

CANADA / JUDGMENT

R. v. Sampson

2020 BCSC 1891

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1891 R. v. Sampson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sampson,

2020 BCSC 1891

Date: 20200714

Docket: 36451-2

Registry: Williams Lake

Her Majesty the Queen

v.

Ronald Sampson

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Before: The Honourable Mr Justice Crerar

On appeal from: an order of the Williams Lake Provincial Court of British Columbia, dated September 27, 2019

(R. v. Sampson, File No. 901149-4-C)

Oral Reasons for Judgment

Counsel for the Crown:

Julie M.M. Dufour

Counsel for the Accused:

Toby Rauch-Davis

Place and Date of Hearing:

Prince George, B.C.

July 13-14, 2020

Place and Date of Judgment:

Prince George, B.C.

July 14, 2020

INTRODUCTION

- [1] THE COURT: These are my oral reasons for judgment in R. v. Sampson. I make the usual reservation of rights to revise these oral reasons and expand upon them if a transcript is ordered for any reason. The outcome and the essence of the reasoning will not change. Further, in light of the time, I do not propose quoting extensively from the case law or from the transcripts to which I will refer.
- [2] This is an appeal from a decision on September 27, 2019, by the sentencing judge, the Honourable Judge Whonnock PCJ, partly rejecting and partly modifying a joint sentencing submission from Crown and defence.
- [3] The learned sentencing judge heard two joint sentencing submissions in sequence.
- [4] On February 27, 2019, Whonnock PCJ received the initial iteration of the joint submission. The appellant would plead guilty to one charge of committing an offence of sexual interference with a person under 16, contrary to s. 151 of the Criminal Code, RSC 1985, c C-46. He would receive a mandatory minimum of 90 days' custody, and a 12-month probation order, with several conditions.
- [5] Whonnock PCJ expressed concern with the terms of the joint submission. The primary concern was the significant age difference between Mr Sampson and his victim: 18 years. Further, the sexual interference was not a single instance of touching, at a random location. Rather, it involved multiple incidents of sexual intercourse, and it occurred several times in the house where the victim sometimes resides.
- [6] Accordingly, the parties reconvened on June 18, 2019 to provide further submissions on the joint submission. The defence set out his ongoing negotiations with the Crown on possible terms of the joint submission. I will not quote those emails in full. In essence, the Crown stated that it did not consider it necessary to prohibit the accused from being near other underage individuals, or parks or other locations where underage individuals would

frequent; the Crown accepted that the accused had not shown general predatory behaviour towards underage persons, beyond the victim in the present case.

- [7] In the June hearing, as in the February hearing, the Court again expressed its concern about the joint submission. Crown and defence maintained the joint submission. The Court also invited Mr Sampson to reconsider his guilty plea. He declined.
- [8] On September 27, 2019, the sentencing judge provided the reasons for sentence under appeal: *R. v. Sampson* (27 September 2019), Vancouver BC901149-4-C. Those reasons are, in my view, extensive and well-considered.
- [9] Chief among the Court's stated concerns with the joint sentence were Mr Sampson's past criminal record, and, in particular, his history of violent crime, as well as the significant age differential between Mr Sampson and the victim.
- [10] The sentencing judge then turned to the law:
- [18] What is the law?
- [19] First, as per Anthony-Cook, the sentencing judge should approach the joint submission on an "as-in" basis. I have tried to do so, but I have grave concerns with the joint submission.
- [11] The sentencing judge set out the applicable legal principles: paras. 18-23. She then applied those legal principles to the specific facts before her.
- [12] At the end of the day, the sentencing judge largely accepted the joint submission of Crown and the defence. She did not interfere with or extend the custodial sentence for Mr Sampson. Instead, she extended the probation period from 12 to 16 months. The sentencing judge also imposed five primary additional probationary terms:
1. Mr Sampson must not possess or consume alcohol, drugs, or any other intoxicating substance except in accordance with a medical prescription;
 2. He must not go into any public park, swimming area, or community centre where persons under the age of 16 years are present or can reasonably be expected to be present;
 3. He must have no contact or communication, directly or indirectly, or be alone in the presence of a person under 16 years;
 4. He must not go within 100 metres of any residence, school, or workplace of the victim; or within the community where the victim resides;
 5. He must attend, participate in, and successfully complete any intake, assessment, counselling, or programme as directed by the probation officer.
- [13] The sentencing judge further ordered that the appellant was required to comply with the Sex Offender Information Registration Act, SC 2004, c 10, for 10 years.

- [14] The additional terms included certain exceptions and further stipulations, which I will not read out.
- [15] I will turn briefly to the applicable law that governed the sentencing judge and that governs the Court today.

