Brenton v. H.M.T.Q., 2001 NWTSC 48

Date: 2001 07 03
Docket: CR03718

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JAMES KENNETH BRENTON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

Appeal of sentences imposed on four summary conviction offences.

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J. Z. VERTES

Heard at Yellowknife, NT on June 21, 2001
Reasons filed: July 3, 2001

Counsel for the Appellant: Scott Duke
Counsel for the Respondent (Crown): Loretta Colton

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REASONS FOR JUDGMENT

[1] This is an appeal from the sentences imposed on four convictions: 14 months imprisonment plus probation for one year for sexual assault; 1 month concurrent on each of two counts of assaulting a peace officer; and, a fine of $500.00 for common assault. This case has a lengthy history which needs to be reviewed so as to place this appeal in context.

Trial & Sentencing:

[2] The offences occurred on April 9, 1998. The trial proceeded in the Territorial Court as summary conviction proceedings and convictions were entered on December 21, 1998.

[3] The facts adduced at trial can be briefly summarized. The appellant was a boarder in the home of S.H. On the night of the offences, he and S.H. shared a marijuana cigarette. He left the room for a few minutes and when he came back he

attacked S.H., grabbing her leg and beating her as she tried to get away. He chased her outside where he was confronted by a neighbour, W.H., and assaulted him. The appellant then went back into the house and caused extensive damage. When two police officers arrived and tried to subdue him, he fought with them as well. The appellant testified that he blacked out after smoking the marijuana and could not recall what he had done.

[4] Expert evidence was called at the trial on behalf of the appellant. A psychiatrist gave the opinion that, at the relevant time, the appellant was in a psychotic state, not aware of his actions, due to the ingestion of marijuana.

[5] The trial judge expressed reservations about the appellant's credibility but he held that, based on the expert opinion evidence, there was a reasonable doubt as to the appellant's mental state as a result of his self-induced intoxication due to the ingestion of marijuana. He nevertheless went on to convict the appellant, notwithstanding his doubt as to the appellant's mental state, because of the operation of s.33.1 of the Criminal Code. That section removes the defence of lack of intent or voluntariness for general intent offences of violence where the lack of intent is due to self-induced intoxication. The section is Parliament's response to the rule developed by the Supreme Court of Canada in *R. v. Daviault*, [1994] 3 S.C.R. 63, which recognized that a state of extreme intoxication akin to insanity or automatism can be a defence to a general intent offence even if the state was self-induced.

[6] The appellant was sentenced on January 19, 1999. The Crown had sought a term of imprisonment in a federal penitentiary or close to that range (at least on a global basis) while the defence sought a community-based conditional sentence. I think it is fair to say that the trial judge's primary emphasis was on the principle of general deterrence for crimes of sexual violence. The reasons for sentence do not reveal much by way of explanation with respect to the sentences for the other three offences.

[7] The trial judge characterized the appellant as going "berserk". He did not refer, in his reasons, to the doubts he had expressed earlier, when convicting the appellant, as to the appellant's lack of conscious intent. As noted by Crown counsel in her submissions on this appeal, the trial judge considered the aggravating features of the case:

> -the victim S.H. and the appellant were friends and the appellant was a boarder in the victim's home;
>
> -the assault was ongoing and persistent; the appellant pursued the victim, attacked a neighbour who tried to intervene, and then fought with the arresting officers;
>
> -the Victim Impact Statement prepared by S.H. outlined the serious and lasting effect of the attack upon her;

and the mitigating factors put forward on behalf of the appellant:

> -the evidence of good character;
>
> -the fact that the appellant had two unrelated impaired driving convictions and therefore should be treated as a first offender;
>
> -expert evidence which suggested that the appellant was not likely to abuse illicit substances again in the future;
>
> -the remorse expressed by the appellant for his conduct.

[8] In addressing the sexual assault conviction in particular, the trial judge made a number of comments reflecting his concern for the principle of deterrence:

> The Court of Appeal has commented repeatedly on sexual assaults. The Court of Appeal of Alberta, being the Court of Appeal of the N.W.T., on a number of occasions attempting to establish a benchmark of three years for sexual assault, and then when that was taken apart in the Supreme Court of Canada indicating again and again that sexual assaults are one of the most serious offences and have to result in serious consequences...
>
> In terms of general deterrence, I do not disagree with the Crown that an extended period of imprisonment would be appropriate. Every one has to understand that they are going to be held responsible for what they do, whether or not they are stoned, whether or not they are drunk, they will be held responsible and cannot come to court and say "I did it but I was stoned and therefore I'm not responsible."...

