

CANADA / JUDGMENT

R. v. Murtagh

2024 BCCA 390

COURT

British Columbia Court of Appeal

DECIDED

14 November 2024

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2024 BCCA 390 R. v. Murtagh

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Murtagh,

2024 BCCA 390

Date: 20241114

Docket: CA49317

Between:

Rex

Respondent

And

David Wayne Murtagh

Appellant

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Before:

The Honourable Chief Justice Marchand

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Voith

On appeal from: An order of the Provincial Court of British Columbia,
dated August 28, 2023 (R. v. Murtagh, Kamloops Dockets 113111-4-KA,
113282-1-K and 113324-1).

Oral Reasons for Judgment

Counsel for the Appellant:

C. Matthee-Johnson

Counsel for the Respondent:

M.A. Street

Place and Date of Hearing:

Kamloops, British Columbia

November 14, 2024

Place and Date of Judgment:

Kamloops, British Columbia

November 14, 2024

Summary:

The appellant pleaded guilty to several offences including property, driving, mischief and administration of justice offences, as well as offences against his former intimate partner. The sentencing judge rejected a joint submission for three years imprisonment comprised of several concurrent sentences based on concerns the offences were unrelated and the proposed sentence did not adequately address denunciation and deterrence. Held: Appeal allowed. The judge erred in her application of the public interest test for joint submissions on sentence and instead took a traditional sentencing approach. The sentence jointly proposed by the parties would not be regarded by reasonable and informed persons as signalling a breakdown in the proper functioning of the justice system. The sentence jointly proposed by the parties is imposed.

MARCHAND C.J.B.C.:

Introduction

- [1] On July 20, 2023, David Wayne Murtagh pleaded guilty to 17 offences across three informations: 113282-1-K, 113324-1 and 113111-4-KA. Mr. Murtagh's offences included property, driving, mischief and administration of justice offences, as well as offences against his former intimate partner. To preserve the privacy and dignity of Mr. Murtagh's former intimate partner, I will refer to her as "the complainant". Mr. Murtagh has a lengthy and related criminal record.
- [2] The Crown and defence made a joint submission for three years' imprisonment, comprising: (1) three consecutive sentences totalling 36 months and other lesser concurrent sentences on information 113282-1-K; (2) a combined concurrent sentence of 30 months on information 113324-1; and (3) a combined concurrent sentence of eight months on information 113111-4-KA.
- [3] The sentencing judge was concerned about the appropriateness of concurrent sentences for what she viewed as unrelated offences. She also found the proposed concurrent sentences would not adequately address denunciation and deterrence.
- [4] The judge acceded to the parties' submission that Mr. Murtagh be sentenced to a combined three years' imprisonment on informations 113282-1-K and 113111-4-KA. After applying the totality principle, she reduced the parties' proposed 30-month sentence on information 113324-1 to 24 months but ordered that it be served consecutive to, rather than concurrent with, the three-year jail sentence on the other matters. As a result, the judge sentenced Mr. Murtagh to a global sentence of 60 months' imprisonment less 312 days for pre-sentence custody. She also made a number of ancillary orders, which are not at issue on appeal.
- [5] Mr. Murtagh submits the judge did not give "real consideration" to the benefits associated with Mr. Murtagh's guilty pleas and therefore misapplied the public interest test set out in *R. v. Anthony-Cook*, 2016 SCC 43. The Crown agrees. So do I.
- [6] For the reasons that follow, I would grant Mr. Murtagh leave to appeal, allow his appeal and impose the sentence jointly proposed by the parties at the sentencing hearing. In my respectful view, doing so will not cause reasonable and informed persons to lose confidence in our justice system.

Circumstances of the Offences

Information 113324-1: Counts 1 (break and enter) and 2 (theft motor vehicle)

- [7] On December 5, 2022, Mr. Murtagh broke into an underground parkade in downtown Kamloops and stole a Jeep Wrangler. The owner's hunting rifle was inside. Although not an element of either offence, Mr. Murtagh admitted having sold the owner's rifle for drug money.

