
CANADA / JUDGMENT

R. v. Joseph

2012 BCCA 359

COURT

British Columbia Court of Appeal

DECIDED

30 August 2012

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2012 BCCA 359 R. v. Joseph

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Joseph,

2012 BCCA 359

Date: 20120830

Docket: CA039682

Between:

Regina

Respondent

And

Delbert Wayne Joseph

Appellant

Before:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Neilson

The Honourable Mr. Justice Harris

On appeal from: Provincial Court of British Columbia, January 24, 2012

(R. v. Joseph, Prince George Dockets 35016-1, 35021-1-B and 35022-1-B)

Counsel for the Appellant:

R. S. Fowler and J. M. Duncan

Counsel for the (Crown) Respondent:

S. J. Brown

Place and Date of Hearing:

Vancouver, British Columbia

July 16, 2012

Place and Date of Judgment:

Vancouver, British Columbia

August 30, 2012

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Mr. Justice Frankel

The Honourable Madam Justice Neilson

Reasons for Judgment of the Honourable Mr. Justice Harris:

- [1] This is an application by Mr. Joseph for leave to appeal, and, if leave is granted, an appeal of the sentence imposed by Associate Chief Judge Brecknell on January 24, 2012.
- [2] Mr. Joseph was sentenced on a variety of charges principally involving breaching the conditions of probation orders. At issue here, however, is a one-year conditional sentence on a charge of theft and whether Mr. Joseph was awarded the correct credit for the time served in custody before sentence.
- [3] Mr. Joseph argues that the judge erred in law in imposing a conditional sentence order, which he was not seeking. He contends that the sentence is unfit given his record and the near certainty that he would breach its conditions. He also argues that the sentencing judge erred in requiring him to lead formal evidence of the conditions of his pre-sentence custody in order to justify awarding enhanced credit for time served. He submits that he ought to have received enhanced credit for all of the time he spent in pre-sentence custody and, as a result, been sentenced to one day in jail.
- [4] The Crown submits that the sentence is fit and that this Court should defer to the sentencing judge's exercise of discretion, even though neither the Crown nor Mr. Joseph sought a conditional sentence. The Crown argues that the judge was fully aware of Mr. Joseph's history of breaches and his alcohol problem, but made a considered decision that a conditional sentence was appropriate. The length of the conditional sentence was entirely fit

in light of Mr. Joseph's personal circumstances and lengthy and related criminal record. The Crown contends further that the judge correctly denied enhanced credit for pre-sentence custody. The Crown submits that the judge did not require strict formal proof to establish the particular circumstances that would justify enhanced credit. Rather, the facts before him were not sufficient to establish that the conditions of incarceration justified granting enhanced credit.

- [5] In his statement, Mr. Joseph raises three issues regarding this application and the appeal, which I set out as follows:
- (a) Whether a conditional sentence order was an appropriate sentence given Mr. Joseph's history of breaching conditions and his criminal record;
 - (b) Whether a formal evidentiary record is required to establish "exceptional circumstances" justifying awarding enhanced credit under s. 719(3.1) of the Criminal Code; and
 - (c) Whether Mr. Joseph should have received enhanced credit as a result of the conditions of his pre-sentence custody.
- [6] For the reasons that follow, I would grant leave to appeal but would dismiss the appeal.

Background Facts and Procedural History

- [7] On January 24, 2012, Mr. Joseph was sentenced on five counts of breach of probation and one count of theft under \$5,000 (shoplifting from a liquor store). He had pleaded guilty to these charges some months earlier on October 18, 2011.
- [8] Mr. Joseph had served 141 days of pre-sentence custody prior to the sentencing hearing.
- [9] The sentencing judge credited Mr. Joseph with 190 days of pre-sentence custody. He did so by crediting Mr. Joseph on a 1.5 to 1 basis for the period from October 18, 2011, the day on which he pleaded guilty, to the date of sentencing because of delays associated with the preparation of a Gladue report. The judge credited Mr. Joseph with one-day-for-one-day from September 5, 2011, the date he was taken into custody, to October 18, 2011.
- [10] The sentencing judge sentenced Mr. Joseph to one day (concurrent) on four of the breach of probation charges. The breaches of probation consisted of being outside his residence in violation of his curfew, being in possession of or consuming alcohol, and failing to report. He sentenced Mr. Joseph to a one-year conditional sentence order, followed by two years' probation on the theft charge and a 120-day conditional sentence order (concurrent to the one-year order) on the final breach charge.
- [11] At the sentencing hearing, Mr. Joseph sought a sentence of one day, regardless of how time served would be calculated. He argued that the circumstances justified crediting him with enhanced credit of 1.5 to 1 for the entire period of pre-sentence custody. The Crown sought a sentence of 12 months' jail followed by three years' probation.

