
CANADA / JUDGMENT

R. v. Manca

2019 BCCA 280

COURT

British Columbia Court of Appeal

DECIDED

18 July 2019

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2019 BCCA 280 R. v. Manca

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Manca,

2019 BCCA 280

Date: 20190718

Docket: CA46013

Between:

Regina

Respondent

And

Shawn Lorne Manca

Appellant

Before:

The Honourable Madam Justice Newbury

The Honourable Madam Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Provincial Court of British Columbia, dated
January 9, 2019 (R. v. Manca, New Westminster Dockets 81552-1K, 81552-3KAC).

Oral Reasons for Judgment

Counsel for the Appellant:

B. Zargarian

Counsel for the Respondent:

E.A. Campbell

Place and Date of Hearing:

Vancouver, British Columbia

July 18, 2019

Place and Date of Judgment:

Vancouver, British Columbia

July 18, 2019

Summary:

Appeal from sentence for assault and breach of a court order. The appellant submits that the sentencing judge erred in principle by departing from a joint submission on the length of custody as well as the conditions of a probation order. Held: appeal from sentence allowed, in part. The ten-month term of imprisonment is reduced to nine months to reflect the joint submission. The probationary conditions imposed by the sentencing judge are left intact.

- [1] DEWITT-VAN OOSTEN J.A.: On January 9, 2019, the appellant pleaded guilty in the Provincial Court of British Columbia to assault and breach of an order prohibiting communication. He appeals from sentence on both offences.
- [2] The Crown proceeded by indictment on the assault and summarily on the breach. This Court can hear an appeal on the summary matter because the offences were tried together: Criminal Code, R.S.C. 1985, c. C-46, s. 675(1.1) [Code].
- [3] The sentencing proceeded by way of a joint submission, but only in part. The parties agreed that a global nine months' imprisonment was a fit custodial sentence, minus credit for pre-sentence custody. They also agreed on a probation order. However, the length of probation was in dispute. The Crown sought a three-year order under s. 731(1)(b) of the Code. The appellant submitted that 18 months of probation would be sufficient.
- [4] The sentencing judge imposed a global 10 months' imprisonment, exceeding the joint recommendation by one month. He accepted the Crown's position on the length of probation.
- [5] The appellant contends that the sentencing judge erred in exceeding the nine-month prison term. He does not contest the length of probation. However, he asks that a specific condition of the order be deleted because it was not jointly recommended.

Circumstances of the Offences

Assault

- [6] The assault occurred on October 18, 2018. The appellant and the victim were involved in an intimate relationship and, from time to time, the appellant lived with her. There were three children in the home. The youngest was the child of the appellant and the victim.
- [7] Police were called to the home at approximately 1:20 a.m. The victim told them she was asleep on the couch when the appellant arrived at the residence and accused her of using heroin. She denied using drugs. He pushed the victim into the bedroom and to the ground. He placed his hands around her neck, applying pressure. At some point, the victim lost consciousness. She tried to get the appellant off her by scratching, hitting and attempting to bite him. When police arrived, they observed injuries to the appellant consistent with this description.
- [8] While the incident was unfolding in the bedroom, the victim's 16-year old son entered the room. He pleaded with the appellant to stop choking his mother. The appellant and victim moved into the living room. There was further yelling and pushing between them. In the interim, the son was texting with his aunt and requested that she call police. The aunt did so and police arrived.
- [9] Police saw red marks on the victim's neck as well as her upper left arm. There was dried blood on her face and some of her fingernails were broken. She was later examined by a nurse. There was bruising to the front of the victim's neck; a red linear abrasion on the left side of her neck; she had abrasions on one of her forearms; and abrasions on both wrists.
- [10] The victim's 16-year old son told police he had to tell the appellant three times to stop choking his mother before he ceased. The appellant justified his behaviour to the son by saying that he caught the victim using drugs. He offered this same rationale at sentencing:

Yeah, I -- I did do what I did, but it was the fact that I did catch her with drugs with my three-year-old running around while she's passed out on heroin because when people are on heroin they nod off and [indiscernible] and that's how I caught her nodded off.

