
CANADA / JUDGMENT

R. v. Nikkel

2001 BCCA 745

COURT

British Columbia Court of Appeal

DECIDED

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R. v. Nikkel & Synderek

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COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT

Before:

The Honourable Mr. Justice Lambert

December 14, 2001

The Honourable Mr. Justice Hollinrake

The Honourable Madam Justice Saunders

Vancouver, B.C.

BETWEEN:

REGINA

RESPONDENT

AND:

LEE EDWARD NIKKEL

RADOSLAW SYNDEREK

APPELLANTS

I. Donaldson, Q.C.

appearing for the Appellant, Lee Edward Nikkel

J.O. Richardson

appearing for the Appellant, Radoslaw Synderek

J. Gordon

appearing for the (Crown) Respondent

- [1] LAMBERT, J.A.: These two appeals from sentence were heard together.
- [2] Both of the appellants pleaded guilty to a count of manslaughter. The victim was Nirmal Singh Gill. At the time of his death he was 65 years old. The offence occurred on 4 January 1998.
- [3] Nikkel received a sentence of 15 years imprisonment. The sentencing judge, Judge Stewart of the Provincial Court, said that the appropriate sentence for the offence and the offender would be 18 years, but he deducted from that period an allowance of three years for the 18 months spent in pre-trial custody, in accordance with the 2 for 1 guideline adopted, where appropriate, by this Court, and approved, where appropriate, by the Supreme Court of Canada.
- [4] Synderek received a sentence of 12 years imprisonment. Judge Stewart set the appropriate sentence at 15 years, and again deducted three years for the 18 months in pre-trial custody.
- [5] I will turn now to the circumstances of the offence. Nikkel and Synderek were both members of a loosely knit Neo-Nazi, skinhead, racist grouping of likeminded individuals with common views. Nikkel told an acquaintance who gave evidence that the way to be recruited to the group was to beat up "an East Indian or a Nigger or a Nip."
- [6] The two appellants were attending a drinking gathering. At about 2:00 a.m. on 4 January 1998, they and three other Neo-Nazi, skinhead, racist individuals, Kluch, Miloszewski and LeBlanc, left the gathering and went in Kluch's car to a parking area adjacent to the Guru Nanak Sikh Temple. They entered the temple grounds and began by slicing the tires of at least one car. Their noise disturbed a person in a nearby apartment and she telephoned the police. A police car came and noted the vehicle damage, but did not observe anyone and left.

- [7] Shortly after that, Mr. Gill who had some caretaker duties at the temple, including opening the gates at 3:00 a.m., and who lived in the seniors' accommodation at the temple, came upon at least three of the men, Kluch, Miloszewski and Nikkel. It seems that Synderek and LeBlanc were 50 to 100 yards away vandalizing cars. Mr. Gill may have asked them what they were doing. At that point Nikkel made an entirely unprovoked and violent attack on Mr. Gill.
- [8] Judge Stewart found that there was snow on the ground, that the area where the attack occurred was well lit, and that Nikkel knew that he was attacking a man of East Indian racial origin. Mr. Gill had a full beard. Mr. Gill and Nikkel fell to the ground. Nikkel got up. He and Kluch and Miloszewski kicked Mr. Gill violently and determinedly in the head and body over and over again. LeBlanc and Synderek came running. LeBlanc gave Mr. Gill a violent kick. Mr. Gill was crying out for help. Synderek put his foot over Mr. Gill's mouth and nose and held his foot there until Mr. Gill stopped calling out. When he was satisfied that Mr. Gill was quiet and would remain quiet Synderek removed his foot. The five attackers then fled and returned to the drinking gathering, leaving Mr. Gill lying in the snow on the temple grounds. He was found and taken to hospital where he died at about 1:00 p.m. on the same day.
- [9] Judge Stewart said this about the evidence on the cause of Mr. Gill's death:

A post-mortem examination of Mr. Gill's body was carried out by Dr. Gray on January 5, 1998. In my view she was an objective and disinterested witness. I accept her evidence as to the nature of Mr. Gill's injuries and her conclusion as to the cause of death. Dr. Gray found that Mr. Gill had been a relatively healthy man for his age with no pre-existing disease process that would cause or accelerate his death or cause him to collapse or lose consciousness. The post-mortem examination revealed nine wounds to Mr. Gill's face and head, bruising on his left hand, one fracture of the left 8th rib and two fractures of the left 9th rib. In the abdominal area Dr. Gray found a crush trauma resulting in a torn mesentery. No injuries were observed around his mouth area and his nose was not broken. The bleeding caused by these injuries was largely internal and accordingly it was Dr. Gray's opinion that external bleeding would have been in the nature of a "trickle" rather than a large pool of blood. The head injuries consisted of linear scrapes and abrasions, and bruising and deep bleeding of varying degrees of severity. Those of significance were found on the forehead and on the left and right sides of both the cheekbone area and the area over and around the ears. Some areas of bruising had patterned or textured characteristics consistent with the forceful and direct application of footwear in a kicking or stomping motion, while others may have been caused by a glancing blow or a punch. Some of the wounds may have resulted from superimposed impacts. Dr. Gray could not be precise as to the number of blows suffered by Mr. Gill. She testified there was a minimum of three blows to the torso but that it was possible that the rib injuries could have been caused by one blow. The abdominal injuries would require one or more forceful blows separate from impacts to the ribs. With respect to the head injuries, Dr. Gray stated that there was a minimum of 12 to 14 blows to the head, of which the minimum number of "serious" blows were wounds #3 to #9 as described in her post-mortem report. It was her opinion that wound #8 was certainly caused by a kicking motion. In addition, 4 to 5 other wounds were also the possible result of kicking, and perhaps more. Dr. Gray's

conclusion was that none of the blows to the torso would have been fatal. The blow to the abdomen would have caused "considerable incapacitation" but not death. It was Dr. Gray's opinion that all injuries to the head were potential causes of rotational forces that led to Mr. Gill's death. At page 9 of her Report of Post-Mortem Examination, Dr. Gray described this as follows:

As a result of these impacts to the head, his brain was prominently swollen with a large area of hemorrhage on the left side. As a result of the space-occupying effects of this hemorrhage, midline shift and herniation had occurred and the bleeding had extended into the ventricles. There were secondary hemorrhages in the brain stem. It was this head injury associated with the kicking stomping assault which was the immediate cause of this man's death. I find as a fact that Mr. Gill's death is attributable to a closed head injury caused by a kicking, stomping assault.

- [10] Nikkel was two weeks over 17 at the time of the killing. The other four were in their 20s. Nikkel was tried with the others in adult court.
- [11] All five were charged with second-degree murder. There was a preliminary hearing lasting 25 days before Judge Stewart. In the end all five accused pleaded guilty to a count of manslaughter. A sentencing hearing took place, which lasted another 15 days before Judge Stewart. Judge Stewart had, in the end, 40 days of hearing to get to know about these accused persons and this crime. Judge Stewart reserved judgment and gave comprehensive reasons. He sentenced Kluch and Nikkel to 15 years imprisonment calculated from an appropriate sentence of 18 years reduced by three years for the 18 months pre-trial custody. He sentenced Synderek, Miloszewski and LeBlanc to 12 years imprisonment calculated from an appropriate sentence of 15 years reduced by three years for the 18 months pre-trial custody.
- [12] Only Nikkel and Synderek have applied for leave to appeal their sentences. Those are the appeals that we have heard this week and to which these reasons are directed.
- [13] Like Judge Stewart I propose to refer to the relevant sentencing principles. I will start by setting out the Criminal Code.

Sections 718, 718.1 and 781.2 of the Criminal Code state as follows: 718 The fundamental purpose of sentencing is 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: [1] to denounce unlawful conduct;

- [2] to deter the offender and other persons from committing offences;
- [3] to separate offenders from society, where necessary;
- [4] to assist in rehabilitation of offenders;
- [5] to provide reparation for harm done to victims or to the community; and
- [6] to promote a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community.

718.1 A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. [2] A Court that imposes a sentence shall also take into consideration the following principles:

- (a) sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender, and, without limiting the generality of the foregoing, [1] evidence that the offence was motivated by bias, prejudice or hate based on race, national or ethnic origin, language, colour, religion, sex, age, mental or physical disability, sexual orientation or any other similar factor,
- [2] evidence that the offender, in committing the offence, abused the offender's spouse or child,
- [3] evidence that the offender, in committing the offence, abused a position of trust or authority in relations to the victim or
- [4] evidence that the offence was committed for the benefit of, at the direction of or in association with a criminal organization,

shall be deemed to be aggravating circumstances; [2] a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

- [3] where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh;
- [4] an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
- [5] all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

Section 724(3)(e) of the Criminal Code states: 724(3)(e) The prosecutor must establish, by proof beyond a reasonable doubt, the existence of any aggravating factor or any previous conviction by the offender. (emphasis added) [14] There are three authorities to which I would like to refer with respect to the relevant sentencing principles. The first is a passage from the reasons of Chief Justice Lamer in *R. v. M.*(C.A.) (1996), 105 C.C.C. (3d) 327:

...Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more. Retribution, as well, should be conceptually distinguished from its legitimate sibling, denunciation. Retribution requires that a judicial sentence properly reflect the moral blameworthiness of that particular offender. The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory

element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. ... (emphasis added) [15] In that passage Chief Justice Lamer makes the distinction between retribution and denunciation and says that they are both relevant and applicable sentencing principles. In s. 718(a) denunciation is specifically mentioned. I am sure that in that parliamentary expression of principle, denunciation includes both what Chief Justice Lamer correctly calls retribution and what he correctly calls denunciation.