- [12] The defence did not call viva voce evidence in support of the request for enhanced credit. Mr. Joseph relied primarily on the submissions of his lawyer. He did, however, make a statement to the court pursuant to s. 726 of the Criminal Code describing the conditions he experienced on remand. He emphasized the problems caused by persistent double-bunking at the remand centre, and commented on being double-bunked with other prisoners on remand for serious charges. He also described difficulties he faced throughout his life as a result of his alcoholism. The Crown did not apply to cross-examine Mr. Joseph with respect to his statement, nor did it challenge that statement.
- [13] Mr. Joseph has an egregious record. It includes more than 150 convictions for theft since 1988, and approximately 50 breaches of court orders. Most of the thefts involved petty offences to support his alcoholism, and his breaches of court orders also typically involved alcohol. In April 2011, he had been sentenced to six months in jail and probation for a number of shopliftings and breaches of court orders.

Analysis

Did the sentencing judge err in imposing a conditional sentence?

- [14] Mr. Joseph submits that the sentencing judge erred in principle in imposing a conditional sentence because his circumstances do not satisfy the statutory conditions for imposing such an order. Moreover, the judge erred, he submits, in using a conditional sentence as a rehabilitative, rather than a punitive, tool. It was an error for the judge to impose a conditional sentence as a means of giving him "the opportunity to demonstrate his dedication to his rehabilitative progress" (at para. 94).
- [15] Mr. Joseph's argument is based first on his extensive history of repeated offences committed within his community, and second, the practical certainty that he would inevitably breach the terms of his conditional sentence. As a result, he contends, there was no proper basis for the sentencing judge to be "satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2". These conditions are set out in s. 742.1 of the Criminal Code as statutory prerequisites for the imposition of a conditional sentence.
- [16] Before turning to the reasons why I am unable to give effect to this ground of appeal, it is helpful to set out the reasoning of the sentencing judge.
- [17] The judge took into account the fact that Mr. Joseph is an Aboriginal offender and took into account the Gladue factors. He then examined both the aggravating and mitigating factors. He identified the following aggravating factors at para. 86 of his reasons:
- a) There were multiple breaches of probation over a very short period of time that resulted in these charges;

- b) There was a further substantive offence of a nature similar to recent convictions;
- c) All of the offences before the Court were committed while Mr. Joseph was on probation for similar offences;
- d) Mr. Joseph had only been out of custody for a short period of time having just completed serving his previous jail sentences when these offences were committed;
- e) Mr. Joseph's behaviour demonstrates a continuous and unrepentant offending pattern for over three decades;
- f) Mr. Joseph has been given numerous opportunities for community base sentences including both Probation and Conditional Sentence Orders most of which he has breached.

[18] I pause here to observe that these aggravating factors are the factors Mr. Joseph relies on to say that it was an error in principle to impose a conditional sentence. It is clear, however, that the sentencing judge was alive to these factors and took them into account in crafting his sentence.

[19] The judge then identified the following mitigating factors at para. 87:

- a) Mr. Joseph has accepted responsibility for these offences early in the process;
- b) Mr. Joseph's spouse is supportive and acts responsibly in the face of his behaviour ...;
- c) Mr. Joseph has articulated an understanding of his past offending behaviour and the underlying reasons for it and has indicated a wish and willingness to work on those factors to reduce his criminal behaviour;
- d) Mr. Joseph has engaged in some counselling over the past year and has maintained contact with his counsellor while he has been incarcerated.

[20] The sentencing judge took into account "the purposes and principles of sentencing, Mr. Joseph's upbringing and background, his circumstances as an Aboriginal offender, his lengthy criminal history, the nature of these offences and the fact they were committed while he was on probation for similar offences" (para. 90). He considered as well that Mr. Joseph had already had "one opportunity to serve a Conditional Sentence Order in 2009 which he breached within one month and eventually was ordered to serve the remainder of the sentence in custody" (para. 91). The judge also recognized (at para. 92) that "while Mr. Joseph's recent offences have not 'endangered' the public the nuisance factor of such offences has been very large. His past behaviour seems to indicate that he has been unable to curtail his drinking and the resulting criminal behaviour."

