

File No: 248918-1
Registry: Vancouver

In the Provincial Court of British Columbia

REGINA

v.

RYLEY ANDREW SHIER

**REASONS FOR SENTENCE
OF
THE HONOURABLE JUDGE N. PHILLIPS**

COPY

Crown Counsel:	K. Hennessy
Defence Counsel:	D. Fai
Place of Hearing:	Vancouver, B.C.
Date of Judgment:	April 12, 2019

[1] THE COURT: Ryley Shier appears before the court today for sentencing. This follows a conviction in relation to Information 248918, on Count 1 that was entered at the conclusion of a trial in March of this year. I found at that trial that Mr. Shier, on the 16th of May, 2017, in Burnaby, at Metrotown Mall more specifically, had assaulted Oliver Murphy, contrary to s. 266 of the *Criminal Code*; in other words, assault simpliciter.

[2] At the sentencing hearing today, I have heard careful submissions by both counsel on behalf of the Crown and counsel on behalf of Mr. Shier. The Crown submits that an appropriate disposition with respect to this offence would be a three month conditional sentence and a 12 month period of probation. With respect to counsel on behalf of the offender, Mr. Fai submits that this matter could be dealt with appropriately by way of a conditional discharge. My reasons for judgment following the trial should be read in conjunction with this decision at this sentencing hearing.

[3] I will begin first with Crown counsel's submissions at this morning's sentencing hearing. The Crown briefly outlined the key aspects of the conviction that was recorded against Mr. Shier. To put the matter into context, the court was reminded this event occurred in the evening at the Metrotown Mall in Burnaby; that the complainant, Mr. Murphy, is a shorter and more diminutive individual than Mr. Shier; that over a period of a number of minutes Mr. Shier got quite close to Mr. Murphy and when Mr. Murphy asked him to move back Mr. Shier offered that he was comfortable with that close proximity. At one point Mr. Shier said to Mr. Murphy, "Would you like to get dropped." Mr. Shier eventually called Mr. Murphy a faggot. Mr. Murphy then put his hand against Mr. Shier's throat. I found that Mr. Shier did

something very similar. They were not particularly forceful points of contact by either man, and Mr. Murphy backed away, turning his body partially away, and used both hands in an effort to make a cellphone call. Meanwhile, Mr. Shier proceeded to use body language that suggested he was not done, wanting to engage further with Mr. Murphy. He then made a single swinging punch toward Mr. Murphy's head or facial area, causing Mr. Murphy to trip over a chair and fall hard flat to the ground behind him.

[4] As Crown counsel pointed out, in the reasons for judgment I found that Mr. Murphy was meek and placating throughout the interaction with Mr. Shier. Mr. Shier, by contrast, was dominating and not appearing to be intimidated at any point. I found that the force used in that second blow was significant and that non-trivial bodily harm was made out.

[5] Crown counsel submitted that the principles of sentencing which are at play here are denunciation, deterrence, and rehabilitation. The Crown submits that Mr. Shier's use of the word "faggot" shows that he was motivated by hatred toward Mr. Murphy's sexual orientation. Any other sentiments or emotions that were occurring at that time can co-exist with that hatred and that do not override or cancel out that other emotion.

[6] Crown counsel submitted that the aggravating factors here, in addition to that hatred and motivation, are that Mr. Shier struck Mr. Murphy in the face on two occasions, and that on the second occasion Mr. Murphy fell to the ground and was injured. Crown counsel points out Mr. Murphy's vulnerability as a smaller man and a member of a vulnerable LGBTQ community; that he was at work, could not simply

walk away; and that he was actually trying to catch persons' attentions as they went by and was backing away. Crown submits that Mr. Murphy was sucker punched while he was on his phone with both hands in use and defenceless at the time. It was also submitted that it was aggravating that Mr. Shier walked away after Mr. Murphy was rendered onto the ground. The Crown submits that Mr. Murphy's injuries were also serious.

[7] By way of mitigation, Crown counsel points out that Mr. Shier has no criminal record. He is still a young man and rehabilitation is a significant consideration.

