

Case Name:
R. v. Cormier-Ohalloran

Between
Her Majesty the Queen, and
Matthew Leigh Cormier-Ohalloran, Accused

[2013] A.J. No. 1488

Action No.: 120040092P1

Alberta Provincial Court
Edmonton, Alberta

J.T. Henderson Prov. Ct. J.

Judgment: June 13, 2013.

(47 paras.)

Criminal law -- Sentencing -- Criminal Code offences -- Offences against person and reputation -- Assaults -- Assault -- Assault causing bodily harm -- Particular sanctions -- Discharge -- Absolute discharge -- Sentencing considerations -- Aggravating factors -- Mitigating factors -- Deterrence -- Denunciation -- Leniency -- No previous record -- Guilty plea -- Health (incl. mental health) -- Seriousness of offence -- Effect on victim -- Offender given absolute discharge for assault and assault causing bodily harm -- Offender, age 21, suffered significant brain injury that changed personality, rendering him prone to anger and violence -- He resided full-time in group home and required one-to-one care -- Offender assaulted two care workers in separate incidents, slapping and punching one, and pushing other to ground, injuring her -- Discharge was not contrary to public interest given exceptional circumstances -- Absolute discharge favoured over conditional discharge, as offender was already under supervision and undertaking anger management counseling.

Sentencing of the offender, Cormier-Ohalloran, for assault and assault causing bodily harm. The accused was a resident at a group home who suffered from significant mental health issues. In two separate incidents he assaulted care workers. In the first incident, accused pushed a care worker to the ground after she refused to take him to the park and attempted to restrain him. The victim suffered an injury to her tear duct requiring surgery. In the second incident, the accused punched and slapped a care worker. The accused, age 21, suffered from a significant brain injury. He suffered a brain stroke and remained in coma for two months. Following surgery, his demeanour and overall personality changed,

rendering him violent and prone to anger. He remained in a group home thereafter and required one-to-one care. The Crown sought a suspended sentence with probation. Defence counsel sought an absolute discharge.

HELD: Cormier-Ohalloran received an absolute discharge. This was a unique situation in which a person's behaviour was caused by a mental health issue that occurred during brain surgery. Although deterrence and denunciation were objectives, they were of lesser importance given the uniqueness of the circumstances. Although there was harm to one victim, the offender's degree of responsibility was significantly diminished given his mental health issues. Mitigating factors included the offender's age, his guilty plea, his lack of prior convictions, and his significant health issues. Aggravating factors included the nature of the offence, and the fact that it was repeated. A discharge was in the best interests of the accused and, given the exceptional circumstances, was not contrary to the public interest. An absolute discharge was favoured over a conditional discharge, as the offender was already under supervision and taking anger management classes. Sentence: absolute discharge.

Statutes, Regulations and Rules Cited:

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 718(a)(ii)(f)

Counsel:

K.S.G.C. Mark, for the Crown.

Y.R. Ziv, for the Accused.

Sentence

1 J.T. HENDERSON PROV. CT. J.:-- Okay. Thank you. All right. The accused has pled guilty to two counts, assault causing bodily harm and common assault, two separate incidents. One occurred December 12th, 2011. That was the common assault. April 8th, 2012 was the assault causing bodily harm. They are both instances of similar types of behaviour in the sense that the accused, who was a resident of a group home, assaulted care workers who were there to help him, who were there to provide for his safety and for the safety of others around him.

2 Regrettably, on the incident on April 8th, 2012, there was an injury to the complainant's tear duct, and the medical evidence which has been provided makes it clear that it was a relatively serious injury requiring surgery. It appears as though after some time there is good reason to believe that there is a prospect for a full recovery. It is also clear from the victim impact statement that this incident has caused the care worker substantial problems both physically and emotionally, I would say.

