

CANADA / JUDGMENT

## R. v. Jones

2000 BCCA 379

### COURT

British Columbia Court of Appeal

### DECIDED

16 June 2000

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2000 BCCA 379 R. v. Jones

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Jones,

2000 BCCA 379

Date: 20000616

Docket: V03494

Registry: Victoria

Between:

Regina

Respondent

And

Kevin James Jones aka Justin Aaron Phillips

### Appellant

Corrected Judgment: The text of the judgment was corrected to remove information that could identify the complainant(s) on November 10, 2021.

Restriction on publication: A publication ban has been mandatorily imposed under s. 486.4 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a complainant or witness. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Huddart

The Honourable Madam Justice Proudfoot

On appeal from: An order of the Provincial Court of British Columbia,  
dated May 28, 1999 (Regina v. Jones, File 102735-C).

Counsel for the Appellant:

J.J. Blazina

Counsel for the Respondent:

B. Johnstone

Place and Date of Hearing:

Vancouver, British Columbia

April 19, 2000

Place and Date of Judgment:

Vancouver, British Columbia

June 16, 2000

Written Reasons by:

The Honourable Madam Justice Proudfoot

Concurred in by:

The Honourable Madam Justice Ryan

The Honourable Madam Justice Huddart

Reasons for Judgment of the Honourable Madam Justice Proudfoot:

- [1] The appellant applies for leave to appeal a sentence imposed by Judge Higinbotham on 25 June 1999.
- [2] The appellant pleaded guilty to two counts in a several-count direct indictment dated 19 May 1999. The relevant counts read as follows:

Count 2: On or about the 23rd day of December, 1998, at or near Saltspring Island, in the Province of British Columbia, they [the appellant and another person] did break and enter a place, a dwelling house, situate at 140 Reid Road, and commit an indictable offence therein, the confinement of Justin Beaumont and L.M.M., without lawful authority, contrary to s. 348(1)(b) of the Criminal Code.

.....

Count 4: On or about the 23rd day of December, 1998, at or near Saltspring Island, in the Province of British Columbia, he [the appellant] did sexually assault L.M.M., contrary to Section 271 of the Criminal Code.

## Facts

[3] The facts are comprehensively set out by Crown counsel. As there is no disagreement I will recite them as put forward by the Crown at the Sentencing Hearing.

On the 23rd of December 1998, sometime between three and three-thirty in the morning, Justin Beaumont and his girlfriend L.M. were sleeping in a basement bedroom at 140 Reid Road in Saltspring Island, B.C., when Mr. Beaumont was awakened by the sound at the front door, the front door being forced open.

He went up the stairs leading to the front door where he was confronted by two males at the door who were screaming, "Police, search warrant, get on the ground." They were carrying flashlights, and they were the only lights that appeared to be on at the time, other than some Christmas lights outside.

Mr. Beaumont observed what he felt was a handgun in one of the male's hands. One of them then struck him once on the right side of his face with that gun. Mr. Beaumont was only partially dressed at the time, was told to lay down, which he did. His hands were then bound behind his back with plastic flexcuffs, and duct tape was also wrapped around his ankles and then hooked together with the plastic strap, hog tying him.

He was laid on the living room floor, and the males laid some items over his head so he couldn't see. They kept telling him to keep his head down and not to look at them. He didn't get a look at their faces throughout the incident.

While laying on the floor, he could observe Ms. M. coming up the stairs, believes that she was laid down beside him for a period of time. He couldn't see anything but could hear the males ransacking his home, both upstairs and down, and heard them talking.

The males said they were there for a marihuana grow operation, and when they only found eight plants in the basement, they wanted to know where the other grow was. Mr. Beaumont said that was all that he had, and threats were directed his way, and the result if he didn't tell where the rest of the marihuana was.

He recalls that at some point Ms. M. was moved away from his side, but he doesn't know exactly when. He continued to lay on the floor. He was questioned again from time to time. They seemed to be interested in drugs or money. He could still hear the males inside the residence. He could not identify them.

Meanwhile, Ms. Beaumont [sic] was downstairs in the residence. She could hear a male telling Beaumont to, "Shut up. Don't do anything or you'll get shot." They asked if there was anyone else in the house, and Mr. Beaumont said that his girlfriend was downstairs. A male came down and took her upstairs to where Beaumont was being held captive.

The female complainant saw two people she described as being in their early twenties with dark complexions. Both were wearing what appeared to be gloves, dark-coloured toques, and dark-coloured, winter-style jackets that had the word "POLICE" in yellow lettering. She didn't recall seeing a weapon.

She saw Mr. Beaumont laying on his side on the floor with his hands tied securely by pieces of tape. She, too, had her arms tied behind her back by the use of cuffs, and then she, too, was tied up in hog-tied fashion with duct tape. A blanket was placed over her head.

She states that she could hear one of the males go downstairs and doing things like rustling, banging around. Then one of them came back upstairs, said, "Interrogation time," and took her into [the] bedroom and asked her if there was anything else he should know about, and she said no.

