
CANADA / JUDGMENT

R. v. Wellwood

2011 BCSC 690

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Wellwood,

2011 BCSC 690

Date: 20110404

Docket: 5055-2-C

Registry: Victoria

Regina

v.

Kruse Hendrick Wellwood

Cameron Alexander Moffat

Restricted Access

Before: The Honourable Mr. Justice Johnston

Oral Reasons for Sentence

Counsel for the Crown:

P. Juk, Q.C.

T. Hodge

Counsel for the Accused Wellwood:

R. Jones

Counsel for the Accused Moffat:

S. Kelliher

Place and Date of Hearing:

Victoria, B.C.

April 4, 2011

Place and Date of Judgment:

Victoria, B.C.

April 4, 2011

- [1] THE COURT: Mr. Wellwood and Mr. Moffat have pleaded guilty to the first degree murder of Kimberly Proctor and to offering indignity to her remains.
- [2] The Crown has applied for an order that they be sentenced as adults under the Youth Criminal Justice Act. Although neither Mr. Wellwood nor Mr. Moffat led evidence or put forward argument in opposition to the Crown's application that they be sentenced as adults, I am still required to form an opinion under either s. 72(1)(a) or (b) of the Youth Criminal Justice Act, and so I must consider the principles and purposes of youth sentencing set out in that Act.
- [3] The burden is on the Crown to satisfy the court that a youth sentence would not have sufficient length to hold either Mr. Wellwood or Mr. Moffat accountable for his behaviour. That is set out in s. 72(1)(b) which reads:

In making its decision on an application heard in accordance with section 71, the youth justice court shall consider the seriousness and circumstances of the offence, and the age, maturity, character, background and previous record of the young person and any other factors that the court considers relevant, and

...

... if it is of the opinion that a youth sentence imposed in accordance with the purpose[s] and principles set out in subparagraph 3(1)(b)(ii) and section 38 would not have sufficient length to hold the young person accountable for his or her offending behaviour, it shall order that an adult sentence be imposed.

- [4] The s. 3 referred to sets out the policy for Canada to be applied to all young persons involved in the youth criminal justice system and establishes the principles to be applied under the Youth Criminal Justice Act. Section 3 reflects the broad range of offending conduct and offenders the Act is intended to deal with.

[5] Section 3(1)(b)(ii) that I have referred to requires the court to emphasize fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity.

[6] Section 38 states that the purposes of a youth sentence:

... is to hold a young person accountable for an offence through ... imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public.

[7] The burden on the Crown under s. 72(1)(b) is to make a sufficient case that the court arrives at the opinion set out in that section, bearing in mind the principles in s. 3 -- 3(1)(b)(ii) and the purposes of youth sentencing set out in s. 38.

[8] Subsection (2) of s. 38 sets out a list of principles which, added to those general principles stated in s. 3, are to apply to youth sentences.

[9] It is a somewhat complex statute. The Ontario Court of Appeal has explained with some clarity the sections I have just referred to in a case called *R. v. O.* At paragraph 42 the court says:

The combined effect of ss. 72, 3 and 38 is to identify accountability as the purpose that the youth court must consider when deciding an application to impose an adult sentence on a young person. Accountability is achieved through the imposition of meaningful consequences for the offender and sanctions that promote his or her rehabilitation and reintegration into society. The purpose of accountability in this context would seem to exclude accountability to society in any larger sense or any notion of deterrence.

[10] That court concluded that accountability for the purposes of the Act had the same meaning as the adult sentencing principle of retribution; that principle as explained by the Supreme Court of Canada in *R. v. M.*, as follows:

Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender's conduct. Furthermore, unlike vengeance, retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment, and nothing more.

[11] The court must consider and apply the purposes and principles of sentencing set out in s. 38 in forming the opinion required under s. 72(1)(b).

