
CANADA / JUDGMENT

R. v. Lankin

2002 BCCA 118

COURT

British Columbia Court of Appeal

DECIDED

14 February 2002

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R. v. Lankin

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Docket:

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Madam Justice Rowles

February 14, 2002

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Donald

Victoria, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

BRUCE FRANKLIN LANKIN

APPELLANT

J.J. Blazina

appearing for the Appellant

Robert A. Mulligan, Q.C.

appearing for the Respondent

- [1] ROWLES, J.A.: This is an application for leave to appeal a sentence of 18 months incarceration imposed on September 28, 2001, following the appellant's conviction by a jury on August 16, 2001 on three counts of indecent assault and three counts of gross indecency.
- [2] Counsel for the appellant argues that the learned sentencing judge erred in principle by giving undue emphasis to the principles of deterrence and denunciation, erred by giving undue emphasis to the absence of remorse, and erred in deciding that the principles of deterrence and denunciation could not be met in the circumstances of this case by the imposition of a conditional sentence. It is the appellant's submission that a conditional sentence of 24 months would have been an appropriate sentence in this case.
- [3] The respondent's position is that the sentence imposed is fit and ought not to be disturbed. In putting forward the Crown's position that there is no proper foundation for this Court to interfere with the sentence, Mr. Mulligan argues that the nature and extent of the offences committed in this case would warrant a much longer term of imprisonment, well in excess of the two-year statutory limit for conditional sentences under s. 742.1(a) of the Criminal Code. While acknowledging that factors such as the appellant's record in the many years since the offences and his current health problems would be proper cause for lessening the otherwise appropriate period of incarceration, Mr. Mulligan argues that incarceration was necessary to provide a just sanction, proportionate to the gravity of the offences and the degree of responsibility of the offender, and to meet the continuing and pressing need for denunciation and general deterrence that are essential parts of the larger societal duty to protect children from the type of serious harm done here.
- [4] The offences were committed by the appellant in the late 1970's and involved fondling, oral sex, anal intercourse and, in respect of one complainant, vaginal intercourse. At the time the offences were committed the appellant was 33 years old and the three complainants were between the ages of 8 and 11.
- [5] The appellant was the uncle by marriage of one of the complainants. The offences occurred after the appellant had separated from his wife. The appellant had asked his sister-in-law if her daughter could do cleaning work for him in his trailer. That was agreed and it was during the cleaning sessions that the offences took place, initially involving only the appellant's niece but later her two friends.

- [6] The complainants have different memories of the frequency and duration of the offences but it appears that the offences took place over a period of months, not years.
- [7] The appellant is now 57 years of age. He is in poor health, having suffered a major heart attack in 1996, as well as two further attacks. He is on a disability pension. In addition to his heart condition, the appellant suffers from poor vision, asthma, gallstones and a thyroid condition. A report from his family physician lists the many medications he takes presumably to keep his medical condition stable.
- [8] The appellant has a criminal record but other than these offences, he has not been convicted of any other sexual offences and has not been convicted of any serious criminal offences since 1973.
- [9] A psychologist was asked to assess the risk of the appellant re-offending and his report was before the learned sentencing judge. Based on the results of psychometric testing, as well as the appellant's personal history and circumstances, and his recent ill-health, the psychologist opined that there was a low risk of re-offence. The psychologist also expressed the opinion that the appellant was not a psychopath and was of a compliant personality or nature, making him a good candidate for community supervision.
- [10] Before the learned trial judge, Crown counsel sought a sentence of 4 years incarceration but the trial judge did not accede to that submission. It was defence counsel's submission that a conditional sentence would be appropriate but that submission was not accepted either.
- [11] In his reasons, the sentencing judge made reference to the applicable sentencing provisions in the Criminal Code and then summarized the submissions of counsel.
- [12] Some of the arguments advanced by the appellant before us were to the effect that the trial judge had overlooked or failed to adhere to what has been said by the Supreme Court of Canada in relation to the imposition of conditional sentences. Because of those arguments, I think it is important to note that the trial judge made reference to the following submissions of defence counsel and must therefore have had them in mind in arriving at his decision on sentencing:
1. Based on what was said by the Supreme Court of Canada in *R. v. Proulx* (2000) 140 C.C.C. (3d) 449, no offences or categories of offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment. 2. There should be no presumption in favour of or against a conditional sentence for specific offences; 3. Parliament has sent a clear message to the judiciary to reduce the use of incarceration as a sanction; 4. Once the prerequisites of s. 742.1 are met, the court should give serious consideration to the possibility of a conditional sentence in all cases by examining whether it is consistent with the fundamental purpose and principles set out in s. 718 to s. 718.8. 5. A conditional sentence can provide significant denunciation and deterrence. [13] The trial judge concluded that a sentence of imprisonment rather than a conditional sentence was necessary. In that regard he said:

