Simpson v. H.M.T.Q., 2001 NWTSC 28

Date: 2001 03 19
Docket: S-1-CR 2000000052

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

ANDY SIMPSON

Appellant

-and-

HER MAJESTY THE QUEEN

Respondent

MEMORANDUM OF JUDGMENT

[1] The Appellant was sentenced in the Territorial Court to a term of one year of imprisonment followed by one year of probation after his plea of guilty to a summary conviction sexual assault.

[2] The Territorial Court Judge had to balance a number of mitigating and aggravating factors in coming to an appropriate sentence. Much of the Appellant's argument comes down to an assertion that the Territorial Court Judge gave more weight to the aggravating factors than the mitigating ones. Even so, it was for him as the sentencing Judge to weigh all the relevant factors and this Court must not interfere unless he committed an error in principle or the sentence is demonstrably unfit.

[3] The Appellant complains that the Territorial Court Judge did not expressly refer to or review the various sentencing options open to him, such as a conditional sentence. A Judge is, however, presumed to know the law and need not refer to every available option. At the end of the day, the question is whether the sentence imposed is a fit one.

[4] The Territorial Court Judge had before him a pre-sentence report which expressed the view that the Appellant was a good candidate for a conditional sentence or probation. It is clear from the record that he had reviewed the report and he specifically referred to the fact that it had many positive things to say about the Appellant. It cannot be thought that he was unaware of the report's recommendations or conclusions. At the same time, no specific plan for or terms of a conditional sentence were presented at the sentencing hearing.

[5] The Appellant also says that the Territorial Court Judge did not take into account that he is an aboriginal person as required under s.718.2(e) of the Criminal Code (*R. v. Gladue*, [1999] 1 S.C.R. 688). It is true that the Territorial Court Judge did not refer to the Appellant's aboriginal status, but being aboriginal does not mean that a non-custodial sentence is necessarily appropriate. The Territorial Court Judge was clearly familiar with the Appellant's background, his family, and his community and the problems encountered by all. Where, as here, the offence is one of violence and there is a related record, considerations of general and specific deterrence and denunciation are likely to carry more weight than a restorative approach. The issue is still whether the sentence imposed was a fit one.

[6] One of the issues argued before me was whether the Territorial Court Judge found the Appellant to be a danger to the public. The Judge made no such specific finding. While a sentencing Judge must be satisfied before imposing a conditional sentence, that serving the sentence in the community would not endanger the safety of the community, it does not follow that not imposing a conditional sentence necessarily means that the Judge has found the individual sentenced to be a danger. But clearly in this case there was a basis for concern. The Appellant had an alcohol related record of two assaults and commission of an indecent act as well as property offences. He was intoxicated at the time of the sexual assault. Despite being released on condition that he not drink, he committed a further offence of mischief while intoxicated. He was released again and continued to drink, thereby breaching his release conditions, until a few weeks before the sentencing hearing. This did not bode well for the prospect of his compliance with the terms of a conditional sentence despite his earlier successful completion of terms of probation.

[7] Finally, the circumstances of the sexual assault were very serious. When the Appellant's attempts to kiss the victim, a friend of his, were rebuffed, he grabbed her and dragged her to some bushes where he laid on top of her, restraining her by holding her wrists. She struggled and her calls for help were heard by three young girls who challenged the Appellant and then obtained assistance to chase him away. This occurred at 8:00 in the morning near the playground of the local elementary school. The pre-sentence report indicates that the victim was afraid she was going to be raped and that after the incident she was afraid to walk anywhere by herself or to be alone. The suggestions made by the Appellant's counsel that the offence was not very serious and that the fact that the victim did not attend in court at the time of sentencing and did not complete a victim impact statement somehow lessen the gravity of the offence are without merit.

[8] I am not persuaded that a conditional sentence would have been appropriate in these circumstances. In any event, I find no error in the Territorial Court Judge's decision. The sentence of one year of imprisonment followed by one year of probation was clearly aimed at protecting the public and encouraging the Appellant to address his alcohol problem. It cannot be said that the sentence was unfit.

[9] Accordingly, the appeal is dismissed.

V.A. Schuler
J.S.C.

Dated at Yellowknife, Northwest Territories
this 19th day of March 2001.

Counsel for the Appellant: Hugh Latimer
Counsel for the Respondent: Sadie Bond

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MEMORANDUM OF JUDGMENT OF
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