
CANADA / JUDGMENT

R. v. J.A.P.

2008 BCSC 1259

COURT

Supreme Court of British Columbia

DECIDED

7 March 2008

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2008 BCSC 1259 R. v. J.A.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.A.P.,

2008 BCSC 1259

Date: 20080307

Docket: 5470-3

Registry: Chilliwack

Regina

v.

J.A.P.

BAN ON PUBLICATION OF ANY INFORMATION THAT COULD IDENTIFY THE
ACCUSED PURSUANT TO S. 486.5(1) AND S. 486.5(9) OF THE CRIMINAL CODE

Before: The Honourable Mr. Justice Grist

Oral Reasons for Sentence

March 7, 2008

Counsel for the Crown:

J.D. Hempstead

Counsel for the Accused:

G. Orris, Q.C.

Place of Trial/Hearing:

Chilliwack, B.C.

- [1] THE COURT: The accused was charged with first degree murder arising from the shooting death of his mother. He was convicted after a jury trial of the lesser included offence of second degree murder.
- [2] The offence occurred on or about the 9th of January, 1999, when the accused was 14 years of age.
- [3] The evidence at trial indicated that the accused was the product of a highly dysfunctional family life. The accused's father and mother were adherents of the Hare Krishna faith and raised their five children on a rural property near Hope, British Columbia. The defendant was the third child born to the couple, next in order to his two older sisters.
- [4] The accused's father was controlling and ordered family life around adherence to their religious faith. The children were withdrawn from school after the elementary grades and were home schooled through distance education in order to remove them from possible adverse influences during their teenage years. As a result of this and the rural setting, the children had limited contact with others in the community.
- [5] The defendant's mother was manic-depressive and she abused medications, taking large numbers of Tylenol 3's and Graval. Her behaviour was often unsettling. On a number of occasions she left the home and would be found in Hope, sometimes days later. On one occasion she left home for a year, eventually travelling to the Philippines where she lived with another man. When she returned home, she was pregnant and after the child was born, the baby girl was put up for adoption.
- [6] Interaction in the home between the defendant's father and mother was often marked by violence. The defendant's father's attempts to control the two older girls also became physical when they rebelled against the father's strictures. The defendant became part of this when he took his father's side against his sisters and there were incidents during which he joined in physical assaults on the two older girls. This ended in December, 1998, when the girls left the home and were placed in foster care by the Ministry of Families and Children.
- [7] The accused's relationship with his mother seriously deteriorated when she returned to the family. The fact that she had left, gone with another man, and returned pregnant was regarded by the defendant's father and the accused as a family disgrace. It became an imperative to see that her mental disorder and continued drug abuse did not cause further embarrassment for the family. It became part of the defendant's role to try and prevent her from getting access to the drugs she was abusing and to report her activity to his father while his father was away from home.

- [8] On several occasions, the defendant's mother became physically abusive and she once exposed herself to him while making demeaning comments about him. The accused began to wish his mother was dead. He hoped his father would then form a liaison with another woman his father was acquainted with, and whom the accused was sure would make a better mother for the family.
- [9] The accused said in statements to the police that he found the murder weapon, a 45-calibre handgun, where his father had buried it a number of years before in the garden. He said that on the day of the murder he got his mother to come with him by implying that he had found a quantity of drugs in the woods near the home. He then confronted her with the handgun. There was some conversation between them at the end of which he said, "I started crying and I got really upset and, you know, I turned around and I ran away, and then I came back and then she started to leave and then I just -- everything just exploded all at once. All these emotions came out. I was crying. I was flipped out. I was upset. I didn't want to do it but it was just right there, and so finally, I just pulled out the weapon and emptied it."
- [10] He fired the eight shells held in the handgun. At least three of these struck his mother. He said she was alive when he left her in the woods but was dead when he returned. He buried her in a shallow grave he dug at the site.
- [11] The accused reported to his father that his mother had again left the home. He then put on a pretence of searching the neighbourhood. The mother's disappearance was not reported and only came to police attention a number of weeks later when a social worker noted that she was gone. The social worker and the police were told by the defendant and his father that she had again left the home. There was little to indicate otherwise. Subsequently, the defendant, in an attempt to avoid further investigation, wrote a letter purportedly from his mother, which stated that she had left to begin a new life.
- [12] The murder went undetected until the accused eventually told his oldest sister that he had killed their mother. She subsequently informed the police who set up a sting scenario designed to have him repeat what he had told his sister. The police then arranged for the sister to present him with roses to be put on their mother's grave. The gravesite was determined by police surveillance and the accused was arrested.
- [13] In my view, the conviction of second-degree murder was based on the jury's conclusion that although the defendant had formed the intention to kill his mother when he discharged the handgun, they were not satisfied to the criminal standard that his mental processes exhibited what the law requires to establish planning and deliberation.
- [14] Following the conviction and in light of notification by the Crown that imposition of an adult sentence was being sought, the parole ineligibility section indicated in s. 745.3 of the Criminal Code, R.S.C. 1985, c. C-46 [CC], was modified and read to the jury. The jury was informed that should the accused be determined to be liable for the adult sentence of life imprisonment rather than a youth sentence, they may choose to give a recommendation on a period of parole ineligibility of between five and seven years. The jury was told that if they

choose to give such a recommendation, it would be considered in setting the term.