Information 113282-1-K: Counts 1 (harassment), 2 (mischief), 3 (possession of stolen property), 4 (drive while prohibited), 7 (assault), 8 (theft motor vehicle), 15 (assault by choking), 5, 6, 10, 13, 16 and 18 (breaches)

- [8] On December 10, 2022, Mr. Murtagh slashed the tires of the complainant's vehicle while it was parked at a women's shelter.
- [9] Shortly after midnight on January 1, 2023, Mr. Murtagh followed the complainant to a women's shelter. He was in a stolen vehicle. Eventually, he blocked her exit from a cul-de-sac with the car he was driving. He approached her car with a screwdriver, hit the hood repeatedly and threatened to further damage her property if she did not stay with him. Mr. Murtagh was under the influence and prohibited from driving at the time. The police arrested Mr. Murtagh and released him on an undertaking with restrictive conditions.
- [10] The following day, Mr. Murtagh repeatedly contacted the complainant. A week later, the police found the complainant inside Mr. Murtagh's home. She was in fear for her safety. Mr. Murtagh was arrested for breaching his January 1, 2023, release order.
- [11] On January 11, 2023, Mr. Murtagh was again released on an undertaking with further restrictive conditions relating to the complainant and her daughter.
- [12] On February 9, 2023, the complainant's 15-year-old daughter reported to the police that Mr. Murtagh was pushing her mother around inside their home. Mr. Murtagh had arrived approximately a week and a half prior, had thrown the complainant around every day since arriving and would not let her access her car. Mr. Murtagh was not present when the police arrived. He had taken the complainant's car without her permission.
- [13] At 4:30 a.m. on February 20, 2023, the complainant knocked at her neighbour's door. The neighbour's security system recorded Mr. Murtagh dragging the complainant away while she was screaming. The neighbour phoned the police, who located the complainant and Mr. Murtagh inside her apartment. The complainant advised the police Mr. Murtagh had assaulted her and choked her so hard she could not breathe. The police observed bruising on the complainant's face and jaw consistent with her description of what occurred. Mr. Murtagh was in breach of his release order by having contact with the complainant and not abiding by his curfew.

Information 113111-4-KA: Counts 1 and 2 (breaches)

- [14] Mr. Murtagh further breached his release order by failing to obey his curfew on January 27, 2023, and failing to report to his bail supervisor on February 9, 2023.

Circumstances of Mr. Murtagh

- [15] Mr. Murtagh is a member of the Siksika First Nation. He was 41 years old at sentencing. His life has been marred by many of the all-too-common direct and indirect adverse effects of Canada's colonial and post-colonial assimilationist policies. The details are not important for purposes of this appeal.
- [16] Mr. Murtagh has a grade seven education and has had some limited employment. He also suffers from substance use disorder. He began drinking at age 10 and first used marihuana when he was 12 or 13. He moved to crack cocaine at 16 or 17, and switched to methamphetamine at age 35.
- [17] Mr. Murtagh has 118 prior convictions: 52 are property related, 32 are driving related, 25 are for breaching court orders or obstructing justice, eight are for violent offences, and one is for a drug offence.

The Sentencing Judge's Concerns with the Joint Submission

- [18] During the Crown's submissions on July 20, 2023, the judge advised she was struggling with the proposal to have the combined sentence for the break and enter and motor vehicle theft run concurrently to the other two combined sentences. In her view, the break and enter and theft were "completely unrelated to the other circumstances."
- [19] Crown counsel replied he would normally agree, but was trying to ensure the length of Mr. Murtagh's individual sentences would appropriately reflect the circumstances and seriousness of his offences.
- [20] Crown and defence counsel also referred to "challenges" that "might" arise from the complainant's evidence. Defence counsel further observed the break and enter and motor vehicle theft were connected to the other offences because Mr. Murtagh committed them to feed his drug addiction.
- [21] On August 3, 2023, Crown and defence counsel inquired whether the judge "was contemplating time in addition to the proposed three years" or "redistributing" the sentences proposed. The judge replied she was contemplating additional time. She was concerned with "the appropriateness of attaching the 30-month sentence concurrently to the indictable Information and, essentially, that sentence being swept under the carpet to some extent, at least in the public's view because of the fact that Mr. Murtagh is pleading guilty to other non-related offences."
- [22] Before proceedings continued on August 28, 2023, Crown counsel provided some cases on the topic of consecutive versus concurrent sentences to the court. He added he and defence counsel had considered the mitigating and aggravating factors, as well as "other strengths and weaknesses of the Crown's case" which could not be "properly aired in a courtroom", in arriving at their joint position.