[8] Mr. Murphy asked that his victim impact statement be read by Crown counsel into the record this morning and that occurred. It makes clear to the court that Mr. Murphy did suffer injuries as a result. I bear in mind in saying that that Mr. Shier is being sentenced for assault simpliciter. Mr. Murphy describes being depressed; having some disassociation; this incident triggered his pre-existing PTSD; and that he suffered migraine headaches. He purchased a cane to help him with standing. He had a pre-existing condition. He testified that he has a small dent on the right side of his chin as a result of what occurred there, and he thinks it is permanent. He wishes to pursue physio/massage therapy and long-term counselling but he does not currently have the resources financially to do that.

[9] Mr. Murphy missed work as a result of what happened and his residence had to be changed as a result of what occurred, primarily I gather due to some financial challenges and also some discomfort on his part. Mr. Murphy has since this incident left the Vancouver or Lower Mainland area and is now living on Vancouver Island. He had to leave his job as a result of the move to Vancouver Island. He said that

when he went back to his former job, his flight or fight response was always “on” as a result of what occurred. Mr. Murphy concluded his victim impact statement by saying that he is still recovering and that this incident had a major impact on him.

[10] Mr. Fai, on behalf of Mr. Shier, submits that this matter can be dealt with appropriately by way of a conditional discharge. Mr. Shier is 24 years of age. He graduated Grade 12 from public high school in North Vancouver. He is currently living in North Vancouver with his father. His father was here earlier this morning to support his son at his court appearance, but unfortunately had to leave for work before we could get to this case.

[11] Mr. Shier's currently working as a landscaper. He had in the past been driving trucks for a mining company in Princeton. I will return to that more in a moment. He tells the court by way of explanation that on the night this incident occurred at the Metrotown Mall he had gone to a restaurant in the area with his girlfriend. He consumed too much alcohol and then the two of them had gone into Metrotown Mall. He says that he thought he had paid for the items that Mr. Murphy disputed had not been paid for, and he thought Mr. Murphy was ripping him off. He said he left the other items behind but in anger he “flipped” Mr. Murphy “the bird” and called him a faggot.

[12] Mr. Fai submits on Mr. Shier's behalf that there is no evidence in doing so that Mr. Shier intended to hit Mr. Murphy until Mr. Murphy pressed his hand, as I have described, against Mr. Shier's neck. Mr. Shier acted in a similar fashion and then had a momentary lack of judgment and levied the second blow which was the basis for the conviction. Mr. Fai submits, on Mr. Shier's behalf, that to suggest that the

crime was motivated by bias related to sexual orientation simply has not been proven beyond a reasonable doubt and the court should not proceed to sentence Mr. Shier on that basis.

[13] Mr. Shier provided two letters to the court to assist at sentencing. First of all, there is a letter -- it is undated but I accept that it is current -- from Mr. Shier's employer that confirms that Mr. Shier is, indeed, employed. He is described as a phenomenal employee and a proud member of this individual's company. The employer expressed surprise that Mr. Shier had been found guilty of assault. It bodes well that Mr. Shier was candid, in my view, with the company. The employer indicates that Mr. Shier is not that type of person at work; that Mr. Shier has been a good employee and helped the employer to grow his business by taking on added responsibilities, including dealing with clients in the landscaping business. Mr. Shier has also shared with his employer some of the struggles he has gone through in the past, including, as Mr. Fai also noted, the death of Mr. Shier's former girlfriend about a year ago which is obviously something that would be very difficult to deal with.

[14] Mr. Shier's father submitted a letter which, in considerable length, provides information that is of assistance to the court regarding the young man in front of the court about Mr. Shier's childhood and moving onto some career opportunities for him. In particular, Mr. Shier took advantage of a summer job to secure a very good job at the Copper Mountain Mine near Princeton, B.C., where he managed to work his way up to driving the very big mining trucks. Unfortunately, Mr. Shier fell asleep at the wheel of one of those big vehicles on the nightshift. Fortunately, although a minor incident occurred, it was not catastrophic. Regrettably, Mr. Shier lost his job

and he made his way back to Vancouver. It appears from the father's letter that he managed to secure employment with the landscaping company fairly quickly upon his return to Vancouver. Mr. Shier Sr. exhorted his son to display character by trying to show how one deals with adversity and not to let the rest of his life be blemished by some of the challenges he has faced. The father notes, by way of the concluding paragraph, a concern with respect to a criminal record saddling his son with some challenges in terms of employment opportunities going forward. As his son may still have the option of using his driving skills on large equipment, to pursue another similar opportunity for work in North America or on an international level, the father is concerned about the potential for a criminal record to cause some problems in pursuit of that path.

