

CANADA / JUDGMENT

R. v. Sesay

2020 BCCA 41

COURT

British Columbia Court of Appeal

DECIDED

24 January 2020

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

2020 BCCA 41 R. v. Sesay

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Sesay,

2020 BCCA 41

Date: 20200124

Docket: CA46120

Between:

Regina

Respondent

And

Latto Simian Sesay

Appellant

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated May 3, 2019 (sentence) (R. v. Sesay, 2019 BCSC 795, Victoria Docket 173593).

Oral Reasons for Judgment

Counsel for the Appellant:

R. Mansoori-Dara

Counsel for the Respondent:

J.M. Gordon, Q.C.

J.A. Dyck

Place and Date of Hearing:

Vancouver, British Columbia

January 22, 2020

Place and Date of Judgment:

Vancouver, British Columbia

January 24, 2020

Summary:

The appellant seeks leave to appeal and, if leave is granted, an order reducing his sentence for aggravated assault. He was sentenced to six and one-half years' imprisonment, less credit for pre-sentence custody awarded at a rate of 1.5, for an unprovoked "sucker punch" assault that left the victim with a life-altering brain injury. The appellant submits that the sentencing judge erred by: (1) imposing a demonstrably unfit sentence; (2) failing to consider the appellant's personality disorder in assessing his moral blameworthiness; (3) treating the appellant's misleading statements to police following his arrest as an aggravating circumstance; and (4) miscalculating his credit for pre-sentence custody. Held: Leave is granted and the appeal is allowed, but only to the limited extent of reducing the sentence by 23 days to account for the judge's mathematical error. The sentence is not demonstrably unfit given the appellant's violent antecedents, the risk he poses to the public, and the devastating harm caused to the victim. The sentencing judge did not err by failing to treat the appellant's personality disorder as a mitigating circumstance. The sentencing judge did err in principle in treating the appellant's misleading statements to police, which sought to deflect responsibility for the assault to the victim, as an aggravating circumstance. However, this error cannot reasonably be supposed to have had a material impact on the sentence.

FITCH J.A.:

I. Introduction

- [1] On March 31, 2018, the appellant, Latto Simian Sesay, committed an unprovoked assault on Brian Rowley by "sucker punching" him in the face when the two men happened to encounter one another in an alley adjacent to a bar in Victoria, British Columbia. Mr. Rowley crumpled from the powerful force of the unexpected blow and struck his head on

the ground. He sustained a significant and life-altering brain injury. Despite the fact that the appellant acknowledged hearing the victim's head hit the ground with what he described as "a sickening sound", he walked away from the scene wagging his finger at Mr. Rowley in what I gather was some sort of drunken taunt. The appellant made no effort to obtain medical assistance for Mr. Rowley.

- [2] The appellant had been drinking heavily and ingesting cocaine before committing the offence. When he was apprehended a short distance from the scene, he resisted arrest and attempted to fight with police officers. He was tasered twice and restrained in the course of the ensuing scuffle. He told the arresting officers, "If I am going to do pen time, I'm going to take one of you with me."
- [3] The appellant was charged with aggravated assault and obstructing a peace officer in the execution of his duty, contrary to ss. 268(2) and 129(a) of the Criminal Code, R.S.C. 1985, c. C-46 [Code].
- [4] The appellant pleaded guilty to the latter offence. He was convicted of aggravated assault by a Supreme Court judge following a four-day trial. His defence of self-defence was rejected. Reasons for judgment are indexed as 2019 BCSC 76.
- [5] The appellant was sentenced to six and one-half years' imprisonment for aggravated assault, less credit for pre-sentence custody awarded at a rate of 1.5 days for every day spent in pre-sentence custody. A concurrent sentence of six months' imprisonment was imposed for obstructing a peace officer. In addition, a number of ancillary sentencing orders were made that are not contested on appeal. Reasons for sentence are indexed as 2019 BCSC 795.
- [6] Against this background, the appellant seeks an order granting him leave to appeal sentence and, if leave is granted, an order allowing his appeal and reducing the sentence to five years' imprisonment.
- [7] The appellant submits that the judge erred by: (1) imposing a demonstrably unfit sentence; (2) failing to consider the appellant's personality disorder in assessing his moral blameworthiness; (3) treating the appellant's misleading statements to the police following his arrest as an aggravating circumstance; and (4) miscalculating the credit he should have been given for time spent in pre-sentence custody.
- [8] A few additional introductory remarks are necessary to put the second ground of appeal in context. The appellant does not dispute that he has a significant personality disorder with antisocial and narcissistic traits. A psychiatric report prepared for sentencing confirms this diagnosis. Further, the appellant concedes that the sentencing judge was not asked to treat his personality disorder as a mitigating circumstance that attenuated his moral culpability. He acknowledges that this issue is raised for the first time on appeal. He submits, nevertheless, that the sentencing judge had an independent obligation to consider whether his personality disorder contributed to the commission of these offences and served to diminish his moral culpability. He argues that the judge erred in principle by failing to make