3 Similarly, with respect to the assault incident -- I should say with respect to the assault causing bodily harm, what happened here was that the accused -- and I will come to his personal circumstances in the moment, but for the moment we will simply say that he was an individual who was in care in a group home. He does suffer some significant mental health issues, which I will come to in a moment. He wanted to go to the park. The worker denied him that opportunity and tried to restrain the accused. The accused reacted inappropriately and pushed the care worker off of him, pushed her to the ground. That caused an injury to occur, that is the injury to the eye which is described in the medical evidence.

4 A similar type of situation occurred on December 12th, 2011. That was a situation in which the accused punched and then slapped a care worker.

5 The accused is a 21-year-old young man. His personal circumstances I think are well described in the Pre-sentence Report that has been provided to me and which is marked as Exhibit S-2. He has, I must say, had some significant difficulties in life, and he does suffer from a brain injury. The brain injury, according to the Pre-sentence Report, is fairly significant, and it apparently arose, according to the pre-sentence Report, during the course of a brain surgery that was undertaken. The accused was placed in a drug induced coma. He had some substantial brain swelling. There was a brain stroke. He remained in a coma for approximately two months, and after the surgery, the evidence is that his demeanour and overall personality had changed and that he was violent and easily angered, There were problems with paralysis and vision problems, incontinence issues, balance issues, and he has been in a group home pretty much ever since.

6 He is now, according to the evidence, in a situation where he is receiving one-on-one care, so a supervisor is with him -- or a care worker is with him at all times on a one-to-one basis. He had previously been in a two-to-one relationship, that is to say one worker for two individuals, but that was changed to one-on-one staffing.

7 He has, according to the evidence of Mr. Stonehocker, who is the manager of the group home that the accused currently resides in, has made some good progress, has been taking anger management, has been able to control anger issues much better. He is, I am satisfied, making progress. His mood is improved, and there apparently have not been any further instances of these types of behaviours in the last year or so.

8 The real issue here is how the criminal justice system can properly deal with this type of individual. It is a difficult situation, to say the least. As with any other sentencing, we need to begin with the principles of sentencing that are set out in the *Criminal Code*, because of course those dictate sentencings in all circumstances. When I look at the objectives of sentencing set out in section 718(A)(ii)(f) of the *Criminal Code*, I see that those provide very little guidance in terms of what the sentence should be with respect to this particular individual.

9 It is fair to say that assaults and assaults causing bodily harm need to be denounced in the strongest possible terms. That is behaviour which is inconsistent with a peaceful society, and so denunciation would generally be an objective of sentencing, much less so

in this case, however. This is a unique case. This is not something that happens every day. This is a situation where a person's behaviour is driven by a mental health issue triggered by something that occurred during brain surgery. Precisely what, I can't say, and perhaps the medical people can't say either. But we do know that the evidence is uncontradicted. There was a pronounced change in his behaviour following a brain surgery.

10 So denunciation is certainly an objective. I would not rank that high on the list of objectives because of the uniqueness of this case.

11 Deterrence is obviously an objective that is applicable with respect to every case of assault and every assault causing bodily harm. But, again, I would not say that deterrence is of the same importance in sentencing in this case. The unique circumstances of this case would not call for deterrence, either specific or general. Obviously we can't - society simply cannot permit these types of activities to take place within a civilized society, but the uniqueness of this case makes deterrence much less of an objective than would be the case with an ordinary accused.

12 The other principles of sentencing really are not applicable. There is no suggestion that the accused needs to be separated from society. The Crown is not seeking a custodial sentence. The rehabilitation would be a factor, but I am satisfied that rehabilitation has been at the forefront of the scenario right from the time that the accused had his surgery many years ago, and nothing I can do in the sentencing regime would facilitate greater rehabilitation than is current -- than is currently being provided.

13 Reparations from harm and promoting a sense of responsibility are similarly not objectives that I would think to be important here. So, overall, I would say that denunciation and deterrence would be sentencing objectives, but they are not of the same character that we would see in the typical sentence.

14 Proportionality is something that must be considered. It is the only sentencing principle in the *Annual Code*. It must be considered in all cases. That involves two factors. One is the gravity of the offence, and that is a concept which is directed to what the offender did wrong. It includes two components: One, the harm or likely harm to the victim, and, secondly, the harm or likely harm to society and its values.

