SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Coley,* 2024 NSSC 146

Date: 20240513
Docket: 523585
Registry: Halifax

Between:

Michael Coley
(as represented by the Public Prosecution Service of Canada)

Appellant

v.

His Majesty the King

Respondent

DECISION ON APPEAL

Judge: The Honourable Justice Scott C. Norton

Heard: May 13, 2024, in Sydney, Nova Scotia

Decision: May 13, 2024

Counsel: Stephen Jamael, for the Appellant
Peter Harrison, for the Respondent

By the Court (Orally):

[1] This is a Summary Conviction Appeal from the sentencing decision of Judge Daniel A. MacRury of the Provincial Court of Nova Scotia, given orally on April 28, 2023, at Sydney, Nova Scotia. Mr. Coley appeals from the sentence passed on that date for two offences committed under s.266(b) of the *Criminal Code*. The sentencing judge imposed a sentence of six months custody and 24 months probation.

Circumstances of the Offences

[2] According to the pre-sentence report, the offender and the victim had been in a relationship for approximately 25 years. The sentencing judge related the circumstances of the offences (November 19, 2019, and May 1, 2020) at the outset of his sentencing decision (transcript, pp. 27-28):

> At trial [the complainant] described being assaulted by Mr. Coley and Mr. Coley kicking her in the, in the head. She described Mr. Coley grabbing her by the shoulders and throwing her down and started to kick her with his foot, stomping on her head. She estimated that she was struck four or five times by his foot in the head area and he began to kick her in the stomach and on the side. She defended herself by kicking Mr. Coley in the groin area and running out to a neighbour's house… She described that there was blood coming from her nose. That when she went to the neighbour's house, [the neighbour] wiped her face and she returned home…
>
> In May of 2020 there was an altercation with Ms. Coley, Mr. Coley and [the complainant] in Mr. Coley's truck where he grabbed her by the shirt. He was racing back to the residence and was swinging at [the complainant]. He also stated when they arrived back at the house that he was going to bury her.

Sentencing

[3] On April 13, 2023, the sentencing judge heard oral submissions from the Crown and counsel for Mr. Coley including reference to a pre-sentence report dated June 3, 2022. The judge reserved his decision to April 28, 2023, when he gave his oral reasons for decision.

Issues

[4] In his Notice of Summary Conviction Appeal dated May 1, 2023, the Appellant raised the following grounds of appeal:

(a) The sentencing judge erred when applying the sentencing principles;

(b) The sentence is excessive;

(c) The sentence is not fit and proper under the circumstances; and

(d) The sentencing judge did not give proper weight to all relevant principles of sentencing.

[5] The appeal raises the following issue: did the learned sentencing judge err in law by imposing a sentence which was clearly unreasonable and demonstrably unfit?

Standard of Review

[6] In *R. v. Everett*, 2024 NSSC 114, at para. 14, I noted that the standard of review on a sentence appeal was recently considered in *R. v. Chiasson*, 2024 NSCA 11, at para. 66:

> [66] The principles governing this Court's review of a lower court's sentencing decision are well established. These were recently set out in *R. v. Friesen*, 2020 SCC 9 as follows:
>
> > [25] Appellate courts must generally defer to sentencing judges' decisions. The sentencing judge sees and hears all the evidence and the submissions in person (*Lacasse*, at para. 48; *R. v. Shropshire*, [1995] 4 S.C.R. 227, at para. 46). The sentencing judge has regular front-line experience and usually has experience with the particular circumstances and needs of the community where the crime was committed (*Lacasse*, at para. 48; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 91). Finally, to avoid delay and the misuse of judicial resources, an appellate court should only substitute its own decision for a sentencing judge's for good reason (*Lacasse*, at para. 48; *R. v. Ramage*, 2010 ONCA 488, 257 C.C.C. (3d) 261, at para. 70).
> >
> > [26] As this Court confirmed in *Lacasse*, an appellate court can only intervene to vary a sentence if (1) the sentence is demonstrably unfit (para. 41), or (2) the sentencing judge made an error in principle that had an impact on the sentence (para. 44). Errors in principle include an error of law, a failure to consider a relevant factor, or erroneous consideration of an aggravating or mitigating factor. The weighing or balancing of factors can form an error in principle "[o]nly if by emphasizing one factor or by not

> giving enough weight to another, the trial judge exercises his or her discretion unreasonably" (*R. v. McKnight* (1999), 135 C.C.C. (3d) 41 (Ont. C.A.), at para. 35, cited in *Lacasse*, at para. 49). Not every error in principle is material: an appellate court can only intervene if it is apparent from the trial judge's reasons that the error had an impact on the sentence (*Lacasse*, at para. 44). If an error in principle had no impact on the sentence, that is the end of the error in principle analysis and appellate intervention is justified only if the sentence is demonstrably unfit.

[7] If a sentence is demonstrably unfit or if a sentencing judge made an error in principle that had an impact on the sentence, an appellate court must perform its own sentencing analysis to determine a fit sentence (*R. v. Lacasse*, 2015 SCC 64, para. 43).