that inquiry on his own motion. To rectify the situation, he submits, for the first time in oral argument, that the question of whether there exists a link between his personality disorder and the offences should be remitted to the sentencing judge for inquiry pursuant to s. 683(1) (e) of the Code. The appellant relies on *R. v. Pahl*, 2016 BCCA 234, in support of this unusual submission.

- [9] The Crown concedes that the judge made a mathematical error in calculating the time that should have been credited for pre-sentence custody. The appellant was credited 574 days. He should have been credited 597 days for time spent in pre-sentence custody. The Crown otherwise opposes the remedies the appellant seeks.
- [10] For the reasons that follow, I would grant leave to appeal and allow the appeal, but only to the limited extent of reducing the sentence by 23 days to take account of the judge's mathematical error.

II. Circumstances of the Offence

- [11] The circumstances surrounding the lead offence were summarized by the judge in his reasons for sentence:
- [8] At trial, Mr. Sesay testified that he walked down the alley looking for his friends, who had agreed to meet up with him when the bars closed at 2 a.m. He stepped into a puddle of liquid that he though[t] was urine. He became frustrated and upset. When he saw Mr. Rowley standing behind the dumpster, he decided to confront him, explaining in his testimony it is what he does when he is upset. He also acknowledged that he has a temper such that, he said, "stuff builds up in me; it fills up like a jar and I explode." Indeed, that is what occurred after he stepped in the puddle and saw Mr. Rowley almost immediately thereafter.
- [9] Mr. Sesay walked up and stood in front of Mr. Rowley to stop him, and said something to him. A brief verbal interaction, initiated by Mr. Sesay, of approximately six seconds ensued. There was nothing provocative or threatening about Mr. Rowley's movement of his arms and hands. His appearance was passive throughout. Conversely, Mr. Sesay took up what he called a "bladed stance" before striking Mr. Rowley, which is something that he learned while in prison as a technique to fight. Mr. Sesay also leaned into Mr. Rowley as he spoke to him. At one point, Mr. Sesay placed his left arm and hand either on or in extreme close proximity to Mr. Rowley's chest area and right shoulder as he leaned into Mr. Rowley, all the while levelling insults at him.
- [10] Mr. Sesay knew that Mr. Rowley was not responsible for the puddle that he had just stepped in.
- [11] Suddenly, and without warning, Mr. Sesay punched Mr. Rowley directly in the face. Upon being struck, Mr. Rowley immediately fell backwards to the ground and hit his head. Mr. Sesay admitted in his evidence at trial that he knew Mr. Rowley was unconscious as soon as he hit him. Even though Mr. Sesay watched Mr. Rowley fall directly to the ground, heard him hit his head with a noise that he said he will never forget, and claimed in his evidence to be

alarmed at what he had done, Mr. Sesay turned and walked quickly down the alley in the direction he had previously come, and exited onto Courtney Street.