[15] Mr. Shier himself did not address the court and he did not offer any insight into what happened or offer an apology to Mr. Murphy.

[16] Both counsel provided the court very brief submissions with respect to case law, dealing with both what might be a fit disposition for this offence, and also with respect to s. 718.2(a)(i) of the *Criminal Code*, and it is to that latter issue that I turn next.

[17] In *R. v. Van-Brunt*, Judge Watchuk, as she then was, at 2003 BCPC 0559 considered the provisions of the *Criminal Code* dealing with crimes motivated, in part, by bias, prejudice or hate based upon, amongst other things, a person's sexual orientation. At paragraph 46 of Judge Watchuk's decision, she cited with approval the Ontario Court of Justice decision in *R. v. Vrdoljak*. She stated:

It can also be extremely difficult to determine whether or not an

offender was motivated by bias, prejudice or hate. In some instances, there are a number of possible motivating factors that may be present. Moreover, there has been some debate whether a crime must be solely motivated by bias, prejudice or hate for it to be a 'hate crime'. In our view, a hate crime can be motivated in whole or in part by bias, prejudice or hate. This is not a novel concept in sentencing, since judges have always taken into account numerous aggravating and mitigating factors at the time of sentencing. To suggest that, for the purpose of sentencing, an offence is only a 'hate crime' if it is established that bias, prejudice or hate is the sole motivating factor simply would be inappropriate and inconsistent with sentencing practices. . . .

[18] Judge Watchuk noted (@ paragraph 47):

The Court concludes that it must be established beyond a reasonable doubt that the offence was motivated at least in part by bias, prejudice or hate based on the victim's race or colour. . . .

As applied in her case. She says:

. . . I agree with that conclusion.

[19] In *R. v. Kandola*, 2010 BCSC 841 Mr. Justice Groves of the Supreme Court of British Columbia, had to consider that provision of the *Criminal Code*. Justice Groves stated (at paragraph 11):

In the past, through case law, courts have taken into consideration in determining whether an offence is motivated by hatred related to sexual orientation the following circumstances: whether there was anti-homosexual language uttered before, during, or after the offence was committed; whether the offence was committed in a high-visibility, for lack of a better term, location where homosexuals are known to frequent; the lack of provocation; any lack of prior interaction between accused and victim; extreme or disproportionate violence; and finally, absence of any possible alternative explanation or motivation given the presence of some or all of the above-noted factors. . . .

[20] I turn then to my assessment of whether or not that aggravating factor has been established here, either in accordance with s. 718.2 or as a simple aggravating factor at common law.

[21] In this case, I consider the following to be significant. Unlike some of the case authorities this court was directed to this morning, Mr. Shier and Mr. Murphy spent a number of minutes together. That was clearly borne out in the video testimony and in the witness testimony. Both men had an opportunity to examine or check one another out. Mr. Murphy described this as being intimidating to him. By the words used on Mr. Shier's part, he did not find the physical proximity to be a problem. In asking Mr. Murphy if he would like to get dropped, clearly it was not an intimidating thing to him. He was assessing Mr. Murphy in making those comments to him.

[22] I bear in mind that the specific word used by Mr. Shier -- "faggot" was a deliberate choice on his part. As Crown counsel pointed out, there are myriad derogatory or insulting words that Mr. Shier could have used, but he chose that one specifically. He did so at the end of having spent that time with Mr. Murphy and having assessed him. Mr. Murphy had done nothing physical toward Mr. Shier prior to Mr. Shier giving him the finger and calling him a faggot.

