
CANADA / JUDGMENT

R. v. McMillan

2011 BCSC 1537

COURT

Supreme Court of British Columbia

DECIDED

23 September 2011

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2011 BCSC 1537 R. v. McMillan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McMillan,

2011 BCSC 1537

Date: 20110923

Docket: X73856-4

Registry: New Westminster

Regina

v.

Jesse John Margison and Troy Dax McKinnon

IN THE MATTER OF THE CONTEMPT PROCEEDINGS AGAINST

Robert Eugene McMillan

Ban on Publication pursuant to s. 486.5

Criminal Code of Canada

Before: The Honourable Mr. Justice Schultes

Corrected Judgment: The text of the judgment was corrected at
paragraph [30] on November 14, 2011

Oral Reasons for Sentence

Counsel for the Crown:

P.W. Hogg

Counsel for the Accused:

J.F. Douglas

Place and Date of Hearing:

New Westminster, B.C.

September 23, 2011

Place and Date of Judgment:

New Westminster, B.C.

September 23, 2011

- [1] Robert McMillan has elected not to show cause why he should not be found in contempt for his actions in refusing to be sworn as a witness at a trial before Mr. Justice Silverman in March of this year.
- [2] The circumstances of his contempt are briefly that he was alleged to have been the victim of an extremely serious set of offences committed by Jesse Margison and Troy McKinnon in 2007.
- [3] Mr. McMillan and his brother had been involved in a drug-related robbery of Mr. Margison and Mr. McKinnon. The brother, without Mr. McMillan's prior knowledge, shot McKinnon in the foot during it.
- [4] Eventually, McKinnon and Margison were said to have exacted retribution on Mr. McMillan by abducting him, taking him to a residence, tying him up and, in the course of interrogating him, assaulting him in a very severe and terrifying manner. This included beating his knees with a framing hammer, cutting off the front of his left ear using an exacto knife and eventually snipping off the small finger on his right hand with a pair of garden shears.
- [5] In a macabre footnote to these assaults, the ear and finger were kept in a freezer in a ziploc bag in the location where these assaults took place. They were later identified and linked to Mr. McMillan, and then were relied on as evidence as matter went forward.
- [6] Mr. McMillan was uncooperative with the police officer who dealt with him when he was dropped off by his kidnappers. In 2008, he was arrested for and held in custody for a home invasion in which he had committed a sexual assault committed on the female occupant. After he was arrested on the home invasion, he gave a statement to the police implicating Margison and McKinnon in the assaults on him. He later gave a video-taped statement under oath to the same effect.

- [7] He was sent to a federal institution following his sentence for the home invasion. It appears that he then began to harbour concerns about his safety while in custody. He first expressed an unwillingness to cooperate with the prosecution of Margison and McKinnon in January 2010. Those safety concerns were apparently addressed to his satisfaction by the police later that year.
- [8] Early in January of this year he began to express once again his unwillingness to be a witness. I am told by his counsel that he felt that the police had not followed through with certain safety measures that they had guaranteed in return for his cooperation. From January 6th onward, despite the efforts of the police and the prosecutors, he was never again willing to testify. He was called into court on two consecutive days and both times he stated to the trial judge, in loud and offensive terms, his unwillingness to be sworn to give evidence.
- [9] The upshot of that was the Crown was forced to rely on statements by him to the police and others about how the offences had been committed, based on the principled exception to the hearsay rule. Those statements were found to be inadmissible for various reasons and, in the absence of any evidence from Mr. McMillan, the charges against Mr. Margison and Mr. McKinnon were dismissed.
- [10] Mr. McMillan is 35 years old. There has been a pre-sentence report with a psychological assessment, both of which I found very helpful in understanding his background.
- [11] He has had the kind of background that is unfortunately often seen in individuals who come before the courts for serious offences. The reports indicate that his father used excessive force when disciplining him. His mother, on the other hand, was not able to offer the necessary structure and discipline when raising him. From a relatively young man it appears that Mr. McMillan has had to make his own decisions in life and operate as best he could out in the world.
- [12] He has abused various substances throughout his adolescence and adult life, including alcohol, crack cocaine, heroin and oxycontin. He has had two significant relationships and has fathered a total of six children with these partners - five in his major relationships, and one during the more recent one. He is interested in having more contact with his children at some point.
- [13] He has a criminal record which consists of convictions for :
- a robbery in Youth Court in Ontario in 1992, for which he received a period of open custody;
 - possession of stolen property in Ontario in 1997, which resulted in a period of probation and a suspended sentence;
 - an assault in Coquitlam in 2008, for which he received another suspended sentence; and then

