated in remand centres from October the 5th of 2006 to the present time. That is a period of 117 days. In my opinion, Mr. Seitcher is entitled to double credit for that time, for credit for an additional 234 days.

[32] I therefore calculate that the total credit for time served is 8 years and 69 days.

- [33] It is the Crown's submission that the appropriate sentence in this case is 10 years, less credit for time served. The submission advanced on behalf of Mr. Seitcher is that he has already served more time than he would have served in prison had he been sentenced for manslaughter in 2002 and not been sentenced for murder. There is a submission on behalf of Mr. Seitcher that an appropriate sentence today would be a suspended sentence with a period of probation of 1 year.
- [34] I have been referred to a number of authorities addressing length of sentence. I have concluded that the most relevant of the authorities to which I have been referred is *R. v. Green*, in which a trial judge imposed a sentence for manslaughter of imprisonment for 7 years in addition to 3 and one-half years for pre-trial incarceration. That sentence was upheld by the British Columbia Court of Appeal. Mr. Green's sentence, had Mr. Green been allowed double credit for pre-trial incarceration, and it is not the case that the trial judge expressed that he was doing that, would have been equivalent to a sentence of 14 years in prison, less credit for time served.
- [35] The trial judgment in *Green* is reported at 2001 BCSC 456, and the Court of Appeal judgment is at 2001 BCCA 672. Mr. Justice Low delivered the judgment for the Court of Appeal.
- [36] The trial judge had accepted psychiatric evidence that Mr. Green was in a drug-induced psychotic state at the time of the killing. Mr. Green expressed great remorse for having committed the offence of which he was convicted.
- [37] Mr. Justice Low said this at paragraph 13 to 19 of the judgment:

After reviewing the positions of counsel and numerous other sentencing cases, the judge discussed and emphasized the sentencing principles of denunciation and general deterrence. He concluded that this case was closer to murder than to accident because the voluntary consumption of crack cocaine led directly to the disturbed state of mind that resulted in this brutal killing. He said that the range of sentence suggested by the defence "would not ... reflect the nature of the crime, the circumstances of the offender or society's values". Then he imposed the sentence of seven years' imprisonment "after allowing three and one half years for pre-trial incarceration".

The sentencing judge made no error in the way he took into account the time the appellant had spent in custody pending disposition. Section 719(3) of the Criminal Code provides that the sentencing judge "may take into account any time spent in custody by the person as a result of the offence". Although a factor of two is often employed in taking the time into account, that is a guide only. There is no mathematical formula. The amount of credit given is a matter for the discretion of the trial judge. There is no reason to interfere with the exercise of that discretion in this case.

It seems to me that this appeal comes down to whether the trial judge correctly balanced the aggravating factors (wholesale use of a dangerous substance and an extremely brutal killing of a defenceless victim) with the mitigating factors (remorse, no criminal record, no history of violence and a guilty plea). I think he did.

I do not accept the submission made on behalf of the appellant that, because the appellant was not aware of what he was doing at the time of the killing, the brutality of the killing does not aggravate the circumstances to any great extent. I agree that it is not as aggravating as if he were aware of what he was doing. But then he would be guilty of murder and be subject to a much longer term of imprisonment. The appellant went on a reckless binge. He used a mind-altering substance known to be capable of bringing about uncontrolled, violent conduct. In that state, he attacked the victim. He is criminally responsible for the degree of violence that caused the death of the victim and for the post-mortem indignity to the body of the victim. Those circumstances weigh heavily in this case in considering denunciation and deterrence. In my opinion, the sentencing judge properly considered the aggravating and the mitigating factors in relation to each other.

The appellant says that, the violence notwithstanding, the mitigating factors I have mentioned bring this case into the middle or lower end of the range of sentence for manslaughter. I disagree. This case is similar to *R. v. Hicks* . . . In that case, the offender killed two women while he was under a cocaine-induced psychosis. He stabbed his cocaine supplier 17 times and her landlady six times. After taking into account 15 months of presentence custody, the trial judge imposed a sentence of ten years on each of two counts, to be served concurrently. This court upheld the sentence. The offender in that case did not plead guilty but he was charged with two counts of murder and a jury convicted him of manslaughter on both counts. Therefore, it cannot be said that the absence of a guilty plea distinguishes that case from the present case. Further, like the appellant, Hicks was a steadily-employed family man with no criminal background. The trial judge in the Hicks case found the offender to be "not the type of person with a bad background that needs to be rehabilitated or from whom society must be protected," Hicks, at para. 10. However, he said that deterrence of others and denunciation were the most important factors in fixing sentence.

In Hicks, this court agreed that the circumstances of the killings put the case "high on the relative scale of severity of manslaughter offences," Hicks, at para. 11. The trial judge emphasized the proper sentencing principles.