At that point the male put his hand up underneath her T-shirt and began to feel her breasts. He rolled her over on her stomach and pulled down her pants and underwear. He then had sex with her, penetrating her vagina with his penis. He pulled out and ejaculated over her back. He then grabbed something and cleaned off her back, pulled up her pants and underwear, and did up the zipper and button. Then rolled her over on the back and told her to stay put, be quiet, and said, "Do you know whose neighbourhood this is? It belongs to H.A[.]," a phrase that the complainants took to mean Hell's Angels.

Ms. M. says the males did return, and rifled through some of the dresser drawers in the bedroom where she was, a short time later but then departed. She could hear them telling Beaumont they were going to leave but they'd be back, one of them was going to stay behind to make sure they didn't - that is, the complainants, didn't do anything, and things got quiet.

She lay there for a period of time until Mr. Beaumont was able to free himself from the tying - or from the bonds that were on him. He immediately went into the bedroom where he freed Ms. M. At that point they both went to the complainant's mother's residence.

Before leaving, Mr. Beaumont observed that both - that the front door had been forced open. There was a large set of tire tracks believed to be from a truck-type vehicle in the fresh snow of the driveway. Forty dollars cash had been taken from the kitchen and eight large marihuana plants from the basement. The phone had been ripped out of the wall, and the home ransacked.

[4] Crown counsel went on to submit what he considered to be aggravating and mitigating factors. First, he set out the aggravating factors:

- (i) the circumstances and the amount of planning and premeditation were aggravating factors, and specifically, he referred to the degree of sophistication involved in the assault with the use of police jackets, scanners and a variety of equipment;
  - (ii) the appellants were aware that somebody, at least Mr. Beaumont, would be in the house, although they may not have expected Ms. M. to be present, they knew they would expect to confront occupants;
  - (iii) the use of weapons, particularly the handgun Mr. Beaumont saw and was struck in the face with;
  - (iv) the degree of violence used, including the sexual assault of Ms. M.;
  - (v) the confinement of the victims who were left bound and helpless; and
  - (vi) the criminal record of the appellant.
- [5] The appellant was on probation at the time this particular offence was committed and while Crown counsel did not mention this as an aggravating factor, I would suggest that in my view it falls into that category.
- [6] Then, Crown counsel set out the following as mitigating factors:
- (i) the youth or relatively young age of the appellant who is now, I believe, 22-years of age (he was approximately 20-years of age at the time of the offence);
  - (ii) the appellant pleaded guilty to spare the complainant and family members the necessity of coming to the trial and going through the anguish of that event;
  - (iii) the considerable time that was saved by the guilty plea as the Crown would have had to call approximately 30 witnesses to the stand;
  - (iv) the acknowledgment by way of a guilty plea is a major factor and while the Crown is not aware of remorse on the part of the appellant, the appellant was willing to acknowledge his wrongdoing; and
  - (v) the appellant was held in pre-trial custody for some five months.
- [7] The appellant did not take issue with the factors as outlined by the Crown; however, defence counsel stressed other factors: the young man had employment, he was living with a young woman who is now pregnant with his child, and he had a rather problematic background. It was stated that the appellant had been pressured into this act by other, older members of this invasion gang.
- [8] Defence counsel pointed out while indeed there was a record it did not include the most serious crimes and furthermore he had not been sentenced to a single day in custody on any of his previous offences.

[9] Defence counsel stated the appellant was remorseful and felt badly for being involved in this "cowardly, ugly act".

[10] The trial judge was troubled with how to deal with what he called a "difficult matter" and he adjourned to give consideration to the sentencing on the two counts. The first, breaking and entering, carries a maximum of life imprisonment. The second, sexual assault, carries a maximum of ten years. He concluded that the sexual assault was probably the more serious. Of course, since the sexual assault was committed during the course of the break-in and as a result of his conclusion, he was concerned about how to deal with the question of aggravating factors.

[11] The trial judge expresses the difficulty he was having in this passage:

THE COURT: I understand that. The difficulty I am having with that - I was thinking about this during the break - is that count two carries a maximum of life imprisonment, and count four carries with it a maximum of ten years imprisonment, count four being the sexual assault.

The - I'll be blunt about it. Quite frankly, the sexual assault, to me, is more serious in this case. The fact that it was committed during the course of a break-in, of course, is an aggravating feature. And it's difficult for me to know, that's what I wanted your help with, on how the relations - on how to deal with the relationship between the two offences without, in effect, sentencing Mr. Jones twice for a sexual assault or twice for breaking and entry, and whether or not you wish me to consider the sexual assault an aggravating feature of the unlawful confinement or deal with it as an entirely separate matter that arose once he was in the house, but wasn't planned initially as was the rest of the break-in.

The transcript would indicate there was much discussion about the sentencing principle of totality, in other words, the imposition of a global sentence.

