
CANADA / JUDGMENT

R. v. McKibbin

2020 BCCA 337

COURT

British Columbia Court of Appeal

DECIDED

18 November 2020

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2020 BCCA 337 R. v. McKibbin

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. McKibbin,

2020 BCCA 337

Date: 20201118

Docket: CA46687

Between:

Regina

Respondent

And

Michael Shawn McKibbin

Appellant

Before:

The Honourable Madam Justice Bennett

The Honourable Mr. Justice Butler

The Honourable Mr. Justice Grauer

On appeal from: An order of the Provincial Court of British Columbia, dated
January 29, 2020 (R. v. McKibbin, Terrace Docket 32077-1).

Oral Reasons for Judgment

Counsel for the Appellant

(via videoconference):

J. Whysall

C. Moore

Counsel for the Respondent

(via videoconference):

R.D. Leong

Place and Date of Hearing:

Vancouver, British Columbia

November 18, 2020

Place and Date of Judgment:

Vancouver, British Columbia

November 18, 2020

Summary:

The appellant pleaded guilty to one count of trafficking in a controlled substance and was sentenced to six months' imprisonment. The appellant suffers from a respiratory health condition and challenges his sentence on the basis that the sentencing judge erred: in finding the appellant's health issues were not an exceptional circumstance; in failing to consider a departure from a normal sentence range; and in placing insufficient weight on the mitigating factors of the appellant's case, including the appellant's health issues. The appellant seeks to adduce fresh evidence with respect to his particular susceptibility to COVID-19 if incarcerated during the COVID-19 global pandemic. Held: Fresh evidence is admitted, and the appeal allowed. The sentence imposed by the sentencing judge was without error, but the COVID-19 pandemic, coupled with the context of the appellant's serious respiratory illness has rendered the appellant's circumstances exceptional and warrants appellate intervention. The six months' imprisonment is suspended and the appellant is placed on probation with strict terms for the remainder of his sentence.

- [1] BENNETT J.A.: Michael McKibbin asserts that he is too ill to serve six months in prison for trafficking in cocaine. The sentencing judge disagreed. If it were not for the unusual global circumstances currently existing, I would see no basis upon which to interfere with that sentence. However, a current medical report, taken into consideration with the serious conditions in British Columbia due to the COVID-19 pandemic, demonstrate that Mr. McKibbin's health is seriously compromised. As a result, I would allow the appeal and order that the six months' imprisonment be suspended, and place Mr. McKibbin on probation for

the remainder of his sentence with strict terms.

Background

- [2] Mr. McKibbin is sixty-two years old, and lives in Terrace, British Columbia, a small, northern community. The police received a number of tips indicating that Mr. McKibbin was selling cocaine in a "dial-a-dope" operation. They set up a sting operation, and Mr. McKibbin was caught with three small packages of cocaine of 1.1 grams in total.
- [3] At the time of sentencing, Mr. McKibbin was suffering from chronic obstructive pulmonary disease ("COPD"). He owned his own home and had a good history of employment. At the time of sentencing, he earned income (other than by selling drugs) by running a home-based taxi company, repairing saws, and cutting firewood. We are told that his illness has worsened and he is no longer working. He was sentenced on the basis that he had no previous criminal record.

Reasons of the Sentencing Judge

- [4] Mr. McKibbin pleaded guilty after receiving an unfavourable ruling with respect to his Charter applications to exclude evidence. The sentencing was adjourned many times to permit Mr. McKibbin to obtain medical evidence regarding his COPD condition.
- [5] The sentencing judge stated at the outset that the central dispute was whether Mr. McKibbin should receive a jail term or a suspended sentence (a conditional sentence was not available). He correctly stated the principles of sentencing with reference to the statutory provisions. After considering the medical evidence and the case law, the judge concluded that the normal range of sentence for a first offender drug trafficker is between six and 18 months' imprisonment. He correctly identified deterrence and denunciation as the dominant sentencing principles. He concluded that "drug trafficking is a scourge on this community".
- [6] The judge quoted from the medical reports:
- [33] Mr. McKibbin is not in good health. Exhibit 3, a medical-legal report dated September 3, 2019, from Dr. Roberts Ugbekile sets out that Mr. McKibbin has been diagnosed with chronic obstructive pulmonary disease, COPD, brought on by his heavy use of tobacco cigarettes. At page 2 of that report, the doctor said the following under the heading, "Degree of Disability":

Mike's shortness of breath and incessant difficulty with breathing had rendered him generally weak most of the times, unable to carry out his activities of daily living such as eating, washing, cooking, shopping, and transportation.

