

CANADA / JUDGMENT

R. v. O.V.

2016 BCCA 454

COURT

British Columbia Court of Appeal

DECIDED

8 November 2016

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2016 BCCA 454 R. v. O.V.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. O.V.,

2016 BCCA 454

Date: 20161108

Docket: CA40939

Between:

Regina

Respondent

And

O.V.

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the child witnesses or the victim. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Savage

On appeal from: an order of the Supreme Court of British Columbia, dated
April 29, 2013 (R. v. O.V., 2013 BCSC 868, Vancouver Registry No. 25344)

Oral Reasons for Judgment

Counsel for the Appellant:

M. McCubbin

Counsel for the Respondent:

M.T. Ainslie, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

November 8, 2016

Place and Date of Judgment:

Vancouver, British Columbia

November 8, 2016

Summary:

Appellant convicted of second degree murder appeals a sentence imposing a 15 year period of parole ineligibility arguing the sentencing judge failed properly to take into account mitigating factors arising from his mental disorder, speculated improperly about his future dangerousness and did not consider the collateral consequences of his immigrant status on an appropriate sentence. Held: appeal dismissed. Deference is owed to the judge's consideration of the appellant's mental disorder. The court rejected the argument that the appellant's immigration status affected his sentence.

- [1] HARRIS J.A.: This is an appeal of a sentence for second degree murder in which the judge set the period of parole ineligibility at 15 years. The appellant alleges the judge erred in:
- a. speculating that the appellant would not receive treatment for his mental illness while incarcerated or, alternatively, overemphasizing the appellant's prospects for rehabilitation without sufficient evidence;
 - b. failing to give adequate weight to the appellant's mental illness as a mitigating factor on sentencing; and
 - c. failing to consider the impact of the appellant's immigration status on his parole eligibility and its corresponding effect on an appropriate sentence.

- [2] In relation to this third matter, we have received applications to adduce fresh evidence which, in light of the reasons I am about to give, I would not admit. It is unnecessary to do so.
- [3] It is also not necessary to outline the facts in any detail. The appellant was convicted of murdering his wife by stabbing her brutally 15 times. He did so in front of his three young daughters. At the time he was separated from his spouse. He was also suffering from a mental disorder. The killing appears to have been triggered in part by his anger when he realized, on returning to the home, that his wife was planning on moving with the daughters without telling him. The circumstances of the offence are outlined in great detail in the reasons for conviction, the reasons of this Court dismissing the appeal from conviction, and are succinctly summarized in the reasons for sentence at paras. 2-4.
- [4] The appellant admitted the actus reus of the offence. His defence was that he was not criminally responsible on account of his mental disorder and did not have the necessary mens rea for the offence. The judge was not persuaded that the appellant's mental disorder established that he was not criminally responsible and found that he had the necessary mens rea for murder.
- [5] At sentencing, the Crown argued that the circumstances were sufficiently aggravating that a parole ineligibility period of 12-15 years would be appropriate. The defence contended that the period of parole ineligibility should not be increased beyond 10 years, but in the alternative it should be no more than 12 years. The judge's reasoning in support of her conclusion that the appellant should be subject to a 15 year period of parole ineligibility bears reproduction:
- [21] Having reviewed the parties' submissions and the authorities relied upon, I find a period of parole ineligibility of 15 years is the appropriate disposition in this case.
- [22] There are a number of aggravating factors that relate to the nature of the offence and the circumstances surrounding the commission of this murder: (1) the accused murdered his common-law spouse and the mother of his children; (2) the murder took place in their home where she had a right to privacy and safety; (3) it was a particularly brutal murder, as the accused repeatedly stabbed her body until she died from blood loss. Deep, penetrating wounds were inflicted, with many of the cuts passing through bone; (4) and most significantly, the accused committed this brutal act while his three young daughters watched. The impact on the children was horrific. They continue to suffer great mental anguish and will likely never fully recover from this horrific experience; (5) the accused fled the scene and made no attempts to secure medical aid for his spouse. She died moments after the attack.