[12] The concern that defence counsel had was if the sexual assault feature was eliminated from count two and dealt with on a separate basis then the Crown was seeking a consecutive sentence. However, that concern was dispelled. The judge concluded that a consecutive sentence was not the appropriate course to take.

[13] He then went on and made these comments with reference to how he was going to deal with these two counts:

Looked at overall, both offences are at the very serious end of the scale. I suggested during submissions, to Crown counsel that since the two charges might be considered distinct and separate, as the accused did not enter the premises with rape on his mind, that consecutive sentences might be appropriate. Upon reflection, I do not find myself able to neatly separate the two charges.

The rape is an aggravating feature of the break-in and subsequent confinement, and the circumstances surrounding the rape include the elements of the offence of break, enter and committing the offence of confinement. Therefore, I believe it would be wrong to sentence consecutively. It would, I think, constitute a double punishment for identical offence elements and would result in an excessively long or harsh sentence.

I agree with the approach taken by the trial judge.

[14] Defence counsel's further argument regarding the appellant's mother's very serious personal difficulties that occurred less than forty-eight hours before this offence should be considered when imposing the sentence. Counsel argued this fact should be a mitigating factor whereas the sentencing judge did not agree, he took the contrary view and stated that "it may show a lack of feeling on the part of the accused". Further, he went on to say, "It suggests that the accused has a long way to go in any rehabilitative endeavour."

[15] Finally, in sentencing, he stated:

In this case, having due regard for the possibility of rehabilitation, I am most concerned that my sentence reflect society's denunciation of the accused's conduct and serve as a deterrent to others of like mind.

[16] On the charge of sexual assault the maximum sentence of ten years was imposed and fifteen years for the breaking and entering. The sentences were made concurrent making a global sentence of fifteen years.

[17] The appellant presented several arguments, the principal one being the sentencing judge erred in imposing a sentence outside the range. Counsel argued that the error arose as a result of the statement that the maximum sentence for the sexual assault "is probably inadequate given the circumstances" and in translating that error into a higher term of imprisonment for the breaking and entering. In other words, defense counsel argued that because he could not impose a sentence higher than ten years for the sexual assault, he sentenced higher (i.e. fifteen years) on the breaking and entering. The argument before this Court was that the breaking and entering to commit an indictable offence called for a ten-year, not a fifteen-year, prison term. A ten-year term would be within the eight to ten year range as suggested by both Crown and the lesser period suggested by the defence.

[18] I do not view as error the fact that the trial judge did not give effect to Crown and defence submissions regarding the range. While indeed in some instances trial judges accept ranges as outlined by counsel, the law neither binds nor requires the trial judge to "give effect" to either Crown or defence submissions about the appropriate range of sentences.

[19] In my view, the reason the trial judge imposed a sentence beyond the suggested range (eight to ten years) is evident from his reasons. He was obviously of the opinion that in order to meet the sentencing principles of deterrence and denunciation a higher period of imprisonment was mandated. The argument centering on his reasons lacking reference to the range does not in my view mean it was not considered. The trial judge does not err

merely because he fails to give reasons one way or another (see *R. v. Grimsson (K.A.)* (1997), 100 B.C.A.C. 253; 163 W.A.C. 253 (C.A.); leave to appeal refused [1998] 2 S.C.R. viii). The question to be asked in the final analysis is whether the sentence was fit.

- [20] As for the remark made by the trial judge that the maximum penalty for the sexual assault "is probably inadequate, given the circumstances", this was nothing more in my view than his pointing out that the violent sexual assault of the complainant while she was in her home was at the severe end of the spectrum. He was merely attempting to emphasize the seriousness of this crime.
- [21] The proper approach in dealing with this sentence is to approach it by assessing it globally. Is fifteen years a fit sentence in the horrendous circumstances of this case? I answer that in the affirmative. The trial judge considered the mitigating factors and the aggravating factors, all of which I referred to earlier. Also, I note that he took into consideration the time spent in custody pre-trial.
- [22] Indeed, he imposed the maximum period of imprisonment for sexual assault, and while the appellant may not be the worst offender as far as offenders are concerned, as for the offences it is difficult to imagine a more despicable, demeaning, and cowardly act - raping a young woman who was "hog-tied". This scenario could well have escalated and one of the victims could have been more seriously injured or killed.
- [23] Dealing with the breaking and entering, this was a premeditated armed robbery, the assailants posed as policemen (knowing at least one occupant would be at home), they broke in and they terrified the occupants with the use of a gun. These circumstances alone justify a fifteen-year prison term without the added sexual assault.
- [24] In all the circumstances of this case the global sentence of fifteen years is a fit sentence. The trial judge did not err. He dealt with the principles of sentencing in an appropriate manner. I would grant leave; however, I would dismiss the appeal.

"The Honourable Madam Justice Proudfoot"

I AGREE:

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Madam Justice Huddart"

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Prepared on 29 October 2026 · Esheria