[16] I would like to refer next to *R. v. Hicks* (13 February 1995) Vancouver Registry No. CA018422 (B.C.C.A.). There at page 6:

The overriding principle in sentencing is that the sentence must be commensurate with the gravity of the offence. In that principle the gravity of the offence must be assessed in accordance with the circumstances of the offence itself and also the circumstances of the offender. As subordinate principles to the overriding principle are factors of rehabilitation of the convicted person, protection of society, specific deterrence of the convicted person, and general deterrence of other people who may be minded to commit a similar kind of offence. Denunciation is, in my opinion, a proper factor to consider and apply in order to lead to a sentence that is consistent with the overriding principle that the sentence must be commensurate with the gravity of the offence. But denunciation cannot be used beyond that point. It is when denunciation goes further and results in a sentence that is more severe than is required in order to be proportionate to the gravity of the offence that denunciation turns from an applicable sentencing principle into revenge, which is inappropriate.

[17] I endorse what was said there. Denunciation and retribution are appropriate sentencing principles, but they cannot apply to add to what is an appropriate sentence commensurate with the gravity of the offence and the circumstances of the offender as set out in s. 718.1, which must be the dominant principle. But they can apply to shed light on the gravity of the offence and the circumstances of the offender, and can all operate together to produce an appropriate sentence.

[18] The third case to which I would like to refer is *R. v. MacIntyre* [1992] A.J. No. 1088 (Alta. C.A.). There in the reasons delivered by Chief Justice Fraser on behalf of the Alberta Court of Appeal, this was said:

The fundamental error made by the trial judge in sentencing both Liron and Macintyre was the fact that he essentially treated the assaults by these parties as isolated incidents rather than as what they were, part of a sequential series of assaults perpetrated by four individuals acting as a group or gang-like manner against the victim Devereaux. By doing so, he overlooked what we regarded as one of the most aggravating factors in this case, this is the gang-like backdrop of the abuse inflicted upon Devereaux. ... It is true that because of the manner in which the evidence evolved, it is impossible to determine which of the four individuals involved, if any, caused the blow to Devereaux's left leg which ultimately figured prominently in his death. But when individuals act as part of a group or gang and perpetrate criminal acts, this gang-like feature of

their activities does not permit each individual to offer his individual involvement alone, ignoring for sentencing purposes, the seriousness of their collective actions. When a person acts in concert with other members of a group or gang to victimize a single victim, that person must accept the consequences, which flow from this group action. Each member of the group must be taken to know that by committing individual assaults upon a victim, he advances, and even encourages, the violence of the others.

[19] In short the fact that it is a group or gang-like crime colours the crime and makes it inappropriate to draw fine distinctions between one member of a gang carrying out a co-ordinated activity in pursuit of the aims of the gang from another member of the gang engaged at the same time in roughly the same activity carrying out the aims of the gang.

[20] In relation to all five men, Judge Stewart set out these mitigating factors and aggravating factors:

MITIGATING FACTORS The following are factors I have considered in mitigation as they relate to all five accused. [1] Each has pled guilty. This is not one of those cases in which an early plea would have been appropriate, but they entered their pleas in a reasonable time after the Preliminary Inquiry. Their pleas have saved the public time and expense of conducting what would undoubtedly have been a complicated and very lengthy trial. Furthermore, the pleas have saved the witnesses the inconvenience and stress of testifying at a trial. Finally and equally as important, their pleas have brought a measure of closure for Mr. Gill's family and for the Indo-Canadian community.

[2] They are young men, they have the support of their families and there is hope for their rehabilitation.

I will enumerate other mitigating factors with reference to each of the accused later in my Judgment AGGRAVATING FACTORS The following are the aggravating factors that I have considered as they relate to all of the accused: [1] The attack and beating of Mr. Gill was racially motivated. (Section 718.2 (a)(i) of the Criminal Code.)

[2] The attack was cowardly and so brutal in its intensity that Mr. Gill was left unconscious, alone and slowly dying in the cold snow within sight of his beloved Temple.

[3] This was a random, unprovoked attack by a group of strangers on an elderly, peace-loving man.

[4] The attack took place on Temple grounds which should be a place of peace and comfort.

[5] They made derogatory and racist comments about Mr. Gill after learning of his death.

[21] In relation to Nikkel and Synderek, Judge Stewart set out these additional mitigating and aggravating factors particular to the two appellants:

LEE EDWARD NIKKEL - The following are the additional mitigating factors as they relate to Mr. Nikkel: [1] He was 17 at the time of the offence, he has no adult criminal record and a youth court conviction which was described as minor and not related to this type of offence.