> I have no authorities to indicate that other than a jail sentence can be imposed. I have to apply the law within limits that are allowed me. Given the obiter of the Supreme Court of the Northwest Territories and the Court of Appeal, in a sexual assault with this violence *I do not think I have the kind of discretion that would allow me to impose a community-based sentence...*
>
> I do not want to impose a sentence that is going to crush the accused, and *it may be that specific deterrence is not necessary but general deterrence is*. It is a difficult balance. I am doing the best I can. (emphasis added)

[9] The appellant appealed the convictions and sentences. He was released on bail pending appeal on March 11, 1999, after serving approximately seven weeks of his sentence.

Appeal Proceedings:

[10] The appeal was heard by me, as the summary conviction appeal judge, on August 19, 1999. I delivered reasons for judgment on October 15, 1999 (reported at 28 C.R.(5th)308). I held that s.33.1 of the Criminal Code violated sections 7 and 11(d) of the Charter of Rights and Freedoms and was not saved by s.1 of the Charter as a reasonable limit. I then set aside the convictions and acquitted the appellant on all counts.

[11] The Crown appealed my judgment to the Court of Appeal. That court heard the appeal on October 12, 2000, and delivered its judgment on March 12, 2001 (2001 NWTCA 1). The court allowed the Crown's appeal; restored the convictions for sexual assault and common assault; and substituted convictions for common assault in place of the two convictions for assaulting a peace officer (since the latter is a specific intent offence not caught by s.33.1 of the Code). In doing so, the court did not pronounce on the constitutionality of s.33.1, holding instead that the issue was academic since the trial judge merely entertained a reasonable doubt as to the appellant's mental state as opposed to the appellant establishing the issue on a balance of probabilities (as required by the *Daviault* rule). It then remitted the sentence appeal to me for consideration on the merits.

Grounds of Appeal:

[12] The appellant raises two grounds in seeking to reduce or alter the sentences imposed. The focus, of course, is on the sentence of 14 months imprisonment imposed on the sexual assault offence.

[13] The first ground of appeal comes down to this: Because of the passage of time since the appellant was released on bail pending appeal, it would be unjust and inappropriate to uphold the sentence of imprisonment now. Approximately 27 months have elapsed since the appellant was released (17 of which were taken up with the proceedings in the Court of Appeal). The appellant acknowledges that the length of time taken to this point was due to the inherent requirements of the appeal process. It is not a question of some deliberate or unreasonable delay. But, as appellant's counsel put it, the appellant is "rehabilitated"; he is in as good a position now as he would have been if he had served his sentence; and, no useful purpose would be served by sending him back to jail. The Crown's response, one that has great merit, is that it would be a troubling principle indeed if the effect of a lengthy appeal process is that an offender need not serve his sentence.

[14] The second ground of appeal is that the sentence is unfit having regard to the circumstances of the offence and the offender. Appellant's counsel submits that the sentencing judge failed to adequately consider available sanctions other than imprisonment, in particular the appropriateness of a conditional sentence. The Crown responds simply that the sentence is fit. Crown counsel concedes that, with respect to the sexual assault offence, the degree of intrusiveness in terms of the sexual aspect of the assault was relatively minor, but the assault itself was extensive and prolonged. Thus the circumstances were sufficiently serious so as to warrant a lengthy term of actual imprisonment (even though the trial judge acknowledged that specific deterrence was not a concern and that the actions of the appellant were out of character).

Analysis:

[15] The role of an appellate court with respect to sentencing decisions is well-known. An appellate court can only interfere with the decision of a sentencing judge if the judge made an error in principle, failed to consider a relevant factor, overemphasized appropriate factors, or if the sentence is demonstrably unfit: *R. v. McDonnell*, [1997] 1 S.C.R. 948 (at paras. 15-17).

[16] With respect to the first ground of appeal, delay in and of itself is not normally an issue on an appeal from sentence. It can be a relevant factor on the initial sentencing. Section 720 of the Criminal Code requires a court to impose sentence "as soon as practicable after an offender has been found guilty". The guarantee to be "tried within a reasonable time", found in s.11(b) of the Charter, has been held to apply to sentencing proceedings: *R. v. MacDougall*, [1998] 3 S.C.R. 45. Delay in sentencing continues to prejudice the accused's liberty interests so it is a factor that may be taken into account. But no case has recognized simply the passage of time taken up by appeals as a mitigating factor (perhaps on the same principle as to why appellate delays do not come within the ambit of s.11(b) of the Charter, as per *R. v. Potvin*, [1993] 2 S.C.R. 880).

