
CANADA / JUDGMENT

R. v. S. W. M.

2006 BCSC 184

COURT

Supreme Court of British Columbia

DECIDED

17 January 2006

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2006 BCSC 184err1.doc R. v. S.W.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. S. W. M.,

2006 BCSC 184

Date: 20060117

Docket: 23348

Registry: Vancouver

Regina

v.

S. W. M.

Ban on Publication: Section 486(4.1) C.C.C.

Previously ordered 21 February 05 in Provincial Court, that Order directing

that the identity of K.M. and A.M. shall not be published in any

document or broadcast in any way

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Sentence

January 17, 2006

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Place of Trial/Hearing:

Vancouver, B.C.

Introduction

- [1] S.M. was charged with aggravated assault on February 7, 2004, of his infant daughter, K.M., contrary to s. 268 of the Criminal Code. The maximum penalty prescribed by Parliament for an offence under s. 268 is 14 years imprisonment. S.M. was found guilty at trial of that offence on November 16, 2005, and he is now before me for imposition of sentence.

Facts

- [2] The facts are fully set out in the reasons for conviction at 2005 BCSC 1601. They may be briefly summarized as follows.
- [3] In the fall of 2003, S.M. was living with his common-law spouse, J.P., and their one-year-old son, S.M. Junior, in an apartment in Burnaby. J.P. was pregnant and gave birth to their twin daughters, K.M. and A.M., two-and-one-half months prematurely. Because of the premature birth, the twins remained in hospital for two months before S.M. and J.P. brought them home on January 16, 2004.
- [4] The aggravated assault occurred three weeks later, on February 7, 2004. On that day, the family was together at home in their apartment. J.P. was watching a movie on television, and the accused was arranging shelving and stringing decorative lights. He was also looking after the children. He tried feeding K.M. and put her to bed in the bedroom. Shortly before 8:30 p.m. he went into the bedroom, where K.M. was crying. Then the crying stopped, and S.M. came out of the bedroom holding K.M., who now had a large lump on the left side of her head. K.M. clearly had serious head injuries.
- [5] Both the accused and J.P. testified at trial. Each one denied having caused the injuries. It was clear on the evidence that they were the only persons who had access to the children. I concluded that the Crown had proven beyond a reasonable doubt that it was the accused who inflicted the head injuries on K.M. and that the severity of the injuries made the assault an aggravated assault.
- [6] Realizing that K.M. needed medical attention, the couple tried calling 911, but their phone was disconnected, so they took the children by SkyTrain to Royal Columbian Hospital. They arrived at the hospital emergency department around 10:00 p.m. and were met by a paediatric emergency physician, Dr. Clarke. She asked them why they were there, and the

accused said he was concerned about the swelling to K.M.'s head. He said K.M. had not been feeding well. He told her he had put K.M. in her car seat on the bed, had left the bedroom to string Christmas lights, and when he returned to the bedroom he noticed the swelling on the left side of her head and that her eyes were rolled back. He said the car seat had not moved and K.M. had not fallen. Either the accused or J.P. said that S.M. Junior had hit K.M. with a toy two weeks earlier.

- [7] Dr. Clarke observed that K.M. had an obvious swelling and bruise to the left side of her head above her ear. She was listless and had an elevated heart rate indicating possible shock. Her eyes were open, but her level of consciousness was not normal. The tissue under her tongue (the fraenum) was torn and there was a blood clot. Dr. Clarke asked a nurse to call the Ministry of Children and Family Development. All three of the couple's children were eventually taken into care and have not been returned to either parent.
- [8] At the hospital K.M. was prepared for intravenous access and moved to the resuscitation room. She had irregular breathing, and a breathing tube was inserted. She was then transported by helicopter to B.C. Children's Hospital, where she was examined by a neurosurgeon, Dr. Durity. He found that K.M. had a severe, major skull fracture, and a combination of brain tissue and blood had escaped and collected under her scalp. These injuries were potentially life threatening.
- [9] Dr. Durity operated on K.M. After making a large incision to her head, he found four cc's of disrupted brain tissue. He removed the blood clot and contused brain material, controlled the bleeding, and repaired the dura and skull.
- [10] Dr. Durity testified that for a child of K.M.'s age, these were the most severe brain injuries he had ever seen since he began practicing medicine in the 1960s. He said that these injuries were the result of a direct, significant force to the left side of her head. As he put it, the injury required "explosive force." The most likely cause is that K.M.'s head came into contact with a blunt object with considerable force. Her injuries could have been caused by a punch, but if so, the punch must have been totally uncontrolled and with the full force of a swinging arm.
- [11] The Crown also called Dr. Colbourne, who was qualified to give expert opinion evidence on the causes of injuries to young children. She examined K.M. in hospital on February 8, 2004. She also reviewed the clinical records, X-rays and the CT scans. She found that K.M. had some old injuries that pre-dated her skull fracture. There were several rib fractures, some about a week old and some two to three weeks old. Fractured ribs are rare in young children due to their flexibility. They were likely caused by severe squeezing.