Failure to Comply with an Order

- [11] The appellant was arrested for the assault. While in custody, an order was imposed under s. 516(2) of the Code, prohibiting him from contacting the victim.
- [12] Between the start of the order and October 23, 2018, the victim spoke with the appellant by telephone. The call came from a correctional centre. The appellant asked about their child and money he left at the residence. The victim insisted that their relationship was over. The appellant protested. He apologized for the choking. The victim told him to stop calling and blocked the number from which he was calling.

Appellant's Antecedents

- [13] At the time of sentencing, the appellant was 43 years old and employed in Richmond. The employer has indicated a willingness to continue the appellant's employment on his release from custody.
- [14] The appellant has a criminal record with over 25 prior convictions as an adult. The record includes convictions for assault, sexual assault, assault causing bodily harm, assault of a police officer, uttering threats, unlawful confinement, and overcoming resistance by attempting to choke, suffocate or strangle another person.
- [15] Crown counsel informed the sentencing judge of the circumstances surrounding some of the prior offences. The appellant took no issue with the facts.
- [16] This included the fact that in October 2013, the appellant was sentenced in Cranbrook for offences involving his then-girlfriend. The appellant punched her in the face with a closed fist. The victim told police that the appellant kicked her, punched her, broke her nose, smashed her cell phone when she said she was going to call 9-1-1 and choked her six times, to the point that she could no longer breathe. He was holding a knife and waving it around. The appellant was drinking, having consumed 12 to 15 beers.
- [17] In January 2014, the appellant was sentenced for assaulting a stranger at a bus station. He tried to initiate contact of a sexual nature, despite the victim's repeated attempts to push him off.
- [18] Also in January 2014, the appellant received a 14-month jail term for assault causing bodily harm against the same girlfriend who was the victim on the October 2013 matter. The appellant grabbed her by the throat three times and said he was "going to choke her out".
- [19] In January 2016, the appellant received a 24-month prison sentence for various offences arising out of Alberta. These included offences of violence against a woman he met on a dating website. They got into an argument. She told him to leave. He punched and pushed her. She fell and he kicked her in the stomach and back. She tried to escape and the appellant choked her until she passed out. When she regained consciousness, the appellant was still punching and kicking her. It was 24 hours before the victim was able to reach out to a friend and seek assistance. She sustained two broken ribs, numerous bruises and a swollen throat.

Reasons of the Sentencing Judge

- [20] The sentencing judge's reasons are brief.
- [21] He began his analysis by stating that the joint submission for a global nine months' imprisonment was a "gift at such an extreme low end of things" that he was "having trouble" in deciding whether to accept it.

- [22] The judge was concerned about the gravity of the physical conduct that underlay the assault, particularly the choking. He noted that choking "ranks right in there with wounding, maiming and all the other definitions of what constitutes an aggravated assault", the most serious form of assault under the Code.
- [23] The judge was also concerned about the appellant's history of assaultive behaviour, including a propensity for choking:
- [4] With your record of at least I think it is two sexual assaults, one in 2005, one I believe in 2013, if my memory serves me right, the number of assaults, the variety of the assaults, many of which also involve choking another human being, you are hardly in a position to be the white knight on a charger saving other people's lives. You are a fulltime project in and of yourself.
- [5] I have no idea what [sic] in your background, whether it was in your childhood or other parts of your background, you came across the reflex that the way to control another person is to subdue them by choking them, but it is an ingrained pattern in you and one of these days somebody, probably unintentionally by yourself, will either have a heart attack or die or be otherwise very seriously injured by that kind of activity and then you will come to court and say, well, I didn't really mean that consequence, I only meant to have the person quieten down or stop using drugs. But you know, dead is dead.

[Emphasis added.]

- [24] The judge noted that a sentencing court must "really pay attention" to joint submissions. However, he was of the view that the "appropriate sentence [for these offences], although very much at the bottom end, [was] 10 months." He gave the appellant 126 days credit for pre-sentence custody and ordered that while the appellant is serving his custodial sentence, he is not to have contact with the victim or her children: Code, s. 743.21. Finally, the judge imposed three years of probation. The probation order includes the following condition:

You are not to enter into any other intimate relationships without first advising your Probation Officer with the name, address and phone number of your proposed partner.

