R. v. *Felix*, 2002 NWTSC 63

Date: 2002 10 01
Docket: S-1-CR-2002000061

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

RONALD JAMES FELIX

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Summary conviction appeal of banishment condition in probation order.

Heard at Yellowknife, NT on September 5, 2002

Reasons filed: October 1, 2002

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

Counsel for the Appellant: Margot Engley
Counsel for the Respondent: Caroline Carrasco

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REASONS FOR JUDGMENT

[1] This summary conviction sentence appeal raises the issue of the propriety of a Abanishment@ condition in a probation order.

[2] The Appellant was convicted in Territorial Court after pleading guilty to two charges of breach of probation, a charge of assault with a weapon and a charge of assault. The charges arose from two separate events which took place in a domestic context.

[3] On the first occasion, the Appellant attended at his former spouse=s home in Tuktoyaktuk while intoxicated and screamed at the children. The police were called and removed him from the home. He was charged with breach of probation for failing to comply with the condition that he abstain from the consumption of alcohol, and was released.

[4] Five days after his release, the Appellant again attended at his former spouse=s home. He was again under the influence of alcohol. He kicked his spouse and their eleven-year-old daughter on the body and head and threw an ashtray at the daughter, hitting her in the face. The spouse left the home, the police were called and the Appellant

was charged with assault on his spouse, assault with a weapon on his daughter and breaching probation by failing to keep the peace and be of good behaviour.

[5] The Appellant has a lengthy criminal record which includes previous convictions for assaults on his spouse and others. With respect to the offences now under consideration, the Crown sought imprisonment for 18 to 20 months, while defence counsel submitted that 11 to 15 months would be appropriate.

[6] The Territorial Court Judge sentenced the Appellant to a total of 18 months and 15 days imprisonment. He also placed the Appellant on probation for two years. The conditions of the probation are the statutory ones and that the Appellant not be within the town limits of Tuktoyaktuk for two years. The propriety of the latter condition is the sole issue on this appeal.

[7] One point about the condition should be noted. Although the sentencing transcript indicates that the judge worded the condition as indicated above the order as drawn up and signed sets out the condition this way:

> Not to be within the geographic limits of the Hamlet of Tuktoyaktuk for any purpose until further notice of this court.

[8] There is nothing in the record that explains how this change came about, nor were counsel on this appeal (who were not counsel at the sentencing) able to shed light on the discrepancy. The Appellant did not rely on it in argument. For the purposes of this appeal, I will deal with the condition as pronounced in court, that is, as prohibiting the Appellant from being within the town limits of Tuktoyaktuk for two years.

[9] The Appellant argues that the condition amounts to banishment and that it is inappropriate in this case because (i) the use of banishment has not been encouraged by appellate courts; (ii) there was insufficient evidence before the sentencing judge to justify banishment; (iii) neither probation nor banishment were addressed by counsel in their submissions on sentence and the judge did not ask for submissions in that regard; and (iv) the sentencing judge did not consider that banishment is a punishment and adjust the jail portion of the sentence accordingly.

[10] The Respondent argues that the condition in question is appropriate because it is not aimed at banishing the Appellant from the community but instead at protecting his family. The Respondent also argues that the evidence before the sentencing judge was sufficient in the circumstances, that there is no requirement that a sentencing judge ask

for submissions on every available sentencing option and that the sentence as a whole is otherwise fit.

[11] The standard of review on a sentence appeal was set out by the Supreme Court of Canada in *R.* v. *M.(C.A.)*, [1996] 1 S.C.R. 500: absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, an appellate court should only intervene if the sentence is demonstrably unfit.

[12] The use of banishment as a condition of probation has been viewed with some disapproval in a number of cases. In what is generally considered the leading case on the issue, *R.* v. *Malboeuf*, [1982] 4 W.W.R. 573, 68 C.C.C. (2d) 544 (Sask. C.A.), Bayda C.J.S. stated:

> For a community to think in terms of unburdening itself of an undesirable individual by saddling a neighbouring community with him smacks of a lack of civic responsibility and unthinking behaviour, particularly where the individual grew up in, and was a product of, the first community.

