

CANADA / JUDGMENT

R. v. J.J.L.K.

2024 BCSC 1447

COURT

Supreme Court of British Columbia

DECIDED

18 June 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 1447 R. v. J.J.L.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. J.J.L.K.,

2024 BCSC 1447

Date: 20240618

Docket: 113980

Registry: Kamloops

Rex

v.

J.J.L.K.

Before: The Honourable Justice Norell

Restriction on publication: A publication ban has been imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting, or transmission in anyway of any information that could identify a complainant or witness under the age of 18

On appeal from: Provincial Court of British Columbia, dated December 6, 2023.

Oral Reasons for Judgment

In Chambers

Counsel for the Crown:

O.A. Potestio

Counsel for the Defence:

D.J. McNamee

Place and Date of Hearing:

Kamloops, B.C.

June 14, 2024

Place and Date of Judgment:

Kamloops, B.C.

June 18, 2024

- [1] These reasons have been edited to comply with the publication ban.
- [2] THE COURT (via videoconference): The appellant pleaded guilty to one count of assault, contrary to s. 266 of the Criminal Code, R.S.C., 1985, c. C-46.
- [3] The circumstances of the offence involved the appellant biting a child in a one-off incident, which was excessive force to discipline another parent's child. The appellant was at a park with the person caring for the child. The child had what was described as a "fit" when told it was time to leave. While attempting to prevent the child from running into a parking lot area, the child was uncooperative and the appellant bit the child's shoulder and pinched the chest area. The bite broke the skin, there was bruising, and the child was emotionally impacted. Friends of the appellant describe this as out of character for the appellant who they say is a loving parent. The appellant had no criminal record.
- [4] The Crown and defence counsel made a joint submission for a suspended sentence with a 12-month probation period with protective conditions. The sentencing judge rejected the joint submission and imposed a suspended sentence, with a 19-month probation period, extending the protective conditions by seven months and making changes to the exceptions to the protective conditions that had been agreed to between Crown and defence counsel.
- [5] On this appeal, the appellant asks this court to set aside the length of the probation order and replace it with the 12-month probation order that was proposed in the joint submission. The appellant does not appeal the changes to the other terms of the probation conditions.
- [6] The appellant does not suggest that the sentence imposed by the sentencing judge is demonstrably unfit. Rather, the appellant submits that the sentencing judge correctly stated the applicable legal test in *R. v. Anthony-Cook*, 2016 SCC 43 [Anthony-Cook], but then erred when she failed to apply it, and ultimately rejected the joint submission when it did not bring the administration of justice into disrepute and was not otherwise contrary to the public interest. The appellant submits that the adding of the seven months of protective conditions in an attempt to make the sentence more fit, is tinkering and an error. Further,

the appellant submits that the sentencing judge erred by not providing cogent reasons for departing from the joint proposal.

- [7] The Crown concedes that the sentencing judge erred in not applying the test in Anthony-Cook. For the reasons that follow, I agree, and the appeal is allowed.

Preliminary Matter

- [8] Prior to addressing the grounds of appeal, I address one preliminary matter.
- [9] Defence counsel negotiated an agreement with a different Crown counsel than the one who spoke to sentencing. Although Crown counsel indicated at the start of the submissions that this was a joint submission, at one point during the hearing Crown counsel indicated a lack of certainty about the nature of the negotiated agreement when pressed as to the length of the proposed probation period, indicating that "this was a bit of a negotiated agreement" that took place between his colleague and defence counsel, and he was "not sure if this really was set as a joint submission or not". However, defence counsel subsequently and soon after reiterated to the judge that the proposal was a joint submission that had been negotiated with a different Crown counsel. Despite this one unsure statement by Crown counsel, the sentencing judge accepted and treated the sentencing proposal as a joint submission.
- [10] The sentencing judge had concerns about the fitness of the proposed sentence. The discussion at the hearing centered on the fact that both the victim child and the appellant's child attend the same school and some of the same recreational activities, and how the protective conditions could be accomplished to allow, for example, the children to be picked up from school and attend activities, while still protecting the victim child from having contact with the appellant or being fearful of that.
- [11] The appellant acknowledges that, while asking questions of counsel during the hearing, it seems the sentencing judge was invited to assist with the particular terms and exceptions of the protective conditions, and does not appeal those changes in which the sentencing judge was effectively invited to engage.
- [12] However, notwithstanding those discussions, the length of the probation order was always agreed to be 12 months. Crown counsel on this appeal agrees that this was a joint sentence, both as to length and the probation terms.

Reasons for Sentence

- [13] Just prior to providing the reasons for sentence, the sentencing judge acknowledged the joint submission was made, and informed the parties that she was not "going to stray too far away": transcript, page 28, line 36. She provided an opportunity to offer further submissions, and then provided her reasons.

- [14] The sentencing judge reviewed the circumstances of the offence and the offender, the benefits to the child of not having to testify and an early guilty plea, the principles of sentencing, and the mitigating and aggravating circumstances. At para. 36, the sentencing judge concluded that a suspended sentence was not "so untethered from the range", but the nature of the sentence was concerning to her. At para. 39, the sentencing judge set out the test from *Anthony-Cook*. At para. 40, she expressed her concern for the public interest, being a child's fear of running into the appellant, which would only be accomplished through a probation order. She referred to a submission that, if at the end of the 12 months there was still a concern, the child could obtain a peace bond. That left the sentencing judge "very uncomfortable". At para. 41, the sentencing judge concluded:
- [41] It seems to me that it is my job, and going back to the very first principle of sentencing, which is to protect society and maintain a just, peaceful, and safe society, by imposing just sanctions. In my view, my primary job, when it is an abuse of a child is to continue to protect that child on that level, without interfering with the liberty of the accused any further than I need to, and I think I can accomplish that by simply making this probation order longer, but having the reporting piece of it end at the end of 12 months. That way, the protective conditions can extend to the complainant
- [42] So, this is the sentence that, in my view, is appropriate. It is a suspended sentence, and it is for a period of 19 months. That takes us to the end of the school year, next year, and the conditions are going to be as follows:

Analysis

- [15] This Court may only interfere if the sentence imposed is demonstrably unfit, or the sentencing judge has made an error of law or an error in principle that had an impact on sentence: *R. v. Manca*, 2019 BCCA 280 at para. 28. Where intervention is justified, the Court must replace it with a sentence it considers appropriate: *R. v. Cheema*, 2019 BCCA 268 [Cheema] at para. 19.
- [16] The test and legal framework for assessing a joint submission on sentence were established in *Anthony-Cook*. A sentencing judge should not reject a joint submission unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. This would be a submission that is "so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down". This is an "undeniably high threshold": at para. 34.
- [17] *Anthony-Cook* also affirms the value of carefully considered agreements between counsel as offering certain or near certain benefits to the parties and recognizes the importance and vital role that joint submissions play in the proper functioning and wellbeing of the criminal justice system: at para. 25.

- [18] In *R. v. Huston*, 2024 BCCA 179 [Huston], Justice Fenlon summarized the task of the Court on a joint submission, and the high threshold for rejecting a joint submission as to sentence:
- [10] The Supreme Court also made it clear that a judge is not to reject a joint submission simply because they think the sentence is too lenient. That is because there are critical systemic benefits that flow from joint submissions that are highly relevant in applying the public interest test. The high threshold for rejecting a joint submission ensures that the certainty a joint submission affords an accused person who is considering whether to plead guilty will yield only "where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty": *Anthony-Cook* at para. 43, citing *R. v. DeSousa*, 2012 ONCA 254 at para. 22. As a result, it is possible that a sentence which would otherwise be considered demonstrably unfit, absent a joint submission, may nonetheless be acceptable in the context of a joint submission.
- [19] Justice Fenlon went on to state that a judge considering a joint submission must use a different methodology than one they would use for a conventional sentencing hearing. A judge is required to consider both the principles of sentencing and proportionality, and the benefits of a joint sentence. A judge is also required to provide cogent reasons for not accepting a joint submission on sentence: *Huston* at paras. 11-12.
- [20] In this case, the sentencing judge imposed a sentence that she saw fit and did not apply the test in *Anthony-Cook*. There is no demonstrated consideration of the benefits of a joint submission, or cogent reasons for departing from the jointly proposed sentence. It is not apparent from the sentencing judge's reasons how the proposed 12-month probation order would bring the administration of justice into disrepute, or is otherwise contrary to the public interest. The sentencing judge expressed concern for the public interest: at para. 40. However, the sentencing judge did not go on to provide specific reasons for departing from the joint submission. Being "very uncomfortable" is not sufficient, and is only part of the required analysis.
- [21] The sentencing judge had earlier noted in her reasons that the early guilty plea had a significant salutary effect in not requiring the child to have to testify about an event that was traumatic and which continued at the time of the sentencing to cause significant emotional discomfort, some physical discomfort and embarrassment: at paras. 27-28 and 37. The sentencing judge did not address how the benefit of adding seven months of protective conditions would weigh against requiring the child to testify, or the benefit of certainty to this victim and accused of an early guilty plea, or the vital importance of joint submissions in the functioning of the criminal justice system, or the potential negative effect of a rejection in future joint submissions.
- [22] The sentencing judge fell into a similar error as the sentencing judge in *Cheema*:

- [26] However, in my view, while the judge stated the test in Anthony-Cook correctly, she did not apply it. Rather, she conducted her analysis as though she was dealing with a conventional sentencing proceeding. Contrary to the Court's direction in Anthony-Cook, she assessed what she saw as a "fit" sentence based on considerations of deterrence, denunciation and protection of the public and, in doing so, failed to consider the significant systemic benefits that flowed to the justice system and the Crown from the joint submission.
- [23] Justice Fenlon's comments in Huston are also applicable here:
- [16] In summary, it was not enough for the judge to compare the sentence put forward in the joint submission to the sentence she would have imposed on a contested sentencing hearing. That is a proper consideration, but it must be coupled with a demonstrated consideration of the benefits of the joint submission.
- [24] As a result of the sentencing judge erring in principle, I must apply the test in Anthony-Cook and consider whether the proposed joint sentence would leave reasonable and informed persons to believe that the proper functioning of the justice system had broken down.
- [25] A number of sentencing decisions which involved assaults of children were reviewed at the hearing before the sentencing judge. She also reviewed the conventional sentencing principles, the circumstances of the offence and offender, and the aggravating and mitigating circumstances. She concluded a suspended sentence was appropriate. I agree with that analysis.
- [26] Turning to the length of the probation order and the value of the joint proposal, in particular the significant benefit in sparing the child having to testify, the early guilty plea, the certainty or near certainty to the child victim and accused of a guilty plea and joint sentence, the systemic benefits to the criminal justice system of joint submissions on sentence, and the potential detriments to that system in rejecting a joint submission, I can find no reason to depart from the original joint submission of 12 months' probation. I find that the originally proposed joint submission would not bring the administration of justice into disrepute and is not otherwise contrary to the public interest.
- [27] I therefore allow the appeal and impose the originally proposed joint submission of a 12-month suspended sentence with the same probation conditions imposed by the sentencing judge, except as to length.
- [28] That concludes my reasons.

"Norell J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/14/2024BCSC1447.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-j-j-l-k-2024>

Prepared on 26 October 2026 · Esheria