
CANADA / JUDGMENT

R. v. P.A.S.

2009 BCCA 360

COURT

British Columbia Court of Appeal

DECIDED

12 August 2009

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

2009 BCCA 360 R. v. P.A.S.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. P.A.S.,

2009 BCCA 360

Date: 20090812

Docket: CA037064

Between:

Regina

Respondent

And

P.A.S.

Appellant

Restriction on publication: s. 486.4(1), 486.4(2) C.C.C.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

The Honourable Madam Justice Bennett

On appeal from: Provincial Court of British Columbia, March 26, 2009

(R. v. P.A.S., Campbell River 33876-1)

Oral Reasons for Judgment

Counsel for the Appellant:

M.F. Allen

Counsel for the (Crown) Respondent:

J. DeWitt-Van Oosten

Place and Date of Hearing:

Vancouver, British Columbia

August 11, 2009

Place and Date of Judgment:

Vancouver, British Columbia

August 12, 2009

- [1] BENNETT J.A.: Mr. S. pleaded guilty on October 29, 2007 to one count of sexual assault pursuant to s. 271 of the Criminal Code. The offence occurred in November 2004 and was reported to the authorities in 2007. On March 26, 2009, the learned sentencing judge sentenced Mr. S. to one year in prison followed by three years probation, along with the usual ancillary orders. Mr. S. brings an appeal from that sentence and the issue is whether he should receive a conditional sentence order. Mr. S. says that the learned sentencing judge made an unreasonable finding with respect to whether his release would endanger the safety of the community.
- [2] The facts of the case are as follows: Mr. S. was the common law husband of the complainant's mother. They had been living together for approximately four years. The complainant was 14 years old at the time of the offence, and Mr. S. was 55 years old.
- [3] One evening in November 2004, at around 8 or 9 pm, the complainant was sitting at a computer looking at the internet. The appellant came up behind her and began rubbing her breasts. He told her to remove her shirt and bra. He placed his hand inside her pants and digitally penetrated her vagina.
- [4] He told her to go to the couch and remove her clothing, which she did. He removed his clothing, fondled her and performed oral sex on her. He had her rub his penis while this occurred. He then mounted the complainant and rubbed his penis against her, but did not penetrate her. He told her not to tell anyone about the assault. The appellant had been drinking at the time of the offence.
- [5] The complainant suffered from depression and suicide ideation as a result of this assault. She eventually reported the incident to the authorities on February 8, 2007. The appellant left the home upon the report being made to the police.

- [6] A Pre-Sentence Report was prepared by a Probation Officer and a psychological assessment was prepared by Dr. Clarke of the Forensic Psychiatric Services Commission. David Owen, a social worker who provided counselling to the appellant post offence prepared a report, and Dr. Derek Eaves, a psychiatrist, also prepared a report on behalf of the appellant. All of the reports were before the sentencing judge. The reports provide a thorough review of Mr. S.'s background leading up to the offence and his current circumstances. Further, Dr. Clarke and Dr. Eaves both conducted psychological testing for risk assessment.
- [7] Mr. S. was born in Newfoundland, but left home at age 17 in part because of a physically abusive father. He completed grade nine before he left school. He has since completed a Grade 12 equivalency. He was married on two previous occasions and has two children (ages 34 and 37) from his second marriage. He worked primarily in the mining industry. He has no criminal record. At the time of the offence he was living in Campbell River, B.C., but has since moved to Pink Mountain in northern British Columbia.
- [8] Mr. S. commenced counselling after the offence was reported. He admits to consuming alcohol in excess regularly. His judicial interim release required him to abstain from alcohol, but he breached this term.
- [9] Mr. S. has expressed shame and remorse for his actions. This was a one-time event, even though he continued to live with the complainant and her mother for two more years after the incident.
- [10] The complainant was significantly affected by the assault. She became very depressed and attempted suicide. She spent approximately one month in a psychiatric hospital.
- [11] The experts are divided on whether Mr. S. is at low or moderate risk to re-offend. Dr. Clarke opined that the appellant was a moderate risk to re-offend. Dr. Eaves and Mr. Owen opined that the appellant was a low risk to re-offend. All recommended that he attend for sex offender treatment. Because he was living in a remote and isolated area of the province, it was difficult for him to obtain the recommended treatment. He has had some 16 sessions with Mr. Owen when he was in Campbell River and before he moved to northern British Columbia.
- [12] It is clear from Dr. Eaves' report that alcohol was a major factor in this offence, and he stated that if the appellant continues to drink, "It would place him at risk. It is very important that he attend to his obvious alcohol problems". Dr. Eaves further said, "It is very important that he attend effectively to his drinking problems - he needs a prolonged period of abstinence, since, in my opinion, drinking was the preeminent factor in his offending".
- [13] In Dr. Clarke's report, he refers to Mr. Owen's comment that the appellant has "little understanding of the role that alcohol and his anger played in leading up to the sexual offence". He further opined that, "[u]ntil he develops a better grasp of the reasons he offended and can develop an active approach to reduce the chances of it happening again, Mr. S. remains at risk for repeating this type of behaviour".