15 Certainly there was harm to the victim in this case. The victims both provided victim impact statements. In the one case there was bodily harm. Certainly there is harm, and I would not want to in any way diminish or underestimate the harm that was done here. It was significant.

16 On the other hand, the second component of the gravity of the offence, harm or likely harm to society and its values, has no application here whatever. This gentleman did not harm society and its values. I don't think that the nature of this offence, being driven by his mental health issues, is something that harms society or its values. Certainly assaults and assaults causing bodily harm should not be tolerated in society, but the uniqueness of this case renders the second element of the gravity of the offence as not being at the serious

end of the spectrum. The degree of the responsibility of the offender, in my view, is significantly diminished in light of the evidence with respect to his mental health issues.

17 So certainly in one sense the gravity of the offence is at the higher end of the spectrum because of the damage. The degree of responsibility of the offender is at the lower end of the spectrum.

18 I need to take into consideration the aggravating and mitigating circumstances here. The mitigating circumstances are obviously the guilty plea. The accused did give up his right to trial, took responsibility. Secondly, he is a young offender, 21 years of age. He has no prior criminal record, and I would say as a mitigating factor also his what I would describe as significant mental health issues are mitigating factors.

19 Now, on the aggravating side, certainly the nature of the offence, particularly the bodily harm, the assault causing bodily harm is an aggravating factor. I simply cannot ignore that. The fact that there were two instances as opposed to just one is also an aggravating factor. That sets up something in the nature of a pattern. I wouldn't call it much of a pattern because they were two instances that happened within three months of one another, more or less, and it appears not to have been repeated. But, nevertheless, that would have to be an aggravating factor.

20 The Crown recognizes the mitigating factors and recognizes the particular circumstances of this accused and, therefore, proposes a much more lenient sentence than would be applicable with respect to an individual who did not have the personal circumstances of the accused, and, therefore, the Crown seeks a suspended sentence with a period of probation. The accused, on the other hand, through counsel, argues that a fit and proper sentence in this case would be an absolute discharge.

21 And certainly offences, even serious offences, can be the subject of discharges. To grant a discharge I would have to be satisfied that the discharge is in the best interests of the accused and that the discharge is not contrary to the public interest. Certainly there can be no doubt that a discharge would be in the best interests of the accused. That is the case in almost every application for a discharge, and I'm satisfied that that component has been met here.

22 The much more difficult issue is whether it could be said that this is not contrary to the public interest. The leading decision in Alberta with respect to discharges is *R. v. MacFarlane*, (1976), 55 A.R. 222. That is authority which is binding on me, and it was recently reinforced by the Court of Appeal's decision in *R. v. Zentner*, 2012 ABCA 332. The Court of Appeal makes it clear in both cases that the criteria set out in *MacFarlane* must be followed and that a discharge can only be granted in the appropriate cases, that is to say in the context of the factors that were set out in *MacFarlane*.

23 It should be recognized, and I do recognize, that a discharge, either conditional or absolute, can only be granted sparingly and that a discharge should not be granted routinely. So then I need to consider the various factors set out in *MacFarlane* to determine whether or not the public interest component has been satisfied. The first factor that

Macfarlane refers to is the nature of the offence. The nature of the offence here, assault causing bodily harm and assault, are offences of violence. Generally speaking, those would not be subject properly to discharge applications, successful discharge applications. The nature of the offence would, therefore, argue against the granting of a discharge.

24 The prevalence of the offence, assaults and assault causing bodily harm, are prevalent offences. We see them routinely in this courthouse. We see them routinely attracting sentences of sometimes incarceration, sometimes large fines, sometimes suspended sentences, but rarely discharges. They are prevalent. They happen routinely. They do not happen routinely in the context of the type of situation that we currently face here. Persons with mental health issues, significant mental health issues committing these types of offences do not come before the Court routinely, in my experience. Nevertheless, I would say that the prevalence of these types of offences is something that would also argue against a discharge.