- [12] Just before leaving the alley, Mr. Sesay turned back towards the direction where Mr. Rowley had fallen to the ground, and raised his arm and wagged at least two of his fingers as if to signal a final taunt or jeer. At no time did Mr. Sesay stop to check on Mr. Rowley.
- [13] Prior to striking Mr. Rowley, Mr. Sesay had been drinking alcohol with his girlfriend and other friends since he finished work at approximately 4:30 p.m. on March 27. Over the course of the evening, he consumed some 10 to 12 alcoholic drinks, including three doubles, all containing vodka and the Red Bull caffeinated energy drink. He also ingested cocaine.
- [12] Mr. Rowley was 28 years of age at the time of sentencing. At the time of the assault, he was studying for a master's degree in community development at the University of Victoria. He was also working to pay for school and volunteering with a community-based association that provides support to children with autism. As noted earlier, Mr. Rowley suffered a moderate to severe brain injury as a consequence of the assault that will affect him for the rest of his life. He was hospitalized for over one week after the offence and continues to receive physical and cognitive therapy as an outpatient at Victoria's Royal Jubilee Hospital. He has no current source of income and understandably struggles with both sadness and fear that the appellant will come after him in the future.
- [13] As might be expected, Mr. Rowley's parents have also experienced the impact of this offence. They relocated from Ontario to Victoria to assist their son in his recovery. They did so at the expense of their jobs and other family relationships, including relationships with their grandchildren who live in Ontario. At the time of sentencing, the victim's mother had been forced to move back to Ontario to secure work to meet the family's financial needs. As a consequence of this decision, Mr. Rowley's parents are temporarily separated -- an unfortunate situation for which he feels responsible.

III. Circumstances of the Offender

- [14] The appellant was 34 years of age at the time of sentencing. He had an unfortunate upbringing that involved interventions by the Children's Aid Society and his placement in various group homes.
- [15] The appellant was involved with setting fires to a number of townhouses at a very young age. His first encounter with the youth criminal justice system was when he was 13 years old.
- [16] The appellant has a horrendous criminal record. He has been convicted of assault-related offences on six occasions, most recently in 2013. He has twice been convicted of uttering threats. He has one conviction for robbery, one conviction for sexual interference, and one conviction for committing an indecent act. He has numerous convictions for failing to comply with his probation order or recognizance. He has previously served time in a federal penitentiary.

- [17] The appellant's criminal history was summarized in greater detail by the sentencing judge:
- [28] His criminal record spans back in time to 1998, when he was 13 years old. His record includes convictions for crimes (including assaults) involving violence (which [the author of the pre-sentence-report] describes as general, domestic, expressive, and instrumental violence), robbery, property-related offences, driving offences, sexual offences (one involving a friend's child), and failing to abide by court orders:
- (a) January 26, 1998, assault;
 - (b) June 6, 2000, uttering threats, failing to comply with disposition and recognizance;
 - (c) January 3, 2001, theft under \$5000 and failing to comply with disposition;
 - (d) May 1, 2001, escape from lawful custody;
 - (e) August 3, 2001, mischief under \$5000 and failing to comply with disposition;
 - (f) March 14, 2002, assaulting a police officer;
 - (g) March 26, 2003, robbery;
 - (h) September 7, 2004, uttering threats;
 - (i) March 20, 2007, assault and public mischief;
 - (j) February 4, 2010, sexual interference, assault, theft under \$5000, and failing to comply with probation order and recognizance;
 - (k) June 29, 2012, failing to comply with prohibition regarding children;
 - (l) October 11, 2012, assault, mischief over \$5000, and failing to comply with probation order;
 - (m) May 10, 2013, assaulting and obstruction of a police officer, indecent act;
 - (n) September 18, 2013, break and enter; failing to comply with probation order;
 - (o) July 12, 2018, driving while suspended;
 - (p) August 9, 2018, driving while prohibited;
 - (q) October 10, 2018, operating a motor vehicle to cause nuisance by noise; and
 - (r) October 26, 2018, theft under \$5000.
- [29] The 2003 robbery included threats of violence uttered by Mr. Sesay as he robbed a woman of her purse while he was armed with a 12 inch knife. He told the victim to give him her purse or he would stab her.
- [30] The 2004 uttering threat offence involved Mr. Sesay, as one of a group of individuals making harassing phone calls from jail to a woman. He threatened to kill her, telling her that she would be cut up and raped.