- [34] Then immediately below under the heading, "Prognosis," the doctor stated the following:

With regulated diet and medications, Mike's acid reflux can be managed and staying in any environment without better aeration or with triggers for COPD (such as closed room dust, pollens, mildews, and cold temperatures) would immediately worsen and dangerously provoke exacerbation of his COPD. Mike's COPD is unlikely to improve spontaneously and Mike has to be on his inhalers every day and would need close and regular clinical consultations. There is more than a 50 percent chance of acute COPD exacerbation every month.

He noted that the COPD was treated with prescription drugs.

- [7] He concluded that Mr. McKibbin's crime was motivated solely by profit, as he was not a drug user himself, nor was he desperate or destitute. He found that the fact the health issues would "make a jail sentence harsher on [Mr. McKibbin] than if he was healthy" did not amount to exceptional circumstances that would justify a non-custodial sentence, and imposed a sentence of six months.
- [8] Mr. McKibbin has been on bail pending appeal since March 19, 2020. Leave to appeal was granted at that time.

Errors in Judgment

[9] Mr. McKibbin asserts four errors:

- i. The Sentencing Judge erred in principle in finding that the appellant's underlying health issues were not an exceptional circumstance;
- ii. The Sentencing Judge erred in principle by limiting his considerations to either a suspended sentence, or a jail sentence in the range of 6 to 18 months; the judge ought to have considered whether a departure from the range permitted a jail sentence below 6 months;
- iii. the Sentencing Judge erred in principle in failing to give sufficient weight to the appellant's underlying health issues, in particular his COPD; and
- iv. the Sentencing Judge erred in principle and placed undue weight on the aggravating factors, in particular that the offence was motivated by profit, and placed insufficient weight on the mitigating factors.

Positions of the Parties

- [10] Mr. McKibbin submits that the finding that "medical ailments that would make a jail sentence harsher on him than if he were healthy" was an exceptional circumstance, particularly in light of COVID-19. He contends that the judge erred by placing the issue as either a suspended sentence or six to 18 months' imprisonment. He says if his health was at least a mitigating factor that should lead to a sentence of less than six months. Mr. McKibbin has filed an application to adduce fresh evidence setting out his current state of health, and the situation regarding COVID-19 in the community, and in some of the local correctional facilities.

- [11] The Crown submits that the sentence is a fit sentence, that the evidence does not show that the prison authorities cannot manage his COPD during COVID-19, and that this Court should show proper deference. The Crown says that there is no evidence that suggests that Mr. McKibbin is at higher risk in prison than he would be in the community.

Standard of Review

- [12] In *R. v. Friesen*, 2020 SCC 9 at para. 26, the Court once again reiterated the standard of review for a sentence appeal: an appellate court can only intervene to vary a sentence if: "(1) the sentence is demonstrably unfit, or (2) the sentencing judge made an error in principle that had an impact on the sentence. Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor".
- [13] Furthermore, not every error is material; it must impact the sentence. If the error was material, the appellate court is no longer bound by deference, but will make its own determination of a fit sentence in all of the circumstances.
- [14] The appellate courts must give deference to sentencing judges who are on the front line of the criminal courts, and know the communities in which they live. In *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 at para. 91, Lamer C.J.C. said this:

A sentencing judge still enjoys a position of advantage over an appellate judge in being able to directly assess the sentencing submissions of both the Crown and the offender. A sentencing judge also possesses the unique qualifications of experience and judgment from having served on the front lines of our criminal justice system. Perhaps most importantly, the sentencing judge will normally preside near or within the community which has suffered the consequences of the offender's crime. As such, the sentencing judge will have a strong sense of the particular blend of sentencing goals that will be "just and appropriate" for the protection of that community. The determination of a just and appropriate sentence is a delicate art which attempts to balance carefully the societal goals of sentencing against the moral blameworthiness of the offender and the circumstances of the offence, while at all times taking into account the needs and current conditions of and in the community. The discretion of a sentencing judge should thus not be interfered with lightly.

Legislation

- [15] The legislation governing sentencing is found in s. 718 of the Criminal Code, R.S.C. 1985, c. C-46, set out below:

718 The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

718.2 A court that imposes a sentence shall also take into consideration the following principles:

- (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender

Discussion

Application to adduce fresh evidence

[16] Mr. McKibbin has filed an application to adduce fresh evidence in relation to his current medical condition in relation to COVID-19. In the medical update, his doctor stated:

Given the above information [his current condition and the onset of COVID-19, and the development of Acute Respiratory Distress Syndrome in patients], if Mike, a known COPD patient with already compromised respiratory system, were to contract COVID-19, his vulnerability would accelerate, thereby worsening his health and eventually may even cause him early death compared to other people without respiratory problems.

