CANADA / JUDGMENT

R. v. Potter

2004 BCCA 581

COURT
British Columbia Court of Appeal

DECIDED
18 November 2004

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2004 BCCA 581 R. v. Potter

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Potter,

2004 BCCA 581

Date: 20041118

Docket: CA32269

Between:

Regina

Respondent

And

Christina Lynn Potter

Appellant

Before:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Low

The Honourable Mr. Justice Thackray

M.D. Smith

Counsel for the Appellant

W.L. Rubin

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

1 November 2004

Place and Date of Judgment:

Vancouver, British Columbia

18 November 2004

Written Reasons by:

The Honourable Mr. Justice Low

Concurred in by:

The Honourable Madam Justice Rowles

The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Mr. Justice Low:

[1] The appellant pleaded guilty to assault causing bodily harm. The victim was her infant daughter. She seeks leave to appeal a sentence of imprisonment for 15 months followed by probation for three years imposed by Waurynchuk P.C.J. on 10 June 2004 in Golden, B. C.

[2] The appellant says that she should have received a conditional sentence or the term of imprisonment ought to have been shorter and, in any event, the term of probation should be shorter.

[3] The circumstances of this offence are egregious. The appellant, then 18 years old, gave birth to the infant victim on 13 July 2001. Seventeen days later, she took the baby to a doctor who determined that the baby had a broken arm and a bruised cheek. The appellant later told police officers that she pulled the baby's arm in anger and grabbed her face too hard when she was moving during feeding.

[4] On 4 August 2001, a medical expert at Alberta Children's Hospital, Dr. Cooper, examined the child. He reported that there were multiple fractures caused over a period of a week to ten days. There were six fractures involving all four limbs plus multiple rib fractures. In a later report, the doctor opined that the fractures were inflicted on at least two different occasions.

[5] During a subsequent interview by police officers, the appellant was unable to explain the additional injuries to the infant. She said that she might have blacked out. Defence counsel at the sentence proceedings told the court that the appellant had no memory of what happened except for pulling the child's arm when changing her. He said the appellant accepted that she must have caused the other injuries to the baby because nobody else could have caused them.

[6] Crown counsel agreed that the appellant was the victim of abuse and parental neglect as a child and that she had a psychological history.

[7] In the trial court, the Crown sought a gaol sentence of up to two years with probation for three years to follow.

[8] There was a delay of about two years between the date the appellant pleaded guilty and the date of the imposition of sentence. During this time the appellant sometimes failed to appear and sometimes obtained adjournments as she considered whether she wished to apply to set aside her guilty plea, an application that was subsequently denied. There was a delay in the preparation of a pre-sentence report because the appellant could not be located. When the appellant entered the guilty plea the court ordered a psychiatric and psychological assessment. However, that assessment was not done because the appellant failed to show up for assessment interviews scheduled twice in July 2002.

[9] The sentencing judge reviewed the circumstances of the offence and the history of the proceedings. He noted the mitigating factors - the age of the appellant, the entering of a guilty plea, the absence of a criminal record, the unfortunate background of the appellant, the diagnosis of the appellant in 1995 as suffering from attention deficit hyperactivity disorder and the fact that at the time of the assaults she suffered extreme postpartum depression with huge mood swings. He also noted that she lost custody of a child born to her earlier because she accidentally dropped the child. He further observed that the appellant had "little or no insight into her problem" and "little or no regard for consequences" and that she used illicit drugs "up to and after the birth" of the victim of the assault. Apparently the appellant has managed to stay drug-free for the past two years.

[10] The sentencing judge also noted that the appellant was diagnosed in 2003 with a borderline personality disorder, that she sees a counsellor and that she attends parenting courses with a view to obtaining custody of a third child born to her in 2003 who is now in the care of the Director of Families and Children.

[11] Finally, the sentencing judge stated that the appellant currently has a good partner who is the father of her third child and that she picks cherries to supplement a disability income she now receives. But he also stated that the appellant is "still very impulsive and very volatile". He concluded his reasons as follows:

[22] Both counsel provided me with a number of court cases, precedents to consider, and the range of sentencing in those cases varies from a suspended sentence to one of two and a half years. Some of the cases apply to the granting of conditional sentences. The principles to be applied in the sentencing case are clearly set out in Section 718 of the Criminal Code. I have reviewed all of them and the case law provided to me by counsel. It is clear that the paramount considerations and the principles applicable here are deterrence, denunciation and retribution.