- [23] The character of the accused also has a bearing on the proper disposition. He did not have a lengthy criminal record before the murder; there were only two prior episodes of violence in his relationship with the victim. Prior to 2008, he had been able to provide for his children and they functioned appropriately as a family unit. However, in and about 2009, his behaviour became increasingly bizarre and erratic as the delusional disorder surfaced and became a significant problem affecting his ability to function normally on a daily basis.
- [24] The accused was admitted to hospital and placed on antipsychotic medication. The medication assisted him for a while; however, he gradually stopped taking it and his delusional disorder returned. It was when the accused was off medication and his illness was in the acute stage that he murdered his spouse.
- [25] The defence argues that while the accused's mental disorder did not meet the test under s. 16(1) of the Code, it reduces his moral culpability for the offence. I agree with this proposition; however, I believe the accused's mental health brings into question his prospects for rehabilitation and his future dangerousness. These factors must be considered by the trial judge and are not the exclusive jurisdiction of the parole board.
- [26] In *Purdy*, our Court of Appeal held that *Shropshire* demands that the trial judge consider rehabilitation and future dangerousness in deciding upon parole ineligibility. It is not a matter to be left to the parole board. *Purdy* says that their judgment in *Mafi* cannot be interpreted as excluding this factor from the trial judge's purview. As the court says at paras. 21 and 22 of *Purdy*:
- [21] I disagree with the appellant that an offender's prospects for rehabilitation should not be considered by the sentencing judge in determining whether to extend the period of parole ineligibility. Rehabilitation is a statutory objective of sentencing under s. 718, along with the need to separate offenders from society where necessary, and cannot be considered the exclusive realm of the Parole Board. I consider the passages from *Mafi* relied upon by the appellant to be inconsistent with the Supreme Court of Canada's decision in *Shropshire*, in particular para. 34 of *Shropshire*:

...I do not find that permitting trial judges to extend the period of parole ineligibility usurps or impinges upon the function of the parole board. I am cognizant of the fact that, upon the expiry of the period of parole ineligibility, there is no guarantee of release into the public. At that point, it is incumbent upon the parole board to assess the suitability of such release, and in so doing it is guided by the legislative objectives of the parole system: see ss. 101 and 102 of the Corrections and Conditional Release Act... However, it is clear that the parole board is not the only participant in the parole process. All it is designed to do is, within the parameters defined by the judiciary, decide whether an offender can be released. A key component of those parameters is the determination of when the period of parole eligibility (i.e. when the parole board can commence its administrative review function) starts to run. This is the manner in which the system is geared to function -- with complementary yet distinct input from both the judiciary and the parole administrators. It is the role of the sentencing judge to circumscribe, in certain statutorily

defined circumstances, the operation of the parole board. ...

[22] This passage makes clear the joint functioning of the Parole Board and the sentencing judge. There is no majority judgment in Mafi that would exclude from consideration the offender's prospects for rehabilitation. Rather, Shropshire makes it clear that rehabilitation is a legitimate consideration in determining the period of parole ineligibility.

[Emphasis in original.]

[27] The accused continues to be a dangerous person whose future prospects for rehabilitation are in doubt. He remains off any antipsychotic medication and has bizarre ideations regarding his spouse. He has recently expressed the belief that she is still alive and is lying about the murder to punish him. The accused has no memory of the events and is unable to explain why he brutally murdered the victim. Thus, the underlying cause of his anger at her is left unexplained and unexplored by his mental health professionals.

[28] It is apparent that ordinary life stresses bring on his delusional disorder and while in the acute stage of illness, he is capable of great violence. He is thus potentially very dangerous to the community. Because the accused is unable to acknowledge his illness, he is a poor candidate for rehabilitation.

[29] Dr. Iskander, the psychiatrist retained by the accused for the trial, described several possible motives for the crime in her report. The couple had a volatile relationship and the accused had assaulted the victim previously. The accused also acknowledged that he had been physically aggressive in prior romantic relationships. In addition, the accused must have realized that the family was about to move and had not told him where they were going. At the time he had financial pressures and missed his children.

[30] These are ordinary life stresses that may well be part of the accused's life upon his release from custody. Thus, unless he has rehabilitated, the risk for re-offending is significant and he poses a great risk of harm to the community.

[31] Balancing all of these factors, I find there is ample justification for increasing the period of parole ineligibility from 10 to 15 years. It is not a case where the aggravating factors are so egregious that a period greater than 15 years is appropriate. For these reasons, Mr. [V.], I sentence you to life in prison without the possibility of parole for a period of 15 years.

[6] The question for this Court ultimately is whether the period of parole ineligibility is clearly unreasonable.

[7] It is evident that the circumstances of the offence contained many aggravating factors as recognized by the judge at para. 22 of the reasons for sentence. She was entitled to rely on them to support her view that a period of enhanced parole ineligibility was appropriate in the circumstances. The appellant's primary contention revolves around the judge's treatment of his mental disorder. He argues that his mental disorder was critical to the events that occurred that day and the judge erred in giving it no, or inadequate weight, and

in speculating that his mental illness would remain untreated, that his prospects for rehabilitation were poor, and therefore he would continue to pose a danger well into the future.

