In the Court of Appeal of Northwest Territories

Citation: R. v. Morgan, 2008 NWTCA 12

Date: 2008 12 02
Docket: A-1-AP-2007000011
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

Delroy Nicholas Morgan

Appellant

The Court: **The Honourable Mr. Justice John Vertes**
The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Peter Martin

Memorandum of Judgment

Appeal from the Sentence by
The Honourable Madam Justice L.A.M. Charbonneau
Dated the 13th day of April, 2007
(2007 NWT SC 30) , Docket: S-1-CR-2006000084)

Memorandum of Judgment

The Court:

[1] This judgment addresses a sentence appeal following a conviction for aggravated assault. The appellant was involved in a fight outside a bar in Yellowknife, where he twice stabbed his opponent in the head with a knife. The victim has since recovered from his injuries. The appellant was convicted and sentenced to three and a half years' imprisonment. His conviction appeal was previously dismissed.

Fresh Evidence

[2] Upon being sentenced to imprisonment for a term of two years or more, ss. 64(1) and (2) of the ***Immigration and Refugee Protection Act***, S.C. 2001, c. 27 required the appellant to be automatically removed from Canada and returned to Jamaica without the benefit of an appeal. That fact appears not to have been known to defence counsel at the sentence hearing. Accordingly, the trial judge was not advised that the appellant would be deported to Jamaica if he were sentenced to imprisonment for two years or more, despite having lived in Canada for the past 10 years.

[3] To rectify that oversight, the appellant sought to introduce new evidence at the sentence appeal hearing outlining his circumstances relative to this issue. The Crown did not contest that application, which was granted.

[4] From that information, the following picture emerges. The appellant and two brothers were born in Jamaica. While he was still young, his father and one of his brothers immigrated to Canada. When the appellant was 11 years old, his mother sent him to Canada to live with his father. The appellant attended school in Edmonton, where he completed his grade 11. He later worked as a cook at various restaurants in Edmonton, and accumulated a minor criminal record, including convictions for possession of drugs and failing to appear. At the time of this offence, the appellant was on bail awaiting trial on an assault charge. By the time this appeal was heard, he had served enough of his sentence to be granted parole. The appellant was immediately deported, and we were advised that he now lives in Jamaica with his mother.

Grounds of Appeal

[5] There are two grounds of appeal:

(1) That the sentence was excessive,
(2) That it was excessive in this case due to the collateral consequence of deportation

(1) Was the Sentence Excessive?

[6] At trial, the Crown sought a sentence of four to five years imprisonment; the appellant

asked for a sentence in the range of 18 - 24 months. On a review of the case law, the trial judge decided that the proper range for an assault with a knife was a sentence of 30 months' to five years' imprisonment. She observed that the victim's recovery was a matter of chance and that both the appellant and victim were fortunate the results were not more tragic. The trial judge considered that the circumstances justified an increased level of blameworthiness because the appellant introduced a weapon to what was otherwise a fist fight. She also noted the need for deterrent and denunciatory sentences to address the proliferation of assaults with knives. She then imposed a sentence of three and a half years' imprisonment.

[7] We are unable to discern an error. The sentence responds to the seriousness of the crime. We agree that the use of knives and similar deadly weapons in altercations is becoming increasingly popular and must be deterred. The sentence is fit and we are not inclined to change it.

(2) What Effect Does the Collateral Consequence of Deportation Have on This Sentence?

[8] The collateral consequence of deportation is not a factor that justifies the reduction of a sentence outside of the appropriate range, though it may result in a lower sentence within that range. This point was made by the Ontario Court of Appeal in ***R. v. Hamilton*** (2004), 72 O.R. (3d) 1, at para 158, 189 O.A.C. 90:

> I would not characterize the loss of a potential remedy against a deportation order that might be made a mitigating factor on sentence. I do think, however, that in a case like Ms. Mason's there is room for consideration of the potentially added risk of deportation should the sentence be two years or more. If a trial judge were to decide that a sentence at or near two years was the appropriate sentence in all of the circumstances for Ms. Mason, the trial judge could look at the deportation consequences for Ms. Mason of imposing a sentence of two years less a day as opposed to a sentence of two years. I see this as an example of the human face of the sentencing process. . . . While the assistance afforded to someone like Ms. Mason by the imposition of a sentence of two years less a day rather than two years may be relatively small, there is no countervailing negative impact on broader societal interests occasioned by the imposition of that sentence: see ***R. v. Lacroix***, [2003] O.J. No. 2032 (C.A.).

[9] This rationale has been used to marginally reduce a sentence to avoid automatic deportation, so long as it does not detract from the fitness of the sentence. See, for example, ***R. v. Leila*** 2008 BCCA 8, 250 B.C.A.C. 117 and ***R. v. Sidhu***, 2008 BCCA 157, where the B.C. Court of Appeal reduced the sentence in each case to two years less a day. A more significant adjustment was made in ***R. v. Leung***, 2004 ABCA 55, 354 A.R. 2, where the Alberta Court of

Appeal reduced a sentence of 30 months to two years less a day. While the initial sentence was the product of a joint submission, the Court of Appeal found that the joint submission would have been for two years less a day had all parties known of the immigration legislation, which was enacted after the sentence but with retroactive effect. Moreover, the court found that a joint sentence of two years less a day would have been accepted by the trial judge, as it was within the acceptable range for the offence.

[10] The situation before us differs. The Crown does not agree that a sentence of two years less a day is within the appropriate range; indeed, it sought a lengthier sentence in the court below. Further, we are not aware of a case where an otherwise fit sentence has been trimmed by 18 months to benefit an appellant in this way. In our view, it is neither desirable nor appropriate to establish such a precedent, which would have the effect of defeating the clear intention of Parliament to expeditiously remove non-citizens from the country who are convicted of "serious criminality".

[11] Accordingly, the appeal is dismissed.

Appeal heard on October 21, 2008

Memorandum filed at Yellowknife, NWT
this day of December, 2008

Vertes J.A.

Hunt J.A.

Martin J.A.

Appearances:

J. MacFarlane
for the Respondent

R. Claus
for the Appellant

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