
CANADA / JUDGMENT

R. v. Seitcher

2007 BCCA 255

COURT

British Columbia Court of Appeal

DECIDED

24 April 2007

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2007 BCCA 255 R. v. Seitcher

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Seitcher ,

2007 BCCA 255

Date: 20070424

Docket: CA034841

Between:

Regina

Appellant

And

Thomas Tyson Seitcher

Respondent

Before:

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Low

The Honourable Mr. Justice Lowry

Oral Reasons for Judgment

K.D. Madsen

Counsel for the Appellant

A.P. Brown

Counsel for the Respondent

Place and Date:

Vancouver, British Columbia

24 April 2007

- [1] HALL, J.A.: We have had an opportunity to consider the submissions of counsel and are prepared to deliver judgment on this sentence appeal. The Crown is appealing from a conditional sentence imposed upon the respondent on 30 January 2007 by a trial judge following a guilty plea by the respondent to a charge of manslaughter.
- [2] The homicide occurred on 12 August 2001 near Tofino, B.C. The respondent was initially charged with and convicted of second degree murder and was sentenced to life imprisonment on 4 November 2002. The circumstances of the offence are set out briefly in the reasons of Madam Justice Dillon, who on 4 November 2002 consequent upon his conviction of second degree murder, sentenced the respondent to a term of life imprisonment with a minimum parole eligibility period of ten years.
- [3] In her reasons, she noted that the respondent had had an unfortunate childhood and to some extent a troubled background in that he had spent a fair bit of time with relatives after his mother died. The judge observed on sentencing that he has had a significant problem with drugs and alcohol as is obvious from the circumstances of the offence.
- [4] The offence was one that occurred after some sort of a party. The person killed was an older individual who was not a blood relative of the respondent, but the respondent referred to him at times as his "uncle", so it was someone the respondent knew.
- [5] The judge who passed sentence at the murder trial said this at para. 7 of her reasons:
- This was a violent, vicious attack on a man that both of the offenders referred to as uncle. This offence has split a very close First Nations community and has split families, as has been described by Mr. Manson today and in the victim statements that are before me. The loss of Rufus Manson to the community and to the families means the loss of a brother, uncle and cousin; but it also means a greater loss to the whole of the community of some of the culture of the community in song, games and language. The impact statements received by [sic] cousins, sisters, nephews and nieces indicate the profound personal impact that the victim's family has suffered as a result of this vicious assault.
- [6] The respondent engaged in a brutal attack on someone for no apparent reason. It was a situation where the victim was kicked to death for no discernible reason, other than perhaps senseless violence on the part of the respondent and his co-accused fuelled by alcohol or drugs. It is difficult always to comprehend why these things happen.

[7] Counsel referred us this morning to the case of *R. v. Peters*, [2004] B.C.J. No. 1923 (C.A.), another sort of senseless killing arising out of the use of alcohol. We were also referred by counsel to *R. v. K.E.M.*, [2004] B.C.J. No. 2735 (C.A.), a situation where alcohol and involvement in a fight resulted in a homicide. We were referred as well to cases where this Court had considered the appropriate length of sentences in manslaughter cases, including *R. v. Glover*, 2002 BCCA 271 and *R. v. Green*, 2001 BCCA 642. The case of *Green* particularly relied upon by the Crown, was a judgment of Mr. Justice Low. There a person had been killed by someone under the influence of cocaine. Mr. Justice Low observed in that sentence appeal at para. 10:

The maximum sentence for manslaughter is life imprisonment. It has been said that the range of sentence for this offence is from a suspended sentence to life imprisonment. I think, however, that most cases fall within the period of four to 15 years. A sentence below or above that range is imposed only in a case involving special circumstances.

That case suggests that there can be a very wide range in sentences for manslaughter, but usually they range, in these violent cases, somewhere between four to 15 years. It is noted that sentences in cases can be below or above that, depending on unusual circumstances.

[8] In the present case, the judge who sentenced the respondent to a conditional sentence imposed a sentence that was illegal. The sentence was illegal because of the judgment of the Supreme Court of Canada in the case of *R. v. Fice*, [2005] 1 S.C.R. 742, 2005 SCC 32. Counsel are *ad idem* that that sentence was not open to the sentencing judge to impose. So, the question then becomes: what ought we to do with sentence?

[9] He was at liberty for some three months since the date of the imposition of the conditional sentence and he has taken the opportunity to obtain some counselling to address some of his problems with alcohol and violence. That is, as counsel for the respondent notes, indication of positive behaviour by the respondent.

[10] The Crown submits that the sentencing judge was correct in the assessment that, having regard to the other dreadful circumstances of this offence, a sentence in the range of ten years was appropriate for what was described as a horrific crime.

[11] I see no reason to differ from the sentencing judge as to the appropriate sentence for this type of offence, having regard to the aggravated circumstances. An innocent person was killed for no apparent reason in circumstances of great violence. Deterrence and denunciation are prime considerations in sentencing for such an offence.

[12] We have to take account of the circumstance that the respondent has served time in custody and he has done some useful rehabilitation apparently consequent upon his being sentenced to this conditional sentence earlier this year. His problem seems to stem in large measure from abuse of alcohol. He has also suffered from depression - that could be to some extent related to his rather troubled youth where he did not have a great deal of stability. I note he did have relatives who were fairly stable and who looked after him, but

still there was some uncertainty in his life in his early years. While he has had some helpful assistance, but on the whole, he has not had an ideal upbringing. He was not always in the same place with the same people and that is never good for young people.