The Judge's Reasons for Sentence

- [23] After setting out the circumstances of Mr. Murtagh's offences, the judge outlined his personal circumstances. In light of Mr. Murtagh's lengthy criminal record, she was skeptical of Mr. Murtagh's prospects for rehabilitation. She held the sentence she imposed had to focus on denunciation and deterrence. She also recognized Mr. Murtagh's Indigenous heritage and how the trauma he endured contributed to bringing him before the courts. She held she would evaluate his conduct and moral blameworthiness within the context of his Gladue factors.
- [24] The judge noted the purpose and principles of sentencing as set out in ss. 718 to 718.2 of the Criminal Code, R.S.C. 1985, c. C-46. She next identified a number of mitigating and aggravating circumstances. Among the mitigating factors, she noted Mr. Murtagh's early guilty pleas had saved court time and resources, and spared the complainant and her daughter from testifying. Among the aggravating factors were: Mr. Murtagh's record; his high risk of re-offending; the period of time over which the offences took place; the complainant's status as an intimate partner; the complainant's particular vulnerability; and the assaults having occurred in the presence of the complainant's daughter.
- [25] The judge reviewed two authorities from this Court, *R. v. Chow*, 2009 BCCA 369 and *R. v. Li*, 2009 BCCA 85, regarding the question of consecutive versus concurrent sentences. She cited *Li* for the proposition that such decisions involve a factual assessment of the degree of interconnectedness of the offences: *Li* at para. 24. She also cited *Li* for the proposition "[w]hether sentences for multiple offences are made consecutive or concurrent, it is the task of the sentencing judge to fix an appropriate sentence that reflects the specific circumstances of the offences and the unique circumstances of the offender." In other words, the sentences must be proportionate: *Li* at para. 26.
- [26] Relying on the leading case of *Anthony-Cook*, the judge correctly observed she must give "substantial deference" to a joint submission and "not depart from it unless it is so unhinged from the offender and the offence that to accept it would cause reasonable and informed persons who are aware of all the relevant circumstances to believe that the proper functioning of the justice system had broken down."
- [27] In the judge's view, this high threshold had been met. She reasoned:
- [65] In my view, the proposed sentence on its own and on a standalone basis is appropriate, but as a concurrent sentence it is disproportionate to the gravity of the offence and the degree of responsibility of this offender. I find a concurrent sentence would breach the fundamental principle of sentencing and not address specific deterrence for this offender, and I say this for the following reasons:
1. The proposed concurrent sentence fails to take into account Mr. Murtagh's criminal and moral culpability for these particular property offences. He has an extensive criminal history for property-related offences. As I noted earlier, there are 52 prior related

convictions. A concurrent sentence, in my view, would not meet the principles of denunciation and deterrence nor would it address specific deterrence for this offender. Mr. Murtagh's extensive record makes it clear to me that earlier interventions to ameliorate his behaviour have failed and that something more is needed to deter him.