[17] A lengthy passage of time between release and appeal has been taken into account in some cases. But, as Crown counsel noted in reference to the cases referred to by appellant's counsel on this point, they are usually situations where the Crown appeals from a sentence seeking an increase and, by the time the appeal is heard, the offenders have been released on parole or have completed a part of a probation term. Also, in those cases, there is evidence of positive rehabilitative efforts by the offenders in the meantime. In those types of cases, the courts conclude that it would be unfair and unproductive to return the offenders to jail to serve a lengthier sentence: see *R. v. Burchnall* (1980), 65 C.C.C. (2d) 490 (Alta. C.A.); *R. v. Oates* (1992), 74 C.C.C. (3d) 360 (Nfld. C.A.); *R. v. Collins* (1997), 133 C.C.C. (3d) 8 (Nfld. C.A.).

[18] While delay in the appeal process is not generally considered a mitigating or extraordinary factor, the passage of time may result in corollary factors that are mitigating, for example, evidence of significant rehabilitative efforts having been undertaken. In such cases it can be said that the passage of time indirectly produces a mitigating effect due to changes in the offender's circumstances. This is as relevant at the appeal stage as at the initial sentencing stage.

[19] In this case , there was evidence before the trial judge on sentencing as to steps having been taken by the appellant to rehabilitate himself. After the charges were laid, the appellant quit his job of 17 years due to depression. He obtained treatment from a psychiatrist. I was told that after his release on bail pending appeal, the appellant returned to his parents' home in Newfoundland. He has been there since, living with

and caring for his elderly parents, and gainfully employed in a shrimp plant. He is now 43 years old and has conducted himself appropriately while on bail.

[20] All of this is to the appellant's credit. In many ways it simply reinforces the observations of the trial judge that the appellant's crimes were out of character and that specific deterrence is not a concern.

[21] The second ground of appeal, the one addressing the overall fitness of the sentences, raises more complex issues. As noted previously, the trial judge was confronted with submissions from the Crown seeking a lengthy term of actual imprisonment and submissions from the defence arguing for a conditional sentence. The sentence in this case was pronounced before the judgment of the Supreme Court of Canada in *R. v. Proulx*, [2000] 1 S.C.R. 61 (released on January 31, 2000). The trial judge therefore did not have the benefit of that judgment's extensive consideration of and guidance on the conditional sentencing provisions of the Criminal Code. Nonetheless, I am of the opinion that the appellant should not be deprived of any benefit he might accrue from that judgment on this appeal.

[22] The judgment in *Proulx*, authored by Lamer C.J.C. on behalf of the full Court, identified Parliament's intention in introducing the conditional sentencing regime as being the dual need to remedy the problem of over-incarceration and to expand the use of, and put emphasis on, restorative justice principles in sentencing. Lamer C.J.C. noted that there are four criteria contained in s.742.1 of the Criminal Code that a court must consider before deciding to impose a conditional sentence:

(1) the offender must be convicted of an offence that is not punishable by a minimum term of imprisonment;

(2) the court must impose a term of imprisonment of less than two years;

(3) the safety of the community would not be endangered by the offender serving the sentence in the community; and

(4) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2 of the Code.

[23] The first three of these criteria are prerequisites of any conditional sentence. Once they are satisfied, then the sentencing judge is to give serious consideration to the imposition of a conditional sentence. Lamer C.J.C. wrote (at para.90):

> Accordingly, it would be an error in principle not to consider the possibility of a conditional sentence seriously when the statutory prerequisites are met. Failure to advert to the possibility of a conditional sentence in reasons for sentence where there are reasonable grounds for finding that the first three statutory prerequisites have been met may well constitute reversible error.

[24] The judgment in *Proulx* also held that no offence is to be presumptively excluded from the conditional sentencing regime. There must be no judicially created presumptions that conditional sentences are inappropriate for certain types of offences. As stated by Lamer C.J.C. (at para. 81): "Such presumptions do not accord with the principle of proportionality set out in s.718.1 and the value of individualization in sentencing, nor are they necessary to achieve the important objectives of uniformity and consistency in the use of conditional sentences."