[13] In *Malboeuf*, the accused had been banished for one year from his home community after being convicted of three break and enters in that community. On appeal, the banishment condition was deleted. Bayda C.J.S. stated that judicial banishment decrees should not be encouraged but he did not go so far as to say that such a decree would be inappropriate in every case, observing that, AIt may well be that in certain predictable circumstances involving predetermined controls banishment orders could work and may be appropriate...@.

[14] *Malboeuf* was considered by de Weerdt J. of this Court in *Saila* v. *The Queen*, [1984] N.W.T.R. 176, a case in which he upheld a banishment condition imposed as part of probation by local justices of the peace in a small Arctic community. In *Saila*, the accused had a record of property-related offences and the banishment condition was imposed on his conviction for stealing a pair of shoes. The community from which he was banished, and where the crime had taken place, was not his home. In considering the appeal, de Weerdt J. took into account that until recently, the community had been generally crime-free and he considered that banishment was an expression of a traditional Inuit method of discipline by ostracism from the community. He stated that each case should be considered carefully to determine if a banishment condition is reasonable and wise in all the circumstances of the case, having regard to the principles of sentencing, available alternatives and resources. In upholding the banishment condition, he stated that

the sentence evidently reflected a lack of adequate resources in that community to protect the public from the accused=s activities.

[15] However, in *R.* v. *Maher*, [1995] N.W.T.J. No. 115 (S.C.), Roberts J., a Deputy Judge of this Court, declined to include a banishment condition in a probation order imposed after the accused=s conviction for possession of marijuana for the purpose of trafficking. Many residents of the community had drug problems and the elders had recommended that the accused be banished. Roberts J. was of the view that if he were to banish the accused, he would be foisting an undesirable on to some other community and that he could not do so based on judicial disapproval of such a practice.

[16] In *R.* v. *Williams*, [1997] B.C.J. No. 2101, the British Columbia Court of Appeal, agreeing with the concerns expressed in *Malboeuf*, set aside a condition which banished the accused from his home reserve after conviction for property and driving offences. The Court found that there was no logical connection between the offences and the banishment condition and no evidence indicating that anyone had asked that the accused be banned from the reserve.

[17] Another case where a banishment condition was set aside is *R.* v. *Cardinal*, [1999] A.J. No. 482 (Q.B.). There the accused, who had a lengthy record, mostly for property offences, was put on probation with a banishment condition after conviction for stealing a bottle of liquor. The summary conviction appeal court set aside the banishment condition, finding that on top of the maximum available jail sentence and one year probation which were imposed, banishment was excessive in the circumstances and there was no logical connection between the theft and banishment.

[18] The cases referred to above are what I would call community banishment cases. They involve an accused who is considered to be a nuisance or an undesirable in the community where he committed his crime. His offence or offences do not target any particular victims. Banishment is considered a means of protecting the community as a whole. The problem identified by the courts is that banishment from one community will result in another community being saddled with the undesirable individual. *Saila* can be distinguished on the basis that it involved a remote community which had had little experience of crime and was not the offender=s home.

[19] There are, however, other cases in which banishment has been considered or imposed for the purpose of protecting not the community at large, but certain individuals in that community who have been victims of violence by the accused.

[20] One such case is *R.* v. *Banks* (1991), 3 C.R.R. (2d) 366 (B.C.C.A.) [application for leave to appeal to the Supreme Court of Canada refused, Doc. No. 22394, June 20, 1991]. In *Banks*, the Court of Appeal upheld a term of probation that the accused remain outside the province of British Columbia. He had been convicted of threatening his former wife and her parents, who lived in that province. Lambert J.A. remarked that:

> In view of the fact that there is such a close relationship between the genuine apprehension of the former family and the restriction that was imposed in the probation order, this cannot be looked on as a case of banishment at all. It is a case of a nicely judged probation order designed to protect particular members of society who have been specifically threatened.