2. A concurrent sentence, in my view, is unfit given that these property offences are completely different in nature from the offences in Information 113282-1-K. Also, the offending in Information 113324-1 took place on a different date, and involves different victims. As I alluded to earlier, these are distinct societal interests and I find that Mr. Murtagh has a high degree of legal and moral culpability for these property offences.
3. I find it aggravating that, as a result of the property offences, there is now an unlocated firearm somewhere in our community and, more than likely, that firearm is in the wrong hands.
4. I find that a reasonable and informed person, who is aware of all of the relevant circumstances, would conclude that a concurrent sentence for the property offences would be akin to Mr. Murtagh getting a break simply because he pled guilty to a series of violent offences against his intimate partner. In other words, a reasonable and informed person, in my view, would see the 30-month sentence for break and enter/theft as being swept under the rug of a 36-month sentence for a series of unrelated and serious offences involving a vulnerable domestic partner. This alone would cause a reasonable and informed person to question the proper functioning of our justice system.

[Emphasis added.]

- [28] Having rejected the joint submission, the judge went on to sentence Mr. Murtagh. She acceded to the sentences proposed for the offences on informations 113282-1-K and 113111-4-KA. However, she changed the proposed combined concurrent sentence of 30 months' imprisonment for information 113324-1 to a combined consecutive sentence of 24 months. As noted at the outset, this resulted in a global sentence of 60 months' imprisonment less credit for time served.

Standard of Review

- [29] Appellate courts can intervene only if a sentence is demonstrably unfit or the sentencing judge made an error of law or an error in principle that had an impact on the sentence: *R. v. Lacasse*, 2015 SCC 64 at paras. 11, 43-44; *R. v. Huston*, 2024 BCCA 179 at para. 7. Where there has been an error in principle in rejecting a joint submission, the appellate court must consider the joint submission afresh using the correct test and determine whether to accept the jointly proposed sentence: *Anthony-Cook* at para. 6; *Huston* at para. 17.

The Public Interest Test for Joint Submissions

- [30] Joint submissions on sentence are vitally important to the proper functioning of the criminal justice system and the justice system at large: Anthony-Cook at para. 25. When properly conducted, they benefit the accused, victims, witnesses, counsel and the administration of justice generally: Anthony-Cook at paras. 35-40.
- [31] A sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest: Anthony-Cook at paras. 33-34. A sentencing judge's rejection of a joint submission "denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down": Anthony-Cook at para. 34.
- [32] This stringent public interest test "ensures that the certainty a joint submission affords an accused person who is considering whether to plead guilty will yield only 'where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty'": Huston at para. 10, citing Anthony-Cook at para. 43. Accordingly, departures from joint submissions should occur rarely: Huston at para. 9. It is therefore possible for an otherwise demonstrably unfit sentence to be acceptable in the context of a joint submission: Huston at para. 10.
- [33] A sentencing judge presented with a joint submission "must use a different methodology than the one they would use on conventional sentencing hearings": Huston at para. 11. In *R. v. Cheema*, 2019 BCCA 268, this Court described the process as follows:
- [22] [A] judge presented with a joint submission must approach the sentencing task differently than on a conventional sentence hearing. Under the conventional approach, the judge focuses on the circumstances of the offender and the offence, and the applicable sentencing principles. However, when assessing a joint submission, the judge must consider factors beyond the typical sentencing principles and should not "reverse engineer" a joint submission by determining the sentence that would have been imposed after a trial and comparing it to the jointly proposed sentence. Rather, the analysis should begin with the basis for the joint submission, including the important benefits to the administration of justice, and ask whether there is something apart from the length of the sentence that engages the public interest or repute of the justice system: Anthony-Cook at paras. 32, 42, 44, 48; *R. v. Belakziz*, 2018 ABCA 370 at para. 18. This approach enables a full appreciation of the basis and justification of the jointly proposed sentence: *R. v. McInnis*, 2019 PECA 3 at para. 78.

- [34] If a sentencing judge is not satisfied with a proposed joint submission, they must notify counsel of their concerns and invite further submissions on those concerns, including the possibility of permitting the accused to withdraw his or her guilty plea: Anthony-Cook at para. 58; see also *R. v. Manca*, 2019 BCCA 280 at para. 35. If, following further submissions, the judge remains unsatisfied, he or she should "provide clear and cogent reasons for departing from the joint submission": Anthony-Cook at para. 60.