- [25] The judge acknowledged that this condition was not "suggested by either counsel", but felt it was necessary because "other women have to be aware of what they are getting into".

Grounds for Appeal

- [26] The appellant contends that the sentencing judge erred by exceeding the recommended nine-month prison term and including an "intimate relationships" condition on the probation order. He asks that the custodial term be reduced to nine months and the impugned condition be deleted.

- [27] The respondent Crown agrees that the prison term should be reduced by one month "to reflect the joint submission". However, it submits that the probation order should remain intact. The conditions of that order were not the subject of a joint submission and the impugned condition is reasonable in light of the appellant's history for domestic violence.

Analysis

Standard of Review

- [28] This Court will only interfere with a sentence in the face of material error, or where the sentence is shown to be demonstrably unfit: *R. v. Agin*, 2018 BCCA 133 at paras. 56-57.

Joint Submissions on Sentence

- [29] The principles governing joint submissions are well established. Where the Crown and defence agree to recommend a particular sentence in exchange for a guilty plea, the sentencing judge may only depart from the recommendation where the "proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest": *R. v. Dunkers*, 2018 BCCA 363 at para. 38, citing *R. v. Anthony-Cook*, 2016 SCC 43 at para. 32.

Application of Principles -- Prison Term

- [30] The respondent agrees that the appellant's imprisonment should be reduced from 10 to nine months. The concession is well founded.
- [31] It is incontrovertible that violence in domestic relationships constitutes a serious offence. Indeed, s. 718.2(a)(ii) of the Code deems this form of assault an aggravating factor for the purpose of sentencing. In *R. v. Cuthbert*, 2007 BCCA 585, the Court made clear that violence against one's spouse presents a serious societal concern, rendering denunciation and deterrence the primary principles applicable at sentencing: at para. 57, citing *R. v. Edwards* (1996), 28 O.R. (3d) 54 (Ont. C.A.) at paras. 38-40.
- [32] However, it is not apparent from the judge's reasons how the proposed nine-month custodial term would bring the administration of justice into disrepute, or is otherwise contrary to the public interest. The judge expressed concern about the nature of the violence perpetrated by the appellant and his history of like-behaviour. However, he did not specify his reasons for departing from the joint submission. The judge also imposed a prison term that was only one month longer than the recommendation. This is not a substantial difference.

- [33] The appellant entered guilty pleas, accepting responsibility for his offences, providing certainty in resolution and avoiding the necessity of a trial. Crown counsel told the sentencing judge that the victim was anxious about testifying and, in particular, concerned about her 16-year old son having to participate in the process. The guilty pleas spared the son from having to tell his story in open court. The victim was similarly relieved of this burden.
- [34] Within this overall context, it is my view that the sentencing judge committed errors in principle in rejecting the joint submission for a nine-month prison term.
- [35] First, as required by Anthony-Cook (at para. 58), he was obliged to give counsel an opportunity to make further submissions on the rationale behind their joint recommendation when he determined that he was "having trouble" accepting it. He did not do so.
- [36] Second, the judge imposed a custodial sentence that exceeded the joint submission on custody by only one month. Respectfully, this amounted to "little more than tinkering": Anthony-Cook at para. 63. The judge considered a 10-month prison term to be "at the bottom end" of the accepted range for the two offences. The parties' recommendation was only one month lower. Generally, a one-month difference will not provide a sufficient basis to depart from a joint submission.
- [37] I agree with the sentencing judge that nine months' imprisonment is a lenient sentence for this assault, given the nature of the underlying conduct and, importantly, the appellant's criminal history. His attitude towards the victim, as displayed at the sentencing hearing, is also troubling. He continued to blame her for what transpired.
- [38] However, notwithstanding these features, a one-month difference between the perceived "bottom end" of the available range, and the joint recommendation, cannot reasonably be said to have rendered the proposed sentence "so unhinged from the circumstances of the offence and the offender that its acceptance would leave reasonable and informed persons to believe that the proper functioning of the justice system had broken down": Anthony-Cook at para. 34.

