
CANADA / JUDGMENT

R. v. Mack

2001 BCCA 688

COURT

British Columbia Court of Appeal

DECIDED

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

The Honourable Mr. Justice Lambert

November 28, 2001

The Honourable Mr. Justice Esson

The Honourable Madam Justice Huddart

Victoria, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

LEONARD RAYMOND MACK

APPELLANT

Hugh M.G. Braker, Q.C.

Appearing for the Appellant

Robert A. Mulligan, Q.c.

Appearing for the Crown Respondent

- [1] LAMBERT J.A.: An application to extend the time for bringing the application for leave to appeal from sentence has been granted. This then is an application for leave to appeal from sentence and, if leave is granted, the appeal itself.
- [2] The circumstances of the offence are that a young woman was packing up her possessions preparatory to moving from Victoria to Vancouver and her apartment was full of packing equipment and her sleeping arrangement was that she would sleep on a mattress on the floor. She came home from a mild celebration and went to bed about 1:00 a.m. She was attacked in the early hours of the morning by an assailant, who picked up his weapon while passing through a room adjacent to the room where she was sleeping. His weapon was an iron for ironing clothes. The assailant had broken into the basement apartment through a ground level window, which in normal circumstances would have been closed with a dowel, but because the apartment was being vacated, was not firmly closed against the possibility of intruders. He broke in through that window, picked up the iron in the first room he entered and must have moved into the second room, where the assault occurred.
- [3] The victim received several severe wounds on the head, wounds to the bone, and she also received wounds on her arms and hands through, at some stage, trying to protect herself. Neither the victim nor the assailant had a clear recollection afterwards of the precise events, but the room was described as being "covered in blood", with blood spatters on the walls.
- [4] Mack, the assailant, who was convicted of this offence, had imbibed alcohol during the course of the evening and may also have consumed drugs, I think cocaine. He apparently has no recollection of the event itself and in the end no description is available, and there is no knowledge, of the motivation for this assault. That has added to the impact on the victim and the terror that she experienced. It has taken her some considerable time, first of all, to get back to work and, second, to try to resume a normal life. The effects of this experience will, I am sure, be with her always.
- [5] The circumstances of the offender are that he is a member of the Tseshah Band. His mother consumed alcohol and perhaps drugs and was an unsatisfactory mother. Mack moved through a long series of foster homes and has now been diagnosed as suffering from foetal alcohol effects, though that is distinguished from full foetal alcohol syndrome. He was guilty of antisocial behaviour throughout his childhood, leading to a conviction for assault in 1997 and 6 months later to a conviction for robbery. He received, respectively, 1 year probation and then 8 months in jail for the robbery. He also had convictions in 1997 for failure to

attend court and for theft under \$5,000. In 1999 he was convicted of possession of a scheduled substance and, also in 1999, he was convicted of possession of property under \$5,000 obtained by a crime. He had been charged with a number of criminal offences at the time he was arrested for this offence. Those other offences included possession of a stolen cheque, but there were also charges of fraud and uttering. He was under release in relation to those offences and under a promise to appear when he was arrested and charged, as he was in this case, with break and entry and commission of the indictable offence of aggravated assault in a dwelling house by night, under section 348(1)(d) of the Criminal Code. He remained in custody. The Crown said that he would have been kept in custody if an issue had arisen in relation to the other offences but the matter never came up and he remained in custody only in relation to this offence.

- [6] After several months in custody Mack pleaded guilty to the count of possession of the stolen cheque and he received a sentence of 40 days. The proceedings on the other earlier counts were stayed. In the end, after his arrest, 23 months went by before he was convicted of this offence. The 40 days to which he was sentenced for possession of the stolen cheque were a part of that 23 months.
- [7] The sentencing judge in this case reserved judgment following the submissions on sentencing and when he did give his reasons for sentencing they were extensive and clearly carefully considered. After looking at authorities that might be thought to have indicated an appropriate range of sentence for similar offenders committing similar offences in similar circumstances, and after perhaps making adjustments to those cases, as one must do because none are exactly the same, to take into account the very grave nature of this aggravated assault, in this case in the course of a break and entry, the sentencing judge concluded that a sentence of 9 years' imprisonment was the sentence that most fitted the circumstances of this offence and this offender.
- [8] The sentencing judge then came to consider whether there should be any adjustment to that sentence to take into account the 23 months of pre-trial custody. After mentioning the guideline of doubling pre-trial custody and applying it as a reduction from a sentence otherwise in the appropriate range, the sentencing judge said this:

I note the Supreme Court of Canada last week, in a case that I do not have, doubled time served in a five month situation to ten months and then gave the accused person credit for a year. So, they follow the rule and our Court of Appeal follows the rule. In this particular case, I do not intend to follow the rule and I appreciate that I may well be putting the Crown and Mr. Mack in harm's way by an appeal, but I feel that it is necessary in this case and I intend to give reasons for that. In this particular matter, you will be aware from my reasons that Mr. Mack was on a recognizance of this court for a series of serious criminal offences that occurred at the time these events occurred. Those matters, I have no idea whether they were ever dealt with, but in fact, he then appeared in court in detention on this matter, if I may refer to it, that is, the aggravated assault, breaking and entering. It is my view that he was equally in custody on the fraud, uttering and personation charges and in my view I can take that into consideration. Secondly, there has been very little

done by way of assessment or counselling in this particular matter and it is my view that Mr. Mack, if he is to return to society a person who can be trusted in society, must be assessed and must be counselled by the very best persons. Cultural modification that has occurred at Wilkinson Road is not the answer in his specific case. I therefore feel that the two years that he has served in custody have been of very little assistance to him other than perhaps as a specific deterrence. What I intend to do on this sentencing I understand is not being done by way of denunciation or general deterrence or, again, even for retribution. It is being done to attempt, in a way, to assist him. He requires a significant period in custody. In my view, a sentence reduced to five years will be totally inadequate for that purpose. I intend to give him credit for the time he has served. I do not intend to double that amount. He will receive, then, a sentence in this particular matter in the following way. Mr. Mack, would you stand up, please, sir. On this matter, I sentence you to a period of seven years in custody. (Emphasis added.)

- [9] The trial judge apparently did not have the benefit of the explanation that was given to us, about the offences for which Mack was held in custody. He was held in custody for this offence only for those 23 months, subject to the 40 days and 1 day on an earlier charge that he served during that 23 month period. It is fair to say that the period of pre-trial custody for this case was 22 months, or just under 22 months. So, when the sentencing judge says it is his view that he was equally in custody on the fraud, uttering and impersonation charges, and that he can take that into consideration, I would express the view that Mack had been at large on those offences on a promise to appear and, in my view, except for the 40 days, it was an error, in viewpoint at least, or on appreciation of the facts, to take into consideration the suggestion that Mack was in custody for the other offences.
- [10] I turn then to the part of the sentencing judge's reasons that start with the word "Secondly ...". What had happened was that since Mack was in pre-trial custody, there was only a very limited availability of assessment and counselling and the sentencing judge says that assessment and counselling are very important in Mack's case. I think that because of Mack's membership in the Tseshah Band and because of the foetal alcohol effects, the sentencing judge knew about the native brotherhood program in which Mack had participated, but he said that the "Cultural modification that has occurred at Wilkinson Road is not the answer in his specific case." The sentencing judge then said "I therefore feel that the two years that he has served in custody have been of very little assistance to him other than perhaps as a specific deterrence."
- [11] On behalf of the appellant, it is argued that one of the reasons for having a guideline of 2:1 for time spent in pre-trial custody is because of the unavailability of counselling programs. So to say that that guideline is not going to be applied, or is only going to be applied on the basis of 1:1, because no counselling programs were available in pre-trial custody, is standing the principle underlying the guideline on its head. The reason for 2:1 is because the appellant has not got whatever access is available to assessment and counselling. I would also add, as has been indicated by Crown counsel in this case, that part of counselling and part of doing the utmost that can be done for this man, would almost certainly include the

cultural programs that can be made available for him, and which seem to represent a part of his best hope for behaviour modification.