- [16] ... I have come to the conclusion that in this case there must be a sentence of imprisonment, not a conditional sentence. I do accept there is an element of breach of trust in this case. It was precisely because the accused was related to W.P.'s family that he was able to engage her in the offending acts. All three of the complainants knew and thought of the accused as W.P.'s uncle. His initial contact with her was through his sister-in-law and, of course, as long as she and the other complainants were in his trailer, ostensibly to clean, he was entrusted with their safety. [17] Secondly, I do not accept the accused's denial. He was convicted of these offences by a jury that heard and considered all the evidence. In my view the jury's conclusion was the right one and the accused's denial of guilt speaks loudly of a lack of remorse and an unwillingness to accept responsibility for the offence. [18] Thirdly, the offences are serious ones. They are as invasive as offences of this sort can be. Two of the three complainants attested to two offences involving anal intercourse and, in one case, sexual intercourse. The use of the complainants as a means to gratifying his sexual desires was not confined to fondling. It involved complete sexual acts and, as well, it involved the use of sexual aids such as vibrators and the use of a camera to take pictures of them in a state of undress. [19] In my view the principles of sentencing set out in s. 718 and 718.1, with reference to 718.2, are not met in this case by the imposition of a conditional sentence. In coming to that conclusion, I have considered, in particular, the case of *R. v. S. (N.R.)* (2000) 140 C.C.C. (3d) 553, and I have also considered the case of *R. v. C.A.M.* (1996) 1 S.C.R. 500 * * * [21] It is my view that the principles set out in s. 718, particularly denunciation and deterrence, require the imposition of a custodial sentence in this case. It is my view that the three to four year sentence sought by the Crown is in excess of what is appropriate here. While it is difficult to calibrate the length of the sentence to the seriousness of the events and all of the exigent circumstances, it is my view that a sentence of 18 months is appropriate and I so order
- [14] As Mr. Blazina observed when he began his able submissions on behalf of the appellant in this case, there is a limited scope for appellate review on a sentence appeal. In recent years, the Supreme Court of Canada has made plain that on an appeal, the sentence imposed by the trial judge is entitled to considerable deference from an appellate court. Absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only vary a sentence imposed at trial if the sentence is demonstrably unfit.
- [15] In this case, the trial judge first made reference to the various provisions of the Criminal Code that he considered to be applicable. There is no suggestion here that the trial judge erred by failing to take into account a relevant factor. Instead, the appellant asserts that the trial judge erred by placing undue emphasis on the principles of deterrence and denunciation and erred by giving undue emphasis to the absence of remorse. The appellant also argues that the trial judge erred in deciding that the principles of deterrence and denunciation could not be met in the circumstances of this case by the imposition of a conditional sentence.

- [16] As set out in his reasons, the trial judge considered that a term of imprisonment of 18 months was appropriate and he declined to permit the appellant to serve his term in the community. It is implicit in his reasons that the trial judge found that the appellant would not endanger the safety of the community by serving a conditional sentence but that such a sentence would not accord with the objectives of s. 718 of the Criminal Code. He concluded that even if incarceration was not necessary to deter the appellant from similar future conduct, incarceration was necessary to denounce his conduct and to deter others from engaging in similar conduct.
- [17] I do not read Mr. Justice Cullen's reasons to mean that in the case of sexual offences against children, the need for deterrence and denunciation necessarily excludes the imposition of a conditional sentence. Rather, I read his reasons to mean that in this case, the nature of the conduct constituting the offences, which included anal intercourse with two of the complainants and vaginal intercourse with one of them, had to be regarded as serious, and that when such invasive conduct had been directed at children, the need to denounce and deter such conduct was the dominant principle to be applied in sentencing. Nor do I read his reasons to mean that a lack of remorse would exclude the imposition of a conditional sentence. Rather I read his reasons to mean that the goals of restorative justice may not be achieved when the perpetrator has not accepted responsibility for his criminal acts.
- [18] With deference to appellant's counsel and the thorough arguments he put forward on the appellant's behalf, I am unable to say that the trial judge, in declining to impose a conditional sentence, gave undue weight to the principles of deterrence and denunciation or that he erred by proceeding on the assumption that in the case of sexual offences against children, a conditional sentence could never meet the need for deterrence and denunciation.
- [19] The Supreme Court of Canada has emphasized that sentencing is an individualized process in which the trial judge has considerable discretion in fashioning a fit sentence. It was up to the trial judge to assess the degree of denunciation and deterrence required in the circumstances
- of this case and, in my view, deference must be given to his decision.
- [20] I would grant leave but dismiss the appeal.
- [21] RYAN, J.A.: I agree.
- [22] DONALD, J.A.: I agree.
- [23] ROWLES J.A.: Leave is granted but the appeal is dismissed.

"The Honourable Madam Justice Rowles"

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