- [12] Before I deal with the individual criteria set out in those sections, I must remind myself that each of Mr. Wellwood and Mr. Moffat are to be treated individually, as is their right. I may in these reasons from time to time appear to deal with them together in discussing factors that I must consider, but the final decision must be and will be individually tailored to each of these young men and his peculiar circumstances.
- [13] The first consideration under s. 72 is the seriousness and circumstances of the offence. It goes without saying that first degree murder involving an intention to kill is the most serious of offences. The circumstances of this murder, as admitted by the young persons in Exhibit 1 and amplified during this hearing, are so horrific that no words can adequately convey the inhuman cruelty these young men showed to Ms. Proctor.
- [14] They planned in advance to sexually assault and kill Ms. Proctor. They chose her because they thought she would be an easy target, not necessarily because either of them had any ill will toward her. On March 18, 2010, they lured Ms. Proctor to Mr. Wellwood's home. They sexually assaulted and brutalized her there over several hours. They then killed Ms. Proctor. Ms. Proctor's body was subjected to indignities and mutilation before being stored in a freezer. The next day, both young men took Ms. Proctor's body to an area off the Galloping Goose Trail, soaked it in fuel, and set it on fire.
- [15] It is important in a case that is as terrible as this one is to bear in mind that there are other factors that I must consider, and to not allow revulsion against the circumstances of the offence to overwhelm the sentencing process.
- [16] Another factor that I must consider is age. Mr. Wellwood is now 17, he was 16 at the time of the offences. Mr. Moffat is now 18, he was less than two months short of his 18th birthday at the time of the offences.
- [17] As to maturity, Mr. Wellwood has been examined and interviewed by Dr. Riar, a psychiatrist, by Dr. Hemphill, a psychologist, Ms. Kienas [phonetic], a psychiatric social worker, and Ms. French, a youth probation officer. Ms. French has described Mr. Wellwood as a highly intelligent and articulate 17-year-old. Dr. Hemphill provides the most comprehensive analysis of Mr. Wellwood's maturity, pointing out that his intellectual and interpersonal maturity appear to be average or higher. His emotional maturity shows some aspects of maturity, some aspects of immaturity. Dr. Riar summarizes Mr. Wellwood's maturity as age-appropriate. On the whole of the evidence, I conclude that Mr. Wellwood is at least as mature as can be expected for a 17-year-old, if not somewhat more mature.
- [18] As to Mr. Moffat, he was nearly an adult for the purposes of the criminal law at the time of the offences. He had been employed from time to time, had plans to join the military. Mr. Moffat's intelligence is difficult to describe, as his performance on some of the tests administered to him range from exceptional strength in some tests to below average in others. Generally, however, he was found to process information thoughtfully and carefully, and he showed intellectual sophistication. Dr. Stefanelli has described Mr. Moffat as a mature individual. On the whole, I conclude that Mr. Moffat has the maturity to be expected

of someone about to turn 19 in less than two months.