- [12] Dr. Colbourne described K.M.'s head injury as a massive skull fracture resulting in the extrusion of brain tissue and blood. In her opinion, this injury was caused either by throwing or swinging the child into a hard surface or by hitting her with something with severe force. She said it was very unlikely that this injury was caused by a punch to the head with a fist, although that was possible if her head was being held firmly with the other hand. She said the injury was most likely caused by being hit with an object such as a bat.
- [13] Although I found that the Crown had proven beyond a reasonable doubt that the accused caused K.M.'s head injuries, we may never know exactly how he caused them. He had a lengthy interview with the police, near the end of which he admitted assaulting his child, but the explanation he gave was inconsistent with the medical evidence. The actual level of violence he inflicted on K.M. must have been considerably greater than he has admitted either to the police or during his testimony at trial.

Previous Violent Conduct

- [14] During his trial testimony, the accused acknowledged other assaults on K.M. beyond that which was charged in the indictment. He admitted, for example, that he had forced the bottle and pacifier into K.M.'s mouth. That would account for the torn tissue under her tongue. He also accepted responsibility for some of her fractured ribs, which, on the medical evidence, must have occurred several days earlier than the head injuries. He admitted that he caused K.M.'s fractured ribs by shaking her. He said he did this because she was crying and he got upset. In his own words, he said he was "blinded by frustration."
- [15] Defence counsel submits that this other violent conduct cannot be taken into account on these sentencing proceedings since it does not form part of the charge in the indictment.
- [16] Counsel is quite correct that the accused cannot be sentenced now as if he had been convicted of those other assaults. He is being sentenced today only for the aggravated assault on February 7, 2004 that caused K.M.'s head injuries. On the other hand, that does not mean that his other violent conduct towards the same child in the days and weeks preceding this offence must be ignored and that he must be sentenced as if his assault on February 7, 2004 was an isolated and out-of-character incident. Evidence of his previous violent behaviour toward K.M. may properly be considered for the limited purpose of showing the background and the character of the offender: *R. v. Edwards* (2001), 45 C.R. (5th) 177 (Ont. C.A.). It is certainly relevant when considering the rehabilitative and protective objectives of sentencing.

Victim Impact

- [17] The aggravated assault of which the accused now stands convicted caused serious damage to K.M.'s brain. The extent of the damage is a significant aggravating circumstance.

- [18] In his evidence, Dr. Durity said K.M. will probably suffer some developmental delay affecting learning and emotional development. The damage to the left side of her brain may cause difficulties on the right side of her body, such as clumsiness, loss of sensation, and disruption of the right side of her visual field. There is also a 60 to 70 percent chance that she will experience seizures.
- [19] K.M. was not yet three-months-old when the accused inflicted these injuries on her. Even that is an understatement of her vulnerability, since she was born two months premature, and it might therefore be more accurate to consider her the equivalent of a one-month-old infant at the time of the assault.
- [20] Almost two years have now elapsed since the assault. One of the unusual aspects of this case is that K.M. has a twin sister. In assessing the effect that K.M.'s injuries have had on her, therefore, it is possible to compare her development with that of her sister who is precisely the same age.
- [21] Since K.M. cannot herself describe the impact of this offence on her, a social worker from Aboriginal Child and Family Services has prepared a report on her behalf. The social worker described the physical impact on K.M. as follows:

At the age of 12 months (one year), K.M. was still on a liquid diet of milk only. She was nonresponsive and had no facial expressions. She would only lay on her back with no head movement or tracking with her eyes. She had no visual attention toward toys or people. She would not roll or sit up. She had no movement in her right arm or leg. Her right arm was very tight and she kept it fisted. She needed to sit on a specialized seat to keep her up, though she would lean to the left when sitting. She was very stiff in her right side. She would keep her right hand clenched and could not grab nor reach. She had difficulty bearing any weight on her right side. She was unable to bring her hands together at any one time (no clapping or be able to hold an object with both hands). She was not able to kick, nor enjoy any time on her tummy. She was not able to coo, babble, squeal or laugh. She had difficulty shifting body weight from side to side.

K.M. is now over 24 months old (two years). She is definitely not in line developmentally in terms of her social, self-help, gross motor, fine motor and language skills. At her age she still needs constant daily workouts to ensure that her muscles do not become stiff. There is still no strength in her right arm or leg.

K.M. is unable to do the following, which would be indicative of a typical two-year-old child. She is unable to stand, crawl, kick, walk, jump, run, climb stairs. She is unable to feed herself. She is unable to sit without help. She recently has been able to sit for short periods of time by holding her trunk up. She is unable to hit two objects together, bring her hands together, or transfer an object from one hand to the other. She is unable to pretend in her play or imitate other behaviour. She is unable to work on her own shoes or dress herself. She is unable to talk. She is just discovering she has a voice. By this time children should be at two-word sentences or have a vocabulary minimally of 20 to 30 words.

[22] Though less quantifiable than the physical effects, there will undoubtedly also be emotional effects that K.M. will have to deal with as she matures. The social worker discussed the possible emotional effects in these terms:

At the time of this event K.M. was only three months old. At corrected age she would have been one month old. It is very difficult to state the exact emotional impact the assault has played in her life due to her age. This area will definitely play an impact when she is older and when/if she has the ability to understand how her life has been changed due to this assault. She will need to deal with why she is a permanent ward (continuing custody) of the Ministry for Child and Family, why she will no longer have contact with her biological parents, why she will be adopted or placed with extended family if there are any willing to come forward to care for a compromised child, why she is going to be different than other children.

Circumstances of the Offender

[23] The background and circumstances of the accused are described in detail in a 10-page pre-sentence report.

[24] The accused is of Aboriginal descent. When he was growing up, he witnessed his father assaulting his mother many times. She sometimes tried to leave him, and during those times the accused would be left as the main caregiver for his two siblings.

[25] Sometime after he turned 12, he and his siblings were apprehended by the Ministry. He then lived in various foster homes and group homes. At school he achieved approximately grade 10 level.

[26] After meeting his common-law partner, J.P., they lived for a while with her grandmother, and then for some time with his mother, before moving into their apartment in Burnaby. Around that time he had worked as an electrician, but that employment lasted only a few months.

[27] The accused was only 19-years-old at the time of this offence. He had a few convictions in Youth Court. He was convicted on three occasions for theft under \$5,000, twice in 2001 and once in 2002. Also, in 2002, he was convicted of two counts of failing to comply with a disposition. On each occasion that he was convicted, his sentence was the same, one year probation.

The Accused's Aboriginal Background

[28] In sentencing S.M., consideration must be given to the circumstances of his Aboriginal background: s. 718.2(e) of the Criminal Code; R. v. Gladue, [1999] 1 S.C.R. 688. The pre-sentence report discusses this topic in some detail:

The subject reports that he has grown up "in a white man's world" and states that he does not feel connected to any First Nations Band or organization and does not necessarily believe in First Nations philosophy, for example, "respecting your elders." He reports that his father, [M.D.], was of Cree descent, but ran away at a young age and began living on the streets.