In the present case, general deterrence and denunciation are the most important factors in determining the proper sentence. I do not accept the argument that deterrence is not a significant factor because people on cocaine binges are unaware of their conduct and cannot be deterred. In my opinion, deterrence is not aimed at violence per se, but is aimed at the highly irresponsible conduct that leads to the violence. Those who might emulate the lifestyle of the appellant that led to the killings must know that serious crimes done while under the influence of self-administered, mind-altering substances will attract substantial terms of imprisonment: the more horrific the circumstances of the crime, the higher the sentence.

- [38] The circumstances surrounding Mr. Manson's death are horrific. Mr. Manson was by nature a gentle and easy-going person, and his homicide was savage and brutal. It must attract a substantial term of imprisonment.
- [39] Mr. Seitcher's conviction in 1996 for sexual assault was associated with his excessive consumption of alcohol and marihuana at that time. There was a psychological report dated June 19th, 1996, prepared by Dr. Stangeland in connection with the 1996 proceedings. That report was prepared before Mr. Seitcher was sentenced as a youth for the 1996 offence. Dr. Stangeland noted that Mr. Seitcher claimed he could only remember drinking and next remembered waking up in a police cell. Dr. Stangeland concluded that Mr. Seitcher's pre-disposition for anti-social behaviour was greatly increased by his abuse of drugs and alcohol.
- [40] As I noted earlier, Mr. Seitcher had been consuming marihuana and alcohol to excess before he was involved in Mr. Manson's homicide. Mr. Seitcher did have previous knowledge that he had a greater increased pre-disposition for violence after consuming marihuana and alcohol to excess. That he was consuming alcohol and marihuana to excess before Mr. Manson's homicide does not, in my view, excuse Mr. Seitcher's behaviour. It makes it worse.
- [41] Mr. Seitcher is in need of future supervision, and he requires assistance in his reintegration to the community.
- [42] I accept that Mr. Seitcher is remorseful. I am satisfied of that because of Mr. Seitcher's post-offence conduct, he has completely abstained from alcohol and drug use over a period of years. The pre-sentence report prepared for this hearing identifies steps that Mr. Seitcher has suggested that he is prepared to take to ensure his future good conduct. Mr. Seitcher has told the probation officer that he wants to change his life and that he hopes to demonstrate that he can be a good person. Actions do speak louder than words. The steps that Mr. Seitcher has already taken, including obtaining a G.E.D. standing of Grade 12 equivalency, and especially his actions in completely abstaining from the use of alcohol and drugs for several years, demonstrates and satisfies me that Mr. Seitcher is remorseful for this offence. They offer every reason to be optimistic as to his future.
- [43] Having considered all of the circumstances, I have concluded that the appropriate sentence is indeed that sought by the Crown; that is of 10 years incarceration, but less credit for time already served of approximately 8 years.
- [44] I have also concluded that the sentence should be served in the community.
- [45] I have come to that last conclusion for several reasons. First, the sentence being imposed is less than 2 years; that is, 2 years less 1 day.

- [46] Second, Mr. Seitcher's remorse and his determination to abstain absolutely from the consumption of alcohol and illicit drugs satisfies me that his serving the sentence under conditions and supervision in the community will not endanger the safety of the community. In that regard, I have had particular regard to the evidence that when Mr. Seitcher was on judicial interim release for over 6 months in 2002, he abided by the conditions that were then imposed upon him and he did not re-offend.
- [47] Third, in my opinion, Mr. Seitcher's serving of the sentence in the community is consistent with the fundamental purposes and principles of sentencing set out in s. 718 to 718.2 of the Criminal Code.
- [48] I note in particular that Mr. Seitcher has already actually been incarcerated for almost 5 years and that this incarceration is an incarceration that I have concluded is equivalent to incarceration of about 8 years of time served. That lengthy period of actual imprisonment addresses the issues of denunciation of unlawful conduct and the deterrence of Mr. Seitcher and others from committing offences.
- [49] Mr. Seitcher's personal circumstances as a child and as a young person were extremely difficult. Near the outset of the reasons I made reference to the sentencing judge's references to that. The pre-sentence report also makes reference to that at page 6, where it reads in part (as read in):

Thomas's personal history reveals a disadvantage from an early age due to significant factors, such as loss of biological parents, inconsistent parenting, family breakdown, and early substance abuse.

Thomas has limited education and work experience. He has some mental, emotional health issues that he has struggled with since his teens. Mr. Seitcher is now addressing the anti-social behavioural problems that have been at the cause of his past legal difficulties.

- [50] Section 718.2(e) of the Criminal Code of Canada requires that particular attention be given to the circumstances of Aboriginal offenders. Mr. Seitcher is an Aboriginal offender. Mr. Seitcher's difficult personal childhood and youth is one of the particular factors to which particular regard must be paid pursuant to s. 718.2(e).
- [51] In addition, 718.2(d) requires that an offender not be deprived of liberty if a less restrictive sanction is appropriate.
- [52] And, finally, Mr. Seitcher, as I noted earlier, recognizes that his community is not yet ready to accept him back into their fold.
- [53] Mr. Seitcher, would you stand up, please.
- [54] I sentence you to a term of imprisonment of 2 years less 1 day.
- [55] Pursuant to s. 742.1 and 742.3, I order that you serve the sentence in the community, subject to you complying with the conditions of a conditional sentence order.