- [19] The next factor is character and it is not, I must say, completely clear to me what is meant to be evaluated under this factor, in addition to other factors referred to.
- [20] Mr. Wellwood has shown a tendency to feel superior to others. He has shown a tendency in the past to disrespect the property of others. He has set fires. Mr. Wellwood appears to have had little regard for rules or expectations of his school or indeed for anyone else. Mr. Wellwood has shown little respect for his mother, and on occasion has been verbally and physically abusive toward her.
- [21] As to Mr. Moffat, Dr. Bodnarchuk has described some traits that may impact on Mr. Moffat's character as follows. He has characterized Mr. Moffat as rebellious, evasive, manipulative, glib, superficial, and impulsive. He has also said that Mr. Moffat engages in pathological lying and has narcissistic traits.
- [22] Mr. Wellwood's background is canvassed in the reports of Ms. Kienas and Ms. French. He is an only child. His mother and father separated when he was one and a half years old and divorced soon after. Mr. Wellwood and his mother lived with his maternal grandparents for about 10 years. Mr. Wellwood's relationship with his grandfather deteriorated, and he and his mother moved out of his grandparents' home. Mr. Wellwood has had some irregular contact with his father, but that stopped in 2001 when his father was imprisoned.
- [23] By his teens, Mr. Wellwood was defiant, argumentative, verbally abusive, and sometimes physically violent. Mr. Wellwood started to have trouble in school at about Grade 5. Part of that difficulty seems to have been his response to frustration or challenge, and that response was often volatile or confrontational.
- [24] Mr. Wellwood became increasingly difficult to manage, both at school and at home. Mr. Wellwood's academic progress has waxed and waned. It deteriorated, it then improved, and then deteriorated again. At some point, Mr. Wellwood was designated at his school as someone having intensive behaviour needs.
- [25] Mr. Wellwood has in the past consumed alcohol to excess, perhaps not frequently. He is a regular user of marihuana, to the point that he considers himself to be addicted.
- [26] Mr. Moffat has two older half-brothers and a younger sister. It appears that Mr. Moffat suffered some form of sexual abuse when he was three years old. Mr. Moffat was difficult to manage as a child. He engaged in destructive and dangerous behaviour from an early age. Mr. Moffat's parents separated when he was around nine years old, and Mr. Moffat appears to have been affected by his father's absence.
- [27] Mr. Moffat's mother's employment necessitated before- and after-school care. Mr. Moffat soon refused to go to after-school care, and that left him with a fair amount of unsupervised time. When his mother changed her job so that she could provide her own after-school supervision, Mr. Moffat rebelled at the attempt to impose some structure upon him. Mr.

Moffat has had frequent conflicts, both within his family and outside. He has struggled in school, both academically and in his relationships with other students. He has missed a great deal of school.

- [28] He has experimented with drugs and alcohol. He has been, in short, a significant behaviour problem in school.
- [29] Mr. Wellwood and Mr. Moffat met when Mr. Wellwood was in Grade 5. They became close friends. They started skipping school together. They shared interests, including computers. These interests apparently expanded to fantasies of violence and sexuality, a lot of it obtained and shared through their computers.
- [30] Neither of these young men have a record of youth offences for which they have been found guilty.
- [31] All of the above factors and additional ones, of course, must be weighed and balanced in arriving at an opinion as to whether the Crown has shown that a youth sentence imposed, in accordance with the principles I have outlined, would not have a sufficient length to hold either of these young persons accountable for his offending conduct.
- [32] Again, accountability, according to the Ontario Court of Appeal, is similar in meaning to retribution, as I have explained.
- [33] That leads to the consideration of the moral culpability of each of these young persons. Moral culpability, according to the definition, also imports questions such as intentional risk taking, consequential harm caused, and the normative character of the conduct of each of the young men.
- [34] Given the guilty plea to first degree murder and the admissions represented in the agreed statement of facts, I agree with counsel for the Crown that the intentional risk-taking referred to in the explanation of retribution is not an easy fit in this case, and that the intent to kill component of first degree murder can and should be substituted. The intent to kill is also relevant in consideration or considering s. 38(3)(b) of the Youth Criminal Justice Act.
- [35] The harm caused by each of these offenders is obvious. Kimberly Proctor is dead, and those who survive her are devastated.
- [36] The normative character of the offender's conduct which I must consider refers, I think, to the comparison between societal values and the conduct of the offenders, without of course bringing back in through that back door the concepts of general deterrence or denunciation. The gulf between the way in which this intentional killing was carried out by these two young men acting together and any normal societal value is obvious and enormous.

