In the Court of Appeal for the Northwest Territories

Citation: ***R* v *Bonnetrouge*, 2017 NWTCA 1**

Date: 20170123
Docket: A-1-AP-2013-000009
Registry: Yellowknife

Between:

Her Majesty the Queen

Respondent

- and -

Robert Walter Bonnetrouge

Appellant

The Court:

The Honourable Mr. Justice Frans Slatter
The Honourable Mr. Justice J.D. Bruce McDonald
The Honourable Madam Justice Barbara Lea Veldhuis

Memorandum of Judgment

Appeal from the Conviction by
The Honourable Madam Justice L.A. Charbonneau
Dated the 22nd day of September, 2011

And the

Appeal from the Sentence by
The Honourable Madam Justice L.A. Charbonneau
Dated the 18th day of November, 2013
(2013 NWTSC 93, Docket: S-1-CR2009000081)

Memorandum of Judgment

The Court:

[1] The appellant appeals his jury conviction for sexual assault and unlawful confinement, and the indeterminate sentence imposed following the designation that he is a dangerous offender.

The Conviction Appeal

[2] At the commencement of the trial, the trial judge gave the usual introductory instructions to the jury. Those instructions mentioned the basic principles: the burden is on the Crown, there is no burden on the accused, and the accused is presumed innocent. Before any evidence could be called, the trial judge received a question from a juror respecting something that had been said during the jury selection process. The trial judge responded:

> The second thing I want to address is a note I received this morning. And members of the jury, you can send me notes whenever you need to during the trial, you can ask whatever questions you want. In this one, the juror identified who it was asking the question and that is not necessary. I take any questions from the jury. Especially once we get going, there will usually be questions from all of you; you are working as a group.

The trial judge then proceeded to answer the specific question, which has not generated any issues on this appeal.

[3] The trial commenced. The Crown entered its evidence, the defence called no evidence, and counsel made their addresses to the jury in the usual manner. The trial was then adjourned over to the next day for the charge to the jury. Before the charge to the jury commenced, members of the jury made three inquiries of the Court, containing four questions:

> 1. Is there no evidence from the RCMP on this matter, in particular how they came to be in possession of the pants? [exhibit J3]
>
> 2. Why were we not provided with any evidence from the arresting RCMP officer and the process they went through to charge Robert? [exhibit J4]
>
> 3. Why have we not been provided with and [sic] information on Robert as to his story and his character, we received a good insight to the two victims and nothing on Robert? [exhibit J4]

4. Due to the limited amount of evidence, is it possible to force Mr. Bonnetrough [sic] to testify in his defense? [exhibit J5]

All of these questions anticipated some gaps in the evidence, particularly the observation that the appellant had not testified. Some of the questions came from individual jurors, and others may have come from groups of jurors.

[4] The questions were of course problematic, because they reflected a misunderstanding of the burden of proof in criminal matters, and the right of an accused to remain silent. In particular, s. 4(6) of the *Canada Evidence Act*, RSC 1985, c. C-5 would have prevented either the judge or the Crown from commenting adversely on the fact that the appellant had not testified, although the trial judge may affirm the right to silence in appropriate cases: ***R. v Prokofiew***, 2012 SCC 49 at para. 3, [2012] 2 SCR 639.

[5] When court reconvened the next morning (when the charge was scheduled to be given), the trial judge advised counsel of the questions received from the jury after the previous afternoon's adjournment. The trial judge advised counsel that she proposed not to answer the questions in advance of the main charge. Rather she proposed to incorporate the answers into the charge itself. Many of the topics were already covered in the charge, for example, the last two questions would be dealt with as part of the instructions on the burden of proof and the fact that the appellant had no obligation to prove anything. At the end of the charge the jury would be invited to ask any still outstanding questions.

[6] The following discussion then took place:

> Crown Counsel: I don't have any objections to what you propose to do. I think most of these issues are stuff that can be addressed in the charge. If they have further questions as a result of your charge, they can provide another note if they require further clarification.
>
> The Court: I must say I've never had so many questions before the charge, but obviously they've been engaged.
>
> Any submissions from you, Mr. Bock [defence counsel]?
>
> Defence Counsel: No. In many ways, the questions seem logical of people who are thinking about the – and seems to be a little bit of speculation and that's a concern, certainly.
>
> Certainly the onus is on the Crown. I know you will direct them that way, and there should be no negative

	inference or no inference in any way the fact that Mr. Bonnetrouge did not testify. That's his choice.
The Court:	Yes. So if I say it's his choice and he has no obligation, are you satisfied that's sufficient?
Defence Counsel:	Yes.