[25] In this case it is obvious that the trial judge felt that the three prerequisites mentioned above were satisfied. The offence of sexual assault carries no minimum term of imprisonment. The trial judge evidently concluded that neither a penitentiary term nor probation would be an appropriate disposition. Thus the range of sentence was within the two-year limit. (Indeed no penitentiary term could be imposed for the sexual assault conviction since the Crown chose to prosecute by summary conviction.) The third prerequisite requires a consideration of the threat posed by the specific offender. This criterion is unrelated to the principle of general deterrence. General deterrence is addressed under the fourth criterion when considering whether a conditional sentence would be consistent with the fundamental purpose and principles of sentencing. Here, having regard to the appellant's circumstances, the overall circumstances of the offence (including the trial judge's doubts as to the voluntariness of the appellant's actions), the appellant's background, and the trial judge's recognition that specific deterrence is not necessary, it is evident to me that the safety of the community would not be endangered by this offender serving his sentence in the community.

[26] In light of these conclusions, there remains to consider whether a conditional sentence would be consistent with the fundamental purpose and principles of

sentencing. In this regard, the trial judge clearly felt compelled by the weight of precedents to emphasize the principle of general deterrence over all others. He stated at various points in his judgment: "... sexual assaults are one of the most serious offences and have to result in serious consequences..."; "I have no authorities to indicate that other than a jail sentence can be imposed..."; "... I do not think I have the kind of discretion that would allow me to impose a community-based sentence..."

[27] It is true that courts, not just in this jurisdiction but across Canada, have traditionally considered denunciation and deterrence to be the primary aims of sentencing in cases of sexual violence. When there has been a serious violation of a person's bodily or psychological integrity, then offenders can indeed expect serious consequences. Appellate courts still resort to "starting point sentences" so as to provide guides to lower courts in order to achieve consistency in sentencing (a method specifically approved of in *McDonnell, supra)*. However, as noted in *Proulx* (at para.87), starting point sentencing patterns are less helpful in cases where the individualized approach, and a consideration of the above-noted criteria, make a conditional sentence a possible option:

> ... I do not find it necessary to resort to starting points in respect of specific offences to provide guidance as to the proper use of conditional sentences. In my view, the risks posed by starting points, in the form of offence-specific presumptions in favour of incarceration, outweigh their benefits. Starting points are most useful in circumstances where there is the potential for a large disparity between sentences imposed for a particular crime because the range of sentence set out in the Code is particularly broad. In the case of conditional sentences, however, the statutory prerequisites of s.742.1 considerably narrow the range of cases in which a conditional sentence may be imposed. A conditional sentence may only be imposed on non-dangerous offenders who would otherwise have received a jail sentence of less than two years. Accordingly, the potential disparity of sentence between those offenders who were candidates for a conditional sentence and received a jail term, and those who received a conditional sentence, is relatively small.

[28] In terms of general deterrence, when the trial judge referred to "authorities" that call for imprisonment in these cases, he no doubt had in mind one of the more significant rulings of the Alberta Court of Appeal, *R. v. Brady* (1998), 121 C.C.C. (3d) 504, where that court stated (at para. 56): "So we conclude that a conditional sentence would not ordinarily be available for those offences where the paramount consideration is denunciation and deterrence."

[29] This comment from *Brady* must be reconsidered in light of the judgment in *Proulx*. This is the kind of offence-specific presumption that brings rigidity to the sentencing process, undermines the individualized approach that must be taken in all cases, and places an over-emphasis on the gravity of the offence to the exclusion of the circumstances of the offender. The judgment in *Proulx* confirms that a conditional sentence, while certainly favouring restorative objectives, can also satisfy the punitive and deterrent objectives of sentencing (at paras. 114-115):

> Where punitive objectives such as denunciation and deterrence are particularly pressing, such as cases in which there are aggravating circumstances, incarceration will generally be the preferable sanction. This may be so notwithstanding the fact that restorative goals might be achieved by a conditional sentence. Conversely, a conditional sentence may provide sufficient denunciation and deterrence, even in cases in which restorative objectives are of diminished importance, depending on the nature of the conditions imposed, the duration of the conditional sentence, and the circumstances of the offender and the community in which the conditional sentence is to be served.
>
> Finally, it bears pointing out that a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender. Aggravating circumstances will obviously increase the need for denunciation and deterrence. However, it would be a mistake to rule out the possibility of a conditional sentence *ab initio* simply because aggravating factors are present. I repeat that each case must be considered individually.

[30] Lamer C.J.C. also cautioned judges, in *Proulx* (at para. 107), to be wary of placing too much weight on deterrence when choosing between a conditional sentence and imprisonment. Empirical evidence suggests that the deterrent effect of sentences of incarceration is uncertain.

[31] It remains important to firmly deter sexual assaults (even where, as here, it is more of an assault than particularly sexual). In light of *Proulx*, however, a case which in my opinion significantly altered the approach to sentencing in cases such as this, the ability of a conditional sentence to satisfy that aim must be seriously considered. This is consistent with s.718.2(e) of the Criminal Code which provides that sentencing judges should consider all available sanctions other than imprisonment that are reasonable in the circumstances.