25 The next factor that I need to take into consideration is whether or not the accused stood to make some personal gain at the expense of others. That would not be a relevant factor here. It would neither argue in favour of or against a discharge.

26 The fourth factor is with respect to offences relating to property and, in particular, the value of the property. That would not be a factor here. There was no property involved, and, therefore, that would not argue either for or against a discharge.

27 The next factor in *Macfarlane* that I need to consider is whether or not this was a matter of impulse, and surely that must be the case here. This was an impulse that was driven by one factor alone, I am satisfied, and that was his mental health issues, his mental health concerns. His brain injury caused him to act out impulsively, and it regrettably resulted in the injury in the one case and the assault in the other. The impulsive nature of this offence would certainly argue in favour of granting a discharge.

28 The final factor that needs to be taken into account is whether or not it is necessary that the offence, or offences in this case, be a matter of public record so that members of the community are aware of that fact. And the Crown argues that there is a need for public awareness of these offences, that there is a need for the public to be aware that this is an individual who has been convicted of these offences so that perhaps greater steps can be taken to provide for public safety.

29 There is certainly force to that submission, and, on the other hand, this is an individual who has had major difficulties in life. And I am not persuaded that having a criminal record here is something that the public needs to be aware of by way of public record. He is living in a group home. To the extent that flags or warnings are needed that this might be an individual that should be approached with caution or dealt with in a particular way, his presence in the group home satisfies that requirement. I am not satisfied that anything would be gained by having the plea or the offence recorded as a matter of public record. Therefore, that, in my view, would argue in favour of a discharge as well.

30 So what we have here are some factors weighing against and perhaps even strongly against a discharge. We have some factors that weigh in favour of a discharge, and we have some factors that are not relevant.

31 The Court of Appeal in *Zeu/ncr* and also one more recent case, the name of which I can't remember, but it came out just a couple of weeks ago, emphasized that there will be exceptional circumstances that need to be taken into consideration, and there are exceptional circumstances here. It is impossible to ignore the exceptional circumstances that exist here, and the exceptional circumstances arise due to the brain injury that this young man has suffered and the mental health issues that flow from it and the impulsive nature of the offence.

32 So when I look at all of those factors, and I am trying to weigh all of the evidence here, I am satisfied that this is a fit and proper case for a discharge. The question is whether or not it should be conditional or absolute. We could impose conditions, but the reality is and the evidence before me is that this young man is receiving care in a group home. He is taking anger management classes. Supervision by probation would do, in my view, absolutely nothing for this young man. He is being supervised. He is being supervised on a one-on-one basis. I am satisfied that he is receiving good and proper care. I am satisfied that his workers are taking the necessary steps to rehabilitate, educate, train, and do those things that are necessary to ensure that the accused becomes a productive member of society and a member of society who can be integrated properly into the community in a very safe way.

33 So I am satisfied that all of those steps are being taken, and, as a result, I don't think that a period of probation would be necessary and could potentially even set back some of the progress that this young man has made. So when I consider all of the circumstances, I am satisfied that, given the extraordinarily unusual nature of the circumstances here, that an absolute discharge is warranted. And that is what I order.

34 MR. ZIV: Thank you.

35 MR. MARK: Thank you, Sir.

36 THE COURT: So while I find him guilty of the offence, I discharge him absolutely.

37 MR. MARK: Sir, one procedural matter. I think -- and I'm not certain how this applies with the absolute discharge, but I understand that I am obliged to ask for a DNA request given that it is a primary designated offence.

38 THE COURT: Sure. I would consider your application, but denied.

39 MR. MARK: Okay, Thank you, Sir. If the -

40 THE COURT CLERK: The matter of victim surcharge?

41 MR. MARK: victim surcharge could be waived, Sir.

42 THE COURT: He is not working, is he?

43 MR. ZIV: No. He is on AISH.

44 THE COURT: He is on AISH, as that would be waived on the basis of hardship.

45 MR. ZIV: Thank you.

46 THE COURT: Fine. They are withdrawn. Thank you very much.

47 MR. ZIV: Thank you.