[21] It should be noted that at the time of sentencing, the accused in *Banks* had agreed to the condition that he live outside British Columbia. However, that does not appear to me from the case report to have been a determinative factor in the Court=s decision. Obviously the Court found a logical connection between the crime and the banishment condition.

[22] In *R.* v. *Griffith* (1998), 128 C.C.C. (3d) 178, the British Columbia Court of Appeal struck out a condition which in effect banished the accused from his home and office. The trial judge had imposed the condition because of a dispute between the accused and his neighbour. However, the Court of Appeal found that he had failed to consider that the immediate cause of the offence of mischief was not the neighbour, but the accused=s anger at the police who arrested him. The majority reasons did, however, indicate that protection of society may require a condition such as the removal of an accused for a long period of time from his home and place of business. It said that such a condition should be imposed only after all relevant evidence is heard and considered.

[23] Another case not involving domestic violence is *R.* v. *Asgari*, [1998] O.J. No. 5667 (Prov. Ct.), in which the accused was banished from the City of Ottawa as a condition of probation where all his criminal convictions, two of which involved violence, resulted from his obsession with seeking redress from certain governments through their embassies in Ottawa.

[24] There was no challenge on this appeal to the constitutionality of the banishment condition and I make no finding in that regard, having taken note of the comments and findings made in *R.* v. *Saila* and *R.* v. *Banks*.

[25] Finally, the power to impose a banishment condition can only be found in s. 732.1(3)(h) of the *Criminal Code*, which provides that a court may prescribe, as additional conditions of a probation order, that the offender:

> (h) comply with such other reasonable conditions as the court considers desirable, subject to any regulations made under subsection 738(2), for protecting society and for facilitating the offender=s successful reintegration into the community.

[26] Subsection 738(2) has no application in this case.

[27] From all of the above, I conclude that a probation condition that restricts or prohibits the accused=s presence in a certain community, where its purpose is to protect certain individuals and there is a logical connection between the offence and the condition, is not really Abanishment@ in the sense that term is used in cases such as *Saila* and *Malboeuf*. It is instead a form of restraining order, albeit one which applies to a much larger geographic area than is normally the case. It does not give rise to the concerns noted about one community foisting its problem members off on another community. It seeks instead to protect certain members of the community in an effective way.

[28] It is clear that in this case, the sentencing judge had in mind protection of the Appellant=s family, the victims of his violence. He was aware of the Appellant=s criminal record, which included over 30 convictions, 14 of which were for assault. He had been convicted of uttering threats in 1997 in a spousal situation (for which he was sentenced to three years imprisonment), assault with a weapon, also in 1997 in a spousal situation and in 1995, assault in a spousal situation. His most recent convictions prior to the offences which led to the banishment condition were in April 2001 for assault causing bodily harm and uttering threats, not in a family context. He was on probation at the time of the offences now under consideration.

[29] The sentencing judge said about all this:

> Obviously the criminal law has failed to protect the family members here ...
>
> ... any efforts by the Court, either to punish or rehabilitate has [sic] been a total failure.

[30] Having considered the cases and the purpose of banishment in this case, I find that it was open to the sentencing judge to impose a condition banishing the Appellant from the community where the victims of the offences reside. The question then is whether he should have done so.

[31] The Appellant argues that the evidence before the sentencing judge was insufficient to justify the imposition of banishment. His counsel submitted that since no one requested the condition, or even probation, and the sentencing judge did not invite submissions on the issue, there was no evidence as to the views of the family or the community.

[32] As to the views of the community, I do not consider that their absence is of much significance where the banishment condition is aimed at protecting certain individuals rather than ridding the community of an undesirable individual. Even if the community or its representatives were to oppose a banishment condition, that should not outweigh the concern for protection of specific individuals within that community.

[33] As to the views of the family, as Crown counsel pointed out, the victim impact statements provided to the Court pursuant to s. 722(1) of the *Criminal Code* contained relevant material. Two of the children involved said that they do not want to see the Appellant again. Three others referred to being scared when the Appellant drinks. The adult victim, the former spouse of the Appellant, stated that she felt hurt that her children had seen what had happened. The fact situation that was placed before the sentencing judge also gives rise to the inference that the former spouse called the police or asked for them to be called on the occasions when the offences occurred.