- [37] I am also required to consider whether a youth sentence reflecting the principles set out in ss. 3 and 38 would have sufficient length to hold each of these young persons accountable for their offending behaviour. This brings into consideration the purposes in s. 38(1), to hold the young person accountable for an offence through the imposition of a just sanction that has meaningful consequences for the young person and promotes his rehabilitation and reintegration into society.
- [38] Meaningful consequences must take its meaning from the circumstances surrounding the offending conduct, the offender, and the offence itself, in that the sentence must produce some consequences that have a meaningful relationship to what the offending youth has done. It takes its meaning in part from s. 38(2)(c), which requires that a sentence be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.
- [39] Here, as I have already indicated, the seriousness of the offence is obvious. The respective degrees of responsibility of each of Mr. Wellwood and Mr. Moffat is not so clear. That is because, as time passed after the offence, each of these young men has tended to minimize his own participation in the offences and to point to the other as being more responsible.
- [40] Dr. O'Shaughnessy has postulated that either the two of them could have agreed to obfuscate in this manner, or that one is telling the truth and the other is lying by reversing the roles each of them played during the offences.
- [41] It is not really possible to sort out the truth here. There are some hints in the communications each of these young men had with third parties immediately after the killing that might indicate that Mr. Wellwood played a larger part than Mr. Moffat, but it is not safe to make any firm findings on the available evidence. It seems to me that the evidence shows that each of these young persons was a full and willing participant in these offences, and that any difference in degree of participation would not affect the proportionality of any sentence as contemplated by s. 38(2)(c) or 38(3)(a), where the degree of participation is a factor to be considered.
- [42] The promotion of rehabilitation and reintegration into society is one of the purposes of sentencing set out in s. 38(1). Here the opinions of Dr. Riar and Dr. Hemphill as they relate to Mr. Wellwood, and of Dr. Stefanelli and Dr. Bodnarchuk as they relate to Mr. Moffat are of great assistance.
- [43] Dr. Riar's opinion is that Mr. Wellwood has deviant sexual disorders and strong traits of psychopathy. There are treatments available in both youth and adult systems but, he says, Mr. Wellwood's psychopathology is better treated in the adult system. Dr. Riar's clinical impression is that Mr. Wellwood is at a very high risk of committing a similar crime in the future, if he is released untreated and unsupervised into the community in the next 25 to 30 years. Of course, one hopes that Mr. Wellwood will take and benefit from treatments while in custody, but that remains to be seen. Mr. Wellwood's letter marked as Exhibit 15 stops short of saying that he will.

- [44] Dr. Hemphill says that the youth system has less experience than the adult system in dealing with people who have committed sexually-motivated homicides. He also says that the adult system has more experience than the youth system in providing the monitoring and supervision he thinks Mr. Wellwood needs. Dr. Hemphill concludes that Mr. Wellwood is at high risk to commit a subsequent violent act in the future if he is not carefully managed and supervised.
- [45] Dr. O'Shaughnessy, who prepared reports at the request of the Crown, without having seen Mr. Wellwood, was not optimistic that Mr. Wellwood would show any significant improvement in the timeframes afforded by youth sentencing. Dr. O'Shaughnessy thought Mr. Wellwood would need prolonged, very close supervision over the next 30 plus years. He said expectation of any substantial improvement from psychological or psychiatric intervention is frankly unrealistic, especially in light of the severity of his psychopathology.
- [46] The timeframes Dr. O'Shaughnessy refers to need to be considered in light of the youth sentences available under the Act. Under the Youth Criminal Justice Act, the mandatory youth sentence for first degree murder is a total of 10 years, of which no more than six can be in custody, and at least four must be non-custodial; that is, in the community under supervision. Once the total of 10 years has passed, there can be no further supervision or conditions imposed upon the young person.
- [47] In my view, on all of the evidence and bearing in mind the principles and purposes set out in ss. 3, 38, and 72 of the Youth Criminal Justice Act, that available range of sentence under the youth sentencing provisions would not have sufficient length to hold Mr. Wellwood accountable for his offending conduct. Under s. 73 of the Act, therefore, an adult sentence is the appropriate result.
- [48] Mr. Wellwood, would you please stand up. On Count 1, first degree murder, under ss. 745 and 745.1(b) of the Criminal Code, the mandatory sentence is imposed leaving no room for discretion in the court. You are sentenced to imprisonment for life pursuant to s. 745. Pursuant to s. 745.1(b), you are not eligible for parole until you have served 10 years in prison.
- [49] On Count 4, indecently offering an indignity to Ms. Proctor's remains, and in light of the nature and extent of that indignity, I sentence you to five years to be served concurrently.
- [50] Pursuant to s. 487.051(1) of the Criminal Code, I authorize the taking of the number of samples that are reasonably required for the purposes of forensic DNA analysis.
- [51] Pursuant to s. 109(2)(a) of the Code, you are prohibited from possessing any firearm, other than a prohibited firearm or a restricted firearm, cross-bow, restricted weapon, ammunition, and explosive substance for 10 years. Pursuant to s. 109(2)(b) of the Code, you are prohibited from possessing a prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