Analysis

- [35] Here, the sentencing judge correctly articulated the public interest test and recognized the high threshold for rejecting a joint submission. Further, it was appropriate for her to consider the overall fitness of the jointly proposed sentence. And, she was entitled to conclude it was demonstrably unfit because it did not adequately address the principles of proportionality, denunciation and deterrence.
- [36] However, in my respectful view, the judge fell into error in her application of the public interest test.
- [37] As was the case in *Huston*, the judge did not follow the required methodology for assessing the appropriateness of a joint submission on sentence. Her rejection of the joint submission was rooted in her application of conventional sentencing principles. As set out in *Cheema* at para. 22, her analysis should have started with a consideration of: (1) the basis for the joint submission; and (2) whether there was something apart from the length of the sentence that engaged the public interest or repute of the justice system.
- [38] Regarding the basis of the joint submission, the judge did not address the benefit to the complainant and the community of securing wide-ranging convictions against Mr. Murtagh or counsel's remarks about the weaknesses in the *Crown* case.
- [39] To her credit, the judge recognized neither the complainant nor her daughter would have to testify, and the general time and resources saved as a result of Mr. Murtagh's guilty pleas. However, she did so in the context of a traditional approach to sentencing while considering aggravating and mitigating factors. She did not meaningfully consider these factors as forming part of the basis for the joint submission.
- [40] While the judge's focus on proportionality, denunciation and deterrence was understandable, she did not consider whether anything beyond the length of the sentence engaged the public interest or repute of the justice system: *Cheema* at para. 22. No such factor is apparent to me.
- [41] In addition, the judge's concern about the appropriateness of concurrent sentences was misplaced. Not only were the offences close in time and linked by Mr. Murtagh's relapse into substance misuse, but counsel also sought to have Mr. Murtagh's record reflect the seriousness of his individual offences by imposing lengthy concurrent sentences rather than shorter consecutive ones. Proceeding this way is often necessary to achieve a proper

sentence in the context of a joint submission: R. v. Barrett, 2011 NLCA 5 at para. 20; R. v. McCabe, 2009 NSCA 50 at para. 7. There was nothing about the proposal to impose concurrent sentences in the circumstances of Mr. Murtagh's case that was "unhinged".

- [42] Finally, insofar as the judge concluded it was sufficient to depart from the joint submission because it would have "cause[d] a reasonable and informed person to question the proper functioning of our justice system", she was in error. The threshold is higher. As stated above, a sentencing judge should not depart from a joint submission unless the proposed sentence would bring the administration of justice into disrepute or would otherwise be contrary to the public interest: Anthony-Cook at paras. 33-34.

Disposition

- [43] For these reasons, I would grant leave to appeal, allow the appeal and set aside the custodial sentence imposed by the sentencing judge on information 113324-1.
- [44] When I ask myself whether the sentence jointly proposed by the parties would be regarded by reasonable and informed persons as signalling a breakdown in the proper functioning of the justice system, my answer is no.
- [45] Considering: the circumstances of the offences and Mr. Murtagh; the benefit to the complainant and her daughter of not having to testify; the certainty of obtaining convictions against Mr. Murtagh; and the significant systemic benefits derived from his early guilty pleas, I would impose the custodial sentences that were so thoughtfully jointly proposed by the parties.
- [46] To be more specific, on information 113324-1, I would set aside the consecutive custodial sentences of nine months on count 1 (break and enter) and 15 months on count 2 (theft motor vehicle). Instead, I would impose 12- and 18-month sentences respectively. These sentences are to be served consecutively to one another but concurrently to the sentences imposed on informations 113282-1-K and 113111-4-KA. Mr. Murtagh is also entitled to 312 days' credit for time served.
- [47] I would not disturb the ancillary orders imposed by the sentencing judge.
- [48] I thank counsel for their helpful submissions.
- [49] ABRIOX J.A.: I agree.
- [50] VOITH J.A.: I agree.

"The Honourable Chief Justice Marchand"

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