[21] The sentencing judge concluded his analysis as follows:

[93] However, since the last Conditional Sentence in 2009, Mr. Joseph has taken some steps (albeit limited) to address his alcohol abuse which arose when he was very young, was sustained throughout his adulthood and which is the underlying component of his criminal

activities. I have carefully considered *R. v. Proulx* [2000] 1 S.C.R. 61 and have concluded that in these circumstances it would still be appropriate to give Mr. Joseph the opportunity to show the Court and the community that he is serious about moving forward in his life by granting him a one-year Conditional Sentence Order on Information 35016 on strict terms and conditions followed by a two-year Probation Order.

- [94] I am satisfied that such a sentence is capable of addressing the necessary denunciatory and deterrent principles and purposes of a sentence, will protect the public from Mr. Joseph's further criminal behaviour and at the same time will give him the opportunity to demonstrate his dedication to his rehabilitative progress.
- [95] I conclude that a Conditional Sentence Order of one year can maintain strict control over Mr. Joseph for a longer period than a similar jail sentence. In addition, it will hang over Mr. Joseph like the sword of Damocles so that if he is in breach of the order he might well expect to be returned to jail to serve out the rest of his sentence....
- [22] The standard of review in a sentencing appeal is well settled. That standard was recently concisely articulated in *R. v. Potts*, 2011 BCCA 9, 266 C.C.C. (3d) 279, as follows:
- [17] The standard of review on a sentencing appeal is a deferential one. The sentencing judge enjoys considerable discretion because of the individualized nature of the process: *R. v. L.M.*, 2008 SCC 31, [2008] 2 S.C.R. 163 at paras. 14, 17. "[In] the absence of an error in principle, failure to consider a relevant factor, or overemphasis of the appropriate factors, a sentence should only be overturned if the sentence is demonstrably unfit": *R. v. McDonnell*, [1997] 1 S.C.R. 948, 114 C.C.C. (3d) 436 at para. 17; *R. v. Li*, 2009 BCCA 85 at para. 23.
- [23] Here, I am satisfied that the sentencing judge did not commit an error in principle, fail to consider a relevant factor, or overemphasize appropriate factors in crafting a sentence that he considered to be appropriate for the particular individual circumstances confronting Mr. Joseph.
- [24] Mr. Joseph says that the sentencing judge used a conditional sentence as a rehabilitative tool, failing to recognize that it is primarily punitive in nature. I do not agree with this submission. Conditional sentences fulfill both punitive and rehabilitative purposes. This was made clear by Chief Justice Lamer, writing for the Court, in *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61, where he said this:
- [23] There has been some confusion among members of the judiciary and the public alike about the difference between a conditional sentence and a suspended sentence with probation. This confusion is understandable, as the statutory provisions regarding conditions to be attached to conditional sentences (s. 742.3) and probation orders (s. 732.1) are very similar. Notwithstanding these similarities, there is an important distinction between the two. While a suspended sentence with probation is primarily a rehabilitative sentencing tool, the evidence suggests that Parliament intended a conditional sentence to address both punitive and rehabilitative objectives.

[Emphasis added.]

- [25] It was for the sentencing judge to balance those objectives in imposing an appropriate sentence. Indeed, it is apparent that the sentencing judge did balance these objectives, having regard for denunciation and deterrence, the protection of the community, and the provision to Mr. Joseph of an opportunity to foster his rehabilitation.
- [26] Similarly, the judge was fully aware of, and took into account, the impact on the community of Mr. Joseph's proclivity to criminal behaviour, including whether that behaviour precluded the imposition of a conditional sentence. Implicitly his conclusion that Mr. Joseph's behaviour would not endanger the community is one that he was entitled to draw and is entitled to deference.
- [27] Finally, the judge took into account Mr. Joseph's history of breaching conditions. He was aware of the likelihood that Mr. Joseph would breach his conditions in the future. Again, in my view, it was open to the judge to impose a conditional sentence even though it was clear that there was a high risk that its conditions would be breached. The sentencing judge considered a conditional sentence order to be appropriate partly because the severity of punishment for breaching its terms might assist in controlling Mr. Joseph's behaviour. It would also provide a context that gave him the opportunity to demonstrate that he was working to mend his ways. In my view, given that a conditional sentence order may appropriately be used to further rehabilitation, it cannot be said that imposing such a sentence in this case involved an error in principle.
- [28] In summary, the sentencing judge identified all of the relevant factors to be taken into account in crafting a sentence suitable to the particular, and difficult, circumstances faced by Mr. Joseph and the community in which he lives. He took into account Mr. Joseph's status as an Aboriginal offender, the prerequisites for the imposition of a conditional sentence order, and the principles of sentencing incorporated within the Criminal Code. As a result, it would not be appropriate for this Court to substitute a different view of what would be a proper sentence. The sentence is not demonstrably unfit and no error has been shown in the exercise of the sentencing judge's discretion.