- [56] I prescribe that the conditions of the conditional sentence order shall be these.
- [57] You shall keep the peace and be of good behaviour.
- [58] You shall appear before the court when required to do so by the court.
- [59] You shall report to a supervisor within 2 working days of your release and thereafter when required by the supervisor and in the manner directed by the supervisor.
- [60] You shall remain within the jurisdiction of the court unless you first obtain written permission to go outside that jurisdiction from the court or from the supervisor, and when outside the jurisdiction you shall have that written permission upon your person.
- [61] You shall notify the supervisor in advance of any change of name or address and promptly notify the supervisor of any change of employment or occupation.
- [62] You shall reside at a residence first approved of by your supervisor.
- [63] You shall not reside on the Esowista Reserves either in Tofino or Port Alberni unless your residence there has already been approved of in writing by your probation officer.
- [64] You shall not go to the Esowista Reserve at Tofino or be upon the Reserve for any reason whatsoever unless you first have the approval in writing of the supervisor, and unless you have that writing on your person.
- [65] You shall not contact directly or indirectly any of the 10 persons whose victim impact statements were filed on this proceeding unless you have obtained the written permission of the supervisor to contact the persons who you contact.
- [66] You shall abstain completely and absolutely from the consumption of alcohol or the consumption of drugs, except in accordance with a medical prescription.
- [67] You shall abstain from owning or possessing or carrying any weapon as defined in s. 2 of the Criminal Code.
- [68] You shall perform 120 hours of community service as directed by your supervisor over the period of the next 15 months.
- [69] You shall attend and participate and complete any and all counselling programs, including substance abuse, residential treatment, or recovery programs, and any other forms of counselling that your supervisor considers appropriate and directs you to take.
- [70] The Crown seeks the mandatory orders required by s. 109 of the Criminal Code.
- [71] Mr. Seitcher, I order that you be and are prohibited from possessing any prohibited firearm, restricted weapon, prohibited weapon, prohibited device, and prohibited ammunition for life. I order that you be and that you are prohibited from possessing any other firearm, crossbow, restricted weapon, ammunition, and explosive substance for the period of 10 years as calculated by s. 109(2) of the Criminal Code.

- [72] The offence for which you have been convicted is a primary designated offence within the meaning of s. 487.04 of the Criminal Code. The Criminal Code requires that an order be made for the taking from you of bodily substances for the purposes of forensic DNA analysis. I make that order as it relates to Mr. Seitcher, pursuant to s. 487.05(1)(i) of the Criminal Code. That order shall be in form 5.03 as required. It shall authorize the taking from Mr. Seitcher for the purposes of DNA analysis of any number of bodily substances that are reasonably required for that purpose by means of any of the investigative procedures described in s. 487.06(1).
- [73] You may sit down, Mr. Seitcher.
- [74] Mr. Baines, is there anything further that you seek to have addressed?
- [75] MR. BAINES: Perhaps with respect to the conditions on the conditional sentence order, My Lord, a no contact order with Reginald Ernest David.
- [76] THE COURT: With who?
- [77] MR. BAINES: With the co-accused, Mr. David.
- [78] THE COURT: Yes, I will make that order. Mr. Seitcher, do you understand that? The non-contact order shall also relate to Mr. Reginald David.
- [79] The pre-sentence report suggested that a no contact order should relate to members of Mr. Manson's immediate family. I decline to make an order as general as that, as it is impossible for one to know who that encompasses. I made the order I did relating to those who filed victim impact statements, but are there any other specific persons that you consider should be named?
- [80] MR. BAINES: It would take some investigation on my part, My Lord. I would submit in the circumstances that the order that Your Lordship had made is adequate.
- [81] THE COURT: All right. We will leave that as it is.
- [82] Ms. Brown, do you seek to have anything further addressed?
- [83] MS. BROWN: No, My Lord.
- [84] THE COURT: Yes?
- [85] THE CLERK: My Lord, we need -- for the DNA we need a time limit, please, to report. Generally they go to the RCMP within a certain time frame for the purpose of acquiring the DNA sample.
- [86] THE COURT: All right. What I am going to do is I am going to order that Mr. Seitcher shall attend as directed by the supervisor for the purposes of complying with the requirement to provide DNA samples.

[87] I do not suppose Mr. Seitcher has any of the materials referred to in s. 109 of the Criminal Code, but I will make an order that if he does, they all be surrendered within 30 days of today. There is a provision for such an order within that legislation. I will make it as a matter of form.

[88] Anything further?

[89] MR. BAINES: No, thank you, My Lord.

[90] THE COURT: We will adjourn then.

Shabbits, J.

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