- [15] The section does not anticipate the present form of the Youth Criminal Justice Act, S.C. 2002, c. 1 [YCJA] and the hearing following conviction under that statute to determine whether or not an adult sentence will be imposed. Section 745.3, although inconsistent with the Y.C.J.A., remains in the Criminal Code, and is worded in mandatory terms. Accordingly, this modified process was adopted.
- [16] It was apparent from the jury's reaction in recommending the minimum five- year parole ineligibility that they intended that some leniency be offered on sentencing in light of the defendant's youth at the time of the offence and the circumstances surrounding the crime.
- [17] The application for imposition of an adult sentence is governed by s. 72(1) of the Y.C.J.A. This section requires consideration of whether or not a youth sentence, imposed in accordance with the purpose and principles set out in the Y.C.J.A., ss. 3(1)(b)(ii) and 38, would have sufficient length to hold the offender accountable for the offence.
- [18] Subparagraph 42(2)(q)(ii) stipulates that the youth sentence for second degree murder shall not exceed seven years, comprised of a committal to custody for a period not to exceed four years and the balance to be served in the community under conditional supervision.
- [19] The principles referred to in s. 72(1) are the following:
- (1) under s. 3(1)(b)(ii):
fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity
 - (2) Under s. 38(1), the multi-faceted statement of purpose:
...to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public
 - (3) Subsection 38(2) provides some more specific principles, and in particular s. 38(2)(b) stipulates comity with like offenders committing like offences.
 - (4) Paragraph 38(2)(c) promotes proportionality to the seriousness of the offence, and the responsibility of the offender.
 - (5) Paragraphs 38(2)(d) and 38(2)(e) stipulate preference for reasonable sanctions short of custody, and the least restrictive sentence capable of satisfying the purpose expressed in subsection (1); and
 - (6) Subparagraph 38(2)(e)(iii) promotes a sense of offender responsibility and acknowledgement of harm done.

- [20] Additionally, s. 38(3) directs consideration of five specific mitigating and aggravating circumstances and inclusion of any others relevant to the prior stipulated purposes and principles. Two particular factors of mitigating effect in this case are:
- (1) in reference to s. 38(3)(d), the 26 months the accused has spent in pre-disposition custody; and
 - (2) in reference to s. 38(3)(e), previous findings of guilt.
- [21] The defendant had no prior youth record. In the seven years that followed the murder until the accused's arrest, his only conviction was for a common assault on his father in 1997, followed by a breach of probation. The assault was an incident much in keeping with the struggle the two sisters went through in breaking away from their father's control. The offence was dealt with by imposition of probation. The defendant did not complete the term of this probation, however, leaving the country to travel to California, and was subsequently assessed a \$400.00 fine.
- [22] These convictions are relevant to sentencing but, in my view, do not weigh heavily as aggravating factors. In total, the lack of a significant record of convictions weighs as a mitigating factor.
- [23] It is notable that the defendant's potential release from custody under either sentencing regime is not markedly different. If sentenced today as an adult, parole eligibility, if set in accordance with the jury recommendation, would follow 34 months from the imposition of sentence. If given the maximum youth sentence, and giving consideration for pre-disposition custody as required under Y.C.J.A. s. 38(3)(d) at the 1-for-1 rate most consistent with the authority on credit for youth remand time, the release from custody would occur 22 months following sentencing.
- [24] In each case as a result of the defendant's age, the in-custody portion of the sentence will be served in an adult facility.
- [25] Subsequent to the murder, the defendant continued to live at home until he was 16. He then travelled to India and stayed six months at a Hare Krishna temple. After some further travel, he returned to British Columbia and took work at Whistler. He went back to high school and completed grade ten. He has subsequently maintained employment working in construction, and would like to get trades training in carpentry. He remains estranged from his father but gets along well with the woman his father subsequently married. She and his father have divorced.