- [14] A conditional sentence may not be imposed unless the judge is "satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2" of the Criminal Code: see s. 742.1. These two factors are preconditions to the imposition of a conditional sentence order. Included in the purpose of sentencing in s. 718 are the objectives of denunciation and deterrence.
- [15] The learned sentencing judge considered both the aggravating and mitigating facts. He found that the offence was serious, and had only stopped short of actual intercourse. He correctly identified the fact that the appellant was in a trust position vis à vis the complainant, as he was in the role of a father. Both a position of trust and offending against the child are aggravating factors to be applied in sentencing pursuant to s. 718.2 of the Criminal Code and the common law.
- [16] The sentencing judge noted the conflict between the experts with respect to the likelihood of the appellant re-offending. He referred to the significant effect the offence had on the complainant and the fact that the appellant told her not to tell anyone what occurred. He also noted the fact that the appellant's consumption of alcohol played a major factor in the commission of the offence.
- [17] The mitigating factors were also taken into account. These include that the offence occurred only once even though the appellant continued to live in the family home for more than two years. The appellant feels shame and remorse for his actions and entered a plea of guilty saving the complainant from having to testify. He entered counselling on his own volition once the charges were laid. There is no suggestion that he is a pedophile or sexual deviant. He has no criminal record.
- [18] The sentencing judge considered the leading decision on conditional sentence orders and quoted from *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 69, as follows:

In my opinion, to assess the danger to the community posed by the offender while serving his or her sentence in the community, two factors must be taken into account: (1) the risk of the offender re-offending; and (2) the gravity of the damage that could ensue in the event of re-offence. If the judge finds that there is a real risk of re-offence, incarceration should be imposed. Of course, there is always some risk that an offender may re-offend. If the judge thinks this risk is minimal, the gravity of the damage that could follow were the offender to re-offend should also be taken into consideration. In certain cases, the minimal risk of re-offending will be offset by the possibility of a great prejudice, thereby precluding a conditional sentence.

- [19] The sentencing judge concluded that the appellant was at a real risk to re-offend. This conclusion was based on the reports he received from the three experts, as well as the fact that the appellant's acts were fuelled by alcohol and he has not come to terms with his alcohol use. He continued to consume alcohol while on bail contrary to a court ordered prohibition. Further, he found that if the appellant re-offended, the consequences to any victim would be severe.
- [20] The evidence before the learned sentencing judge included opinions from the experts, set out above, that the appellant was at risk to reoffend if he did not address his issues with alcohol. He has not done so. The sentencing judge's finding that there was a real risk that he would re-offend was grounded in the evidence and was not unreasonable based on the whole of the record before him.
- [21] Further, the learned trial judge found that if the appellant re-offended, the consequences would be significant to the victim. The offence was a serious sexual assault on a child. There is no question that if he re-offended the "gravity of the damage" to use the words from Proulx, would be severe. Thus, when the two concepts are considered together, as suggested in Proulx, the sentencing judge's conclusion that the appellant is a danger to the safety of the community is strengthened.
- [22] Next, the learned trial judge also found that, in the circumstances of this case, a conditional sentence order would not satisfy the principles of denunciation and general deterrence, which are also a pre-requisite to the imposition of a conditional sentence order. That conclusion is also sustainable on the record for the reasons that follow.
- [23] Counsel has referred to *R. v. M.H.*, 2002 BCCA 248, 166 C.C.C. (3d) 308, where this Court substituted a nine-month conditional sentence order for a nine-month prison term in a sexual assault on a child. The Crown has referred to *R. v. D.A.C.* (1988), 101 B.C.A.C. 147 and *R. v. L.C.W.* (1998), 111 B.C.A.C. 130, 128 C.C.C. (3d) 195, both cases where this Court refused conditional sentence orders for sexual assaults on children.
- [24] Each case has a different factual matrix but are helpful in determining the appropriate range of sentence and applicable principles. If a sentence is within the appropriate range of sentence, this Court will not interfere with the sentence. In *R. v. C.A.M.*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, the Court addressed the scope of appellate review in the context of a sentence appeal. At para. 90, Chief Justice Lamer, speaking for the Court said:
- Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.
- [25] As noted in *C.A.M.*, sentencing is an individualized process. The Court made specific reference to the fact that a sentencing judge normally presides near or within the community where the offences occurred. The Court said at para 91:

...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 the 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 the community. The discretion of a sentencing judge should thus not be interfered with lightly.

[26] The sentencing judge was in the best position to ascertain the "just and appropriate" sentence within his community.

[27] The appellant submitted that a conditional sentence order is also in the range of sentences available for this type of offence. This is a correct statement in terms of the sentencing of the appellant. However, the appellant needed to overcome the preconditions for the imposition of a conditional sentence order, and he did not. Even if he had, the appellant must show not just that a conditional sentence is in the appropriate range, he must show that the sentence imposed was demonstrably unfit.

[28] There is no error in principle, no failure to consider a relevant factor and no over-emphasis of appropriate factors in this case. The trial judge considered all of the material, and took into account the aggravating and mitigating factors and the principles of sentencing. He said that a conditional sentence would not sufficiently address the principle of denunciation and deterrence for such a serious crime. The sentence is clearly within the range of available sentences, and it cannot be said that the sentence is demonstrably unfit.

[29] Therefore, I would grant leave to appeal but would dismiss the appeal.

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

[31] HALL J.A.: I agree.

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

"The Honourable Madam Justice Bennett"

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/09/03/2009BCCA0360.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-p-a-s-2009>

Prepared on 26 October 2026 · Esheria