- (arising from the home invasion that I have previously described) the break and enter and sexual assault offences in December of 2009 in Surrey, for which he received an effective 12-year sentence, taking into account credit for pre-trial custody. It consisted of two concurrent sentences, the highest being nine years and eight months. That is the sentence he is serving now.
- [14] To his credit, in the psychological assessment he expressed significant remorse for the sexual assault and it indicates that he continues to have feelings of shame and self-disgust for having harmed his victim. This has some meaning, because it arises long after it would have benefited him at all in that case.
- [15] The findings of the psychological assessment are that he suffers from a major depressive disorder, including suffering a breakdown after being incarcerated for the home invasion. He also meets the criteria for alcohol and heroin dependence and marijuana abuse.
- [16] The Crown has provided helpful sentencing authorities. If I can summarize the general principles that I take from them, they are:
 - Contempt of court by refusing to be sworn or testify is a very serious offence, because it goes to the heart of the ability of the justice system to adjudicate serious criminal charges on their merits. In effect the contemnor takes it upon himself to remove potentially relevant evidence from even being considered by the court.
 - The code of behaviour among criminals, under which testifying in court for the Crown is considered prohibited conduct, cannot be allowed to dictate how the justice system functions.
 - It is a serious aggravating factor if the refusal to testify and be sworn effectively derails the prosecution. The acquittal or stay of proceedings must of course be related to the witness's refusal to before it could be seen as an aggravating factor.
- [17] In *R. v. Neuburger*, 1995 CanLII 201 (B.C.C.A.), the witness had declined to be sworn in the trial of the notorious murder of a young man in Surrey. The sentence for contempt at trial was two years. On appeal, it was reduced to time served, effectively 15 months. Madam Justice Prowse made a number of helpful comments at para. 9:
- [9] In my view, the sentencing judge was justified in viewing general deterrence as the most important single factor in sentencing for contempt in the face of the court. I also concur with his view that the refusal of a witness to testify in a criminal proceeding undermines the ability of the courts to deal effectively with the administration of criminal justice. It is not the prerogative of witnesses to criminal events to decide whether or not they will testify. They are bound to testify if called upon to do so, for it is only in this way that those guilty of crimes can be brought to justice and the public be protected.

- [18] Although the Court found that the trial judge was justified in emphasizing those concerns about general deterrence, in the particular circumstances Mr. Neuburger's youth, his lack of significant criminal record and the relatively low range of sentences in Canada for this type of offence meant that the sentence needed to be reduced to the extent that I have described.
- [19] Next is the decision of Mr. Justice Grist of this Court in the case of *R. v. Abu-Sharife*, 2006 BCSC 1981. There the person who refused to be sworn and give evidence was the youth co-accused in the murder for which Mr. Abu-Sharife was being prosecuted. The result of his refusal to give evidence was that the remaining circumstantial evidence was insufficient and Mr. Abu-Sharife was acquitted. Mr. Justice Grist said at para. 6:
- [6] It is clear from this that the contemnor had material evidence to give concerning his dealings with Abu-Sharife in connection with the murder that may well have influenced the outcome of the trial, either through confirmation of the Crown's case or exoneration of the accused.
- [20] And I quote from para. 11, partway in:
- [11] [T]he most significant factor here is clearly that of general deterrence. Criminal sanctions are often a less than effective deterrent to crime. In the instance of this form of contempt, however, as here, the act is a considered one. Again, as here, often with the advice of counsel and the benefit of a measured and considered response from the trial judge. Deterrence is therefore most likely to have maximum effect and those inclined to refuse to give evidence need to have the jeopardy they face clearly defined.
- [21] The other useful authorities provided by the Crown are two companion cases in which the Manitoba Court of Appeal dealt with appeals from sentences of various witnesses who had refused to testify and be sworn in the same murder trial. In *R. v. Jacob*, 2008 MBCA 7 the Court noted at para. 25:
- [25] The purpose of criminal contempt is explained by Mr. Justice E.G. Ewaschuk *Criminal Pleadings & Practice in Canada*, 2nd ed., looseleaf (Aurora: Canada Law Book, 2007) as follows (at para. 29:0040):

Criminal contempt is aimed at punishing public acts which tend to bring the administration of justice into disrepute and interfere with the due administration of justice. It is directed at the protection of the integrity of the administration of justice. Its general purpose is to protect the fairness of the trial process.

- [26] General deterrence is the principal factor to be considered when a witness refuses to testify. See *Neuburger*. The highest custodial sentences for contempt are imposed when a witness refuses to be sworn or to give evidence.
- [22] On the importance of rejecting firmly the criminal culture's values, at para. 35 the Court quoted from *R. v. Johnston*, [1976] O.J. No. 1144 (C.A.):

The further submission that Johnston should be found blameless because his refusal to answer was conduct which conformed to a code of behaviour common to prison inmates is an argument without merit and would in effect subvert the law. There is a single standard applicable to all, including prison inmates, and any attempt to justify a deviation from that objective, impartial base is pure sophistry. To hold otherwise would mean that any group could disregard the law and set their own standards of behaviour and morality with impunity. Johnston claims his refusal is justified on the ground that if he answered the questions other inmates would consider him a "stool pigeon" and place him on the lowest rank of the prison social hierarchy. In my opinion this is not a defence. His professed altruistic motive is an attempt to give legal recognition to a code of conduct which society considers to be no higher than "the law of the jungle".