Law

- [16] *R. v. Anthony-Cook*, 2016 SCC 43 is the leading case on joint submissions. The operative passages in *Anthony-Cook* are paras. 32, 44, and 48:
- [32] Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.
- [44] Finally, I note that a high threshold for de-parting from joint submissions is not only necessary to obtain all the benefits of joint submissions, it is appropriate. Crown and defence counsel are well placed to arrive at a joint submission that reflects the interests of both the public and the accused (*Martin Committee Report*, at p. 287). As a rule, they will be highly knowledgeable about the circumstances of the offender and the offence and the strengths and weaknesses of their respective positions. The Crown is charged with representing the community's interest in seeing that justice is done (*R. v. Power*, [1994] 1 S.C.R. 601, at p. 616). Defence counsel is required to act in the accused's best interests, which includes ensuring that the accused's plea is voluntary and informed (see, for example, *Law Society of British Columbia, Code of Professional Conduct for British Columbia* (online), rule 5.1-8). And both counsel are bound professionally and ethically not to mislead the court (*ibid.*, rule 2.1-2(c)). In short, they are entirely capable of arriving at resolutions that are fair and consistent with the public interest (*Martin Committee Report*, at p. 287).
- [48] Further, both the fitness test and the appellate "demonstrably unfit" test suffer from a similar flaw: they are designed for different contexts. As such, there is an appreciable risk that the approaches which apply to conventional sentencing hearings or sentencing appeals will be conflated with the approach that must be adhered to on a joint submission. In conventional sentencing hearings, trial judges look at the circumstances of the offender and the offence, and the applicable sentencing principles. They are not asked to consider the critical systemic benefits that flow from joint submissions, namely, the ability of the justice system to function fairly and efficiently. Similarly, appellate courts are not bound to consider these systemic benefits on a conventional sentencing appeal. The public interest test avoids these pitfalls.

- [17] Distilling those passages, the sentencing judge should not depart from a joint submission unless "the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest": Anthony-Cook at paras. 5, 32; R. v. Manca, 2019 BCCA 280 at para. 29; R. v. Dunkers, 2018 BCCA 38.
- [18] The court must consider two aspects of the public interest. On one hand, the sentencing judge must consider the importance of joint submissions on the effective and proper conduct of the criminal justice system. As stated by Moldaver J in his first paragraph of Anthony-Cook, joint sentences permit the system to function "smoothly and efficiently." The other public interest concern is whether a "reasonable and informed" person would view the proposed sentence "as a breakdown in the proper functioning of the justice system " Anthony-Cook at para. 42.
- [19] This Court has the benefit of a recent decision of the Court of Appeal, R. v. Cheema, 2019 BCCA 268, which came out just before the June hearing and was not expressly referred to in the September reasons for sentence. In Cheema, Dickson JA, writing for the Court, at para. 22, emphasized the task before the sentencing court:

Given the foregoing, a judge presented with a joint submission must approach the sentencing task differently than on a conventional sentence hearing. Under the conventional approach, the judge focuses on the circumstances of the offender and the offence, and the applicable sentencing principles. However, when assessing a joint submission, the judge must consider factors beyond the typical sentencing principles and should not "reverse engineer" a joint submission by determining the sentence that would have been imposed after a trial and comparing it to the jointly proposed sentence. Rather, the analysis should begin with the basis for the joint submission, including the important benefits to the administration of justice, and ask whether there is something apart from the length of the sentence that engages the public interest or repute of the justice system: Anthony-Cook at paras. 32, 42, 44, 48; R. v. Belakziz, 2018 ABCA 370 at para. 18. This approach enables a full appreciation of the basis and justification of the jointly proposed sentence: R. v. McInnis, 2019 PECA 3 at para. 78.

- [20] In reasons indexed at 2018 BCSC 2407, the Cheema sentencing judge had received a joint submission for five years' imprisonment of the appellant. The judge rejected that joint submission and substituted her own sentence of eight years' imprisonment, on the basis that the joint submission did not send a sufficiently strong message to the appellant and other individuals in society involved in the drug trade.
- [21] The Court of Appeal found that the sentencing judge erred in principle in rejecting the joint submission: Cheema at paras. 26, 30. Specifically, the sentencing judge had stated the test in Anthony-Cook correctly, but did not apply it. Rather, she conducted her analysis as if she was dealing with a conventional sentencing proceeding and did not pay sufficient weight to the importance of a joint submission in the proper functioning of the criminal justice system. See also R. v. White, 2019 BCCA 461; R. v. Manca, 2019 BCCA 280: recent decisions of the Court of Appeal to the same effect as Cheema.

DISCUSSION AND Decision

[22] I now turn to my decision.

[23] Despite the very thorough and very balanced arguments of counsel for the appellant, this Court must dismiss the appeal.

[24] I will start by noting the three grounds of appeal advanced by the appellant. They significantly overlap. After reciting the grounds of appeal, I will address them collectively.

[25] The grounds of appeal:

- a) the sentencing judge erred in law by failing to apply the public interest test in refusing to defer entirely to the joint submission;
- b) in the alternative, the sentencing judge erred in law by failing to provide clear and cogent reasons for departing from the terms of the joint submission; and
- c) in the further alternative, the sentencing judge erred in law by imposing unreasonable conditions on the appellant.

[26] On the standard of review, the appellant argues that the sentencing judge made an error of law or principle with respect to the first two grounds of appeal and that thus no deference is to be afforded to those reasons. With respect to the third ground of appeal, the appellant properly recognizes that a deferential standard of appeal applies.