Application of Principles -- Probation Order

- [39] When imposing a probation order, sentencing judges have broad authority under s. 732.1(3) (h) of the Code to direct that the offender "comply with such other reasonable conditions as the court considers desirable ... for protecting society and for facilitating the offender's successful reintegration into the community."
- [40] The principles governing this "residual clause" were addressed by Justice Fitch in *R. v. Duguay*, 2019 BCCA 53. Sentencing judges must ensure there is a "nexus" between any residual condition and "the offender, the protection of the community and the offender's reintegration into the community": at para. 65, citing *R. v. Shoker*, 2006 SCC 44 at para. 13.

- [41] At the same time, judges must be allowed sufficient flexibility to craft sentences that are tailored to the circumstances of the case: Duguay at para. 66, citing *R. v. Knott*, 2012 SCC 42 at paras. 1-2, 10, 43. As a result, there are "only a few judicially-recognized limits on the kinds of conditions that can be imposed under the residual clause": Duguay at para. 66. The judge cannot delegate a judicial function. The conditions of the probation order must be "clear, unambiguous and enforceable". They must also be "reasonable" and "desirable" in light of the objectives of the particular order. Finally, probationary conditions must comply with provincial and federal legislation, as well as the Charter: Duguay at para. 66, citing Shoker at para. 14, and *R. v. Traverse*, 2006 MBCA 7 at para. 24; see also *R. v. Goddard*, 2019 BCCA 164 at paras. 20-23.
- [42] Deciding what residual conditions to include in a probation order involves an exercise of discretion. As such, an appellate court will intervene only where a sentencing judge has erred in principle, imposed a clearly unreasonable condition, or the probation order is manifestly inappropriate or renders the sentence unfit: Goddard at para. 19, citing *R. v. Bourque*, 2013 BCCA 447 at para. 25, and *Knott* at para. 61.
- [43] The appellant does not argue that the condition in this case was clearly unreasonable, led to a manifestly inappropriate order, or rendered the sentence unfit. Instead, he says the sentencing judge erred by imposing a condition that was not recommended by the parties.
- [44] Having reviewed the record, I am not persuaded that the probationary conditions suggested to the sentencing judge formed part of a joint submission, such that the Dunkers and Anthony-Cook principles apply.
- [45] At the start of the hearing, Crown counsel told the judge that the parties agreed on a specific custodial term, but not the length of probation:

Your Honour, my friend and I are in agreement that an appropriate sentence is nine months of custody. Where we differ is the length of probation to follow. The Crown is seeking three years of probation to follow and I'm not entirely sure what my friend's position is but gather that it [is] less than that

- [46] When it was time to speak to the content of the probation order, Crown counsel presented a set of conditions, describing them as ones that were sought by the Crown. The defence made no submissions on the proposed list. Instead, counsel for the defence focused his efforts on the length of probation. The conditions were not put before the Provincial Court as ones that were agreed upon in exchange for a guilty plea, or crafted between counsel:

[Crown counsel]: So I've typed up some conditions and I've given a copy to my friend. [The victim] has served Mr. Manca with family court documents, that was done here in court not long ago, and so hopefully that process will be well under way by the time Mr. Manca gets out and there will be no need to figure out contact with their child beyond that, that will already hopefully be in place by the time he's released, but the Crown is seeking no contact conditions with her and her children, no go contact conditions with her and her children, other than

according to any family court order, no weapons, no alcohol, no drugs and counselling as directed by the probation officer.

[Emphasis added.]

