

CANADA / JUDGMENT

R. v. Kelly

2002 BCCA 190

COURT

British Columbia Court of Appeal

DECIDED

15 March 2002

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2002BCCA0190 Citation: R. v. Kelly Date: 20020315 2002 BCCA 190 Docket: CA028834 Registry: Victoria COURT OF APPEAL FOR BRITISH COLUMBIA ORAL REASONS FOR JUDGMENT Before: The Honourable Mr. Justice Hall March 13 & 15, 2002 The Honourable Madam Justice Saunders The Honourable Mr. Justice Thackray Victoria, B.C. BETWEEN: REGINA RESPONDENT (PLAINTIFF) AND: DIRK THOMAS KELLY APPELLANT (DEFENDANT) Peter A. Gibb appearing for the Appellant Robert A. Mulligan, Q.C. appearing for the Crown Respondent

- [1] HALL J.A.: The appellant Kelly pleaded guilty to several offences under the Criminal Code, namely, break and enter and committing sexual assault (s.348(1)(b)), threatening to use a weapon in a sexual assault (s.272(1)(a)), and confining (s.279(2)). The offences occurred on October 1, 2000.
- [2] The appellant came through a rear door of a home, entered a bedroom where the female complainant was asleep, and sexually assaulted the complainant by touching her sexually and placing his fingers in her vagina. No weapon was found but in his dealings with the complainant he threatened to use a weapon. The appellant eventually fell asleep as he was speaking to the complainant. At about 8:00 a.m. the police were called to the residence and discovered the appellant asleep on a bed. He was awakened and handcuffed. He appeared to be surprised and agitated. He had cut a phone line in the house and the complainant had to go next door to phone the police. She had earlier tried to get out of the house but had been restrained from doing so by the appellant. It is clear from a victim impact statement that the assault had a serious effect on the complainant, who thereafter was fearful for her safety and because of her fears decided to move from where she had been living at the time of the assault.
- [3] The appellant was aged 20 when this offence occurred and is now 22. He is of partly aboriginal background. His life as a child was very chaotic. He got into considerable trouble as a young offender. He acknowledged to a probation officer that he had been in trouble since he was 7. Prior to this offence he had been out of trouble with the law since 1996. He was in a common law relationship in 1999-2000 but we were told this is no longer an existing relationship. He has no contact with his father and has had a somewhat up and down relationship with his mother. His employment record discloses no history of long-term jobs

although post the date of the offences he worked for a construction company in Surrey and got a good report. That company stands ready to re-employ him. He has had much trouble with alcohol. It appears on the date of the offences here he had ingested alcohol and a drug, Ecstasy. As I noted, he fell asleep at the premises of the complainant.

- [4] Dr. Eaves, a psychiatrist who assessed the appellant, opined that if he could deal with his alcohol problem the appellant does not have a problem of sexual deviation that would render him likely to repeat such acts.
- [5] The Crown at trial suggested a sentence in the range of 6 years and this was the sentence imposed by the judge in July 2001. The defence had suggested a conditional sentence but now acknowledges that was not a realistic suggestion. The appellant in this court suggests that a sentence of about 3 years would suffice, having regard to the offence and particularly to the circumstances of the offender, who has no other adult convictions. The Crown submits that the sentence imposed was an appropriate one.
- [6] A number of authorities were referred to by both counsel, including *R v. Reszitaryk* (1999), B.C.C.A., CA025706, where a conditional sentence was imposed and sustained in this court for a 35 year old offender for a sexual assault of the class of rape through to *R. v. Bielecki* (1999), 128 B.C.A.C. 310 where this court upheld a sentence of 6 years imposed on an offender who was aged 40 and had been convicted of sexual assault and confinement. That appellant was 40 years old, had a lengthy record and had previously been sentenced, in 1981, to 6 years for a rape conviction. Like so many of these offenders, both *Reszitaryk* and *Bielecki* had problems with alcohol.
- [7] This young appellant, who has also had alcohol problems, has an aboriginal background. That circumstance was pointed out to the trial judge but not adverted to by him in his reasons for sentence. It seems likely the learned judge would have been cognizant of that circumstance when he imposed sentence. Counsel before us laid considerable stress on the circumstance that this young man has had a most unfortunate background, marred by violence and drinking by his caregivers when he was a child.
- [8] I should like to refer to the following comments made in *R. v. Wells* (2001), 1 S.C.R. 207: Notwithstanding what may well be different approaches to sentencing as between aboriginal and non-aboriginal conceptions of sentencing, it is reasonable to assume that for some aboriginal offenders, and depending upon the nature of the offence, the goals of denunciation and deterrence are fundamentally relevant to the offender's community. As held in *Gladue*, at para. 79, to the extent that generalizations may be made, the more violent and serious the offence, the more likely as a practical matter that the appropriate sentence will not differ as between aboriginal and non-aboriginal offenders, given that in these circumstances, the goals of denunciation and deterrence are accorded increasing significance. ... The analysis for sentencing aboriginal offenders, as for all offenders, must be holistic and designed to achieve a fit sentence in the circumstances. There is no single test that a judge can apply in order to determine the sentence. The sentencing judge is