- [12] In short, I consider that while the law does not require adherence to the 2:1 principle, the basis on which it was approached by the sentencing judge indicates a misapplication in this case of the principle, and not an exercise of discretion in a way consistent with the reasons underlying the 2:1 principle.
- [13] I consider that, as a basic starting point, the sentence of 9 years is longer than this court has applied in *R. v. Desjarlais* (1996), 77 B.C.A.C. 43 (B.C.C.A.) or in *R. v. Robert* (1996), 108 C.C.C. (3d) 83 (B.C.C.A.). But this was a very savage and unprovoked attack on a young woman who was asleep in her own bed in her own apartment and, in my opinion, 9 years is not outside the appropriate range in this case. But I consider that this application, based to some extent on a misapprehension of the facts by the sentencing judge, of the guidelines for taking into account pre-trial custody, warrants the reduction of the 9 year sentence to a sentence which, rounding out the numbers, would be a sentence of 5 years' imprisonment.
- [14] It is important to say that nothing in the materials or in the submissions could be said to indicate that Mack's prospect of rehabilitation would be better after serving a 7 year sentence than it would be after serving a 5 year sentence. And in my opinion a sentence of longer than 5 years, after serving 23 months of pre-trial custody, cannot be justified as being for the protection of society; it would be nothing other than the warehousing sentence that the sentencing judge was at pains to avoid.
- [15] I would grant leave to appeal this sentence and substitute a sentence of 5 years' imprisonment for the sentence of 7 years imposed by the sentencing judge.
- [16] ESSON J.A.: I agree in substance with most, virtually all, of what has been said by Mr. Justice Lambert. Nevertheless, I would not interfere with the sentence. Looking at the matter in a broad view, I think that to reduce the sentence to one of less than 7 years from the date of conviction would likely be to reduce the sentence to one that is less than fit. I agree that the reasons given by the trial judge with respect to pre-sentence custody leave much to be desired. Nevertheless, it is an area in which, upon the authority in the cases of the Supreme Court of Canada, discretion is conferred on the trial judge.
- [17] As a matter of interest, the trial judge was also the trial judge in the case of *R. v. C.A.M.*, [1996] 1 S.C.R. 500. In that case, he took the unusual, almost unique, position of refusing to give any credit for time served. With respect to that, Chief Justice Lamer, giving the judgment of the court allowing an appeal from the decision of this court, said:
96. After taking into account all the circumstances of the offence, the trial judge sentenced the respondent to 25 years' imprisonment. In imposing that term of imprisonment, Filmer Prov. Ct. J. was at liberty to incorporate credit for time served in custody pursuant to s. 721(3) of the Code, but chose not to. I see no reason to believe that the sentencing order of Filmer Prov. Ct. J. was demonstrably unfit.

[18] The matter was touched upon in a more recent decision of the Supreme Court of Canada in *Wust v. The Queen*, [2000] 1 S.C.R. 455; 2000 SCC 18. Madam Justice Arbour, giving the judgment of the court, dealt with the question of pre-sentence custody in paragraphs 44 and following of her reasons. She endorsed as being generally appropriate the "often applied ratio of 2:1". However, she concluded that passage by saying:

... The credit cannot and need not be determined by a rigid formula and is thus best left to the sentencing judge, who remains in the best position to carefully weigh all the factors which go toward the determination of the appropriate sentence, including the decision to credit the offender for any time spent in pre-sentencing custody.

[19] This was, as Mr. Justice Lambert emphasized, a very serious offence. Any breaking into a dwelling house is a very serious offence, carrying a maximum penalty of life imprisonment. The circumstances of this offence, involving a nocturnal invasion of a dwelling house with extreme violence, are certainly at the high end of seriousness.

[20] I would, with respect, adopt a passage in Crown counsel's written submission to us, where he said this:

The sentencing judge's concern about useful treatment and other help is reflected in the reasons given for not granting 2:1 credit for the pre-sentence time in custody. With respect, those reasons are open to question, but the ultimate issue here is whether the lengthy sentence, however calculated, is fit within the meaning of the law. This is not an ordinary case of its kind. Much more is required than simple incarceration. Hopefully, notice of the appellant and others like him will result in the changes needed, but for now the extreme nature of his very worrisome, unexplained violence and the particular difficulties of dealing with suspected FAE or FAS mean that, in the absence of any reasonable alternative, an unusually long term of imprisonment is necessary and legal. This is regrettably so with full regard, such as the sentencing judge had, for the appellant's tragic background.

[21] For those reasons, although I would grant leave to appeal, I would dismiss the appeal.

[22] HUDDART J.A.: Had I been the trial judge, I might well have imposed a sentence considerably higher than the equivalent of 9 years. Parliament has fixed the maximum sentence of life for the offence of breaking and entering a dwelling house and committing an indictable offence. The nocturnal invasion of an apartment and brutal assault with a weapon, causing severe injuries to a sleeping woman, must be among the worst conduct for which this offence is designed.

[23] The offender, while only 20 years of age, suffers from foetal alcohol effects and has a record of previous violence and a history of unpredictable assaultive conduct within his family. He has a propensity for violence. Nevertheless, like my colleagues, I cannot say the trial judge erred when he imposed the equivalent of a 9 year sentence.

[24] I agree with Mr. Justice Lambert, however, that the trial judge erred in his consideration of the time spent in pre-trial custody. Like him, I would give double credit for that dead time. It follows that I too would grant leave to appeal and vary the sentence to one of 5 years.

[25] LAMBERT J.A.: Leave to appeal is granted. The sentence is varied from a sentence of 7 years to a sentence of 5 years' imprisonment.

"The Honourable Mr. Justice Lambert"

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