[27] Turning to the first ground of appeal, I would not give force to the submission that the sentencing judge failed to apply the public interest test in her consideration of the joint submission.

[28] The reasons for sentence and the February 27, 2019 and June 18, 2019 transcripts make clear that the sentencing judge was well versed in and well aware of the principles in Anthony-Cook, and the proper procedure to be followed when the joint sentence troubled her. Specifically, the reasons show that she considered the dual public interest in joint sentencing: on one hand, its utility and efficiency, and, on the other hand, the effect of the joint submission on the public estimation of the judicial system.

[29] The appellant argues that while the sentencing judge expressed concern about how the public would view the joint submission, given the harm and repugnance of sexual offences against children, she gave inadequate overt consideration of the societal benefits of a joint submission, as discussed in Anthony-Cook and Cheema. Counsel for the appellant places great weight on Cheema at para. 22:

the analysis should begin with the basis for the joint submission, including the important benefits to the administration of justice, and ask whether there is something apart from the length of the sentence that engages the public interest or reputation of the justice system ...

- [30] I agree with the respondent Crown that nothing in Anthony-Cook requires a sentencing judge to overtly and expressly discuss or acknowledge the important role of joint submissions to the administration of justice. A court is not required to recite well-known legal principles: *R. v. R.E.M.*, [2008] 3 SCR 3 at para. 19. Those principles were certainly well known to a sentencing court citing Anthony-Cook, which sets out at length the importance of considering the role of joint submissions in the judicial system, and in not lightly interfering with a joint submission, except where it would offend the public conscience such as to bring the administration of justice into disrepute.
- [31] In her reasons for sentence, and in particular paras. 18-23, the sentencing judge framed her reasons based upon the specific principles and process that she was to consider under Anthony-Cook. Her reasons, in light of the February 27, 2019 and June 18, 2019 transcripts, make clear that she was well aware of, and properly directed her mind to, the restraint she was obliged to exercise towards the joint submission. I am also satisfied that she correctly applied those principles to the Mr Sampson, in light of the personal and criminal history of Mr Sampson. To paraphrase the authorities, she considered those principles in light of both the offence and the offender.
- [32] The foregoing also addresses the two alternative grounds of appeal. The sentencing judge provided detailed and extensive reasons as to why she made her relatively minor modifications to the joint submission. Again, she did not lengthen the custodial term, as in Cheema. Rather, she only imposed additional probationary terms that were tailored to the offender as well as the offence: designed to distance the offender from other potential underage victims, and reassure the public of that safeguard.
- [33] Turning to those reasons, at paras. 23-31, the Court weighed the important role of a joint submission, with the public perception of the joint submission, all viewed in light of the individual circumstances of the offence and the offender. Among these considerations:
- (a) the significant age discrepancy between the accused and the victim: 18 years;
 - (b) the fact that it was not a sexual encounter that was solitary and spontaneous, but instead, prolonged and repeated;
 - (c) the fact that it took place in the victim's father's house;
 - (d) the fact that the sexual interference was full sexual intercourse rather than touching;
 - (e) the fact that the sexual occurrences were accompanied by alcohol consumption by both the underage victim and by Mr Sampson; and
 - (f) the specific public interest in sentencing those who commit sexual offences against children.

[34] I agree with the conclusion of the sentencing judge at para. 30 of her reasons for sentence that there is a clear link between the facts of Mr Sampson's sexual offence against an underage victim, and the specific additional conditions. Further, these conditions were not of the judge's own creation. Rather, they were based upon s. 161(1.1) of the Criminal Code, which requires a sentencing judge to consider imposing those very conditions where there has been, as here, a sexual offence against a child.

[35] There is a clear link or nexus between Mr Sampson's repeated offences against the underage victim, and the risk, particularly in light of Mr Sampson's longstanding problem with alcohol, that he could offend again against another underage victim. If he were to do so while free under the terms of the joint submissions, with no restrictions on access to underage persons or the places where they frequent, it would significantly besmirch the reputation of the justice system, not to mention the harm suffered by the underage victim.

[36] Both Anthony-Cook and Cheema anticipate that from time to time, sentencing judges will depart from joint submissions. As Moldaver J stated at para. 3 of Anthony-Cook:

joint submissions on sentence are not sacrosanct. Trial judges may depart from them.

[37] Counsel were specifically forewarned, at the February hearing, of the judge's concern that allowing a sexual offender near other potential underage victims would harm the public perception of the justice system. At the February hearing, the Court expressly and repeatedly alluded to Anthony-Cook and, at the same time, expressly stated the public perception concern:

what would the public think? I have to be concerned with the safety, not just of the Williams Lake public, but of all of the public.

[38] The sentencing judge appropriately, with a proportionate eye to the offence and the offender, and with balancing the efficacy of joint submissions with the public reputation of the judicial system, departed slightly but appropriately from the joint submission. I would thus dismiss this appeal.

[39] I thank both counsel for their very thorough and fair written and oral submissions. Anything further, counsel?

[40] MS DUFOUR: No, thank you, My Lord.

[41] MR RAUCH-DAVIS: No, My Lord. Thank you, My Lord.

[42] THE COURT: Thank you, both.

"Crerar J"

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