R. v. *Arden*, 2001 NWTSC 66

Date: 2001 09 07
Docket: S-1-CR2001000063

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

DOUGLAS ARDEN

Respondent

MEMORANDUM OF JUDGMENT

[1] This is a summary conviction appeal from sentence. The Respondent pleaded guilty in the Territorial Court to assault causing bodily harm, unlawful confinement and uttering a death threat, for which he received a sentence of ninety days' gaol intermittent concurrent on each offence and one year probation. The Crown appeals the sentence and seeks an increase to the range which was submitted by Crown counsel at the sentencing hearing, being 12 to 15 months.

[2] The incident giving rise to the offences was serious and was marked by a number of aggravating features. It involved a number of assaults on the Respondent's former common-law spouse over an eight hour period in the presence of their child at a remote location late at night. The child was inadvertently hit during one of the assaults, sustaining a bruise, and the victim suffered bruising on her body, a split lip for which stitches were required, and a black eye.

[3] The Respondent, who is 37 years old, had no criminal record prior to these convictions. He has a lengthy history of employment. The pre-sentence report filed was not very favourable, in that it suggested that the Respondent had no appreciation of the effects of his behaviour on the victim and that he tended to blame and criticize her. The Respondent had, however, undertaken anger management counseling and had seen a psychologist since the commission of the offences.

[4] The sentencing judge was faced with what may be the most difficult task a judge has: to sentence a person of otherwise good background for a serious offence of violence. He took into account the seriousness of the offences and the effect on the victim, the aggravating factors and the breach of trust involved. He correctly recognized that there had to be a balance between the principles of deterrence and denunciation on the one hand and, in the circumstances of this case, rehabilitation on the other.

[5] On the appeal, Crown counsel argued that the sentencing judge placed too much emphasis on rehabilitation and not enough on deterrence and denunciation and none at all on retribution. However, the balancing of the various principles of sentencing is very much within the discretion of the sentencing judge, as is evident from the deference owed to a sentencing judge by an appeal court: *R. v. McDonnell* (1997), 114 C.C.C. (3d) 436 (S.C.C.). Retribution, which requires that a sentence properly reflect the moral blameworthiness of the particular offender, must be considered in conjunction with the other objectives of sentencing and the relative weight and importance of those objectives will vary depending on the nature of the crime and the circumstances of the offender: *R. v. M.(C.A.)* (1996), 105 C.C.C. (3d) 327 (S.C.C.). In the end, the sentence imposed must be one that is "just and appropriate" and reflects the gravity of the offence committed and the moral blameworthiness of the offender.

[6] In my view, the sentencing judge recognized the principle of retribution by recognizing that the offence was a serious one that called for a term of incarceration in jail. From his reasons it is clear that he endeavoured to balance that with the other objectives of sentencing.

[7] Crown counsel also submitted that the sentencing judge erred in considering the Respondent's employment as a mitigating factor. A mitigating factor is something that usually leads directly to a lower sentence than would otherwise result. For example, a guilty plea is generally considered a mitigating factor. I am not convinced that the sentencing judge considered the Respondent's employment as a mitigating factor rather than simply a circumstance in the Respondent's favour and something that, along with the fact that the Respondent was making child support payments, could be taken into account in determining the appropriate sentence. It might also be noted that the Respondent, who works at a mine site outside Yellowknife on a two weeks in, two weeks out rotation, would, under the intermittent sentence imposed, spend each

rotation out back in Yellowknife in custody for a period extending over at least six months.

[8] Nor am I convinced that the sentencing judge erred in considering that a short, sharp term of imprisonment was appropriate in these circumstances for this first time offender. He did not state that a short, sharp term was always appropriate for a first time offender, but rather clearly considered the prospects for rehabilitation for the Respondent as pointing toward that type of sentence.

[9] As is clear from the cases submitted by counsel, sentences for assault causing bodily harm, including those where the victim is a spouse, vary considerably and each case very much depends on its own facts. Circumstances such as the use of a weapon and a prior record or history of abuse (which were not present in this case) will be significant, as will other factors. While the sentence imposed in the circumstances of this case is at the low end of the range, it has not been shown that it is unfit or that the sentencing judge committed an error in principle or ignored relevant factors. Accordingly, I would not interfere with the sentence itself.

[10] The sentencing judge did, however, err in imposing a mandatory firearms prohibition under s. 109 of the *Criminal Code*, since these were summary conviction offences and therefore only the discretionary order under s. 110 was applicable. Since no issue was taken by the Respondent with the appropriateness of such an order and although no weapon was used in the commission of the offences, I would deal with this aspect simply by substituting for the order under s. 109 an order in identical terms to that made by the sentencing judge but under s. 110.

[11] In the result, the appeal is allowed only to the extent of substituting the discretionary firearm prohibition order for the mandatory one imposed by the sentencing judge.

V.A Schuler,
J.S.C.

Dated at Yellowknife, NT this
7th day of September 2001

Counsel for the Appellant, Her Majesty The Queen: Bernadette Schmaltz
Counsel for the Respondent: Kelly Payne

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