In the Court of Appeal of the Northwest Territories

Citation: R. v. Allooloo, 2010 NWTCA 7

Date: 2010 07 02
Docket: A-1-AP2009000013
Registry: Yellowknife, N.W.T.

Between:

Her Majesty the Queen

Respondent

- and -

Colin Roy Allooloo

Appellant

The Court:

The Honourable Madam Justice Constance Hunt
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Frans Slatter

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Mr. Justice L.F. Gower
Dated the 9th day of September, 2009

Appeal from the Sentence by
The Honourable Mr. Justice L.F. Gower
Dated the 13th day of November, 2009
(2009 NWTSC 65, Docket: S-1-CR-2008000051)

Memorandum of Judgment

The Court:

[1] The appellant appeals his conviction for assault with a weapon, and the sentence subsequently imposed.

Facts

[2] The appellant is an RCMP officer, and the complainant was a prisoner held in the RCMP cells. The theory of the Crown was that the complainant was being disruptive in the cells, and the appellant sprayed pepper spray underneath the cell door in retaliation.

[3] Constable Janke, another officer on duty, was the key Crown witness. The appellant was Constable Janke's acting superior officer at the time of the incident. The most compelling aspect of Constable Janke's evidence was that the appellant had admitted to Constable Janke, shortly after the event, that he had sprayed pepper spray underneath the cell door into the complainant's eye. The defence directly attacked Constable Janke's memory and credibility, to the point of suggesting that the event never happened. The trial judge, however, found Constable Janke to be a "careful, thoughtful, and generally reliable witness".

Conviction Appeal

[4] The first ground of appeal is that the verdict is unreasonable, and contrary to the evidence. The conviction rested largely on Constable Janke's evidence. The appellant did not testify. The trial judge was entitled to find Constable Janke a credible witness, and there is no basis on which an appellate court can intervene. Once Constable Janke's evidence was accepted, there was ample evidence to support the conviction.

[5] The appellant argues in his factum that the trial judge should have approached Constable Janke's evidence with caution, because Constable Janke might have been the one responsible for the pepper spraying, and therefore may have had a motivation to shift blame to the appellant. This argument was not raised at trial; it was never suggested that Constable Janke was the one responsible. The only evidence on that subject was the statement of the appellant (admitted into evidence) that "Constable Janke had nothing to do it". In the circumstances there was no reason for the trial judge to refer to this theory: ***R. v. S.G.T.***, 2010 SCC 20 at paras. 35-7.

[6] The second ground of appeal is that the trial judge should not have limited the cross-examination of the complainant on other criminal acts. The trial judge was well aware of the inadequacies of the complainant's evidence, and expressly stated that his evidence alone would not have provided a "reasonable prospect of a conviction". The trial judge generally did not rely on the complainant's evidence, except where it was corroborated by other external

evidence. A trial judge can limit unnecessary cross-examination, any limits imposed here were minor, and in any event further cross-examination on the complainant's character would not have affected the outcome of the trial.

[7] The third ground of appeal is that Constable Janke should not have been allowed to testify on the effect that these events have had on him, personally and professionally. Constable Janke testified that his initial reports of the incident were either not believed, or not taken seriously, or there was a reluctance to pursue the allegations further. At one point he was investigated for providing false information, or alternatively for not reporting the incident. Given this background, and the general attack on his credibility, the effect that the events had on him were relevant to his overall credibility, which was a key issue. The disputed evidence, while of marginal relevance, was not lengthy, if it was oath helping it was borderline, and it was properly admitted in this case.

[8] The fourth ground of appeal relates to the use of evidence of what was described as post offence conduct. The "conduct" consisted of statements made by the appellant: a statement that the event had been "looked after", an imprecise apology to his superior officer, a statement that Constable Janke was not involved in the incident, and an apology to the complainant. The trial judge found that these statements, while not conclusive, were consistent with guilt, a finding which discloses no reviewable error.

[9] The appeal from conviction is therefore dismissed.

Sentence Appeal

[10] The trial judge rejected a conditional discharge as an appropriate sentence. He imposed a conditional sentence, including house arrest, of 30 days. In addition, he ordered the appellant to provide a DNA sample, and he imposed a mandatory firearms prohibition. The appellant's submission was that the firearms prohibition would result in his discharge from the RCMP.