[23] I agree with Crown counsel the fact that when Mr. Shier used that word on someone he had only met a few minutes earlier, he must have meant the intended common understanding of the word. It simply would not make sense otherwise. There is also an absence of any alternative motivation or explanation in front of me with respect to that comment. It was in the circumstances, in my view, made as an unmistakable homophobic insult and Mr. Shier meant what he said when he used that word that evening. I find the only reasonable inference that can be drawn from the evidence in front of the court at trial is that Mr. Shier's conduct was motivated, in

whole or in part, by bias against Mr. Murphy's sexual orientation. I find that has been proven beyond a reasonable doubt in accordance with the provisions of s.

718.2(a)(i).

[24] The next question then is what is a fit sentence for this offence? As both counsel have pointed out, there are cases that assist the court in coming to an appropriate sentence but ultimately sentencing is an individualized process. I do not intend to review what I have already referenced as to the Crown's summary of aggravating and mitigating circumstances. I would note on Mr. Shier's part, as highlighted by Mr. Fai, the lack of criminal record, and the fact that he is 24 years of age and otherwise unknown to these courts as considerable mitigating factors. The need for the court to bear in mind Mr. Shier's rehabilitation looms larger in my view because of those things than some of the other cases to which my attention was directed this morning.

[25] However, with respect to the aggravating factors. As Justice Groves pointed out at paragraph 39 in *Kandola*, deterrence is particularly crucial where the Crown has proven beyond a reasonable doubt that a crime has been motivated by hate.

Justice Groves went on to state in that paragraph:

. . . In Canada, people are free to live their lives as they choose, be they heterosexual or homosexual. In Canada, we do not tolerate crime based on prejudice or hateful motives related to sexual identity, related to race, related to religion, related to age, or related to language. Mr. Kandola individually must know his actions are not only contrary to the law, but are deplored by Canadian society as articulated by Parliament in s. 718.2 of the *Criminal Code*. In terms of general deterrence, those who wish to act like he did on September 27, 2008, must know that there are real consequences for their behaviour if they act in that fashion.

[26] Justice Groves, on somewhat different circumstances, imposed 17 months incarceration.

[27] With respect to whether or not a conditional discharge would be a fit sentence in the circumstances, I consider firstly whether it would be in Mr. Shier's best interest to grant him a conditional discharge. I think clearly it would be in his best interest, although I note in the letter from his father, which is really the only significant evidence the court has on this point, that any impact upon Mr. Shier of a criminal record is not crystalized in the sense that it is a possibility, depending on what Mr. Shier decides to do in the future.

[28] Whether or not a conditional discharge would be contrary to the public interest which is the next aspect of the *Fallofield* test. The circumstances in this case involving a hate-motivated crime; the public nature of where this event occurred, in a busy mall; and Mr. Shier's callousness in leaving after he forcefully hit Mr. Murphy causing him to fall hard to the ground; all of those things, in addition to what I have already referred to, cause me to conclude that a conditional discharge would be contrary to the public interest. It would send the wrong message to the community that hate crimes and crimes that occur in such public and callous fashion could result in a discharge. In the specific circumstances here, I think a reasonably informed citizen would not find a discharge appropriate, and therefore, I am declining to grant a discharge to Mr. Shier.

[29] With respect to what is an appropriate sentence, I am of the view that a short period of jail is required but that it can be served in the community. It will be a bit shorter than what Crown counsel has suggested. There is nothing to suggest that

Mr. Shier cannot comply with a conditional sentence in the community. It will be of 60 days duration followed by 10 months' probation where he will be under control of the Correction Services.

[30] With respect to the s. 742.3(1) statutory conditions, they all apply, requiring that Mr. Shier keep the peace and be of good behaviour; appear before the court when required to do so; and that he report to a conditional sentence supervisor. Counsel, should that be this coming Monday then, April the 15th by four p.m.?

[31] MR. HENNESSY: I believe so, based on the timing of today.

[32] THE COURT: Yes. Thank you. So April the 15th, the usual location on East Cordova and thereafter report as and when directed and the other mandatory conditions.

