

Court of Appeal for British Columbia

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Chief Justice McEachern	January 30, 1996
The Honourable Mr. Justice Goldie	
The Honourable Mr. Justice Donald	Vancouver, B.C.

BETWEEN: REGINA RESPONDENT AND: CLARENCE SMITH APPELLANT

M. Klein	appearing for the Appellant
J. Gordon	appearing for the Respondent

1 DONALD, J.A.: Clarence Smith applies for leave to appeal an eight year sentence for aggravated assault imposed by Mr. Justice Brenner on April 29, 1993, after a trial. The appellant's appeal against conviction was dismissed on December 9, 1994.

2 The learned trial judge summed up the facts in this way:

The accused, as of today, a 49-year-old native, attended on a number of occasions at the Christian Apostolic Church in Vancouver and on those occasions met a number of the parishioners and Reverend Hardy. He used those meetings to increase his familiarity with the members of the church and he ultimately asked Reverend Hardy to provide him with monies on a number of occasions, which Reverend Hardy did. That continued up until Sunday, June 14th, 1992. On that occasion, Reverend Hardy told the accused, in response to yet an additional request for money, that he, the accused, would have to go elsewhere.

On June 15th, 1992, a Monday, the accused came to the church at approximately nine o'clock in the evening and rang the doorbell. Reverend Hardy saw the accused through the glass, recognized him, waved to him and the accused waved back and Reverend Hardy admitted the accused to the church.

I found as a fact that Reverend Hardy recalled, upon being interviewed in the hospital some four days after the incident, that the accused had a stick with him when he was admitted to the church. After being admitted, Reverend Hardy went to take the accused downstairs and to take him to the lounge to talk with him, since Reverend Hardy viewed the accused as a potential member of the congregation and as one who had shown an interest in his church.

As they were going down the stairs, the accused again asked Reverend Hardy for money and Reverend Hardy again declined. The accused then followed Reverend Hardy down the stairs, followed Reverend Hardy to a washroom where he inflicted what can only be described as a most savage beating upon him.

The evidence of Dr. Rua Mercier, the Emergency Room physician, at trial, was that some seventeen individual blows were inflicted to Reverend Hardy's head and face with a blunt instrument. Reverend Hardy sustained a fractured jaw, two skull fractures, permanent scarring to his head and face, and suffered permanent memory loss to an extent. As I said in my reasons for judgment, I considered his recovery or the fact of his recovery to be remarkable in the circumstances.

In my view, the fact that the accused attended at the church on June 15th at the time he did when it was unlikely that there would be other people in the church other than Reverend Hardy who lived there, and carrying a stick, indicates that the accused was returning for the purpose of again asking Reverend Hardy for money and that if Reverend Hardy refused, he was prepared to apply force and to in fact do what he ultimately did which was to inflict a savage beating on Reverend Hardy and to rob him of his wallet.

3 The appellant has a long record. It includes a 4-1/2 year sentence in 1982 for robbery. There is one other conviction for violence. In 1981, he was convicted of assault causing bodily harm and given a suspended sentence and probation. Many of the items in his record are property offences, and there are some indications of alcohol and drug abuse in his background.

4 Defence counsel urged the learned trial judge to take into account efforts by the appellant to reform his life and to notice his involvement in the native community, particularly in his pursuit of an interest in poetry reflecting the aboriginal experience.

5 I am satisfied that the learned trial judge kept those features in mind when he passed sentence. He found that the circumstances of the case were extremely aggravated. With respect, I think his assessment was accurate. The appellant almost beat to death an 84 year old minister who had helped the appellant in the past and had befriended him. The judge found an element of premeditation in the crime. He could see no mitigating factors, nor can I.

6 The appellant spent seven months in custody before trial. If credit for dead time is reckoned in the calculation of the penalty, the sentence of the aggravated assault is roughly equal to nine years. Again, I am satisfied that the learned trial judge was fully conscious of that when he gave the sentence under appeal.