Pauline [D.] confirms that the subject's father suffered much childhood abuse, grew up in foster homes and began going in and out of jail around age 11. She states that [M.D.] "spent most of his life in jail before he met me."

The subject notes and Pauline confirms that she is of the Skwah Band in Chilliwack, but was adopted into a Caucasian family at a young age. Pauline reports that her adopted mother studied First Nations culture and informed her of her ancestry. She notes that her adopted father was a minister.

Pauline has no complaints about her adopted family and states that she is grateful because her half-brothers "got messed up" going from foster home to foster home.

Pauline relays that she knows nothing of her biological father and reports that her biological mother ran away to California due to becoming pregnant with Pauline while her husband (the father of Pauline's half-brothers) was in jail. All three children went into foster care or were adopted.

Pauline states that her biological mother has now passed away and she never had a chance to meet her.

While there is no specific mention of the effects of or attendance at residential school or experiences of racism, it is apparent that the turmoil and trauma, presence of the foster care system and contact with the criminal justice system that have plagued many First Nations families since colonialism are present within this family, as well. In terms of sentencing, however, even if restorative justice programs were available, the subject would likely not qualify, as taking responsibility for the offence is a prerequisite of most restorative justice programs. In addition, the victim is a minor and unable to participate, and this writer's understanding is that the Ministry of Children and Family Development has now placed the child up for adoption.

[29] In the circumstances of this case, I agree with the author of the pre-sentence report that no appropriate restorative justice option is available.

Mitigating Circumstances

[30] The accused's youth and relatively minor Youth Court record are mitigating factors in this case. The accused's Youth Court record does not disclose a history of violence. At the time of this offence he was only 19-years-old, and yet he had to cope with the weighty adult responsibilities of being a parent to three young children.

Aggravating Circumstances

- [31] The main aggravating factors in this case are the extremely serious effects on the victim and the fact that she was so particularly vulnerable. The accused stood in a position of trust to his infant daughter, and he violated that trust in a most devastating way.
- [32] I need not quote from the various cases that have discussed why assaults by parents on children must be firmly condemned. The reasons are obvious. Children are by their very nature vulnerable. They look to their parents for protection and have every right to expect that it will be given. When a parent not only fails to protect, but is himself the agent of violent harm, this extraordinary breach of trust calls for a sentence that unmistakably demonstrates society's denunciation. The sentence for such conduct must also serve to deter both the accused and others from similar conduct in the future. Finally, an appropriate sentence must strive to protect vulnerable children, while working towards the eventual rehabilitation of the offender.

Pre-trial Custody

- [33] The accused was released on bail shortly after this offence. On more than one occasion he violated his bail conditions. In January 2005, he was ordered detained pending trial. In all, he has spent 13 months in pre-sentence custody.
- [34] Crown counsel submits that since the reason for his detention order was that he had breached his bail conditions, he should only receive one-for-one credit for his "dead time" rather than the more usual two-for-one credit. In support of that position, he cites *R. v. Warren*, [1999] O.J. No. 4591 (Ont. C.A.), and *R. v. D.W.H.*, 2005 BCSC 247.
- [35] Although I do not doubt that there are circumstances in which something less than two-for-one credit should be given for time spent in pre-sentence custody, I do not agree that this is one of those cases. In imposing sentence, I will give S.M. credit for the equivalent of 26 months.

The Position of the Crown and of the Defence

- [36] The Crown, emphasizing the principles of deterrence, denunciation and protection of children, submits that the accused should receive a sentence of four to six years in addition to the time he has already spent in custody.
- [37] Crown counsel relied on a number of cases in which substantial sentences were imposed for serious assaults against children, including *R. v. Soper*, [1986] B.C.J. No. 449 (B.C.C.A.); *R. v. Isch* (1981), 22 C.R. (3d) 106 (B.C.C.A.); *R. v. Naglik* (1991), 3 O.R. (3d) 385 (Ont. C.A.); *R. v. Madget*, [1995] O.J. No. 2959 (Ont. Gen. Div.); *R. v. Santana*, [1995] O.J. No. 2141 (Ont. Gen. Div.); *R. v. Gregory*, [1985] B.C.J. No. 1860 (B.C.C.A.); *R. v. McCrindle*, [1997] O.J. No. 5457 (Ont. Gen. Div.); and *R. v. S.E.C.*, 2003 BCCA 421.