The trial judge then proceeded to charge the jury, and opened as follows:

> THE COURT: Good morning, members of the jury. Again, for the record, I observe that all 12 of you are here. I am going to give you my instructions about the law this morning. But since we adjourned yesterday, I actually received three notes from you. So what I will do, just to make sure the record is clear, is I am going to read those notes into the record. I have tried to incorporate the answers to the questions in my charge, but obviously if you still have questions after my charge or during your deliberations, you are always welcome to ask those questions.
>
> [The questions were read on to the record]
>
> So rather than answer these questions now because they are on quite different topics, I am just going to - - I have incorporated the answers into the relevant part of my charge.

At the conclusion of the lengthy charge, both counsel confirmed that they had no submissions to make on its contents.

[7] On appeal, the appellant raises two overlapping issues: that the charge did not clearly state that the jury could not draw a negative inference from the appellant's exercise of his right to silence, and that the trial judge "failed to adequately answer" the questions, particularly the one reflecting a misunderstanding of an accused's right to silence.

[8] Questions posed by a jury before the charge are of a different character than those posed after the charge, particularly when the questions appear to come from individual jurors: ***R. v Lepine***, 2013 NWTCA 8, 304 CCC (3d) 143, affm'd 2014 SCC 65, [2014] 3 SCR 285. Prior to the charge, individual members of the jury might not fully understand certain important aspects of their role, the process they should use to reach a verdict, and the law that they must apply. After the charge has been given, the law assumes that the jury has a basic understanding of these matters, that the jury will follow those instructions. Any questions will generally relate to clarification of the instructions already given. As ***Lepine*** shows, premature questions from the jury do not necessarily result in a miscarriage of justice.

[9] On appeal, the appellant argues that the charge did not adequately deal with the questions, particularly the ones that related to the appellant's right to silence. In addition to the usual instructions to the effect that the jury should decide the case on the evidence before it, not on speculation, the charge included the following passages:

> So now I want to go back to the two general principles that I talked about on the first day of the trial. As I said then, they are very important in our system of criminal law and you should keep them in mind throughout your deliberations.
>
> The first is the presumption of innocence, and it is fairly simple what it means, in a way. It means that every person charged with a criminal offence in our system is considered innocent at the moment they are charged, at the start of the trial, and right now. A person is presumed innocent and they are considered innocent throughout the case unless and until you, the jury, decide that they are guilty. So what that means is that Mr. Bonnetrouge does not have to prove to you he is not guilty. He does not have to prove anything to you. He does not have to explain away the evidence that you heard. The responsibility to prove things is on the Crown and it never shifts away from the Crown, and that takes me to the answer of two of the questions I just read this morning.
>
> I guess the second part of J4: "Why have we not been provided with any information on Robert as to his story and his character?" and also J5: "Due to the limited amount of evidence, is it possible to force Mr. Bonnetrouge to testify?" No, it is not possible to force Mr. Bonnetrouge to testify because he has the right to not present evidence at this trial. He has that choice; he has that right. In this case, he has chosen not to present evidence, and so you must decide this case based on the evidence that has been presented and not speculate about other things. So that is the presumption of innocence and, as I say, it is a very important starting point here.

The appellant now argues that the trial judge should have expressly told the jury that they could not draw an adverse inference from the appellant's exercise of his right to silence.

[10] The charge, when considered as a whole, is fair and accurate. Normally the trial judge would say nothing about the fact that the accused had not testified, but here some comment was compelled by the questions sent by the jury. A balance is required between a) the principle that an accused has a right to remain silent, and no probative weight can be assigned to an exercise of that right, and b) the fact that if the Crown's evidence stands uncontradicted, the jury may accept that evidence in the absence of any competing explanation: ***Prokofiew*** at paras. 4, 10-11.

[11] The trial judge stated emphatically that the burden was on the Crown, that the appellant had a right to remain silent, and he had exercised that right. As Moldaver J noted in ***Prokofiew*** at para. 24 about a very similar jury charge:

> Doherty J.A. observed that this jury instruction "tied the presumption of innocence into the burden of proof in a manner that spoke almost directly to the irrelevance of the appellant's failure to testify" (para. 49). I agree.

There is no realistic risk that the jury misunderstood its task: ***Prokofiew*** at paras. 21-2. It can be noted that during its deliberations the jury did submit a further question, but not one with respect to the appellant's right to silence.