[8] The Court in *Lacasse*, *supra*, addressed the very high burden on the Appellant to overturn a sentence as demonstrably unfit, at paras. 51-52:

> 51 Furthermore, the choice of sentencing range or of a category within a range falls within the trial judge's discretion and cannot in itself constitute a reviewable error. An appellate court may not therefore intervene on the ground that it would have put the sentence in a different range or category. It may intervene only if the sentence the trial judge imposed is demonstrably unfit.
>
> 52 It is possible for a sentence to be demonstrably unfit even if the judge has made no error in imposing it. As Laskin J.A. mentioned, writing for the Ontario Court of Appeal, the courts have used a variety of expressions to describe a sentence that is "demonstrably unfit": "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", or representing a "substantial and marked departure": *R. v. Rezaie* (1996), 31 O.R. (3d) 713 (Ont. C.A.), at p. 720. <u>All these expressions reflect the very high threshold that applies to appellate courts when determining whether they should intervene after reviewing the fitness of a sentence</u>.
>
> [Emphasis added]

[9] This appeal comes before the court pursuant to s.813 of the *Criminal Code*, R.S.C., 1985, c. C-46, a provision governed by s.822(1):

> **822 (1)** Where an appeal is taken under section 813 in respect of any conviction, acquittal, sentence, verdict or order, sections 683 to 689, with the exception of subsections 683(3) and 683(5), apply, with such modifications as the circumstances require.

Powers of court on appeal against sentence

687 (1) Where an appeal is taken against sentence, the court of appeal shall, unless the sentence is one fixed by law, consider the fitness of the sentence appealed against, and may on such evidence, if any, as it thinks fit to require or to receive,

> **(a)** vary the sentence within the limits prescribed by law for the offence of which the accused was convicted; or
>
> **(b)** dismiss the appeal.

Effect of judgment

(2) A judgement of a court of appeal that varies the sentence of an accused person who was convicted has the same force and effect as if it were a sentence passed by the trial court.

The Appellant's Position

[10] The Appellant asserts that the sentencing judge erred in principle by emphasizing and stressing the aggravating factors, while crucial mitigating factors and important principles of sentencing were not "unpacked" and supported by case law. In other words, not enough weight was given to important factors, ultimately resulting in the sentencing judge unreasonably using their discretion.

[11] The Appellant asks this Court to vary the sentencing decision and impose a conditional discharge with 24 months probation or, alternatively, a conditional sentence of 3 months followed by 24 months of probation.

The Respondent's Position

[12] The Respondent says that the sentencing judge properly considered all those factors which in law supported his imposition of a fit and just sentence. Even if the sentencing judge did err, there is ample evidence to suggest such an error would have had no practical effect on the ultimate disposition in this matter and consequently the appeal should be dismissed.

Analysis

[13] After summarizing the facts, the sentencing judge reviewed the information provided by the pre-sentence report, a victim impact statement, the position of the parties, and cited the aggravating and mitigating factors. He then reviewed the principles of sentencing, identifying his role to craft a fit and proper sentence balancing and weighing the sentencing principles set out by Parliament as they relate

to the offender's circumstances, the circumstances of the offences, and the harm done to the victim and to the community.

[14] The sentencing judge then considered the proportionality of the sentence and referred to various case authorities. He was alert to the principle that imprisonment is a sentence of last resort and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered.

[15] The sentencing judge reviewed in detail the provisions of the *Criminal Code* and appellate and trial authorities addressing the seriousness of the issue of intimate partner violence. It was in this context that he rejected the offender's request for a conditional discharge, finding that while a discharge was in the best interest of the offender, it was not in the public interest. He found that a discharge would not properly denounce the offender's conduct in this case.

[16] Although neither party raised the possibility of a conditional sentence, the sentencing judge then considered whether that would be an appropriate sentence. He cited case authority confirming that a conditional sentence is punitive and that the amount of denunciation and deterrence provided by such a sentence varies by the nature of the conditions imposed and the duration of the sentence. It must be determined on an individual basis. It requires the sentencing judge to weigh the various objectives in fashioning a fit sentence. Ultimately, the determination of the availability of a conditional sentence depends on the sentencing judge's assessment of all the circumstances relevant to a fit and proper sentence.

[17] After reviewing these principles, the sentencing judge stated that he had carefully considered a conditional sentence in this case but concluded that a conditional sentence was not appropriate because this was a case of serious intimate partner violence. He found the acts of the offender to be "reprehensible"; that those acts "have to be condemned" and denounced in the strongest terms. He found that this could not be achieved by a conditional sentence order because denunciation and deterrence were paramount considerations.

[18] This Court finds no error with the sentencing judge's reasoning that in the circumstances of this case, a conditional discharge or a conditional sentence would not be appropriate. He correctly determined that the paramount sentencing principles are denunciation and deterrence, both specific and general. He identified and considered the mitigating factor that the Appellant came before the court with no prior criminal record. He identified other positive aspects of the pre-sentence report.

[19] The Appellant has failed to persuade this Court that the sentencing judge made any error of principle, nor that in their weighing of the aggravating and mitigating factors, they exercised their discretion unreasonably.

[20] In summary, this Court finds that sentence imposed has not been shown to be demonstrably unfit and the very high threshold that applies to an appellate court when determining whether to intervene after reviewing the fitness of a sentence has not been met.

[21] The Appeal is dismissed.

[22] Mr. Coley is committed to serve the remainder of the custodial term imposed by the sentencing judge (154 days) to be followed by 24 months probation as set out in the sentencing decision.

Norton, J.