7 Before us Mr. Klein presented letters of support from native groups and from others attesting to the appellant's involvement in native offender programs, his pursuit of the artistic side of native culture while in the Kent institution, and his participation in drug and alcohol counselling for his own benefit including the sweat lodge experience. Mr. Klein pointed to efforts made by the appellant to address his substance abuse problem and to help others. He presents these as positive signs of rehabilitation, elements of hope that mitigate against the severity of the circumstances of the crime and should, in his submission, lead us to vary the sentence of eight years.

8 We were given a psychological assessment of the appellant prepared by Dr. Michael F. Elterman dated October 9, 1995. It helps to put in perspective what was said on the appellant's behalf concerning his involvement in native affairs and provides us an important insight into the rehabilitative prospects for this individual. I quote from pages 4 and 5 of the report:

Opinion

Clarence Smith is a 52 year old inmate serving an eight year sentence for Robbery and Aggravated Assault. He denies the present offence for which he is serving his sentence and puts this down to a case of mistaken identity. He says that the same mistaken identity was also occurring in previous offences. Mr. Smith describes a difficult childhood where he was raised in a residential school. During this time he developed a great deal of anger and resentment in relation to the way that he was raised by the authorities who were placed over him in such residential facilities. He began a criminal history at around age 16 and has continued on throughout 35 years. Mr. Smith describes himself and presents himself as someone who has matured and evolved as a consequence of his re-identifying with his Native Indian culture. He describes having dealt with his criminal past through this process. What I have found in Mr. Smith is someone who aspires to be an evolved individual within his culture but is still struggling emotionally with the angry and hostile emotions from his past. One sees in him a marked and divergent identity, that which is and that which he aspires to. This is encapsulated in his saying that he could not have committed his last three offences because of his re-identification with Native Indian Spirituality and Culture. Having this strong sense of identity has certainly helped Mr. Smith in one sense but, frankly, in another sense, I think that he is minimizing, denying and rationalizing the other part of his emotional self which has not properly been addressed. I do not believe that how he wishes to project himself is the way that he is emotionally. Until such time as [sic] he confronts his criminal behaviour, and the emotions that led to the way that his adult life has gone, his risk to re-offend remains relatively high. I do not believe that he has achieved any real understanding of the criminogenic factors that have led to his lengthy criminal history. I am concerned that he is hiding behind a persona that may be difficult for him to maintain. My hope is that he will address these long-term issues in a substantive way through counselling with someone who has the background and skills to understand the incongruencies in him.

9 The appellant has maintained his denial of involvement in this crime as he does with at least one prior conviction for violence. Dr. Elterman, in the opinion just quoted, reveals a disturbing aspect of the appellant's psychology in that he now feels that since he has become deeply involved in aboriginal affairs and in his poetry he could not be the kind of person who committed this offence. This form of denial has led Dr. Elterman to express concern that the risk of re-offending remains relatively high.

10 Despite what was so ably said on his behalf by Mr. Klein, in my view the appellant presents a significant risk to the safety of the public and the public needs to be protected from him by a long sentence. Eight years is a very severe sentence and must be seen as at the top of the range. However, when the circumstances of the offence are examined together with a recent assessment of the appellant's attitude towards his criminality and his responsibility to society, I am of the view that the sentence is not excessive. I would leave it to the Parole Board to assess his progress, and I can only hope that counsel's optimistic predictions for the appellant's rehabilitation will come true.

11 In these circumstances, I would grant leave to appeal but dismiss the appeal.

12 McEACHERN, C.J.B.C.: I agree with what Mr. Justice Donald has said. For those having similar cases in the future, I would merely add a reference to the decision of this Court in *Regina v. Whetstone*, CA016971, Vancouver Registry, February 28, 1994, where Mr. Justice Wood speaking for the Court expressed the view just mentioned by Mr. Justice Donald that where there is a serious likelihood of re-offending and the sentence is otherwise fit, this Court should leave it to the Parole Board to determine when rehabilitation has progressed to the stage where the offender is no longer a threat to the public.

13 GOLDIE, J.A.: I agree with the disposition proposed by Mr. Justice Donald and I concur in the observations made by the Chief Justice.

14 McEACHERN, C.J.B.C.: Thank you, counsel. Leave is granted. The appeal is dismissed.

"The Honourable Chief Justice McEachern"

"The Honourable Mr. Justice Donald"