- [31] The 2013 assaulting and obstructing a police officer offence involved Mr. Sesay engaged in physical violence, including kicking. He bit one officer and sent one for medical treatment. It took five police officers to subdue him and get him into the police van. He continued to misbehave while in custody and told police officers that he would not come out of his cell without a fight. He took a light from its fixture and held it up to use it as a weapon. While handcuffed, he announced that he would injure as many officers as possible, and when they least expected it, he'd attack. He spat at one corrections officer.
- [32] While Mr. Sesay points to a five-year period without convictions between 2013 and 2018, some of that time was spent in custody following his sentence on September 18, 2013 of 531 days for breaking and entering.
- [18] Prior to his incarceration for the offences before us, the appellant had not participated in any form of drug or alcohol treatment. He had also declined to participate in violence prevention programs made available to him in the past.
- [19] Despite his criminal record, the appellant told the author of the pre-sentence report that he believes he has good problem-solving skills and good coping skills. He said that he is not aggressive and began working on developing more pro-social skills during a period of incarceration five years earlier. Notwithstanding his lengthy history of non-compliance with court orders, the appellant reported having no concerns about his ability to follow any conditions deemed appropriate by the court.
- [20] The appellant was found by the probation officer to be an unreliable historian. For example, he denied having any children when he was interviewed by the probation officer charged with preparing the pre-sentence report but told Dr. Miller, who prepared a pre-sentence psychiatric report, that he has two young boys with whom he is not in touch. In reports prepared by the Correctional Service of Canada ("CSC"), the appellant was noted to be a "skilled manipulator" for whom dishonesty seems to come easily.
- [21] Dr. Miller diagnosed the appellant with an alcohol and substance abuse disorder. He also thought it probable that the appellant had a significant personality disorder with antisocial and narcissistic tendencies. There was no evidence that the appellant suffered from a severe mental illness such as schizophrenia, bipolar disorder or other psychotic illnesses. There was no evidence that his thinking process was impaired by mental illness at the time of the assault, although it likely was by the voluntary ingestion of alcohol and drugs.
- [22] In terms of risk assessment, Dr. Miller opined that the appellant presented a moderate to high risk of further violent offending. He also expressed the view that if the appellant were to reoffend, it was likely he would commit similar offences causing serious bodily harm.
- [23] Dr. Miller's report is consistent with a psychological assessment undertaken on behalf of the CSC in 2014. In that report, the appellant was assessed as having markers associated with psychopathy and being in the "high moderate range for both general and violent recidivism".

- [24] Notably, the appellant has performed well since being incarcerated. In 2018, the appellant was placed in the Right Living Unit, which holds reform-minded offenders to strict account. Letters submitted on his behalf by individuals working with him in the institution give rise to guarded optimism that the appellant may finally be taking steps towards rehabilitation.

IV. The Positions of Counsel on Sentencing

- [25] The Crown sought a sentence of imprisonment of six to eight years for aggravated assault and a concurrent six-month sentence for the obstruction offence. Neither the Crown nor the sentencing judge made specific mention of the totality principle.
- [26] The appellant sought a sentence of two years less one day (after taking into account the time he served in pre-sentence custody) to be followed by a three-year probation order.

V. Reasons for Sentence

- [27] The judge reviewed what he considered to be the aggravating and mitigating features of the case. He gave the appellant's expressions of remorse limited weight, finding the appellant to be disingenuous in relating to Dr. Miller the self-serving statement that he did not appreciate that he could hurt Mr. Rowley as much as he did. The judge also viewed with caution the extent to which the appellant claimed to have made rehabilitative strides while incarcerated.
- [28] The judge found the appellant's moral culpability to be high and concluded that the sentencing principles of protection of the public, general deterrence and denunciation required emphasis.