[12] The appellant relies on ***R. v Turcotte***, 2005 SCC 50 at para. 58, [2005] 2 SCR 519, but it is distinguishable. In that case the appellant's exercise of his right to remain silent had been admitted in evidence as an "inextricable part of the narrative" surrounding his arrest and interrogation by the police. Since it was part of the evidence, the trial judge had to deal with it in the charge. Here the Crown did not introduce any evidence about the appellant's exercise of his right to silence; it came up in the spontaneous questions from the jury, which the trial judge firmly and correctly answered.

[13] The appellant also argues that the trial judge never fully answered the question about "the process they went through to charge Robert?" In light of the general instruction that the jury was not to speculate, and that the burden was on the Crown, any shortcomings in the answer to this question could not have prejudiced the appellant. If the jurors thought there was something unexplained or irregular about the charging process, that could only have created some reasonable doubt in their minds.

[14] The appellant has failed to show any reviewable error in the jury charge or the way the trial judge dealt with the questions from the jury, and the conviction appeal is dismissed.

<u>The Sentence Appeal</u>

[15] After the jury rendered its verdict, the Crown gave notice that it would be seeking a dangerous offender designation. The trial judge subsequently held a sentencing hearing. At that sentencing hearing, the issue was whether the appellant should receive an indeterminate sentence or a determinate sentence plus a long term supervision order, his status as a dangerous offender having essentially been conceded.

[16] Dr. Woodside, a psychiatrist, testified for the Crown. He described a number of standard tests performed by the appellant, and interpreted the results. His overall conclusion was that the appellant suffered from a severe substance dependence disorder and multiple forms of sexual deviance including pedohebephilia, possibly paraphilia for coercive sexual partners, cognitive deficiencies, and antisocial personality disorder: ***R. v Bonnetrouge***, 2013

NWTSC 93 at paras. 48-9. Considering the types of medical treatments and therapies that were available, Dr. Woodside was of the view that the appellant presented a risk that could not reasonably be controlled in the community: sentencing reasons at para. 58.

[17] In addition, the Court received the appellant's criminal record, evidence about the operation of the parole system, evidence about treatment programs available in the corrections system, evidence on programs the appellant had participated in, his correctional records, victim impact statements and other pertinent information. Included was information about the appellant's aboriginal background, and the disadvantaged life he had lived, although there was no formal "Gladue report".

[18] The appellant was about 31 years of age at the time of the offences, and about 35 years of age at the time of sentencing. He had been convicted of five separate sexual assault offences while a youth and each time was sentenced to custody in youth facilities. The offences were primarily against young children, and included the period when he was 16 or 17 years old. He was convicted of sexual assaults of other inmates while he was in custody. When he was an adult, the appellant was sentenced to three years imprisonment for another sexual assault committed on another inmate while he was in custody. He also had convictions for mischief, break and enter, assault, and other offences, some of them involving children.

[19] Dr. Nesca, a psychologist, was called by the defence. Dr. Nesca agreed with Dr. Woodside's general diagnosis, and that the appellant presents a high risk to re-offend: sentencing reasons at paras. 35, 59. He was of the view, however, "that there is a reasonable possibility that the combination of the burnout effect due to aging, substance abuse treatment, and biological interventions, as well as therapy, could result in his risk being controlled in the community": sentencing reasons at para. 69.

[20] The sentencing judge stated the test as being whether the court was "satisfied that there is a reasonable expectation that a jail term, followed by a long-term supervision order, could adequately protect the public": sentencing reasons at para. 71; *Criminal Code* s. 753(4.1). While she found both experts to be credible, the trial judge favoured the opinion of Dr. Woodside. After considering all of the evidence she concluded: "I am not satisfied that there is a reasonable expectation that the combination of a determinate sentence and a long-term supervision order would adequately protect the public because I am not satisfied that Mr. Bonnetrouge's risk can be reduced in that timeframe to the point that he could then be completely free in the community and the public still protected": sentencing reasons at para. 100. The trial judge accordingly imposed an indeterminate sentence.

[21] On appeal, the appellant argues that the trial judge failed to give proper consideration to the principles in ***R. v Gladue***, [1999] 1 SCR 688. The trial judge was aware of the relevance of these factors:

> 101.The Supreme of Canada, in *R. v. Ipeelee*, 2012 SCC 13, stated that the special considerations that apply in sentencing aboriginal offenders apply to dangerous offender proceedings. I have not overlooked the fact that Mr. Bonnetrouge is an aboriginal offender. I have not overlooked the fact that he has faced very difficult circumstances as a child that no doubt contributed to his antisociality and his addiction to alcohol. Sadly, many children in this jurisdiction continue to grow up in circumstances that are difficult and are exposed to alcohol abuse and neglect.