[11] The trial judge declined to grant an exception under s. 113(1)(a) or (b) of the *Code* to the firearms prohibition. While there was evidence that the appellant engaged in traditional hunting, he held there was insufficient evidence that it was necessary to "sustain" the appellant and his family. The trial judge was also not satisfied that being an RCMP constable was the "only vocation" open to the appellant.

[12] The appellant argues that the 30-day conditional sentence is excessive, and that a conditional discharge with probation is more appropriate. He argues that when he discharged the pepper spray under the door it was not foreseeable that the complainant would be there, on the floor, looking under the door. The consequences of his act could not have been anticipated, and the sentence is unfit when compared to cases where force was deliberately applied directly to the complainant. The Crown argues that when a custodian assaults a prisoner the offence amounts to a breach of trust, and the sentence is fit.

[13] An appellate court should not interfere with a sentence unless it reflects an error of principle, or is wholly unfit. Given the aggravating factor that the complainant was a prisoner under the appellant's control, the sentence imposed is within the acceptable range. There is no error in principle and appellate interference is not warranted.

[14] The appellant argues that he should have been granted an exemption to the mandatory firearms prohibition under s. 113 of the *Criminal Code*, which reads:

> 113(1) Where a person who is or will be a person against whom a prohibition order is made establishes to the satisfaction of a competent authority that
>
> (a) the person needs a firearm or restricted weapon to hunt or trap in order to sustain the person or the person's family, or
>
> (b) a prohibition order against the person would constitute a virtual prohibition against employment in the only vocation open to the person,
>
> the competent authority may, notwithstanding that the person is or will be subject to a prohibition order, make an order authorizing a chief firearms officer or the Registrar to issue, in accordance with such terms and conditions as the competent authority considers appropriate, an authorization, a licence or a registration certificate, as the case may be, to the person for sustenance or employment purposes.

Subsection 113(2) confirms that the power to grant an exemption is discretionary, and should only be exercised having regard to the criminal record of the applicant, the circumstances of the offence, and safety considerations. Subsection 113(3) provides that any exemption granted can be subject to conditions, and is to extend only to sustenance activities or employment, as the case may be.

[15] The only evidence on the record relating to the appellant's sustenance activities was a letter from the appellant's spouse, admitted without objection by the Crown. It read in part:

> Colin and I are both aboriginal and have professional careers that we thrive at. We follow a modern aboriginal lifestyle with our children. It is paramount that we blend our home with traditional values as much as possible. We hunt for our meat and gather as much from the land. We use our caribou, moose, birds, fish and berries as our primary source of food for our family. We gather wood to supplement heating our home and

spend our recreational time on the land and the water. We use this time to demonstrate and teach safety and survival skills on the land.

The trial judge agreed with the Crown that there was insufficient evidence on the record to warrant an exemption. The Crown had argued that the appellant was a participant in the wage economy, was not a subsistence hunter, and therefore did not need a firearm to "sustain" his family.

[16] While there is an evidentiary burden on a person seeking an exemption, the section is not as narrow as the trial judge assumed. Hunting or trapping can be used to "sustain" a family even if the survival or subsistence of the family does not depend it. Participating in the wage economy or relying partly on non-traditional food sources does not disqualify the applicant from an exemption. The evidence on this record respecting the appellant's sustenance activities was uncontradicted, and satisfied the requirements of the section. Nothing about the offence, the offender, or the safety of the public precluded an exemption for the appellant's sustenance activities. It was an error to conclude that there was insufficient evidence.

[17] In contrast, there is no evidence on this record that policing is "virtually the only" occupation open to the appellant. It was conceded that he has skills that could be applied to other occupations. His preference to remain a police officer does not satisfy the requirement that policing be the only vocation open to him.

[18] The sentence appeal is therefore allowed only to the extent that, notwithstanding the firearms prohibition, a chief firearms officer or the Registrar is authorized to issue an authorization, a licence or a registration certificate to the appellant, as the case may be, for sustenance purposes.

Appeal heard on June 15, 2010

Memorandum filed at Yellowknife, N.W.T.
this day of July, 2010

Hunt J.A.

O'Brien J.A.

Slatter J.A.

Appearances:

M.D. Gates, Q.C.
for the Respondent

K.B. Molle
for the Appellant

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