Did the sentencing judge err in requiring formal evidence to demonstrate the existence of "special circumstances" to justify enhanced credit?

- [29] Having rejected the ground that the sentencing judge erred in imposing a conditional sentence, it is unnecessary to consider the remaining two grounds of appeal. It is apparent, however, that courts have diverged in their view of the nature of the evidence required from an accused who seeks to establish that the circumstances justify enhanced credit for time spent in pre-sentence custody. Some courts have required an accused to lead formal proof or viva voce evidence of the circumstances that justify granting enhanced credit: see, for example, *R. v. A.W.C.*, 2010 BCPC 197; *R. v. Hindmarch*, 2010 BCSC 1257; and *R. v. J.B.*, 2011 BCPC 158. Other courts have expressed the view that nothing in the Truth in Sentencing Act, S.C. 2009, c. 29, which introduced the current rules governing the granting of enhanced

credit, warrants a departure from the general rules governing the manner in which facts are presented to the court for the purpose of sentencing: see, for example, *R. v. Cahoose* (25 March 2011), Kamloops No. 90534-2 (B.C.S.C.); *R. v. Whillock* (4 June 2012), Port Coquitlam No. 85568-C2 (B.C.P.C.).

[30] I have concluded that it is appropriate to provide some guidance on this important matter of practice. Section 719 of the Criminal Code reads, in part, as follows:

(3) In determining the sentence to be imposed on a person convicted of an offence, a court may take into account any time spent in custody by the person as a result of the offence but the court shall limit any credit for that time to a maximum of one day for each day spent in custody.

(3.1) Despite subsection (3), if the circumstances justify it, the maximum is one and one-half days for each day spent in custody unless the reason for detaining the person in custody was stated in the record under subsection 515(9.1) or the person was detained in custody under subsection 524(4) or (8).

[31] The Truth in Sentencing Act does not explicitly amend the traditional sentencing procedure. There is nothing in s. 719 that amends the procedure by implication. There is no reason in principle to depart from the general rules applicable to all sentencing hearings when a court is asked to decide whether the circumstances justify granting enhanced credit.

[32] Sections 723 and 724 of the Code make it clear that a court may rely on submissions, hearsay and agreed facts in sentencing. *R. v. Gardiner*, [1982] 2 S.C.R. 368, 68 C.C.C. (2d) 477, confirms that strict evidentiary rules do not apply unless matters are contested. Writing for the majority, Dickson J., as he then was, wrote at 414:

It is a commonplace that the strict rules which govern at trial do not apply at a sentencing hearing and it would be undesirable to have the formalities and technicalities characteristic of the normal adversary proceeding prevail. The hearsay rule does not govern the sentencing hearing. Hearsay evidence may be accepted where found to be credible and trustworthy. The judge traditionally has had wide latitude as to the sources and types of evidence upon which to base his sentence. He must have the fullest possible information concerning the background of the accused if he is to fit the sentence to the offender rather than to the crime.

[33] In my view, the same general principles that govern providing the court with the necessary facts or information for the purpose of sentencing apply to s. 719(3.1).

[34] Given the basis on which I would dispose of this appeal, it is unnecessary to consider whether the sentencing judge in fact required formal proof of the circumstances of Mr. Joseph's pre-sentence custody.

Conclusion

[35] I would grant the application for leave to appeal sentence, but dismiss the appeal.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Mr. Justice Frankel"

I agree:

"The Honourable Madam Justice Neilson"

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Prepared on 29 October 2026 · Esheria