- [38] In both Soper and Isch sentences of 12 years were imposed, but they were cases of manslaughter and therefore are of little assistance here. Gregory was also a charge of manslaughter. In McCrindle, the court imposed a sentence of six years for criminal negligence causing bodily harm.
- [39] The remaining cases are all convictions for aggravated assault. In Naglik, a sentence of four-and-one-half years was imposed, and in Madget and Santana, the sentences were four years each. In S.E.C. the sentence was four-years, but this was in addition to one year of pre-trial custody, making it effectively a six-year sentence. It must be noted, however, that at the time of his offence, S.E.C. was on probation for an earlier assault.
- [40] Defence counsel submits that the most important sentencing objectives in this case are reformation and rehabilitation. He emphasizes the youth of the offender and the fact that he does not have a record for violence. He points out that the accused is only charged with a single count in the indictment. He submits that the appropriate range of sentence for this offence and this offender would be two to three years, but when credit is given for pre-trial custody, the appropriate sentence would be an additional six months incarceration, plus probation for three years.
- [41] The defence relies on *R. v. Marks* (1994), 91 C.C.C. (3d) 421 (Nfld. C.A.); *R. v. Carle* (2001), 158 B.C.A.C. 167, 2001 BCCA 492; *R. v. Legge* (1994), 115 Nfld. & P.E.I.R. 86 (Nfld. S.C.); *R. v. C.L.P.*, 2004 BCCA 581; *R. v. O'Brien*, 2000 BCCA 199; and *R. v. Ewen* (2000), 144 C.C.C. (3d) 277 (Sask. C.A.). In those cases, the sentences ranged from eight months plus three years probation to two years less one day. Most of those cases were convictions for assault causing bodily harm, which is a less serious offence than aggravated assault. Those cases also involved less serious injuries than the present case.
- [42] The defence relies particularly on the distinction made by the Newfoundland Court of Appeal in *Marks*, between intentional or indifferent infliction of injury and the application of force by an immature parent out of frustration. There the court held that there was a high degree of culpability attaching to the former calling for a severe sentence, whereas in the latter case a short sentence followed by probation would be more appropriate in order for the abuser to receive counselling. O'Neill J.A. wrote at paragraphs 27 to 28:

Physical child abuse frequently falls into two distinct types:

- (i) the application of force with, if not the intention, the expectation of causing injury, or an indifference as to whether injuries will result, and
- (ii) the application of force where a parent or other custodian of a child is immature and is unskilled in matters of child care and acting out of emotional upset, frustration or impatience does not fully appreciate the serious injuries which might result.

In the first situation, there is a high degree of culpability and the court will in most cases impose a severe sentence. In the second situation, while punishment is warranted, a sentence, where such is warranted, will not ordinarily be a severe one and will usually be followed by a period of probation, a condition of which would be that the abuser receive training and counselling to the end that further acts of abuse will be avoided.

The court there found that the accused's conduct fell into the latter category, and so they upheld a sentence of eight months incarceration plus three years probation.

- [43] Defence counsel in the present case submits that S.M.'s conduct should be similarly classified as an isolated, frustrated outburst, and a short sentence plus probation would therefore be appropriate.
- [44] I do not agree that S.M.'s conduct is similar to that of the accused in *R. v. Marks*. In *Marks*, the baby's injuries were described as being consistent with "shaken baby syndrome." The suggestion was that the accused in that case may not have realized that such conduct could cause significant injuries.
- [45] The facts in the present case are entirely different. While it is likely that S.M. acted out of frustration at K.M.'s colicky crying, his assault was not limited to shaking. Rather, he delivered a powerful blow, one that any reasonable person must realize would cause devastating injuries.
- [46] If one adopts the distinction made by O'Neill J.A., then I would find that S.M.'s conduct falls within the first category, that is, "the application of force with, if not the intention, the expectation of causing injury, or an indifference as to whether injuries will result." I agree with O'Neill J.A. that there is a high degree of culpability attaching to such conduct and that it properly attracts a severe sentence.