- [2] He was under the influence of alcohol at the time and he was acknowledged that he may require counselling for alcohol and substance abuse.
- [3] It is acknowledged that Mr. Nikkel may have a bright future in the fields of computer technology and woodworking and that he has done well while he has been incarcerated.

In addition to the general aggravating factors I find the following aggravating factors as they relate to Mr. Nikkel: [1] He began the attack on Mr. Gill and delivered the first blow followed by a number of kicks. He delivered so many kicks with such force that the day after complained of having a sore leg. He stated to Mr. Gontier that he beat Mr. Gill to demonstrate that he was a worthy applicant to join a racist group.

- [2] He involved Mathew Gontier and Morgan Sluzar and tried to recruit them to share his racist views. Furthermore he tried to intimidate them into not talking of what they knew about what happened at the Temple.

No matter to whom he is speaking to about what happened on January 4, 1998, he was remarkably consistent about providing details of his involvement. As stated earlier, in my view Mr. Nikkel was the first person to assault Mr. Gill. He along with Mr. Kluch should pay the heaviest penalty. RADOSLAW SYNDEREK The following are the additional aggravating factors as they relate to Mr. Synderek: [1] Whether I accept the fact that Mr. Synderek's involvement was limited to putting his foot over Mr. Gill's mouth to keep him quiet and to his keeping a lookout as the beating continued or was as he described in the intercepted communications, he demonstrated a callous disregard for the well-being of Mr. Gill.

- [2] He demonstrated his willingness to engage in criminal activities by his participation in the bogus criminal scenarios organized by the undercover police officers.

The following are the additional mitigating factors I have considered: [1] He was 22 years old at the time of this offence, he has no prior youth or adult criminal record and he was under the influence of alcohol at the time of this offence.

- [2] Mr. Synderek appeared to be genuinely remorseful as he tearfully apologized to the family of Mr. Gill and to the Indo-Canadian community.
- [3] His role in the beating of Mr. Gill was less than that of Mr. Nikkel, Mr. Kluch and Mr. Miloszewski.
- [4] He has renounced his racist views and is desirous of separating himself from his past associates.

- [22] The argument on behalf of Nikkel was that the sentence was not fit because Nikkel was only two weeks over 17 at the time of the offence, that he could have been tried in Youth Court, that he received a sentence higher than any 17 year old had ever received for manslaughter, and that his sentence was out of the range.
- [23] Reference was made to *R. v. Bagga* (1991), 2 B.C.A.C., where a 17-year old who pleaded guilty to attempted murder received a sentence of 14 years. It was said that Bagga was the highest sentence that could be found in Canada for a 17-year old who committed the crime of manslaughter or attempted murder.
- [24] In my opinion, having regard to the aggravating and mitigating factors that I have set out, as found by Judge Stewart who carefully took into account Nikkel's age, the sentence imposed on Nikkel was within the appropriate range for the offender and the offence. It matters not that a worse offender or a worse offence can be imagined, so can a heavier sentence.
- [25] I would grant Nikkel leave to appeal but I would dismiss his appeal.
- [26] The argument on behalf of Synderek was, first, that his participation in the brutal killing was less than the participation of the other four; second, that he did not know that Mr. Gill was an Indo-Canadian; and, third, that he demonstrated remorse, that he gave evidence which Judge Stewart took as showing his sincerity, and that an inadequate allowance was made for the remorse. The participation of Synderek was discussed by Judge Stewart, as was Synderek's remorse. A finding was made by Judge Stewart that Synderek must have known that Mr. Gill was an Indo-Canadian.
- [27] On the question of participation it is important to understand that in a gang crime committed together by a like-minded group of racial bigots together carrying into effect their deplorable aims there is no room for nice distinctions about degrees of participation.
- [28] On the question of knowledge of Mr. Gill's race, it defies belief that Synderek did not know in the well-lighted temple grounds that the person who was being violently attacked by his skinhead friends was an Indo-Canadian.
- [29] Synderek and Miloszewski both demonstrated remorse. They each received 12 years compared to 15 years for Kluch and Nikkel. The only basis for their lower sentences was their remorse. It was properly recognized. I would grant Synderek leave to appeal but I would dismiss his appeal.
- [30] Finally, I wish to say that I endorse what was said by Judge Stewart in his comprehensive reasons. In my opinion, he imposed fit sentences for this despicable crime cruelly committed by a gang of racial bigots in pursuit of their racist aims.
- [31] I would grant leave to appeal in both cases but dismiss both appeals.
- [32] SAUNDERS, J.A.: I agree.
- [33] HOLLINRAKE, J.A.: I agree.

[34] LAMBERT, J.A.: Leave to appeal is granted in both cases and the appeals are dismissed.

"The Honourable Mr. Justice Lambert"

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