VI. Analysis of Grounds of Appeal

- [29] Appeals from sentence attract a deferential standard of review. Appellate intervention will only be justified if the sentencing judge committed an error in principle that had an impact on the sentence or imposed a sentence that is demonstrably unfit: *R. v. Lacasse*, 2015 SCC 64 at para. 11; *R. v. Agin*, 2018 BCCA 133 at paras. 56-57.
- [30] The appellant's first ground of appeal is that the sentence is demonstrably unfit. He submits that the general sentencing range for aggravated assault is between 16 months and six years' imprisonment and says that nothing about this case justified a departure from that range. I do not agree.
- [31] I begin by noting that aggravated assault is a serious offence punishable by a maximum period of imprisonment of 14 years.
- [32] While sentencing ranges provide useful guidelines that serve to minimize disparity in sentencing practices, they do not displace an individualized approach to sentencing. That a sentence exceeds the generally applicable range does not mean that it is the product of an error in principle or that it is demonstrably unfit: *Lacasse* at paras. 57-61.

- [33] This Court has upheld sentences in the range of six to eight years for assaults causing life-altering injuries to the victim. As noted in *R. v. Payne*, 2007 BCCA 541 at para. 44, "sentences in the range of six to eight years for serious aggravated assaults are not uncommon": see also *R. v. Heiney*, 2018 BCCA 313 at para. 58; *R. v. Larose*, 2013 BCCA 450 at paras. 17-22; *R. v. Woodward*, 2011 BCCA 251 at para. 30; *R. v. Tschritter*, 2006 BCCA 202 at para. 14; *R. v. Biln*, 1999 BCCA 369 at para. 24; and *R. v. Rasanen* (1997), 92 B.C.A.C. 74 at paras. 5, 9.
- [34] I recognize that no two cases are exactly alike and that factual distinctions can be drawn between these cases and the one at bar. As Justice Saunders noted in *Larose* at para. 17, the circumstances in which the offence of aggravated assault may be committed are variable and difficult to organize into categories. I also recognize that the injury in this case, as in *Woodward*, was caused by a single punch, not by a prolonged beating or the use of a weapon.
- [35] Nevertheless, I am of the view that the sentence imposed in this case is not a marked departure from sentences imposed in comparable cases. Moreover, the sentence is justified by the appellant's violent antecedents, the risk he poses to the public, and the devastating harm he caused to Mr. Rowley. The callous disregard the appellant demonstrated by leaving Mr. Rowley unattended and in an unconscious state is a particularly disturbing feature of this case. The judge properly treated this as a factor aggravating the appellant's moral culpability. In my view, the sentence has not been shown to be demonstrably unfit.
- [36] I turn next to consider the appellant's submission that the judge erred in principle by failing to consider whether his personality disorder should operate in mitigation of penalty. I would not give effect to this ground of appeal.
- [37] The appellant has not been diagnosed with a major mental disorder affecting his cognitive capacity. Rather, he displays traits typically associated with an antisocial or narcissistic personality disorder -- traits that make him a moderate to high risk to reoffend violently. The appellant's entrenched antisocial attitudes are reflected in his criminal record. It is not surprising that the attitudes and behaviours rooted in his personality disorder were not regarded by the judge as mitigating. Indeed, I know of no case in which the antisocial personality traits of an offender who has a lengthy record for violent behaviour has been treated as a mitigating circumstance.
- [38] Further, it is not surprising that the appellant's substance abuse disorder was not treated as a mitigating factor where the appellant, despite his criminal history, has not availed himself of any form of drug or alcohol treatment in the past.
- [39] I see no merit in the appellant's submission that the judge committed a material error in principle by failing to consider whether there was a link between the appellant's personality disorder and his assaultive behaviour, or in his related contention that the matter should be remitted to the sentencing court for inquiry into that issue pursuant to s. 683(1)(e) of the Code. In my view, the only reasonable inference to be drawn from the psychiatric report is

that such a link exists. But even assuming that such an inference is unavailable on the record, demonstration of the existence of a link between the appellant's personality disorder and the offences he committed would not assist him on this appeal. It would simply confirm that he presents a continuing risk to public safety.