- [8] In the first place, it must be recognized that the judge accepted and agreed with the defence argument that the appellant's mental disorder reduced his moral culpability for the offence. I cannot give effect to the argument that the judge did not weigh this point in mitigation. Clearly she did take it into account. In my view, the weight to be given this factor is for the sentencing judge. We should defer to her assessment, unless some clear legal error is engaged in the weighing of all of the circumstances. The sentencing judge had, after all, presided over a judge alone trial that called on her to consider the effect of the appellant's mental disorder in considering whether he was not criminally responsible. As a result, she was intimately familiar with the details of his mental disorder and the role it played in the death of his wife. The judge was in a uniquely privileged position to weigh the significance of the appellant's mental disorder in evaluating his moral culpability for the offence and factoring it into her sentencing analysis. I think deference is owed to the judge on this point.
- [9] After recognizing the relevance of the appellant's mental disorder to his culpability, the judge went on to express her concern that his mental disorder called into question his prospects for rehabilitation and future dangerousness. The appellant criticizes the judge's analysis because, he says, there was no evidence concerning his prognosis for future course of treatment and, moreover, that she treated this as an aggravating factor without adequate proof.
- [10] In principle, the judge is entitled to consider the appellant's prospects for rehabilitation and future dangerousness in assessing the period of parole ineligibility. Further, I accept the Crown submission that the judge was entitled to take into account the evidence at trial which included two psychiatric reports and other medical evidence. Her conclusions on rehabilitation and dangerousness are, in my view, adequately rooted in her assessment of that evidence. I do not think the judge was merely speculating in the absence of evidence. To the contrary, she was drawing reasonable conclusions that were available to her given the state of the record. In my view, deference is owed to the assessment made by the trial judge.
- [11] Finally, I turn to the argument that the judge failed to consider the appellant's immigration status in an appropriate manner or as a relevant factor. This argument is premised on the proposition that because the appellant is a permanent resident and not a citizen, his day parole ineligibility is effectively three years longer than that of a citizen because he is not eligible for day parole. It is true that the judge failed to consider the potential relevance of the appellant's immigration status on the question of an appropriate period of parole ineligibility, if she was required to do so. The issue was not raised before her, although it could have been because, in substance, all the potentially relevant facts were well-known at the time of sentencing.

[12] The appellant's argument is that his possible entitlement to day parole and deportation at 12 years has been removed by s. 128(4) of the Corrections and Conditional Release Act, S.C. 1992, c. 20, which provides:

Despite this Act, the Prisons and Reformatories Act and the Criminal Code, an offender against whom a removal order has been made under the Immigration and Refugee Protection Act is not eligible for day parole or an unescorted temporary absence until they are eligible for full parole.

[13] The difficulty with this argument is that it does not apply to the appellant's eligibility for day parole. This is because his eligibility for day parole is governed by s. 746.1 of the Criminal Code which so far as it is material reads:

746.1 (1) Unless Parliament otherwise provides by an enactment making express reference to this section, a person who has been sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act shall not be considered for parole or released pursuant to a grant of parole under the Corrections and Conditional Release Act or any other Act of Parliament until the expiration or termination of the specified number of years of imprisonment.

(2) . . . in respect of a person sentenced to imprisonment for life without eligibility for parole for a specified number of years pursuant to this Act, until the expiration of all but three years of the specified number of years of imprisonment,

(a) no day parole may be granted under the Corrections and Conditional Release Act

[14] As will be apparent, s. 128 (4) does not make express reference to s. 746.1 as required by that section. In my view, the general reference to the Criminal Code found in s. 128(4) is not sufficient to render it applicable to those rights which have been defined under s. 746.1 of the Criminal Code. It is noteworthy that other sections of the Corrections and Conditional Release Act make express reference to that particular section. In my view, this conclusion is sufficient to dispose of this ground of appeal, although we are given to understand, although I do not rely on this, that Corrections Canada takes the position that the appellant remains eligible for day parole as stipulated in that section.

[15] For the reasons given, I would not accede to the grounds of appeal advanced by the appellant. Accordingly, I would dismiss the appeal.

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

[17] SAVAGE J.A.: I agree.

[18] NEWBURY J.A.: The appeal is dismissed.

"The Honourable Mr. Justice Harris"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/16/04/2016BCCA0454.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-o-v-2016>

Prepared on 27 October 2026 · Esheria