[32] In a case like the one before me, the denunciatory and deterrent effects of a conditional sentence can be readily discerned. The appellant will bear the stigma of his crimes by serving his sentence under strict conditions (albeit in the community). That stigma, and the message it sends to others, can be especially pronounced in relatively small communities (whether in the Northwest Territories or Newfoundland).

[33] The trial judge found that the accused did not need to be deterred. All the prerequisites for a conditional sentence had been satisfied. Where the trial judge erred in principle, in my respectful opinion, was in thinking that he had no discretion to impose a conditional sentence because of the nature of the crime and the necessity of emphasizing general deterrence. I do not wish to be seen as faulting the trial judge too much because, given the state of the law at the time and before the opinion of the Supreme Court of Canada was made known, it is easy to see how he came to the conclusion he did. Nevertheless, the presumptive dismissal of a conditional sentence because of the type of crime committed ignored the individualized analysis called for in sentencing. It placed an over-emphasis on the offence and an under-emphasis on the offender which distorted the proportionality principle stated in s.718.1 of the Code. That principle requires an examination of both the offence and the offender to ensure that the sentence fits the crime. As stated by Lamer C.J.C., again on behalf of the full Court, in *R. v. M. (C.A.),* [1996] 1 S.C.R. 500 (at para. 92): "It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime ... Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction."

[34] For these reasons, I conclude that a fit and appropriate sentence on the conviction for sexual assault would be a conditional sentence of equal duration. Such a sentence can satisfy the various principles and objectives of sentencing including that of general deterrence. Therefore, leave to appeal is granted and the appeal is allowed.

Conclusions:

[35] With respect to the conviction for sexual assault, the sentence of 14 months incarceration is vacated and the probation order is set aside. Substituted therefor is a conditional sentence of 14 months, less the 52 days already served. The conditions of the conditional sentence order will be as follows:

(a) keep the peace and be of good behaviour;
(b) appear before the court when required to do so;
(c) report to the nearest supervisor in Newfoundland within two working days of receipt of a copy of this order;
(d) continue to report as directed by the supervisor;
(e) remain within the jurisdiction of Newfoundland residing with his parents;
(f) notify his supervisor promptly of any change in employment;
(g) abstain absolutely from the consumption of alcohol or other intoxicating substances and the consumption of drugs except in accordance with a medical prescription;
(h) attend such counselling or treatment programmes as directed by his supervisor;
(i) continue regular employment or seek out regular employment;
(j) perform 120 hours of community service work at the direction of his supervisor;
(k) obey a curfew from 8 p.m. to 6 a.m. (except with respect to employment-related matters or medical emergencies);
(l) have no contact directly or indirectly with S.H. (the clerk can insert the full name on the order as reflected in the information on file); and,
(m) pay to the Clerk of the Court (if he has not already done so) the sum of $395.00 as compensation to W.H. (again the clerk can insert the full name in the order).

[36] I ask that counsel prepare a formal order and then both should attend on the clerk to review the conditional sentence order and to facilitate its transmission to Newfoundland (perhaps through the police or the supervisor's office). The appellant should attend in person at the appropriate office to receive a copy of the order and to be advised of the substance of sections 742.4 and 742.6 of the Code.

[37] I invite the supervisor to apply to transfer the conditional sentence order to the appropriate court in Newfoundland in accordance with the procedure set out in s.742.5 of the Code. Such a transfer will require the consent of the Attorney General of Canada but I am prepared to approve it once consent is received.

[38] With respect to the fine of $500.00 imposed in respect of the original conviction for common assault, I see no reason to disturb that disposition. The appeal with

respect to that sentence is dismissed (except to the extent that the appellant will have 60 days within which to pay that fine).

[39] With respect to the one-month concurrent sentences imposed on each of two charges of assaulting a peace officer, now that the Court of Appeal has substituted convictions for common assault, I see no reason to treat these any differently than the other common assault conviction. The one-month sentences will be vacated and substituted therefor on each charge will be a fine of $500.00 (payable within 60 days). Accordingly the total in fines payable by the appellant is now $1,500.00, all of which is to be paid within 60 days failing which he will have to do the necessary default time.

[40] If further directions are required, counsel may see me in chambers.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, NT this 3rd day of
July, 2001.

Counsel for the Appellant: Scott Duke
Counsel for the Respondent (Crown): Loretta Colton