[34] Is it necessary that a sentencing judge have before him or her the views of the victim specifically on the issue of banishment? In this case the adult victim is the former spouse of the Appellant and nothing in the facts or submissions before the sentencing judge suggests that there is any prospect of reconciliation of the family. In any event, the Appellant=s behaviour toward his family and the sentencing judge=s justified concern for protection of the family must outweigh the views of the family victims on whether the Appellant should be banished. So although generally I think it is advisable that a judge who is considering banishment invite submissions on the views of the victims, in this case I do not consider the absence of that information to be significant.

[35] The more troublesome aspect of this matter is, in my view, the lack of information before the sentencing judge about the Appellant=s personal circumstances. The Appellant=s counsel at sentencing, no doubt anticipating a jail sentence but not banishment or probation, focused his submissions on the circumstances of the offences, the Appellant=s guilty plea and the six weeks he spent in pre-trial custody. In the result, however, no information was presented about the Appellant=s background or his connection to Tuktoyaktuk. On this appeal, the only information put forward is that the

Appellant is a resident of that community. This may simply mean that there are no circumstances pertaining to the Appellant personally which would make banishment even more of a hardship than it would be for any other individual.

[36] The question is whether, even without more information, banishment can still be said to be a Areasonable@condition of probation pursuant to s. 732.1(3)(h) of the *Criminal Code*. I think it can, in that the Appellant=s record of violence, including violence against his family, is such that it is likely that only a prolonged period of separation from the family will protect them and, one hopes, lead him to reflect on the harm his behaviour is causing and try to resolve his own problems, such as drinking, that may be contributing to that behaviour. Rehabilitation in this case can only be accomplished, if at all, by means of a condition which protects the victims while permitting the Appellant to reintegrate into society.

[37] Counsel for the Appellant submitted that a condition prohibiting contact with the victims would suffice. It is fair to say that such a condition is not uncommon in cases of domestic violence and is certainly a less drastic measure than banishment. However, I take notice of the fact that Tuktoyaktuk is a small community where it would be extremely difficult, if not impossible, for the victims to avoid encountering the Appellant and vice versa. This in itself detracts from the effectiveness of a non-contact order and the ability of the authorities to enforce it. Further, considering the Appellant=s record of violence and failures to abide by court orders, the likely effectiveness of a non-contact order is even more diminished.

[38] For the reasons set out above, I am not persuaded that the evidence before the sentencing judge was insufficient to justify banishment or that it makes the banishment condition unreasonable.

[39] Counsel for the Appellant also relied on the sentencing judge=s failure to seek submissions from counsel on the question of banishment. She submitted that he ought to have followed the procedure used in *R.* v. *Kataoyuk*, T-1-CR-2002000659/660, April 9, 2002 (Terr. Ct.), unreported. In that case, the sentencing judge notified counsel that he was considering banishment and sought their submissions. He decided against banishment when advised by the Crown that the victim of the spousal assault would be happy to have the accused return.

[40] I agree that it would have been preferable for the sentencing judge to ask for counsel=s submissions since banishment is unusual and has significant consequences for the person banished. Nevertheless, the determination of an appropriate sentence is in the

discretion of the sentencing judge, subject of course to the requirements of the *Criminal Code* and other applicable law. There is no requirement that a judge canvas every possible sentence with counsel and no requirement that the sentence imposed fall within the scope of what is submitted by counsel as appropriate. This case does not involve a joint submission on sentence, where the considerations are quite different.

[41] The duty of the court is set out in s.726.1 of the *Criminal Code:*

> 726.1 In determining the sentence, a court shall consider any relevant information placed before it, including any representations or submissions made by or on behalf of the prosecutor or the offender.