[17] Other evidence filed relates to news reports, BC Centre for Disease Control reports, and other information related to COVID-19 in British Columbia and prisons.

[18] In response, the Crown has filed a BC Government Factsheet from the Ministry of Public Safety and Solicitor General outlining the extensive protocols for provincial prisons in relation to COVID-19 that have been put in place to protect against COVID-19 infiltrating the prisons. It is dated August 11, 2020 and is not specific to Mr. McKibbin or someone in his condition.

[19] The Crown submits that rather than interfering with a fit sentence, Mr. McKibbin's health issues should be addressed by the prison management, relying on *R. v. Swope*, 2015 BCCA 167 at para. 39:

- [39] I would not admit the fresh evidence. It would not, in the end, serve to identify any error in the judge's assessment, nor does it deal with the appropriateness of the sentence. Further, the evidence of difficulties is equivocal, given certain inaccuracies and problems that are demonstrated by the clinical notes. In my view, any deficiencies in the accommodation of Mr. Swope's medical condition in prison is best dealt with directly through appropriate administrative or legal channels rather than indirectly through sentence modifications.
- [20] The evidence sought to be admitted is "after-the-fact" evidence, relating to events post-sentence and before the appeal. The test for such evidence is outlined in *R. v. Sipos*, 2014 SCC 47:
- [28] On sentence appeals in indictable offences, the court may consider "such evidence, if any, as it thinks fit to require or to receive": s. 687(1). There is no parallel provision in relation to appeals of dangerous offender designations. However, on those appeals, the court of appeal may admit fresh evidence when it is in the interests of justice to do so: s. 759(7) and s. 683(1).
- [29] The Court established in *R. v. Lévesque*, 2000 SCC 47, [2000] 2 S.C.R. 487, that while the sources and types of new evidence are more flexible in relation to sentence appeals, the well-known "Palmer" test governs admissibility of fresh evidence. That test, as is well known, sets out four criteria concerned with due diligence, relevance, credibility and impact on the result: *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Generally, fresh evidence should not be received if it could have been obtained at trial by exercising due diligence, although this criterion is not strictly applied in criminal matters when it would be contrary to the interests of justice to do so. The evidence must be relevant in the sense that it relates to a potentially decisive issue and reasonably worthy of belief. Finally, the evidence, if accepted, must reasonably be expected to have affected the result when considered along with the trial evidence. As Charron J. explained in *R. v. Angelillo*, 2006 SCC 55, [2006] 2 S.C.R. 728, at para. 15:

In accordance with the last three of the Palmer criteria, an appellate court can therefore admit evidence only if it is relevant and credible and if it could reasonably be expected to have affected the result had it been adduced at trial together with the other evidence. [Emphasis added.]

- [30] Fresh evidence addressing events that have occurred between the time of sentencing and the time of the appeal may raise difficult issues which bring competing values into sharp relief. On one hand, we must recognize, as Doherty J.A. put it in *R. v. Hamilton* (2004), 72 O.R. (3d) 1, at para. 166, that "[a]ppeals take time. Lives go on. Things change. These human realities cannot be ignored when the Court of Appeal is called upon to impose sentences well after the event." However, we must equally pay attention to the institutional limitations of appellate courts and the important value of finality. Routinely deciding sentence appeals on the basis of after-the-fact developments could both jeopardize the integrity of the criminal process by undermining its finality and surpass the appropriate bounds of appellate review: *Lévesque*, at para. 20; *R. v. Smith* (2005), 376 A.R. 389 (C.A.), at paras. 21-25.