[23] Then at para. 38 of Jacob:

[38] The court's observations in Johnston are equally applicable to the circumstances before this court where Jacob preferred to comply with the code of the street in preference to his obligations as a citizen. I would impose precisely the same sentence in the circumstances of this case [which was two years consecutive].

[24] In R. v. Amyot and Abdullah, 2008 MBCA 48 the Court considered the important differences between Jacob and the two other witnesses who declined to testify in the trial, at para. 34:

[34] There are significant distinctions to be made between the two appellants and Jacob. They were eyewitnesses and hence of much greater significance to the Crown's case. There is clear evidence that they were members of a criminal organization. There are no mitigating circumstances such as there were in the case of Jacob. The fact that they had already refused to testify in earlier criminal proceedings relating to Cansanay makes their behaviour all the more contemptuous.

[25] The Court found that their conduct was more egregious and called for a greater sentence near the higher end of the scale - 36 months for each.

[26] Crown counsel submits that the range of sentence that is to be derived from the authorities is from a lower range provincial sentence to a high of about 36 months. In all of the present circumstances, Crown counsel asks me to sentence Mr. McMillan to 30 months' imprisonment, consecutive to the sentences that he is currently serving.

[27] Mr. McMillan's counsel points to the breakdown in the relationship between Mr. McMillan and the police, and later between Mr. McMillan and the assigned prosecutor. Counsel attributes some of the lack of cooperation to the erosion of those important relationships.

[28] He also points out that Mr. McMillan wants to take programs to rehabilitate himself in the federal prison system. These programs have not been available yet, because the length of his current sentence gives him lower priority than offenders serving shorter ones, but he is motivated to take whatever is eventually available to him and to do something more productive with his life than he has been able to do so far. He is going to be released one day and counsel argues that it is in everyone's interest, including the safety of the public, that

rehabilitation not be placed out of his reach by a consecutive sentence for this contempt that is so long that it creates a sense of hopelessness.

- [29] The other point that counsel raised is that, unlike the vast majority of cases in which individuals who refused to testify were criminal associates of the offender, Mr. McMillan was himself the victim of the violence here. In other words, counsel drew a distinction between cases in which people are involved in the criminal world and then just cannot be bothered to step up and get involved in testifying when a crime is committed and someone who is an actual victim of a serious violent offence. He suggested that distinction should influence the range of sentence that I impose. In all the circumstances, he suggested a range of one year to 18 months would be sufficient and that it would of course be served consecutively.
- [30] I think that the only relevance of Mr. McMillan's status as the victim is that, despite having had his finger and part of his ear cut off in this terrifying ordeal, he has, through a very ill-advised series of decisions, taken a position which has meant that the people who did this to him will never be held accountable. In other words, to the extent that a person who is violently assaulted hopes for accountability on the part of those who have harmed him, Mr. McMillan has lost that and has done so solely through his own decisions. I do not think it goes beyond that.
- [31] Turning to the principles of sentencing that deserve greatest emphasis here, the cases have indicated that general deterrence must be paramount. There cannot be an implicit message that it is worth the risk to come to court and refuse to be sworn in a serious criminal matter. Without these kinds of sentences being significant, we will have anarchy, with witnesses taking upon themselves the right to participate or not participate in trials. Prosecutions of offences that arise within any kind of criminal milieu would be impossible
- [32] Specific deterrence is not as much of a factor. As I said earlier, Mr. McMillan has tragically suffered extensively at the hands of these offenders. I cannot imagine him being in this situation again, but if he is he has been deterred more effectively than any sentence would from refusing to testify by seeing those offenders escape any liability because of his refusal in this case.
- [33] Rehabilitation in the context of this offence alone does not weigh as significantly as general deterrence. However, I must also consider the question of totality. He is still serving a very lengthy sentence. Crown counsel concedes very fairly that totality has to be considered when I impose a consecutive sentence, to make sure that, while this offence is punished properly, the resulting total sentence is not so significant that it undermines the possibility of rehabilitation and the effectiveness of correctional programs.

- [34] I think that the range of sentence that has been set out by Crown counsel is accurate. Obviously ranges of sentences are not straitjackets and one must always look at the particular circumstances of the offence and the offender. However, they do assist me in ensuring that like offenders are sentenced alike.
- [35] When one balances the various factors, the sentence sought by Crown would normally be the appropriate one. However, I am concerned that a sentence of that length, when combined the ones to which it will run consecutively, would yield a total that delays access to programs and erodes the motivation to engage in them, to an unacceptable extent. As a result, I am inclined to impose a slightly lower sentence.
- [36] Mr. McMillan, I sentence you to 18 months imprisonment, to be served consecutively to the sentence you are now serving. You have indicated a hope to involve yourself in programs while you are in custody to help you avoid re-offending when you are released. I certainly hope you are able to do that.
- [37] I thank counsel for their very helpful submissions.

"The Honourable Mr. Justice Schultes"

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