[42] The judge is obliged to consider the information and submissions presented to him or her, but not to tailor the sentence to what either counsel might propose. There is no requirement that a judge invite further submissions from counsel if he or she is considering a sentence different in nature from what counsel submit is appropriate. Again, joint submissions involve other considerations not applicable to this case. Generally, an individual before the court for sentencing is liable to whatever range of penalties may be found in the law for the offences he or she has committed, not just those suggested by counsel. I do not mean to suggest that counsel in this case should have anticipated that the judge would impose banishment. However, in my view the judge was not required to seek submissions on banishment and did not lose jurisdiction or err in principle by not doing so.

[43] Having said all that, I have no doubt that it is preferable that counsel be permitted to address any sentence that is being considered by the judge that is unusual or not frequently imposed. Counsel=s input may make a difference in the judge=s decision, as it did in *Kataoyuk*, or it may assist with the wording or scope of, for example, a condition of probation.

[44] Finally, the Appellant submits that the sentencing judge erred in principle in imposing a condition which amounts to punishment without considering its effect on the total sentence and whether adjustment should be made to the imprisonment portion of it.

[45] Banishment has been regarded by courts as having a punitive effect. In *Malboeuf*, Bayda C.J.S. referred to the possibility that communities might enter into arrangements for the exchange of undesirable individuals Ain lieu of conventional punishment@. In *Banks*, Lambert J.A. said of the accused=s agreement to a probation condition that he live outside the province of British Columbia that, Athe accused would certainly have been

aware that he could expect to receive more favourable consideration in relation to the period of incarceration if he were to agree to such an order@.

[46] Lambert J.A. also made the following comments, which are applicable to the circumstances of this Appellant:

> It would have been wrong, having regard to the history of this man=s harassment of his family, not to have striven to prevent the continuation of that harassment. Without this kind of probation order the only way to have done that would have been to sentence him to a lengthy period of imprisonment so as to keep him away from his former family long enough for him to think over his relationship with them and for him perhaps to have a chance to cure himself of the drug and alcohol problems which induce the rages that bring about these threatening attacks.

[47] In *Banks*, the probation and the banishment condition were for a period of two years, to follow a term of imprisonment of three months.

[48] In *Griffith*, Huddart J.A. stated, Ain practical terms, the removal of a person from his home and place of business for two years would be regarded by many reasonable, well-informed people as punishment at least the equal of six months= imprisonment, when regard is had to the availability of temporary and early release programmes under the provincial corrections system@. In *Griffith*, it should be noted, the ban imposed (and deleted on appeal) applied only to a one block radius around the complainant=s home but as such included the accused=s residence where he also carried on his business. It was, therefore, somewhat less drastic than banishment from his community.

[49] In *Kataoyuk*, Bruser Terr. Ct. J. recognized that sentencing should be viewed as a package and that any period of banishment would be a reason to reduce what would otherwise be an appropriate term of imprisonment.

[50] In this case, the sentencing judge did not say whether he was adjusting the term of imprisonment because of the banishment condition. So the assessment I have to make is whether the sentence as a whole is unfit.

[51] The Crown having proceeded summarily on the charges, the Appellant was liable to maximum sentences of six months for the assault, eighteen months for the assault with a weapon and eighteen months on each of the breach of probation charges. With his past record, a jail sentence exceeding the eighteen and a half months imposed would not have

been inappropriate. At the same time, however, banishment for two years from his community is significant and should be equated to at least six months imprisonment.

[52] When the sentence imposed is viewed as a whole it is, in my view, unduly harsh and unfit. I would therefore reduce both the period of probation and the banishment condition to one year.

[53] I would add in response to one of the submissions made by the Appellant=s counsel that if there is a change in circumstance (such as the victims relocating to a community other than Tuktoyaktuk), an application for variation of the banishment condition or relief from compliance with it may be made as appropriate pursuant to s. 732.2(3) of the *Criminal Code* by the Appellant, the probation officer, or the prosecutor.

[54] Accordingly, the appeal is allowed, the period of probation is reduced to one year and the optional condition is changed to provide that the Appellant is not to be within the town limits of Tuktoyaktuk for a period of one year.

V.A. Schuler
J.S.C.

Dated at Yellowknife, NT, this
1st day of October, 2002

Counsel for the Appellant: Margot Engley
Counsel for the Respondent: Caroline Carrasco

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