[33] The discretionary conditions will be as follows: that Mr. Shier have no contact, direct or indirect, with Oliver Murphy. That he not go to Oliver Murphy's residence, workplace, or educational location.

[34] That he attend for and successfully complete counselling, including anger management counselling if directed by the conditional sentence supervisor.

[35] That he not have any weapons in his possession as defined in s. 2 of the *Criminal Code*. That he not have any knives in his possession with the two exceptions that he be permitted to have them for the preparation and consumption of food for himself or for work purposes. In landscaping, he may very well need to do so.

[36] Because this is a conditional sentence order, even though the court has no

other knowledge of Mr. Shier having an alcohol and drug problem, alcohol was a factor the evening of the offence. Regardless, because he is in jail in the community it is, in my view, critical that he abstain absolutely from the consumption of alcohol and non-prescription drugs under the conditional sentence order.

[37] Finally, that he be in his residence between the hours of 11 p.m. to 6 a.m. by way of a curfew for the conditional sentence for the 60 days and that he not be outside except for work purposes or for a medical emergency for himself, and in such instance he must provide a doctor's note within 72 hours of such absence. He must present himself at the door of his residence if directed by staff of the Corrections Office or his conditional sentence supervisor or delegate to prove that he is inside his residence when required.

[38] Mr. Shier is not to go to the Metrotown Mall at any point.

[39] With respect to the probation conditions, the usual statutory conditions will apply. Keep the peace and be of good behaviour; appear before the court when required to do so. That he report forthwith upon completion of the conditional sentence to the Probation Office and thereafter as and when directed by the probation officer. That he provide the probation officer his name, address and not change those things without notifying his probation officer or the court.

[40] The same no contact provision with respect to Mr. Murphy will apply, as will the same no-go to the residence, workplace or educational institution.

[41] The same counselling term will apply because it is not clear to the court that Mr. Shier will be able to attend to any counselling that he may be directed to by

Corrections during the 60 day CSO.

[42] I direct that Mr. Shier not have any weapons in his possession as a term of the probation order. This is under s. 2 of the *Criminal Code*. I decline to make an order with respect to knives because there is no suggestion it was involved in this incident. I only included it in the conditional sentence order because in my view it is appropriate given the jail in the community aspect of that part of the sentence.

[43] With respect to whether or not the court should impose community work service with respect to Mr. Shier, I am of the view that that would be appropriate. It will be 16 hours, so roughly two days equivalent to his regular work, to be completed within the first eight months of the probation order and under the direction and to the satisfaction of his probation officer. In my view that is an appropriate term for Mr. Shier to make some recompense to the community for this offence against Mr. Murphy. Hopefully that will assist Mr. Shier in moving on because he is still a young man.

[44] Finally, with respect to a DNA order sought by counsel on behalf of the Crown. This is a secondary designated offence. I am satisfied it would be appropriate in the circumstances, in part, because of the fact that Mr. Shier left the scene after this incident occurred. It is minimally intrusive. If I can ask counsel for their assistance in terms of when Mr. Shier should attend at the Vancouver Police Detachment. Or sorry, is this --

[45] MR. HENNESSY: Based on the last -- surname --

[46] THE COURT: Sorry, this is a Burnaby file.

[47] MR. FAI: It is, yes.

[48] MR. HENNESSY: Yes. So it would be the RCMP Detachment at 6355 Deer Lake Avenue in Burnaby, B.C., between eight a.m. and four p.m. Monday to Friday. It does not appear there are any surname breakdowns about when to attend.

[49] THE COURT: Thank you. Unless you have any other comments, Mr. Fai, I am going to direct that he attend sometime the week of April the 29th, and if your client has a day that works better for him, we can accommodate that.

[50] THE ACCUSED: Any day is fine.

[51] THE COURT: We will make it April the 29th and that way it can be dealt with at the outset of that week. April the 29th for Mr. Shier to attend at the Burnaby RCMP Detachment, Deer Lake, to have that DNA drawn.

[52] Is there anything else then, counsel? Thank you.

(REASONS CONCLUDED)