required to take into account all of the surrounding circumstances regarding the offence, the offender, the victims, and the community, including the unique circumstances of the offender as an aboriginal person. Sentencing must proceed with sensitivity to and understanding of the difficulties aboriginal people have faced with both the criminal justice system and society at large. When evaluating these circumstances in light of the aims and principles of sentencing as set out in Part XXIII of the Criminal Code and in the jurisprudence, the judge must strive to arrive at a sentence which is just and appropriate in the circumstances. ...

- [9] The facts of this case are serious and the sentencing judge was entirely correct to impose a penitentiary sentence. The circumstances of this offender, including his age and the fact that he has begun in the recent past to show some commitment to being employed and trying to lead a more orderly life, persuades me that a somewhat shorter sentence may achieve the sentencing purposes of deterrence and rehabilitation. The latter is of particular significance here, where we are dealing with an offender who had just turned 20 at the time of the commission of these offences. Hopefully, the combination of federal time and a period of parole supervision may dissuade this young person from a life of crime and the dreary repetition of offences and resultant incarcerations.
- [10] Substantially based on the particular circumstances of this young aboriginal offender, I would substitute for the sentence of 6 years a sentence of 4 years. To that extent I would allow this appeal.
- [11] SAUNDERS J.A.: I agree.
- [12] THACKRAY J.A.: I agree with the disposition of this appeal as articulated by Mr. Justice Hall.
- [13] I will comment on one of the submissions of Crown Counsel, Mr. Mulligan. He stated that "the grounds of appeal may well justify reducing the term of imprisonment to 3 or 4 years if this case is seen to properly fall at the lower end of the perceived range." However, he went on to categorize "this type" of offence as involving both terror to the victim and a "very serious infringement" of personal security. He thereupon submitted that there should be a reconsideration, presumably by this Court, of the generally accepted sentencing range for this type of offence.
- [14] Mr. Mulligan put this into the context of the pressing need to provide security against sexual assault, particularly for women, and also within the context of the sentencing range for home invasions. In suggesting this comparative approach I do not take him to be in any way minimizing the seriousness of home invasions. Quite the contrary. In his oral presentation he made it clear that he was suggesting consideration should be given to increasing the range of sentence for serious sexual assaults in keeping with the increased range for aggravated break-ins.

- [15] I find strength in that submission. The unauthorized invasion of a person's physical integrity is an extremely serious crime. Particularly when it is in combination with an unaware, defenceless victim and a break-in of a home. I would note that the range that is presently generally accepted for sexual assaults was set about 18 years ago. I see no reason why consideration of the range of sentences for serious sexual assaults should not be reconsidered. Nor do I see any harm in taking into account the comparative approach suggested by Crown counsel.
- [16] However, the case at bar is not an appropriate case for such a review in that even if the bar was raised, the facts of this case, and the section of the Criminal Code under which the charge was laid, make the sentence excessive.
- [17] HALL J.A.: The appeal is allowed. The sentence is varied in the terms set forth in the judgment given. "The Honourable Mr. Justice Hall"

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