- [31] Given the almost infinite variety of circumstances that may arise, it is neither desirable nor possible to formulate any hard and fast, detailed rules about the sorts of after-the-fact evidence that should or should not be considered in all cases. The abundant appellate jurisprudence cannot be reduced to a tidy set of rules, but rather reflects the courts' attempts to balance these at times competing values in light of particular and widely varying sets of circumstances: see, e.g., *R. v. Riley* (1996), 150 N.S.R. (2d) 390 (C.A.); *R. v. Faid* (1984), 52 A.R. 338 (C.A.); *R. v. Jimmie*, 2009 BCCA 215, 270 B.C.A.C. 301; *R. v. Halliday*, 2012 ONCA 351; and generally, C. C. Ruby, G. J. Chan and N. R. Hasan, *Sentencing* (8th ed. 2012), at §§ 4.49 ff.; *R. v. N.A.S.*, 2007 MBCA 97, 220 Man. R. (2d) 43; *R. v. Martin*, 2012 QCCA 2223. At the level of principle, the approach set out in *Lévesque* and *Angelillo* strikes the balance between the competing values and, when applied thoughtfully to the particular circumstances before the court, provides sufficient flexibility to ensure that the appellate process is both responsive to the demands of justice and respectful of the proper limits of appellate review.
- [21] I think it is fair to say that when Mr. McKibbin was sentenced, no one in the courtroom predicted a global pandemic that would have particular deleterious effects on someone with a respiratory disease. It is clear to me that had this information been available to the sentencing judge, it "could be expected to have affected the result".
- [22] In my view, in the unusual circumstances of this case, the evidence does meet the criteria in *Sipos*. I would admit the fresh evidence.
- [23] The evidence adduced changes the landscape in which Mr. McKibbin was sentenced. The sentencing judge concluded that the fact that "[his] medical ailments would make a jail sentence harsher on him than if he were healthy" did not amount to exceptional circumstances justifying a suspended sentence.
- [24] The evidence before us is that not only would serving the sentence be harsher, but if he contracted COVID-19, it could well lead to an early death, which in my view does amount to circumstances justifying a suspended sentence. Normally, the prison authorities would be delegated the responsibility of managing a prisoner's illness in the prison, and they are usually equipped to do so. However, given that Mr. McKibbin faces a significantly higher risk of death if he contracts COVID-19 because of his serious pre-existing respiratory disease, and given that he has a very short time left to serve in his sentence, it makes no sense to me to require that he be re-incarcerated, particularly when the numbers of infections are reaching an all-time high in this province. If he is at home, Mr. McKibbin can control who he has contact with, something that he cannot do in the prison setting.
- [25] This is an unusual case. The sentence imposed by the sentencing judge was without error, and but for the fresh evidence, I would not interfere with the sentence. It is also unusual in the sense that it is not just the COVID-19 pandemic that has changed the sentencing landscape, but the pandemic in the context of Mr. McKibbin's serious respiratory illness, which makes him much more susceptible to serious COVID-19 symptoms, including death.

- [26] I would allow the appeal, suspend the six-month sentence passed by the sentencing judge, and place Mr. McKibbin on probation for that period with conditions. Mr. McKibbin indicated that he was prepared to be supervised on probation for 18 months in addition to the time he has served. Frankly, I see no reason to burden the provincial authorities with a further supervision order.
- [27] Subject to setting out the probation conditions, I would allow the appeal.
- [28] BUTLER J.A.: I agree.
- [29] GRAUER J.A.: I agree.
- [30] BENNETT J.A.: The appeal is allowed and the six-month sentence of imprisonment is changed to a six-month suspended sentence with a probation order attached.
- [31] The probation conditions are as follows:
- a) The Appellant shall keep the peace and be of good behaviour.
 - b) The Appellant shall, by telephone and within forty-eight (48) hours of his release, contact a probation officer at Terrace Community Corrections at 102-2918 Eby Street, Terrace, British Columbia, and report to the probation officer as and when directed to do so by the probation officer.
 - c) The Appellant shall remain within the Province of British Columbia.
 - d) The Appellant shall reside at [Redacted], Terrace, British Columbia, and shall not change his address, employment or occupation, without the prior written permission of the Court or his probation officer.
 - e) The Appellant shall be subject to house arrest, and may only leave his residence once per day between the hours of 10:00 a.m. and 2:00 p.m. He will answer the door or telephone if his probation officer or a peace officer attends at his residence to confirm compliance with this order. (If electronic monitoring is available, the Appellant should be placed on it.)
 - f) The Appellant may possess only one cellular or mobile telephone with one telephone number, which must be registered in the Appellant's name and can only be used for the purposes of: (1) contacting his counsel; (2) contacting his probation officer; (3) contacting his immediate family members; (4) employment; (5) health professionals; or (6) an emergency, and further:
 1. The Appellant shall provide his probation officer with the telephone number of his cellular or mobile telephone and shall not change this telephone number without prior written permission of his probation officer;
 2. The Appellant shall not subscribe or use a "pay as you go" service and shall not possess more than one SIM card;

3. The Appellant shall provide his probation officer with a copy of the monthly cellular or mobile telephone bills with details of all telephone, SMS and text activity, and any peace officer may obtain a copy of the monthly cellular phone bills from the probation officer; and
4. The Appellant shall keep a history of, and shall not delete, any record of call or text made or received on his cellular or mobile telephone and upon the request of any peace officer, the Appellant shall provide the peace officer access to any cellular or mobile telephone in his possession for the purpose of verifying the Appellant's compliance with this condition.
- 9) The Appellant shall not have in his possession any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance or anything designed or intended to be used as a weapon.

"The Honourable Madam Justice Bennett"

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