- [40] There is, however, merit in the appellant's third ground of appeal that the judge erred in principle by treating misleading statements he made to the police following his arrest -- statements that sought to deflect responsibility for the assault to Mr. Rowley -- as an aggravating circumstance.
- [41] To put this issue in context, the remarks appear to me to have been motivated by a meritless submission made by the appellant's trial counsel (not counsel on this appeal) that the appellant demonstrated remorse "from day one". The judge asked how this could be so in circumstances where the appellant sought from the outset to cast blame on Mr. Rowley. While I do not question the legitimacy of the judge's inquiry, as a general rule the fact that an offender made disingenuous statements to the police after his arrest is not properly characterized as an aggravating circumstance. The judge was entitled, in my view, to entirely discount the submission that the appellant's post-offence conduct displayed immediate remorse. He was also entitled to consider the appellant's post-offence conduct in assessing the appellant's rehabilitative prospects. The difficulty in this case is that the judge appears to have used the appellant's attempt to shift responsibility to Mr. Rowley as a circumstance that aggravated the offence: *R. v. Kreutziger*, 2005 BCCA 231 at para. 12.
- [42] In addressing the aggravating features of this case, the judge said this:
- [72] Another [aggravating factor] is Mr. Sesay's untruthful account to the police, following his arrest, of the events in order to paint Mr. Rowley in a negative light and thereby decrease his own culpability.
- [107] To summarize, the circumstances of Mr. Sesay's assault on Mr. Rowley involved an unprovoked and direct forceful assault, borne out of Mr. Sesay's uncontrolled anger, on an unsuspecting victim who had no opportunity to defend himself, in order to mete out punishment for an act Mr. Sesay knew Mr. Rowley did not commit. Mr. Sesay immediately left the scene after watching Mr. Rowley fall to the ground and strike his head, knowing that he had struck him with such force that he was immediately rendered unconscious. As he left, he turned and wagged at least two of his fingers back where Mr. Rowley lay on the ground in defiance. After learning how to fight in prison, Mr. Sesay was well aware of the force he could use when striking blows with his fist. In dealing with the police after his arrest, Mr. Sesay knowingly provided an inaccurate account of events in order to cast culpability on his victim and thereby minimize his own. The degree of Mr. Sesay's moral culpability is high.

[Emphasis added.]

[43] In my view, the judge erred in principle in his approach to this issue. The issue is whether this error in principle had an impact on the sentence: Lacasse at para. 44. In my view, it did not. In light of the number and kind of aggravating circumstances present in this case, the appellant's post-offence attempt to shift responsibility for what occurred to Mr. Rowley cannot reasonably be supposed to have played any material role in the imposition of the sentence. I would not intervene on this basis.

[44] As noted earlier, the trial judge made a mathematical error in calculating the number of days the appellant should be credited for time served in pre-sentence custody. To rectify this error, I would reduce the sentence imposed on the appellant by 23 days.

VII. Conclusion

[45] In the result, I would grant leave to appeal and allow the appeal to the limited extent of reducing the sentence by 23 days.

[46] SAUNDERS J.A.: I agree.

[47] BUTLER J.A.: I agree.

[48] SAUNDERS J.A.: Leave to appeal is granted. The appeal is allowed to the extent of substituting for the sentence imposed a sentence of six and one-half years less 597 days to account correctly for pre-sentence custody, that is a reduction of 23 days.

"The Honourable Mr. Justice Fitch"

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/20/00/2020BCCA0041.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-sesay-2020>

Prepared on 25 October 2026 · Esheria