The Accused's Attitude Toward the Offence

- [47] In considering whether S.M. continues to pose a danger to young children and whether a short sentence would be sufficient for purposes of deterrence and rehabilitation, I am troubled by the comments of the author of the pre-sentence report under the heading "Attitude and Understanding Regarding Offence":

The subject pled not guilty to this offence and continues to claim that he is "innocent of what they say." Although he acknowledges some misconduct on his part, he states, "I never hit her anywhere near hard enough to cause these injuries. There was always a limit to the force I used, if you want to call it force."

The subject does not take responsibility for the offence and does not feel he is in need of anger management or counselling. The subject also appears to be in denial regarding the impact of the offence on his daughter. He states, "I really hate what they say about my daughter. The effects won't be as bad as they are saying." The subject notes that: "The human mind will repair itself. She will get better. Over 20 years she will be just as normal as you or I." Although in one breath he

claims his daughter will be "normal," in the next breath he states, "People with disabilities are just as special as anyone else."

The subject appears either unable or unwilling to understand the extent of the victim's injuries and the impact on the victim. Similarly, he refuses to acknowledge that it could have been his actions that caused these injuries. While he does state that he feels "real bad about what happened," he does not appear to link "what happened" to his own actions.

[48] Of course, the accused is entitled to maintain his innocence, particularly if he is contemplating an appeal. It is of concern, however, that he does not seem to acknowledge the extent of his daughter's injuries.

Sentence

[49] In the final section of the pre-sentence report, the probation officer described the resources available to the accused in a federal institution, in a provincial institution and in the community. With respect to federal institutions, she wrote:

Federal institutions offer a range of educational opportunities from basic upgrading to vocational programs and post-secondary education. They also offer a range of work opportunities.

Federal institutions offer programs in substance abuse, violence prevention and family violence. They also offer a variety of programs related to living skills, something the subject could clearly benefit from. For example, federal institutions offer the "reasoning and rehabilitation" program, which consists of 37 sessions of two to three hours in length over a four-month period. This program focuses on sociocognitive deficits and "teaches participants to think before they act, to anticipate problems and plan their reactions, to focus more on problems and solutions, to consider other people's points of view." While it cannot be guaranteed that the subject would be placed in this program (classification and case management takes place within the institution), he does meet the criteria outlined in the program description materials.

[50] In my view, the protection of the public as well as the accused's own rehabilitation will be best served by a significant custodial sentence in a federal institution. As well, no other sentence would be proportionate to the offence. A significant sentence is required to meet the objectives of deterrence and denunciation.

[51] Mr. M., would you please stand.

[52] Your aggravated assault on your infant child left her with devastating injuries. It may be that she will never be able to realize her full potential. Every day of her life she will bear the consequences of the terrible wrong that you have done to her.

[53] Were it not for your pre-trial custody the appropriate sentence for your offence would be four-and-one-half years imprisonment. You have already spent 13 months in custody. Giving you the usual two-for-one credit for that pre-trial custody, I sentence you to serve an additional 28 months imprisonment.

- [54] You will, as well, be subject to a 10-year firearm prohibition order pursuant to s. 109 of the Criminal Code.
- [55] I am not ordering that you pay the usual victim fine surcharge under s. 737, as I am satisfied that you have no ability to pay.
- [56] Finally, there will be an order under s. 487.051(1)(a) of the Criminal Code for you to provide a sample for DNA analysis. I am not persuaded that the impact of such an order on your privacy or security of your person would be grossly disproportionate to the public interest in the protection of society and the proper administration of justice, to be achieved through the early detection, arrest and conviction of offenders.

"W.F. Ehrcke, J."

The Honourable Mr. Justice W.F. Ehrcke

February 17, 2006 - Revised Judgment

These Oral Reasons for Judgment were rendered on January 17, 2006 and not on January 17, 2007 as inadvertently stated.

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Prepared on 26 October 2026 · Esheria