- [47] In light of the manner in which the process unfolded, I agree with the respondent that it was only the length of the custodial term that was presented as a joint submission. At best, the parties shared a common view on appropriate probationary conditions, but standing alone, this does not amount to the equivalent of a joint submission. As noted in para. 10 of *R. v. Smith*, 2004 BCCA 657, when matters proceed by way of joint submission, it is incumbent upon counsel to make clear to the sentencing judge what falls within the scope of the agreement.
- [48] The type of condition complained of by the appellant has been previously endorsed by this Court. See, for example, *R. v. Joy*, 2011 BCCA 189, and *Bourque* at paras. 39-40.
- [49] In the latter case, the appellant was required to "immediately advise" her probation officer "of any close, intimate, familiar, or familial relationships" and "refrain from continuing such a relationship" until that person was told of the appellant's "criminal record and background" in the presence of the probation officer. Justice Bennett held that the condition was logically connected to the risk presented by the appellant's conduct and not too vague to be understood:
- [39] These conditions prevent Ms. Bourque from forming relationships with or being around individuals who are unaware of her predilection for violence and may therefore be vulnerable. These conditions are designed to achieve maximum protection of the public. They also contribute to her rehabilitation since they minimize her opportunities to reoffend and reduce her potential for developing relationships that would negatively impact her rehabilitation.
- [40] Ms. Bourque also submits that the term "familiar" is too vague to understand and therefore compliance will be difficult. In my view, this term is used in common parlance and means "well-acquainted with" in the context of personal relationships. This term is understandable and not vague.
- [50] On the record in this case, I am satisfied it was reasonable for the sentencing judge to impose a condition requiring disclosure of the appellant's intimate relationships, to ensure that a probation officer has the opportunity to inform these persons of the appellant's criminal history for violence and the exposure to risk. Furthermore, similar to the situation in *Bourque*, including this condition on the order supports the appellant's rehabilitation by minimizing opportunities to re-offend.
- [51] The appellant has been convicted of domestic violence-related offences on more than one occasion. The violence perpetrated by him was not insignificant. It has resulted in bodily harm. In one of the prior incidents, the appellant prevented a victim from reaching out for assistance by smashing her cell phone. He has convictions for confinement and overcoming

resistance to his offending behaviour. In the present case, the victim's son had to ask the appellant three times to stop choking his mother before the appellant ceased. Choking is a form of violence the appellant has previously engaged in, causing his victims to lose consciousness. Although the appellant acknowledged responsibility for his assaultive behaviour at sentencing, he continued to justify it with reference to alleged conduct on the part of the victim.

- [52] In my view, there is a logical and, indeed, compelling nexus between the residual probationary condition imposed by the sentencing judge, the nature of the appellant's offending, its entrenchment and the protection of society.
- [53] Having said that, I consider it appropriate that the wording of the condition be clarified to make it more precise. In this regard, I find the language upheld in *Bourque* (at paras. 39-40) to be instructive, as it captures co-habitation and dating relationships. The appellant has offended in both contexts. However, as will be seen below, some modification is required to fit the appellant's circumstances.

Disposition

- [54] For the reasons provided, I would grant the appellant an extension of time to apply for leave to appeal from sentence, grant leave to appeal, and allow the appeal in part.
- [55] I would vary the sentence of 10 months' imprisonment on each of the two convictions by reducing it to nine months imprisonment (273 days), minus 126 days of credit for time spent in pre-sentence custody. This results in 147 days of imprisonment to serve on each offence, concurrent.
- [56] I would not vary the length of the three-year probation orders. However, I would clarify the "intimate relationships" condition on the orders, substituting the current condition with this wording:

Upon release from the custodial portion of your sentence, you shall not continue with, or enter into, any dating, marriage or common law relationship until the other person in that relationship has been advised of your criminal record and background in the presence of your probation officer.

- [57] At the hearing of the appeal, in response to a question posed by the Court, the respondent confirmed that the sentencing judge was obliged under the Code to impose a lifetime firearms prohibition in this case, but did not do so. It is appropriate for this Court to ensure that the mandatory order is in place.
- [58] As such, pursuant to s.109(1)(a.1) of the Code, I would also order that:
- a) the appellant be prohibited from possessing any firearm, crossbow, restricted weapon, ammunition and explosive substance for life after release from his term of imprisonment; and

- b) the appellant be prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device and prohibited ammunition for life, running from the date of sentence.

[59] NEWBURY J.A.: I agree.

[60] GRIFFIN J.A.: I agree.

[61] NEWBURY J.A.: The appeal is allowed to the extent indicated.

"The Honourable Madam Justice DeWitt-Van Oosten"

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