- [26] During the 26 months the defendant has been in custody there have been a number of incidents during which he was either involved in fights with other inmates or reacted negatively to institutional controls. This appears to be in accord with a background of violent response to conflict and his eventual reaction to parental control. Anger management training and violence prevention should clearly be a focus of rehabilitative programs.
- [27] The pre-sentence material prepared for this sentencing did not disclose any psychological disorder but found the defendant to be a moderate risk to react with violent behaviour; particularly, should he develop negative peer relationships. He appears to have some insight into his problems and generally has what is termed pro-social attitudes. It is expected that he will be capable of maintaining employment upon his release but that counselling, supervision and structure should be features of community supervision.
- [28] I find the most difficult factor to weigh on imposing sentence to be the significance of the fact the defendant is now 23 years of age, an adult, to be given a sentence to be served in an adult facility, for a crime he committed at the age of 14. In many cases, the goal of rehabilitating and reintegrating a 23-year-old offender might be quite a different undertaking than would be appropriate for a youth of 14 years.
- [29] At the same time, s. 3 of the Y.C.J.A. directs that the culpability of young persons should be measured in recognition of their greater dependency and reduced level of maturity. To take the dialogue further, proportionality to the seriousness of the offence is obviously a significant consideration, this being a sentencing for a murder conviction. But this feature has to be considered in the context of the default sentencing provision under the statute, being a maximum term of seven years of combined custody and community supervision.
- [30] In this case, it is my view that the relevant factors indicated by Y.C.J.A. s. 72 and the circumstances of the offence do not establish that a youth sentence would not be of sufficient length to hold the defendant accountable for the offence.
- [31] I say this for the following reasons:
- (1) although the murder was marked by some of the features of planning and pre-meditation in that the accused armed himself and had elements of a plan to convince his mother to come with him to the wooded area near the home, this offence was very much a product of the dysfunctional family background and the defendant's dependency and reduced level of maturity.
 - (2) the defendant was very young, even in the context of the age parameters of the Y.C.J.A..
 - (3) the defendant, now 23 years of age, has not significantly re-offended.
 - (4) that while needing further counselling and insight into his behaviour, the defendant is a reasonable candidate to successfully complete a program of rehabilitation within the maximum term stipulated under the Y.C.J.A..

- [32] I have had the advantage of considering the decision in *R. v. C.K.*, [2006] O.J. No. 2982, a case which has a number of similarities to the circumstances of this offence. There, the conviction was for first degree murder in respect of the killing of the two accused's mother. The two young offenders were older at the time of the offence and the period of time before the crime was detected was not as pronounced as here. Nonetheless, the analysis leading to the decision to impose a youth sentence was helpful in considering the facts of this case.
- [33] I differ from that decision in the credit I give for pre-disposition custody. Here pre-disposition custody was served by way of a harsher form of incarceration at an adult provincial remand facility and the period of custody continued for a greater period of time.
- [34] I have also considered and distinguished the decisions of our Court of Appeal in *R. v. K.D.T.*, 2006 BCCA 60, 206 C.C.C. (3d) 44 and *R. v. Pratt*, 2007 BCCA 206, 218 C.C.C. (3d) 298. The defendant in each of these cases was significantly older than this defendant and under the statute was presumably to be dealt with by way of imposition of an adult sentence.
- [35] The maximum youth sentence is appropriate in this case. Accordingly, the sentence imposed is a further period of incarceration of 22 months, followed by three years of community supervision.
- [36] This offence qualifies for designation as a serious violent offence. There will be a requirement to submit a sample for DNA analysis and there will be a lifetime prohibition from possessing any of the items listed under s. 109 of the Criminal Code, most notably firearms and ammunition.
- [37] All right now, are there further corollary orders that I have not dealt with in this matter counsel?
- [38] MR. HEMPSTEAD: No additional corollary orders. I wondered if Your Lordship was going to be spelling out the terms of the community supervision aspect of that at this time or if there is a procedure to readdress that prior to his release.
- [39] THE COURT: Yes, I think that is a matter that should await the prospect of his release. I have already made comment in my reasons about what I think needs to be the primary focus of rehabilitative programs. Beyond that, further direction should be made in light of the circumstances existing at the time of his prospective release. There is also the question of publication. I think that in light of the way this matter has been dealt with, the publication of the accused's name should be restricted to the usual form, initials.
- [40] MR. HEMPSTEAD: I do not think I could ask for that and I think that I abandoned that request.
- [41] THE COURT: No, I appreciate that, I just wanted to make clear on the record that course will be adopted.

[42] MR. ORRIS: My Lord, I agree with my friend's comments about addressing the issue of counselling. As he approaches the term of his time of release the --. I know that we can access some programs within the Fraser Regional Correctional Centre where I believe he will be serving his time and then I know I have already discussed with Dr. Lee (phonetic) and Dr. O'Shaughnessy the possibility of implementing programs in the community under supervision thereafter. So as the time comes close for his release, we will get those in place and then we can come and present them to the court and you can either marry them or instruct us as to what you think is appropriate.

[43] THE COURT: Yes, all right. Thank you.

"W.G. Grist J."

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