There is nothing in the reasons to suggest, as the appellant argues, that the trial judge expected him to provide a causal link between his aboriginal background and his offending. The ***Gladue*** factors were not overlooked, and the argument on appeal must simply be that they should have been weighed differently. Some deference is owed to sentencing decisions on this type of issue, and there is nothing unreasonable about the way the trial judge dealt with the appellant's aboriginal background.

[22] The ***Gladue*** factors can have but a limited role in a dangerous offender situation. The sentencing judge quoted from ***R. v Kudlak***, 2011 NWTSC 29 at para. 108, [2011] 10 WWR 96, in determining whether an offender's aboriginal status could justify a different outcome in circumstances similar to those present in this appeal:

> . . . The need for protecting the public is just as acute in a northern aboriginal community as anywhere else. In a case such as this, where public protection is paramount, incarceration is the only alternative, whether one is considering an aboriginal or non-aboriginal offender.

As the trial judge observed:

> 103.. . . . The sad reality is that Mr. Bonnetrouge has proven to be very dangerous for members of his community, who are in majority aboriginal. He has caused great harm to young children and others who, by virtue of various circumstances, were in vulnerable positions. He has done this consistently over the years and he did so again in 2009 when he committed the two offences that he must be sentenced for today.
>
> 104.One can have empathy for the situations that he himself has faced when he was growing up and for the fact that throughout all these years, in and out of the correctional system, he has not had access to programing that was suited to his specific needs or to the type of treatment and programming he would have needed at a much younger age when he first came into contact with the criminal justice system. But as the Court said in ***R. v. Evans***, 2008 Carswell Ont 994, at paragraph 127: "Sympathy cannot

> ground the conclusion that there is a reasonable expectation of controlling his risk in the community."

If a person is dangerous, the ***Gladue*** factors may explain how he came to be dangerous, but that does not make him any less dangerous.

[23] The ***Gladue*** factors seek to address certain entrenched socio-economic issues faced by aboriginal offenders, but they are not a cure-all; they are helpful only "to the extent that a remedy is possible through the sentencing process": ***Gladue*** at para. 64. They might sometimes be relevant to whether the person can be "controlled in the community", or to the prospects of rehabilitation and reintegration (see ***R. v Ipeelee***, 2012 SCC 13 at para. 89, [2012] 1 SCR 433), but that is not the situation here.

[24] The appellant also argues that it was an error for the trial judge not to insist on a more robust record of the ***Gladue*** factors. In this case a very formal sentence hearing was held, and the parties had significant advance notice of it. Each side had ample opportunity to assemble evidence. Evidence about the appellant's childhood and his aboriginal background was included in the material provided to the trial judge. It was open to the appellant to tender more complete evidence about his personal background if he chose. The sentence process is still an adversarial one, and the primary responsibility for assembling the evidence is on counsel. An accused cannot proceed through a formal hearing like this, and then argue on appeal that the trial judge should have refused to proceed on the evidence presented by his counsel. There is no magic in a formal ***Gladue*** report, and the necessary evidence can come before the Court in many different ways: ***Ipeelee*** at para. 60.

[25] The appellant argues that the trial judge's assessment of his risk was not sensitive to his cultural background. The expert witnesses did not, however, testify that his risk was unmanageable because of his aboriginal background, nor did they suggest that past attempts at rehabilitation had failed because of that. There was no evidence of the existence of more aboriginal-sensitive therapies that had not been tried, or even existed. The appellant argues that the psychological tests used by the expert witnesses may not be culturally sensitive, but acknowledge that it is "impossible to know" what affect more evidence about these tests may have proved. Neither of the experts suggested that their opinions were qualified because of the appellant's aboriginal background, and the trial judge was not required to speculate about evidence that was not before her.

[26] At the end of the day, the sentencing judge considered all of the relevant factors, and did not consider any irrelevant factors. It is not the role of an appellate court to reweigh the evidence, and decide if the appeal court would impose the same sentence. The imposition of an indeterminate sentence was not unreasonable, and is not tainted by any errors of law or principle.

Conclusion

[27] In conclusion, the conviction appeal and the sentence appeal are dismissed.

Appeal heard on January 17, 2017

Memorandum filed at Yellowknife, Northwest Territories
this day of January, 2017

Slatter J.A.

Authorized to sign for: McDonald J.A.

Veldhuis J.A.

Appearances:

B. MacPherson
for the Respondent

C. Wawzonek
for the Appellant

A-1-AP-2013-000-009

IN THE COURT OF APPEAL
FOR THE NORTHWEST TERRITORIES

Between:

HER MAJESTY THE QUEEN

Respondent

- and -

ROBERT WALTER BONNETROUGE

Appellant

MEMORANDUM OF JUDGMENT