- [13] The Crown has suggested that giving him credit for the time served in custody prior to this time and for what he has done while on his conditional sentence that something in the order of 21 months should be imposed by way of further incarceration. The Crown also suggests that he needs to be afforded some time to take further program treatment and to recognize the gravity of the circumstances of this offence.
- [14] Counsel for the respondent has asked us to impose a probationary term and suggests that that would be consistent with the analysis of the learned sentencing judge who imposed a conditional sentence, pointing to the circumstance that the respondent seems to have recognized some of his difficulties by enrolling in a program to address his difficulties.
- [15] We have had access to the materials that were prepared whilst he was serving the sentence for murder before a new trial was ordered by this Court. I would take from the materials that he was not a problem prisoner, but on the other hand, I do not know that he had particularly taken steps to address his problems at the time he was serving that federal sentence.
- [16] The respondent is now 27; he will be 28 this summer. He is moving from being a young person when he committed this offence in 2001 to now being a person who is getting to an age where he is starting to be fully in adulthood. The fact that he has taken this recent program I think tells in his favour and affords some basis for optimism that perhaps he is recognizing his problems. But I am not of the view that a probationary term here would be appropriate, having regard to all circumstances, including the nature of the offence and the need for the respondent to come to terms with the offence and with his problems and to take such assistance as may be afforded in a custodial setting. Programs such as anger management and addressing substance abuse should be available to him in an institution.
- [17] I consider that a fit disposition of this offender at this time would be to set aside the conditional sentence which was an illegal sentence and impose a custodial term of 18 months, to be followed by 18 months probation. The only additional term of the probation that occurs to me is one that is said to have been imposed at the time of the conditional sentence. That was that the respondent refrain from attending at the location of the Reserve where this offence occurred. It seems to me that if this man is given this sentence then he will have an opportunity to take programs that may assist him and it is to be hoped that the probationary period imposed will transition him into the community at an age and time when he, hopefully, will be able to act in a more mature fashion and to avoid the sort of problems that led to this tragic homicide.
- [18] I would allow the appeal on those terms.
- [19] LOW, J.A.: I agree.

[20] LOWRY, J.A.: I agree.

[21] MR. MADSEN: In the C.S.O. the conditions that were provided, as I understand it, appear at the judgment - paras. 58 - 69. I do take from My Lord's judgment that there should obviously be a relaxing of that with respect to the probation order, but the conditions were:

At para. 58: (1) Appear before the court when required to do so. (2) Report to a supervisor (in this case a probation officer) within two workings days of release. Those are two mandatory conditions.

At para. 60: (3) Remain within the jurisdiction of the court unless you first obtain written permission to be outside the jurisdiction of the court from the supervisor. When outside the jurisdiction, you shall have the written permission upon your person.

At para. 61: (4) Notify the supervisor in advance of any change of name or address and promptly notify the supervisor of any change of employment or occupation.

At para. 62: (5) Reside at a residence approved of by your supervisor.

Then leading into the area that your Lordship addressed

- You shall not reside on the Esowista Reserve, either in Tofino or Port Alberni unless your residence has already been approved of in writing by your probation officer

At para. 64: You shall not go to the Esowista Reserve at Tofino or be upon the Reserve for any reason whatsoever unless you first have the approval in writing of the supervisor and unless you have that writing on your person.

- No contact order directed to the ten persons whose victim impact statements were filed. They were, essentially, next-of-kin and there is a list of them in the directory of this matter. I

I would certainly ask that those non-attendance and non-contact clauses be imposed in the probation order.

[22] HALL, J.A.: Yes, I think those are sensible. I do not know that we need many of the others because I think that the conditional sentence regime is a bit different from what we are imposing.

[23] MR. MADSEN: It is - I would ask obviously for the statutory conditions on a probation order.

[24] HALL, J.A.: Well, they go with the order.

[25] MR. MADSEN: The other conditions that were included in the C.S.O. such as abstention from alcohol, community service and so forth - hopefully those issues are going to be dealt with rather in the custodial sentence that has been imposed. This latter is more to make sure he continues to be of good behaviour in the community and to keep him away from situations either on the Reserve or with people who were impacted directly.

[26] HALL, J.A.: Yes, that's fine.

[27] MS. BROWN: The reporting requirement did not seem to be ongoing.

[28] MR. MADSEN: I think the reporting requirement was "you shall report within two working days of your release and thereafter when required by the supervisor and in the manner directed by the supervisor". I think that is effectively the statutory requirement.

...

I am sorry - I was abbreviating because it occurred to me these are all statutory conditions, those first three, and I apologize. I am going to suggest that three statutory conditions: to advise the probation officer of where you are residing and then the conditions that are in paras. 623, 64 and 65 of the judgment, which keeps him away from the Esowista Reserve and keeps him out of contact with the persons who filed pre-sentence statements and I can put all the names into a probation order.

[29] HALL, J.A.: Yes, I agree those should go in.

[30] MS. BROWN: I have one concern My Lord and that is with respect to the language that was used by the honourable sentencing judge and what is proposed here as far as the "not reside at the Esowista Reserve in Port Alberni or Tofino" because that reserve is only in Tofino. So, if it can say "not reside at the Esowista Reserve in Tofino unless that residence is approved of by your supervisor in writing." It was a problem that Mr. Seitcher had already raised with his probation officer because it seemed to suggest that he should not be on the Shot [sic] Reserve in Port Alberni and I don't believe that was the intention.

[31] HALL, J.A.: So, it should be the Esowista Reserve at or near Tofino. We will excise any reference to Port Alberni.

[32] Yes, well, that should give you the guidance you need counsel then to work out the terms of the probation order.

"The Honourable Mr. Justice Hall"

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Prepared on 29 October 2026 · Esheria