[23] This is a very sad and tragic case involving serious multiple injuries to a seventeen day old infant by its own mother. It has left the child with permanent and lasting disabilities. The breach of trust, the injuries, the pain are all a result of the child's mother's actions. Christina Potter is culpable for all of this when her duty was to protect and love. It has been said many times that serious crimes of violence against defenceless children warrant a strong and firm response from the courts as the particular vulnerability of the child victim and the profound breach of trust involved in the abuse of a child by a parent, the very person to whom the child must look for care and protection.

[24] This was not a case of child discipline which normally results in sentences at the lower end of the range. This case calls for a sentence in the higher end of the range. The fact that the offender herself could fit into the battered child syndrome because of her early life experiences and her terrible family life is no excuse. Brutality and violence is not to be condoned simply because it is passed from one generation to the next.

[25] There is no justification for what happened to Kailee Potter. Children are amongst the most vulnerable in our society and Kailee was brutally abused all within her first seventeen days. The important factor here is to remember that society and the courts must protect those who cannot protect themselves.

[26] I cannot find that a conditional sentence order would be in the best interests of the offender. I cannot find that a conditional sentence order would meet the principles of deterrence and denunciation and retribution as it applies to cases of this nature. I cannot agree that a sentence of three months in custody would meet the sentencing requirements brought forth by the circumstances in this case.

[12] The appellant argues that the sentencing reasons contain three specific errors of law.

[13] First, the appellant says the judge failed to consider, as required by s. 742.1 of the Criminal Code, whether a community-based sentence would endanger the public. The judge did not specifically deal with this aspect of a conditional sentence but the Crown did not contend that such a sentence would endanger the public and it is implicit in the judge's reasons that he did not refuse a conditional sentence on that basis.

[14] Second, the appellant refers to the opening sentence of paragraph 26 of the sentencing reasons quoted above and contends that the judge attached to the codified conditional sentencing principles a requirement that such a sentence be in the best interests of the offender. I do not think that is necessarily so. Rather it appears to me that the judge's comment was in response to a submission by the appellant's counsel that a conditional sentence would be "extremely helpful" for the appellant.

[15] Third, the appellant argues that we should find error in the sentencing reasons, again in paragraph 26, where the judge said that the proposed sentence would not properly address the principles of deterrence, denunciation and retribution "as [they] apply to cases of this nature". The argument is that it is an error to generalize in this manner because the circumstances of the offence alone do not dictate the appropriateness of a conditional sentence: R. v. Proulx, (2000) 140 C.C.C. (3d) 449 (S.C.C.). The appellant says that the passage amounted to a finding that a conditional sentence was not available in any case of physical abuse of an infant.

[16] I do not agree that the sentencing judge made the error contended. In the ensuing sentence he based his decision not to impose a conditional sentence on the circumstances "brought forth in this case". The impugned passage is taken out of context. It is clear that the sentencing judge focused on the seriousness of the assaults in this case and concluded that that circumstance outweighed the other factors, all of which he carefully considered.

[17] In my opinion, the sentence of imprisonment for 15 months was fit. I would not interfere with the determination of the sentencing judge that a conditional sentence in this case was not appropriate to address the factors of deterrence, denunciation and retribution. I agree with the submission of the Crown that paragraph 106 of the judgment in Proulx has application:

The amount of denunciation provided by a conditional sentence will be heavily dependent on the circumstances of the offender, the nature of the conditions imposed, and the community in which the sentence is to be served. As a general matter, the more serious the offence and the greater the need for denunciation, the longer and more onerous the conditional sentence should be. However, there may be certain circumstances in which the need for denunciation is so pressing that incarceration will be the only suitable way in which to express society's condemnation of the offender's conduct.

[18] In the circumstances of this case, I am unable to find error in the determination by the sentencing judge that important principles of sentencing would not be addressed adequately by a conditional sentence. The length of the sentence is consistent with sentences in other cases.

[19] I would not shorten the period of probation, nor would I vary any of the terms of the probation order. Information before us suggests that the appellant has taken some steps toward her rehabilitation but she lacks insight into her behaviour and its consequences and she does not have family support. If she continues to improve, she can apply to the trial court under s. 732.2(3) of the Criminal Code for a reduction in the term of the probation order.

[20] I would grant leave to appeal the sentence, but I would dismiss the appeal.

"The Honourable Mr. Justice Low"

I agree:

"The Honourable Madam Justice Rowles"

I agree:

"The Honourable Mr. Justice Thackray"

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