- [52] You will comply with the provisions of the Sex Offender Information Registration Act for life, pursuant to s. 490.012 and .013 of the Criminal Code.
- [53] You may sit down.
- [54] With respect to Mr. Moffat, Dr. Stefanelli doubted the sincerity of Mr. Moffat's claims of remorse. He remarked on Mr. Moffat's assertion that he was not violent and did not have a problem with violence when Mr. Moffat was asked why he did not wish to participate in a violence program in custody. Dr. Stefanelli suggested that Mr. Moffat should be monitored, likely for the rest of his life, on the basis of a study of a relatively small number of subjects in the United States, but also based on the circumstances of these offences.
- [55] Dr. Bodnarchuk described Mr. Moffat as passive aggressive, rebellious, hostile toward authority figures, evasive, manipulative, glib, superficial, and profoundly remorseless. Dr. Bodnarchuk says that Mr. Moffat requires extensive and long-term treatment, management, and supervision almost certainly throughout his life.
- [56] Dr. O'Shaughnessy has described Mr. Moffat as a very disturbed young man with very clear antisocial tendencies. He says Mr. Moffat is a high risk to re-offend and that his zone of risk will be substantial and will likely be in the vicinity of three decades or longer. Dr. O'Shaughnessy's greater concern for Mr. Moffat is long-term follow-up, as he feels Mr. Moffat will be at an ongoing risk for many years to come.
- [57] In my view, on all of the evidence, and bearing in mind the principles and purposes set out in ss. 3, 38, and 72 of the Youth Criminal Justice Act, the maximum available for youth sentences would not have sufficient length to hold Mr. Moffat accountable for his offending conduct. Under s. 73, an adult sentence is the appropriate result.
- [58] Mr. Moffat, would you please stand up. On Count 1, first degree murder, ss. 745 and 745.1(b) of the Criminal Code are mandatory, leaving no room for discretion in the court. You are sentenced to imprisonment for life pursuant to s. 745, and pursuant to s. 745.1(b) you are not eligible for parole until you have served 10 years in prison.
- [59] On Count 4, indecently offering an indignity to Ms. Proctor's remains, and in light of the nature and extent of the indignity, I sentence you to five years to be served concurrently.
- [60] Pursuant to s. 487.051(1) of the Criminal Code, I authorize the taking of the number of samples that are reasonably required for the purposes of forensic DNA analysis.
- [61] Pursuant to s. 109(2)(a) of the Code, you are prohibited from possessing any firearm, other than a prohibited firearm or a restricted firearm, cross bow, restricted weapon, ammunition, and explosive substance for 10 years. Pursuant to s. 109(2)(b) of the Code, you are prohibited from possessing any prohibited firearm, restricted firearm, prohibited weapon, prohibited device, and prohibited ammunition for life.

[62] You will comply with the provisions of the Sex Offender Information Registration Act for life, pursuant to ss. 490.012 and 490.013 of the Criminal Code.

[63] You may sit down.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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